World Trade in Agricultural Products under the GATT and the WTO: A Legal Analysis

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Abstract

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The World Trade Organisation’s (WTO) agriculture regime set out to abolish protectionist measures and institute free trade. The regime consists of the WTO Agreement on Agriculture, the Agreement on the Application of Sanitary and Phytosanitary Measures and the Agreement on Technical Barriers to Trade. The new rules were designed to overcome three fundamental deficiencies of the WTO’s predecessor, the General Agreement on Tariffs and Trade (GATT): firstly, GATT’s inadequate rules which failed to address agricultural trade in detail; secondly, a regulatory structure which facilitated loopholes in the coverage of the agreements and consequently affected the rules’ cogency and finally, adverse effects on developing countries from GATT’s failure to adequately address the difficulties posed by protectionism in international agricultural trade. Despite the WTO regime’s shift to an economic solution focusing on these three elements, international agricultural trade is still problematic. This thesis suggests that these difficulties are caused by failure on two levels. Firstly, the WTO’s rules are ineffective because they have not fully addressed the three problem areas evident during the GATT era. Secondly, the amended agriculture regime’s fundamental deficiency lies in the fact that it fails to address both economic and non-economic goals. This is because the WTO’s rules are exclusively based on the economic objective of free trade, which means that even if all three problem areas are addressed, substantial issues will be left unregulated. The thesis advocates the gradual removal of the free trade goal and its replacement with the goal of sustainable agriculture. This solution acknowledges the inherent tension in international agricultural trade regulation between preventing a return to protectionism and the recognition that the pursuit of non-economic goals may require the use of restrictive trade barriers in certain circumstances.

This thesis is compiled with material accurate to the 1st August 2001.
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Introduction

When the World Trade Organisation (WTO) Agreement on Agriculture\textsuperscript{1} was concluded at the end of the protracted Uruguay Round of multilateral trade negotiations,\textsuperscript{2} it was celebrated as a triumph. Finally, one of the most problematic areas of international trade\textsuperscript{3} would be regulated by a single agreement. The new regime was designed to eradicate protectionism in all forms\textsuperscript{4} and institute free trade in agricultural products.\textsuperscript{5} This was part of an overall shift in the character of international trade regulation generally. Although GATT’s free trade ideal was retained, a separate institution with legal personality\textsuperscript{6} was created and individual, subject-specific agreements flowed from it. Members could not contract out of any of these agreements, but had to accept all the rules as a condition of their accession to the WTO.\textsuperscript{7}

Although the Agreement on Agriculture was only designed to be the first stage in a “long term”\textsuperscript{8} reform process, it was clear that many WTO members thought that it would, at the very least, significantly erode the use of protectionist policies and defuse

\textsuperscript{1} Hereafter referred to as the Agreement on Agriculture

\textsuperscript{2} The Uruguay Round was the longest series of multilateral trade negotiations held under the auspices of the General Agreement on Tariffs and Trade (GATT). It ran from 1986 to December 1993

\textsuperscript{3} Most importantly here is the European Community’s Common Agricultural Policy (CAP) which operated a complex system of quotas and subsidies: the complexity of this regime is outside this thesis, but on the historical structure of the CAP see Wyn Grant: ‘The Common Agricultural Policy’ (1997) Macmillan at Chapter 3

\textsuperscript{4} Even the most contentious measures would be covered: see Chapter 1 section A (thesis) generally on the European Communities’ variable import levy in its Common Agricultural Policy (CAP) and the United States’ waiver from GATT’s disciplines on agriculture. The CAP mechanism prevented imported agricultural products undercutting domestically produced goods by imposing duties on the imported goods until their price reached the threshold price. The threshold was set by the Communities’ that is the minimum price that good could be imported at. The whole system was designed to ensure that European farmers’ prices were not undercut by cheaper imports: see Grant supra n. 3 at 67

\textsuperscript{5} This thesis uses the term ‘agricultural products’ as defined in Article 1(b) Agreement on Agriculture and the scope of product coverage in Annex 1 Agreement on Agriculture: those products which “are as close as practicable to the point of first sale” and those which are specifically listed in Annex 1 Agreement on Agriculture

\textsuperscript{6} Article VIII:1 Marrakesh Agreement Establishing the World Trade Organisation (the Marrakesh Agreement)

\textsuperscript{7} Article II:2 Marrakesh Agreement

\textsuperscript{8} Para 2 Preamble WTO Agreement on Agriculture (the Agreement on Agriculture)
the tensions created by international agricultural trade. Those developing country members that were heavily dependent on primary products particularly shared this view.\footnote{Agricultural exports provide a major contribution to the Gross Domestic Product (GDP) of many developing countries: UNCTAD's 1998 Trade and Development Report notes that in Africa as a whole, there were only 15 countries where agriculture's share of GDP was less than 15%. It also states that in 8 countries, agricultural exports accounted for more than 40% GDP: UNCTAD/TDR/1998 at 134} Although this approach seemed to rectify the problem at first, difficulties remained.

Despite projections that gains from the liberalisation of international agricultural trade would be anywhere between US$109billion to US$510billion, the reality was not so positive.\footnote{Ibid. at 134. Even though this is only a measurement in monetary terms, it does give an example of the critical importance of the effect of protectionist policies in agricultural trade} Significant reductions in the real level of tariffs and other protectionist tools\footnote{i.e. quotas and other non-tariff barriers} did not occur. More importantly, the introduction of the agriculture regime did not lead to a fall in the number of highly contentious international trade disputes that have agriculture as their base.\footnote{Members are reluctant to allow the importation of genetically modified foods. See Chapter 4 (thesis) generally}

This thesis examines why the WTO agriculture regime has not been successful in alleviating the problems posed by international agricultural trade. It suggests that this failure occurs on two levels: firstly, ineffective regulation and secondly, because even if the rules had been effective, the new regime only addressed half of the problems raised by international agricultural trade.

Firstly, the WTO regime was based on the assumption that GATT's failure lay in its lack of coherent rules and institutional structures. The WTO rules on agriculture therefore were designed to provide 'effective' regulation in these areas and reduce protectionism. However, the new regime is unsuccessful in this respect.

The history of agricultural trade regulation under GATT shows that this effectiveness test comprises three elements: firstly, whether the WTO's rules on international
agricultural trade eliminate the continued use and future adoption of protectionist agricultural policies. GATT's history shows that the primary reason for its failure to control agricultural trade was due to problems inherent in the application of Articles XI and XVI GATT. Although both the Agreement on Agriculture and the SPS Agreement are primarily designed to address difficulties associated with international agricultural trade, Article 1:3 Agreement on Technical Barriers to Trade (TBT Agreement) states that that agreement's rules also cover technical regulations and standards imposed on agricultural products. In addition, when the WTO agreements were concluded in 1993, a series of decisions were also incorporated into the WTO scheme which impact on agricultural trade. The first limb of the effectiveness test therefore evaluates the extent to which the new rules in all the relevant agreements and decisions eliminate protectionism in international agricultural trade.

Secondly, the test examines the interaction of the various agreements' rules. The difficulties of agricultural trade regulation under GATT indicate that part of the problem derived from the relationship between the relevant rules. Whilst Articles XI and XVI GATT were the main provisions covering agricultural trade, various committees established to look into inter alia the operation of the United States' waiver and the establishment of the European Communities' Common Agricultural Policy (CAP) showed that other more general GATT rules also applied. Examples include those covering the establishment of free trade areas and customs unions, the imposition of safeguard measures designed to protect domestic industry from unexpected trading conditions, the general exemption from the operation of GATT

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13 Most notably, the Decision on Measures in Favour of Least-Developed Countries, the Decision on Measures Concerning the Possible Negative Effects of the Reform Programme on Least-Developed and Net-Food Importing Developing Countries
14 Article XXIV GATT
15 Article XIX
rules, the grant of waivers from certain obligations, and the operation of the Tokyo Round Agreement on Technical Barriers to Trade. The contracting parties did not directly address the difficult connection between these rules and their ability to block the adoption of an adverse panel finding in a dispute settlement report meant that rectifying the problem via that mechanism was patchy at best. The loopholes that emerged from the operation of all the GATT rules were then exploited by members for protectionist purposes. This was illustrated most notably by the longevity of the United States’ waiver and the dubious legal justification of the European Communities’ CAP under Article XXIV GATT.

Article 14 Agreement on Agriculture states that members must “give effect” to the provisions of the SPS Agreement, indicating a clear relationship between those two agreements, even if the exact nature is not specified. In addition, although Article 1:5 TBT Agreement expressly exempts the operation of the SPS Agreement in relation to technical barriers to trade, Article 1:3 does state that the TBT Agreement’s rules will cover general agricultural issues, thus highlighting another potential problematic relationship. The incorporation of GATT into the WTO’s scheme also means that its

16 Article XX
17 Article XXV
18 BISD 26S/33: this agreement’s rules were not automatically binding on the GATT contracting parties, but only operated as between those parties who signed it: see J. H. Jackson, W.J. Davey & A. O. Sykes: ‘Legal Problems of International Economic Relations: Cases, Materials and Text’ (1995) 3rd ed. West at 461-462
19 Note that the Haberler report did make some recommendations on the inadequacies of all GATT rules on agricultural trade, but these were ignored: Haberler Report: ‘Trends and Issues in International Trade: A Report by a Panel of Experts’ (1958) GATT
20 This comment does not mean that GATT dispute settlement was ineffective per se, but more that it was difficult to use a non-binding panel report as the basis for the establishment of a legal principle in the same way as, for example, the English common law develops. On GATT dispute settlement generally see R.E. Hudec: ‘Enforcing International Trade Law: The Evolution of the Modern GATT Legal System’ (1993) Butterworths
21 By the 12th report, the committee set up to look into the ‘temporary’ GATT waiver were starting to despair about GATT’s ability to ensure the removal of the waiver: “the provisions of the General Agreement were not fully adequate to cope with the special conditions of international trade in agricultural products.” 12th Report of the Working Parties on Action taken under Waivers: BISD 15S/197 at 203 para 22
22 See Section C in ‘Trade in Agricultural Products’ BISD 6S/81 & Interim Report BISD 7S/69
23 Article II:4 Marrakesh Agreement
rules and jurisprudence will still play a role in the regulation of international agricultural trade. All these rules are then supplemented by the various decisions concluded at the 1993 negotiations and at Marrakesh in 1994. The second limb of the effectiveness test explores the relationship between all these relevant agreements and decisions to determine whether the apparent complexity hides loopholes in the regulatory structure that can be exploited by members wishing to maintain high levels of protection on their domestic agricultural sectors.

Finally, the third limb of the effectiveness test is derived from an evaluation of the consequences of contracting parties' ability to pursue protectionist policies under the GATT regime. Although it is axiomatic that international trade in agricultural products was distorted under GATT, the main sufferers were not the developed countries who could afford to counteract the adverse effects of distorted market prices, but the developing countries who relied heavily on trade in primary products and who were financially unable to protect their domestic economies in the same way as developed countries.

Special and differential treatment for these countries was recognised in GATT, but its practical manifestation under the Generalised System of Preferences (GSP) schemes and the series of broad commitments in Part IV GATT meant it was difficult for such countries to force developed countries to specifically recognise their needs, especially in agriculture.

The third part of the effectiveness test therefore examines the WTO's agriculture regime to determine whether it has in fact eliminated protectionism in international agricultural trade by analysing the effects of the rules on developing countries. This is

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25 e.g. Article XXXVI:4 GATT states that the imposition of protectionist measures on agricultural products would inevitably harm developing country trade. It therefore noted that such measures should be "avoided." This was not directly enforceable by developing countries
achieved by establishing whether there has been an actual reduction in the levels of agricultural support used by developed countries and also by looking at the amended special and differential provisions to determine whether these facilitate greater developing country participation in international agricultural trade.

The second reason for the WTO agriculture regime’s failure concentrates on the fundamental assumptions on which its rules are based. Both the GATT and the WTO are based on the assumption that achieving free trade in agricultural products by eradicating ‘protectionism’ will solve the problem. It is clear from contemporary difficulties epitomised by environmental regulation and food safety that the free trade principle is unworkable in relation to agricultural trade generally. This is because it is evident that agriculture involves both economic or ‘trade’ aspects and non-economic aspects, like preservation of the natural environment, rural communities, food security and elimination of risks to human health through food contamination. The WTO scheme is an economic solution, designed to achieve an economic objective: free trade. This means that it is doomed to failure because even when it ‘passes’ the ‘effectiveness’ test, it still only regulates half the issue. When the GATT’s attempts at the regulation of international agricultural also are revisited, it is possible to argue that in addition to its structural defects inherent in the ‘effectiveness’ test, its mistaken assumption that free trade would resolve the issue also contributed to the regulatory failure. GATT’s failure does show that there is an inherent tension between eliminating protectionism and allowing the pursuit of non-economic goals as the latter may be used as an excuse to reintroduce protectionist measures. Consequently, it is important that the solution adequately balances these competing objectives to successfully address the problems of international agricultural trade. The
three parts of the ‘effectiveness’ test must be satisfied, but the contemporary concerns must also be addressed.

The discussion is divided into five chapters. Chapter 1 explores its troubled history under GATT. The first part identifies the basis of the effectiveness test on which the WTO regime is based by looking at the operation of GATT’s rules, their enforcement and the effect of their application and inadequate supervision on developing countries. The second part then considers whether the two main rule systems, the Agreement on Agriculture and the SPS Agreement are effective. The analysis evaluates the scope of the rules and then moves on to their application and enforcement through the amended dispute settlement mechanism.26 It also pinpoints areas where the regulatory failure is attributable to the free trade principle, rather than regulatory failure.

Article 20 Agreement on Agriculture states that that agreement’s rules must be reconsidered before the end of the implementation period in December 2001.27 To aid the renegotiation process, members submitted proposals for change to the WTO General Council prior to the failed third Ministerial Meeting in Seattle in December 1999 and subsequently to the WTO Committee on Agriculture. Commentators have also suggested proposals for change. Chapter 2 evaluates all these proposals in two parts: firstly, agriculture-specific models formulated by members which focus on specific changes to the rules on market access, domestic support and export subsidies in the Agreement on Agriculture. These are further supplemented by academic commentators who put forward suggestions based specifically on changes to the existing agriculture regime. In addition, chapter 2 also analyses whether broader non-agriculture specific proposals would provide a more ‘effective’ solution. These are

26 Under the WTO Understanding on Rules and Procedures Governing the Settlement of Disputes (the Dispute Settlement Understanding)
27 Article 1.f Agreement on Agriculture
divided into traditional economic models, including comparative advantage theory\textsuperscript{28} and more advanced modelling techniques that predict trade flows.\textsuperscript{29} Despite the SPS Agreement’s important influence on international agricultural trade regulation, it is not timetabled for reform at the same time as the Agreement on Agriculture, and so chapter 2 does not discuss amendments to it.\textsuperscript{30}

Chapter 2 evaluates all the proposed amendments to the Agreement on Agriculture in the light of the ‘effectiveness’ test on which the WTO agreements are based. It then moves on to consider whether the solutions advocate the retention of the free trade principle and if not, whether they adequately deal with both the economic and non-economic aspects of agricultural trade.

Chapters 3 and 4 concentrate on two problems that epitomise the inadequacy of international agricultural trade regulation under the WTO. This is because they are not dealt with adequately under the WTO rules neither in relation to the ‘effectiveness’ test nor in their implications for the continued relevance of the free trade principle.

Chapter 3 focuses on the critical relationship between agriculture and the environment and the tensions that occur in the battle between the elimination of protectionism in agricultural trade and the simultaneous preservation of the natural environment.

Incorporating environmental preservation into the WTO scheme has attracted a significant body of literature from both members\textsuperscript{31} and outside commentators;\textsuperscript{32}

\begin{itemize}
\item \textsuperscript{28} See P. A. Samuelson & W.D Nordhaus: ‘Economics’ (1995) 15\textsuperscript{th} ed. London McGraw Hill at Chapter 35
\item \textsuperscript{29} The discussion is limited to the most influential model, the Global Trade Analysis Project (GTAP): see T. W. Hertel (ed.): ‘Global Trade Analysis: Modeling and Applications’ (1997) Cambridge University Press
\item \textsuperscript{31} This has focussed on the discussion of ‘multifunctionality’; see WTO: ‘Environmental Effects of Trade Liberalisation on Agriculture: The Multifunctionality of Agriculture’ WT/CTE/W/107, 15 February 1999
\item \textsuperscript{32} Anderson: “Agricultural Trade Liberalisation and the Environment: A Global Perspective” (1992) 15 World Economy 153
\end{itemize}
Chapter 3 draws on this literature and shows that the effectiveness test on which the WTO agriculture regime is based indicates that the free trade principle is an inappropriate basis for regulating a non-economic issue. This discussion is complicated by the existence of several international treaties which already address environmental issues.\textsuperscript{33} Difficulties arise because there is potential for conflict between members' existing international commitments under these treaties and any solutions proposed by the WTO. However, merely incorporating these treaties into the WTO scheme is not an attractive option because some members are not parties to them.\textsuperscript{34} These complications will inevitably influence any legal outcomes relating to any solution to the agriculture/environment nexus and are evaluated in the discussion of the solutions proposed.

Chapter 4 explores the difficulties raised by food safety issues. The implications of trade related aspects of food safety were not fully realised by the drafters of the WTO agriculture regime. The discovery that Bovine Spongiform Encephalopathy (BSE) could be transmitted to humans in the form of variant Creutzfeld Jacob Disease (variant CJD) prompted governments to impose import restrictions on British livestock.\textsuperscript{35} Further fears over the safety of genetically modified foods has also encouraged the use of trade restrictions to protect domestic consumers from the fear of contamination, not just its reality.\textsuperscript{36}

Although the WTO agriculture regime should not preclude the adoption of measures designed to protect consumers, particularly through the SPS and TBT Agreements, the extent to which the rules permit this to the satisfaction of members is uncertain.

\textsuperscript{34} Most notably, the United States
\textsuperscript{35} "BSE on increase outside the UK" Agra Europe No. 1941, 2 March 2001 at N/1
\textsuperscript{36} "Consumer unease prompts rethink on GM ingredients" 31 May 1999 Financial Times}
This is because members may wish to impose higher levels of protection than can be justified under the rules. Members have suggested that the rules be modified either to take multifunctionality into consideration, or even to allow the adoption of measures on a precautionary basis.

Any solution has been further complicated by the successful negotiation of the Cartagena Protocol on Biosafety, which seeks to adopt the precautionary principle in relation to the transport of genetically modified organisms and therefore poses a potential conflict between the WTO rules. Chapter 4 evaluates the difficulties posed by food safety in terms of the ‘effectiveness’ test and the implications for the continued use of the free trade principle.

Finally, chapter 5 offers a resolution to the problem of the regulation of international agricultural trade which addresses both the economic and non-economic aspects. This thesis advocates changing the basic philosophy in the WTO agriculture regime from free trade to sustainable development as the principle on which the agreements are based.

This final chapter also offers suggestions for changes to the rules and regulatory structure of the WTO agriculture regime in order to ensure that the new solution does not lead to a move back towards protectionism. This thesis argues that sustainable

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37 Multifunctionality is discussed in chapters 2,3,4 & 5 (thesis)
38 i.e. the adoption of the Precautionary Principle: European Commission: ‘Communication on the Precautionary Principle’ COM(2000) 1
39 Following from Article 19(3), (4), 8(g) & 17 Convention on Biological Diversity, Decision II/5 Conference of the Parties, 17 November 1995, (1992) 31 ILM 822; the Protocol was finally concluded in Montreal in January 2000; it was open for signature between 15-26 May 2000 and 5 June 2000-4 June 2001: Article 36. It enters into force “on the ninetieth day after the date of deposit of the fiftieth instrument of ratification, acceptance, approval or accession by States or regional economic integration organisations that are Parties to the Convention.” Article 37:1
40 This term was coined by the Brundtland Commission: ‘Our Common Future: The World Commission on Environment and Development’ (1987) OUP at 322. This was formally recognised in Agenda 21 following the Earth Summit held at Rio de Janeiro in 1992: U.N. Doc. A/CONF.151/26, vols. I,II, III & IV
agriculture is a more realistic solution to the problem because it recognises
agriculture’ inextricable link with both trade and non-trade issues.
Chapter 1:

Identifying the Problem

Any analysis of the effectiveness of the World Trade Organisation’s (WTO) Agreement on Agriculture\(^1\) must initially identify the exact nature and scope of the problem that it was intended to address.

Problems associated with international agricultural trade under the WTO’s predecessor, the General Agreement on Tariffs and Trade (GATT), manifested themselves in three ways. Firstly, the contracting parties\(^2\) of the GATT were very keen to protect their domestic agricultural markets against the adverse effects of international trade. Consequently, they employed measures\(^3\) which resulted in significant distortions to agricultural trade flows. Secondly, GATT’s legal provisions were unable to police these measures adequately. Huge disputes threatened to undermine its existence because the disagreements often teetered on the brink of turning into trade wars. Agriculture was the major underlying common denominator in most of these.\(^4\)

Thirdly, as a corollary to the two other issues, developing contracting parties experienced severe difficulties in exporting their agricultural products. As these

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\(^1\) Hereafter the Agreement on Agriculture

\(^2\) GATT never had legal personality; therefore, its ‘members’ were referred to as ‘the contracting parties.’ This term was designed to play down the fact that it did operate as a quasi-organisation: see J.H. Jackson, W.J. Davey & A.O. Sykes: ‘Legal Problems of International Economic Relations: Cases, Materials and Text’ 3rd ed. (1995) West at 296

\(^3\) These fell into three main categories: limitations on market access (usually in the form of quantitative restrictions), export subsidies and domestic support measures

\(^4\) See the oilseeds dispute: *Payments and Subsidies Paid to Producers of Oilseeds and Related Animal Feed Proteins* BISD 29S/91 & 37S/86; also significant were the chicken war: *US/EC Negotiation on Poultry* BISD 12S/65 & *Panel on Poultry* GATT Doc.L/2088; the Hormones dispute: *United States-Increase in Rates of Duty on Certain Products from the European Community* European Community complaint (unreported) L/6438
nations were heavily dependent on trade in these commodities to raise GDP levels,\(^5\) inevitably agricultural protection had an important consequence on their ability to industrialise. Such countries act as an indicator of the effects of protectionism on international agricultural trade.

When the GATT contracting parties commenced multilateral trade negotiations in the Uruguay Round,\(^6\) they assumed that agriculture would only be effectively regulated once all these problems had been addressed and free trade in agricultural products had been achieved. In theory, the new WTO agriculture regime resolves these major problems.

This chapter firstly considers agricultural trade difficulties experienced by GATT in the three problem areas outlined above: the imposition of protectionist policies by the contracting parties; the lack of legal regulation; and the special problems associated with developing countries. This analysis reveals the origins of the ‘effectiveness’ test employed by this thesis. Secondly, the chapter evaluates the extent to which the existing Agreement on Agriculture is effective on the basis of the definition.

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\(^5\) Experts agree that the economic crises suffered by many African countries in the early 1980s were mainly due to poor economic performance in the agricultural sector: UNCTAD: ‘Trade and Development Report 1998’ UNCTAD/TDR/1998 at 133

\(^6\) The Uruguay Round ran from 1986-1993. A detailed discussion of the round and why it was so successful when other attempts to regulate agriculture failed is outside the scope of this thesis. This is because the thesis is concerned with determination the effectiveness of the WTO Agreement on Agriculture. The reasons for the success of the Uruguay Round do not add anything to identifying what the problem of agricultural trade was under GATT, nor do they say anything about the effectiveness of the terms of the new agreement. Instead they go more to identifying changes in GATT contracting parties’ attitudes to introducing further regulation into the international trade regime. See: T.P. Stewart (ed.): ‘The GATT Uruguay Round: A Negotiating History’ (1993) Kluwer, (up to 1992) & J.J. Schott: ‘The Uruguay Round: An Assessment’ (1994) Institute for International Economics considers the final stages.
A. Agricultural Regulation under GATT: Identifying the Problem

1. Protectionism in Domestic Agricultural Policies

Analysing the difficulties that agriculture posed for GATT is complex because the problems\(^7\) are so closely linked. Although difficulties experienced by developing countries flow from a combination of both the contracting parties’ overwhelming desire to protect their domestic agricultural sectors and GATT’s inadequate regulation, it is difficult to say with certainty which provides the actual root of the problem. On one level, the inadequate regulation enabled the contracting parties to sustain policies that were marginally GATT-compliant at best, and illegal at worst. However, GATT is a product of its history. It is clear that the desire to protect domestic agricultural sectors was a fundamental reason for the failure of the International Trade Organisation (ITO),\(^8\) and it is this which leads to GATT’s problematic rule structure. On this interpretation, it is the protectionist policies that lead to inadequate regulation. This thesis supports the latter view and so considers the nature of the contracting parties’ policies first. Any discussion of domestic agricultural policies must consider two elements: firstly, why do the policies exist and secondly, what form do they take.

The roots of the adoption of protectionist policies lie in the very early history prior to the formation of the ITO and then GATT. Two important events shaped the contracting parties’ early agricultural policies: the Great Depression of 1929 and the devastation caused by World War II.

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\(^7\) i.e. contracting parties’ protectionist policies, GATT’s inadequate regulation and problems experienced by developing countries

The Great Depression profoundly affected post-war agricultural policies due to its disastrous effects on the sector. On an economic level, industrial and agricultural sectors were hit in different ways, but there was an overall drastic decline in the total average world price and volume of world exports.9 Agriculture was the first sector to be hit; prices dropped more quickly and the decline in price as a whole was greater than for industrial products.10 The United States was particularly badly affected in economic terms. There was a decline in demand for its more expensive agricultural exports in its traditional European markets. This led to a fall in prices in the United States, which then had consequential effects in European markets as agricultural exports’ prices also fell overall. Ultimately, this caused severe balance of payments difficulties in all countries.11

Combined with this was the effect of World War II. Although the war’s impact can also be measured in economic terms, its importance operates on a non-economic level. Policies put into operation after the war indicates the European countries’ overwhelming desire to encourage a return to food production with the ultimate goal of achieving self-sufficiency.12 Although the United States initially pursued a free trade policy immediately following World War II to satisfy excess demand from Europe,13 this changed after it became more difficult to sustain economically because of Europe’s new policies.14 Powerful farm lobbies within the United States’ Congress simultaneously demanded greater protection for domestic agriculture.15 Although it is

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10 Ibid. 1931-7 average price of agricultural exports was 57% below the 1929 level compared to non-agricultural exports which were 45% below
11 Curzon supra n. 8 at 24
12 Ibid. at 167
14 As agricultural sectors recovered, the United States had too much output which it could not find a market for: Curzon supra n. 8 at 168
easy to justify accession to their demand on economic grounds to fulfil a need for emergency protection, in reality, it is a political response to a profound change in the dynamics of the market.

It could be argued that these factors only explain the pursuit of policies in the early stages of GATT and that they have no relevance to the continued adherence to protectionism. On one level this is true as reports clearly indicate that the nature of agricultural trade changed in response to new challenges. Most notably, the creation of the European Communities led to profound adjustments in agricultural policy following the establishment of its Common Agricultural Policy (CAP).16 Nevertheless, the contracting parties still retained their protectionist strategies in only slightly modified forms. There are arguably two reasons for this. Firstly, the objectives underlying the domestic legislation do not change during the GATT period. For both the United States17 and the European Communities,18 these were originally set early in the ITO and GATT period at a time when the effects of the Great Depression and World War II were still prevalent. Subsequent changes to both policies are “evolutionary rather than revolutionary.”19 This can be seen in the European Communities’ CAP where, despite changes to the rules for each common organisation, the overall objectives found in Article 33(1) (ex 39) of the Treaty of Rome do not alter.

19 Ibid. at 43. This comment is made in connection with the European Community, but it is possible to see that the United States Farm Bills for the GATT period all perpetuate the underlying objectives established in the 1949 legislation.
Article 33(1) contains a list of economic and non-economic objectives including the food security imperative.\(^{20}\) Article 33(1)(b) stresses the need to "ensure a fair standard of living for the agricultural community" by "increasing the individual earnings of persons engaged in agriculture."\(^{21}\) The wording of Article 33(1) merely lists these objectives and so, as McMahon argues, it is difficult to perceive any obvious hierarchy between them.\(^{22}\) This interpretation is supported by the European Court of Justice's assertion that any modifications to the CAP must be achieved in a way that does not "render impossible the realisation of [the] other objectives."\(^{23}\) It follows from this that although the European Communities can pursue other goals perhaps dictated by external sources,\(^{24}\) ultimately, it must still adhere equally to all the objectives in Article 33(1). Consequently, both the economic and non-economic objectives in Article 33(1)(b) and (d) must be fulfilled as the CAP must still seek to protect rural communities and preserve food security regardless of any modifications to its specific terms. The adverse effects of the combination of economic and non-economic factors is that domestic farmers become insulated from the adverse effects of vacillations in international agricultural trade because their production is based on the system of support and is no longer responsive to market conditions.\(^{25}\) Arguably, the lack of fundamental change in the legal objectives of agricultural policies coupled with the political need to pacify the powerful farm lobby ensures that domestic agricultural policies remain unchanged.

\(^{20}\) Article 33(1)(d)EC  
^{21}\) Article 33(1)(b)EC  
^{22}\) McMahon: 'Law of the Common Agricultural Policy' supra n. 18 at 26  
^{23}\) Joined Cases C-133/93, C300/93 & C-362/93 Crispoloni II [1994] ECR 1-4863 at 4903; see also McMahon ibid. at 27  
^{24}\) i.e. the GATT rules  
^{25}\) A good example is the European Community's variable import levy which was raised or lowered dependent on the price that agricultural exports entered the European markets: see McMahon supra n. 18 at 98-9
Secondly, the complexity of the regimes means that changing them can become extremely complicated both legally and politically. Both the United States' and the European Communities' agricultural policies are interesting examples of this.

During the GATT period, the CAP was based on an intricate system of price support that differed according to the relevant product. The European Council of Ministers set these prices annually. Products were organised into common organisations and then prices were set for each group. Although the basic objectives of the CAP were included in the Treaty of Rome, the actual minutiae of the policy is found in voluminous secondary legislation. Similarly, the United States' domestic agricultural support legislation operated a complex system of 'non-recourse loans' that were offered for crops at specific prices. The loans could be repaid by forfeiting the crop to the government when the crops' market price was not high enough to repay the loan. It follows that unravelling the details of both these policies is very difficult. It is also interesting to see that proposed modifications to these policies that were made during the GATT period merely involved changes in the way support was offered. Neither the United States, nor the European Communities ever suggested that support be withdrawn completely.

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26 Article 34(1) (ex 40)EC gives the European Community three options to achieve the objectives of the CAP. Article 34(1)(c) was chosen. (Note that this thesis adopts the amended numbering from the Treaty of Amsterdam, with the original Treaty of Rome numbering in brackets)
28 McMahon supra n. 18 at 36
29 Hathaway supra n. 15 at 81
30 Ibid.
31 It is important to realise that although the United States was calling for liberalisation of international agricultural trade in the 1980s, it was doing this whilst retaining the immunity which its waiver from GATT rules provided: see: Payne & Gamble: "Introduction: The Political Economy of Regionalism and the World Order" in A. Gamble & A. Payne (eds.): 'Regionalism and the World Order' (1996) Macmillan, 1 at 3. On the waiver see Waiver Granted to the United States in Connection with Import Restrictions imposed under Section 22 Agricultural Adjustment Act (of 1933) as amended BISD 38/32
32 In its first review document, the European Commission does not advocate the complete removal of all support measures: European Commission: 'Reflections on the CAP' COM(80)800. This is also the case for later documentation: see European Commission: 'Future Guidelines for the CAP' COM(83)323 final; 'Rationalisation of the CAP: Commission proposals' COM(83)500 & 50 & the
In determining the origins of the problems seen under GATT's regulation of international agricultural trade, this section has concentrated on the United States' and the European Communities' domestic agricultural policies. This is because both provided the main focus of the problems experienced by GATT in agricultural trade. Other contracting parties' agricultural policies merely seemed to mirror these.\(^{33}\)

Unfortunately, GATT's regulatory system failed to appreciate the inextricable link between economic and non-economic issues in agriculture and that freeing international agricultural trade only addresses the economic aspect of the problem.

**2. Problems of Agricultural Trade Regulation under GATT**

GATT did contain limited rules on the control of agricultural trade, but adequate regulation of the area was difficult.\(^{34}\) Hudec's study of dispute settlement under the GATT shows that a high proportion of those disputes involve agricultural products.\(^{35}\) Out of a total of 207 recorded GATT complaints in his study, 89 involved agriculture.

It is also interesting to note that Hudec finds a steady increase in the percentage of cases involving agriculture as the GATT period progresses.\(^{36}\) Whilst it is important to look at Articles XI and XVI, wider issues must also be taken into consideration. It is evident that not all agricultural disputes identified by Hudec concerned Articles

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**Footnotes**

33 Most notably, Japan's domestic system for rice: see Hathaway *supra* n. 15 at 41.

34 Suggestions for the creation of comprehensive rules on agricultural trade were proposed at many of the GATT rounds. All these attempts failed. Despite proposals in the Haberler Report, the Dillon Round became weighted down by crystallising the tariff negotiating structure and tariff bindings: see Warley: "Western Trade in Agricultural Products" in A. Schoenfield: 'International Economics Relations of the Western World 1959-1971 Volume 1 Politics and Trade' (1976) OUP at 287 & Haberler Report: 'Trends and Issues in International Trade: A Report by a Panel of Experts' (1958) GATT. The Kennedy Round focussed on sorting out the detailed compensation claims resulting from the rebound tariffs after the formation of the European Community: Evans *supra* n. 16 at 14. Whilst the Tokyo Round did achieve the Subsidies Code which resulted in slight modifications to the wording of Article XVI.3, the fact that members had to specifically accede to these accords before the terms became binding meant that their effect was undermined: see Jackson, Louis & Matsushita: "Implementing the Tokyo Round: Legal Aspects of the Changing International Economic Rules" (1982) 81 Mich.L.Rev. 267 at 390.


36 1950s, 23% involved agriculture compared with over 50% in 1960-1989: *ibid.* at 327.
XI:2(c)(i) and XVI:3, the main rules governing agricultural trade. In fact, many of the major disputes did not concern those articles at all, but were brought on the basis of other rules. The reasons for this operate on two levels: firstly, Articles XI:2(c)(i) and XVI:3 only concern a narrow range of measures and on that view, it is obvious that other measures would be applied. However, this interpretation only looks at one aspect of the problem. Certainly, there were problems with the wording of the rules on quantitative restrictions and subsidies, but if the major disputes are analysed, then it is possible to discern that it is not always the rules that are at fault. Two issues arise: the main difficulty is that GATT’s rules were based on the economic assumption that achieving free trade in agricultural products would alleviate all the remaining problems. This defect arguably was hidden by the second difficulties, which were the complications inherent in the GATT rule structure and the function of its dispute settlement mechanism. The drafting style of GATT’s rules was part of its fluid approach to international trade regulation where disputes would be settled through a system that was not designed to be legalistic. Flowing from this are defects in the regulatory system underlying other subjects of international trade that impinged on agriculture and the problems of GATT’s dispute settlement mechanism. The regulatory authorities and the panels’ interpretation of their roles within this fluid structure were therefore crucial to the results that could be achieved. The inadequate rule structure and the problematic regulatory system need to be considered before an accurate evaluation of GATT’s impact on international agricultural trade can be made, but crosscutting issues are also relevant.

37 See Pasta, Hormones, Oilseeds disputes supra n. 4
38 i.e. the imposition of quantitative restrictions (Article XI) and the use of subsidies (Article XVI)
a. GATT’s Rules on Agricultural Trade

Article XI GATT provides a comprehensive treatment of quantitative restrictions. Article XI:1 completely prohibits the use of both import and export quotas, subject to the limited exceptions listed in Article XI:2(a)-(c). Article XIII GATT goes further, stating that any ‘legal’ quotas imposed under Article XI:2 must be in accordance with the fundamental GATT principle of non-discrimination. Agricultural quotas are allowed subject to the provisions in Article XI:2(c)(i)-(iii).

Although more permissive than Article XI, Article XVI does seek to regulate the use of subsidies. Its regime is dependent on notification of the subsidy to the contracting parties, which may then lead to nullification and impairment actions. Article XVI:3 specifically regulates the imposition of agricultural export subsidies. It provides that the contracting parties should “seek to avoid the use of subsidies,” but in the event of their use, they should not be applied in a manner that allows that contracting party to achieve a “more than equitable share of world trade.”

i. Quotas

Article XI:1 is unequivocally worded: it provides for the complete elimination of all quotas. However, the prohibition is immediately flawed because as Davey notes, it only operates on the importation of the product and fails to regulate the use of quotas once that product has been imported. It is apparent from their decisions, that the panels regarded the coverage of the general ban as “comprehensive.” Consequently, a broad interpretation was placed on what would constitute a “measure:” both

40 Article XIII:1
41 Article XVI:1
42 Article XVI:3
43 Ibid.
45 Japan-Trade in Semi-Conductors BISD 35S/116
implemented legal rules would be included, plus those that could be categorised as merely "non-mandatory requests." Failure to justify a measure under another provision seemed to lead to an almost automatic finding of nullification and impairment under Article XXIII because of the *de facto* restriction on free trade.\(^\text{46}\)

Accordingly, this aspect of Article XI did not prove particularly problematic to GATT jurisprudence on agriculture.\(^\text{47}\)

In contrast, Article XI:2(c) allows the imposition of quotas on agricultural products where they are necessary to the enforcement of a government programme which has one of three specified effects: firstly, it restricts the quantities of the "like domestic product"\(^\text{48}\) that can be imported into the state; or, secondly, it is designed to remove a temporary surplus\(^\text{49}\), or finally, it is designed to restrict the quantities of any specified "animal product" which is "directly dependent" on the production of the imported product.\(^\text{50}\)

Panel interpretation here relies firmly on the negotiating history of the provision. Agricultural trade is seen as distinct from trade in industrial products because of the "capricious bounty of nature."\(^\text{51}\) This attribute leads to a distinctive phenomenon in which a trader could not always anticipate changes in trading patterns.\(^\text{52}\) However,

\(^\text{46}\) Note Korea beef disputes: *Australia Complaint BISD 36S/202; New Zealand Complaint BISD 36S/234 & US Complaint BISD 36S/268*: the panel noted at para 92 Australia complaint, if a measure was held to be in breach of Article XI, it had to be justified under another provision of the GATT: there is no real discussion that the Korean measures were anything other than prohibited quantitative restrictions.

\(^\text{47}\) Note that although Chile brought evidence to illustrate that the European Community's dessert apple regime was illegal under Article XI:1, the EC did not counteract this allegation: *EEC Restrictions on Imports of Apples from Chile BISD 27S/98* at paras 2.1-2.6

\(^\text{48}\) Article XI:2(c)(i)

\(^\text{49}\) Article XI:2(c)(ii)

\(^\text{50}\) Article XI:2(c)(iii)

\(^\text{51}\) Havana Reports at 89 quoted by the panel in *Japan-Restrictions on Imports of Certain Agricultural Products BISD 35S/163* at para 5.1.2

\(^\text{52}\) *Ibid.*
instead of using this to be flexible on the application of the free trade principle, the
provision was instead viewed as an emergency measure and interpreted restrictively.53
Panel reports show a highly legalistic interpretation of the individual elements within
the exception. Therefore, if one element were not proven, then the import restrictions
would not benefit from the exemption. Japan-Restrictions on Imports of Certain
Agricultural Products54 provides an exhaustive treatment of the provision. Here, the
panel formulated a comprehensive list of the factors that needed to be established
before the benefit of the exception would accrue.55 This crystallises much of the
earlier jurisprudence on the area and was reiterated later in Canada-Import
Restrictions on Ice cream and Yoghurt.56

In particular, only “restrictions” on imports were covered, not complete prohibitions
because a prohibition by its nature inhibits free trade and was assumed to be
automatically bad.57 Earlier in EEC-Programme of Minimum Import Prices, Licences
and Surety Deposits for Certain Fruit and Vegetables58 the panel elaborated on this,
arguing that the wording of Article XI:2(c)(i) meant that a measure that was deemed
to be an ineffective restriction would not come within the exception. Other elements
of the Japanese Agricultural Products test sought to restate the panels’ views that the

53 The panel noted that a measure imposed as part of the European Community’s dessert apple regime,
could not be regarded as an emergency measure, as it had been in place for a number of years. No
protection under Article XI:2(c) was allowed: Dessert Apples-Chile Complaint supra n. 47 at para 4.6
54 Japanese Agricultural Products supra n. 51
55 ibid.
56 BISD 36S/68 at para 62: the elements are:
   a. Only restrictions are permitted, not complete prohibitions+
   b. Restrictions only permitted on agricultural products, not processed ones
   c. The import restriction and the domestic production measure must be on “like” products in any
      form
   d. The domestic products must be similarly restricted
   e. Public notice of the imposition of the restriction is required
   f. Proportionality is required between the imposition of the import restriction and the reduction
      of domestic production
   g. The import restriction must be “necessary” to ensure the enforcement of the domestic
      production restriction.
57 Supra n. 51 at para 5.3.1.1
58 BISD 25S/68 at para 4.13
exception should only be available in limited circumstances, to prevent its use as a protectionist measure. Most notably, the panel argued that any restrictions on imports justified under Article XI:2(c)(i) should be proportionate to domestic production.\footnote{Japanese Agricultural Restrictions supra n. 51 at para 5:1.3.7} This reiterates the drafters’ view that the exception should only be available as part of an existing agricultural programme that “...cut domestic production and allowed imports to retain their market share.”\footnote{C. Wilcox: ‘A Charter for World Trade’ (1949) Macmillan at 85}

This issue was further considered in \textit{EEC-Restrictions on Imports of Dessert Apples-Chile Complaint}.\footnote{BISD 36S/93 at para 12} The panel again adopted a ‘black letter’ interpretation.\footnote{\textit{Dessert Apples-Chile Complaint} supra n. 47 at para 12.14} Here the European Communities’ domestic scheme only concerned the extent to which the product could be marketed. The panel argued that if the government programme did not result in the reduction of domestic production at all, then Article XI:2(c)(i) would not apply.\footnote{Ibid. at para 12.14} Inevitably, this restrictive interpretation by panels led to the exception becoming a dead letter.\footnote{Ibid. at para 12.4}

\textbf{ii. Subsidies}

Article XVI:1’s permissive language is in stark contrast to the prohibition under Article XI:1. Here subsidies are permitted provided they are duly notified to the contracting parties. Although Article XVI:3 cautions against the use of subsidies on primary products, it does permit their use if their imposition does not result in that contracting party acquiring “more than an equitable share of world trade.”\footnote{Article XVI:3 states that: “Accordingly, contracting parties should seek to avoid the use of subsidies on the export of primary products. If, however, a contracting party grants directly or indirectly any form of subsidy which operates to increase the export of any primary product from its territory, such subsidy shall not be applied in a manner which results in that contracting party having \textit{more than an equitable share of world export trade} in that product, account being taken of the shares of the contracting parties in such trade in the product during a \textit{previous representative period}, and any \textit{special factors} which may have affected or may be affecting such trade in the product.” (emphasis added)}

\footnotesize{\textsuperscript{59} Japanese Agricultural Restrictions supra n. 51 at para 5:1.3.7 } \textsuperscript{60} C. Wilcox: ‘A Charter for World Trade’ (1949) Macmillan at 85 \textsuperscript{61} BISD 36S/93 at para 12 \textsuperscript{62} \textit{Dessert Apples-Chile Complaint} supra n. 47 at para 12.14 \textsuperscript{63} Ibid. at para 12.14 \textsuperscript{64} Ibid. at para 12.4 \textsuperscript{65} Article XVI:3 states that: “Accordingly, contracting parties should seek to avoid the use of subsidies on the export of primary products. If, however, a contracting party grants directly or indirectly any form of subsidy which operates to increase the export of any primary product from its territory, such subsidy shall not be applied in a manner which results in that contracting party having \textit{more than an equitable share of world export trade} in that product, account being taken of the shares of the contracting parties in such trade in the product during a \textit{previous representative period}, and any \textit{special factors} which may have affected or may be affecting such trade in the product.” (emphasis added)
Interestingly, in comparison to Article XI, Article XVI:3’s jurisprudence is curiously vague. Although the *French Wheat Flour* panel found a breach of Article XVI:3 relatively easily, subsequent panels, faced with very similar facts were unable to do so. In the ensuing complaint by the United States against the European Communities’ wheat flour regime in 1983, the panel was unable to come to a definitive conclusion at all, despite admitting that it was only with the use of the subsidy that the European Communities was able to export such large quantities of the product. Davey argues that these difficulties flowed from the prevailing political view within GATT at that time that the CAP was not to be threatened significantly because it was feared that the European Communities would withdraw from the GATT completely.

Article XVI:3 GATT’s difficulties centre on three interpretative problems: firstly, when a contracting party will be deemed to have a “more than an equitable share of world trade” vis-à-vis other contracting parties’ shares; secondly, determining the “previous representative period” in order to compare the ‘defendant’ contracting party’s existing share of world trade with its share under ‘normal’ trading conditions. Finally, assessing whether any “special factors” should be taken into consideration which explain why the ‘defendant’ contracting party did have ‘more than an equitable share of world trade.’ None of these terms is defined in Article XVI:3 and so interpretation was left to the panels. Several problems arise.

*French Wheat Flour* recognised that it was difficult to define the term “more than an equitable share of world trade” in the abstract. Instead, it chose to assess whether there was a causal link between the imposition of the subsidy and the injury caused to

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66 *French Assistance to Exports of Wheat and Wheat Flour* BISD 7S/46 at para 15
67 *EEC-Subsidies on Export of Wheat Flour* GATT Doc. SCM/42 (unadopted); see Boger: “The United States-European Agricultural Export Subsidies Dispute” (1984) 16 Law & Policy in International Business 173 at 208
68 Davey *supra* n. 44 at 49
the complainant. To ascertain evidence of this causal link, the panel considered whether there had been a displacement of Australian flour due to the operation of the French measures. Although the panel found that it was “difficult to assess this displacement quantitatively with any precision,” it went on to find that displacement had occurred.

Subsequent panels failed to find the existence of a causal link. EEC-Refunds of Sugar-Brazil Complaint even reiterated the test put forward by French Wheat Flour, but failed to follow it in a straightforward manner. A mixture of assessing the relevant market shares, displacement and “special factors” determined “more than an equitable share of world trade.” Nevertheless, the sugar panel was only able to conclude that: “[a] close examination of individual markets did not provide clear and general evidence that Community exports had directly displaced Brazilian exports.”

Arguably, the French Wheat Flour panel had found displacement on significantly less evidence.

Tokyo Round amendments to the test provided some clarity as the concepts of “serious prejudice” and “displacement” were introduced by the Subsidies Code. However, these made little difference. No causal link was ever found following French Wheat Flour.

Interestingly, although able to satisfactorily determine that there had been displacement, French Wheat Flour makes little reference to the “previous representative period.” The panel only looked at the export statistics. In comparison,
those panels that did go on to consider this, failed to satisfactorily conclude which should be the relevant period, and so ultimately failed to find displacement.\textsuperscript{76}

Although all panels noted that “special factors” should be taken into account, these have never been used for the benefit of a complaining party.\textsuperscript{77} This indicates the blind adherence to the free trade principle, as the flexibility in the wording of Article XVI:3 GATT here would have allowed panels to take a more optimistic view of the non-economic effects of agriculture which prompted the use of domestic subsidies particularly.

The problems with both these provisions is deeper than merely inadequate drafting, although it is clear that lack of legal certainty generated by the generalised wording also led to difficulties. However, it is the whole rule structure of the GATT that primarily contributed to the problem.

b. GATT’s Regulatory Structure

(i) Dispute Settlement

GATT’s regulatory inadequacies lie in two areas. Firstly, on one level, its dispute settlement procedural rules were problematic.\textsuperscript{78} Even if the panel did issue a report, it was only binding if it was adopted. In many of the major agricultural disputes\textsuperscript{79} the losing contracting party refused to adopt the report and accordingly, never became bound by it.\textsuperscript{80} Unfortunately, the difficulties that then emerge are due to the panels’

\footnotesize{\textsuperscript{76} EEC-Refunds on the Export of Sugar-Australia Complaint BISD 26S/290 para 2:22
\textsuperscript{77} Note that the International Sugar Agreement was referred to in EEC-Sugar Exports-Brazil Complaint supra n. 70 at para 4.27
\textsuperscript{78} Procedural difficulties were caused by GATT’s difficult transition to independent entity operating without many of the ITO’s rules: see Jackson: ‘World Trade and the Law of GATT’ supra n. 8
\textsuperscript{79} e.g. the Bananas dispute: EEC-Member States Import Regime for Bananas DS32/R 3 June 1993: even though this occurs late in the GATT’s history, it still illustrates the point well. The new WTO dispute settlement procedure did not come into effect until 1 January 1995
\textsuperscript{80} Decision by the CONTRACTING PARTIES establishing the GATT Council in 1960, specifically gave it authority to “consider matters arising between sessions of the CONTRACTING PARTIES which require urgent attention…” this was taken to include adoption of panel reports: see WTO: ‘Guide to GATT Law and Practice: Volume 2’ (1995) WTO at 761. This practice was assumed by the}
failure to develop a clear jurisprudence on the application of those rules. Superficially, it seems that this is a fault with the panels themselves rather than the dispute settlement structure. In reality, the issue goes to the root of the function of the dispute settlement system under GATT.

Dispute settlement was not a judicial process under GATT, but mirrored the arbitration model. Panels were not expected to develop a coherent body of rules, but instead to decide each case on its facts under the general rallying cry of the protection of free trade. This approach, whilst allowing flexibility, inevitably led to uncertainty. The panels' interpretation of Article XVI:3 after the French Wheat Flour decision is a significant illustration of this trend. Maximising flexibility is an important quality for resolving international trade disputes. However, because agriculture was heavily protected with measures that were not compliant with the rules already, the lack of a coherent jurisprudence arguably exacerbated the problems that existed in the sector. The result was that it was always open to the contracting parties to argue that they were not really sure whether their measures were compliant because there was no definitive guidance.

Inadequacies in the dispute settlement system are only one aspect of the problem. The second issue is the lack of regulatory control that GATT had over the establishment of agricultural policies within regional trading arrangements, most notably, the European contracting parties and was confirmed in the Uruguay Round Ministerial Declaration 1986 BISD 33S/19 at para 10

82 Compare this with Davey's view on the purposes of GATT dispute settlement. He argues it does have an ad judicatory role: Davey: “Dispute Settlement in GATT” (1987) 11 Fordham Int'lL.J. 51 at 67

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Communities’ CAP, and also the inadequate supervision it exercised over the United States’ agricultural waiver once it was granted.

(ii) Inadequate Supervision

a. European Communities’ Common Agricultural Policy

GATT’s control of the CAP focused primarily on supervision, although there is some residual attempt to curb its worst excesses through the panel process. The basis of this lies in two issues, firstly, the application of Article XXIV and secondly, the supervision of the CAP.

Jackson stated in 1969 that “Article XXIV.… contains one of the most troublesome provisions of the GATT.” Although superficially legally precise in its wording, its efficacy had been questioned throughout the GATT’s history. Issues of interpretation had always dogged the provision, but the true problems of the legal drafting was revealed in the reports of the Working Parties that dealt with the creation of the European Communities and ultimately the CAP.

Sub-Group C considered the agricultural provisions of the Treaty of Rome when the European Communities first applied to the GATT for clearance under Article XXIV. Despite severe reservations expressed by the members with regard to the proposed areas of coverage of the CAP, the Group did not go on to find that the provisions were in breach of Article XXIV. Its report merely stated that members were “not able
to determine...either that the agricultural provisions of the Rome Treaty or their implementation would be consistent with the provisions of the General Agreement." \[94\]

Sub-Group C did not say that the provisions were definitely not in conformity, merely that they could not determine the issue at that stage in the CAP's growth. Instead, they opted for the creation of "liaison machinery" which would enable the contracting parties to monitor any developments. \[95\] Unfortunately, this effectively ensured that the CAP was created with little censure from the GATT and was de facto 'legal.'

The European Communities' agricultural regime subsequently became the subject of numerous panel reports \[96\] and other committee reviews. \[97\] Some common criticisms can be identified. Although considering the CAP at a very early stage in its construction, Committee II identified issues that continued to be problematic until the European Communities' 1992 reform programme. \[98\] The CAP's variable import levy was of particular concern. \[99\] It is possible to see the anxiety expressed by committee members that the imposition of the levy could give European Communities states an "additional preference on outside suppliers:" \[100\] not only would domestic producers enjoy high prices, they would also have guaranteed markets for their production. Furthermore, although the overall compatibility of the levy with the GATT was questioned, \[101\] surprisingly the Committee did not feel that it was its task to consider the levy's legality. \[102\] Committee II's reservations over the protective nature of the CAP's price and levy structure were clearly detailed within its report on the sectors it

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\[94\] Ibid. at para 14
\[95\] Ibid. at para 17
\[96\] The European Communities either blocked the adoption of the report or refused to implement the findings
\[97\] Supra n. 92
\[98\] Some issues remained problematic including the bananas and hormones issue
\[99\] See Gardner supra n. 8 at 33
\[100\] Committee II supra n. 92 at 82 para 54 re beef
\[101\] Ibid. at 91 para 22 re dairy
\[102\] Ibid. at para 23
considered. However, the Committees did go on and consider the motivations for the CAP but would arguably never be able to adequately regulate it. GATT's continued adherence to the free trade ideal meant that it never evaluated the non-economic factors, but blindly assumed that the CAP's measures were a synonym for protectionism. Whilst this might have been the case, GATT's inability to go further still meant that only half the problem was evaluated.

b. The United States' Waiver

GATT's failure here is crucial because it reveals its inability to control a temporary exemption to the rules once it had been granted. More importantly, it indicates that there are other reasons beyond inadequate legal rules that contribute to the difficulties GATT experienced with international agricultural trade.

In 1967 a member of the GATT working party on the United States' waiver expressed the view that "the provisions of the General Agreement were not fully adequate to cope with the special conditions of international trade in agricultural products." This statement followed twelve years of the 'temporary' waiver and personified the breakdown of GATT regulation in this area.

The exclusion of the United States from GATT's agricultural rules is important because it reflects a contracting party's inability to fulfil agriculture's economic and non-economic objectives within the limitations of the rules structure based on the free trade principle. The United States' waiver was only part of a whole system of domestic policies which could not operate within the constraints of free trade. These often took the guise of non-tariff barriers that were difficult for the GATT to

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103 Ibid. at 106 para 59
105 Note the proviso within the wording of the grant of the original waiver in 1955:

"The United States will remove or relax each restriction permitted under the waiver as soon as it finds that the circumstances requiring such restrictions no longer exist or have changed so as no longer to require its imposition in any form." BISD 3S/32 supra n. 31 at 36 para 5
specifically regulate.\textsuperscript{106} The European Communities particularly raised the waiver as a justification for the imposition of its own non-economic policies. It argued that it needed a certain level of protection because international agricultural trade was not liberal.\textsuperscript{107}

The United States' statement to the GATT contracting parties implied that s. 22 of the Agricultural Adjustment Act which it wished to claim the waiver for, was an emergency safeguard measure designed to protect the United States from balance of payments difficulties.\textsuperscript{108} However, Article XIX GATT, concerning the imposition of safeguard measures, could have achieved the result that the United States wished, but within the GATT framework. Article XIX only involved the imposition of temporary measures for use during "emergencies." In contrast, the waiver became an integral part of United States' domestic agricultural policy because the United States was unable to pursue both economic and non-economic policies through adherence to the free trade ideal.\textsuperscript{109}

Supervision of the waiver exposes the inadequacies of GATT's regulatory system. Although the contracting parties set up a working party following the grant of the waiver, this proved impotent.\textsuperscript{110} In its first report, members attempted to impose a series of amendments to the United States' policy that they regarded were of "major importance" to fulfil the free trade goal.\textsuperscript{111} These related to the lack of a specified

\textsuperscript{106} See 'Programme for Expansion of International Trade: Agricultural Protection' 3\textsuperscript{rd} Report of Committee II (1961): BISD 10S/135 at 147 para 18; note also all the problems encountered by the imposition of Voluntary Export Restraints (VERs) and Orderly Market Arrangements (OMAs) outside Article XIX GATT: Preusse "Voluntary Exports Restraints-An Effective Means Against a Spread of Neo-Protectionism" (1991) 25 JWTL 5; note the failure of the Tokyo Round to fully regulate these as the 'Codes' were only applicable on the basis of reciprocity: Jackson, Louis, & Matsushita supra n. 34
\textsuperscript{107} Evans supra n. 16: Kennedy Round negotiations Ch. 10 at 203
\textsuperscript{108} BISD 3S/32 supra n. 31 at 33
\textsuperscript{110} 'Import Restrictions Imposed by the United States under Section 22 of the United States Agricultural Adjustment Act 1933' BISD 3S/141
\textsuperscript{111} Ibid. at 142 para 2
time limit for the waiver. The United States rejected them. Subsequent reports started with a general condemnation of the fact that the United States still felt it needed recourse to the waiver. As the longevity of the waiver was accepted, the language of the Working Party reports became terser, and members were less willing to accept the United States' reasons for the maintenance of the restrictions. By 1987, it was clear that the United States was only willing to negotiate on the waiver within the Uruguay Round negotiations, despite severe misgivings expressed by the Working Party members. Further meetings seemed pointless: this was reflected in the Working Party deliberations.

GATT conduct in relation to the United States' waiver should not be completely condemned. Although the Working Party was ineffective in achieving the removal of the waiver itself, some reduction in the product coverage was accomplished. However, the GATT was unable to secure the removal of the waiver through adjudicatory means and it was finally removed through a political bilateral agreement between the United States and the European Communities that successfully contributed to the conclusion of the Uruguay Round.

From the discussion of the contracting parties' domestic agricultural policies and the problem the GATT posed, two important themes are emerging. Firstly, GATT's rules on agricultural trade were based on the same assumption as manufactured products.

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112 Ibid. at 142-143 para 3
113 The list is very long, but for example: BISD 4S/96 at 98 para 8; BISD 5S/136 at 137 para 2; BISD 6S/152 at 153 para 2; BISD 13S/122 at 133 para 3; BISD 34S/38 at 39 para 7
114 Note BISD 26S/206 at 208 para 10; BISD 31S/198 at para 6: several members of the Working Party went so far as to express the view that the 26th Annual Report presented to the Working Party gave them "...no confidence that the United States was taking adequate measures to remedy the situation which originally gave rise to its request for the waiver."
115 BISD 34S/38 at 39 para 7
116 Ibid. at 40 paras 7-8
117 'United States Import Restrictions on Agricultural Products Imposed under Section 22 of the Agricultural Adjustment Act' BISD 10S/262 at 263 para 3
118 This is a two stage agreement referred to as the Blair House Agreement. Here the waiver was removed in return for the grant of concessions on United States' oilseeds exports to the European Community: there is no official text, but the European Community released a summary in its Monthly Bulletin: Bull.EC 11-1992 at para 1.4.83
that achieving free trade would inevitably reduce the number of agricultural disputes
and alleviate the difficulties experienced by developing countries. Secondly, the
regulatory system was flawed. Panels could not adequately police contracting parties’
aricultural policies, and GATT’s working party and committee structure were unable
to do anything other than report the situation. The result is a general breakdown of
regulation of international agricultural trade. This failure had particularly important
consequences for developing nations because they were heavily dependent on
agricultural trade for revenue. Unfortunately, GATT’s genesis meant that these
countries’ needs were not specifically addressed in a comprehensive way, but were
dealt with on a piecemeal basis. The result was that GATT’s problems with
international agricultural trade start to focus on two fronts: firstly, the inadequate
regulatory system and secondly, the inability to meet the special needs of developing
nations.

3. Developing Countries
Determining whether developing countries achieved any significant benefits from the
GATT is difficult. This is because there was a clear disparity between what
developing countries wanted from their membership and what developed nations were
prepared to concede to them. For example, within the debate over the grant of
generalised preferences, two opposing views were apparent. Developed country

119 In the ITO negotiations, developing countries’ needs were only addressed through the award of
concessions on quantitative restrictions. As these were then subject to exemption, this was a pyrrhic
victory: Jackson: ‘World Trade and the Law of GATT’ supra n. 8 at 627
120 Part IV of the GATT did deal with development issues, but these were in the form of general goals
rather than specific legally enforceable obligations: ‘Protocol Amending the GATT to Introduce a Part
IV on Trade and Development’ BISD 13S/2. Note Hudec’s view of the efficacy of Part IV: R.E.
Rules on the Generalised System of Preferences (GSP) were only added later: see BISD 18S/24 and
then permanent enactment through the Enabling Clause: Decision on Differential and More Favourable
Treatment, Reciprocity and Fuller Participation of Developing Countries BISD 26S/203
writers like Hudec argued that the grant of preferential trading terms to developing nations was unhelpful, and that the Most Favoured Nation (MFN) principle should have been applied in full. This view was reflected in the United States’ early attitude to the award of preferential treatment and is based on the assumption that free trade automatically provides non-economic welfare benefits. Whereas developing country representatives stated that it was only with the help of preferential trading terms that they could ever hope to have the opportunity to compete against developed country trade. Consequently, whether the GATT was successful in addressing the concerns raised by developing countries depended on whom you asked.

Herein lay the tension that made solving the development dilemma more complicated. Firstly, who should have been responsible for unravelling the problem of development: developed nations or developing ones? Secondly, how successful was any scheme adopted? Within the GATT, it was axiomatic that the developed countries primarily undertook the formulation of all policy. Accordingly, promotion of development ideals would always be difficult. This was essentially because developing countries sought to achieve economic prosperity through increased exports of agricultural products. Unfortunately, international agricultural trade was heavily distorted by the complex regime of non-tariff barriers imposed by the developed countries as there was no coherent rule structure to regulate exactly what

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121 Hudec: ‘Developing Countries in the GATT Legal System’ ibid. See introduction to the book generally
122 His argument is logical to a certain extent because he states that even the preferences that were awarded had been undermined by subsequent tariff reductions: ibid. Although Hudec argues that GSP is unhelpful for developing countries, this is in sharp contrast to such countries’ own views
123 Graham: “The US Generalised System of Preferences for Developing Countries: International Innovation and the Art of the Possible” (1987) 72 AJIL 513 at 513
125 Trying to solve this problem was exacerbated by the fact that decisions within the GATT were made by consensus: see Jackson, Davey & Sykes supra n. 2 at 297
126 Note Raghavan’s caustic comments that GATT was run for the developed nations merely to enhance market access for their exports: C. Raghavan: ‘Re-colonisation: GATT, the Uruguay Round and the Third World’ (1990) Zed Books at 50
type of measures could be used. This distortion would remain in place until the conclusion of the WTO agreements. Consequently, the way GATT dealt with developing countries must be seen against this background.

a. 1944 to 1964: Twenty Years in the Wilderness?

The United States’ draft on which the original ITO charter was based did include provisions for liberalising international agricultural trade, but only in relation to improving the terms of trade for developed nations. Recognition of the necessity for special treatment of developing countries was completely absent. It was not until 1946 and the London conference that the insertion of a chapter on industrial development into the ITO was even contemplated. This chapter recognised that developing countries had special needs and consequently provided for derogation from the rules for the purposes of development and reconstruction. These rules were mainly general principles, but they did at least recognise the need for a twin track approach incorporating wider non-economic factors into the rules. Jackson noted that quantitative restrictions provided the real battleground. In fact, this battle centred on the issue of developing countries’ ability to use quantitative restrictions on industrial products without first seeking permission from other “members” of the ITO. He further stated that those countries won the battle to impose such restrictions on agricultural products, albeit in limited circumstances. Nevertheless, it is arguable that this was a pyrrhic victory.

127 Jackson: ‘World Trade and the Law of GATT’ supra n. 8 at 628
128 Ibid. at 628
129 Ibid. at 629
130 Ibid. i.e. no specific provisions on agricultural trade
131 Ibid. at 628
132 Ibid. at 629
Despite Article XI’s interpretative problems, it was still relied on by many developed countries to justify the protection of their domestic agricultural sectors.\textsuperscript{133} Consequently, although developing nations were also able to impose restrictions on their own agricultural products, they were only protecting them in an already distorted market as there was no clear balance between these domestic objectives and needs of developed countries and the corresponding needs of developing ones. In addition, developing countries could only hope to industrialise through, \textit{inter alia}, enhanced export performance. If developed nations were protecting their domestic markets by restricting the entry of cheaper agricultural exports from developing countries, then the concession within Article XI was not as helpful as it first appeared.\textsuperscript{134} Like many of the exceptions facilitating the protection of international agricultural trade, Article XI did not go further and provide specific exceptions for developing country trade.

Following the failure of the ITO, some of the rules governing developing countries were incorporated into the GATT in Article XVIII.\textsuperscript{135} Superficially, the Article met developing country needs as it covered all products including agricultural ones. It clearly stated that developed countries recognised that non-industrialised nations required the freedom to impose protective restrictions on imports in order to facilitate economic development and rectify any balance of payments imbalance.\textsuperscript{136} These measures could take the form of quantitative restrictions, but the discriminatory imposition of such constraints was subject to prior approval by the contracting parties and had to be followed by the offer of compensation from those developing countries.

\textsuperscript{133} This is irrespective of the lack of success in dispute settlement procedures
\textsuperscript{134} Subsidies were a prohibitively expensive alternative: see Article XVI GATT
\textsuperscript{135} The original version was subsequently modified from the ITO draft. However, provisions on quantitative restrictions still proved problematic and as a result of the Special Committee’s findings, a new Article XVII was inserted into the GATT. See Jackson: ‘World Trade and the Law of GATT’ \textit{supra} n. 8 at 639
\textsuperscript{136} Article XVIII:2
who wished to rely on the provision. Developing countries relied on other balance of payments exceptions in Articles XII and XIV as a result because these did not require prior approval. Article XVIII accordingly became a dead letter. 

During this early period it was clear that existing GATT development policies were inadequate. The ability to impose import restrictions alone would not facilitate trade: developing countries must also be able to increase their exports. As many such countries sought to achieve this initially through export of agricultural products, the high level of protection placed on this sector by developed countries was a considerable obstacle, although problems associated with primary products were recognised.

In the 1955 Review session, the Contracting Parties resolved to consider the issue of development in the light of the problems associated with agricultural products. Consequently, GATT ministers sought to appoint a panel of experts under the chairmanship of Gottfried Haberler to consider the difficulties posed by the linkage between agricultural trade and development.

Haberler’s report clearly indicated that there was a genuine need for concern over the levels of protection placed on agriculture. His report is based on the free trade assumption that the measures imposed were distorting international agricultural trade and consequently prohibiting growth. Although all countries’ restrictions were criticised, the report particularly targeted protectionist policies used by developed

137 Article XVIII:7(a) & (b)
138 Jackson: ‘World Trade and the Law of GATT’ supra n. 8 at 639
139 Note Korea’s failure to justify its import restrictions under Article XVIII: Korea-Restrictions on Imports of Beef-Australia Complaint supra n. 44 paras 98-101; United States Complaint supra n. 44 paras 120-123 & New Zealand Complaint supra n. 44 paras 114-117
140 Hudec: ‘Developing Countries in the GATT Legal System’ supra n. 120 at 40
141 BISD 3S/79 for resolution on development
142 BISD 5S/26 at 27
143 See GATT: ‘International Trade-1956’. The Haberler Committee reported in 1958 supra n. 34
144 Haberler ibid. at 11
nations.\textsuperscript{145} The subsequent action programme initiated by GATT\textsuperscript{146} saw the formation of Committee II on primary products and Committee III on development.

Committee II's first report detailed what it perceived to be its work programme.\textsuperscript{147} Throughout the report, the difficulties of international agricultural trade were well rehearsed. Although the Committee clearly stated that it would need to look into the issue of protectionist policies in relation to developing nations, this was relegated to a paragraph at the end of the report.\textsuperscript{148} The majority of the report concentrated on the need to have a contracting party by contracting party consultation starting with the developed nations. This consultation would take into account specific issues that were detailed in the annex to the report.\textsuperscript{149} Although the deliberations would analyse the adverse effect of any measure on international agricultural trade,\textsuperscript{150} there was no separate consideration of the special problems of developing nations. In subsequent reports,\textsuperscript{151} the committee did try to address the difficulties of measuring protectionism and put forward some suggestions for alternative policies. Unfortunately, these were inevitably too general.

Committee III played a crucial role by ensuring that general development issues were not sidelined within the formation of general GATT policy on trade liberalisation. Hudec argued that this was important because "(t)he initiative was now with the developing countries. Their demand for market access had become the first issue on the agenda."\textsuperscript{152} However, little was achieved in addressing the specific difficulties that international agricultural trade presented. This was primarily because developing

\begin{footnotesize}
\begin{itemize}
  \item \textsuperscript{145} \textit{Ibid.}
  \item \textsuperscript{146} BISD 7S/27
  \item \textsuperscript{147} BISD 8S/121
  \item \textsuperscript{148} \textit{Ibid.} at 126 para 15: this is perhaps an inevitable consequence of the separation of development into Committee III
  \item \textsuperscript{149} \textit{Ibid.} at 127 Annex A
  \item \textsuperscript{150} \textit{Ibid.} at para A(iii)(b)
  \item \textsuperscript{151} BISD 9S/110: BISD 10S/135 at 140
  \item \textsuperscript{152} Hudec: 'Developing Countries in the GATT Legal System' \textit{supra} n. 120 at 41
\end{itemize}
\end{footnotesize}
nations were concentrating on achieving differential treatment for their immature industrial sectors.\footnote{BISD 12S/44} It is true that Committee III did indicate that certain developing countries had to rely on the export of primary products for growth,\footnote{Ibid. at 45} but this was subsumed into the general export debate and the special needs of agricultural trade were again overlooked. Committee III’s main contribution to the development debate centred on a “non-binding and gently-worded”\footnote{Ibid. at 43} call to developed nations for unilateral trade liberalisation.\footnote{BISD 8S/23: Hudec goes on to note that this was only the first of many such calls: Hudec: ‘Developing Countries in the GATT Legal System’ supra n. 120 at 43

\footnote{Hudec Ibid. at 43} BISD 8S/23. However, Haberler provided the impetus for setting the negotiating agenda for the Dillon Round specifically.

Subsequent multilateral trade negotiations in the Dillon and Kennedy Rounds did little to address the difficulties engendered by international agricultural trade and development. There was an overall consensus that the contracting parties as a whole were dissatisfied with the outcome of the Dillon Round.\footnote{GATT decided to set up an Action Programme as a result of the Haberler Report and it decided on the need for further tariff negotiation: BISD 7S/27. However, Haberler provided the impetus} Although the Dillon Round had been prompted by the publication of the Haberler report,\footnote{See Evans supra n. 16} there was only limited discussion on the issues it specifically raised. Overall, the negotiations concentrated on further tariff reductions and ignored development issues. In contrast, the Kennedy Round did address agricultural trade,\footnote{See Evans supra n. 16} although the opportunity to fundamentally address the issue was lost in squabbles between the US and the EC. Development issues were again sidelined.

1944 to 1964 was a fallow period for developing countries. Despite considerable activity in GATT committees, no new legal rules were formulated as part of a plan designed to comprehensively assist development in general. In fact, the committee responsible for setting the negotiating agenda for the Dillon Round specifically
declined to include development issues.\textsuperscript{160} Article XVIII GATT was an exception, but its availability was academic because of the pre-notification requirement. It is only following the UNCTAD conference of 1964 that GATT was expanded to include specific principles on development.

Fear that developing countries would defect to UNCTAD if their needs were not met prompted the successful incorporation of Part IV into the GATT.\textsuperscript{161} Hudec argued that this threat was more apparent than real,\textsuperscript{162} but the fact that developed nation representatives believed it was enough to start negotiations. Part IV was a series of broad commitments and principles based on both economic and non-economic objectives. Although it did not contain any specific legally enforceable rules, its importance in respect of general development policy should not be underestimated.\textsuperscript{163}

However, this was not the case for specific areas like international agricultural trade. Article XXXVI(4) stated, as a matter of principle, that the imposition of protectionist measures on agricultural products would inevitably harm developing country trade. It therefore noted that such measures should be “avoided.” This loose wording ensured that agricultural trade liberalisation remained illusory.

Part IV was significant because it recognised developing countries should not be required to give reciprocal trade concessions in multilateral negotiations. Although this was not a specific legal right,\textsuperscript{164} developing countries sought to rely on the moral obligation it created in subsequent tariff discussions.\textsuperscript{165} The recognition of non-

\textsuperscript{160} BISD 8S/108: the Committee argued that developing countries already had Article XVIII GATT
\textsuperscript{161} BISD 13S/2
\textsuperscript{162} Hudec: ‘Developing Countries in the GATT Legal System’ supra n. 120 at 39
\textsuperscript{163} Both Jackson and Hudec share this view
\textsuperscript{164} Some developing countries did try to enforce Part IV obligations, but these were unsuccessful: panels refrained from making a finding under Part IV if other Articles of the GATT had been violated: United States-Imports of Sugar from Nicaragua BISD 31S/67 at 74; or that they could not find a violation of Part IV on the evidence: EEC-Restrictions on Imports of Dessert Apples supra n. 47 at 134
\textsuperscript{165} See Jackson: ‘World Trade and the Law of GATT’ supra n. 8 at 647
reciprocal treatment for developing countries is further embodied within the debate over the award of preferential trade conditions.

Equally problematic for GATT was the call by developing countries for preferential treatment for their agricultural exports.

b. The Generalised System of Preferences

Development of the GSP merely mirrored existing GATT practice on developing countries: it was reactive, rather than proactive. Committee activity may have been frenetic, but the GSP evolved on an ad hoc basis following external pressure, again from UNCTAD.166

Extensive discussions within the UNCTAD Special Committee on Preferences resulted in the publications of its Agreed Conclusions.167 These formed the basis of the GSP. Although the legal authority of these conclusions was dubious,168 this did not matter. As Hudec argued, the obligations created by the GSP were “permissive not mandatory.”169 It followed that the obligation was merely to create the scheme, not to apply it to specific countries. It was unlikely therefore that a developing country could legally force a developed nation to grant it a preference if that country did not already do so.

Once the Agreed Conclusions had been adopted, GATT tried to incorporate them within its existing legal framework.170 The adopted solution was for all the contracting parties to agree to the authorisation of the GSP for a limited period.171

166 Note Raul Prebisch’s enormous influence in this area while he was Secretary General of UNCTAD: see Prebisch: ‘Towards a New Trade Policy for Development’ UN Doc.E/Conf.46/3 (1964)


169 Hudec: ‘Developing Countries and the GATT Legal System’ supra n. 120 at 64

170 A detailed account of the legal difficulties of incorporating the GSP into GATT can be found in Gros Espiell: supra n. 124 (N.B. Gros Espiell was the Uruguay representative during the 1970-71 debate on preferences)

171 BISD 18S/24
This was further extended following the Tokyo Round negotiations to a permanent exception referred to as the Enabling Clause.\footnote{\textit{Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries (The Enabling Clause) BISD 26S/203; see UNCTAD: \textquote{Secretary General Report 1982: Assessment of the Results of Multilateral Trade Negotiations} T/B/778/Rev.1 at 29; Yusuf: \textquote{\textquote{Differential and More Favourable Treatment} supra n. 168}}

Final incorporation of the GSP into the GATT should have been a triumph for developing countries. Although it was a major achievement, the breakthrough was in terms of industrial products rather than agricultural ones. Unfortunately, even when developing countries were granted preferential treatment in agriculture, the concessions were inevitably limited. In most cases they were designed not to interfere with the donor country’s major domestically produced agricultural products. Some writers have even questioned whether these concessions had any benefit at all because developed nations had such high levels of protection on their agricultural trade that the value of the preference was substantially eroded.\footnote{\textit{Hudec: \textquote{Developing Countries in the GATT Legal System} supra n. 120 at 153; F.V. Garcia-Amador: \textquote{The Emerging Doctrine of Development} (1990) Oceana at 104-107 questions the extent to which the GSP is legally beneficial; Baldwin & Murray argue that developing countries could gain more from non-preferential trade: \textquote{MFN Tariff Reductions and Developing Country Trade Benefits in the GSP} (1977) Economic Journal 30. For the opposite view see: Pomfret: \textquote{The Effects of Trade Preferences on Developing Countries} (1986) 53 Southern Economic Journal 18}}

The difficulty with GATT’s piecemeal approach to the GSP was that it did not encourage the contracting parties to adopt unified systems. Although both the United States\footnote{\textit{The United States remained opposed to the grant of preferential treatment until 1968. It only then acceded to put a scheme in place because it felt it would give it leverage against the European Community’s reverse preference scheme. The United States’ scheme came into effect in 1976 with a lengthy list of exemptions, which included many agricultural products: on the United States’ GSP scheme see Graham supra n. 123}} and the European Communities\footnote{\textit{The European Community’s scheme was very limited: see J.A. McMahon: \textquote{Agricultural Trade Protectionism and the Problems of Development} (1992) Leicester University Press at 131-139. It placed more importance on its Lomé Convention: European Commission: \textquote{Trade Relations Between the European Union and Developing Countries} (1995) Development at 7 & J.A. McMahon: \textquote{The Development Co-operation Policy of the EC} (1998) Kluwer at 39-80. Signed originally in 1976 by the European Community and the African, Caribbean and Pacific (ACP) states, it was designed to grant preferential trading concessions to former colonies of the European Communities’ member states. The Convention was renewed four times during the GATT period: Lomé I came into effect 1 April 1976, Lomé II came into effect on 28 February 1985, Lomé III came into effect 1 May 1986 and Lomé IV came into effect 15 December 1989. Both the GSP and the Lomé Convention only allowed restrictive}} did adopt schemes, neither offered any
true concessions on international agricultural trade. Clearly, this was problematic because it meant that there was no comprehensive benefit for developing countries in the area that they required it most.

4. Summary and Conclusions

GATT’s regulation of international agricultural trade was problematic for three reasons. Firstly, the contracting parties’ domestic agricultural sectors were insulated from significant changes in world prices. Although the explanation for this emotional attachment is based heavily on events in the pre-GATT era, the imperatives driving the agricultural policies during the GATT period never really shift from these original objectives. It is important to note that the overlap between economic and non-economic objectives within these policies remain unchanged despite bringing them before GATT’s dispute settlement procedure.

Secondly, GATT’s transition to an organisation following the collapse of the ITO was difficult. GATT was primarily an economic agreement based on the free trade ideal without any of the ITO’s broader policy considerations. The difficult transition meant that the regulatory structures evolved round GATT’s economic objectives, so there was little consideration of non-economic factors. Consequently, the broader problems of international agricultural trade were not considered. However, it also meant that WTO negotiators could argue that the GATT’s rules were the problem, rather than fundamental assumption on which those rules were based. This was an automatic presumption because many contracting parties believed the reason for the start of World War II was protectionism and so were unlikely to believe that agriculture might be an exception to the free trade philosophy.
Thirdly, developing countries’ needs were not directly addressed by GATT’s rules. Any attempt to rectify this had inevitably led to piecemeal changes, rather than a fundamental reconsideration of the rules to provide a comprehensive scheme to promote development. This problem is not specific to agriculture, but was applied to all other GATT provisions. However, developing countries’ heavy dependency on agricultural trade meant that the problems were more acute: there were no real provisions to help such countries develop and, simultaneously, any attempts they made to develop through exporting their goods, were restricted because of the protectionist measures developed contracting parties imposed on their agricultural sectors.

It is clear that any solution to the problems caused by international agricultural trade must cover these three aspects. In addition, it is evident that the underlying imperatives that lead states to pursue such policies must be addressed. GATT presupposed that protectionism was \textit{prima facie} wrong. However, the fact that some members retain their ‘protectionist’ imperatives in their agricultural policies in the WTO era raises the question whether effective regulation of international agricultural trade will only be effective when both protectionism and the non-economic factors are adequately addressed.

\textbf{B. Regulation of Agricultural Trade under the WTO Agreement on Agriculture: Is the New Regime ‘Effective?’}

The history of agricultural regulation under GATT therefore suggests that the solution to the problem lies in an adequate regulatory structure, including coherent rules, a clear interaction between the agreements and a system that accommodates the needs
of developing countries.\textsuperscript{176} The WTO was established to deal with these problems. The discussion now moves on to evaluate the effectiveness of the WTO agriculture regime. Two questions must be asked: firstly, is the WTO regime effective in dealing with the three problematic areas seen during the GATT era. This first part of the discussion considers the effectiveness of WTO scheme in relation to the economic aspects of international agricultural trade: protectionism. Secondly, does the WTO rules adequately accommodate members' pursuit of non-economic objectives within their domestic agricultural policies?

The conclusion of the Uruguay Round came at a point when it was virtually impossible financially for the GATT contracting parties to continue with their domestic support systems for agriculture,\textsuperscript{177} so they were ready to agree to the new WTO agricultural regime.\textsuperscript{178} It is important to note that the new Agreement on Agriculture does not advocate the removal of support completely, but goes towards a change in the method by which it is offered.\textsuperscript{179} Viewed in this way, the new regime merely closes a door that the GATT contracting parties wanted to shut anyway. The new regime does not propose a fundamental change to the objectives on which GATT was built on. This means that there is still a tension between the need to pursue free trade and the WTO members' desire to retain some form of protection perhaps to achieve non-trade objectives. However, in contrast to the GATT's ineffective regulatory system, the WTO's stricter regime means that members are now constrained by the WTO's comprehensive rule structure and effective dispute resolution.

\textsuperscript{176} See Chapter 1 section A:1 (thesis)
\textsuperscript{177} See UNCTAD: 'Protectionism and Structural Adjustment in the World Economy' (1982) TD/B/888/Rev.1 at Ch. IV
\textsuperscript{178} This is one reason why the negotiating parties agreed to the new scheme, but it was clear that bilateral agreements occurred between the United States and the European Community to ensure maximum concessions were awarded prior to the conclusion of the agreement: see Blair House Agreement A. Swinbank & C. Tanner: 'Farm Policy and Trade Conflict: the Uruguay Round and CAP Reform' (1996) Michigan Press at 104
\textsuperscript{179} i.e. from product specific support linked to production to direct payments
settlement mechanism. However, because the same tensions still exist, members are
testing the efficacy of this structure to the limit to find new ways in which to protect
their domestic agricultural markets. This does raise the question whether it is the
regulatory system alone that is at fault.

This section of the analysis determines whether the WTO's agriculture regime is
'effective' in solving the three problems seen under GATT by considering the
application of the WTO's agriculture regime to these problems. Firstly, the analysis
looks at the WTO's rules that affect agriculture. Secondly, in order to determine the
'effectiveness' of these rules, the analysis considers whether there have been any
changes to the levels of protection on international agricultural trade by evaluating
modifications in members' domestic agricultural policies and their consequences for
international agricultural trade flows. This analysis seeks to show why these problems
remain.

1. The New Agriculture Regime

Agricultural trade is primarily regulated under two WTO agreements: the Agreement
on Agriculture itself coupled with the Decision on Measures Concerning the Possible
Negative Effects of the Reform Programme on Least-Developed and Net-Food
Importing Developing Countries and the WTO Agreement on Sanitary and
Phytosanitary Measures (SPS Agreement). In addition, other WTO provisions have a
residual effect. Most notably, the Agreement on Subsidies and Countervailing
Measures, the Agreement on Technical Barriers to Trade (TBT Agreement), the
Agreement on Import Licensing Procedures and the Decision on Measures in Favour
of Developing Countries. Despite the comprehensive change to the rule structure, it is

\[180\] The WTO's institutional structure is also important: see J.H. Jackson: 'The World Trade
Organisation: Constitution and Jurisprudence' Chatham House Papers, Royal Institute for International
Affairs (1998) Pinter at 8

\[181\] After the implementation period and only for limited matters within that period: Article 13
Agreement on Agriculture

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still based on the assumption that free trade in agricultural products is the preferred objective. As the amended system advocates the reduction of support in a general way, this should lead to an automatic reduction in distortions to international agricultural trade because it should be more difficult for members to circumvent the rules by arguing that their selected method of support does not come within its ambit. The main provisions are contained within the Agreement on Agriculture.

a. The WTO Agreement on Agriculture

The agreement covers three areas: market access, export subsidies and domestic support. Article 4 states that market access for agricultural products should be improved. It contains a prohibition on the imposition of new non-tariff barriers (NTBs).\textsuperscript{182} Existing NTBs are to be converted into tariffs. These “tariffied” measures are then added to any existing tariffs and that total is then to be reduced by 36% over the implementation period.\textsuperscript{183} The reduction is calculated from the base period 1986-88. Although there is flexibility over the reductions that can be made, each tariff line must be cut by at least 15%.\textsuperscript{184} In addition, members have to provide minimum levels of access through the allocation of tariff quotas. These start at 3% and must rise to 5% at the end of the implementation period.\textsuperscript{185} This ensures importation of even the most sensitive agricultural product.\textsuperscript{186} Schott notes\textsuperscript{187} that this is designed to allow consumers to sample new sources of supply. Theoretically this should then lead to increased demand from the new source, consequently opening markets further.

\textsuperscript{182} Article 4:2
\textsuperscript{183} See Schott \textit{supra} n. 6 at 50
\textsuperscript{184} 1995-2001: Article 1:f
\textsuperscript{185} J. Whalley & C. Hamilton: 'The Trading System after the Uruguay Round' (1996) Institute of International Economics at 43
\textsuperscript{186} See McMahon: "The Uruguay Round and Agriculture: Charting a New Direction?" (1995) 29(2) International Lawyer 411 at 424
\textsuperscript{187} Schott \textit{supra} n. 6 at 51
Fears that the market access provisions would prove too draconian are allayed by the availability of concessions in Article 5 and Annex 5. Article 5 allows the imposition of special safeguard measures that take the form of "additional duties." Its aim is to alleviate any difficulties encountered in the execution of the market access commitments, and is only valid for the duration of the implementation period. However, its availability is limited by several criteria. Firstly, safeguards can only be imposed in relation to those agricultural products that were previously protected by NTBs. Secondly, they can only then attach to those products if the member has pre-designated them within their tariff schedule. "Additional duties" can then be invoked if one of two situations occurs: firstly, if the volume of the product imported is in excess of a predetermined trigger level; or secondly, if the price at which the product "enters the customs territory" falls below a trigger price. Although the article does not specify what form the "additional duties" should take, it appears from the wording of Article 5:5 that they should be tariffs. Article 5:5 then sets the permitted levels of those duties.

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188 Article 4:2: see McMahon supra n. 186 at 425
189 Article 5:4
190 Article 5:9
191 Article 1:1 specifically states that imposition is only "in respect of which measures referred to in paragraph 2 of Article 4 . . . have been converted into ordinary customs duties" (emphasis added)
192 The product will be allocated the nomenclature "SSG": Article 5:1
193 Article 5:1(a): Article 5:1(a) goes on to state that that trigger level relates to "existing market access opportunities." This is further defined in Article 5:4 as the percentage of imports in relation to domestic consumption. These levels vary according to the percentage imported: Article 5:4(a)-(c)
194 This definition is considered in more detail by the Appellate Body in European Communities-Measures Affecting the Importation of Certain Poultry Products WT/DS69/AB/R at 48-53
195 Article 5:1(b): the trigger level is calculated by the c.i.f. price of the goods to be imported (in the member's domestic currency) falling below the trigger or "reference" price. Therefore, safeguards will be activated when the current c.i.f. price of the shipment falls below the price at which it would have been taking 1986-88 as the basis of calculation. (The calculation is based on c.i.f. unit value)
196 Article 5:5(a)-(e); note that there are also special provisions for "perishable and seasonal products" in Article 5:6
To alleviate the difficulties that had previously been encountered under Article XIX GATT, safeguards imposed under Article 5 can only remain in place for a maximum period of one year. In addition, they must be administered in a transparent manner: notice in writing must be given to the Committee on Agriculture either in advance, or “within 10 days of the implementation” of the measures.

Annex 5 operates in a similar way to Article 5. It exempts products from Article 4:2 of the Agreement on Agriculture if they conform to the restrictive criteria in Annex 5:1(a) to (e). Even if the products can be accorded “special treatment” under the Annex 5 provisions, they must still comply with minimum access conditions. In contrast to Article 5, Annex 5 concessions can run beyond the implementation period. If a member does wish to continue to grant its product special treatment, it must enter into negotiations within the implementation period, and comply with any “additional and acceptable concessions as are determined in that negotiation.”

Annex 5 is not designed to cover a wide range of products. Consequently, it is not as useful to members as Article 5.

Part IV of the Agreement on Agriculture recognises the considerable distortional effect that domestic policies can have on international agricultural trade. Article 6, in conjunction with Annexes 2, 3 and 4, regulates the permitted levels of domestic assistance. Members are required to reduce support levels on those commodities

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197 See Merciai: “Safeguard Measures in the GATT” (1981) 5 JWT 41 for detail on the pre-WTO position
198 Article 5:4
199 Article 5:7
200 e.g. such products must be so designated in the member’s schedule in the same way as Article 5 Agreement on Agriculture: Annex 5:1(d)
201 Annex 5:1(e)
202 Annex 5:3; note that the member can cease to apply special treatment at any time. In this case, minimum access concessions must be increased by 0.4% per year for the remainder of the implementation period: Annex 5:2
203 Ibid.
204 Ibid. 5:4
205 See McMahon supra n. 186 at 425
206 Annex 4 calculates the Equivalent Measurement of Support (EMS) when the AMS would not be practicable
contained in Part IV of their schedules by an average of 20% during the implementation period measured from a 1986-8 base.

Methods for supporting agriculture differ amongst members, so a single measurement of the levels of domestic support was devised: the Aggregate Measurement of Support (AMS).\textsuperscript{207} Annex 3 details the method of calculation, which is to be undertaken on a sector wide basis.\textsuperscript{208} This is designed to take into account all methods of financial support available to farmers, whatever forms these take.\textsuperscript{209} Annex 2 exempts certain measures from the AMS calculation because they have either no, or minimal distorting effects on trade or production.\textsuperscript{210} Exempt measures are listed in Annex 2:2 to 7.\textsuperscript{211} These provisions are referred to as the "Green Box"\textsuperscript{212} and members can therefore continue to operate these without reduction.\textsuperscript{213} However, Green Box measures in Annex 2:6 and 7 caused problems for some domestic agricultural policies. It was unclear whether the compensation payments provided by the European Communities under its 1992 reform programme and the United States’ deficiency payments would qualify for Green Box status. Consequently, in the Blair House negotiations these were specifically exempted. This is referred to as the "Blue Box."\textsuperscript{214}

\textsuperscript{207} This was originally formulated in the OECD: see Cahill & Legg: “Estimation of Agricultural Assistance using Producer and Consumer Subsidy Equivalents: theory and practice” (1989-90) 13 OECD Economic Studies Special Issue: Modelling the Effects of Agricultural Trade Policies at 13
\textsuperscript{208} Article 1:(a) & Annex 2:1; Tangermann: “An Ex-Post Review of the MacSharry Reform” in Ingersent, Rayner & Hine supra n. 17 at 26
\textsuperscript{209} Support does not need to be given directly to the farmer, but needs to influence his decision to produce: see definition of AMS in Article 1 Agreement on Agriculture, Annex 2: 2-13; also McMahon supra n. 186 at 427 & Schott supra n. 6 at 49
\textsuperscript{210} Annex 2:1
\textsuperscript{211} Annex 2:2(a) to (g) are “general services” which range from financial aid for general research programmes to support for infrastructure; Annex 2: 3 exempts stockholding for security purposes and Annex 2:4 covers domestic food aid
\textsuperscript{212} See Swinbank & Tanner supra n. 178 at 69
\textsuperscript{213} These are classed as non-actionable subsidies for the purposes of the Subsidies Agreement: Article 13:a Agreement on Agriculture
\textsuperscript{214} See Tangermann supra n. 208 at 26
In addition to Green and Blue Box exemptions, Article 6:4 provides a *de minimis* exclusion. Product specific support can be excluded from the AMS calculation if "such support does not exceed 5 per cent of that Member's total value of production of a basic agricultural product during the relevant year."\(^{215}\) The exception also extends to non-product specific support if it does not exceed 5% of the value of the Member's total agricultural production.\(^{216}\) If members have not included a reduction commitment in Part IV of their schedules, then they are still required to ensure that their total levels of domestic support do not exceed the *de minimis* levels.\(^{217}\)

Part V regulates the imposition of export subsidies. Article 8 contains an unequivocally worded prohibition on the imposition of such measures other than in conformity with the Agreement. Article 9 then goes on to list the specific subsidies that are subject to reduction. These range from direct payments\(^{218}\) to assistance in the form of marketing support,\(^{219}\) and payment of internal freight and transport charges.\(^{220}\) Reduction of subsidies must be both in terms of value and production quantities.

Measured from the base period, 1986-90, members must achieve a reduction of 36% in the value of subsidies and a 21% decrease in the quantity of production subsidised.\(^{221}\) In general the commitments are product specific, but there are notable exceptions for coarse grains and fruit and vegetables.\(^{222}\) Flexibility is also built into the reductions in Article 9:2(b) which allows a member to transfer subsidies between products in the second to fifth years of the implementation period up to the maximum level for that year specified in the member's schedule. This transfer must be in

\(^{215}\) Article 6:4(a)(i)
\(^{216}\) *Ibid.* at (ii); note that different levels are available for developing countries
\(^{217}\) Article 7:2(b)
\(^{218}\) Article 9:1(a)
\(^{219}\) *Ibid.* at (d)
\(^{220}\) *Ibid.* at (e)
\(^{221}\) See Normile: "Uruguay Round Agreement on Agriculture: The Record to Date" ERS/USDA Agricultural Outlook December 1998 28 at 29
\(^{222}\) Schott *supra* n. 6 at 47
accordance with Article 9:2(b)(i) to (iii). Article 10 further reinforces the prohibition on the imposition of export subsidies. This reiterates the importance of ensuring that the rules on export subsidies are not circumvented and stresses the need for members to work towards devising a legal regime for the control of measures not yet within the scope of the agreement.223

In addition to the three pillars, the Agreement on Agriculture includes a "peace clause."224 This insulates domestic support measures and export subsidies from actions under Article XVI GATT 1994 and the Subsidies Agreement for the duration of the implementation period. However, measures exempt from the AMS calculation by reason of Article 6:5 will not be protected from the imposition of countervailing duties if the provisions of Article 13:(b)(i)-(iii) are not satisfied.225 For Article 13, the implementation period is deemed to be nine years rather than the usual six.226

Residual articles include a definition of "basic agricultural product" which previously caused so much difficulty for GATT panels.227 In addition, a Committee on Agriculture is established to review the implementation of the Agreement's provisions.228

The Agreement on Agriculture also makes express provision for developing countries' needs. In particular, it focuses on the need to liberalise tropical agricultural products consequently ensuring that developing countries do not need to have recourse to illicit crops in order to secure valuable revenue.229

Specific allowances for developing countries also fall into three categories: market access, general domestic support commitments and export subsidies. Although

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223 These include export credits, export guarantees and insurance programmes: Article 10:2
224 Article 13
225 Article 13:(b)(i)
226 Article 1:(f)
227 Article 1:(b): see Japan-Restrictions on Imports of Certain Agricultural Products supra n. 51 at 223
228 Article 17
229 Preamble Agreement on Agriculture para 5
developed countries are prohibited from imposing non-tariff barriers on agricultural products, and developing countries may do so if the product subject to the measure is the “predominant staple in the traditional diet,” and the special treatment provisions in Annex 5 paragraph 1 (a) to (e) are satisfied. It must further show that the measure still provides minimum access to imported goods which correspond to 1% of the domestic consumption of the product in the first year, rising to 2% from the fifth year and 4% following the sixth year of imposition. This concession is limited to ten years, although there is provision for an extension following negotiations with affected WTO members.

The agreement places firm emphasis on achieving free trade in agricultural products and so all developing countries are also expected to undertake domestic support reduction commitments in conformity with Article 6. However, these could take place over a longer period. In addition, the de minimis level for the AMS calculation to determine the level of domestic support is raised to 10% for developing countries, although the agreement does make a distinction between developing and least-developed countries. The latter are excused from reduction commitments completely. This is in addition to the general exclusion from liberalisation encapsulated within the Decision on Measures in Favour of Least-Developed Countries.

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230 Article 4:2
231 Annex 5 Section B para 7: special treatment is provided for developed country products if they meet the criteria in Annex 5 Section A para 1(a) to (e)
232 These percentages are based on base year figures: Annex 5 Section B para 7(a)
233 Ibid. From the 6th year, the rise to 4% has to be achieved in equal instalments
234 Annex 5 Section B para 8-10: negotiations must take place before the expiry of the measure
235 10 years: Article 15:2
236 Article 6:4(b)
237 Article 15:2
238 Least-developed countries are only required to undertake liberalisation to the extent that it is “consistent with their individual development, financial and trade needs, or their administrative and institutional capabilities.” Decision on Measures in Favour of Least-Developed Countries para 1: note further commitments for Least-Developed Countries in para 2 (i)-(v)
The reduction requirement for export subsidies is extended to developing countries. Although there are exclusions for the implementation period, these are very limited in comparison to those granted for domestic subsidy commitments. Export subsidies will only be allowed if they assist in the marketing of the product, or are placed on "internal transport and freight charges on export shipments." Developing countries can also take advantage of some of the general concessions within the Agreement on Agriculture available to all countries. Most notably, non-tariff barriers could be imposed if they comply with the safeguards rules within Article 5. In particular, Article 5 makes special provision for tropical products by recognising the need for shorter time periods in the calculation of the volume of exports or the price at which the exports have entered the country. Furthermore, Green Box exemptions may also be available.

b. The SPS Agreement

The Agriculture and SPS Agreements are linked by Article 14 of the Agreement on Agriculture which exhorts members to "give effect" to the SPS Agreement's provisions. Although the SPS Agreement is specifically intended to control agricultural trade barriers, it does not exclude the operation of the broader Agreement on Technical Barriers to Trade. Overall the scheme is designed to promote minimum standards for SPS measures, whilst advocating the use of the international standards that already exist. Countries

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239 Article 9:4
240 Note also that developing countries are excused from the reporting requirement in Article 12: Article 12:2
241 Article 9:1(d)
242 Article 9:1(e)
243 Developing country members would have to be eligible
244 Article 5:6
245 Article 1:4 SPS Agreement: see Chapter 4 section A:2(d) (thesis) for a discussion of the relationship between the TBT and SPS Agreements
246 Preamble to the SPS Agreement para 4: this is inevitably aimed at developing countries
247 Ibid. at para 5 & 6
are not prohibited from introducing higher standards, but these must be in conformity with the provisions of the agreement. Article 2 states that members can impose SPS measures to protect “human, animal or plant life or health.” However, the rules must only be applied to the extent that it is necessary\textsuperscript{248} and should be based on a scientific risk assessment if the member chooses measures that are above the agreed international standard.\textsuperscript{249} The scope of the necessary risk assessment is defined in Annex A:4 and is regulated by Article 5. Any risk assessment undertaken by members should be “appropriate to the circumstances.”\textsuperscript{250} It should also take into consideration important issues such as the available scientific evidence,\textsuperscript{251} economic factors\textsuperscript{252} and also the need to minimise the adverse effects on international trade.\textsuperscript{253} Any measures subsequently imposed should “not be more trade restrictive” than is necessary.\textsuperscript{254} It is possible for members to adopt interim SPS measures if available scientific evidence is insufficient, but the member must undertake a further risk assessment within a reasonable period.\textsuperscript{255} Notably, any SPS measure that is either in conformity with an existing international standard, or complies with the risk assessment criteria in Article 5, is deemed to be in conformity with GATT 1994 obligations, particularly Article XX.\textsuperscript{256}

In addition, the agreement includes equivalence and transparency provisions. Article 4 states that other members’ measures should be accepted as conforming to the agreement if it is possible to objectively demonstrate that they offer the same level of protection as the importing member’s. In order to facilitate ease of compliance with

\textsuperscript{248} Article 2:2 SPS Agreement
\textsuperscript{249} Ibid.
\textsuperscript{250} Article 5:1
\textsuperscript{251} Article 5:2
\textsuperscript{252} Article 5:3
\textsuperscript{253} Article 5:4
\textsuperscript{254} Article 5:6
\textsuperscript{255} Article 5:7
\textsuperscript{256} Article 2:4
the relevant member’s SPS measures, Article 7 requires members to notify any
to their SPS regimes. A Committee is also established to oversee compliance
and to be a forum should consultations and negotiations be necessary.257
Although the Agreement on Agriculture exempts developing and least-developed
countries from some commitments completely, this is not the case in the related SPS
Agreement. Such countries are expected to impose SPS standards within their own
territory, and try to comply with those imposed by developed countries. Special and
differential treatment is only recognised258 through the offer of technical assistance of
implementation commitments.259
Developing country schemes can be phased in, with the availability of longer
implementation periods for those products which are “of interest” to those
countries.260 However, exemption from the terms of the agreement is limited to
specific, time limited, full, or partial exemptions offered only at the discretion of the
Committee on Sanitary and Phytosanitary Measures.261
Least-developed countries are only allowed to delay implementation of the
agreement;262 they enjoy fewer exemptions from its provisions than is the case in the
Agreement on Agriculture.263 This delay is limited to five years, with a similar delay
of two years for developing countries.264

2. Is the New Regime Effective?
The WTO’s comprehensive agreement marks a move away from the GATT’s limited
coverage of agricultural trade, but it is still based on free trade principles.

257 Articles 12:1 & 2
258 Preamble, para 7
259 Article 9
260 Article 10:2
261 Article 10:3
262 Article 14
263 Article 15:2 Agreement on Agriculture
264 Article 14 SPS Agreement
Superficially, the combination of the Agreement on Agriculture and the SPS Agreement coupled with the institutional reforms means that the old loopholes exploited by the GATT contracting parties are now closed. The success of the new regime must be measured on a number of levels. If the underlying assumption that freer trade means fewer problems with international agricultural trade, then the WTO Agreements must lead to a visible reduction in the overall level of support for agriculture, especially for developing countries. Under GATT, the methods of support used by the contracting parties in their domestic agricultural policies led to the distortions in agricultural trade flows. Consequently, it is necessary to consider whether there have been real changes to the United States' and the European Communities' domestic agricultural policies in particular. These two policies are focussed on here because of their significance during the GATT period and also their importance to international agricultural trade flows generally. It is then possible to establish whether there have been any subsequent changes to the global international agricultural trade flows.265

a. Changes to Domestic Agricultural Policies

Initially, the impact of the new agriculture regime looks positive. The United States radically altered its domestic policy by introducing the Federal Improvement and Reform Act 1996 (FAIR). This resulted in a significant move away from the traditional support mechanisms towards payments that were allegedly fully decoupled from production.266 Farmers had to continue to introduce comprehensive rural

265 An evaluation on this level in a legal thesis is problematic as it involves an economic assessment. However, it is important to note that the solution adopted by the Agreement on Agriculture is based on an economic model. It is only possible to correctly determine the effects of the new scheme if all aspects are considered
266 These are known as Production Flexibility Contract (PFC) Payments
development and conservation schemes,\textsuperscript{267} but they were no longer required to comply with compulsory set-aside provisions, nor produce the crop for which they claimed the payment.\textsuperscript{268} Although the United States' old system of deficiency payments to farmers was specifically excluded from the AMS calculation under the Blue Box exemption,\textsuperscript{269} the United States argued that FAIR would be fully compliant with the Agreement on Agriculture and would therefore qualify for Green Box exemption.\textsuperscript{270}

Likewise, the European Communities overhauled the CAP through the MacSharry reforms to ensure it complied with the Agreement on Agriculture's free trade philosophy.\textsuperscript{271} Although not as far-reaching as FAIR, the reforms saw changes in the method of support away from market price support towards a system of compensation payments for farmers which were partially decoupled from production.\textsuperscript{272} The reforms allowed the European Communities to meet its commitments in three areas: in domestic support the European Commission's figures showed that their resulting AMS would be 14 billion ECU below the required minimum.\textsuperscript{273} Secondly, the compensation payments are excluded from the calculation because of the Blue Box exemption, and the European Communities argued that some of the environmental changes should qualify for Green Box exemption.\textsuperscript{274}

Despite these significant changes, problems still exist. Tariffication in the European Communities' CAP has only emulated the general developed country trend toward the

\textsuperscript{268} Ibid.
\textsuperscript{269} OECD: 'The Agricultural Outlook: Trends and Issues to 2000' (1996) at 42-44
\textsuperscript{271} Resulting from COM(91)100 supra n. 32 and COM(91)258 supra n. 32
\textsuperscript{272} Tangermann supra n. 208 at 27
\textsuperscript{273} Thomson: "The CAP and the WTO after the Uruguay Round Agreement on Agriculture" in Ingersent, Rayner & Hine supra n. 17, 175 at 178
\textsuperscript{274} Thomson ibid.
creation of very high tariff barriers for agricultural imports. Even though the Agenda 2000 initiative advocated changes, the general protection of agricultural markets remains at high levels. The opportunity for reductions in the amount of compensation payments has not been taken. Payments to farmers have actually increased, and are still not fully decoupled. In terms of the pursuit of free trade, this means that the Agreement on Agriculture has been unsuccessful because this failure to fully decouple payments means that there is no disincentive to produce. Excess stocks will therefore result. At a time of decreasing world prices, the European Communities cannot dispose of these unless they are subsidised. Consequently, export subsidies will have to be used which will be difficult for the European Communities’ WTO reduction commitments in the same way that the MacSharry programme was. Even the United States’ radical FAIR programme raises difficulties when viewed against the objectives of the Agreement on Agriculture. When he signed the Bill in 1996, the then President Bill Clinton expressed concern over the lack of an adequate safety net for farmers following the changes in the support payments. This concern was realised following the worldwide decline in crop prices, the adverse effects of El Niño and the impact of the Asian crisis on United States’ agriculture. Consequently, in December 1998 President Clinton announced an emergency aid package for farmers to preserve rural incomes. This package provided approximately $6bn in aid: $2bn went to compensate farmers for the decline in income due to the adverse trading conditions; $400m supplied

275 Thomson *ibid.* at 179
278 Further proposals for change look unlikely to reverse this trend: see Agra Europe No. 1843 1 April 1999 at 3
279 White House Press Release: “Statement by the President on the Farm Bill Signing” 4 April 1996
280 USDA Press Release: “President Clinton Announces Emergency Aid to Farmers” 12th December 1998
incentives in connection with a modified crop insurance scheme and $3.5bn went towards assisting farmers recovery from low commodity prices. The 1998 Emergency Farm Financial Relief Act also gave farmers the option either to receive one payment or two equal payments at any point during the 1999 financial year. Although FAIR itself ensures the United States domestic reform programme fulfils WTO commitments without using the Blue Box exemption, the inclusion of these emergency assistance payments is more challenging. They are a direct response to non-economic concerns, including the preservation of rural income, but are unlikely to come within Green Box.

Arguably, the European Communities' and the United States' reforms show that the traditional imperatives within their agricultural policies deemed 'protectionist' under GATT remain unchanged. Despite suggestions in Agenda 2000, the CAP is still operating on the basis of Article 33 of the Treaty of Rome. Likewise the United States did not take the opportunity to completely overrule the underlying farming legislation. The implications from this are that the WTO agriculture regime is not tackling all the problems of agricultural trade. It also shows that it was not the inadequate regulatory system under GATT necessarily that was the problem, but something much more pertinent to the nature of international agricultural trade. If the WTO is now addressing economic issues more coherently and only residual changes were necessary to ensure the rules were drafted better, then it should have been possible to witness a more fundamental alteration in the levels of support that remain on agriculture. If this is not the case, then the failure must be attributable to other

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281 Ibid.: financial provision was included in the 1999 Budget Bill; see Omnibus Consolidated and Emergency Supplemental Appropriations Act 1999
282 USDA: Farm Service Agency Fact Sheet, February 1999
283 Josling: "Agricultural Policy Reform in the USA and the EU: A Comparison of the CAP Reform and the 1996 US Farm Bill" in Ingersent, Rayner & Hine supra n. 17, 36 at 47
factors, most notably, the assumption the free trade automatically resolves all the difficulties.

b. Global Impact of the Agriculture Regime

Initially, the economic literature suggested that overall gains from liberalisation would be anywhere between US$109billion to US$510billion. However, the reality is different. Initial observations carried out in 1995 indicated that the tariffication of agricultural protection measures led to very high tariff levels. International agricultural trade was therefore still experiencing high levels of protection, albeit in a more transparent form. More recent reports indicate that problems still exist with international agricultural trade liberalisation. The 1997 joint UNCTAD/WTO study revealed that tariffication resulted in rates that mostly exceeded 30%, with higher increases for MFN rates. These high levels are still protecting traditional markets consequently ensuring that it is difficult for any new exporter to penetrate them. This situation is worse because of developed country application of the special safeguard provisions within the Agreement on Agriculture. The UNCTAD/WTO study found that the United States’ and Japan’s systems for the implementation of safeguards in line with Article 5 contained similar provisions. These imposed additional duties that affect imports above the tariff quota. Such duties increase as the export price for the product subject to the safeguard clause declines. Japan’s rate for rice can rise to as

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286 Ibid. at 20
287 UNCTAD Report on LDCs 1998; also UNCTAD/WTO Joint Study: “The Post-Uruguay Round Tariff Environment for Developing Country Exports” (6 October 1997) at 4
288 Ibid.
290 UNCTAD/WTO Joint Study supra n. 287 at 4
much as 550%. However, the areas that enjoy the highest levels of tariffication are the traditional temperate-zone products such as cereals.

3. Why is Agricultural Trade Still Problematic?

It is important to assess the effectiveness of the WTO regime in relation to the goals it set. This means evaluating whether the amended scheme is effective at addressing the economic aspects of agriculture. Even on this assessment it is possible to determine that the regime is unsuccessful, or more accurately, 'ineffective.' The reasons for this can be divided firstly into specific issues inherent in the agriculture scheme and secondly, broader issues which underlie the WTO's whole regulatory structure.

a. WTO's Rules on Agricultural Trade

(i) Drafting Defects

In relation to the agreements covering agriculture, two deficiencies are apparent. The first lies in drafting defects within the agreements. Schott notes that the procedure by which the tariff levels are set under Article 4 Agreement on Agriculture is open to abuse. Countries have to notify the WTO of the new tariff levels that result from the conversion of non-tariff barriers into tariffs. Unfortunately, there are no rules for countries to follow when calculating these tariffs. This encourages members to artificially inflate the values, with the result that the subsequent reductions will not have such a significant impact on domestic markets.

This defect has become apparent through the application of the Agreement on Agriculture. However, further drafting problems have arisen through the attempted resolution of disputes under the WTO's dispute settlement procedure.
a. The Agreement on Agriculture

Despite the prevalence of agricultural disputes under the GATT, the WTO’s dispute settlement process has only dealt with the agreement specifically in two cases: the Canada-Milk case and the contentious Foreign Sales Corporations dispute. Both cases deal with the application of the export subsidies rules in Article 9 and 10 Agreement on Agriculture. This is an interesting development, because several commentators had already identified that the export subsidy reduction commitments were likely to be the most effective curb on agricultural protectionism.

In the Canada-Milk dispute, the United States and New Zealand argued that the Canadian system of milk pricing was in breach of the export subsidy rules within Article 9 and 10 Agreement on Agriculture. The Canadian scheme allocated prices in accordance to milk’s end-use and destination. Certain categories of milk destined only for export enjoyed lower prices than milk intended for domestic markets. The pricing structure was the responsibility of marketing boards established by the Canadian federal and provincial governments.

The United States and New Zealand argued that this system would give Canada’s exported milk a benefit that was a subsidy under Articles 9 and 10 Agreement on Agriculture. In its defence, Canada maintained that the price allocation was made by an independent organisation which was not a government agency and that the price allocation itself was producer driven and did not reflect a “payment” or a “payment in kind” for the purposes of Article 9.1(a). It concluded that the scheme would not result

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298 See Tangermann supra n. 208 at 29
299 See WT/DS103/R & WT/DS113/R supra n. 296 at paras 7.1-7.8 for details of the scheme
300 Ibid. at paras 7.73-7.78
301 Ibid. at para 7.12
in the award of an export subsidy in breach of the Agreement on Agriculture. The panel disagreed.

It is clear from both of their reports that the panel and Appellate Body were very keen to ensure that the terms of the Agreement on Agriculture were not circumvented. The panel started with a contextual examination of the purpose of the Agreement on Agriculture, and then placed a wide interpretation on "payments in kind" and "governments or their agencies" under Article 9:1(a). The panel assumed that if it found the scheme to amount to a "payment-in-kind" this would automatically be a "direct subsidy" for Article 9:1(a). It argued that "payment" for Article 9:1(a) would be satisfied if the milk scheme amounted to the award of a "gratuitous act, a bounty or a benefit." Following this broad view, the panel stated that if exported milk were cheaper than milk available from other sources, then this must automatically accord a benefit which it would otherwise not receive. The panel then reasoned that this must be the type of benefit which the term "payment-in-kind" was designed to cover in Article 9:1(a), accordingly, the Canadian scheme must be in breach.

The panel went on to take a similarly wide approach to when "governments or their agencies" would "provide" these subsidies for the purposes of the prohibition. Two issues are crucial to the panel’s findings: firstly, that the marketing board was granted powers by the Canadian government to enable it to undertake its tasks. Secondly, that the government retained ultimate supervision over the board. On this view, the panel

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302 WT/DS103/R & WT/DS113/R supra n. 296 at paras 7.24-7.26
303 Ibid. at para 7.43
304 Ibid. at para 7.44; this finding was extrapolated to cover Article 9:1(c) Agreement on Agriculture by the panel which considered Canada’s amended regime following an Article 21:5 DSU complaint by New Zealand and Canada: Canada-Measures Affecting the Importation of Milk and the Exportation of Dairy Products-Recourse to Article 21:5 DSU by New Zealand and the United States WT/DS103/RW & WT/DS113/RW, 11 July 2001 at paras 6.12-14 & 6.29
305 Ibid. at para 7.48
306 Ibid.
307 It argued that this would be decided on a case-by-case basis: Ibid. at para 7.67
felt that the marketing boards would be government agencies for Article 9:1(a).\textsuperscript{308} It then adopted this view in its interpretation of Article 10:1, arguing that it was likely that if Article 9:1(a) prohibited direct payments, then Article 10:1 covered indirect payments, so the scheme would still be in breach.\textsuperscript{309}

Although the Appellate Body took a more restrictive view of the scope of Article 9:1(a), it indicated its support for the panel’s general enthusiasm for blocking potential loopholes in the terms of the Agreement on Agriculture, thus reinforcing the traditional GATT goal of free trade in agricultural products. In rejecting the panel’s interpretation of “payments-in-kind” as automatically equating to “direct subsidies”\textsuperscript{310} under Article 9:1(a), the Appellate Body did indorse a similar interpretation of “payments-in-kind.”\textsuperscript{311} By adopting a wider view of Article 9:1(c), the Appellate Body argued that such payments could be included within that prohibition.\textsuperscript{312} This interpretation means that the panel’s result is upheld, albeit by a different route. The Appellate Body’s view of the function of Article 10:1 is interesting because it apparently views it as a sweep-up provision which can catch those issues which are not caught by Article 9.

This trend to prevent circumvention of the Agreement on Agriculture’s terms continues in the Appellate Body’s consideration of the United States-Foreign Sales Corporations case.\textsuperscript{313} The dispute concerned the United States’ discriminatory taxation system for those companies not incorporated in the United States, but which

\textsuperscript{308} Ibid. at para 7.78

\textsuperscript{309} Ibid. at 7.125

\textsuperscript{310} It argued that a payment in kind could only be a subsidy if it involved a transfer of economic value. This would not always be the case. It argued that it was not then possible to make the automatic assumption that the payment-in-kind would be a subsidy: WT/DS103/AB/R & WT/DS113/AB/R supra n. 296 at para 86

\textsuperscript{311} Ibid. at para 109

\textsuperscript{312} Ibid. at para 111

\textsuperscript{313} WT/DS108/AB/R supra n. 297
retained a connection with it.\textsuperscript{314} The regime allowed taxation of such foreign corporations’ income in certain circumstances if there was a transfer of revenue back to the United States.\textsuperscript{315} However, certain portions of that income were exempt if the company can be classed as a ‘foreign sales corporation.’\textsuperscript{316} Although the taxation benefit could apply to any company, in reality, the main beneficiaries were United States’ companies whose overseas subsidiaries came within the definition.\textsuperscript{317} The European Communities argued that the benefits accorded to corporations under this system would operate as, \textit{inter alia}, an export subsidy in breach of Article 9:1(d) because the system facilitated a reduction in the marketing costs of the corporations’ export of agricultural products.

The panel found a breach of Article 9:1(d)\textsuperscript{318} by adopting a flexible interpretation of what constituted “marketing costs.”\textsuperscript{319} Although the Appellate Body also concluded that the United States’ measure was in breach of the export subsidies’ prohibition, it did so on different grounds.\textsuperscript{320} It argued that the form of taxation adopted by the United States’ did not “reduce marketing costs” because the tax benefit accrued after the goods were sold, or “marketed” abroad and not before.\textsuperscript{321} Consequently, it stated that the taxation scheme could only “reduce the marketing costs” if it had attached to the product before it was sold. It concluded that as this was not the case, there was no breach of Article 9:1(d).\textsuperscript{322}

Nevertheless, in deciding that there was a breach of Article 10:1 Agreement on Agriculture, the Appellate Body adopted a distinctive approach. It would have been
possible for the Appellate Body to follow the panel’s contextual interpretation of Article 9:1(d) to ensure the taxation scheme was in breach if its primary aim was to find that the scheme violated the rules. It is surprising that it did not take this route, as it is clear from the general tenor of the report that it was keen to prevent circumvention of the Agreement on Agriculture’s rules. Arguably, the Appellate Body’s approach was a tactical one.

It stated that the interpretation of Article 9:1’s application to products within members’ schedules meant that export subsidies could be imposed on such products provided that members were still able to meet their reduction commitments under the Agreement on Agriculture. If the Appellate Body had concluded that the taxation scheme was within Article 9:1(d), it would be effectively allowing the United States to retain the scheme in relation to those products within its schedule. By placing the taxation scheme within Article 10:1, the Appellate Body guaranteed that the scheme could not be retained at all. This is because it adopted a wide view of what constituted a threat to circumvention for the purposes of Article 10:1. As it applied the same test irrespective of whether the products were within a members’ schedule or not, the United States’ scheme inevitably came within the prohibition. By adopting this wide view of Article 10:1, the Appellate Body was able to use it as a sweep-up provision in circumstances where anything which did not directly come within Article 9:1 can still be subject to adjudication if it does, or potentially could constitute a threat to circumvention.

As Article 16 Understanding on Rules and Procedures Governing the Settlement of Disputes (Dispute Settlement Understanding) means the reports are adopted unless a

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323 Ibid. at para 151: the Appellate Body saw this as a limited exception
324 Subject to reduction commitments
325 It is clear that the Appellate Body disliked the idea that the United States could achieve the payment of export subsidies via tax incentives, when it would have been prevented making actual payments by Article 9:1: Appellate Body report supra n. 297 at para 150
majority of WTO members oppose them, adherence to the Agreement on Agriculture is more likely. However, problems still remain. Most notably, neither report dealt with the difficult issue of Canada and the United States’ potential liability under the WTO Agreement on Subsidies and Countervailing Measures (Subsidies Agreement). In particular, breach of Article 9:1(c) Agreement on Agriculture brings the Canadian milk scheme outside the protection of the ‘peace clause’ in Article 13:c(i) Agreement on Agriculture because protection is only extended to subsidies which fully comply with Part V. Neither the panel nor the Appellate Body dealt directly with this issue.326 Failure to resolve this problem means that potential drafting defects within the Agreement on Agriculture remain if panels are not prepared to adjudicate exactly when measures would cease to be protected by the Peace Clause.

In a series of broadly agriculture related cases, the WTO’s dispute settlement process has also been helpful in clarifying the scope of the SPS Agreement’s terms.

b. The SPS Agreement

The treatment of the SPS Agreement through the dispute settlement mechanism is significant because the majority of cases concerning agriculture, which have been brought by WTO members, have related to that agreement, rather than the Agreement on Agriculture. On one level this suggests that the Agreement on Agriculture may be effective, as the rules are so clear that members are able to adhere to them without the need for further clarification through the dispute settlement process. However, a more likely explanation is that this trend indicates the importance of non-economic issues in members’ domestic agricultural policies.327 The Appellate Body has considered the

326 The Appellate Body does not discuss this at all. The panel does state that there should be a potential breach of Article 3 of the WTO Agreement on Subsidies and Countervailing Measures, but then refuses to discuss it further on the grounds of judicial economy: WT/DS103/R & WT/DS113/R supra n. 296 at paras 7.135-7.141
327 Also note the problems raised by the safety of genetically modified foods. See Chapter 4 (thesis) on food safety generally
SPS Agreement in a series of cases beginning with the contentious Hormones dispute. It then reiterated and refined its findings in the Australia-Salmon and Japanese Varietals cases.

The crux of the issues in all three disputes focused on whether a system of sanitary and phytosanitary measures could be justifiable under the SPS Agreement if it was not an exact replica of the existing recognised Codex international standards. In its deliberations, the Appellate Body was keen to maintain a balance between allowing members to implement standards that were higher than Codex, while simultaneously preventing the use of those measures for protectionist purposes. The debate concentrated on the relationship between Article 3 and 5 SPS Agreement: whereas, the former allows the imposition of SPS measures to promote harmonisation of standards, the latter sets out the criteria for determining the appropriate level for those measures.

In the Hormones dispute the panel attempted to assess the legal basis for any SPS regime imposed by members. Article 3:1 SPS states that the aim of the agreement is to harmonise the use of SPS measures. To this extent, the panel noted that members’ SPS regimes should be “based on” existing international standards. It concluded that to fulfil this goal, members should be required to impose SPS measures that

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331 Article 2:1 SPS Agreement

332 See Article 3:2 ibid.
"conformed to" such standards, unless they were excluded from doing so by Article 5. In contrast, the Appellate Body adopted a "black letter" interpretation, which it argued represented the ordinary meaning of the term. It stated that it was unable to "lightly assume that sovereign states intended to impose upon themselves the more onerous, rather than less burdensome, obligation." The European Communities had attempted to argue that even though its hormone measures were not "based on" existing international standards, the wording of Article 3:3 SPS meant that they did not actually have to be justified by a risk assessment. Article 3:3 allows the imposition of higher standards in two circumstances: firstly, "if there is scientific justification" or secondly, "as a consequence of the level of... protection a Member determines to be appropriate in accordance with the relevant provisions of paragraphs 1 through 8 of Article 5." The European Communities' argument was based on the premise that these two sentences are disjunctive, and the need to establish the risk assessment only related to the second part of the Article. Upholding the panel, the Appellate Body rejected this argument. It concluded that whenever a member wished to introduce measures that differed from existing international guidelines, these still must be based on a risk assessment. It was only by forcing members to undertake such analysis that circumvention of the agricultural scheme could be prevented.

When considering the nature of the required risk assessment, the Appellate Body agreed with the panel's two-stage analysis. Firstly, the assessment "should (i) identify the adverse effects on human health... arising from the presence of the hormones at issue when used as growth promoters in meat ..., and (ii) if any adverse effects exist,

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333 Panel Report paras 8.72 & 8.73 (US) & 8.75 & 8.76 (Canada)
334 Supra n. 328 at 65
335 Ibid. at 64
336 Ibid. at 67
337 Ibid. at 68
evaluate the potential or probability of occurrence of such effects." It went on to conclude that a risk assessment should not be drawn too narrowly and should include a wide range of both scientific and non-scientific issues. Interestingly, the Appellate Body agreed that it was not necessary for the European Communities to carry out its own evaluations. It could rely on a number of unlinked studies and reports as long as there was evidence that it had taken them into account when formulating its SPS regime. In addition, the Appellate Body stated that there must be a relationship between the SPS measure and the risk assessment. It saw this as a loose arrangement so that the measure need only be ‘reasonably supported’ by the risk assessment. Finally, the Appellate Body considered the extent to which an SPS measure could be a disguised restriction on international trade under Article 5:5 SPS. Here what is considered an appropriate standard of protection must inevitably differ between members. Consequently, the Appellate Body called on the SPS Committee to issue general guidelines. Nevertheless, it advocated a mandatory three-stage test based on the wording of Article 5:5 for regimes that were clearly discriminatory.

Although the WTO’s dispute settlement system is not formally based on any doctrine of *stare decisis*, the Appellate Body built on its interpretation of the SPS Agreement’s terms in *Australia-Salmon* and later in *Japanese-Varietals* reinforcing the idea that trade should be unfettered by import restrictions unless the prohibitions could be actually justified scientifically. In the Japanese dispute, the United States had challenged whether the scientific evidence available was “sufficient” to justify...
Japan's imposition of measures under Article 2:2 SPS. Here the Appellate Body reiterated the test from its consideration of Article 5:1 SPS in the *Hormones* and *Australia-Salmon* disputes, that there must be a "rational relationship" between the scientific evidence and the measure imposed. Although this was loose, the member must show that there was a "probability" of risk rather than merely a "possibility." Consequently, the Appellate Body equated the Article 2:2 and 3:3 SPS tests.

In its analysis of Article 5:7, the Appellate Body again specifically rejected a disjunctive interpretation that a risk assessment is only required for the second sentence of Article 5:7. Like its analysis in the *Hormone* dispute, it advocated a strict approach, seeing Article 5:7 as a "qualified exemption," so that all four of its requirements must be met. A member will therefore always need to provide a risk assessment if it wishes to impose a measure that does not conform to an existing international standard, either because it offers protection when no other member does so, or it offers a higher level of protection.

Although the *Hormone* dispute Appellate Body Report did discuss the content of a risk assessment in general terms, the *Australia-Salmon* case went further and identified three requirements that any assessment must contain. Firstly, it should specify the relevant disease; secondly, it must "evaluate the likelihood of entry," and spread of the disease including any economic consequences flowing from that.

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344 The Appellate Body specifically rejected Japan's argument that there should be an actual causal link between the scientific risk assessment and the measure: supra n. 330 at 22
345 See *Hormones* Appellate Body supra n. 328 at para 194 & *Australia-Salmon* supra n. 329 para 123
346 Article 3:3 states that an SPS measure should be "based on" a risk assessment; and Article 2:2 requires scientific evidence to be "sufficient." The Appellate Body linked the two provisions in the *Hormone* Report: *ibid.* at para 193
347 *Japanese Varietals* Appellate Body Report supra n. 330 at 24; this mirrors its treatment of the European Communities' arguments in the Hormone dispute *ibid.*
348 Emphasis in the original: *ibid.* at 21
349 *Ibid.* at 24
Finally, it should “evaluate the likelihood of entry, establishment or spread of the diseases according to the SPS measures which might be applied.”

This comprehensive treatment of the SPS Agreement would seem to support the view that this relationship has now been clarified judicially and so further disputes are unlikely. This is a highly optimistic view. Despite considerable judicial activism to restrict the number of loopholes in the SPS Agreement, it is not clear that this will automatically lead to a resolution of the disputes.

(ii) Built-in Defects

A distinction must be drawn between drafting defects highlighted by the dispute settlement reports and those defects which were built into the agreements by WTO members through the Uruguay Round negotiation process. The most obvious in the Agreement on Agriculture is the Blue Box exemption, which specifically allows certain support measures from both the United States’ and the European Communities’ agricultural policies in particular to be exempted from the reduction commitments. Other provisions also ensure that the burden engendered by the reduction commitments for domestic support and tariffication are eased significantly.

For both market access and domestic support, a base year of 1986-88 was chosen. This was a period of very low world prices and so the levels of support used by members then were very high. 1995 to 1996 has seen higher world prices due to tighter supplies and lower stocks. Consequently, many members did not need to make significant reductions in support levels in real terms because the changing

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350 Australia-Salmon Appellate Body Report _supra_ n. 329 at para 121; (emphasis in the original)
351 Quick and Blüthner argue that the Appellate Body went beyond its jurisdiction by settling a factual issue in the Hormones dispute: Quick & Blüthner: "Has the Appellate Body Erred? An Appraisal and Criticism of the Ruling in the WTO Hormones Case" (1999) 2(4) JIntEconL 603 at 609
352 For example, the Hormones dispute has yet to be resolved
353 See Chapter 1 section B:1(a) (thesis)
354 Thomson _supra_ n. 273, 175 at 178
355 OECD 1996 Report _supra_ n. 269 at 7
market conditions ensured that minimal changes were sufficient to meet WTO commitments. In addition, members are required to reduce import restrictions by 36%; this is an average over all tariff lines. Individual tariffs only need to be reduced by a minimum of 15%. This enabled members to reduce the tariffs of their most sensitive products by the minimum, whilst reserving the major reductions for their less sensitive products. In this way they were still able to reach the 36% average required. The distortion of markets through this tariff quota allocation has led to higher tariffs on processed products than on primary ones. This is unfortunate, as liberalisation in processed products would have been more beneficial to developing and newly industrialising countries.

Both these issues can be contrasted with the difficulties caused by ‘dirty tariffication.’ This is because it results from a complete omission in the agreement, whereas the other problems identified are the consequences of specific provisions in the Agreement on Agriculture. These problems cannot be resolved through the dispute settlement mechanism because they do not produce WTO-illegal practices.

Unfortunately, the difficulties caused by agriculture are not confined to defects in the Agriculture and SPS Agreements themselves. Despite important changes to the regulatory structure, agricultural trade is still proving problematic for international trade regulation.

b. Regulatory Issues

Even though the Agreement on Agriculture is more efficiently policed through the WTO’s regulatory system, not all of the problems seen under GATT have been

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356 See Normile supra n. 221 at 29
357 This is known as “tariff escalation.” Lindland: ‘The Impact of the Uruguay Round on Tariff Escalation in Agricultural Products’ ESCP/No.3 (1997) FAO
358 i.e. placing an artificially high tariff value on a product following conversion of a non-tariff barrier on that product into a tariff: see J.J. Schott (assisted by J. Buurman): ‘The Uruguay Round: An Assessment’ (1994) Institute for International Economics at 50
rectified. This is because the agriculture regime only calls for reductions in those methods of support that caused difficulties under GATT and does not go further and address the fundamental difficulties of international agricultural trade. This pattern can also be seen in the WTO’s regulatory changes.

Permanent committees on agriculture and SPS measures were established under the Agriculture and SPS Agreements. However, like GATT’s, their role is supervisory, rather than adjudicatory. Although this role is important because it highlights future challenging areas and allows members to air potential disagreements prior to the dispute settlement process, the rules do not allow the committees to act in any formal arbitration capacity. All disputes requiring formal settlement are dealt with via the Dispute Settlement Understanding, which can only work within the existing rules.

The new dispute settlement procedure is certainly more effective than the old system because the introduction of procedural rules means that adherence to the outcome of the reports is more likely. Unfortunately, this has not resulted in less unresolved agricultural trade litigation. Despite the changes, agricultural disputes will still be amongst the most difficult to deal with under the new dispute settlement procedure. The bananas dispute even threatened to fundamentally undermine the new rules.

The bananas dispute is important for two reasons: firstly, it did not primarily concern the WTO’s agriculture regime and secondly, it was a major test of the

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359 i.e. quotas, export subsidies and domestic support measures
360 Article 20 Agreement on Agriculture
361 Article 12 SPS Agreement
362 Article 18 Agreement on Agriculture & Article 12:1 SPS Agreement
efficacy of the new dispute settlement rules because it was festering prior to the establishment of the WTO. The dispute focuses on the legality of the European Communities’ preferential trading regime for the importation of bananas from the African Caribbean and Pacific (ACP) states under the Lomé Convention. The panels found breaches of Articles I:1, III:4, XIII:1 GATT and Article 1:2 WTO Import Licensing Agreement and Articles II and XVII WTO General Agreement on Trade in Services (GATS). The Appellate Body largely upheld this. The WTO scheme was designed to significantly reduce the levels of protectionism in international trade and lead to free trade. The problem is that the Bananas dispute reveals significant loopholes in the WTO scheme, which arguably would not be resolved even if agricultural trade were liberalised. This is because the basis for the dispute rests in the European Communities’ attempts to address non-economic considerations in development issues.

Despite the introduction of changes to the regime by the European Communities, the United States argued that it still breached the WTO rules. It claimed that this would allow it to seek compensation under Article 22:2 Dispute Settlement Understanding. The European Communities objected, stating that the United States could not impose sanctions on the new regime until the old regime had been judged in {Arbitration by the European Communities under Article 22:6 DSU Arbitrators' Report WT/DS27/ARB, 9 April 1999. On the bananas dispute see McMahon: “Going Bananas? Dispute Resolution in Agriculture” in Cameron & Campbell supra n. 81 at 128 & McMahon: “The EC Bananas Import Regime, the WTO Rulings and the ACP-Fighting for Survival?” (1998) 32(4) JWT 101

Although it had been argued that one aspect of the bananas regime would be covered by the peace clause in the Agreement on Agriculture, the panel rejected this approach: United States’ panel report ibid. at paras 7.123-7.127. McMahon argues that this was crucial to the adverse finding against the European Community: McMahon: “Going Bananas” ibid. at 143


See United States’ panel report for a detailed analysis of the regime: supra n. 363. at paras III.1-

III.36

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Sanctions were subsequently imposed to come into effect 3 March 1999: WT/DS27/43 14 January 1999

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breach of the rules by the panel system. Although the resolution of the inconsistencies in Articles 21:5 and 22:6 Dispute Settlement Understanding was resolved by an arbitration panel,\textsuperscript{369} this was only possible after intervention by the WTO’s Director General.\textsuperscript{370} More importantly, the dispute was only settled through a bilateral agreement, rather than through the Dispute Settlement Understanding’s procedures. The *Hormones* dispute is still unresolved.\textsuperscript{371} Even though the dispute settlement procedure has been exhausted, there is no solution. Sanctions are still in place. In addition, the historical tendency of international agricultural disputes to spawn further superficially unrelated disputes is also being seen under the WTO. Arguably, both the European Communities’ complaints against the United States’ s.301 Trade Act 1974 (as amended)\textsuperscript{372} and its Foreign Sales Tax\textsuperscript{373} follow from its lack of success in the *hormones* and *bananas* cases. Although the position is better than it was under GATT, current trends suggest that the agriculture regime is not effective on this aspect of international agricultural trade regulation.

4. Developing Countries

Under the GATT it was clear that developing countries acted as a gauge of the adverse effects of protectionism in agricultural trade. Consequently, in assessing the effectiveness of the amended regime, it is necessary to consider whether there have been any benefits for developing countries. Despite the new regime and consequential changes to members’ domestic agricultural policies, it is clear that developing countries have not benefited. International agricultural trade is still experiencing high levels of protection. The 1997 UNCTAD/WTO joint study shows that tariffication has led to rates, which mostly

\textsuperscript{369} Recourse to Article 21:5 DSU by Ecuador supra n. 362 at para 4.11

\textsuperscript{370} WTO statement issued 1 February 1999

\textsuperscript{371} As at 1\textsuperscript{st} August 2001

\textsuperscript{372} United States-Sections 301-310 of the Trade Act 1974 WT/DS152/R 22, December 1999

\textsuperscript{373} United States-Tax Treatment for “Foreign Sales Corporations” supra n. 297
exceed 30% with higher MFN rates.³⁷⁴ Problems with agricultural trade have also been exacerbated by developed countries' failure to adhere to the more general commitments included in the Decision on Measures in Favour of Least-Developed Countries and the Decision on Measures Concerning the Possible Negative Effects of the Reform Programme on Least-Developed and Net-Food Importing Developing Countries. These countries report that because these commitments are non-contractual, developed nations are ignoring them.³⁷⁵ Unfortunately, it appears that the difficulties that developing countries encountered with Part IV GATT are now manifesting themselves under these new agreements. This was perhaps inevitable due to the general nature of the promises within them. It is to be hoped that developing countries manage to use the decisions as a bargaining device in the same way that Part IV GATT was used.³⁷⁶

In contrast to the difficulties developing countries have experienced following the implementation of the WTO Agreements themselves, there has been some progress within the provisions of preferential trading regimes. This is more important as the concessions available under the GSP can potentially offset other problems encountered and facilitate developing country growth.³⁷⁷ Continuation of GSP schemes is encouraged by the WTO and specifically endorsed for agricultural trade by the Decision on Measures Concerning the Possible Negative Effects of the Reform Programme on Least-Developed and Net-Food Importing Developing Countries.³⁷⁸ Developed country GSP schemes have generally been

³⁷⁴ UNCTAD/WTO Joint Study supra n. 287 at 4
³⁷⁵ ibid. at 71
³⁷⁶ LDCs are already complaining that Part IV GATT '94 is already being ignored: ibid.
³⁷⁷ UNCTAD: “Informal report by the UNCTAD Secretariat on the Ad Hoc Meeting of the Secretary General of UNCTAD on GSP, GSTP and New Initiatives for LDCs” held at Geneva 16-17th July 1998 UNCTAD/SG/AC.1/1 at 2
³⁷⁸ Para 4
and now also incorporate the WTO differential between developing countries and least-developed countries. Developing countries themselves have also introduced GSP schemes.\textsuperscript{380}

The success of GSP schemes should not be overestimated. Their introduction does not make the agriculture regime effective. It is clear from the 1997 report that developing countries have yet to enjoy any significant benefits from the WTO’s agricultural regime.

C. Conclusions

On one level it is possible to argue that the WTO period indicates a higher degree of compliance following the introduction of the new agreements and the WTO dispute settlement mechanism. It is clear that many members are adhering to the rules and that domestic agricultural policies are being modified to comply with the amended regime. Both the European Communities and the United States have adapted their domestic policies in line with their reduction commitments and special and differential treatment clauses specific to agriculture also facilitate developing country trade in this difficult area.

However, the discussion demonstrates that the revolution in agricultural trade regulation anticipated from the Agreement on Agriculture has not occurred. Parallels

\textsuperscript{379} The United States’ scheme now incorporates 1,783 products, including agricultural ones: USTR: ‘Annual Report 1997’ at 253. It has also introduced the new African Growth and Opportunity Act, Bill No. H.R. 434 on 2 February 1999 to facilitate development specifically for African companies: see “A Comprehensive Trade and Development Policy for the Countries of Africa” submitted to United States’ Congress December 1997. The European Community has radically changed its Lomé regime. The new Convention was signed on 31 May 2000. The European Community has also changed its GSP scheme and there are plans to accord least-developed countries the same preferential trading concessions as those allocated to ACP states under the Lomé Convention: see Peers: “Reform of the European Community’s Generalised System of Preferences” (1995) 29 JWT 79. The details of the proposed changes to the regime are contained in COM(1998)521; see Regulation 2820/98/EC (adopted 21\textsuperscript{st} December 1998)

\textsuperscript{380} UNCTAD Informal Report \textit{supra} n. 377 at 3
with regulation under GATT remain: levels of protection on domestic agricultural production are still high; there is a failure to resolve agricultural trade disputes through the dispute settlement process alone and complaints from developing countries that their needs are not being met still exist. In terms of the GATT effectiveness test, the WTO agriculture regime is not effective.

The question then is why is agriculture still a problem? The discussion demonstrates that there are several contributing factors. Firstly, like GATT, the new rules are based on the basic assumption that if a WTO member imposes trade restrictions on agricultural products, they are doing so to protect their domestic producers from the vacillations in world prices. However, if the European Communities and the United States' agricultural policies are evaluated, then it is possible to see that those policies see 'protection' in broad terms: protecting rural communities and their way of life inevitably leads to preserving the appearance of the countryside. In addition, Article 33 of the Treaty of Rome makes it clear that food security is an important consideration for any agricultural policy. All these issues are 'higher' ideals beyond protectionism as defined by GATT and the WTO rules.381

This pattern is repeated in the agricultural disputes, especially in the WTO. All the SPS disputes relate to measures imposed where there was a significant risk to plant, animal or human health. Although on one level, the measures used did restrict trade, it is not inevitable that the only reason for adopting the regimes was to protect domestic sectors because it is particularly evident from the Hormones dispute that one of the reasons the European Communities imposed trade restrictions was through fear of a potential health risk. Certainly, it is always possible to argue that the result is the protection of markets, but it is not the primary motivation. If WTO members continue

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381 This is illustrative of the twin track nature of agricultural regulation: both economic (i.e. protectionism) and non-economic issues need to be addressed
to respond to threats to health, then further disputes are likely if the assumption is automatically that free trade will always resolve such non-trade issues.

Developing countries pose a slightly different dilemma because the reports indicate that developed country barriers to agricultural trade do restrict developing country trade. However, the discussion shows that such countries problems will not necessarily be eradicated just because there is free trade in agricultural products. Food security remains an important issue, as does the ability to preserve rural communities. On this basis the WTO regime is not and can never be effective under the GATT test. Making it effective requires a solution that takes the motivation for members’ agricultural policies into account and addresses both the fundamental causes of trade disputes and the problems experienced by developing countries.
Chapter 2:

Seeking a Solution

An analysis of the historic problems of agricultural trade regulation under GATT indicates that effective regulation of international agricultural trade will only be achieved when three issues are dealt with. Firstly, the rules must comprehensively cover trade in agricultural products; secondly, the interaction of the agreements should not reveal loopholes in the scope of regulation, and thirdly, the special needs of developing countries\(^1\) in international agricultural trade must be taken into consideration.\(^2\)

Superficially, the World Trade Organisation’s (WTO) regime does address these three issues by introducing a comprehensive regime through the Agreements on Agriculture,\(^3\) and Sanitary and Phytosanitary Measures\(^4\) and policing the area using a reformed institutional structure\(^5\) and a dispute settlement procedure.\(^6\) However, chapter 1 of this analysis has shown that significant problems remain, so it is not possible to conclude that the WTO’s current agriculture regime provides an ‘effective’ answer.\(^7\) Further solutions must be explored.

This chapter analyses the key suggestions for change to determine whether they provide an adequate solution to the problems of international agricultural trade regulation. These can be divided into two categories: firstly, agriculture-specific

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\(^{1}\) The analysis in this thesis is based on the assumption that developing countries are a homogenous group because this is the same approach as that adopted in the WTO Agreements

\(^{2}\) This analysis derives from the problems illustrated in Chapter 1 of this thesis

\(^{3}\) Hereafter, Agreement on Agriculture

\(^{4}\) Hereafter, SPS Agreement

\(^{5}\) By creating a single organisation with legal personality: see Articles I (creating the WTO), VIII:1 (awarding the WTO legal personality) & IV (specifying the institutional structure) of the Marrakesh Agreement Establishing the World Trade Organisation (hereafter, the Marrakesh Agreement)

\(^{6}\) Under the Understanding on Rules and Procedures Governing the Settlement of Disputes (hereafter the Dispute Settlement Understanding)

\(^{7}\) The criteria for measuring ‘effectiveness’ is through the three part test established in Chapter 1 of this thesis
solutions and secondly, generalised ones. The former were first put forward by WTO members (hereafter, members) during the review process under both the Singapore⁸ and Geneva Ministerial Declarations,⁹ and subsequently amended at the start of the talks on the next trade negotiation agenda¹⁰ that followed the collapse of the Seattle Ministerial Meeting.¹¹ Academic commentators have also expressed views. Both the solutions posed by members under the renegotiation procedure and those submitted by commentators relate to changes to the minutiae of the existing agriculture regime. This thesis has categorised these as ‘agriculture-specific models.’¹² The generalised solutions can also be further divided into two: firstly, solutions which are based on traditional economic models. The theory of comparative advantage already underpins the GATT and therefore arguably the WTO as well, but there are difficulties inherent in the underlying assumptions made when constructing this theory. Secondly, non-traditional economic models can be used. These use more advanced modelling techniques to predict trade flows. The most significant is the highly influential Global Trade Analysis Project, or GTAP model.¹³

The discussion will firstly evaluate the ability of the agriculture-specific models to rectify the problems associated with international agricultural trade and then will consider whether the generalised solutions are more appropriate.

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¹ WTO/MIN(96)/DEC, 18 December 1996 at para 19. The Analysis and Information Exchange process (AIE process) followed a suggestion from the WTO Committee on Agriculture. The idea was that this would be an informal procedure designed to highlight the successes and the remaining difficulties in agricultural trade regulation to speed up any future multilateral negotiations

² WT/MIN(98)/DEC/1, 25 May 1998 at para 9

¹⁰ See documentation submitted to the Second Special Session of the Committee on Agriculture held 29-30 June 2000: WTO; ‘Report by the Chairman, Ambassador Jorge Voto-Bernales, to the General Council’ G/AG/NG/2, 4 July 2000; also documentation from meeting of the Committee on Agriculture held in September 2000, March 2001

¹¹ The meeting was held from 30 November-3 December 1999

¹² This term has no equivalent in the agriculture literature, but is used by this thesis as a method of distinguishing these suggestions from the sophisticated economic models referred to later in the discussion

A. Agriculture-Specific Models

Proposals for amendment to the current agriculture regime can be placed into two categories: firstly, WTO members submitted suggestions for change. In this first category, a progression can be seen from those views expressed in both the Analysis and Information Exchange (AIE) process following the Singapore Ministerial Meeting\textsuperscript{14} and the preparations for the Millennium Round under the Geneva Declaration,\textsuperscript{15} to those submitted following the re-start of the negotiations in March 2000. Secondly, commentators have proposed a number of schemes.

1. Amending the Agreement on Agriculture: Member Models

a. AIE Process and Geneva Ministerial Declaration Models

WTO members first offered proposals for the existing agriculture regime’s amendment under both the AIE process\textsuperscript{16} and the Geneva Ministerial Declaration procedure.\textsuperscript{17} Although the two procedures were distinct, it is misleading to conclude that the views expressed by members in both were disconnected.

The AIE process was designed as a “process of analysis and information exchange”\textsuperscript{18} to generally identify issues that could prove difficult during subsequent agricultural trade negotiations. The documentation submitted to it was informal, not generally circulated,\textsuperscript{19} and only summarised for transparency purposes in the Committee on Agriculture’s annual report to the WTO General Council.\textsuperscript{20} Members’ submissions were also interspersed with background papers prepared by the WTO Secretariat, also

\textsuperscript{14} Supra n. 8
\textsuperscript{15} Supra n. 9 This thesis will refer to the suggestions under the AIE process and Geneva Ministerial Declaration procedure as ‘member models’
\textsuperscript{16} Supra n. 8
\textsuperscript{17} Supra n. 9
\textsuperscript{18} Ibid. at para 19
\textsuperscript{19} WTO: ‘Committee on Agriculture: Council Overview of WTO Activities (1999)’ G/L/322, 6 October 1999 Annex III at para 4
\textsuperscript{20} Ibid. at para 4; hereafter, the General Council
summarised in the annual report.\textsuperscript{21} In contrast, paragraph 9 of the Geneva Ministerial Declaration\textsuperscript{22} specifically called for members to present formal observations to the General Council regarding issues to be addressed in the ensuing multilateral negotiations.\textsuperscript{23} Despite this obvious difference between the two procedures, members adopted similar views in both. Although no absolute conclusions can be reached regarding the exact content of the AIE documentation,\textsuperscript{24} the summary of those papers indicated that members were already adopting the positions they later formally advocated in the Geneva Ministerial Declaration documentation.\textsuperscript{25} Members' views can be divided into the three categories from the existing Agreement on Agriculture: market access, domestic support and export subsidy regulation. Many also expressed views on how developing and least-developed countries should be treated under the amended regime.

(i) Market Access

All members agreed that market access should be enhanced through the negotiations. However, opinions diverged in both procedures over how this was to be achieved. In the AIE process, the discussion focussed primarily on guaranteeing that the provisions of the existing regime were effective.\textsuperscript{26} Instead of proposing methods to ensure the speedy reduction of agricultural tariffs to bring them into line with manufactured products, the majority of the AIE papers offered solutions to rectify the existing administrative difficulties presented by tariff escalation,\textsuperscript{27} tariff peaks and dirty

\textsuperscript{21} Ibid.
\textsuperscript{22} Supra n. 19
\textsuperscript{23} Members submitted proposals on a number of issues, not just those mandated for discussion in the built-in agenda
\textsuperscript{24} Due to the nature of the AIE process
\textsuperscript{25} e.g. see the European Communities' stance on 'multifunctionality': see European Communities: 'The Multifunctional Character of Agriculture' AIE/40 supra n. 19 reiterated in WTO: 'Preparations for the 1999 Ministerial Conference: EC Approach on Agriculture' WT/GC/W/273 27 July 1999 at para 7
\textsuperscript{26} The analysis of this documentation is necessarily general due to the nature of the material available
\textsuperscript{27} i.e. the allocation of higher tariffs to processed agricultural products than primary ones:
WTO/UNCTAD: 'Tariff Peaks and Tariff Escalation' AIE/43 supra n. 19
tariffication. A number of members, including the United States and the European Communities, also presented discussion papers relating to the difficult question of tariff quota administration. Although it was clear from members’ submissions that a number of administration systems existed, many members argued that no method was superior to another because so much depended on the nature of the product and the bureaucracy in place in the member’s territory. On the basis of the documentation available, no consensus was reached in the AIE process on the market access issue.

In contrast, the Geneva Ministerial Declaration papers concentrated more on improving market access. The Cairns’ Group offered the most radical assessment. In order to achieve parity with industrialised products, it argued that tariffs “must be the only form of protection” and that there must be “deep cuts” to tariff levels, tariff peaks and tariff escalation, coupled with expanded opportunities for trade through increased tariff quotas. Its report also stressed the need for the complete removal of non-tariff barriers “without exception.” Arguably, this view would inevitably lead to the removal of the special safeguard clause because this allows the imposition of Non-

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28 i.e. placing an artificially high tariff value on a product following conversion of a non-tariff barrier on that product into a tariff: see J.J. Schott (assisted by J. Buurman): ‘The Uruguay Round: An Assessment’ (1994) Institute for International Economics at 50
29 United States: ‘Administration of Tariff Rate Quotas’ AIE/46 supra n. 19
30 European Communities: ‘Administration of Tariff Rate Quotas’ AIE/71 ibid.
31 As agricultural tariffs are so high, many members operate tariff quotas whereby market access for a specified product is guaranteed up to the limit of the quota. Arguably, the existing WTO regime does not adequately regulate these areas: see United States’ paper AIE/46 supra n. 19
32 G/L/322 ibid. at 35
33 Ibid.
34 The Cairns’ Group consists of 15 members: Argentina, Australia, Brazil, Canada, Chile, Colombia, Fiji, Indonesia, Malaysia, New Zealand, Paraguay, The Philippines, South Africa, Thailand, Uruguay. It was established in the mid-1980s as a group of like-minded agricultural exporting nations who wanted free trade in agricultural products: see <<http://www.cairnsgroupfarmers.org/>>
36 Ibid.: see also formal Cairns’ Group proposals on Market Access: 20 May 1999 (WT/GC/W/184) (market access generally) & 7 June 1999 (WT/GC/W/199) (tariffs); (WT/GC/W/198) (tariff quotas) & (WT/GC/W/197) (tariff quota administration)
37 Ibid.
Tariff Barriers (NTBs) in the case of emergency as specified in that clause.\(^{38}\) This would be an unpopular view amongst developed nations, as they have been the primary users of the provision.

Although the United States supported the basic contention that market access should be expanded, it was much more vague over how this should be achieved.\(^{39}\) It shared the Cairns’ Group’s view that tariff levels should be reduced\(^ {40}\) and that “new disciplines” should be introduced to deal with tariff quota administration, but it did not say how this should be accomplished.\(^ {41}\) However, it believed that abolishing the special safeguards clause would be unnecessary, although it stated that its operation should be “limited.”\(^ {42}\)

Japan’s view was more cautious.\(^ {43}\) Superficially, it supported the Cairns’ Group’s assessment that tariffs should be the only legitimate restriction on international agricultural trade.\(^ {44}\) This contention was inextricably bound up with the importance it placed on the concept of “multifunctionality”\(^ {45}\) which appeared to recognise the importance of non-economic factors in international agricultural trade. In a very opaque series of arguments, Japan stated that agriculture had broader implications for

\(^{38}\) Article 5 Agreement on Agriculture. Note that under this view, the provisions of the WTO Agreement on Safeguards (hereafter the Safeguards Agreement) should be sufficient in cases of genuine emergency, although Article 11 Safeguards Agreement would have to be reviewed


\(^{40}\) Ibid. at 2

\(^{41}\) WTO: ‘Preparations for the 1999 Ministerial Conference: General Council Discussions on Mandated Negotiations and Built-in Agenda: Communication from the United States’ WT/GC/W/115, 23 November 1998 at 2; this could be because the United States’ documentation available may only constitute general views, rather than specific negotiating positions. This can be compared with the Cairns’ Group’s which make their position very clear

\(^{42}\) Ibid.


\(^{44}\) Ibid. at para 30

\(^{45}\) Ibid.: this term is reiterated in the European Community documentation, but it does not define the concept in as much detail as the Japanese submission: European Commission: ‘Communication to European Council’ 8 July 1999 at 8. The problems associated with ‘multifunctionality’ and its twin concept, ‘non-trade concerns’ are referred to throughout this thesis: see Chapter 2 section A: 1(c) Chapter 3 section B: 1 Chapter 4 section B: 1(thesis) and in the solution proposed in Chapter 5 section B:1(c) (thesis)
the environment and human health and that to see it purely in terms of production was too restrictive. Following from this analysis, Japan seemed to be arguing that these wider implications could justify using non-tariff measures to support the general maintenance of existing protection levels in order to achieve parity between net-importing and net-exporting countries. In the case of a net-importing country, Japan asserted that in order to satisfy the needs of food security, a WTO member might be required to increase its domestic food production. To ensure the food security aim was then satisfied, it maintained the member should be able to maintain high border controls, that is tariffs.  

Although this seemed to be a legitimate argument in favour of developing countries, Japan did not offer this merely as such a targeted solution. Ostensibly, this was a variation on the existing special safeguards clause in Article 5, but it was not clear from the Japanese submission that its proposed provision would be limited in the same way.

The European Communities also recognised the need for greater market access, but offered a qualified view of the extent to which it felt the area could be liberalised. Although it stressed that it would “seek to obtain improvement in opportunities for its exporters,” it also stated that removing all market access barriers on all products would be impractical because liberalisation was “more advanced in some sectors than others.” This would suggest a variable approach dependent on the product’s importance within the domestic economy. This illustrates the European Communities’ stance in previous multilateral trade negotiations where it argued that

46 WT/GC/W/220 ibid. at para 31
47 Japan does mention this food security/multifunctionality argument in favour of developing countries as well, but the argument is first made in the more general section of its report: ibid. at para 37, but see para 30-36
48 This is because it specifically mentions the special safeguards provision in a different section of its submission: ibid. at para 36
49 WT/GC/W/273 supra n. 25 at para 6
50 Ibid.
51 Ibid.
52 This could also be political importance
agricultural products should be treated differently due to the 'capricious bounty of nature.'

Least-developed country views on market access were inextricably bound up with the need to protect their own markets and move away from the free trade goal. The coalition report argued for free access for all least-developed country products whatever forms they took. Kenya's paper reiterated this view, and cited the difficulties it experienced with high protection levels, which prevented its exports entering developed country markets even after the implementation of the Agreement on Agriculture. It consequently supported the Cairns' Group's vision that there should be "drastic" cuts in tariff levels.

(ii) Domestic Support

This area provided the main focus of the papers submitted under the AIE process with members' views falling into similar categories as those for market access. Like the market access debate, the focus within the AIE process was on attempting to improve the existing rules: members seemed reluctant to move away from the current format of the agriculture regime.

In essence, the debate in the AIE centred on two issues: firstly, whether the Green Box should be reduced in scope and secondly, as a corollary to the first, whether the

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54 This is in contrast to the Uruguay Round when least-developed countries sided with developing countries to predominantly operate as a homogenous group to ensure 'development needs' (broadly defined) were recognised by the other contracting parties: see T.P. Stewart (ed.): 'The GATT Uruguay Round: A Negotiating History' (1993) Kluwer
56 That is processed or unprocessed agricultural products: ibid. at Part C section A para 1
58 Ibid. at para 5
59 i.e. those who supported parity of treatment between agricultural and manufactured products and those who did not
Blue Box should be phased out.\(^6\) It is evident that domestic support was the most contentious issue. Although it does not specifically deal with the details of the discussions, it is possible to conclude from the summary that a fundamental division lay between those members who supported the retention of some form of support for domestic agriculture and those who did not.\(^6\)

As a corollary to this, those members who supported retention of some form of support also advocated its retention because of the ‘multifunctional’ character of agriculture.\(^6\)

In the Geneva Ministerial Declaration documentation all countries followed a similar pattern to their submissions on market access, with the Cairns’ Group again supporting the most fundamental revision.\(^6\) It called for “major reductions” in domestic support over the entire range of agricultural products to achieve free trade in agricultural products.\(^6\) This policy would therefore see a complete end to the use of domestic subsidies. However, the report did accept that this removal of all support for domestic agriculture would be unlikely.\(^6\) The United States partly endorsed this view.\(^6\) It reiterated the Cairns’ Group’s opinion that all “production related support” should be brought within the Agreement on Agriculture’s disciplines, and consequently, that the Blue Box exemption should be eliminated. Nonetheless, it still

\(^{60}\) G/L/322 supra n. 19 at 41

\(^{61}\) Ibid. at 41

\(^{62}\) This concept is suggested by Article 20(c) Agreement on Agriculture, which states that members can consider whether to incorporate ‘non-trade concerns’ into the agreement on its renegotiation.

Numerous AIE papers are devoted to the subject: e.g. Norway: ‘Non-Trade Concerns in a Multifunctional Agriculture’ AIE/22, Japan: ‘Non-Trade Concerns in Agriculture’ AIE/25, United States: ‘Non-Trade Concerns and Agriculture’ AIE/36, & European Community: ‘The Multifunctional Character of Agriculture’ AIE/40 supra n. 19

\(^{63}\) WT/GC/W/156 supra n. 35; see also specific documentation presented by Australia on 4\(^{th}\) May 1999 (WT/GC/W/177)

\(^{64}\) WT/GC/W/177 Ibid. at para 2

\(^{65}\) Blue Box would be completely removed under this proposal, but Green Box would be maintained, although the only measures allowed would be tariffs: Ibid. at para 3

\(^{66}\) WT/GC/W/115 supra n. 41
advocated the retention of support for agricultural trade through the Green Box, with any support fully decoupled from production.67

Although the United States argued that its Federal Agricultural and Improvement and Reform Act (FAIR) 1996 would no longer need to be justified by the Blue Box exemption because it provided fully decoupled support, this contention has been doubted following the introduction of emergency measures to cope with the period of low prices at the end of 1999.68 FAIR is due for renewal in 2003 at the proposed end of the new WTO negotiations. If the United States is unable to fight domestic pressure for the re-introduction of further support mechanisms in the new domestic agriculture regime, it may be unable to continue to support the complete removal of the Blue Box.69

An interesting addition to the debate on domestic support came from a number of transitional economies.70 They argued that the Agreement on Agriculture's provisions were merely aimed at developed and developing countries,71 and that the whole debate did not even consider transitional and post-transitional economies' needs.72 Their report further stated that Blue and Green Box exemption would be unavailable for a number of reasons,73 and could even hinder their process of redevelopment rather than helping it.74 Consequently, they submitted that they should be able to

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67 Ibid. at 3
68 USDA Press Release: 'President Clinton Announces Emergency Aid to Farmers' 12 December 1999
70 Their interest lay solely in this area: no further submissions on market access or export subsidies were submitted by them. See WTO: 'Bulgaria, Czech Republic, Hungary, Latvia, the Slovak Republic and Slovenia,' WT/GC/W/217, 28th June 1999
71 This would include least-developed countries
72 WT/GC/W/217 supra n. 70 at para 1
73 1. Agricultural production has largely collapsed in these economies and so production limiting programmes (Blue Box) and those targeted at retirement of land or farmers (Green Box) would be inappropriate.
   2. Decoupled income support, income insurance or other safety net programmes allowed by Green Box would not be practical because many of the transitional economies do not have adequate administrative mechanisms in place: ibid. at para 3
74 Ibid.
retain the use of domestic support programmes without breaching the Agreement on Agriculture.

Although this is a legitimate argument, it is unlikely to gain much support. The primary way in which such an approach could be legitimised would be by granting these countries concessions on a similar basis to developing countries. The difficulty with this approach is that such concessions are currently time-limited, and the periods are due to expire in 2005. Even if WTO members agreed to accord transitional countries developing country concessions, the five year period would not be long enough to assist redevelopment of their domestic agricultural sectors. Unfortunately, members are unlikely to agree to their exclusion from liability for longer unless the developing country exclusion is also extended. Developed country rhetoric in the Geneva Ministerial Declaration procedure submissions, indicated that this is unlikely. Japan's standpoint again reiterated their 'multifunctionality' argument. The submission repeated its belief that domestic agricultural support could not be totally divorced from the notion of "public goods," which, it argued, should always benefit from some level of support. Accordingly, Japan supported the retention of the Blue Box because it took into account this aspect of 'multifunctionality' and also acted as a transitional phase between the use of completely prohibited "amber" policies and acceptable "green" policies. Japan stated that the Blue Box was therefore necessary for that transition. In contrast to the Cairns' Group and the United States, Japan did

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75 Article 15 Agreement on Agriculture: this period is subject to renegotiation in the next Round
76 WT/GC/W/220 supra n. 43 at para 26
77 Ibid.: this seems to mean that certain goods must always be available
78 Again the European Commission supports retention of the Blue Box and advocates the extension of the 'Peace Clause' following the expiry of the 2003 deadline: European Commission Communication 7th July 1999 supra n. 45 at 7
79 Japanese categorisation
80 WT/GC/W/220 supra n. 43 at para 28
not argue for cuts in domestic support, but for each countries' case to be considered on its merits.\(^81\)

The European Communities' stance was again closely allied to the Japanese submission.\(^82\) It also supported the retention of both the Blue and Green Boxes, with a possible extension of the exemption for domestic agricultural support if it promoted the 'multifunctional' role of agriculture.\(^83\) Like Japan, the European Communities specifically argued that the nature of agricultural support measures ensured that they would have associated positive consequences for, *inter alia*, the environment and rural areas.\(^84\) Although the submission did not specifically make the point, it seemed clear that this would be an additional exemption from the existing Agreement on Agriculture's rules, which may or may not come within the current Green Box.\(^85\)

Kenya advocated a twin track approach to domestic subsidies,\(^86\) which was generally supported by the least-developed countries' coalition.\(^87\) It argued for a "degree of flexibility"\(^88\) in the application of the domestic support disciplines to developing countries, but stated that developed countries should be forced to adhere to the provisions.\(^89\) The least-developed countries' coalition went further and argued that they should be completely exempt from all the domestic support rules.\(^90\)

It is unlikely that this approach would be acceptable to developed countries because their submissions made it clear that their overall aim was to see further liberalisation

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\(^{81}\) *Ibid.*: it is unclear from the Japanese submission whether it considers that it should come within the class of country which should be able to retain the use of the Blue Box exemption

\(^{82}\) WT/GC/W/273 *supra* n. 25

\(^{83}\) *Ibid.* at para 7

\(^{84}\) *Ibid.*

\(^{85}\) The European Community only argued that measures to ensure the 'multifunctional' character of agriculture should be in the form of "direct aid with no or minimal trade impact." (*Ibid.* at para 7) Although this seems to be a reference to the Green Box exemption, it does not necessarily follow that it would fall within the existing provisions

\(^{86}\) WT/GC/W/233 *supra* n. 57 at para 6

\(^{87}\) WT/GC/W/251 *supra* n. 55 at Part C

\(^{88}\) WT/GC/W/233 *supra* n. 57 at para 6

\(^{89}\) *Ibid.*

\(^{90}\) *Ibid.* at Part C section A para 2
of international agricultural trade. A complete exemption, even for least-developed
countries, would introduce non-economic factors as it would mean prioritising
development above free agricultural trade.

(iii) Export Subsidies

The Agreement on Agriculture’s disciplines on export subsidies have been accepted
as the most effective of all its provisions.91 Nevertheless, WTO members included
further suggestions for reform in their proposals for the Millennium Round
negotiations. Despite a paper submitted by the United States,92 export subsidies do not
feature significantly in the AIE documentation.93 Like market access, the focus of the
debate was on preventing circumvention of existing disciplines, rather than
implementing a new radical regime.94 Although it is possible that the debate was more
contentious on this issue than is revealed in the documentation available, it is also
arguable that export subsidies were more challenging for the Uruguay Round than for
the renegotiation discussions. This is because of the purpose of the AIE process.

Even though difficulties over export subsidies still exist, the AIE process was
designed to identify highly contentious issues for later discussions. Arguably, the
debate over the retention of domestic support measures and protection of markets
revealed more fundamental divisions between members and so was more likely to
form the core of the debate in the AIE documentation.95 Members did include
proposals on export subsidies in their formal submissions to the General Council
under the Geneva Ministerial Declaration procedure.

92 United States: ‘Circumvention of Export Subsidies’ AIE/2 supra n. 19
93 Note the Secretariat Background Paper on the issue: AIE/S3 ibid.
94 See G/L/322 supra n. 19. at 39
95 This seems to be the case from the documentation: the majority of the papers submitted under the
AIE process focus on domestic support measures, or the retention of the existing exemptions (i.e.
Green and Blue Box) or the introduction of new ones (i.e. ‘multifunctionality’): see G/L/322 ibid. at
Annex III
The Cairns’ Group pointed out that although the Agreement on Agriculture contained specific provisions on export subsidies, only 25 members actually had reduction commitments and of these, only 14 still used export subsidies. Consequently, it argued for “the immediate elimination and prohibition” of all export subsidies. However, they were alone in this call for an immediate ban. The United States did support elimination, but it appeared to suggest that this should be phased in rather than implemented immediately. It then strengthened this with a call for better discipline on circumvention of the rules.

Kenya’s appeal for a comprehensive prohibition was also tempered by its view that developing countries should be allowed to use export subsidies under the “special and differential treatment” exceptions. This approach was also supported by the least-developed countries’ coalition.

In contrast, Japan again adopted a cautious attitude. It agreed with the United States’ view concerning the need to prevent evasion of the existing rules, but it moderated this with a suggestion for reinforcement of the existing rules, rather than a complete ban on all existing export subsidies. This opinion was shared by the European Communities who argued for the continued negotiation on export subsidy reductions. On one level, it looks as though the European Communities was adopting a liberal view regarding the need for continued reform of the export

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96 Cairns’ Group’s specific submission on export subsidies WT/GC/W/168, 9 April 1999 at para 4
97 Ibid. at para 2
98 WT/GC/W/115 supra n. 41 at 2: the United States’ submissions states that “Members should agree to pursue an outcome that will result in the elimination of all remaining export subsidies” (emphasis added)
99 Ibid.
100 WT/GC/W/233 supra n. 57 at para 4
101 WT/GC/W/251 supra n. 55 at Part C section A paras 2 & 3
102 WT/GC/W/220 supra n. 43 at para 23
103 Ibid. at para 25. Again the European Commission suggests “improvements” to the rules on export subsidies, but does not say what form these should take. What the documentation makes clear however, is that protection of the reformed CAP will be central to their negotiating position in the next negotiations: European Commission Communication 8th July 1999 supra n. 45 at 7
104 WT/GC/W/273 supra n. 25 at para 6
subsidies rules. However, their suggestion that agricultural support measures could be justified by ‘multifunctionality’ may also allow the use of export subsidies by the back door.\textsuperscript{105}

(iv) Developing Countries

Most members presented proposals in both the AIE process and the Geneva Ministerial Declaration procedure on the incorporation of development issues into the Agreement on Agriculture but the detail of these differed significantly. During the AIE process, the focus was on developing countries presenting their opinions on the implications of the Agreement on Agriculture within their economies,\textsuperscript{106} rather than on specific proposals for reform. Whilst developed countries recognised that developing countries should be accorded special treatment, in the majority of papers, it was left to the developing countries to indicate the problems they could encounter should issues like ‘multifunctionality’ be incorporated into the amended agreement.\textsuperscript{107} Developed countries concentrated more on the recognition of special and differential treatment for developing countries in their submissions under the Geneva Ministerial Declaration procedure. It is possible to identify two general trends within these documents. Firstly, a number of developed countries stated that special and differential treatment should be recognised, but did not go further and state how that should be achieved in the agricultural context. Japan and the European Communities adopted this view.\textsuperscript{108} Secondly, other developed countries stated that developing

\textsuperscript{105} Although the European Communities’ definition of ‘multifunctionality’ refers to the imposition of domestic support measures, it does not preclude the use of export subsidies if they have also have positive effects in other sectors: see European Communities: ‘Safeguarding the Multifunctional Role of EU Agriculture: Which Instruments?’ Info Paper (October 1999) (publicly available copy of the European Community’s AIE document AIE/40) supra n. 19. On the problems of using multifunctionality to achieve successful reform of the international agricultural trade regime, see Chapter 2 section A:1(c) (thesis).

\textsuperscript{106} Papers were presented on a wide range of topics: see G/L/322 supra n. 19 at 40

\textsuperscript{107} Ibid. at 46; see also India: ‘Issues of Concern to Developing Countries’ AIE/30 ibid.

\textsuperscript{108} The European Communities specifies that this must be achieved in a general context: WT/GC/W/273 supra n. 25 at para 8; see the European Communities’ general paper on special and
nations could only be assisted if they were fully integrated into the liberalisation process because only free agricultural trade would result in significant benefits. The Cairns’ Group’s proposal in particular argued that special and differential treatment meant variable implementation commitments coupled with technical support, rather than complete immunity from the Agreement on Agriculture’s rules. Both these approaches can be contrasted with the views expressed by developing and least-developed nations.

These countries’ proposals concentrated on promoting specific methods to achieve special and differential treatment. The Venezuelan paper called for ‘concrete actions’ and promoted the adoption of new ‘market-oriented policy instruments’ that could be used to improve market access for developing countries. Specific action was also included in the Kenyan paper. It argued for the positive incorporation of measures to promote food security, especially concentrating on the reduction of tariffs on agricultural products that were important to developing and least-developed countries. On a general level, it also focused on the core of the difficulties of promoting the needs of developing and least-developed countries within the WTO Agreements.

This thesis has already identified that the Decision in Favour of Developing Countries and the Decision on Measures Concerning the Possible Negative Effects of the
Reform Programme on Least-Developed and Net-Food Importing Countries only contain ‘best practice’ for developed nations, which is not reinforced by a rule structure.\(^{116}\) Kenya’s paper also recognised this significant deficiency and argued that these general exhortations should be replaced by enforceable obligations.\(^{117}\) In their combined submission, the coalition of least-developed nations\(^{118}\) again acknowledged the lack of enforceable obligations for the promotion of special and differential treatment.\(^{119}\) Accordingly, their proposals focused on creating the appropriate rules.\(^{120}\) In agriculture, they sought to ensure security through specific “duty and quota-free access” for all products originating in such countries, through their exemption from the reduction commitments in market access, export subsidies and domestic support and through the receipt of technical assistance.\(^{121}\)

(b) Problems with Using the AIE Process and Geneva Ministerial Declaration Procedure as Models for Reform

Although the AIE and Geneva Ministerial Declaration papers are comprehensive, they are unable to provide a coherent basis for the reform of the Agreement on Agriculture. There are two main reasons for this. Firstly, general problems associated with the methods adopted and secondly, complications connected to the specific wording of the proposed solutions.

The primary problem with the methodology adopted by members is that it is difficult to readily identify a consensus which could be adopted as a single ‘member model’ on which a modified Agreement on Agriculture could be based. This is because there is a fundamental divergence in the proposals between those members who regard

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\(^{116}\) See Chapter 1 section B:1 (thesis)

\(^{117}\) WT/GC/W/233 \textit{supra} n. 57 at para 37

\(^{118}\) WT/GC/W/251 \textit{supra} n. 55

\(^{119}\) \textit{Ibid.} at Part A para 7

\(^{120}\) \textit{Ibid.} at Part B para 5

\(^{121}\) \textit{Ibid.} at Part C subsection 1
agriculture as a distinct sector requiring special treatment, and those members who argue that the WTO rules on manufactured goods should apply equally to agricultural products. Inevitably, this is a reiteration of the traditional protectionism/free trade debate seen so many times throughout the history of international agricultural trade regulation.

It is possible to argue that the Seattle draft Ministerial Declaration on agriculture could be viewed as an effective synthesis of the AIE and Geneva Ministerial Meeting positions, therefore providing the necessary basis for consensus, but the extent to which this could be used as the model is debatable. Following the breakdown of the negotiations in December 1999, the European Communities made it clear that it was reluctant to adopt that draft as the basis for the reconvened talks that commenced in March 2000.

Secondly, the papers only offer suggestions for change within the existing framework of the Agreement on Agriculture. There is no proposal for a drastic review of the status quo, but merely a furtherance of the reform programme initiated by the Uruguay Round through further cuts in domestic support levels, market access and export subsidies. The most surprising omission here is that no specific suggestions were presented for the reform of the SPS Agreement. As Article 14 inextricably links that agreement to the Agreement on Agriculture, this is a significant problem.

The justification for this omission could lie in the structure of the built-in agenda. The SPS Agreement’s terms specify that the review of its operation should take place in

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122 i.e. rules
123 No formal text of the Seattle Draft exists, but an informal version was reported in Agra Europe: see Agra Europe: ‘Final revision of WTO draft text on agriculture’ No. 1879, 10 December 1999 at EP/5
124 See WTO: ‘First Special Session of the Committee on Agriculture: Report by the Chairperson to the General Council’ G/AG/NG/1, 31 March 2000
125 Note that APEC did suggest an alternative method of tariff calculation, but this was not referred to in any of the members individual submissions in relation to the Agreement on Agriculture: WTO: ‘Preparations for the 1999 Ministerial Conference: APEC’s “Accelerated Tariff Liberalisation” ATL Initiative’ WT/GC/W/138, 26 January 1999
126 Agreement on Agriculture
The Committee on Sanitary and Phytosanitary Measures did suggest a number of changes following the review, but these were primarily to notification procedures and the fundamental terms of the agreement were not altered. In addition, the review process only concentrated on the provisions of the SPS Agreement in isolation and therefore did not go further and look at its important interaction with the Agreement on Agriculture. This omission is significant because it has already been demonstrated that agricultural trade disputes are now mainly focussing on SPS measures.

On one interpretation members’ failure to offer alternative solutions for international agricultural trade regulation is inevitable because the Agreement on Agriculture proved so difficult to conclude during the Uruguay Round, that it would be too time consuming to unravel it and start again in the renegotiation discussions. However, Chapter 1 of this thesis has already identified defects within the existing agreement that would require more significant changes than merely tinkering with the wording of the rules.

Notwithstanding the general difficulties, there are fundamental problems within the wording of the suggestions themselves. Most notably, the European Communities and Japan’s suggestion concerning the retention of agricultural support measures predicated on the ‘multifunctionality’ of agriculture.

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127 Article 12:7 SPS Agreement states that review will take place three years after the implementation of the Agreement, i.e. in 1998. WTO: ‘Review of the Operation and Implementation of the Agreement on the Application of Sanitary and Phytosanitary Measures’ G/SPS/12, 11 March 1999; see also “WTO Committee completes review of health-related agreement” WTO Focus No. 38 March 1999 at 10

128 Hereafter SPS Committee

129 See supra n. 127 at Annex A

130 This could be because the Peace Clause in Article 13 Agreement on Agriculture prevents the core of members’ agricultural policies being subject to dispute settlement proceedings if they come within the criteria in the article: see Chapter 1: B(2)(b)(b) (thesis) for a discussion of the significant Hormone dispute

131 On the agricultural discussions in the Uruguay Round see Stewart supra n. 54 at 131-254

132 E.g. problems with genetically modified food and the environment may require additional agreements: see Chapter 4 generally (thesis)
c. Incorporating ‘Multifunctionality’ into the Agreement on Agriculture

The term ‘multifunctionality’ was originally adopted by both Norway and the European Communities in papers submitted under the AIE process. In order to understand the implications of incorporating the concept into the Agreement on Agriculture in the format suggested by members, it is necessary to explore the origins of the term.

Article 20 Agreement on Agriculture identifies a number of issues that members might wish to take into account when renegotiating the terms of the agreement. Article 20(c) specifically states that members can determine whether ‘non-trade concerns’ should be incorporated into the agreement. There is no further guidance on the meaning of this term in the Agreement on Agriculture, nor any examples of what should be included or how the term should be implemented. Although many members submitted papers under both the AIE process and Geneva Ministerial Declaration procedure referring to the topic, trying to identify a consensus on the issue was further complicated by disagreement over the correct term to use. Whilst the majority of members used ‘non-trade concerns,’ mirroring the wording of the Agreement on Agriculture, others, most notably Japan and the European Communities, adopted ‘multifunctionality.’

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133 The following discussion is based on work by the author of this thesis: see Smith: “Multifunctionality and Non-Trade Concerns in the Agriculture Negotiations” (2000) 3(4) JIntEconL 707; see also Freeman & Roberts: ‘Multifunctionality: A Pretext for Protection?’ (1999) 3 ABARE Current Issues 1
134 AIE/22 supra n. 19
135 AIE/40 ibid.
136 While Japan used the term ‘non-trade concerns’ in its initial AIE documentation, it switched to ‘multifunctionality’ in its Geneva Ministerial Declaration submission: see AIE/25 ibid. & WT/GC/W/220 supra n. 43
137 See WT/GC/W/220 ibid. at paras 11-14
138 See AIE/40 supra n. 19 & WT/GC/W/273 supra n. 25 at para 7
Initially, members used the terms interchangeably in the AIE process. However, in a shift from this, the European Communities argued in its submission\textsuperscript{139} that ‘multifunctionality’ was a distinct concept and was actually a specific example of a ‘non-trade concern.’\textsuperscript{140} Two difficulties arise from the European Communities’ interpretation: primarily, what is ‘multifunctionality’ in this context? In addition, is it possible to amend the Agreement on Agriculture to reflect the incorporation of the term and if so, is there consensus amongst members over how this can be achieved?

Distilling the European Communities’ and Japan’s arguments, it is possible to see that at the core of their definition of ‘multifunctionality,’ is the retention of existing agricultural support measures where they sustain other ‘non-agricultural’ goals such as “feed, food and fibre...including industrial use of agricultural products,” and the preservation of the environment and rural areas.\textsuperscript{141} Japan’s submission is more detailed,\textsuperscript{142} and divides the definition of ‘multifunctionality’ into three elements: firstly, in a similar way to the European Communities’ paper, the Japanese paper starts by stating that where agricultural support measures also have further positive effects in other sectors, this will inevitably show the multiple benefits, or ‘multifunctional’ nature of the agricultural support offered. At this point, there is no substantive difference between the terms ‘multifunctionality’ and ‘non-trade concerns.’ However, the second element of the Japanese definition reveals a distinction.

Japan argues that the ability to positively affect other sectors through the use of agricultural support measures automatically justifies a member retaining that

\textsuperscript{139} WT/GC/W/273 \textit{ibid.}
\textsuperscript{140} AIE/40 \textit{supra} n. 19 at 1
\textsuperscript{141} WT/GC/W/273 \textit{supra} n. 25 at para 7
\textsuperscript{142} WT/GC/W/220 \textit{supra} n. 43 at paras 11-14
support.\textsuperscript{143} To meet potential criticisms that this approach would lead to a shift
towards protectionism, Japan then suggests three conditions that must be reached
before agricultural support would be deemed to be ‘multifunctional.’\textsuperscript{144} In essence,
these conditions cumulatively establish a close causal link between the agricultural
support and the effect in the non-agricultural sector. So the support must be “closely
related to” agricultural production,\textsuperscript{145} the positive effect cannot generally be attributed
to an outside phenomenon unrelated to the support and finally that the value of the
positive effect in the non-agricultural sector is widely recognised by other WTO
members.\textsuperscript{146}

From the AIE and Geneva Ministerial Declaration documents, it is clear that there
was a consensus amongst members that agricultural support measures can have
positive consequences in other sectors.\textsuperscript{147} The major disagreement between members
was over the implementation method.\textsuperscript{148} Both the European Communities and Japan
seem to be supporting the retention of agricultural support as a separate category,
which would not necessarily come within the existing exemptions in the Agreement
on Agriculture.\textsuperscript{149} In essence, ‘multifunctionality’ in the way defined by members
becomes a pseudonym for the retention, or even expansion of agricultural
protection.\textsuperscript{150}

\textsuperscript{143} Ibid. at para 13
\textsuperscript{144} Ibid. at para 14
\textsuperscript{145} Ibid.
\textsuperscript{146} Ibid.
\textsuperscript{147} See India: ‘Food Security-An Important Trade Concern’ AIE/44 \textit{supra} n. 19
\textsuperscript{148} Note the United States’ strong opposition to ‘multifunctionality,’ although they do support the
general consideration of ‘non-trade concerns;’ see Economic Research Service, USDA: ‘The Use and
Abuse of Multifunctionality’ November 1999
\textsuperscript{149} See WT/GC/W/220 \textit{supra} n. 43 at paras 12-13
\textsuperscript{150} Both Japan and the European Communities do not necessarily suggest that agricultural support
justified by its multifunctional character has to come within the Green Box to be exempt. This seems to
be an argument for the creation of further exemptions to the Agreement on Agriculture and accordingly
a potential expansion of justifiable support. It is not clear from their AIE submission whether such
support would come within the Aggregate Measurement of Support (AMS) calculation for the
reduction commitments under Article 6 Agreement on Agriculture
Despite inevitable difficulties over the interpretation of the term, the ‘multifunctionality’ issue is relatively straightforward to understand. This is because the crux of the problem is agricultural trade regulation’s traditional battle between those members who wish to retain some form of protection and those who do not. By cutting through the rhetoric and distilling the issue to this basic level, it is then possible to see that the ‘multifunctionality’ debate is merely an aspect of the greater difficulty, which is identifying a sufficient consensus between members over how the Agreement on Agriculture should be modified: should the sector be regarded as special, so that a residual level of protection will always be necessary, or should there be equality of treatment between manufactured and agricultural products.

Although members agree that agricultural support will benefit other areas, there is no consensus on whether that should be recognised through a formal exemption. Clearly, adopting an additional exception to the existing agreement without sufficient safeguards will inevitably result in retention of agricultural support, which is unlikely to benefit developing countries that already experience difficulties accessing developed country agricultural markets. The problem is that under the free trade goals specified in the Preamble to the Agreement on Agriculture, the reintroduction of support measures based on the multifunctional character of agriculture is synonymous with protectionism and therefore automatically outside the scope of the Agreement. Consequently, introducing multifunctionality into the existing rule structure as a ‘quick fix’ is untenable without re-evaluating the rest of the agreement’s rules.
d. Negotiation Proposals Submitted to the Second Special Session of the Committee on Agriculture

The proposals presented at the second session of the Committee on Agriculture do reflect the general positions adopted by members in the AIE process and Geneva Ministerial Declaration procedure, but it is also possible to see a subtle change in emphasis. The submissions that have been put forward are much more specific and some have even suggested alternative methods to improve agricultural trade regulation beyond that already included in the Agreement on Agriculture. These do address some of the problems identified by this thesis, but further difficulties remain.

At the early stage in the talks, only the United States presented comprehensive proposals specifying its exact stance on all issues. Other members submitted limited proposals. There is insufficient material to allow a detailed discussion of members’ new positions under the three headings of the Agreement on Agriculture, but some preliminary observations can be made.

The same clear division from the AIE process and Geneva Ministerial Declaration procedure between those members who support the retention of all the existing exemptions from the Agreement on Agriculture and those who do not is apparent.

Both the European Communities and Japan, in line with their positions in the AIE and

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151 29-30 June 2000: see G/AG/NG/2 supra n. 10
152 See the European Community’s suggestion that the OECD’s Policy Evaluation Matrix (PEM) be used to as the basis for the assessment of the impact of support measures: See Blue Box reform G/AG/NG/W/17, 28 June 2000 & at para 7
155 i.e. market access, domestic support and export subsidies
Geneva Ministerial Declaration procedure, argue that the Blue Box should be retained.

The European Communities claims that measures exempted by the Blue Box have not been shown to be trade distorting, and that it has actually promoted the pursuit of more liberal policies in certain cases. Japan similarly advocates the retention of the Blue Box, but also seems to be encouraging its extension. Although Japan’s comments are only made in a statement on other members’ negotiating proposals, even in this preliminary phase it does state that the Blue Box should be used as a true intermediary stage between the existing prohibited measures classified as the ‘amber’ measures and the fully exempt measures in the Green Box.

The current Blue Box only contains the United States’ deficiency payments and the European Communities’ partially decoupled support payments. Consequently, the only way to create an intermediate stage would be to change the Blue Box from a specific exemption for these policies, and to open it up to other members. Clearly this is highly controversial and unlikely to be acceptable to others.

The United States’ rejects this proposal. In a new and innovative move away from its tentative position under the AIE and Geneva Ministerial Declaration documentation, it argues for a complete change to the way domestic support is protected by the existing exemptions in the Agreement on Agriculture. It suggests the control of all domestic support measures, and seems to argue for the elimination of the Blue and

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156 It points to the reform of its Common Agricultural Policy (CAP) and the changes to its domestic agricultural policies suggested by Agenda 2000: see G/AG/NG/W/17 supra n. 152 at para 5
157 It states that its own negotiating proposal is still being considered internally: WTO: ‘Second Special Session of the Committee on Agriculture 29-30 June 2000-Statement by Japan’ G/AG/NG/W/27, 11 July 2000, at 1
158 Ibid. at para 1
159 e.g. the Cairns’ Group comments on the general proposals specifically condemns retention of the Blue Box in any form: WTO: ‘Statement by New Zealand’ G/AG/NG/W/29, 11 July 2000
160 G/NG/AG/W/16 supra n. 153 at 1
161 Including those not already bound in members’ schedules: ibid. at 1
Green Boxes. To increase transparency, the United States recommends domestic support measures should be categorised as either exempt or non-exempt. Support would only be in the former category if it came within a specific list of agreed measures, rather than being justified by the existing vague criteria in the Green Box.

This proposal marks a change to the existing rules in the Agreement on Agriculture and so must be regarded as a move towards making the current regime more effective. However, the extent to which it could form the basis of reform is uncertain. It has already been heavily criticised by the European Communities and other members have expressed reservations about completely unravelling the Agreement on Agriculture’s terms on this difficult issue. The favoured approach instead is amendment of the existing exemptions to promote further reductions in support levels, enhance special and differential treatment and incorporate non-trade concerns.

The Cairns’ Group again suggests the elimination of export subsidies, but argues that this will only be possible if all countries are involved. This has already been rejected by developing countries, who have been very proactive in putting forward their own negotiating proposal. In a definite shift from the AIE and Geneva Ministerial Declaration documentation, these countries argue that despite developed country rhetoric, there has been few concrete proposals on how special and

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162 Ibid. at 2
163 Ibid. at 2
164 i.e. support which has “no, or at most minimal, trade-distorting effects or effects on production:” Annex 2:1 Agreement on Agriculture
165 For the criticisms of the current regime see Chapter 1: B (thesis)
166 G/AG/NG/W/24 supra n. 154 at 2
167 See G/AG/NG/W/29 supra n. 159 at 2
168 G/AG/NG/W/11 supra n. 154
169 i.e. no variable implementation commitments for developing and least-developed countries: ibid. at 2. Note that the United States also supports the elimination of export subsidies and couples this with suggestions for the control of ‘export-state trading enterprises’ export taxes and export credits: see G/AG/NG/15 supra n. 153 at 3-4
differential treatment will be achieved in agricultural trade regulation.\textsuperscript{170} They therefore suggest a specific exemption through the creation of a ‘development box.’\textsuperscript{171} The proposal again reiterates the general policy language found in the existing Agreement on Agriculture and the Decision on Measures Concerning the Possible Negative Effects of the Reform Programme on Least-Developed and Net-Food Importing Developing Countries, but it goes on to suggest the adoption of a ‘positive list approach’\textsuperscript{172} which would allow such nations to identify which products they wanted to subject to the Agreement on Agriculture’s rules. All their other products would be outside its scope.

They further advocate a reorientation of the special safeguard clause so that it would only be available to developing and least-developed countries, rather than developed ones.\textsuperscript{173} This approach would force the creation of special and differential treatment in agriculture, but has already been doubted by several members, primarily the developed ones. Both the Cairns’ Group\textsuperscript{174} and the European Communities\textsuperscript{175} have expressed concern that developing countries wish to be excluded completely from some areas of international agricultural trade regulation. As consensus must be reached on the changes to the Agreement on Agriculture, the ‘development box’ is unlikely to be accepted as an appropriate model.

In contrast, developed country ideas for the promotion of special and differential treatment revolve around variable implementation commitments, rather than a fundamental reconsideration of the way in which developing and least-developed

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{170} WTO: ‘Agreement on Agriculture: Special and Differential Treatment and a Development Box: Proposal to the June 2000 Special Session of the Committee on Agriculture by Cuba, Dominican Republic, Honduras, Pakistan, Haiti, Nicaragua, Kenya, Uganda, Zimbabwe, Sri Lanka and El Salvador’ G/AG/NG/W/13, 23 June 2000
\item \textsuperscript{171} Ibid. at 4
\item \textsuperscript{172} Ibid. at 4
\item \textsuperscript{173} Ibid. at 5
\item \textsuperscript{174} G/NG/NG/W/29 supra n. 159 at 2
\item \textsuperscript{175} G/AG/NG/W/24 supra n. 154 at 3
\end{enumerate}
\end{footnotesize}
countries are dealt with.\textsuperscript{176} Canada argues in the introduction to its market access proposal\textsuperscript{177} that as its suggestions for reform benefit all countries, there is no need to make specific provision for developing and least-developed nations.\textsuperscript{178} Inevitably, developing countries will see this as a lukewarm alternative, which is more likely to maintain the status quo than radically meet their needs. It is therefore unlikely to provide an appropriate model for reform.

2. Summary and Conclusions

Analysis of all members’ suggestions for reform of the Agreement on Agriculture reveals it is not possible to identify sufficient grounds for consensus so that a single model for reorganization can be constructed. Instead, three models emerge. These can be broadly categorised as the special sector model, the integrated model and the development model.

The first describes members who support liberalisation, but who regard agriculture as a special sector requiring the maintenance of some form of support. The most obvious proponents of this model are the European Communities and Japan, but despite the rhetoric, the United States does not favour complete removal of all support and so its proposals can also be placed into this model.

The integrated model describes those members who advocate the removal of all forms of agricultural support and the eventual equation of the rules on agricultural and manufactured products. Here, the most obvious followers would be the Cairns’ Group. Finally, the development model describes those members who argue for special treatment for developing countries. Although all members support special and differential treatment to some extent, only a limited number would actively support


\textsuperscript{177} Supra n. 154

\textsuperscript{178} WTO: ‘Intervention to introduce Canada’s negotiating proposal on market access’ G/AG/NG/W/23, 11 July 2000 at 3
the use of previously prohibited measures by these countries. Clearly the most rigorous supporters of this proposal are the developing nations themselves. Even the Cairns’ Group, who has a number of developing country members, is reluctant to go as far as this.

Unfortunately, there are problems with all three suggestions. Firstly, both the special sector and integrated models do not really provide comprehensive suggestions for the treatment of developing nations. Even though proposals are made, in the special sector model these are predicated on the retention of agricultural support without an adequate safety net for such countries. This means that developing countries will suffer because they will still be unable to penetrate developed country markets. In the integrated model, reduction of agricultural support is suggested, but this is for all countries irrespective of the stage of development. As developing countries are so dependent on agricultural production to industrialise, they have argued that they need to retain some form of agricultural support so that cheaper developed country products do not swamp their markets. Inevitably, the developing country model would address the issue, but as it is unlikely to be acceptable to the major developed country WTO members, advocating it as a basis for reform is unrealistic.

Secondly, it is becoming increasingly clear that agricultural trade is facing new challenges from biotechnology, environmental preservation and food security issues. Although some of the proposals do address these issues, treatment of them is not comprehensive and there is little on the appropriate balance between traditional trade, or economic issues and these new issues. It appears from the proposals, that many members have suggested that these areas need to be addressed and then have not gone further and proposed how this might be achieved.
Finally, none of the three models address the institutional infrastructure question. This thesis has already identified that international agricultural trade liberalisation can only be successful if the rules are also adequately supported by more effective regulatory systems, such as dispute settlement procedures. No attempt has been made to do this in the agricultural context.

3. Amending the Agreement on Agriculture: Commentators' Models

Leading academics in the field have put a number of suggestions for reform of the Agreement on Agriculture forward. Most notably, Kym Anderson\(^{179}\) and Tim Josling\(^{180}\) have both contributed significant proposals to move the debate forward. All the schemes can be placed into two general categories: firstly, those proposals that support change to the Agreement on Agriculture generally and those which focus on the specific needs of developing countries.

a. General Proposals for Change

Josling presents the earliest significant paper advocating changes to the Agreement on Agriculture.\(^{181}\) Writing in 1998, he argues that agricultural markets had “undergone a subtle but important structural change” as a result of the modification of domestic policies pursuant to the Agreement on Agriculture.\(^{182}\) He states that the constraints in the agreement stopped WTO members exacerbating existing agricultural price fluctuations through misguided protectionist policies.\(^{183}\) Accordingly, prices would remain relatively stable and significant periods of depressed prices would therefore be

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\(^{180}\) Josling supra n. 69

\(^{181}\) Ibid.

\(^{182}\) Ibid. at 80

\(^{183}\) Ibid.
avoided.  Although he recognises that "[n]atural shocks" could still cause instability, the removal of "man-made" disruptions is a significant step forward. However, he feels that further reform of the Agreement on Agriculture would still be necessary which should concentrate on preventing prices rising too high by removing restrictions on imports. As the Uruguay Round had already attempted to liberalise the well protected cereal markets, the next negotiations could then also focus on opening up the sugar and livestock sectors.

Josling's ten point plan follows the current Agreement on Agriculture closely. He advocates enhancement of market access through tariff reductions, similar significant cuts in domestic support and the complete elimination of export subsidies. His plan also identifies the need to modify the existing agreement to take the changes to the nature of agricultural trade into account. Josling argues that trade in agricultural goods is moving away from primary products to processed goods. The increasing number of disagreements concerning genetically modified food products can illustrate this. Although Josling points to this new trend, he does not provide any specific suggestions for change, but merely states that this must be an area that should be considered by the WTO.

Josling strongly supports ensuring developing countries become "full partner(s)" in the reform of the Agreement on Agriculture. However, his proposals are predicated on those countries adhering to the existing rules, rather than on creating any special

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184 Ibid.
185 Ibid.
186 Ibid. at 81
187 Ibid.
188 Ibid. These remained relatively untouched in the Uruguay Round: Ibid. at 36
189 Ibid. at 120-127
190 Ibid. at 120
191 Ibid. at 122; he does draft a statement of best practice, but this is a 'wish-list' rather than a set of substantive rules. It is clear that it could form the basis of an amended agreement, but is not substantive in its current form: see Ibid. at 124
192 Ibid. at 122
regime for them. Although he does not specifically make the point, he seems to be supporting variable implementation commitments as his preferred method to achieve special and differential treatment.

Anderson, Erwidodo and Ingco also base their reconsideration firmly within the confines of the existing Agreement on Agriculture. Their proposals mirror Josling’s as they propose further cuts to domestic support levels through possible elimination of the Blue Box exemption and the implementation of further constraints to the policies, which would be eligible for the Green Box exemption. Greater market access is suggested by reducing bound tariffs by levels which would eliminate the differential created by dirty tariffication. This reduction could be achieved using three methods of tariff reduction, which could all potentially achieve positive changes in the level of bound tariffs. For unbound tariffs, there is concern that failure to accurately regulate tariff rate quotas, could again lead to significant problems for market access. This is because the amount of agricultural products, which would enjoy the benefits of the quota scheme, would be fixed. If the method for their allocation is not transparent, then the system could easily favour some countries products over others. Developing countries are particularly likely to suffer under this regime. The paper also calls for the complete elimination of export subsidies.

Overall, Anderson, Erwidodo and Ingco caution against completing ignoring “traditional agricultural market access liberalisation” and suggest that this should

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193 Ibid. at 122
194 Supra n. 179
195 Ibid. at 10
196 Ibid. at 10
197 Ibid. at 11
198 1. An across the board tariff reduction by up to 50%; 2. Adopting the ‘Swiss Formula’ from the Tokyo Round where the reductions are undertaken per tariff item and calculated on the basis of that item’s existing tariff level; 3. The zero for zero option: ibid. at 11
199 Ibid. at 12
200 Ibid. at 10
201 Ibid. at 19
form the core of any changes to the regime. On their interpretation, agricultural trade would be liberalised through further reductions in the core disciplines: market access, domestic support and export subsidies. Whilst they highlight the importance of new areas, like genetically modified food, they are reluctant to support changes to the Agreement on Agriculture to incorporate those. Their only suggestion for a consideration of these wider areas would be to provide trade-offs in other sectors for further liberalisation of the Agreement on Agriculture.

Anderson progresses his ideas in a joint paper with Hoekman and Strutt. Again, the paper advocates greater cuts in levels of agricultural protection within the existing categories of support in the Agreement on Agriculture, with elimination of the Blue Box exemption. However, it goes further than the previous paper and recognises the importance that other sectors can have in ensuring that agricultural trade regulation is effective. The paper focuses broadly on services because it argues that enhancement of non-agricultural trade will inevitably benefit agriculture. This is because farmers are heavily dependent on services to sustain their profits: they will require financial services to buy important equipment, better communication facilities and also the ability to readily transport goods for export. On one level, these are important considerations for both agricultural and non-agricultural sectors. However, Anderson, Hoekman and Strutt argue that there is a more important nexus between agriculture and services because of the trade-offs that can be agreed if both sectors are included in the negotiations.

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202 Ibid. at 19
203 Supra n. 179
204 Ibid. at 11
205 Ibid. at 18
206 Ibid. at 14; they also argue that competition regulation would be a necessary part of the services negotiations. This is because as farm sizes increase, large farmers could exploit their dominant positions to drive smaller farmers out of business
207 Ibid. at 15
208 Ibid.
The special needs of developing and least-developed countries are recognised in the paper, but it argues that if all countries participate equally within the talks, then this will promote greater reductions in the levels of protection. This is because all members would be agreeing to make the reductions and so, arguably, there would be no need to retain protection if no one else was.209

One of the most influential proposals for reform comes from the International Policy Council on Agriculture, Food and Trade (IPC). This is a group of independent experts from approximately 20 countries, which meets “to develop policy recommendations to address critical issues facing the world’s agricultural system.”210 As the IPC’s report is constructed on the basis of consensus, it is inevitably couched in very general terms. Its recommendations are wide ranging, and include comprehensive proposals on the traditional areas in the existing Agreement on Agriculture, as well as suggestions for new issues.211

Like the previous papers,212 it advocates significant reductions in tariffs beyond those built into the Agreement on Agriculture to enhance market access and that export subsidies should be eliminated immediately. However, the paper does recognise that the latter goal may be problematic and so suggests incorporating a timetable for elimination into the agreement instead.213 Its proposals for domestic support differ slightly from the previous suggestions.

The IPC does encourage reductions in the Aggregate Measurement of Support (AMS), even though it acknowledges that as an instrument in itself, it has only maintained existing protection levels, rather than led to momentous changes in
support levels. Nevertheless, the report does recognise that even holding support at one level is an achievement that was not possible prior to the Agreement on Agriculture.\textsuperscript{214} Although it also suggests the gradual elimination of the Blue Box,\textsuperscript{215} the IPC proposal seems to be arguing for an extension to the Green Box, to take some ‘non-trade concerns’ into consideration. Most notably, preservation of the environment and rural areas are specifically referred to.\textsuperscript{216} If this suggestion leads to an extension in the level of support, then this potentially could have a detrimental effect on developing and least-developed countries and undermine special and differential treatment provisions.

Josling and Anderson have also made similar suggestions for the incorporation of disciplines on state trading enterprises and export taxes and credits in previous papers. In contrast to the earlier papers, no specific proposals on special and differential treatment are made.

**Problems with These Approaches**

There are a number of general problems with all these proposals. The major difficulty is that there is no real attempt to solve the core problems. Although it is clear that further reductions in the overall levels of support are desirable, specifying the degree of the cuts will not necessarily rectify all the problems because these suggestions are predicated in the existing free trade principle, rather than on any fundamental reconsideration of the problem.

It has already been demonstrated by this thesis that members are protecting their domestic agricultural sectors. This has already occurred through the use of SPS measures and it is evident that the possible incorporation of non-trade concerns will introduce some level of protection, even if the rules specify further reductions.

\textsuperscript{214} Ibid. at 28
\textsuperscript{215} Ibid.
\textsuperscript{216} Ibid.
Anderson, Hoekman and Strutt, the IPC and Josling do suggest that the SPS Agreement should be applied equally to food and non-agricultural products. Even if this were the case, this approach would not resolve the issue. The evidence from the dispute settlement reports on the SPS Agreement shows that members are still protecting their agricultural sectors irrespective of the stringent interpretation of the tests by the panels and Appellate Body. There is no reason to suggest that treating agricultural and manufactured products the same way would prevent members trying to retain protection in some form. More importantly, such homogeneity does not address the reasons why members protect their agricultural sectors because these solutions are based on the assumption that free trade should be the goal. This means the same type of regulation is retained which has already proven problematic under GATT. Any solution must go back to the fundamental cause of ‘protectionism’ to resolve the difficulties.

Likewise, the needs of developing countries are not specifically addressed, but instead are subsumed into the general discussion. The assumption appears to be that developing countries will automatically benefit through further reductions in support levels. Whilst this may be the case, it may not be enough to promote active growth. Positive action may be necessary to achieve food security, protect their rural populations, and address their traditional market access concerns.

In addition, none of the solutions consider the importance of the institutional infrastructure of the WTO. This is an important omission as it has already been demonstrated that one of the causes of GATT’s failure to regulate international agricultural trade effectively was due to its inadequate enforcement mechanisms. The WTO does have much better systems in place, but it is not necessarily certain that these will be adequate enough to ensure the rules are not circumvented. Primarily, the
solutions concentrate on the mechanics of agricultural trade regulation through the introduction of further reductions to domestic agricultural support levels. This focus on an 'economic' solution does not address the difficult interaction of the various agreements which has proved so problematic in the past. It is important to ensure that the rules themselves operate effectively, but it is equally critical to consider the interaction of the agreements to construct a comprehensive regulatory system. Clearly, all the suggestions go some way to alleviating the difficulties, but they are not comprehensive enough.

b. Developing Country Models

It has been established that the academics’ models for change to the Agreement on Agriculture discussed above do not directly address the special needs of developing countries. This thesis has argued that the WTO's agriculture regime will only be effective when it addresses all the requirements of those countries. On this interpretation, the academics’ models do not go far enough. However, other commentators’ suggestions have offered models for change aimed at addressing the development question.

In a radical proposal aimed at fundamentally reconsidering all the WTO's rules on developing and least-developed countries, Stiglitz argues that the development question will only be settled when the special needs of such countries are taken into account through direct action. He maintains that the new regime must go beyond variable implementation commitments and recognise that it will be appropriate to have definite rules for developing and least-developed countries that takes their special status into account.

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217 Stiglitz: ‘Two Principles for the Next Round, or, How to Bring Developing Countries in from the Cold’ Geneva, 21 September 1999
218 Ibid. at 13
Stiglitz’s views on agricultural trade are particularly far-reaching. He states that developing countries have a comparative advantage in agricultural products.\textsuperscript{219} To achieve his goals of ‘comprehensiveness’ and ‘fairness’,\textsuperscript{220} he argues that all sectors must be included. If the developed nations are only allowed to choose those sectors that they want reformed, then they are less likely to offer significant concessions in agriculture.\textsuperscript{221} The proposals pertinent to agriculture are that tariffs should be subject to further cuts, but that these should be coupled with a change in the instruments that members can use. In common with the general proposals, he advocates the elimination of export subsidies, but also seems to be demanding that domestic subsidies are removed.\textsuperscript{222}

Although Stiglitz’s recognises the need to include specific rules to ensure that developing countries’ needs are met, there are problems with his approach. His proposal is very wide ranging, and he does not focus specifically on agricultural trade, but suggests that many other aspects of developing countries’ treatment be revisited. This could cause difficulties if WTO members are reluctant to reopen so many of the agreements during the next multilateral trade negotiations in this way.\textsuperscript{223} The WTO is certainly keen to promote the needs of developing countries, but such a fundamental reconsideration also depends as much on the political will of the members, as it does on the creating an appropriate solution.\textsuperscript{224} Inevitably, this general approach means that the minutiae of the interaction between the agreements is not addressed. However,

Stiglitz’s approach advocates a fundamental reconsideration of all aspects of the agreements.

\textsuperscript{219} Ibid. at 19  
\textsuperscript{220} Ibid. at 18  
\textsuperscript{221} Ibid. at 22; Stiglitz observes that “(a)fter they have already cherry-picked their favored sectors, what can the United State and the European governments hope to gain in compensation for the political costs of liberalizing the agricultural sector?”  
\textsuperscript{222} Ibid. at 32  
\textsuperscript{224} Comments by Dr. Supachai Panitchpakdi Director General designate of the WTO: International Law Association session \textit{ibid.}
regulatory system. This is important because he moves the debate away from tinkering with the existing system, towards addressing the problem itself. Although his approach may be too oriented towards developing countries to be helpful for agricultural trade as a whole, it shows the benefits of a new way of thinking in the regulation of an area which has always proved problematic for the GATT and is increasingly difficult for the WTO.

Other commentators have also put forward proposals for change, but their value to international agricultural trade regulation in general can be questioned. Binswanger and Lutz address the difficult relationship between agriculture and developing countries. They focus primarily on changes to the Agreement on Agriculture and suggest that such countries will only benefit when market access is enhanced, thus building their proposal on the existing free trade goal. Their proposals on export subsidies and domestic support measures mirror those advocated by Anderson and Josling, however, their scheme to achieve special and differential treatment for such developing countries is much more radical.

Binswanger and Lutz argue that to achieve special and differential treatment, there should be faster reduction commitments for developed countries. Although variable implementation commitments are already built into the Agreement on Agriculture, Binswanger and Lutz' suggestion would go further, as they advocate solutions targeted at specific countries. In the case of preferential treatment, they argue that it

225 H. Binswanger & E. Lutz: 'Agricultural Trade Barriers, Trade Negotiations and the Interests of Developing Countries' paper presented at the High-Level Round Table for UNCTAD X in Bangkok, February 2000 (3 November 1999)
226 Ibid. at 11
227 Ibid. at 11
228 Anderson, Erwidodo & Ingco supra n. 179
229 Supra n. 69
230 Article 15 Agreement on Agriculture
should be possible to focus on certain developed countries, to encourage them to offer
greater tariff reductions, or further preferential treatment.\textsuperscript{231}

This solution to the problems posed by developing and least-developed countries
would address the significant differential between all WTO members. It offers a
method of alleviating the problems caused by tariff escalation, and puts specific rules
in place, where the WTO only previously had general statements of intention.\textsuperscript{232}

However, a number of difficulties exist. These can be divided into specific problems
with the suggestions themselves, and more general issues.

The major difficulty with Binswanger and Lutz' suggestion is that it offers a
fundamental change to WTO law. This is because they are singling out specific
countries, which goes against the fundamental principle of non-discrimination.
Although the WTO does incorporate variable treatment, this has always been
achieved through homogenous groupings: WTO members are either part of the
developed country, the developing country or the least-developed country categories
and are treated equally within those groups. Consequently, it is difficult to see that
this would be politically acceptable to all countries, but particularly to those which
were singled out to award greater market access.

In addition, Binswanger and Lutz argue that developing countries must also accept
that they cannot achieve greater concessions, unless they are also willing to make
specific concessions in intellectual property and concede greater tariff reductions in
manufactured products.\textsuperscript{233} This may reflect the sad political reality, but developing
countries are unlikely to be willing to offer too many compromises in this area,
especially as it appears to go against the principle of sustainable development which

\textsuperscript{231} Binswanger & Lutz \textit{supra} n. 226 at 12
\textsuperscript{232} See the Decision on Measures Concerning the Possible Negative Effects of the Reform Programme
on Least-Developed and Net-Food Importing Countries
\textsuperscript{233} Binswanger and Lutz \textit{supra} n. 226 at 12
recognises such countries right to preservation of their biodiversity which further concessions on intellectual property rights could erode. Deadlock may ensue if developing countries feel that any concessions they achieve are undermined by commitments in other areas.

On a general level, Binswanger and Lutz do not consider how this change could be accommodated within the framework of the WTO agreements. Although this is criticism of many of the general reform proposals put forward, in Binswanger and Lutz' case, this would be even more prevalent, as their suggestion would require a fundamental reconsideration of the legal concepts that underlie the WTO. This could not be undertaken without addressing the relationship between GATT and the WTO Agreements.234

4. Summary and Conclusions

It is possible to identify some general trends from the academics' suggestions for change to the agriculture regime. Most notably, there is a tendency to focus on the Agreement on Agriculture itself, rather than to see the problem in a more general context. This approach means that many of the difficulties identified in chapter 1 of this thesis would remain unresolved. Most notably, the interaction of the rules is not addressed and the reform of the SPS Agreement is not always considered in detail.

On one level, it should be recognised that many writers only focus on narrow issues, and so the criticism levelled at them could be regarded as unfair. However, if these solutions are to be used as a basis for reform, then the limitations of the suggestions should be recognised, and the proposals used as merely part of a more comprehensive reform programme.

234 Article XVI: 3 Marrakesh Agreement states that in the event of conflict, the terms of the WTO Agreement take precedence. However, this neglects problems over which agreement to apply first: see discussion by this thesis in Chapter 4 section A:2(c) (thesis)
B. General Models

It is clear from the above discussion that the agriculture-specific models will not address all the difficulties posed by international agricultural trade regulation. This discussion will therefore analyse general economic models to ascertain whether these are more appropriate as a basis for reform. These can be divided into traditional and non-traditional economic models.

1. Traditional Economic Models

Firstly, comparative advantage provides the theoretical basis for determining the pattern of trade in a particular range of products. Specifically, it establishes which states will be trading in which products. Secondly, the 'free trade versus protectionism' debate indicates the perceived disadvantages of placing quantitative and other restrictions on trade. Accordingly, this theory suggests the efficient level of protection that a state may wish to place on its imports and exports; beyond this level, protection would be inefficient and therefore theoretically unlikely to occur. Consequently, international trade regulation should not need to go beyond the perimeters established by these two theories. The use of these theories as a basis for the formulation of rules in international agricultural trade is questionable.

a. Comparative Advantage Theory

Classical comparative advantage theory rests on the precept that a state will trade domestically manufactured commodities if these goods can be made at a lower cost than those produced in another state. The state that is producing the commodity cheaper will be deemed to have a comparative advantage in that product. The total

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237 Samuelson ibid. at 694
238 Ibid. at 678
cost of the production of those goods is determined by calculating the relative labour
costs. Classical economists believed that labour would be unable to migrate across
state boundaries in sufficient numbers to equalise the costs of production in the short
term. This labour immobility would therefore inevitably lead to the establishment of a
comparative advantage. This theory assumes that the costs of producing a commodity will be such that one
state will always want to trade because it is unable to produce that commodity as
efficiently as the other state. Inevitably this will not always be the case, as one state
may still be able to make the product relatively efficiently. Consequently, the other
state will then only have a relative comparative advantage. Later economists have
invalidated basing the establishment of comparative advantage on labour costs
alone. Even though the shortcomings of this theory have been recognised, it is
still a useful starting point for anticipating trade flows.
Establishing a state’s comparative advantage is not a simple task. Balassa stated
that this problem could be ameliorated by arguing that the establishment of the
comparative advantage enjoyed by a state could be seen if its overall trade
performance was measured. Using this method, the state’s comparative advantage
could be “revealed.” He argued that this method would be more realistic than the
reliance on the pure labour model, as it considers both price and non-price factors.
However, formulation of effective agricultural trade regulation cannot be
accomplished on the basis of comparative advantage theory alone even using

239 Ibid.
240 Ibid.
241 Ibid.
242 Per David Ricardo cited by Samuelson ibid. at 679
243 Samuelson points out that labour costs are not homogenous: ibid.
245 Balassa: “Trade Liberalisation and ‘Revealed’ Comparative Advantage” in Balassa (ed.) ibid. at 41
246 Ibid. at 44
247 Ibid.
Balassa’s modified theory. Superficially, it is possible to point to the commonly accepted failures within the theory, such as non-homogeneity of the product and the neglect of other significant factors. More importantly, as Balassa noted, the conceptual basis for his theory was manufactured products. This was because the inclusion of agricultural products would be too difficult due to the imposition of quotas, subsidies and other “special arrangements.” As Balassa himself comments, “…the ensuing trade pattern can hardly reflect comparative advantage.”

Theoretical predictions of agricultural trade flows therefore should take account of the levels of protection placed upon it by states, but it should be possible to identify the optimum level of this protection, and consequently the necessary scope of resulting regulation. This is complicated for agricultural trade as the level of protection imposed may exceed that theoretical maximum and members may choose to protect sectors for reasons which do not fit within the rationale catered for in the theory.

b. Free Trade v. Protectionism

Traditional advocates of free trade theory argue that “(f)ree trade promotes mutually profitable division of labour, greatly enhances the potential real national product of all nations, and makes possible higher standards of living across the globe.” In addition, it produces welfare effects which translate into the promotion of non-trade issues. Indeed, this was the prevailing theory underlying international trade policy at the start of the post-war era. Although free trade may be the ideal, the more realistic...
view is that a certain level of protection will be placed on domestic economies in the form of tariffs and other trade restrictions. A state may choose to use these protective measures for a number of reasons, one of the most usual is in order to protect ‘infant’ industries. Nevertheless, it is apparent that the imposition of tariffs will distort trade patterns by increasing the price of imported goods. This may be considered an advantage by states if they wish to protect domestic industries, as imported goods will be more expensive. Conversely, however, the imposition of tariffs may lead to an increase in consumer prices overall because domestic producers may wish to increase their own production to take advantage of the higher price of the imported goods. The domestic industry would not be under pressure to keep its prices low because there would be no realistic competition from imported products. This may ultimately lead to inefficiencies within the industry because it will not be open to the vagaries of competition in those protected products. In accordance with this theory, therefore, it is uneconomic for states to impose tariffs in excess of certain levels.

Economic theory does identify this “optimum tariff” level. It recognises that all states will be protecting their domestic markets to a certain extent, and in order to ensure that a state is still able to trade efficiently, it must in turn impose a level of

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protection on its goods.\textsuperscript{261} The actual levels of tariff protection were measured by Balassa following the Kennedy Round using manufactured products.\textsuperscript{262} Again, it is interesting to note that agricultural products are excluded from this analysis.\textsuperscript{263} Balassa notes that trying to measure the level of tariffs in agricultural produce would make little sense because of all the other distorting tools that are employed in the protection of agricultural trade.\textsuperscript{264} Earlier analyses of agricultural tariff levels had already indicated that they exceed this theoretical maximum.\textsuperscript{265}

c. Problems with these Approaches

Both comparative advantage and free trade theory are able to predict the outcomes of state behaviour in specific circumstances, but there are problems with both models. The specific problems within each model have already been highlighted in the discussion, but more general problems can be identified. Most notably, neither model is able to cope with vagaries of international agricultural trade because of the complex system of support that WTO members impose. This makes it impossible to identify ‘normal’ market flows. In essence, it is difficult for these models to cope with the non-economic factors that comprise part of members’ agricultural policies. This is because they are issues which cannot necessarily be calculated in terms of markets and market effects, for example, pursuing special and differential treatment is not a product of free trade theory, but a political desire relating to the need to address non-economic issues. A more complex model has now been constructed which

\textsuperscript{261} Ibid. at 37: this protection can take the form of other restrictions, but tariffs are identified by Deardorff & Stern.
\textsuperscript{262} Balassa: “Tariff Protection in Industrial Countries: An Evaluation” in Balassa (ed.) supra n. 244, 160 at 162
\textsuperscript{263} Balassa notes that the EC indicated at the end of the Kennedy Round that the impact of tariff protection could only be measured using non-agricultural tariffs: ibid. at 162
\textsuperscript{264} Ibid. at 164
theoretically removes many of the difficulties seen with both comparative advantage
and free trade theory.

b. Non-traditional models: GTAP

The Global Trade Analysis Project (GTAP) was started in 1992, primarily by Thomas
Hertel. It builds on earlier economic theories and is designed as a single complex
economic model that can be applied to all sectors of international economic activity to
predict the likely outcome of any trade policies adopted. It differs from previous
modelling techniques in several key ways: firstly, the database, on which the analysis
results are based, is continually being updated as new variables are added by
researchers. Information is also supplied by a number of international agencies and
government departments, ensuring that the database is very comprehensive.

Secondly, the data is publicly available on the internet so that unnecessary
duplication of research into the model structure is avoided, and the GTAP model itself
is made more effective as members concentrate on its application, rather than on
attempting to duplicate the model.

The structure of the GTAP model is very complex, and this thesis will not address the
variables in detail. However, the following general observations can be made. In
contrast to previous economic models that could not cope with the difficulties of
distorted international agricultural markets, GTAP’s numerous variables ensure that it
can be applied to the sector. This is because GTAP can mathematically reproduce the

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266 Hertel supra n. 13 at ix
267 Ibid.
268 Ibid. “Introduction” in Hertel (ed.) ibid. at 3
269 Ibid. at 4
270 Ibid. at 3
271 http://www.agecon.purdue.edu/gtap/index.htm
272 The GTAP model website also provides a software package so that the GTAP model can be easily
applied to any new trade sector: Pearson: “Implementing GTAP using the GEMPACK software” in
Hertel (ed.) supra n. 13 at 164
273 For more detail see Hertel & Tsigas: “Structure of GTAP” in Hertel (ed.) ibid. at 13
effects of specific forms of governmental support in agriculture. Accordingly, the consequences of their removal can also be measured.

In addition, the sophistication of the model enables the effect of domestic policies on international trade to be measured empirically. This is particularly important in international agricultural trade, where it is clear that domestic policies can have significant effects on international trade.

GTAP has been used by many writers in their proposals for reform of the WTO’s agriculture sector. Their suggestions for reform are based on the subjection of their proposals to the GTAP model, so that it is immediately clear what the proposed impact of their suggestions might be. GTAP is therefore a very valuable tool. Its major limitation is immediately apparent therefore. The model cannot be used to provide an answer itself, but can only be used to measure the impact of suggestions for change that have already been made as it only operates on designated variables. It is therefore reactive, rather than proactive. Although it will be invaluable to subject any suggestions for reform to analysis by GTAP, it cannot be the single solution to the difficulties of regulating international agricultural trade.

3. Summary and Conclusions

Reliance on economic theory as the sole predictor of trade behaviour in agricultural products is unreliable. Certainly, it will indicate which state has a comparative advantage in a product and what level of tariffs would be desirable. It should even reveal suggested state responses to changes in production patterns within the world.

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274 See MacLaren: “An evaluation of the Cairns’ Group strategies for agriculture in the Uruguay Round” in Hertel (ed.) ibid. 212 at 217: he mimics the effect of the European Communities’ variable import levy
275 MacLaren ibid. at 218
276 Hertel & Tsiga supra n. 13 at 16
278 See Anderson, Hoekman & Strutt supra n. 179 &Binswanger & Lutz supra n. 225
economy. Unfortunately, no theory can accurately anticipate actual state policies in agricultural trade. It is evident that this deficiency has been recognised by economic theorists. Consequently, economic theory can only be used to reveal the impact of the policies on trade flows, rather than to be used as the sole basis of drafting agricultural trade rules.

As a corollary to this issue, economic theory cannot deal with the minutiae of the relationship between the agreements. It can only predict the impact of rules if they are correctly implemented, and cannot identify where the loophole actually is before it is exploited. Similarly, it does not address the other infrastructure issues that this thesis argued are crucial to effective agricultural trade reform.

Despite these limitations, it is clear that the sophisticated GTAP model is a useful tool to drafters of the new rules. It should not be ignored, as it can be used to test the economic impact of any new rules that are drafted.

C. Conclusions

Making the WTO's agriculture regime effective is difficult because there are no proposals amongst those discussed in this chapter that address all aspects of the problem. Members' suggestions reflect the political reality of reform focussing solely on amending the rules themselves, revealing a clear polarisation between those members who apparently want to retain protection for their agricultural sectors and those who do not.

Academics' proposals for reform focus narrowly on specific issues. These are helpful in the context in which they are proposed, but they do not consider how to make the existing agriculture regime effective to both developed and developing countries. This

279 Balassa: "Tariff Protection in Industrial Countries: An Evaluation" supra n. 244
280 Most notably, the SPS Agreement and the Agreement on Agriculture
means that their value as a general solution to the problems of agricultural trade is necessarily limited to the areas that they discuss. Although on one level it could be argued that these solutions could be used in the narrow context, this thesis argues that agricultural trade is so problematic because there has been a failure to look at exactly why the GATT and WTO rules are not achieving the free trade goal in the way envisaged by both those rule systems.

Economic models are very helpful to predict the impact of reform on agricultural markets, but they only cover those issues that have been fed into the empirical assessment. Important issues may be excluded. Inevitably, economic models do not try to offer legal solutions to problems and so the model must still be incorporated in a legal framework. This incorporation process can mean that the 'purity' of the model is lost because language is an inaccurate tool and lawyers will seek to exploit ambiguities in the rules drafted on the basis of the model. Such exploitation has already been apparent in the dispute settlement process, especially in the interpretation of Article 9 Agreement on Agriculture and is inevitable in any dispute settlement process involving legal representation. Economists and lawyers must therefore work together to ensure that the effectiveness of the economic model is not undermined by its translation into the legal framework.

Despite Stiglitz's innovative suggestions to help developing countries, all the solutions evaluated in this chapter are based on the traditional assumption that achieving the free trade goal will automatically alleviate the problems caused by international agricultural trade. This assumption is not surprising when the Uruguay Round negotiators also drafted agreements based on this premise and apparently did

not even question whether the goal was still as valid in the post-GATT era as it was
after the Second World War. However, drafting new solutions that blindly pursue the
free trade goal without questioning exactly why agricultural trade is so problematic
are likely to fail. The reasons for failure are complex, but building solutions to the
problem based on an assumption that any restriction on agricultural trade is
automatically for protectionist purposes potentially ignores the real reason for the
measures' introduction. The dispute settlement reports already show that members
have multiple reasons for using trade restrictive measures. Such motivations will
remain even if the rules are changed because the reason for the measures relate to
non-trade concerns that are not adequately addressed by the existing agriculture
regime. This view is supported by the fact that despite the advent of the WTO
agriculture regime, members are still adopting measures in agriculture which do not
meet the free trade ideal. More importantly, WTO members' practice is very similar
to their practice under GATT, despite the introduction of the new Agreement on
Agriculture and the SPS Agreement. This is particularly noticeable in the
Hormones and Bananas disputes where the WTO agriculture regime has not
solved problems that started in the GATT era. Arguably, this means that drafting rules


\footnote{283 This is used in a broad sense and not in the sense some members have adopted it in the multifunctionality debate: See Chapter 2 section A: 1(c) (thesis)

\footnote{284 \textit{Hormones} dispute \textit{supra} n. 282

that do not consider the heart of the problem will only perpetuate the difficulties raised by international agricultural trade regulation.

One of the problems in drafting a solution is the assumption that agricultural products can be subjected to the same legal regulatory regime as manufactured products. This is because the latter do not have the relationship with non-trade issues in the same way as agriculture. Chapters 3 and 4 of the discussion now evaluate two non-trade issues which are inextricably linked with agriculture: environmental regulation and food safety. These indicate both the failure of the WTO to adequately cover the economic aspects of agriculture through the elimination of protectionism, as well as the fact that a system based on free trade theory will never adequately address the non-economic aspects inherent in international agricultural trade.
Chapter 3:

Challenges to the Agreement on Agriculture:

The Environment

Increasing political pressure on the World Trade Organisation (WTO) to recognise the “critical relationship”\(^1\) between trade regulation and environmental protection means that this issue now dominates the whole of the WTO’s future agenda. Although environmental considerations will permeate all renegotiation discussions,\(^2\) inevitably, the inextricable nexus between agriculture and the environment means that the debate will have a direct impact on the renegotiation of the provisions of the WTO’s existing agriculture regime under both the Agreement on Agriculture and the Agreement on Sanitary and Phytosanitary Measures (SPS Agreement).\(^3\) However, it is important that the WTO’s rush to be seen to be doing something to address these concerns does not overshadow the need to find a cohesive solution which deals with the real difficulties of the agriculture, trade and environment relationship.

In order to evaluate the efficacy of any solution, the scope of the problem must be identified. Although many commentators have looked at the issue,\(^4\) the overwhelming trend has either been to place the emphasis on different types of environmental impact

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2 Reconciling the trade/environment relationship has been highlighted as an important issue following the collapse of the Seattle Ministerial Meeting in December 1999: WTO Focus: “Trade ministers call time out” No.44 January-February 2000 6 at 7

3 The Agreement on Agriculture was designed as a first step towards international agricultural trade liberalisation. Paragraph 6 of its Preamble recognises the link between agriculture and the environment, and notes that a consideration of these issues should form part of the renegotiation discussions in 2000

and consider 'trade' in a general way, or to look at agriculture as a generic issue which gives rise to a determined set of environmental issues. This bifurcated approach predictably means that critical elements of the discussion are lost and that the solutions proposed are only appropriate for one aspect, either they deal with the general trade/environment relationship, or with the particular environmental difficulties posed by agriculture. Consequently, two major issues are neglected. Firstly, focussing on specific environmental concerns and attempting to resolve the conflict with generally defined 'trade issues' is too narrow. This approach means that 'trade' is perceived as a generic term and the dynamics that operate within explicit areas of 'trade' are neglected. Although it is possible to derive some general conclusions which may underlie 'trade' issues generally, extrapolating these into a solution that attempts to tackle the potential problems posed by the environment within a specific trade area is dangerous. It is particularly problematic in international agricultural trade. This is because it is readily apparent from an analysis of the attempts to regulate international agricultural trade under the World Trade Organisation (WTO), that the political imperatives underlying WTO members' agricultural policies predisposing them towards protecting their domestic sectors inevitably colours the way in which measures to protect the environment are

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5 Ervin's analysis is the very minor exception, but this is not very detailed: see Ervin: "Toward GATT-Proofing Environmental Programmes for Agriculture" (1999) 33(2) JWT 63
7 Ervin proposes a Code of Good Practice: supra n. 5 at 77. This thesis will argue that this approach is an inappropriate solution due to the difficult history of international agricultural trade regulation
8 e.g. Schoenbaum supra n. 4
9 e.g. Andersen supra n. 6
10 Jackson does this in his analysis: "World Trade Rules and Environmental Policies: Congruence or Conflict?" supra n. 4 at 1230-1235
implemented in agriculture. Although it is always possible to argue that members will be keen to protect many areas within their domestic economies against the rigours of trade, this thesis has already demonstrated that the special characteristics of the agricultural sector mean that the emphasis on protection remains stronger here, than for trade in manufactured goods, for example.

The converse of concentrating on agriculture and perceiving environmental issues as a homogenous problem is that the different goals of environmental protection are ignored. Environmental protection denotes reducing emissions of hazardous greenhouse gases to lessen the impact on the ozone layer and introducing strict criteria to ensure the safe transportation of hazardous waste. It is also broader than that and has been used in relation to the protection of the human environment, the preservation of biodiversity and extended to ensuring that developing and least-developed countries achieve sustainable development. Tensions occur if a solution only advocates 'environmental protection' generally. Two problems arise: firstly, developing and least-developed countries already argue that the developed countries' interpretation of 'environmental protection' refers to the preservation of the natural environment and the facilitation of biodiversity only. They argue that they are

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12 See Chapter 1 section A generally (thesis) which argues that despite the introduction of the WTO's agriculture regime members still address non-economic issues in their domestic agricultural policies

13 See Chapter 1 section A: 1 (thesis)


16 This view argues that the protection of distinct cultural identities is also an important consideration: see WTO: 'Trade and Environment' (1999) WTO Secretariat Special Studies No. 4 at 2


18 This term was coined and further defined in the Brundtland Commission Report: 'Our Common Future' (1987) OUP at 43. The notion of 'sustainable development' will be addressed in detail in Chapter 5 (thesis)

19 i.e. protection of habitat, climate and rural areas
therefore forced to pay for the post-industrialisation mistakes made by the latter.\textsuperscript{20}

Developing and least-developed countries state that concentration on preservation of the ‘natural environment’ in this way is specifically against the goals of sustainable development because it underestimates their special needs by insisting on a single agenda.\textsuperscript{21} Clearly, they see a divergence between protecting the ‘environment’ as defined by the developed nations and the promotion of sustainable development. This leads onto the second difficulty, which is determining which of these two environmental goals\textsuperscript{22} should take precedence in these circumstances. It can be argued that both are valid and that the way forward must involve finding a solution that achieves both goals. Nevertheless, resolving the alleged conflict between achieving sustainable development and the preservation of the environment could be dealt with before it becomes a problem if environmental concerns are seen as giving rise to a diverse range of possible issues, rather than one homogenous outcome. Only by appreciating the need to narrowly define environmental protection in relation to international agricultural trade, can an appropriate solution be reached.\textsuperscript{23}

This chapter investigates the difficulties of adequately regulating international agricultural trade, whilst simultaneously pursuing environmental goals. The analysis is divided into two parts. Firstly, it identifies the existing relevant rules and determines whether the coverage of agriculture and environmental protection by those rules is effective.\textsuperscript{24} Although the Agreement on Agriculture and the SPS Agreement do address specific environmental issues,\textsuperscript{25} further provisions are also found in the

\textsuperscript{20} See Esty \textit{supra} n. 4 at 182 & 184
\textsuperscript{21} See Jha: “Developing Country Perspectives” in D. Brack (ed.): ‘Trade and Environment: Conflict or Compatibility?’ (1998) Royal Institute of International Affairs 78 at 79
\textsuperscript{22} i.e. protection of the natural environment, and the promotion of sustainable development
\textsuperscript{23} This chapter does not offer a definition of ‘environment.’ Instead it explores problems with the existing regime and the proposed solutions put forward by WTO members
\textsuperscript{24} These provisions will be subjected to the ‘effectiveness’ test
\textsuperscript{25} In the sense used by this chapter: i.e. ‘natural environmental issues’
Marrakesh Agreement Establishing the WTO (the Marrakesh Agreement), and the GATT. Potential problems within the rules themselves, difficulties focussing on the inter-relationship between the WTO Agreements and the Marrakesh Decision on Trade and the Environment and finally the possible impact of the existing WTO rules on developing and least-developed countries will be assessed.

This first part of the analysis into the effectiveness of the WTO rules is further complicated by the existence of multilateral environmental agreements (MEAs) which concentrate on global concerns, but whose relationship to the WTO in general has not yet been dealt with. This first section therefore evaluates the WTO’s rules linking agriculture and the environment and then considers the implications of the existence of the separate MEAs.

Secondly, the discussion analyses the effectiveness of the potential solutions advocated by WTO members under both the Geneva Ministerial Declaration procedure and through documentation presented to the deliberations of the WTO Committee on Trade and the Environment. The solutions identified fall into three general categories: firstly, agriculture-specific. These centre on incorporating ‘environmental’ issues into the Agreement on Agriculture through the recognition of the ‘multifunctionality’ of agriculture. Chapter 2 of this thesis has already explored the potential difficulties

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26 e.g. the Basel Convention supra n. 15 & the Montreal Convention supra n. 14
27 This forms item 1 of the WTO Committee on Trade and Environment’s (the Committee on Trade and Environment) agenda: see Decision on Trade and Environment at para 6(a) & WTO: ‘Report (1996) of the Committee on Trade and Environment’ WT/CTE/1, 12 November 1996 (the 1996 CTE Report) at 2
28 Using the general ‘effectiveness’ test
29 Under para 9 Geneva Ministerial Declaration WTO/MIN(98)/DEC/1, 25 May 1998
30 The Committee on Trade and Environment was established by the Decision on Trade and the Environment at para 5
31 Note that WTO members do not clearly define what they mean by this concept: see Chapter 3 section A (thesis)
32 WTO: ‘Environmental Effects of Trade Liberalisation on Agriculture: The Multifunctionality of Agriculture’ WT/CTE/W/107, 15 February 1999. Also, see Chapter 2 section A: 1(c) (thesis) which

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generally associated with this concept, especially members' ability to justify their protectionist policies by arguing they are merely recognising the multifunctional character of agriculture. Some members have gone further and argued that the protection of the environment transcends these problems, so the introduction of measures justified by multifunctionality should be recognised in this context.  

Secondly, environmental-specific solutions have been proposed. In particular, some members suggest an answer to the relationship between existing MEAs and the WTO agreements in general. Clearly, a general solution to the relationship between the WTO agreements and the MEAs is problematic because it does not necessarily address the specific difficulties presented by international agricultural trade. Finally, the European Communities has advocated the formal adoption of the precautionary principle into the WTO's regulatory structure. This is presented as a general solution to the 'trade/environment' conflict, but there are clear difficulties in applying this concept to international agricultural trade.  

The analysis will consider how effective all these solutions are in the context of international agricultural trade regulation. This discussion must be set within the wider constitutional debate of the future direction of the WTO. It is becoming increasingly apparent that free trade principles cannot be the sole determinant of trade policy; other issues, including environmental regulation, must have a role. The
analysis in this chapter will address what that role should be and who should be charged with achieving it: should it be left to the dispute settlement mechanism, or would action by the members be more appropriate?39

A. Agricultural Trade Regulation and Protection of the Environment: are the existing rules effective?

An assessment of the effectiveness of the existing rules that regulate international agricultural trade and environmental protection rests on the premise that all these rules are readily identifiable. Unfortunately, although the provisions on international agricultural trade are found primarily within the Agreement on Agriculture and the SPS Agreement,40 this is not the case for the environment, which are scattered throughout the WTO agreements.

The relevant rules fall into three main categories: firstly, those which deal with both environmental protection and international agricultural trade in the Agreement on Agriculture and the SPS Agreement. Secondly, broader environmental-specific provisions from the Marrakesh Agreement and the other agreements in the Annexes to it.41 Although the first category can be described as a sub-division of the second, it is clear that the special problems presented by international agricultural trade regulation mean that distinct issues arise when considering the effectiveness of those rules in

39 The Appellate Body has already stated its reluctance to actively engage in the creation of law: see Hormones Appellate Body report supra n. 37 at para 165; but note that Quick & Blüthner argue that the Appellate Body has engaged in this type of judicial activism in the past most notably in the Hormones dispute, despite the constraints of Article 17:6 WTO Understanding on Rules and Procedures Governing the Settlement of Disputes (the DSU): Quick & Blüthner: “Has the Appellate Body Erred? An Appraisal and Criticism of the Ruling in the WTO Hormones Case” (1999) 2(4) JIntEconL 603 at 609
40 See Chapter 1 section B: 1 (thesis) for a full discussion of the scope of the WTO’s rules on international agricultural trade
41 Inevitably, environmental provisions are also included within Annex 1B: the General Agreement on Services (GATS) and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). These agreements do not deal with trade in agricultural goods and are therefore outside the scope of this thesis
relation to environmental protection, so these issues must be addressed separately. Finally, rules that do not specifically deal with the environment, but which have been used by WTO members to justify unilateral environmental policies within dispute settlement proceedings.42 This final category focuses on the GATT.43 The analysis will identify the specific rules governing both international agricultural trade and the environment and then turn to the general environmental provisions.

1. International Agricultural Trade and the Environment

a. The Agreement on Agriculture

The Agreement on Agriculture does include a specific reference to the interaction of international agricultural trade and the environment, but this is placed in the context of the over-riding purpose of the agreement. The general wording of the Preamble stresses that the primary objective of the Agreement on Agriculture is to pursue free trade and consequently eliminate protectionism. Emphasis is placed on establishing a “fair and market-oriented agricultural trading system”44 through “substantial progressive reductions in agricultural support and protection”45 in both the short and long term.46 Although environmental considerations are not dismissed, they are only referred to briefly in paragraph 6 of the Preamble as part of a general list of issues that could form the basis of the future shape of international agricultural trade reform.47 Even here, the importance is still placed firmly on ensuring that distortions in the

42 United States-Restrictions on Imports of Tuna BISD29S/91 (1982 report adopted) and 1991 report which was not adopted BISD 39S/155 (the Tuna/Dolphin dispute) also United States-Restrictions on Imports of Tuna (Tuna-Dolphin II) GATT Doc. DS29/R (16 June 1994) unadopted; see Jackson: “World Trade Rules and Environmental Policies: Congruence or Conflict?” supra n. 4 at 1241
43 Article XX GATT is the main provision here, but note that it does not use the words ‘environmental protection’ at all
44 Para 2 ibid.
45 Para 3 ibid.
46 Paras 2 & 3 ibid.
47 Other issues include food security, special and differential treatment for developing countries and the consideration of the adverse effects of the Agreement on Agriculture on least-developed and net-food importing countries: para 6 ibid.
pattern of international agricultural trade do not adversely affect members.\textsuperscript{48}

Paragraph 6 of the Preamble to the Agreement on Agriculture does mention "the need to protect the environment," stating that this should be acknowledged as a legitimate 'non-trade concern,' but there is no attempt to define which environmental issues would be included within its scope.\textsuperscript{49} It goes further and notes the significance of special and differential treatment for developing countries, but relates this specifically to the grant of preferential trade concessions for the import of agricultural products, rather than to the recognition of the sustainable development principle or the protection of the 'natural environment' as a distinct concept.\textsuperscript{50} In the context of the Preamble therefore, 'environmental protection' is viewed as a homogenous group of issues that only have general relevance when assessing the effect of members' domestic policies aimed at the preservation of the environment on international agricultural trade. The implications of this are that specific environmental considerations will be ignored as they will always be subordinate to the elimination of protectionism when the Agreement on Agriculture's rules are applied. If it is accepted that agricultural policies should also recognise environmental protection, then it is clear its subordination to the erosion of protectionism may not be desirable because the instruments permitted by the pursuit of free trade might not be suitable to adequately achieve environmental goals.

The Agreement on Agriculture's approach to all aspects environmental protection also reflects the controversial product-process doctrine\textsuperscript{51} developed by the panels during

\textsuperscript{48} Para 6 states that "commitments under the reform programme should be made in an equitable way among members"

\textsuperscript{49} Para 6 Preamble Agreement on Agriculture

\textsuperscript{50} Para 6 ibid.

\textsuperscript{51} This has been widely discussed in the literature and this thesis does not propose to address this in detail. Its comments on the difficulties experienced when applying the WTO's agricultural trade rules are informed by the existence of this doctrine. The main commentaries on this issue are: Hudec: "The Product-Process Doctrine in GATT/WTO" in M. Bronckers & R. Quick (eds.): 'New Directions in International Economic Law: Essays in Honour of John H. Jackson' (2000) Kluwer 187; Zedalis:
the GATT era. Under this doctrine, any measures aimed at the way products were produced were unacceptable under GATT rules, unless that process directly affected the product itself. Hudec argues that the doctrine was never fully developed within GATT jurisprudence, but the Agreement on Agriculture’s emphasis on free trade necessarily focuses on agricultural products, ensuring that process-oriented measures like agri-environmental policies are more difficult to justify under the agreement’s existing rules.

Chapter 1 of this thesis has already discussed the general provisions of the Agreement on Agriculture, so this part of the analysis will concentrate on the extent to which the rules affect all possible aspects of ‘environmental protection.’ These rules can be divided into two categories. Firstly, those that facilitate the adoption of policies that promote environmental protection whilst still concentrating on products, and secondly, rules that operate to perpetuate adverse effects on the environment because the Agreement on Agriculture prioritises elimination of protection on agricultural products rather than on promoting other goals.

The Agreement on Agriculture is built on three pillars, the reduction of both domestic support and export subsidies and the enhancement of market access through the ‘tariffication’ of non-tariff barriers and their subsequent reduction. Despite this

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52 United States-Restrictions on Imports of Tuna (Tuna/Dolphin II) supra n. 42 (not adopted) at para 5.11-5.15
53 Ibid. at para 5.14
54 Hudec: "The Product-Process Doctrine in GATT/WTO" supra n. 51 at 189
55 See Chapter 1 section B: 1 (thesis)
56 Referred to throughout this chapter, as the ‘natural environment’
57 Articles 6 & 7 Agreement on Agriculture
58 Articles 8 & 9 ibid.
59 Article 4 ibid.
broad approach, only the measures on domestic support contain a reference to the

critical agriculture/environment nexus. The domestic support commitments address
the ‘environment’ issue in two ways: expressly in Annex 2 and impliedly in Article
6:2.

Article 6 requires members to reduce their levels of domestic support by 20% over the
implementation period measured from a 1986-88 base. The level of domestic support
is calculated using the Aggregate Measurement of Support (AMS) according to the
criteria in Annex 3 of the Agreement on Agriculture. Certain measures can be
excluded from the AMS calculation if they satisfy the conditions in the Blue or
Green Boxes. The provisions within the Blue Box are particularly aimed at the
European Communities and United States’ agricultural policies, but the Green Box
does refer generally to environmental measures.

Annex 2:12 states that payments made as part of a specific governmental programme
aimed at environmental conservation will be excluded from the AMS calculation
provided they also comply with the over-riding requirements in Annex 2:1. Under

\[\text{References}\]

60 For a detailed explanation of the AMS calculation see Chapter 1 section B: 1(a) (thesis); also
Thomson: “The CAP and the WTO after the Uruguay Round Agreement on Agriculture” in K.A.
Macmillan at 175

61 The Blue Box is specifically targeted to the partially decoupled support payments used by the
European Community’s Common Agricultural Policy (CAP) and the United States’ old system of
deficiency payments.

62 See Chapter 1 section B: 1(a) (thesis)

63 Note that the term ‘Green Box’ does not mean that all the excluded measures relate to
environmentally-friendly measures, but refers to the fact that these measures do not have an adverse
effect on international agricultural trade flows: see A. Swinbank & C. Tanner: ‘Farm Policy and Trade
Economic Issues University of Michigan Press at 69

64 Annex 2:12(a) Agreement on Agriculture

65 Annex 2:1 Agreement on Agriculture states that: “Domestic support measures for which exemption
from the reduction commitments is claimed shall meet the fundamental requirement that they have no, or
at most minimal, trade-distorting effects or effects on production. Accordingly, all measures for which
exemption is claimed shall conform to the following basic criteria:

(a) the support in question shall be provided through a publicly-funded government programme
(including government revenue foregone) not involving transfers from consumers; and,
(b) the support in question shall not have the effect of providing price support to producers.” In
addition to these over-riding general requirements, the domestic support programme for which the
Annex 2:1 such an environmental programme also must have “no, or at most minimal, trade distorting effects or effects on production.” Several points can be noted from this exemption.

The general theme from the Preamble that free trade in international agricultural trade should be the goal is again apparent. It is clear from the wording that payments made under any environmental programme will not be exempt from the AMS calculation unless they satisfy both the Annex 2:12 and the Annex 2:1 criteria. This means that there is no scope, at least within the Agreement on Agriculture, to support general environmental schemes that may involve some form of financial inducement to farmers predicated on production. The exemption also follows the second trend already identified in the Preamble by seeing environmental protection as a homogenous series of issues. Annex 2:12 allows the WTO member to define the scope of its environmental policy. Whilst it is difficult for the WTO to anticipate the full range of pro-environmental policies that any member may wish to pursue, its approach assumes that every policy will have the same effect on trade. The OECD’s 1998 report into the impact of OECD members’ environmental policies on international agricultural trade flows has already identified that this is not the case and demonstrated that different policies produce different effects on trade.

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66 Annex 2:1 ibid.

67 Note that members’ pro-environmental domestic agricultural policies may not comply with the Agreement on Agriculture: see the European Commission’s suggestion that payments made to farmers should be conditional on their adoption of pro-environmental production techniques. As the payment would not be fully decoupled from production, it would not be exempt under the Green Box, although it could be eligible for Blue Box exemption. If the payments are partially decoupled: see Annex 2:6 Agreement on Agriculture & European Commission: “Directions Towards Sustainable Agriculture” COM(1999)22 at para 3.2.2

68 OECD: ‘The Environmental Effects of Reforming Agricultural Policies’ (1998) at 7; this report defined environmental protection purely in terms of the natural environment, rather than sustainable development, or the promotion of cultural identities
A final conclusion that can be drawn from Article 6 and Annex 2:12 is that the Agreement on Agriculture only facilitates environmental protection through domestic programmes designed to protect the natural environment which have purely domestic effects. There is no scope for members to insist on minimum environmental standards for imported products, nor to impose any 'environmental tax' on agricultural products they feel do not meet their own domestic standards. On this interpretation, unilateral action to establish global minimum environmental standards for agricultural trade is impliedly discouraged.

Article 6 of the Agreement on Agriculture also implicitly addresses environmental issues. Article 6:2 exempts domestic support measures from the AMS calculation where payments are made to "encourage agricultural and rural development" by developing and least-developed countries. Although this provision is not primarily aimed at encouraging agri-environmental policies, it has the potential for facilitating broad environmental goals as it allows developing country members to make payments to domestic farmers linked to production. As long as the payments "encourage agricultural and rural development" and are an "integral part of the development programmes of developing countries," the nation is able to place its own constraints on the availability of payments. Consequently, developing country members could decide to make rural development payments predicated on the need to

69 This reflects the problems raised by the product/process dilemma. This assertion excludes the operation of the SPS Agreement, which will be analysed in Chapter 4 section A: 1(b) (thesis)

70 Although it would depend on how the tax was calculated, it is likely that this would be construed as a non-tariff barrier and would therefore have to comply with Article 4:2 if the product appears in the member's schedule: Article 4:1 Agreement on Agriculture

71 So-called 'green imperialism': see Hofreither supra n. 6 at 6

72 For a critique of this anti-unilateralism view, see Bodansky: "What's So Bad about Unilateral Action to Protect the Environment?" (2000) 11 EJIL 339
ensure sustainable development, thus facilitating environmental considerations within
the framework of the Agreement on Agriculture’s existing rules.\textsuperscript{73}

The potential of Article 6 and Annex 2 of the Agreement on Agriculture to promote
pro-environmental polices should not be overestimated. Members’ agricultural
policies may contain non-trade goals,\textsuperscript{74} but it is clear that the Agreement on
Agriculture’s emphasis on free trade significantly restricts the type of measures that
can be used to achieve these non-trade objectives. The efficacy of the Green Box as
an instrument of environmental policy is limited therefore.

In contrast with these pro-environmental measures, the Agreement on Agriculture’s
rules also support the continuation of agricultural policies that produce adverse effects
for the environment.\textsuperscript{75} A joint submission by a number of WTO members\textsuperscript{76} to the
Committee on Trade and Environment\textsuperscript{77} highlighted the adverse effects that export
subsidies have. They identified a number of direct and indirect effects. Firstly, export
subsidies directly encourage intensive agricultural production, which leads to over-use
of the land, extensive chemical fertilizer and pesticide usage, non-sustainable farming
practices and the use of environmentally sensitive land for agricultural production to
enable farmers to recoup payments.\textsuperscript{78} The members also pointed to indirect effects.

They argued that export subsidies lead to artificially high levels of agricultural
production, which then must be disposed of on world markets. This causes distortions

\textsuperscript{73} Sustainable development was defined by the Brundtland Commission as “development that meets the
present without compromising the ability of future generations to meet their own needs.” ‘Our
Common Future’ \textit{supra} n. 18 at 43; see Chapter 5 section A (thesis)


\textsuperscript{75} This term encompasses all aspects of environmental protection, but has particularly adverse effects
for the natural environment

\textsuperscript{76} Argentina, Australia, Brazil, Canada, Chile, Colombia, Indonesia, Malaysia, New Zealand, Paraguay,
the Philippines, Thailand and the United States

\textsuperscript{77} WTO: “Agriculture and the Environment: The Case of Export Subsidies” WT/CTE/W/106, (11
February 1999). It can be argued that the retention of domestic support measures and the high levels of
tariffs on agricultural products also have broad adverse environmental effects. Whilst this is true,
members have not separately identified these. As no specific information is available on these issues,
this thesis concentrates on export subsidies where the adverse impact has been measured quantitatively
in WT/CTE/W/106 \textit{ibid.}

\textsuperscript{78} \textit{Ibid.} at 3

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in the patterns of international agricultural trade that prevents the use of sustainable agricultural practices, as it is impossible for developing countries in particular to protect their countries against unstable world prices for agricultural products.\(^7\)\(^9\)

Although the connection between the continued use of export subsidies and adverse effects on the environment is evident, it could be argued that it does not directly follow from these findings that the Agreement on Agriculture’s rules cause these adverse environmental effects.

However, on one interpretation the agreement does have this consequence. Article 8 prohibits the use of export subsidies, but qualifies this by allowing their continued use if they comply with the rules in the Agreement on Agriculture. Article 9 lists six ‘permitted’ export subsidies that are subject to reduction commitments. The Appellate Body has narrowly interpreted the scope of these,\(^8\)\(^0\) but members are still allowed to retain them during the implementation period.\(^8\)\(^1\) Not only does the agreement sanction the continued use of export subsidies generally, it also ensures that members can maintain export subsidies on key agricultural products. This is because Article 9:2(b) allows members to retain export subsidies in excess of the reduction commitments from the second to the fifth year of the implementation period, provided that they comply with the terms of Article 9:2(b)(i) to (iii). Members are therefore able to make significant reductions on unimportant products, therefore allowing them to retain subsidies in other more strategic areas of agricultural production.\(^8\)\(^2\)

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79 Ibid. at 3
81 Article 9:1 Agreement on Agriculture
82 See Thomson: “The CAP and the WTO after the Uruguay Round Agreement on Agriculture” in Ingersent, Rayner & Hine *supra* n. 60, 175 at 188
The adverse effects on the natural environment are further exacerbated by Article 9:4, which excludes developing countries from the export subsidy commitments for Article 9:1(d) and (e) subsidies. Clearly, the retention of any form of protection will distort international agricultural trade patterns. This thesis has already demonstrated the adverse effect that this has on developing nations in particular.83 Two consequences for environmental protection flow from this. On one level, the high incidence of protection engendered by the continued use of export subsidies and other protectionist policies will mean that it will be almost impossible to achieve sustainable development for developing nations. This is because their agricultural sectors will never be able to compete if international markets continue to be distorted. In addition, there will be no incentive for developing countries to eliminate export subsidies if developed nations retain them, as the former’s products will always be more expensive than similar developed countries’ goods. The report to the Committee on Trade and the Environment84 has already demonstrated the adverse effects created by export subsidies on the physical environment, so their continued use by developing countries will only exacerbate the existing problems. Unfortunately, the wording of the Agreement on Agriculture produces a direct clash between the pursuit of environmental goals that protect the physical environment and those that seek to achieve sustainable development.

b. The SPS Agreement

In contrast to the Agreement on Agriculture, the SPS Agreement does not contain any explicit exemption for the promotion of the ‘environment’ defined as the natural environment, or the promotion of broader environmental goals.85 Instead, it advocates

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83 See Chapter 1 section B: 1(b) (thesis)
84 WT/CTE/W/106 supra n. 77
85 See Chapter 3 section A: 1 (thesis)
the use of measures that "protect human, animal or plant life or health" within a controlled regulatory framework, predicated on the need to scientifically justify any measures imposed. The SPS Agreement's rules were analysed in Chapter 1 of this thesis, so this part of the discussion will concentrate on the extent to which the agreement supports measures designed to promote environmental protection.

The wording in both the Preamble and Annex A mirrors Article XX(b) GATT 1994. Although environmental protection is not mentioned specifically in Article XX(b), the provision has been used in the context of environmental disputes over the protection of the natural environment, with varying degrees of success. The identical choice of words in both Article XX(b) and the SPS Agreement means that the latter's rules also could be applied to justify agri-environmental policies which focus narrowly on just the natural environment, although broader issues could also be incorporated. However, using the SPS Agreement to promote environmental protection in the narrow sense of the natural environment is problematic.

Paragraphs 1 and 2 of the Preamble make it clear that the agreement only relates to plant, animal and human life or health. This implies that the SPS Agreement can only be applied to environmental matters where there is a link to one or more of these issues. This would seem straightforward as environmental concerns do relate to

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86 Para 1 Preamble SPS Agreement
87 Article 2:2 SPS Agreement. If measures conform to existing international standards, they are exempt from the need to provide an adequate risk assessment: Article 3:2
88 See Chapter 1 section B: 1(b) (thesis)
89 i.e. the definition of a SPS measure
91 This interpretation is supported by the Appellate Body's views in Hormones that the purpose of the SPS Agreement is to prevent "arbitrary or unjustifiable discrimination between members" (Hormones-Appellate Body report supra n. 37 at para 177). Consequently, if members wish to impose SPS measures in excess of existing international standards or where there are no international standards in an area, these must be justified by a risk assessment in accordance with Article 5:1 SPS Agreement (ibid. at para 177). Any measure which is then imposed following the risk assessment must
“life” in a general way, nevertheless, using it to promote environmental concerns is challenging.\(^2\) In particular, endorsing sustainable development is difficult because the principle concerns the methods used to exploit resources, rather than directly concentrating on “life” or “health” issues.\(^3\) Whether such measures are within the terms of the SPS Agreement is dependent on the definitions of “health” and “life” in Article 2:1.

There is no definition of either concept in the SPS Agreement, but the way the agreement is drafted implies that, *prima facie*, the member itself determines when an issue comes within the agreement’s scope by categorising its measure as one designed to protect plant, animal or human health or life.\(^4\) It follows from this, that provided the member designates the measure it uses to promote sustainable development, as an SPS measure in the first instance there is no difficulty. Whether the measure does in fact do this is then a matter for the risk assessment.\(^5\) Consequently, any provisions designed to promote sustainable development also must conform to this requirement.

However, problems arise when the content of the appropriate risk assessment is considered.

Annex A:4 SPS Agreement defines the nature of the risk assessment to include the “entry, spread of a pest or disease” or some “associated potential or biological consequence” or the “adverse effects on human or animal health arising from the presence of additives, contaminants, toxins or disease-causing organisms in food,

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\(^2\) Ervin takes an optimistic view that the SPS Agreement will allow the promotion of environmental protection. However, he defines this in relation to specific environmental effects which result from agricultural production techniques, whereas this thesis’ discussion evaluates the broader questions where the agreement’s application is uncertain: see Ervin *supra* n. 5 at 75


\(^4\) Annex A:5 states that the member chooses the appropriate level of sanitary and phytosanitary protection at the first instance

\(^5\) *Hormones*-Appellate Body report *supra* n. 37 at para 192
beverages or feedstuffs.” There are two points to consider: firstly, Annex A:4 places
the emphasis primarily on the effects to animals and humans rather than plants. This
ambiguity is a problem for sustainable development policies if they concentrate on the
preservation of crop biodiversity, rather than on diversity within animal species as this
would be covered by the plant life or health provision, rather than that relating to
human or animal life or health.96 Plants are not directly mentioned, but as the
reference to the “spread of disease” is expressed in general terms, this would arguably
encompass plant disease as well as disease in animals or humans.97
A second more difficult issue to resolve is that Annex A:4 stresses the “health”
aspects of the SPS measures, rather than the “life” ones. This interpretation is
supported by paragraph 2 of the Preamble, which does not mention “life” at all, but
instead states that the purpose of the agreement is to “improve human health, animal
health and phytosanitary situation in all Members.” The Appellate Body’s
examination of the content of the appropriate risk assessment in *Hormones*,98
*Japanese Varietals*99 and *Australia-Salmon*100 also takes this view.
In *Hormones*, the Appellate Body discussed the general content of the risk
assessment, arguing that a wide range of issues could be considered, including
“relevant ecological and environmental conditions”101 as well as the need to evaluate
the “risk in human societies as they actually exist.”102 Despite this general debate, the

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96 See Johnston supra n. 93 at 54
97 This would follow the Appellate Body’s general exhortation to give the ordinary meaning to a word
or phrase: e.g. see *Hormones supra* n. 37 at para 163
98 *Hormones*-Appellate Body report *ibid.*
1999
100 *Australia-Measures Affecting the Importation of Salmon* WT/DS18/AB/R, 20 October 1998,
 Arbitrators’ Report WT/DS18/9, 23 February 1999 & Recourse to Article 21:5 DSU by Canada
 WT/DS18/RW 18 February 1999
101 Article 5:2 SPS Agreement; *Hormones*-Appellate Body report *supra* n. 37 at para 187
102 *Ibid.* at para 187
emphasis was again placed firmly on health in both the *Hormones* case\(^{103}\) and later in *Australia-Salmon*.\(^{104}\)

Although "life" has not been separately considered, the Appellate Body's construction of Article 3:3 SPS Agreement indicates that "life" is defined in terms of "health,"\(^{105}\) arguably ensuring that measures concentrating on the preservation of life in a broader way are outside the scope of the SPS Agreement. Treating "life" as a sub-division of "health" is a problem for the imposition of measures designed to achieve sustainable development because the focus is on the preservation of varieties of "life"\(^{106}\) for future generations, rather than on immediate health concerns.\(^{107}\)

These ambiguities might be overcome if the member could avoid the necessity of the risk assessment. Article 5:7 SPS Agreement allows the imposition of measures where "relevant scientific evidence is insufficient."\(^{108}\) Members would seem to be able to use this provision therefore to implement pro-environmental policies without the additional burden of providing the necessary risk assessment. Article 5:7 merely states that measures can be imposed on the "basis of available pertinent information."

However, in the *Hormones* dispute the Appellate Body made it clear that Article 5:7 is only an interim measure\(^{109}\) and cannot be used to justify long term policy objectives that are not supported by a risk assessment.\(^{110}\) This analysis therefore lets members impose measures designed to protect the environment with no risk assessment in the

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\(^{103}\) *Ibid.* at 187
\(^{104}\) *Australia-Salmon* Appellate Body report *supra* n. 100 at para 121
\(^{105}\) *Hormones* Appellate Body report *supra* n. 37 at para 177
\(^{106}\) The Shorter Oxford Dictionary defines "life" as the "condition, quality or fact of being a living organism" and also the "continuance or prolongation of animate existence." (Shorter Oxford Dictionary (1994)) This thesis uses the term "life" in this broader sense
\(^{107}\) Johnston *supra* n. 93 at 52; on food safety issues see Ch. 4 generally (thesis)
\(^{108}\) An embodiment of the "precautionary principle:" see Chapter 4 section B: 3 (thesis) & Chapter 3 section B: 2 (thesis)
\(^{109}\) *Supra* n. 37 at paras 120-125
\(^{110}\) Note that a risk assessment would only be necessary if the measures did not conform to existing international standards (Article 3:1 SPS Agreement). However, as Article 5:7 only applies where there is no existing standard, arguably a risk assessment will always be necessary
short term, but it is unclear how long these measures could remain in place before the appropriate risk assessment had to be produced. The Appellate Body did not discuss this, and Article 5:7 only states that the assessment must be produced within a "reasonable period of time."

If the Appellate Body's view that the normal meaning of the word should be adopted, then arguably, this period should depend on both the nature of the risk and also the measure imposed: if a member is trying to justify a complete ban, then a 'reasonable period of time' should be shorter than if the trade measure was less trade restrictive.\textsuperscript{111} This would fit in with the SPS Agreement’s requirement that the least trade restrictive measure should be used\textsuperscript{112} and reflect the general objective of the agreement, which is to achieve free trade in agricultural products.\textsuperscript{113}

Even using the SPS Agreement to promote 'traditional' environmental goals including climate change and protection of the ozone layer is problematic on two levels: firstly, both these issues relate to human and animal and plant life and health. Article 2:1 SPS Agreement presents these issues as disjunctive, so that SPS measures can be applied to human, or animal, or plant life or health. This pattern is also repeated in Paragraph 2 of the Preamble and Annex A:1\textsuperscript{114} SPS Agreement. The question then must be whether the SPS Agreement will cover members’ pro-environmental policies that are designed to simultaneously cover all these aspects. The panel and Appellate Body reports give no further assistance, as the cases have all considered measures

\textsuperscript{111} e.g. labelling requirements which fell within the terms of the SPS Agreement rather than the WTO Agreement on Technical Barriers to Trade (TBT Agreement). Although Article 1.4 TBT Agreement states that it will apply to agricultural products, Article 1.5 makes it clear that it will not apply where measures are covered by the SPS Agreement. See Chapter 3 section A: 1(b) (thesis)

\textsuperscript{112} Article 5:4 SPS Agreement

\textsuperscript{113} Para 1 Preamble SPS Agreement

\textsuperscript{114} On the definition of SPS measures for the purposes of the agreement
targeted specifically at plants,\textsuperscript{115} or humans\textsuperscript{116} or animals\textsuperscript{117} so this issue has not been addressed.

Arguably, the correct interpretation is that SPS measures can only concentrate on one of these issues because this mirrors the restrictive rules in the agreement itself, which were further narrowed by the Appellate Body’s insistence on a link between the measure imposed and an appropriate risk assessment.\textsuperscript{118} This narrow approach flows from the purpose of the agreement, which is to ensure that any SPS measure imposed does not distort international agricultural trade.\textsuperscript{119} This means that the focus in the SPS Agreement is on the measure used, rather than on the policy behind it, as it assumes that the hidden objective will always be the re-introduction of protectionism on domestic agricultural sectors, rather than the altruistic promotion of any global environmental concern. This is supported by Article 2:1 SPS Agreement which states that the measures taken must be “necessary” to protect human, animal or plant life or health and Article 2:2 which allows the measure to be “applied only to the extent necessary.”\textsuperscript{120}

Even if the disjunctive problems could be overcome, a second complication arises. Article 2:1’s\textsuperscript{121} reference to the ‘necessity’ requirement implies that there must be an imminent and readily identifiable threat to life or health, rather than a slow change that will result in a threat in the future. Climate change and protection of the ozone layer currently fall into the latter category\textsuperscript{122} and are therefore unlikely to fulfil this

\begin{itemize}
\item \textsuperscript{115} Japanese Varietals \textit{supra} n. 99
\item \textsuperscript{116} Hormones-Appellate Body report \textit{supra} n. 37
\item \textsuperscript{117} Australia-Salmon \textit{supra} n. 100
\item \textsuperscript{118} Hormones-Appellate Body report \textit{supra} n. 37 at para 193
\item \textsuperscript{119} Para 2 Preamble SPS Agreement
\item \textsuperscript{120} Article 2:2 SPS Agreement
\item \textsuperscript{121} SPS Agreement
\item \textsuperscript{122} Brack: “Trade and Climate Change Policies” in Brack (ed.): ‘Trade and Environment: Conflict or Compatibility’ \textit{supra} n. 21, 100 at 101
\end{itemize}
criteria. Clearly, the emphasis on the elimination on agricultural protection means that newer global environmental concerns are difficult to pursue using the SPS Agreement.

2. The Marrakesh Agreement

Reference to environmental concerns can also be found in the Marrakesh Agreement establishing the WTO. This agreement does not contain any specific rules on environmental protection broadly defined, but paragraph 1 of its Preamble states that parties should ensure the “optimal use of the world’s resources in accordance with the principle of sustainable development” and seek to “protect and preserve the environment.” In contrast to the Agreement on Agriculture, this indicates that Marrakesh Agreement sees the two concepts as distinct. The positioning of both these issues within the Preamble, rather than in the substantive rules of the Marrakesh Agreement, means that they do not create legal obligations in themselves, but instead inform the rest of the rules.

On one level, a narrow negative interpretation can be placed on this, so that the lack of substantive rules means that the Preamble’s statements are unenforceable rhetoric. If this view is adopted, then ‘informing’ the rest of the rules means that the panel and Appellate Body members should not accord significant weight to paragraph 1 of the Preamble to the Marrakesh Agreement. McRae argues that this narrow literal approach reflects the Appellate Body’s starting point in its process of analysis of the terms of any specific WTO agreement and therefore concentrating on the substantive

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123 This interpretation could change if an appropriate risk assessment could be obtained: Article 3:3 ibid.: see Barton: “Biotechnology, the Environment and International Agricultural Trade” (1996) 9 Georgetown Int’L Envl Rev 95 at 97
124 This approach is taken by the Appellate Body in United States-Import of Certain Shrimp and Shrimp Products WT/DS58/AB/R, 12 October 1998 at para 129; see also Recourse to Article 21:5 DSU by Malaysia WT/DS58/R, 15 June 2001
obligations in the agreements themselves is legitimate. He goes on to note\textsuperscript{126} that leaving the analysis there fails to take account of the political and economic context in which the WTO agreements operate. Accordingly, the original purpose of the specific WTO agreements must be balanced against members’ evolving trade policies and international trade patterns as these may more accurately reflect the changing nature of international trade.\textsuperscript{127} This view also mirrors the second limb of the Appellate Body’s process of analysis, where it adopts a dynamic style, considering both aspects to ensure the rules remain “effective.”\textsuperscript{128}

Using this approach,\textsuperscript{129} arguably the Appellate Body has ensured that paragraph 1 of the Preamble to the Marrakesh Agreement is more than rhetoric. Although not directly enforceable itself, the Appellate Body used it to inform the interpretation of Article XX(g) GATT\textsuperscript{130} in the 	extit{Shrimp/Turtle} dispute.\textsuperscript{131} Here it argued that the wording of Article XX(g) GATT was drafted in 1947 and therefore did not reflect “contemporary concerns of the community of nations about the protection and conservation of natural resources.”\textsuperscript{132} It maintained that it was possible to discern the

\begin{footnotes}
\footnote{126} Ibid. at 36
\footnote{127} e.g. the Agreement on Agriculture is based on economic models, so neglecting the economic effect of members’ domestic agricultural trade policies on international trade patterns means that a significant element of the operation of the agreement is ignored: the basis of the AMS calculation is Cahill and Legg’s Producer Subsidy Equivalent model: see Cahill & Legg: “Estimation of Agricultural Assistance Using Producer and Consumer Subsidy Equivalents: theory and practice” (1989-90) 13 OECD Economic Studies Special Issue: Modelling the Effects of Agricultural Trade Policies at 13
\footnote{128} Ibid. at 36; however, note some commentators’ view that the Appellate Body has gone too far in its pursuit of judicial activism: see Quick & Blüthner \textit{supra} n. 39
\footnote{129} i.e. starting with the literal interpretation of the applicable substantive WTO rules and then moving on to consider the implications of the operation of the WTO rules within the political and economic context in which the rules operate
\footnote{130} Article XX(g) specifies that: “Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:… (g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.” See Chapter 3 section A:3 (thesis) for a detailed explanation of the application of Article XX(g) GATT
\footnote{131} WT/DS58/AB/R \textit{supra} n. 124 at para 129
\footnote{132} Ibid. at para 129
\end{footnotes}
direction of this concern by the wording of paragraph 1 of the Preamble to the Marrakesh Agreement and Article XX(g)’s coverage should therefore be extended to take these more recent views into consideration.\textsuperscript{133}

This analysis is important because it elevates the status of the Marrakesh Agreement’s Preamble to a crucial tool that can be used to reinterpret the ‘covered agreements’ in the light of non-trade issues because all the agreements annexed to the Marrakesh Agreement are governed by the latter’s terms.\textsuperscript{134} In particular, it shows that it is possible to use paragraph 1 to ensure that members’ policies aimed at the natural environment are not excluded from the scope of Article XX GATT because a narrow legalistic interpretation of Article XX’s exceptions has been adopted.\textsuperscript{135} Using the Preamble in this way also permits reinterpretation of members’ obligations without the need for protracted renegotiation of the rules outside the scheduled multilateral trade negotiations.\textsuperscript{136}

This solves the immediate incorporation of policies promoting the natural environment into Article XX GATT, but it could arguably be extended to issues that also promote sustainable development because paragraph 1 of the Preamble to the Marrakesh Agreement also makes specific reference to the pursuit of such policies. The question that remains is whether paragraph 1 can also be used to manipulate the existing rules in the Agreement on Agriculture and the SPS Agreement in the same way? The Appellate Body argued that it was using paragraph 1 in \textit{Shrimp/Turtle} to update members’ obligations in the light of pro-environmental concerns because the

\begin{tabular}{l}
\textsuperscript{133} \textit{Ibid.} at para 130 \\
\textsuperscript{134} Article II:1 & II:2 Marrakesh Agreement \\
\textsuperscript{135} See Shaffer: “United States-Import Prohibition on Certain Shrimp Products” (1999) 93 AJIL 507 \\
\textsuperscript{136} Note that the agenda for renegotiation is ‘built-in’ to a number of the WTO agreements: e.g. Article 20 Agreement on Agriculture provides that renegotiation shall begin in the last year of the implementation period
\end{tabular}

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GATT was concluded in 1947 when such problems were not prevalent. This argument would be very useful in international agricultural trade, but it is difficult to transpose to the Agreement on Agriculture and the SPS Agreement because both were concluded at the same time as the Marrakesh Agreement. Arguing that members did appreciate environmental issues enough to incorporate some terms in both agreements, but were so focused on eliminating protection that they failed to address the entire scope of obligations thus necessitating a 'gap-filling' exercise by the Appellate Body is more difficult to justify when the two agreements were negotiated together.

In addition, it could be argued that paragraph 1 of the Preamble is arguably unnecessary to the Agreement on Agriculture anyway because Annex 2 already recognises the need to give effect to agri-environmental policies by allowing members to exempt such domestic policies from their AMS calculation. Likewise this thesis has argued that the SPS Agreement is likely to cover natural environmental protection initiatives because of its similarity to Article XX(b) GATT, so paragraph 1 would be superfluous there too. The problem then is that both agreements prioritise the elimination of agricultural protectionism over 'environmental protection' in its broadest sense. Paragraph 1's only relevance to both agreements would therefore be to change the order of priorities and ensure that policies aimed at preserving the natural environment took precedence over the elimination of protectionism. This would be a radical approach and would arguably impose a different purpose from the

137 Shrimp/Turtle Appellate Body report supra n. 124 at para 129
138 15 December 1993
139 Annex 2:12 Agreement on Agriculture
140 See Chapter 3 section A: 1(b) (thesis); this view is supported by Ervin supra n. 5 at 75 who does not even question its application & by Schoenbaum supra n. 4 at 285
one negotiated during the Uruguay Round. The Appellate Body has already shown its reluctance to engage in such blatant judicial activism and so it is unlikely that it would use paragraph 1 in this way. This reluctance is even more likely in the case of the Agreement on Agriculture because it is undergoing review.

A different question is whether paragraph 1 of the Preamble to the Marrakesh Agreement could be used to incorporate environmental policies where the WTO scheme is silent on the issue. The most pertinent example is the Decision on Measures in Favour of Least-Developed Countries. Here members agree, inter alia, to give “increased technical assistance in the development, strengthening and diversification of their production and export bases.” The decision primarily focuses on facilitating trade, but if paragraph 1 were used, then the obligation would be modified, so that members would also need to show that any scheme protected all aspects of the natural environment and any production enhancement proposal was carried out “allowing for the optimal use of the world’s resources in accordance with the principle of sustainable development.”

This interpretation would encounter similar problems to that in the Agreement on Agriculture and the SPS Agreement because the Decision on Measures in Favour of Least-Developed Countries was also adopted at the same time as the Marrakesh Agreement was concluded. The decision does not mention the promotion of any aspect of environmental protection at all, so it could be argued that members did not fully appreciate the need to ensure that any agricultural production promotion scheme

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142 Hormones-Appellate Body report supra n. 37 at para 165

143 Article 20 Agreement on Agriculture

144 Para 2:v Decision on Measures in Favour of Least-Developed Countries. Although this decision does not specifically mention members’ agricultural trade obligations, it does have broad application and will therefore also apply to international agricultural trade: see Article 1Decision on Measures in Favour of Least-Developed Countries

145 Para 1 Preamble Marrakesh Agreement
designed to assist such countries should be conducted in a way that addressed all environmental concerns. The nature of the problem is therefore different to the Agreement on Agriculture and the SPS Agreement where environmental protection is acknowledged.

If this view is accepted, then the Appellate Body could distinguish the two situations and use paragraph 1 of the Preamble to incorporate broad environmental concerns into the Decision on Measures in Favour of Least-Developed Countries and therefore broaden the scope of members’ obligations.

3. The GATT

Article XX(g) GATT allows members to adopt or enforce measures that are otherwise inconsistent with their obligations, where those measures relate “to the conservation of exhaustible natural resources.” This exemption is subject to two requirements: firstly, that any restrictions are similarly imposed on domestic production and secondly, that the measures are “not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail” or amount to a “disguised restriction on international trade.”

Members have attempted to rely on Article XX(g) to justify policies designed to protect the natural environment both before and after the introduction of the WTO agreements. These have all been unsuccessful, although many commentators acknowledge that the Appellate Body’s interpretation of the scope of Article XX(g) in the Shrimp-Turtle dispute could be the beginning of a change to this trend.

146 Article XX(g) GATT
147 ‘Chapeau’ Article XX
148 Tuna-Dolphin I & II supra n. 42; note other panels identified by Hudec: see Hudec: “The Product-Process Doctrine in GATT/WTO” supra n. 51 at 203-207
149 Reformulated Gasoline Appellate Body report supra n. 89
The panel and Appellate Body reports have been extensively analysed by commentators in the context of their possible implications for the future importance of the preservation of the natural environment in international trade generally and its place in the interpretation of the WTO agreements as a whole. This thesis does not intend to reiterate these arguments, but will identify the important parts of the Appellate Body’s report that have implications for the relationship between environmental protection and international agricultural trade.

The dispute concerned United States’ legislation, which imposed a trade ban on imported shrimp from exporting nations which did not have a regulatory structure in place requiring their fishermen to adopt techniques designed to protect particular species of sea turtle. The panel declared the United States’ measures inconsistent with GATT and not justified by Article XX; a view endorsed by the Appellate Body, but on different grounds. This section of the analysis will concentrate on the Appellate Body’s examination of Article XX(g) GATT.

In contrast to the panel, the Appellate Body stated that the United States’ legislation should be analysed under the relevant Article XX exemption first before the chapeau was applied. It adopted a broad construction of the term “exhaustible natural resource” in Article XX(g), arguing that taking a literal interpretation of it as only denoting “non-renewable resources,” would mean ignoring the broader importance that members themselves placed on environmental issues. The

151 Ibid. Also see Howse: “The Turtles Panel—Another Environmental Disaster in Geneva” (1998) 32(5) JWT 73 for an appraisal of the panel report
152 See WT/DS58/AB/R supra n. 124 at paras 2-6
153 Article XI: 1 GATT
154 WT/DS58/AB/R supra n. 124 at para 7
155 i.e. the first paragraph of Article XX GATT
156 WT/DS58/AB/R supra n. 124 paras 118 & 120 reiterating Reformulated Gasoline Appellate Body report supra n. 90 at 22; this approach was again adopted by the Appellate Body in Asbestos: European Communities-Measures Affecting Asbestos and Asbestos Containing Products Appellate Body report WT/DS135/AB/R, 12 March 2001
157 WT/DS58/AB/R supra n. 124 at para 129
Appellate Body maintained that any other view would overlook the fact that "(l)iving resources are just as "finite" as petroleum, iron ore and other non-living resources."\textsuperscript{158} In this respect it decided that sea turtles could be an "exhaustible natural resource" for the purposes of Article XX(g).\textsuperscript{159} This interpretation meant that the detailed nature of the United States' measure was discussed only to determine whether it "related" to the preservation of that exhaustible natural resource,\textsuperscript{160} consequently neglecting the broader question of the legitimacy of the United States' measures.\textsuperscript{161}

Following this positive finding, the Appellate Body went on to examine the United States' legislation under Article XX's chapeau. It argued that this involve a three stage analysis:

"firstly, the application of the measure must result in discrimination.... Second, the discrimination must be arbitrary or unjustifiable in character. Third, this discrimination must occur between countries where the same conditions prevail."\textsuperscript{162}

Using paragraph 1 of the Preamble to the Marrakesh Agreement to 'modernise' Article XX,\textsuperscript{163} the Appellate Body argued that a balance must be struck between facilitating the member's sovereign right to pursue a policy which protected the natural environment, whilst simultaneously ensuring that its treaty obligations were complied with.\textsuperscript{164} On this view therefore, Article XX could only ever be a limited exception to the obligations specified in the GATT because the emphasis would be on the maintenance of free trade, rather than on the promotion of environmental

\textsuperscript{158} Ibid. at para 128
\textsuperscript{159} The Appellate Body relied heavily on the definition of "living resources" from both the 1982 United Nations Convention on the Law of the Sea and also the 1992 Convention on Biological Diversity: Ibid. at para 130-131
\textsuperscript{160} Ibid. at para 135
\textsuperscript{161} The Appellate Body stated that the measures' legitimacy should be addressed through international negotiation, rather than through judicial activism: Ibid. at para 168
\textsuperscript{162} Ibid. at para 150
\textsuperscript{163} Ibid. at paras 152-155
\textsuperscript{164} Ibid. at para 156
protection. The Appellate Body then went on to analyse the United States' legislation under its three stage criteria and argued that although some flexibility was built into the regulatory framework, the interpretational guidelines accompanying the legislation ensured that the United States would only accept imported shrimp from those countries which had "essentially the same" rule structure as the United States had. The Appellate Body condemned such unilateral action, and declared that the United States' legislation therefore did not satisfy the test in the chapeau.

A number of general conclusions can be drawn from the Appellate Body's analysis in the Shrimp-Turtle dispute. Firstly, members' policies designed to facilitate protection of the natural environment can come within the scope of Article XX(g) GATT because of the wide construction of "exhaustible natural resource" and the use of paragraph 1 of the Preamble to the Marrakesh Agreement to 'modernise' the GATT rules and accommodate this change. Although this is a positive step, this definition does not seem to encompass broader environmental goals, rather than just the natural environment.

Secondly, it is the measure's application, which must be discriminatory, and not the measure per se. Adopting this approach could allow members more freedom to pursue broader environmental policies, rather than those merely designed to protect the natural environment, because it shifts the focus away from the construction of the measure towards the way it affects international trade patterns. Finally, the Appellate

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165 Ibid. at para 157; this view is substantiated by the rest of the Preamble to the Marrakesh Agreement. Although paragraph 1 discusses the environment, the other provisions firmly place the emphasis back onto the pursuit of free trade goals: see para 3 Preamble Marrakesh Agreement

166 Ibid. at para 163

167 It argued that international standards were desirable, but these should be negotiated through multilateral negotiations and not imposed unilaterally: ibid. at para 168 reiterating the Committee on Trade and Environment’s first report to the first Ministerial Meeting: WT/CTE/1 supra n. 27 at para 171

168 WT/DS58/AB/R ibid. at para 164; the Appellate Body argued that the United States’ insistence on a mirror image of their own regulatory system in exporting countries’ for sea turtle protection was unnecessarily rigid and therefore arbitrarily discriminatory by its nature: ibid. at para 177

169 The Appellate Body made no finding under Article XX(b): ibid. at para 146
Body endorsed multilateral negotiation in preference to unilateral action when attempting to introduce global standards that are designed to prevent damage to the environment.

Despite the change in the direction on environmental policies generally within GATT, several issues remain unresolved. Firstly, Article XX will only be analysed by the panels if the protagonists specifically plead it.\textsuperscript{170} This means a panel will not look at the positive effect of measures on the natural environment, unless the member expressly draws it to their attention. Consequently, environmental protection is not an over-riding objective in the examination of the trade measure at issue.

Secondly, the burden of proof is still placed on the party seeking to rely on the exception. This guarantees that the emphasis is placed on the ‘trade’ aspect of the measure, rather than on the ‘environment’ element of it. By forcing the member to prove that their policy does relate to the “conservation of the natural resource,” the assumption is that free trade is the desirable goal and any policy that impedes that is protectionism by an alternative route. This view is supported by the chapeau to Article XX, which states that in addition to the requirement in the specific exception itself, members must show that their measure is not a “disguised restriction” on international trade.\textsuperscript{171}

The final broad problem is that the emphasis in Article XX(g) is still on the protection of the product and not the process by which it is manufactured, even though the Appellate Body recognised that protecting sea turtles in principle was a legitimate policy goal.\textsuperscript{172} Although it did not refer to the product-process doctrine specifically, the Appellate Body’s analysis reads the doctrine into its interpretation of when a

\textsuperscript{170} WTO: ‘GATT/WTO Dispute Settlement Practice Relating to Article XX, Paragraphs (b), (d) and (g) of GATT: Note by the Secretariat’ WT/CTE/W/53/Rev.1, 26 October 1998 at II

\textsuperscript{171} The relationship between the chapeau and the exceptions in Article XX GATT is dealt with by the Appellate Body in Shrimp-Turtle: Appellate Body report supra n. 124 at paras 147 & 149

\textsuperscript{172} Ibid. at para 135
measure ‘relates to’ the conservation of a natural resource,\textsuperscript{173} therefore presuming that
the doctrine is a settled principle of international trade law.

When discussing the legality of the United States measure, the Appellate Body
stressed the need to establish a close causal nexus between the product, which was the
focus of the ban, and the justification for the imposition of the environmental
policy.\textsuperscript{174} It went on to argue that in order to be justified under Article XX(g), the
measure imposed must not be “disproportionately wide in its scope and reach in
relation to the policy objective of protection and conservation of sea turtle species.”\textsuperscript{175}
The Appellate Body reached a negative conclusion in the \textit{Shrimp-Turtle} dispute, but
this related to the methods used by the United States to implement its environmental
policy, rather than the legitimacy of the policy itself. This represents a change in
emphasis to the interpretation of Article XX(g) GATT in comparison to the \textit{Tuna-
Dolphin} decisions. Inevitably, this has specific implications for the recognition of
policies for the preservation of the natural environment within international
agricultural trade. This occurs on two levels: firstly, on a broad level and secondly, in
relation to the specific impact on the substantive rules of the Agreement on
Agriculture and the SPS Agreement.

On a broad level, the Appellate Body’s approach recognises both the legitimacy of
policies to preserve the natural environment in the trade context and the need to
acknowledge this through the modification of the interpretation of GATT’s rules. If
the \textit{Shrimp-Turtle} Appellate Body report is viewed as a general reinterpretation of
existing obligations to accommodate members’ concerns for the natural environment,
then such a construction can be extrapolated into the SPS Agreement. Using this

\textsuperscript{173} This view is supported by Jackson: “Comments on \textit{Shrimp/Turtle} and the Product/Process
Distinction” (2000) 11 EJIL 303 at 303
\textsuperscript{174} \textit{Supra} n. 124 at paras 135 & 138
\textsuperscript{175} \textit{Ibid.} at para 141
approach, the difficulties this thesis has identified in using Article 2:1 SPS Agreement to support SPS measures designed to promote environmental issues and biodiversity in particular could be alleviated. This is because the “plant, animal or plant life or health” categories are not defined in the agreement itself. This means that Article 2:1 could support either a broad or narrow interpretation by the Appellate Body.

In previous disputes, the Appellate Body has relied on the 1969 Vienna Convention on the Law of Treaties (the Vienna Convention) to assist in interpreting members’ WTO obligations when the text is unclear, or inconclusive. In accordance with Article 31:3(b) of the Vienna Convention, subsequent practice in treaty application can also be taken into account when trying to determine the scope of individual rules. It can be argued that the Appellate Body’s recognition of the need to accommodate members’ changing emphasis towards protection of the natural environment in the Shrimp-Turtle dispute is such a change and can be relied on to inform other broad treaty provisions in the same way.

Likewise, Article 31:2 of the Vienna Convention states that the Preamble to the relevant treaty can be used to inform members’ obligations. The Appellate Body relied on this provision to legitimate its use of paragraph 1 of the Preamble to the Marrakesh Agreement in the Shrimp-Turtle dispute, and consequently, this could be used to widen the scope of the SPS Agreement to incorporate environmental measures. However, the over-riding free trade goal would remain the same.

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176 India-Patent Protection for Pharmaceutical and Agricultural Chemical Products-United States’ Complaint WT/DS50/AB/R, 19 December 1997 at paras 45-46; Reformulated Gasoline Appellate Body report supra n. 90 at 17
177 This argument is problematic in relation to panel and Appellate Body reports, as their decisions are not precedents. However, it is clear from the Appellate Body’s approach in Hormones, Japanese Varietals and Australia-Salmon that it follows its own decision closely as if they had precedent value: see discussion of the Appellate Body’s interpretation of members’ obligations under the SPS Agreement in Chapter 1 section B: 3(a)(ii) (thesis)
178 This was implicit, rather than explicitly stated in the report: see Shrimp-Turtle Appellate Body report supra n. 124 at para 114
Using the same approach to inform the interpretation of the Agreement on Agriculture is difficult. This is because there is no ambiguity in the rules in the same way as the SPS Agreement. Whereas the extent to which agri-environmental policies could be accommodated in the SPS Agreement was debateable,\textsuperscript{179} Annex 2:12 Agreement on Agriculture already legitimises the implementation of such policies by members, subject to specific limitations in Annex 2:12(a) and (b).

Although the Appellate Body endorsed the pursuit of environmental measures, it made it clear that the measure used to fulfil that policy must also comply with the free trade goal.\textsuperscript{180} Accordingly, any environmental measure must not be applied in a discriminatory way, or be a disguised restriction on international trade. The Agreement on Agriculture already adopts this approach because it allows the pursuit of environmental policies within the framework of members’ domestic support reduction commitments in Article 6 Agreement on Agriculture. Agri-environmental measures are therefore allowed under the Agreement on Agriculture unless they constitute disguised protectionism, therefore mirroring the Appellate Body’s analysis in the \textit{Shrimp-Turtle} dispute.

Secondly, the \textit{Shrimp-Turtle} Appellate Body report potentially affects the operation of the substantive rules of the Agriculture and SPS Agreements. The same issue arises in both agreements: whether Article XX(g) can be used to excuse members’ substantive obligations under the WTO agreements. A negative answer results for two reasons: firstly, the General Interpretative Note to Annex 1A of the WTO Agreements states that in the event of a conflict between the GATT 1994 and any agreement in Annex 1A, then the provisions of the Annex 1A agreement prevails. As the Agreement on

\textsuperscript{179} See Chapter 3 section A: 1(b) (thesis)
\textsuperscript{180} \textit{Shrimp-Turtle supra} n. 124 at paras 135 & 149. In the case of \textit{Shrimp-Turtle}, the measure had to ‘relate to’ the conservation of natural resources and also not be disguised restriction on international trade under the chapeau of Article XX GATT
Agriculture and the SPS Agreement are both within Annex 1A, if their rules prohibit certain measures, then Article XX cannot excuse them.

In addition, the panel's view in the *Hormones* dispute\(^{181}\) that Article 1:1 SPS Agreement did not specifically refer to the need to prove a prior violation of GATT before it could apply the SPS Agreement's rules\(^{182}\) ensures that the SPS Agreement should always be applied first when dealing with difficulties over measures covered by it.\(^{183}\) Article XX(g)'s significance is therefore reduced when both are pleaded in the same case. This view could be extended to any Annex 1A agreement and any other exemption of Article XX GATT\(^{184}\) because the panel addressed the question in terms of the order that the rules should be applied generally.\(^{185}\)

Although this addresses the question of what will happen in the event of a conflict between Article XX GATT and both the Agriculture and SPS Agreements, it does not determine whether this should be the appropriate outcome.

### 4. Are the Rules Effective?

This thesis has used a three stage test to determine whether the WTO's rules on international agricultural trade overcome the difficulties seen in GATT: the rules' adequacy is assessed; institutional questions, including the relationship between the relevant rules, and the role of the Appellate Body in interpreting those provisions are analysed. Finally, the impact of the WTO's agriculture scheme on developing and least-developed countries is evaluated both by looking at the scope of the special and differential treatment provisions for such countries and by determining the changes to

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181 See *EC Measures Concerning Meat and Meat Products (Hormones)-Complaint by Canada* WT/DS48/R, 18 August 1997 at paras 8.34-8.45
183 *Ibid.* at paras 8.45: the panel maintained that even if there was a breach of GATT which allowed a claim under Article XX(b), the panel would still need to address the rules in the SPS Agreement because these were different to the GATT's. In the event of any conflict therefore at this stage, the SPS Agreement would prevail anyway: see General Interpretative Note to WTO Multilateral Agreements on Trade in Goods
184 Including Article XX(g)
the levels of protection imposed on agricultural products by developed nations following the application of the WTO agriculture scheme.\textsuperscript{186}

This test is the one on which the WTO regime is based and is focussed on the need to eliminate protectionism in international agricultural trade as identified in the Preambles to the Agreement on Agriculture and the SPS Agreement,\textsuperscript{187} and the importance of recognising the special needs of developing countries.\textsuperscript{188}

So far, the application of this test to the existing WTO agriculture regime has shown that although significant complications remain,\textsuperscript{189} although the Agreement on Agriculture and the SPS Agreement are based on the desire to promote free trade in agricultural products, difficulties arise when the test is applied to the environment context. Several problems can be identified. These should be considered on two levels: firstly, the ability of the agriculture regime to address the concerns raised by preservation of the natural environment and secondly, the extent to which broader environmental goals, including sustainable development, are included.

On the preservation of the natural environment, two issues arise. Firstly, the effectiveness test is based on the same assumptions as the Agreement on Agriculture and the SPS Agreement, that the elimination of protectionism in international agricultural trade is the primary goal for both agreements. This means that free trade is promoted over environmental protection. Consequently, when the effectiveness of the rules is evaluated, if the agreement determines that a member’s agri-environmental policy is protectionist and therefore outside the scope of the Annex 2:1 and 2:12 Agreement on Agriculture, then the rules are effective because they are

\textsuperscript{186} See Chapter 1 (thesis)
\textsuperscript{187} Paras 2, 3 Preamble Agreement on Agriculture; also note paras 1, 4 Preamble SPS Agreement
\textsuperscript{188} Para 4 Preamble Agreement on Agriculture and para 7 Preamble SPS Agreement
\textsuperscript{189} See Chapter 1 section B generally (thesis)
eliminating the barriers to free trade, even though the member’s policy may have legitimate environmental benefits.

Applying the second limb of the effectiveness test to assess the institutional relationship between the rules indicates the test is again satisfied. The main problems identified here are the role of the Appellate Body and the relationship between the environmental exception in Article XX(g) GATT and the Agriculture and SPS Agreements. Arguably, the Appellate Body has carved out its own role through its insistence on “completing the analysis,” so that despite rejecting the panel’s interpretation of the relationship between Article XX(g) and the chapeau, it went on and applied its new formulation to the facts of the Shrimp-Turtle dispute, thus rectifying any outstanding misunderstanding of the incorporation of measures designed to preserve the natural environment into the GATT. The same conclusion can also be reached when examining the relationship between Article XX(g) and the Agriculture and SPS Agreements: the panel’s ruling in the Hormone dispute determines that the Annex 1A agreement is applied first, and the General Interpretative Note to Annex 1A states that in the event of a conflict, the provisions of the Annex 1A agreement will prevail.

This outcome means the agreement is effective in terms of the first two elements of the test, but it does not take into consideration the importance of broader environmental issues to members. Several questions arise from this conclusion. Firstly, to what extent should all environmental concerns be prioritised in the existing rule structure of the WTO and who should make that decision, the

190 See Quick & Blüthner supra n. 39 generally
191 Ibid
192 WT/DS48/R supra n. 179 at paras 8.34-8.45
193 See WT/CTE/1 supra n. 27 at 25
194 This encompasses both measures designed to preserve the natural environment, as well as those which facilitate sustainable development
panels/Appellate Body or the WTO members? The second question is related to this: whether the multilateral renegotiation talks should go further and amend existing WTO rules to reflect this change in priorities? Finally, to what extent can the existing rules be deemed effective, if members do not prioritise the elimination of protectionism in international trade above environmental protection? In other words, whether the first two elements of the WTO’s effectiveness test should be modified to reflect the change.

The questions identified relate to the relationship between international trade and environmental protection generally. It is arguable that the answer to the dilemma for the connection between international agricultural trade and the environment is different. The traditional argument based on free trade theory against the formal recognition of such non-trade issues in international agricultural trade us that the WTO’s agriculture regime has only started the process of the elimination of agricultural trade barriers, this is not complete and members may still use such measures to protect their agricultural sectors. On this interpretation, the danger is that changing the priorities within the Agreement on Agriculture and the SPS Agreement away from the pursuit of free trade towards environmental protection in any form would mean that members exploit the opportunity to reintroduce protectionist policies predicated on the need to fulfil environmental goals.

A balance must be struck so that the focus remains on the elimination of protectionism in international agricultural trade. If the regime is to remain rooted in free trade theory, then the argument is that the Agreement on Agriculture was only designed to be the first stage of the long-term reform of international agricultural trade.

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195 In the context used by this thesis
196 See UNCTAD/WTO Joint Study: “The Post-Uruguay Round Tariff Environment for Developing Country Exports” (6 October 1997) at 4
The emphasis should primarily remain on the elimination of trade barriers until a significant decrease in these levels has been witnessed. However, this assumes that all agric-environmental policies are designed to protect domestic agricultural sectors when this may not be the case. Formal recognition of alternative non-economic goals therefore should therefore be accommodated.

The third element of the effectiveness test raises different issues for the agriculture-environment relationship. Currently, the effectiveness test is formulated so that if the application of the rules and the institutional relationship between the agreements do not enhance opportunities for developing countries to increase their agricultural exports, then the regime is not effective. If the rules are modified so that environmental priorities are recognised, this will be a problem for developing countries. The nature of the effect on developing and least-developed countries of the recognition of environmental issues is dependent on how ‘environment’ is defined in the agreements. If it is seen as the ‘natural environment’ only, then two issues arise. Firstly, it is clear from the studies undertaken by UNCTAD and the WTO that the levels of protection on international agricultural trade are still prohibitively high to facilitate developing and least-developed country trade. These studies recognise that the high dependence of such countries on agricultural exports means that a significant reduction in the levels of protection will be necessary to assist them to ‘graduate’ from developing and least-developed country status.

The second linked issue is that if the Agreement on Agriculture and the SPS Agreement are further modified to recognise preservation of the natural environment,

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197 Para 2 Preamble Agreement on Agriculture
198 Ibid.
199 See Chapter 1 section A: 3 (thesis) for a detailed analysis of the needs of developing countries in international agricultural trade
200 Joint UNCTAD/WTO study supra n. 196
201 Ibid.
then this could adversely affect developing countries. Forcing such nations to adopt specified environmental standards will increase the costs of production in a way, which they perceive as “green imperialism.”²⁰²

Although protection of the environment may be an important policy goal to developed nations, it is clear that eliminating barriers to agricultural trade is the primary concern for developing and least-developed nations. On this view, it would be important to ensure that any alternative to the rules on international agricultural trade still balanced the needs of developing countries with all the other relevant non-economic objectives. This suggests it is still important to evaluate developing country concerns.

Problems also exist with the interaction of the relevant rules.²⁰³ Although problems applying the individual rules to protection of the natural environmental have already been discussed, a number of general comments can be made.

Even if it is accepted that the primary purpose of the rules is the pursuit of free trade, it is still unclear what place environmental protection²⁰⁴ should have under the existing rules. The Agreement on Agriculture only deals with environmental programmes in Annex 2:12, but does not give any detail about what type of policies should be accommodated under the provision. Although a significant degree of discretion is left to the member, Annex 2:12 sees environmental protection as a homogenous group of issues, so it is unclear whether domestic policies designed to facilitate sustainable development, or protect cultural diversity would, or should, also be included.

The SPS Agreement creates even more uncertainty because its rules adopt the narrow wording of Article XX(b) GATT. If the broader construction is placed on “human, ²⁰² i.e. the developed nations insisting on exporting their mistakes of industrialisation to developing and least-developed countries: see Jha supra n. 21 at 79
²⁰³ The application of the test to developing countries reveals the issue of green imperialism and the reintroduction of protectionism, which has just been identified: see also Jha ibid.
²⁰⁴ i.e. narrowly defined as the 'natural environment'
animal or plant life or health," problems can still be found when trying to establish whether measures focusing on general sustainable development issues within agriculture would be included. On one level, it could be argued that if members choose to implement these policies through barriers to trade, the WTO Agreement on Technical Barriers to Trade (TBT Agreement) covers these and so any protectionist aspects could be addressed through the application of that agreement ensuring that any problematic application of the SPS Agreement is unnecessary. This does not solve the problem, because the definition of a SPS measure for the purposes of the SPS Agreement is any measure designed to alleviate the risk to human, animal or plant life or health. It is possible to argue therefore that policies designed to facilitate sustainable development are indirectly protecting human, animal and plant health or life, as they are preserving resources for future generations. If the measures then come within the SPS Agreement, the operation of the TBT Agreement is excluded. This ambiguity in the application of both the Agreement on Agriculture and the SPS Agreement means that the existing rules are ineffective on this level: although the rules will achieve free trade in agricultural products, ambiguity still affects the overall cogency of the regime.

Institutional questions relating to the relationship between the WTO Agreements and the GATT were anticipated through the General Interpretative Note to Annex 1A and the panel's views in the Hormones decision, even though the degree of success is

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205 Article 2:1 SPS Agreement; on then scope of Article XX(b) GATT see Chapter 4 section A: 1(d) (thesis)
206 Article 1:3 TBT Agreement states that it covers all products, whether industrial or agricultural: see Chapter 4 section A: 1(c) (thesis)
207 Annex A SPS Agreement
208 Dependent on the definition of "life" or "health" which may be problematic: see Chapter 3 section A: 1(b) (thesis)
209 Article 1:5 TBT Agreement. See Chapter 4 section A: 2(d) (thesis) on the relationship between the TBT and SPS Agreements
debateable. Further problems arise however, as the wider relationship between the WTO Agreements and other multilateral environmental agreements (MEAs) were not addressed during the Uruguay Round. The Committee on Trade and the Environment is considering this issue in relation to the general relationship between trade and the preservation of the natural environment and also on a subject-specific level, including international agricultural trade.

Charnowitz identifies the 1991 Tuna Dolphin dispute as the beginning of this concern of the relationship between members' obligations under the GATT and under separate MEAs. This is because it was clear in that case that although the measure in question was a unilateral ban, Article XX GATT did not differentiate between unilateral and multilateral action, so potentially members' obligations under MEAs also could be declared incompatible with GATT.

On a general level, several problems arise from this. Firstly, if there are conflicts between the WTO agreements and the MEA, which prevails? Although Article 30:4(a) of the Vienna Convention seems to resolve this matter by stating that the provisions in the later treaty prevail, this only applies when the treaties cover the same subject matter and the same parties. Charnowitz and Schoenbaum argue that the re-dating of the GATT in the Marrakesh Agreement to 15th April 1994 means that

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210 Supra n. 178 at paras 8.34-8.45
211 The Committee's mandate is drawn from the Marrakesh Decision on Trade and the Environment at para 5 (point 2)
213 WT/CTE/1 supra n. 27 at 24-2; also WTO: 'Report (1999) of the Committee on Trade and Environment' WT/CTE/4, 14 October 1999 at 1. WTO members have put forward proposals for change; these will be evaluated in the context of the general proposals for the incorporation of environmental considerations into the WTO scheme in Chapter 3 section B (thesis)
214 Charnowitz: “Multilateral Environmental Agreement and Trade Rules” (1996) (4) Environmental Policy & Law 163 at 163
215 Then contracting parties of the GATT
216 Schoenbaum identifies 180 agreements: supra n. 4 at 281
217 Charnowitz: “Multilateral Environmental Agreements and Trade Rules” supra n. 214 at 163
218 Ibid. at 165
219 Schoenbaum supra n. 4 at 281
both the WTO agreements and GATT will ‘trump’ the major MEAs, but this would only resolve the conflict if the WTO agreements and the MEAs cover the same subject matter. This is an issue where members of the WTO are also signatories to the relevant MEA. Further problems occur where one party is a member of the WTO, but is not a signatory to the relevant environmental treaty. If the provisions of the MEA prevailed over the WTO agreements, then Charnowitz argues that the non-signatory could be subjected to trade sanctions imposed through the MEA that it has not signed without having any recourse to the WTO dispute settlement mechanism. These issues operate on a general level, but special problems arise for the WTO’s agriculture regime. The Agreement on Agriculture is currently based on the presumption that free trade must be achieved through lowering trade barriers. MEAs necessarily prioritise environmental issues above trade issues. The problem is that an interpretation that allows an environmental treaty to take precedence over the Agreement on Agriculture means that the free trade imperative within the latter agreement is removed. Accordingly, allowing members to use trade measures to promote any aspect of environmental protection in agriculture could adversely affect general trade patterns, which may lead to problems, particularly for developing

221 Charnowitz discusses this problem in detail: see “Multilateral Environmental Agreements and Trade Rules” supra n. 214 at 164
222 This would be an issue for the United States if a conflict arose between the Convention on Biological Diversity (1992) and the WTO, as the United States is not a signatory to the former, but is a member of the WTO
223 Charnowitz: “Multilateral Environmental Agreements and Trade Rules” supra n. 214 at 165-6; numerous solutions to this problem have been proposed by members under the CTE consultation process: WTO: ‘The Relationship Between the Provisions of the Multilateral Trading System and Multilateral Environmental Agreements: Submission by Switzerland’ WT/CTE/W/139, 8 June 2000; WT/CTE/W/170 supra n. 34; WTO: ‘Item 1: The Relationship Between the Provisions of the Multilateral Trading System and Trade Measures for Environmental Purposes, Including Those Pursuant to Multilateral Environmental Agreements: Submission by New Zealand’ WT/CTE/W/162, 10 October 2000. Note that these all offer a general solution to these difficulties. This thesis will concentrate on agriculture-specific solutions and so the effectiveness of these general solutions is outside the scope of the discussion
nations if the member chooses to preserve the natural environment, rather than promote general sustainable development goals. These issues must be taken into consideration when evaluating the effectiveness of any solution.

B. Greening International Agricultural Trade: Are the Proposed Solutions Effective?

Numerous solutions to the environment-trade dilemma have been proposed by WTO members\(^{224}\) and also by commentators.\(^{225}\) However, these relate to the relationship between trade and the environment generally and therefore treat both as homogenous issues that need homogenous solutions.\(^{226}\) This thesis has argued that the relationship between international agricultural trade and the environment requires a specific solution that is tailored to the special needs of both sectors. An answer will only be found if it takes these circumstances into account. Despite the broad range of proposals for the resolution of the general relationship between trade and the environment, the main two agriculture-environment specific proposals focus on the incorporation of multifunctionality and the adoption of the precautionary principle.

1. Multifunctionality\(^{227}\)

Article 20(c) Agreement on Agriculture recognises that the agreement is only the first phase of the reform of international agricultural trade and that the second stage should take into consideration 'non-trade concerns,' including protection of the environment.\(^{228}\) Members submitted proposals on the general meaning of

\(^{224}\) Supra n. 223


\(^{226}\) Ibid.

\(^{227}\) Multifunctionality is dealt with in several contexts in this thesis: see Chapter 2 section A: 1(c) Chapter 4 section B: 1; Chapter 5 section B: 1(c) (thesis)

\(^{228}\) This is also reiterated in Para 6 of the Preamble Agreement on Agriculture
multifunctionality under the Analysis and Information Exchange Process (AIE process), pursuant to the Geneva Ministerial Declaration procedure prior to the failed Seattle Ministerial Meeting and subsequent negotiating proposals. The debate is complicated by a disagreement over the correct term: some members used ‘non-trade concerns,’ whilst others adopted ‘multifunctionality.’ Although members are increasingly using the terms interchangeably, this thesis has argued that successfully incorporating policies predicated on either term is difficult. The multifunctionality debate has also filtered into the question of how environmental issues can be incorporated into the Agreement on Agriculture. Members’ proposals reveal that in the context of multifunctionality, environment is defined as the preservation of the natural environment, rather than the adoption of broader concerns.

In the context of the preservation of the natural environment, several concerns arise. Members’ suggestions presented to the Committee on Trade and Environment offer definitions of multifunctionality and non-trade concerns. Argentina’s proposal uses both terms, but defines the former as a part of the latter more general category. It goes on to state that the ‘‘multifunctionality’ of the agricultural sector is a recognition of the complexity of reality and states a valid concept for all WTO disciplines.

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229 These are summarised in WTO: ‘Committee on Agriculture: Council Overview of WTO Activities (1999)’ G/L/322, 6 October 1999 Annex III at para 4
230 Singapore Ministerial Declaration: WTO/MIN(96)/DEC, 18 December 1996 at para 19
231 Geneva Ministerial Declaration supra n. 29 at para 9; all documentation is available at <http://www.wto.org>
232 WTO: ‘Report by the Chairman, Ambassador Jorge Voto-Bernales, to the General Council’ G/AG/NG/2, 4 July 2000
233 WTO: ‘Non-Trade Concerns in the Next Agricultural Negotiations: Submission by Argentina’ WT/CTE/W/97, 10 August 1998 at 1
234 Chapter 2 section A: 1(c) (thesis)
235 Multifunctionality could be used to adopt broader environmental concerns, but it is clear from members’ proposals that they do not support this view in the environment debate: on the wider definition of multifunctionality see Smith supra n. 32
236 WT/CTE/W/97 supra n. 233 at 1
agriculture amongst them.” Japan’s submission relies on the OECD definition of multifunctionality as “beyond [agriculture’s] primary function of supplying food, fibre, agricultural activity [it] can also shape the landscape, provide environmental benefits.”

Superficially, both proposals start from the same basis that retaining the Agreement on Agriculture’s concentration on the elimination of protectionism in international agricultural trade does not take agriculture’s broader influence on both production methods and the global environment into consideration. Following this interpretation, both proposals are based on the need to take these new aspects into account in the review of the Agreement on Agriculture. However, Argentina’s proposal is more comprehensive than this: it sees multifunctionality as a pseudonym for acknowledging ‘broader trade issues’ in the entire reform process. On this view, multifunctionality is jargon for adapting all the WTO agreements to reflect the adoption of broader concerns into the Agreement on Agriculture and therefore does not include any protectionist overtones. In contrast, Japan’s definition is narrower, linking multifunctionality specifically to agriculture.

Although there is no conflict between the two definitions as such, as both acknowledge the place of multifunctionality in agriculture, differences emerge when the Argentinean and Japanese versions are used as the basis of the reform of the Agreement on Agriculture. Under the Argentinean proposal, the broader environmental goals can only be achieved through the elimination of existing barriers to international agricultural trade, thus basing multifunctionality firmly on the existing

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237 Ibid. at 1
238 WT/CTE/W/107, supra n. 32 at 1
239 WT/CTE/W/97 supra n. 233 at 1
240 See also WTO: ‘FAO/Netherlands Conference on the Multifunctional Character of Agriculture and Land’ WT/CTE/W/127, 27 October 1999 at 2
241 WT/CTE/W/107 supra n. 32 at 1
free trade goal. It argues that members' domestic agricultural policies encourage excess production, which leads to pressure on scarce natural resources, as well as encouraging pollution due to excessive fertilizer usage.\textsuperscript{242} Promoting policies that do not rely on such distortive subsidies therefore will reduce the pressure to increase agricultural production at the expense of the preservation of the environment: in this way, such adverse environmental costs will be 'internalised.'\textsuperscript{243}

The Japanese proposal also argues that distortions to international agricultural trade will harm the environment.\textsuperscript{244} In contrast to the Argentinean view it argues that recognition of the multifunctional character of agriculture can only be realised through the acknowledgment of regional differences that necessitate diverse agricultural policies.\textsuperscript{245} The emphasis here is not on the elimination of existing barriers to trade, but on the danger of advocating homogenous global solutions where clear regional diversification is apparent. Japan does not propose any specific solutions, but its interpretation allows the pursuit of domestic agricultural policies that would protect vulnerable sectors, arguably advocating protectionism, but in another guise. In contrast to the Argentinean approach which calls for markets to be opened, the Japanese interpretation sees markets protected.

Using either definition of multifunctionality is difficult because both are based on different principles. Although both argue that multifunctionality requires a recognition of broader environmental concerns, the Argentinean scheme assumes that agriculture automatically has this wider effect, so that continuing the existing reduction of protectionist measures will inevitable result in the facilitation of these broad goals. Whereas, the Japanese proposal suggests that multifunctionality is possible, but only

\textsuperscript{242} WT/CTE/W/97 supra n. 233 at 2
\textsuperscript{243} Ibid. at 3
\textsuperscript{244} WT/CTE/W/107 supra n. 32 at 4
\textsuperscript{245} Ibid. at 5
through agricultural policies designed to achieve it. This is the opposite view to
Argentina, as Japan does not accept that environmental preservation is the inevitable
consequence of agricultural trade liberalisation, but is something which has to be
attained.246

Argentina’s submission makes it clear that it does not support the continuation of
existing barriers to agricultural trade. However, Japan’s only states that regional
differences should be recognised through amendment to the Agreement on
Agriculture, but does not specify how this should be achieved. The major concern in
relying on the Japanese interpretation of multifunctionality is that this will
automatically be through the use of product-specific support justified by its pro-
environmental effects. Reintroducing such measures when existing barriers to
agricultural trade are already high,247 will adversely affect the liberalisation
programme implemented by the Agreement on Agriculture and therefore mean that
the free trade objective is not attained.

Evaluating the effectiveness of the multifunctionality proposals is difficult. On one
level the disagreement among members about the exact scope of the concept means
that formulating coherent rules purely from members’ submissions is not possible.
Even though there is some consensus about the definition, disparities are apparent
when the substance is analysed. The fear that multifunctionality could facilitate the
reintroduction of protectionist barriers to international agricultural trade arguably
automatically leads to the conclusion that any rules based on the concept would be
ineffective. However, this neglects the wider view.

246 Ibid. at 4
247 See UNCTAD/WTO Joint Study supra n. 196 at 4
Free trade as the ultimate goal of the WTO is being questioned as members’ domestic trade policies increasingly take other non-trade issues into consideration. Moving the emphasis away from this norm means that the fundamental principles on which both the Agreement on Agriculture and the SPS Agreement are based are also being displaced. The question is what can replace them? If protection of the natural environment is one of the new non-trade concerns that can be legitimately pursued in agricultural policies, using multifunctionality as a legal tool to control the scope of the policies is useful. However, a clear definition of the concept and the measures that can be justified by it needs to be addressed. Both the proposals submitted to the Committee on Trade and Environment do not do this.

It could be argued that if the Agreement on Agriculture does not address potential protectionist policies, then the SPS Agreement will deal it with. The deficiencies of the SPS Agreement in this area have already been discussed and so relying on it to automatically sweep up difficulties left by the Agreement on Agriculture is unrealistic. Furthermore, the SPS Agreement is not scheduled for review under the built-in agenda multilateral reform programme. This means that any defects in its wording will not be addressed.

A difficult situation could arise where the Agreement on Agriculture permitted domestic agricultural policies that used trade barriers to achieve the required goal of preservation of the natural environment, but these were not based on any scientific risk assessment. In this case, the SPS Agreement would permit such policies in the short term under Article 5:7, but would require an appropriate risk assessment if they were imposed on a long term basis. A conflict between the two agreements would

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248 This is evident from the subject matter of the Shrimp/Turtle dispute supra n. 124
249 Note that this is also the case for those submitted under the AIE process and the Geneva Ministerial Declaration and to the Committee on Agriculture: see Chapter 2 section A: 1(a) (thesis); also Smith supra n. 32
250 Chapter 3 section A: 1(b) (thesis)
result, because one would still be based on the traditional free trade norm, whereas the other would be amended to take wider issues, like environmental protection, into consideration.

Resolving this conflict leads to a dilemma over who should be responsible for the change. Can important constitutional questions be left to the panel and Appellate Body, or should it be dealt with by the members at the Ministerial Meeting?

Arguably, such a fundamental shift away from traditional free trade principles should be discussed by all members, as developing and least-developed countries in particular do not necessarily espouse the pro-environmental goal advocated by the developed members. Consequently, leaving the question to the Appellate Body is inappropriate.

2. The Precautionary Principle

The European Communities advocates the formal recognition of the precautionary principle in all the WTO Agreements in a communication to the Committees on SPS and TBT measures, and the Committee on Trade and Environment. It argues that despite opposition from other WTO members, the principle could be invoked to justify the imposition of trade measures where there is insufficient scientific certainty.

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251 i.e. the SPS Agreement
252 i.e. the Agreement on Agriculture
254 The European Communities has advocated the use of the precautionary principle in its own legislation: see Article 130(2)EC which expressly recognises the precautionary principle and European Commission: 'Green Paper on The General Principles of Food Law in the European Union' COM(97) 176; also Streinz: "The Precautionary Principle in Food Law" (1998) 4 EFLR 413
255 G/SPS/GEN/168 supra n. 36 also see McNellis: "EU Communication on the Precautionary Principle" (2000) 3(3) JIntEconL 545
256 The United States' opposition to this principle was evident in the Hormones dispute Appellate Body report supra n. 37
about the exact extent of the risk to human, animal, plant life or the environment of
the impact of a practice, or the safety of a substance.257

Under the proposal, the principle could only be raised where scientific evidence
indicated that there was a risk of some kind.258 This evidence should firstly indicate
the “potential adverse effects”259 on the basis of existing data and secondly, would
conclude whether the precautionary principle should be used, taking into
consideration available scientific knowledge.260

Although these triggering criteria are derived from scientific evidence, the decision to
invoke measures based on the principle is political. The European Communities’
proposal states that any measure should take five general principles into consideration
before it is imposed.261 However, the Community’s explanation of the scope of these
principles reveals that the scientific evidence plays a very limited role at the start of
the decision process. This is because the precautionary principle is only necessary
where there is insufficient, or no scientific evidence of the risk in question to validate
the imposition of restrictive trade measures. As there is no direct link between the risk
assessment and the measure in the way envisaged by the SPS Agreement,262 the final
decision to impose the measure must be based on a number of factors including public
opinion and underlying political imperatives.263 Several general problems arise from
the European Communities’ proposal.

Applying the effectiveness test on which the existing WTO agriculture regime is
based to the precautionary principle raises similar difficulties to multifunctionality:

257 G/SPS/GEN/168 supra n. 36 at 6
258 Ibid. at 11: the European Community sees this as the “triggering criteria”: ibid. at 14
259 Ibid.
260 Ibid. at 12
261 “Proportionality, non-discrimination, consistency, examination of the benefits and costs of action or
lack of action and examination of scientific developments:” ibid. at 15
262 Article 5:1 SPS Agreement
263 G/SPS/GEN/168 supra n. 36 at 10
rules which allow the application of trade barriers based on significant degrees of political discretion potentially undermine free trade principles, as the decision whether or not to protect the domestic sector resides with the member. This thesis has already demonstrated that key members’ domestic agricultural policies still pursue protectionist policies, so it likely that measures predicated on the precautionary principle could further protectionist imperatives.

The degree of members’ discretion to impose trade measures justified by the precautionary principle also varies dependent on the circumstances, as the decision whether to impose measures or not, and the level of those measures rests solely with the member. On one level, this acknowledges members’ sovereign rights to use a range of instruments within its WTO obligations, but it does not promote certainty in the scope of the rules and consequently, makes any measures imposed more difficult to challenge through the dispute settlement procedure. Both problems lead to the conclusion that the rules are not effective.

Similarly, it is doubtful whether the precautionary principle would be effective under the second limb. Even though the European Communities does refer to Article 5:7 SPS Agreement as an embodiment of the precautionary principle, it goes on to argue that the constraints in that article on the use of long term measures “may mean that somewhat different principles have to be applied.” It is arguable that the European Communities therefore envisages a broader application to all circumstances where risk to humans, animals, plants or the environment are involved. This appears to mean that if the precautionary principle were invoked in these circumstances, the constraints in the SPS Agreement would not apply, as the risks

\footnote{264 See Chapter 1 section A: 1 (thesis); also McMahon \textit{supra} n. 74 at 43}
\footnote{265 This was confirmed by the Appellate Body in the \textit{Hormones} dispute: \textit{supra} n. 37 at paras 124-5}
\footnote{266 G/SPS/GEN/168 \textit{supra} n. 36 at 17}
\footnote{267 \textit{Ibid.} at 17-18}
involved would be outside the scope of the type of risk assessment envisaged by that agreement.268 This interpretation leads to three problems.

Firstly, where should the precautionary principle fit into the WTO Agreements?

Should it be an overriding rule that fulfils a role like Article XX GATT? On this construction, it could only be invoked as a defence when a member was in breach of its WTO obligations. Inevitably, this would lead to questions whether the limitations on the application of Article XX would also be placed on the precautionary principle's application. This results in the second problem: whether it could be relied upon by a member before the Appellate Body as a customary principle of international law.269 This approach would allow the clandestine adoption of the principle, when arguably such a significant shift in policy should be left to the Ministerial Meeting. Thirdly, should the principle be placed within the Agreement on Agriculture? The relationship between the limited recognition of the precautionary principle in Article 5:7 SPS Agreement and the broader discretion represented by the incorporation of the principle into any amended Agreement on Agriculture would then have to be reconciled.

The WTO's shift away from free trade norms towards broader non-trade concerns, including the preservation of the natural environment, raises several questions. Firstly, whether the precautionary principle in the form proposed by the European Communities would be appropriate in a new regime. It is arguable that the strength of the WTO lies in its comprehensive rule structure, which clearly defines members' obligations. The European Communities' view of an overriding general principle is

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268 This is because the scope of the SPS Agreement is limited to the protection of animal, plant and or human life or health. This thesis has already argued that the protection of the environment is problematic dependent of the interpretation of these criteria: see Chapter 3 section A: 1(b) (thesis)

269 See McIntyre & Mosedale: "The Precautionary Principle as a Norm of Customary International Law" (1997) 9 JEnvL 221
problematic because it has no substance\textsuperscript{270} and the final decision of the exact scope and type of measure is left to the member.

Alternatively, the precautionary principle could be incorporated into the Agreement on Agriculture and similarly, the SPS Agreement could be amended to expand its test. Several issues need to be addressed.\textsuperscript{271} Firstly, this thesis has already argued that environmental considerations encompass a wide number of issues. This means that a homogenous test will be inappropriate for all aspects of environmental harm, as this can occur in a variety of ways. Consequently, the measure necessary to prevent the harm will change dependent on the extent of the threat. Superficially, this seems to mirror the European Communities' proposal in that measures differ dependent on what the initial scientific risk assessment says. However, the European Communities' proposal advocates a general overall principle, which would be flexible enough to adapt to each circumstance, whereas incorporating the precautionary principle into the existing rule structure to ensure certainty would mean that these issues need to be resolved before the amendments are made. Finally, what balance should be struck between preventing a return to protectionism in international agricultural trade whilst accommodating the new non-trade concerns in the WTO's agriculture regime? Specifically, whether the balance should be towards preservation of the environment, rather than towards the liberation of trade patterns.

C. Conclusions

Resolving the relationship between the recognition of the special needs of the environment and international trade is difficult on two levels. Firstly, several broad
questions arise: whether the environment should be considered at all and if so what should the definition be? Furthermore, if it should, to what extent should this occur and then, how should this be accommodated within the existing WTO scheme? Addressing these questions inevitably involves a re-evaluation of the constitutional principles on which the whole WTO is based. Currently, the need to achieve free trade is the underlying norm of the agreements, however, to successfully incorporate environmental issues, these norms need to be modified. Successfully achieving this is difficult because of the cumbersome treaty modification provisions in the Marrakesh Agreement. Some change can be seen in the creeping changes made by the Appellate Body’s reinterpretation of members’ substantive obligations, specifically within the GATT. However, it is debateable whether such a fundamental reconsideration of the underlying norms upon which the WTO is based should be left to the Appellate Body. Despite amendment difficulties, this issue should be addressed through multilateral renegotiation of the WTO scheme.

When drafting a solution to the trade-environment relationship, members must also be aware that environmental issues are wider than just climate change, for example. Any solution must also incorporate sustainable development, cultural diversity, as well as those issues traditional associated with environmental preservation. All these issues have not been satisfactorily dealt with in the proposals for change submitted by members.

These general problems are acute for international agricultural trade. Successfully incorporating agriculture into the WTO scheme was a major achievement. Although the Agreement on Agriculture is not necessarily achieving the significant reductions in trade barriers anticipated, international agricultural trade is now regulated, so the

272 Article X Marrakesh Agreement
273 In its Shrimp-Turtle report supra n. 124
process of liberation can start. The danger of modifying the principles on which the
WTO agreements is based is that the emphasis may be shifted away from the
elimination of protectionist trade barriers. This would be particularly problematic for
the Agreement on Agriculture, as its provisions do not fully come into operation until
the end of the implementation period.\footnote{i.e. the end of 2000}
Placing the emphasis purely on protectionism is difficult too, because it is clear that
issues like environmental protection are forming an increasingly important part of
developed members' domestic agricultural policies. Consequently, some recognition
must be accorded to this trend, but not at the expense of allowing the reintroduction of
high trade barriers for agricultural products which clearly have adverse effects on
developing countries. Any solution must therefore take into consideration subject-
specific problems if it is to be effective.
Chapter 4:
Challenges to the Agreement on Agriculture:

Food Safety

In March 2001 a single outbreak of Foot and Mouth disease on a farm in Northumbria in the United Kingdom led to an epidemic that resulted in a continuing large scale cull of potentially contaminated sheep and cattle. Despite the complete lack of scientific evidence of the risk of direct food contamination, meat imports from the United Kingdom to other European countries were prohibited. Although agriculture's contribution to the United Kingdom's Gross Domestic Product (GDP) is small and the numbers of jobs directly affected did not represent a significant percentage of the working population, the Foot and Mouth outbreak attracted significant media coverage and top-level politicians, including the Prime Minister, Tony Blair, were directly involved in the attempt to eradicate it, even though it posed no actual threat to food safety.

The United Kingdom's Foot and Mouth problem is only one of a series of issues involving the safety of food produced under modern farming methods. BSE and its

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1 “Unprecedented’ FMD (Foot and Mouth Disease) epidemic in the UK” Agra Europe No. 1945, 30 March 2001 at N/1
2 Despite claims to the contrary later in the epidemic, veterinary scientists stated that Foot and Mouth could not be passed to humans through the food chain: see “Commission acts to contain UK FMD” Agra Europe No. 1940, 23 February 2001 EP/3 at EP/4. Interestingly, the legislation introduced to combat the epidemic only made reference to the protection of trade rather than the protection of consumer health. However, consumer fear as a result of the outbreak make it a pertinent example for the discussion of food safety issues: see European Commission Decision 2001/488/EC amending Commission Decision 2001/327/EC Regarding Restrictions to the Movement of Animals of Suspected Species with Regard to Foot and Mouth Disease OJL 176/75 (26th June 2001) at Recital 1 & 7; also United Kingdom legislation specifically relating to import and export restrictions regarding foot and mouth disease: Import and Export Restrictions (Foot and Mouth Disease) Regulations 2001 SI 2001/665 which came into force 2nd March 2001
3 Both the French and German authorities prohibited further imports from the United Kingdom and slaughtered animals already imported from there: “FMD spreads across UK” Agra Europe No. 1941, 2 March 2001 at N/1
human equivalent, variant CJD, the contamination of Belgian livestock by
carcinogenic dioxin in animal feed and the potential effects to human health and the
environment posed by genetically modified foods, have also attracted global media
coverage. Inevitably, media involvement creates increased consumer anxiety, which
leads to pressure on governments to act by adopting relevant legislation to restrict the
perceived dangers of contamination to food or the environment. Whilst governments
must be allowed to intervene to ensure food safety, in any international trading system
predicated on the free trade principle, a balance must be struck between consumer and
environmental protection without unnecessarily constraining trade in the products. It
is crucial that any trade restrictions placed on agricultural products in particular,
which are introduced on food safety grounds, are not de facto disguised protectionist
measures.

In the context of the World Trade Organisation (the WTO), the continued relevance of
the free trade principle is important because it is clear that the majority of disputes
concerning agricultural issues brought under the WTO Understanding on Rules and
Procedures Governing the Settlement of Disputes (the Dispute Settlement

4 “BSE on the increase outside the UK” Agra Europe No. 1890, 3 March 2000 at EP/9
5 “Belgian dioxin crisis resurfaces” Agra Europe No. 1902, 26 May 2000 at EP/8 (also Agra Europe
No. 1853, 11 June 1999 at EP/1)
6 “Consumer unease prompts a rethink on GM ingredients” 31 May 1999 Financial Times; “Top buyers
in US spurn modified corn” 15 April 1999 Financial Times
8 Henson: “Regulating the Trade Effects of National Food Safety Standards: Discussion of Some
Issues” OECD Workshop on Emerging Trade Issues in Agriculture 26-27 October 1998,
COM/AGR/CA/TD/TC/WS(98)123 at paras 19 & 25
9 It is not clear that there is a direct risk to consumers from genetically modified food: on the United
Kingdom stance see the First Report of the House of Common Select Committee on Science and
Technology (HC 286) 18 May 1999 at para 26
10 One study has estimated that the effect of the imposition of sanitary and phytosanitary (SPS)
measures on apple imports into Japan, Korea and Mexico between 1994/5-1995/6 was equivalent to the
imposition of a tariff rate of 58%. Krissoff, Calvin & Gray: “Barriers to Trade in Global Apple
Markets” (1997) Fruit and Nut Trees Situation and Nuts Outlook 42
11 The historic problems of protectionism in international agricultural trade are discussed in Chapter 1
at Ch.27
Understanding) have centred on food safety.¹² The WTO Agreement on Sanitary and Phytosanitary Measures (the SPS Agreement) primarily regulates this issue, but the WTO Agreement on Technical Barriers to Trade (the TBT Agreement) is also applicable.

Both the SPS and TBT Agreements have attracted significant academic comment.¹³ However, these views have focused on specific issues: either the panel and Appellate Body’s interpretation of the terms of the SPS Agreement,¹⁴ or the possible overall effect of the agreements on international trade generally.¹⁵ Whilst these approaches are instructive, they only address narrow aspects of the difficulties associated with international agricultural trade and neglect the role of the WTO Agreement on Agriculture (the Agreement on Agriculture) and the application of all three agreements to the food safety question.

To determine whether the WTO’s regime does facilitate the legitimate adoption of food safety measures within the constraints of the free trade goal, the effectiveness of

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¹⁵ Roberts supra n. 13
all the existing rules must be analysed.\textsuperscript{16} The application of the rules in four situations must be distinguished. Firstly, the adoption of food safety measures by WTO members (hereafter, members) as a result of a direct risk to human health. This first category is aimed at the situation where there is an established link between the problem and human welfare, such as the transmission of BSE\textsuperscript{17} which scientific reports revealed could be passed on to humans in the form of the human equivalent, variant CJD.\textsuperscript{18}

The second category comprises the imposition of food safety measures by members where there is only a perceived risk to human health. Here, intervention is undertaken because there is a political desire to alleviate media-induced consumer fear of a risk and not because there is necessarily a proven risk to health. The most significant example is the potential health risk posed by biotechnology.\textsuperscript{19} Currently, there is no direct evidence that food produced through biotechnological processes creates any risk to human health,\textsuperscript{20} but members have still acted on a precautionary basis, arguing that such technology could be a potential or “perceived” threat.\textsuperscript{21}

Both the first two categories of risk concern members’ action founded on anxiety related to human health, but this neglects a further third and fourth situation where members impose food safety measures designed to protect the environment from an

\textsuperscript{16} ‘Effectiveness’ is analysed using the three stage test on which the WTO scheme is based: firstly, the ability of the rules to regulate the issue; secondly, the interaction between the relevant agreements must be determined, and thirdly, whether the needs of developing countries are adequately met. See Chapter 1 (thesis) for the theoretical basis of this test

\textsuperscript{17} Bovine Spongiform Encephalopathy

\textsuperscript{18} Variant Creutzfeld Jakob Disease: See Agra Europe No.1890 supra n. 4

\textsuperscript{19} Although this term encompasses a broad range of issues, this thesis employs it in its narrow sense to encompass genetically modified foods only: see OECD: ‘Spotlight on Biotechnology: the core of the matter” OECD Observer No. 216 March 1999, 17 at 17 for the other interpretations of the term, ‘biotechnology’

\textsuperscript{20} House of Commons Select Committee Report supra n. 9 at para 26

\textsuperscript{21} See Australia: ‘Developing Australia’s Biotechnological Future: Discussion Paper, A Federal Government Initiative’ (September 1999) at 4. Here the Australian government addresses many aspects of the biotechnology problem. However, it is interesting to note that it prioritises “protecting the health and safety of the community…” as its first issue for consideration. Also see European Communities novel feed regulation which encompasses biotechnology: “Commission mulls new ‘novel feed’ rules” Agra Europe No. 1912, 4 August 2000 at EP/1
actual or perceived threat. Members may introduce measures designed to prevent or curtail an actual threat to the environment where toxic chemicals have been released into the atmosphere that can directly affect crop growth. Like members’ response to an actual risk to human health, such measures would be introduced because there is a scientifically provable link between the chemical released and the harm caused to the environment. In addition, a fourth category can be identified where members adopt measures based on a perceived risk to the environment. In this case, it may not be possible to determine scientifically whether there is an actual link between the alleged problematic substance and the harm to the environment, but it is politically expedient to introduce legislation that addresses public concerns that a link between the substance and the harm might occur. For example, members may impose restrictions to regulate the release of genetically modified micro-organisms which might be incorporated into the food chain, but where there is little or no scientific evidence to prove that such a risk may occur.

This thesis has identified four separate categories of food safety risks, but it is clear that there is a considerable degree of overlap. This is because one incident can result in harm to human health and the environment necessitating members’ action in relation to both aspects. In addition, overlap can occur because measures focussing on environmental preservation are de facto also protecting human health. The most obvious example is genetically modified organisms, where members have imposed measures primarily aimed at protecting crops, but which also necessarily stop such organisms entering the food chain and adversely affecting human health.

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22 The term ‘environment’ is used throughout Chapter 4 of this thesis to encompass flora, fauna, and the climate. This must be contrasted with the discussion of the term ‘environment’ which advocated a broader interpretation, including cultural and bio-diversity, sustainable development and the human environment in Chapter 3 section A:1(b) (thesis).

Despite this overlap, it does not automatically follow that measures aimed at the same food safety issue will receive the same legal treatment. There are two related reasons for this: primarily, members can choose to adopt different measures dependent on whether the risk is actual or potential and whether the risk pertains to human health or environmental preservation. A related reason is that the WTO agreements focus on the measures employed rather than their subject matter. Consequently, the proposed subject matter coverage, the scope and the application of the measure in practice must all be investigated before their legality under the WTO agreements can be established.

This chapter analyses the effectiveness of the WTO agriculture regime’s application to the food safety issue by examining the application of the substantive rules, the relationship between the agreements and the whole regime’s ability to adequately meet the needs of developing countries in the context of the free trade goal of the WTO agriculture regime. It will also explore the role of the Dispute Settlement Understanding in such an emotive area and consider whether the proposals for reform of the agricultural trade regime are able to achieve a coherent balance between guaranteeing food safety, whilst ensuring that measures employed are not disguised protectionism.

The discussion will be divided into two parts. Firstly, the application of the rules in the Agreement on Agriculture, the SPS and the TBT Agreements and the General Agreement on Tariffs and Trade (GATT) will be analysed to determine whether they are “effective” in terms of the WTO agriculture regime. This analysis will explore the application of the rules to the four categories of motivation for the imposition of food safety measures already identified.

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24 Environmental preservation *per se* has been discussed in Chapter 3 (thesis), so this chapter will focus on the food safety aspect.

25 See Chapter 1 (thesis) for the theoretical justification for this test.
Secondly, the relationship between the agreements will be examined. Although the panels and the Appellate Body have considered the hierarchy of the SPS Agreement and GATT,26 they have not gone further and expressly examined the relationship between the Marrakesh agreements where more than one applies,27 especially where the application of two or more agreements could lead to a conflict between the rules.28 This is especially relevant in the context of food safety because both the SPS and TBT Agreements could apply to such measures adopted by members.

The final section of this first part of the analysis will evaluate the problems faced by developing countries in the application of the WTO’s rules to food safety. In particular, whether the rules address the needs of developing countries, which were identified in chapter one of this thesis.

Part two of the discussion will then consider whether reform proposals based on the need to allow the implementation of measures on food safety grounds impede the WTO agriculture regime’s fundamental free trade goal. These proposals can be divided into two areas: firstly, those put forward by members during the renegotiation of the agricultural regime. These focus heavily on the concepts of multifunctionality and non-trade concerns,29 which have already been examined in the context of the reform of the Agreement on Agriculture in chapter 2 of this thesis and environmental

26 European Communities-Regime for the Importation, Sale and Distribution of Bananas WT/DS27/AB/R, 25 September 1997 at para 204

27 Note though that the Appellate Body has stated that legal effect must be given to all the agreements quoted in: European Communities-Measures Affecting Asbestos and Asbestos-Containing Products panel report WT/DS135/R, 18 September 2000 at 8.24 e.g. where both the SPS and TBT Agreements would apply to the dispute. Note that in European Communities-Measures Affecting Asbestos and Asbestos Containing Products Appellate Body report WT/DS135/AB/R, 12 March 2001 Canada had originally asked the panel to consider whether the European Communities’ measures were inconsistent with both the TBT and SPS Agreements. However, when the matter came before the panel, Canada did not pursue the matter in written or oral argument: see Appellate Body report at 3 (see Canada’s request for the establishment of a panel: WT/DS/135/3, 9 October 1998)

29 See WTO: ‘Note on Non-Trade Concerns: submission to the third session of the WTO Committee on Agriculture by Barbados, Burundi, Cyprus, Czech Republic, Estonia, the European Communities, Fiji, Iceland, Israel, Japan, Korea, Latvia, Liechtenstein, Malta, Mongolia, Norway, Poland, Romania, Saint Lucia, Slovak Republic, Slovenia, Switzerland and Trinidad and Tobago’ G/AG/NG/W/36, 22 September 2000 at para 16
preservation in chapter 3. Members have also put forward proposals that are specifically aimed at food safety issues, and these will also be subjected to the effectiveness test. Finally, the European Communities has suggested that incorporating the precautionary principle as a general principle within all the WTO agreements could resolve the dilemma created by, inter alia, the introduction of measures designed to guarantee food safety.

The final part of the discussion of the reforms will then evaluate whether the WTO should adopt similar techniques to those used in other international instruments that deal with safety related issues. The most prominent example is the Cartagena Biosafety Protocol (hereafter Cartagena Protocol). This part of the discussion will examine whether a process based on the Cartagena Protocol would be an effective model for international agricultural trade regulation under the WTO.

Throughout this chapter, the analysis also considers the implications of members’ proposals on food safety for the future direction of the WTO, and whether agricultural trade will again prove to be the cause of disagreement that undermines the reform process envisaged in Article 20(c) Agreement on Agriculture.

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32 Following from Article 19(3), (4), 8(g) & 17 Convention on Biological Diversity, Decision II/5 Conference of the Parties, 17 November 1995, the Protocol was finally concluded in Montreal in January 2000; it is open for signature between 15-26 May 2000 and 5 June 2000- 4 June 2001: Article 36. It enters into force “on the ninetieth day after the date of deposit of the fiftieth instrument of ratification, acceptance, approval or accession by States or regional economic integration organisations that are Parties to the Convention.” Article 37:1 (1992) 31 ILM 822
A. The Application of the WTO's Agriculture Regime to Food Safety: Is the Existing Scheme Effective?

1. Are the Rules Effective?

a. The Agreement on Agriculture

Chapter 1 of this thesis has already explored the scope of the specific terms of the Agreement on Agriculture, so the analysis in chapter 4 will only explore the application of the agreement's rules to the food safety question.

Four triggers have been identified which lead members to impose measures predicated on food safety grounds: actual or potential threat to human health and actual or potential threat to the environment. The application of the Agreement on Agriculture to these triggers does not depend solely on the reason why members state they are imposing measures, but instead on the measures' operation. This is because the agreement presumes that members' primary motivation is to protect their domestic producers from the vagaries of international agricultural trade either through import restrictions, or the grant of subsidies.

Although this is not explicitly stated in the agreement itself, paragraph 3 of the Preamble to the Agreement on Agriculture states that its long-term objective is to "provide for substantial reductions in agricultural support and protection" and to ultimately result in the correction and prevention of "restrictions and distortions in world agricultural markets." Likewise, the three pillars on which the agreement's rules are based, all focus on agricultural trade enhancement through specific percentage reductions in the levels of support. As the agreement operates on the presumption that any measure introduced to restrict market access for agricultural

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33 See Chapter 1 section B:1(a) (thesis)
34 Para 3 Preamble Agreement on Agriculture
35 Market access, domestic support and export subsidies
36 See Chapter 1 section B:1(a) (thesis) for the specific reduction commitments
imports is *prima facie* protectionist, food safety protection *per se* is not recognised as a valid reason for excluding liability. This means that the legality of each food safety measure must be investigated on a case-by-case basis. However, a number of general observations can be made.

The Agreement on Agriculture’s automatic presumption that protectionism is the motivation behind the measure means that there will be no difference in the treatment of measures introduced on the basis of perceived, rather than actual threats.37 Both Article 4 on market access and Article 6 regulating domestic support only concentrate on actual reductions to members’ agricultural support levels irrespective of the degree of threat which those measures are designed to circumvent.38

Stopping the importation of agricultural products on food safety grounds inevitably restricts market access for other members’ goods. If the prohibited goods are listed in the importing member’s Schedule,39 *prima facie* this is covered by Article 4:2 Agreement on Agriculture and the member would be liable to an action under the Dispute Settlement Understanding. Article 4:2 is expressed in general terms concentrating on all measures which prohibit market access for agricultural imports, so whether the import ban is introduced because of food safety concerns related to human health or to the environment is extraneous.

The footnote to Article 4 excludes the provision’s application where the rules of another Annex 1A WTO Agreement applies. If the SPS’ or TBT Agreement’s rules are applicable...

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37 Note this is not necessarily the case under the SPS and TBT Agreements: see Chapter 4 section A:1(a) & (b) (thesis)
38 Article 6:1 Agreement on Agriculture states that “(t)he domestic support commitments of each Member...shall apply to all its domestic support measures in favour of domestic producers...” (Emphasis added). Likewise, Article 4:2 states that “Members shall not maintain, resort to, or revert to any measure of the kind which have been required to be converted into ordinary customs duties...” (Emphasis added)
39 Article 4:1 Agreement on Agriculture
also cover the import prohibition,\(^{40}\) the operation of Article 4:2 Agreement on Agriculture is excluded. Article 4’s footnote only prevents the operation of that article and does not apparently cover the operation of the Agreement on Agriculture’s domestic support rules, so liability for food safety measures in breach of these rules could still arise.

If a member provides financial inducements to its domestic producers to ensure that they only cultivate non-genetically modified crops because of the possible adverse effects to human health and the environment, for example,\(^{41}\) then the measures fall to be calculated as part of that member’s Aggregate Measurement of Support (AMS)\(^ {42}\) and must be reduced according to the member’s commitments under the Agreement on Agriculture.\(^ {43}\) Whether the measures in this example would be subject to reduction commitments is then dependent on whether they are covered by the exclusions in the Green Box.\(^ {44}\)

Superficially, a distinction must be made between a food safety measure introduced to protect human health and one designed to preserve the environment. Both measures will only fall within the Green Box if they have minimal trade distorting effects and do not provide price support for consumers.\(^ {45}\) In addition, both must come within the policy-specific criteria in Annex 2 Agreement on Agriculture. This is problematic for the food safety measure designed to protect human health because the measure in the

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\(^{40}\) This is because the import ban could be classed as either an SPS measure, and/or a TBT measure: see Chapter 4 section A:1(b) & section A:1(c) (thesis)

\(^{41}\) The payments in this example would not fall within the prohibition of export subsidies in Article 9:1(a) Agreement on Agriculture, as the payments would not be made contingent on export performance: see *Canada-Measures Affecting the Importation of Milk and the Exportation of Dairy Products* panel report WT/DS103/R & WT/DS113/R, 17 May 1999 at paras 7.22 & 7.61 on the definition of export subsidy and the scope of Article 9:1(a) Agreement on Agriculture

\(^{42}\) If the member has made commitments in Part IV of its Schedule: Article 6:1 Agreement on Agriculture

\(^{43}\) The AMS is used to determine the level of support a member provides for domestic producers. Reduction commitments are expressed in terms of the AMS: see Chapter 1 section B: 1(a) (thesis)

\(^{44}\) For further detail on the scope of the Green Box exclusion see Chapter 1 section B: 1(a) (thesis)

\(^{45}\) Annex 2:1(a) & (b) Agreement on Agriculture
example is linked to production of a specific type of crop and payment is made
directly to the farmer. Consequently, it will not be classed as a payment pursuant to a
governmental programme under Annex 2:2, nor a decoupled or direct payment under
Annex 2:5 and 2:6 respectively.\(^{46}\) If the Green Box exemption is not available, then
the measure falls within the member’s AMS and must be reduced according to
Agreement on Agriculture rules.

The application of the Green Box to the food safety measure designed to protect the
environment in the example is uncertain. Annex 2:12 Agreement on Agriculture
exempts certain payments from the AMS calculation if they are made as part of a
“clearly-defined governmental or conservation programme and [are] dependent on the
fulfilment of specific conditions under the programme…” Annex 2:12 does not go
further and define the nature of the “environmental programme,” so it can be argued
that food safety measures which award payments to domestic producers for the
growth of certain crops by specific ‘environmentally friendly’ methods could be
included. The provision appears to envisage that members will determine whether
their policies fall within the exemption because Annex 2:12 refers to a “clearly-
defined governmental programme,”\(^{47}\) therefore placing the emphasis on the member
to define the scope of the relevant environmental programme. On this interpretation,
the food safety measure could be eligible for Green Box exemption and would
therefore be excluded from the AMS calculation for domestic support reductions.

There are two problems with this interpretation.

\(^{46}\) Swinbank & Tanner argue that the whole motivation behind the Green Box in the Uruguay Round
negotiations was to shift the focus of agricultural support towards production-neutral support.
Consequently, as long as domestic support measures came within this category, the reason for their
imposition was irrelevant: see A. Swinbank & C. Tanner: ‘Farm Policy and Trade Conflict: The
Uruguay Round and CAP Reform’ (1996) Michigan at 69

\(^{47}\) Emphasis added
Firstly, although there is no definition in Annex 2:12, the provision does state that the payments must be made in accordance with an “environmental programme” and that compliance with the terms of that programme must be specifically outlined. Although it could be argued that the member could make the terms of the payment in the example clear, it is difficult to define one-off payments as a coherent “environmental programme.” Linking the two words “environment” and “conservation” in Annex 2:12(a) seems to suggest the adoption of a policy on environmental preservation, rather than a series of single payments made on food safety grounds. Whether the payments in the example were outside the definition therefore would depend on the exact scheme devised by the member. It is also unclear from the wording of Annex 2:12 if the primary motivation for the measure is relevant to the application of the exemption; in particular, the fact that the measures are designed to primarily protect food safety, rather than the environment.

Secondly, the “fundamental” criteria for eligibility for Green Box exemption in Annex 2:1 Agreement on Agriculture means that any payment made to a producer must not “have the effect of providing price support,” and must have “no, or at most minimal, trade distorting effects.” The payment in the example would be designed to make genetically modified crops unattractive financially to producers and would therefore fall outside Annex 2:1 completely. This is because the increasing use of genetically modified crops means that international trade would be significantly affected.

The application of the Agreement on Agriculture to food safety questions has not been explored by commentators, or through the WTO’s dispute settlement process.

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48 Emphasis added
49 Annex 2:1 Agreement on Agriculture
50 Between 1996 and 1997, the area that United States’ farmers planted with herbicide tolerant oilseeds increased from 1 million acres to 9 million: Riley, Hoffman & Ash: “US Farmers are Rapidly Adopting Biotech Crops” ERS/USDA Agricultural Outlook, August 1998 at 22
Instead analysis has more commonly arisen under the application of the SPS Agreement. Nevertheless, problems remain.

b. The SPS Agreement

The SPS Agreement’s coverage has already been discussed in detail in chapter 1,\(^{51}\) so this section will focus on its application to food safety measures. Article 2 SPS Agreement allows members to impose sanitary and phytosanitary (SPS) measures only if they are derived from scientific principles established in an appropriate risk assessment.\(^{52}\) Following the Appellate Body’s analysis in the Hormones dispute,\(^{53}\) this means that any SPS measures imposed must be “reasonably supported” by the findings of that assessment.\(^{54}\) The SPS Agreement’s application to each of the four food safety measure triggers does not inevitably lead to the same finding of legality.

(i) Actual Threat to Human Health or the Environment

Article 2:1 SPS Agreement permits members to “take sanitary and phytosanitary measures necessary for the protection of human, or...plant life or health.” Such measures must only be applied “to the extent necessary”\(^{55}\) to achieve the stated objective and must either comply with existing international standards,\(^{56}\) or, if introducing higher standards of protection, must be supported by “sufficient scientific evidence.”\(^{57}\)

Like the Agreement on Agriculture, the member’s motivation for the introduction of the measure is not the main criteria for legality under the SPS Agreement. This is

\(^{51}\) Chapter 1 section B:1(b) (thesis)

\(^{52}\) Articles 2:2, 5:1 & 5.2 SPS Agreement; this assumes that members would wish to impose measures which give a higher level of protection than existing international standards. This is because members’ regimes merely reiterating existing international standards are deemed to be in accordance with the SPS Agreement: Article 3:2 SPS Agreement

\(^{53}\) Supra n. 12

\(^{54}\) i.e. they must be “based on” that assessment: ibid. at para 193

\(^{55}\) Article 2:2 SPS Agreement

\(^{56}\) In this case the measures will be deemed to comply with the SPS Agreement: Article 2:4 SPS Agreement

\(^{57}\) Article 2:2 SPS Agreement
because Article 1:1 states that the agreement only "applies to all sanitary and phytosanitary measures which may, directly, or indirectly affect international trade," consequently, placing the emphasis primarily on the type of measure, rather than its purpose. Although measures must be introduced for one of the reasons specified in Article 2:1, the panel in *Hormones*,\(^{58}\) relying on the Appellate Body in *United States-Shirts and Blouses*,\(^{59}\) argued that an analysis of the main provisions of the SPS Agreement would only be relevant if the measure came within the definition of SPS measures in Annex A:1 first.

If a member introduces food safety measures in response to an actual threat to human health or the environment,\(^{60}\) then Annex A:1 is only satisfied if the threat comes within those specified in Annex A:1(a)-(d), namely, the prevention, or spread of diseases from other humans, or plants and animals;\(^{61}\) the avoidance of difficulties arising from problems related to the ingredients within food; or to prevent spread or establishment of pests in the member’s territory.\(^{62}\) The criteria in Annex A:1 (a) to (d) should be satisfied where food safety measures are introduced either on human health grounds or the preservation of the environment because both triggers arise because of the risks envisaged in most of the paragraphs, including through the spread of disease from plants or animals to humans, or from ingredients in food.\(^{63}\)

Even in cases of doubt, the dispute settlement panels seem more interested in ensuring that the measures are adequately supported by risk assessments, than by investigating

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\(^{58}\) *Hormones* panel report *supra* n. 12 at para 8.20

\(^{59}\) WT/DS33/AB/R, 25 April 1997 at 14

\(^{60}\) Note in this context that the ultimate aim of the measure is the same whether it has been introduced as a result of an actual risk to human health or the environment

\(^{61}\) Annex A:1(a) & (c) SPS Agreement

\(^{62}\) Annex A:1(d) SPS Agreement

\(^{63}\) Footnote 4 Annex A:1 SPS Agreement gives a wide definition to "plant" to cover "forests and wild flora" as well as cultivated crops. Note that the discussion of the definition of 'environmental preservation' may be wider than the narrow scope used in this chapter: see Chapter 3 section A (thesis) for the difficulties posed by incorporating sustainable development and wider definitions of 'environment'
whether the SPS Agreement covers the measures at all. In *Hormones*\textsuperscript{64} although the determination of the coverage of the agreement was not in issue as such,\textsuperscript{65} the panel relied on the Preamble to the relevant European legislation, which stated that the measures were enacted for the preservation of human health.\textsuperscript{66} This issue was not contested by the appellants and therefore not raised before the Appellate Body.\textsuperscript{67}

Arguably, if the member’s legislation specifically states that it is for one of the purposes in Annex A:1(a) to (d) SPS Agreement, *prima facie*, this seems to be sufficient to apply the rest of the SPS Agreement’s rules. On this view, it does not matter whether the member introduced the food safety measure as a result of an actual or potential risk to human health or the environment because in all four cases, the member can state the measure is designed to fulfil one of the criteria in Annex A:1. However, a distinction must be made between food safety measures introduced in response to actual or potential risks to human health and those introduced in response to an actual or perceived threat to the environment when the main body of the SPS Agreement’s rules are applied. The Appellate Body’s view that Articles 2:2 and 5:1 must be read together\textsuperscript{68} means that if a member wishes to introduce a food safety measure, it must conduct a risk assessment which “evaluates the ‘likelihood,’ i.e. the ‘probability’”\textsuperscript{69} of the threat.

If the threat is clearly recognised by international standards\textsuperscript{70} and the SPS measure chosen fully conforms to those standards, then Article 3:2 SPS Agreement states that the measure automatically conforms to the agreement’s rules. Whereas if the member

\textsuperscript{64} Panel report *supra* n. 12 at para 8.22-23
\textsuperscript{65} This is because both the United States and the European Communities did not dispute that the measures in question were SPS measures: *ibid.* at para 8.23
\textsuperscript{66} *ibid.* at para 8.22
\textsuperscript{67} *Hormones* Appellate Body report *supra* n. 12 at para 96
\textsuperscript{68} *Hormones* Appellate Body report *ibid.* at para 180 & 193
\textsuperscript{69} *Australia-Salmon* Appellate Body report *supra* n. 12 at para 123
\textsuperscript{70} See Annex A:3 SPS Agreement for a list of recognised international standards for the purposes of the SPS Agreement

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wishes to introduce a higher standard, then the risk assessment carried out in conformity with Article 5:1 SPS Agreement, must establish a “rational relationship” between the measure and the available scientific evidence.\textsuperscript{71}

In the case of an actual threat to human health or the environment which is outside existing international standards, the nature of the risk assessment will differ dependent on the measure the member wishes to use, because the greater the adverse effect of the measure on international agricultural trade, the more the evidence that will be required in the risk assessment.\textsuperscript{72} Nevertheless, if a series of measures are introduced which cover the same threat, the Appellate Body has regarded this as a “warning signal” that can “lead to the conclusion that discrimination or a disguised restriction on international trade in fact results from the application of the measure.”\textsuperscript{73}

Further difficulties arise where the SPS Agreement is applied to food safety measures introduced as a consequence of perceived threats to human health or the environment.

(ii) Perceived Threat to Human Health or the Environment

Where food safety measures are introduced in response to a perceived risk to human health or the environment, the member must still show that the measures imposed come within the criteria in Annex A:1 SPS Agreement. This means that the interpretational questions discussed in relation to actual threats to human health and the environment above will be pertinent. Additional problems arise when the remaining rules are applied.

\textsuperscript{71} *Japanese Varietals* Appellate Body report *supra* n. 12 at para 79

\textsuperscript{72} *Australia-Salmon* Appellate Body report *supra* n. 12 at para 125: the Appellate Body noted that there must be a clear distinction between the ‘risk’ in the risk assessment and the “determination of the appropriate level of protection”\textsuperscript{74}

\textsuperscript{73} *Hormones* Appellate Body report *supra* n. 12 at para 240; reiterated by the Appellate Body in *Australia-Salmon* *ibid.* at para 163
If the risk is only perceived, then agreed international standards are unlikely to exist.\textsuperscript{74} Consequently, the member will be introducing measures which impose a higher standard of protection than that recognised and so must ensure the measures are based on scientific principles from an appropriate risk assessment.\textsuperscript{75} Following the Appellate Body’s report in the *Hormone* dispute,\textsuperscript{76} this means that any SPS measures subsequently introduced must be reasonably supported by the findings of that risk assessment.\textsuperscript{77} The most pertinent example where members wish to respond to a perceived threat to human health or the environment is genetically modified food. Several problems arise.

Firstly, formulating an appropriate risk assessment that satisfies the Appellate Body’s criteria is problematic.\textsuperscript{78} Mahé and Ortalo-Magne\textsuperscript{79} argue that it will be difficult to prepare an adequate assessment for two reasons: primarily, available scientific evidence on the risks of genetically modified food to human health and the natural environment is limited. Reports that already exist which do analyse the potential danger mostly reveal that the crops are safe, consequently, negating any member action under the SPS Agreement.\textsuperscript{80} In addition, since the decision to introduce the measures is a political one, it will also be based on ethical grounds\textsuperscript{81} and consumer fear,\textsuperscript{82} as well as health and environmental concerns. The SPS Agreement’s focus solely on scientific justification means that measures introduced as a response to

\textsuperscript{74} Compliance with the SPS Agreement is presumed if the measures conform to existing international standards: Article 3:2 SPS Agreement
\textsuperscript{75} Articles 2:2, 5:1 & 5.2 SPS Agreement; this assumes that members would wish to impose measures which give a higher level of protection than existing international standards
\textsuperscript{76} *Supra* n. 12
\textsuperscript{77} i.e. they must be “based on” that assessment: *ibid.* at para 193
\textsuperscript{78} There must be a “rational relationship” between the findings of the risk assessment and the measures imposed: *Japanese Varietals supra* n. 12 at para 79
\textsuperscript{79} *Supra* n. 30 at 3
\textsuperscript{80} See Novartis: ‘Biotechnology’ (1999) Novartis at 38
\textsuperscript{82} See Henson *supra* n. 8 at 11: he argues that consumer fear of genetically modified foods may actually demand a response which has no rational relationship to scientific evidence
perceived threats therefore are unlikely to satisfy its rules because ethical and consumer fear considerations are difficult to prove scientifically.\textsuperscript{83}

Secondly, Article 5:7 SPS Agreement authorises the use of SPS measures prior to the risk assessment where there is insufficient scientific evidence. Arguably, the existence of data indicating that such crops are safe means such SPS measures are likely to be effectively challenged.\textsuperscript{84} The Appellate Body made it clear in \textit{Japanese Varietals}\textsuperscript{85} that all four elements of Article 5:7 must be satisfied, indicating that members must always obtain adequate scientific evidence for the continued use of a measure.\textsuperscript{86} In the case of genetically modified foods, merely implementing food safety measures on an interim basis is unlikely to adequately address consumer fear and ethical concerns of the long term effect of such foods, consequently necessitating a risk assessment at a later point, even if the measures could be imposed on the basis of consumer fear at first instance.\textsuperscript{87}

Thirdly, in most cases members will need to undertake independent risk assessments which must establish sufficient nexus between the risks presented by genetically modified foods and the measures that the members wish to impose.\textsuperscript{88} However, it is unlikely that members will be willing to accept that they must carry out such assessments before imposing the measures on a long-term basis. This is primarily due to the political nature of the dispute.

\textsuperscript{83} e.g. The \textit{Hormones} dispute

\textsuperscript{84} This issue was not directly addressed by the Appellate Body in \textit{Hormones}: it only looked at Article 5.7 in relation to the precautionary principle: \textit{Hormones} Appellate Body Report supra n. 12 at paras 120-125

\textsuperscript{85} \textit{Japanese Varietals} supra n. 12 at para 89

\textsuperscript{86} \textit{Ibid.} at para 92

\textsuperscript{87} The Appellate Body made it clear in \textit{Hormones} that they would not address this ‘risk management’ issue, as this was solely within the control of the member: \textit{Hormones} Appellate Body report supra n. 12 at para 181

\textsuperscript{88} The European Communities' interpretation that Article 3:3 SPS Agreement did not require a risk assessment was rejected by the Appellate Body: \textit{Ibid.} at 67-68
Increasing numbers of consumers are rejecting genetically modified food so members will be unwilling to be seen to be doing nothing, as this will have adverse domestic political effects. Members will wish to impose some protection measures against genetically modified crops on a precautionary basis. Unfortunately, the Appellate Body in the Hormone dispute stated that although the precautionary principle has a limited place in Article 5:7 SPS Agreement, it does not relieve members from the need to undertake a valid risk assessment. This is because Article 2:2 SPS Agreement specifically requires the link between the need for the measure and the risk to be based on scientific evidence. From this interpretation, even though members could impose restrictions based on the precautionary principle, it would only ever be on a short-term basis.

In contrast to the measures adopted by the European Communities in the Hormone dispute, the rejection of genetically modified crops is not confined to one member; other WTO members are also seeking to control the importation of such products. In this case, it would be very difficult to bring a case before the WTO dispute settlement system challenging the majority of the members. This would be costly, and could potentially grind the whole system to a halt. Clearly questions about the ability of the SPS Agreement to cope with perceived threats to food safety from genetically modified foods remain.

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89 This is often referred to as the 'precautionary principle'
90 Hormone Appellate Body report supra n. 12 at paras 124-5; also Japanese Varietals supra n. 12 at paras 81-82; see discussion of precautionary principle in Chapter 4 section B: 3 (thesis) & Young: "Some Thoughts on the Precautionary Principle" (2000) 1(5) Perspectives in European Business Law 16 at 18
91 Hormone Appellate Body Report supra n. 12 at paras 124-5
92 See “Japan’s move on GM food labelling may anger US” Financial Times 15 July 1999
93 Despite the title of his speech, Dan Glickman, United States’ Secretary for Agriculture, does not offer any real solutions to these problems: “New Crops, New Century, New Challenges: How will scientists, farmers, and consumers learn to love biotechnology and what happens if they don’t?” Washington DC, USA, 13th July 1999
94 This clearly gives rise to institutional problems regarding how the WTO’s dispute settlement system would cope with such a problem
c. TBT Agreement

Paragraph 6 of the Preamble to the TBT Agreement endorses members’ rights to adopt “technical regulations” or “standards” “necessary to ensure... the protection of human, animal or plant life or health, or the environment.” This broad statement envisages wide application to food safety questions arising from threats to both human health and all aspects of the environment.

Throughout the TBT Agreement emphasis is placed on retention of members’ rights to introduce such regulations and standards as they deem necessary, because the rules focus on guaranteeing transparency of the measures imposed, rather than on independent justification through risk assessments like the SPS Agreement. The TBT Agreement’s rules are divided into two parts: firstly, control of regulations and standards imposed by central governments and secondly, those imposed at a local government level, or by non-governmental organisations. Like the SPS Agreement, the focus of the TBT Agreement lies on the measure imposed rather than its subject matter, so that once the broad threshold criteria in Articles 1 and 2 are satisfied, the emphasis in the rules shifts towards ensuring the transparency of the measure, rather than questioning its motivation.

Applying the TBT Agreement to food safety raises several difficult issues. Different problems arise depending on whether the threat is actual or potential, although, like the SPS Agreement, there are some common issues.

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95 Article 2:1 TBT Agreement
96 Article 4 TBT Agreement
97 Academic comment on the TBT Agreement has been limited to its application to labelling in the context of genetically modified crops: see Wha Chang: “GATTing a Green Trade Barrier-Eco-Labelling and the WTO Agreement on Technical Barriers to Trade” (1997) 31 JWT 137; note the difference in wording between the TBT Agreement and the SPS Agreement regarding its application to measures imposed to protect health and the environment generally: see Chapter 4 section A:2(d) (thesis)
98 Articles 2:9 & 4:1 TBT Agreement
99 Articles 2,4,5 & 6 TBT Agreement
100 Articles 3,7 & 8 TBT Agreement
(i) Actual Threat to Human Health or the Environment

Article 2:2 TBT Agreement’s specific recognition of environmental, as well as human health protection means that satisfaction of the agreement’s threshold criteria should be straightforward in the case of food safety measures. In contrast to the SPS Agreement, the member does not need to establish a risk assessment, provided that the measure has been implemented to achieve a “legitimate objective.” Article 2:2 does not define the term in abstract, but merely provides a non-exhaustive list of examples. In this case, specific inclusion within the list seems to be *prima facie* evidence that regulations introduced on such grounds are “legitimate objectives” for the purposes of the TBT Agreement therefore requiring no further justification. To comply fully with the rules, the member must also show that they have adopted the least trade restrictive measure\(^{101}\) and that imported products receive “no less favourable treatment” than domestic ones.\(^{102}\)

Any measures introduced must be either “technical regulations” within the meaning of Annex 1:1, or “standards” defined in Annex 1:2 TBT Agreement. “Technical regulations” must be contained within a “document” which “lays down product characteristics or their related processes and production methods, including applicable administrative provisions, with which such compliance is mandatory.”\(^{103}\) This definition has not received extensive treatment, although the panel and Appellate Body considered it in the *European Communities-Measures Affecting Asbestos and Asbestos-Containing Products (Asbestos)*.\(^{104}\) Despite the controversial nature of their findings, the Appellate Body confined itself to a consideration of the scope of “technical regulation” in the abstract, and, notwithstanding overruling the panel on the

\(^{101}\) Article 2:2 TBT Agreement  
\(^{102}\) Article 2:1 TBT Agreement  
\(^{103}\) Annex 1:1 TBT Agreement  
\(^{104}\) *Supra* n. 27 (panel) & n.28 (Appellate Body)
matter, refused to ‘complete the analysis’ by making a definitive finding on the French decree.

The TBT Agreement does not focus primarily on the existence of a scientifically provable risk. Nevertheless, the nature of the risk is important because it influences the type of measure that the member wishes to impose, even though the risk itself is not open to scrutiny under the rules. The measure must still comply with the test formulated by the Appellate Body.

A general import ban on food that poses actual threats to human health and the environment can target one food type, or a group of foods, but these must be clearly identifiable from the document drawing up the ban. The member must therefore ensure that the document describes “not only features and qualities intrinsic to the product itself, but also related “characteristics,” such as the means of identification, the presentation and the appearance” of the product, or group of products which are the subject of the measures. In the case of an actual threat to human health or the environment, complying with these criteria should not be difficult, as the measure is being imposed in response to an actual risk, so the member is already aware of the nature of the problem it wishes to react to and so can adequately describe it sufficiently to facilitate enforcement.

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105 The Appellate Body overruled the panel’s legal interpretation of Annex 1:1 TBT Agreement and therefore their finding of fact: see Asbestos Appellate Body report ibid. at paras 75-76
106 Asbestos Appellate Body report ibid. at para 78; see criticisms of the arbitrary nature of the Appellate Body’s decision to ‘complete the analysis’ in earlier cases: Quick & Blüthner supra n. 14
107 This means that the measure can also address general food quality issues, as opposed to focussing solely on food safety: see Mahé & Ortalo-Magné supra n. 30 at 4
108 1. It must be within a “document”; 2. That document must lay down “product characteristics”; 3. The measure must include “applicable administrative provisions and 4. Compliance with those provisions must be “mandatory”: Asbestos Appellate Body report supra n. 28 at para 67
109 Ibid. at para 67
110 Ibid.
111 The products do not have to be expressly identified individually: ibid. at para 70
112 This can be prescribed in both a positive and negative manner: ibid. at para 69
113 The Appellate Body stressed that a measure could only be a “regulation” if it could be enforced: ibid. at para 70
The definition of “standards” in Article 4 and Annex 1:2 TBT Agreement has not been explored judicially. Article 4 requires members to establish a Code of Practice that its relevant standards agency will adopt and administer. The problem using this route for actual risks to human health and the environment is that the establishment of a standard is a longer term solution to a general category of products and may not be appropriate to an existing short term risk. Dependent on the exact nature of the risk, members may be more likely to adopt “technical regulations” to address food safety concerns resulting from actual threats to human health and the environment, especially as compliance with standards under the TBT Agreement is not mandatory.

(ii) Perceived Risks to Human Health and the Environment

Implementing food safety measures on the grounds of a perceived risk to human health or the environment also requires the member to satisfy the threshold criteria in Article 1 and to make certain that any measures fall within the definition of “technical regulations” or “standards” in Annex 1:1 or 1:2 TBT Agreement. This raises similar issues to those discussed above in relation to measures introduced in response to an actual threat. Perceived threats also give rise to other distinct issues. The most notable problems occur where members wish to address concerns raised by genetically modified foods.

In contrast to the SPS Agreement, the TBT Agreement prima facie allows members to address non-scientific concerns in their technical regulations, or their standards. One of the difficulties acknowledged for genetically modified foods is that consumer fear and ethical issues may be the primary impetus for measures. Article 2:2 TBT

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114 See also Annex 3 TBT Agreement for the model Code of Practice for the adoption of standards
115 e.g. contamination of animal feed by dioxin
116 Annex 1:2 Explanatory Note TBT Agreement
117 This is because the measure does not have to be justified solely by scientific evidence: Article 2:2 & Annex 3:D & E TBT Agreement
Agreement does refer to the availability of scientific evidence to establish the existence of a risk, but this is merely one consideration within a non-exhaustive list, so other matters can be relevant.\(^{118}\) Complications arise over the appropriate formulation of the measure.

The Appellate Body’s analysis of “technical regulation” under Annex 1:1 in *Asbestos* means that any technical regulation must specify the “product characteristics.”\(^{119}\)

Although the product itself does not have to be expressly stated,\(^ {120}\) the regulation must identify sufficient aspects to ensure that it is possible to comply with the regulation.\(^ {121}\)

A complete import ban on genetically modified foods *per se* will be difficult to enforce under the TBT Agreement. This is because the agreement envisages a linkage to a group of readily ascertainable products which have characteristics that can be easily identified from the regulation itself.\(^ {122}\)

Genetically modified crops fall into two categories that have been referred to as the first and second stage.\(^ {123}\) First stage crops are those that have been altered to cope with specific problems during the growth stage. Primarily, strains of corn have been developed which are resistant to the corn borer insect,\(^ {124}\) and soybeans have been modified so that they are unaffected by the use of existing pesticides.\(^ {125}\) Following the successful adoption of these crops in the US,\(^ {126}\) genetic modification moved onto the creation of second stage crops. These are referred to as “value-added” or “value-

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\(^{118}\) See Mahé & Ortalo-Magné *supra* n. 30 at 5

\(^{119}\) *Asbestos Appellate Body report* *supra* n. 28 at para 67

\(^{120}\) *Ibid.* at para 70

\(^{121}\) *Ibid.* at para 67

\(^{122}\) See Article 2:9.2 TBT Agreement

\(^{123}\) "Value-Enhanced Crops: Biotechnology’s Next Stage" USDA Agricultural Outlook March 1999 at 18

\(^{124}\) The best known of these is Bt corn. This plant is specifically only toxic to the European corn borer insect: see Novartis: “Maize is Maize: why we use gene technology” (1997) at 15

\(^{125}\) Monsanto’s Roundup Ready© Soybeans which are resistant to the use of their Roundup© insecticide: see Monsanto: “Responses to Questions Raised and Statements Made by Environmental/Consumer Groups and Other Critics of Biotechnology and Roundup Ready© Soybeans” 21st April 1997; Monsanto also manufactures Roundup Ready© Canola, Cotton & Corn

\(^{126}\) Riley, Hoffman & Ash *supra* n. 50 at 21: they estimate that the acreage under these crops has increased to 50 million acres in the 3 years following their initial introduction
enhanced" crops\textsuperscript{127} because they have specific desirable end-use characteristics. For example, soybeans with added nutrition which could result in lower feed costs for animals;\textsuperscript{128} high oleic soybeans containing less saturated fat than conventional beans,\textsuperscript{129} wheat specifically engineered for its end-use\textsuperscript{130} and better tasting beer.\textsuperscript{131} Consequently, formulating one regulation that addresses genetic manipulation at all points of the production process is difficult.\textsuperscript{132}

In addition, Article 2:2 TBT Agreement does state that the method of regulation should "not be more trade-restrictive than necessary," so a member would have to show that the perceived threat was so serious that it required an import prohibition, rather than any other form of regulation.\textsuperscript{133} Ironically, the most effective way this could be shown is through scientific evidence, which this thesis has already shown is problematic for genetically modified crops.\textsuperscript{134} The alternative would be to introduce a less trade restrictive measure, but this may not satisfy consumer fear in the way that a complete ban would.

The only alternative would be to introduce a "standard" which would effectively amount to an import prohibition of genetically modified crops.\textsuperscript{135} This is a long term solution which could be more appropriate until consumer confidence in the products increased. Unfortunately, Annex 1:2 TBT Agreement makes it clear that compliance

\textsuperscript{127} See Agricultural Outlook March 1999 supra n. 123 at 18
\textsuperscript{128} This is because these will contain more of the essential nutrients required in animal feed and therefore less will be required: \textit{ibid.} at 19
\textsuperscript{129} \textit{Ibid.} at 18
\textsuperscript{130} For example, bread making or general baking: this will inevitably reduce the processing costs and ultimately the cost of the end product: \textit{ibid.} at 20
\textsuperscript{131} \textit{Ibid.} at 20
\textsuperscript{132} Note that the Appellate Body dismissed a general ban on asbestos fibres as outside the TBT Agreement because that prohibition would not relate to a product directly: see \textit{Asbestos Appellate Body report supra} n. 28 at para 71
\textsuperscript{133} This point was not addressed by either the panel or the Appellate Body in \textit{Asbestos ibid.}
\textsuperscript{134} See Chapter 4 section A (thesis) on perceived threats to human health and the environment
\textsuperscript{135} Under Annex 1:2 TBT Agreement

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with any “standard” is not mandatory, so this makes it a less attractive option if the member’s objective to restrict the import of *inter alia* genetically modified crops.

d. GATT

Although GATT does not directly address food safety concerns, Article XX(b) allows members to impose measures which “protect human, animal or plant life or health.”

This is subject to the general commitment within Article XX’s ‘chapeau’ that such measures do not constitute a disguised restriction on international trade and are not applied in “a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail.” Satisfying these requirements means that the measures will be exempt from other GATT rules where this is required.

Three problems arise when applying Article XX(b) GATT to food safety questions: firstly, whether the aspects of food safety identified in this chapter of the thesis are covered by the exemption at all; secondly, whether the exemption applies to a threat to food safety predicated by an actual risk to human health and the environment and finally, Article XX(b)’s role in relation to perceived risks to human health and the environment.

(i) Does Article XX(b) GATT Apply to Food Safety Issues At All?

Article XX(b) permits exemption from GATT disciplines in order to “protect human, animal or plant life or health.” In *Shrimp/Turtle* the Appellate Body stated that the

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136 Like the Agreement on Agriculture, the SPS and TBT Agreements, the GATT focuses on the measure rather than the policy behind it
137 i.e. the ‘preamble’ to Article XX
138 Chapeau Article XX GATT
139 As Jackson notes, if the prohibition treats imported goods in a like manner to domestic goods and also treats all WTO members’ goods equally, then it will comply with Articles 1:1 & III GATT and so Article XX(b) will not be necessary. It is only where the ban results in discriminatory treatment in reality that a member may need to rely on Article XX: See J.H. Jackson: ‘The World Trading System: Law and Policy of International Economic Relations’ 2nd ed. (1997) MIT Press at 233
member must show that its measure came within the scope of the relevant exemption in Article XX first before the general ‘chapeau’ was applied. In relation to food safety questions arising from any form of threat to human health, the GATT panels’ interpretation of Article XX(b), endorsed by the Appellate Body in Asbestos, allows members to claim exemption from GATT disciplines on this ground. The extent to which Article XX(b) covers threats to the environment is questionable. Chapter 3 argued that although Article XX(b) does state it applies to “plant life, or health,” it does not necessarily follow that all environmental issues will come within the scope of the exemption. Article XX(b) was used for environmental purposes before the establishment of the WTO, but these instances involved broader issues than just food safety. It is uncertain therefore whether the previous panel reports would provide a valid ‘precedent’ for this issue.

Although food safety measures would be imposed as a response to threats to the environment, ultimately the threat is to human health, so on this analysis, the measures should come within Article XX(b) GATT as “necessary to protect human...health” without the need to establish the broader threat to the environment. This more liberal interpretation of Article XX(b) fits in with the Appellate Body’s view in the Shrimp/Turtle dispute that the GATT should be ‘updated’ to take

at para 149

141 This issue has been discussed in detail in Chapter 3 section A:1(b) (thesis)
142 The Appellate Body even expanded the definition of “like products” under Article III:4 GATT so that a product would be “like” another if consumers rejected it because of its adverse risk to human health, rather than aspects intrinsic to the product e.g. end-use, physical colour etc.: Asbestos Appellate Body report supra n. 28 at paras 117,119 & 122
143 Thailand-Restrictions on Importation of and Internal Taxes on Cigarettes (Thailand Cigarettes) BISD 37S/200
144 This is despite Article XX(b)’s application to general environmental issues prior to the establishment of the WTO: see general discussion in United States-Standards for Reformulated and Conventional Gasoline (hereafter Reformulated Gasoline-Panel report) WT/DS2/R, (29 January 1996) at para 6.21. The Appellate Body did not contest this: United States-Standards for Reformulated and Conventional Gasoline (hereafter Reformulated Gasoline-Appellate Body report) WT/DS2/AB/R, (29 April 1996) report adopted 20 May 1996. See Chapter 3 section A:3 (thesis) for a more detailed analysis of the difficulties associated with the interpretation of “animal or plant life or health” in the context of the SPS Agreement. Note that these difficulties will also apply to Article XX(b) GATT as the wording is the same.
members’ contemporary practices into account. Arguably, food safety, like environmental protection, was not a primary consideration when the GATT was drafted in 1947. Consequently, it is possible to argue that as members did not anticipate such issues being problematic, a wider interpretation of Article XX(b) using the Marrakesh Agreement should be adopted to take account of the change in policy. It is unclear whether any member would actually support a narrow interpretation of Article XX(b) in practice in dispute settlement proceedings. This is because members are unlikely to argue that food safety measures predicated on environmental threats are not within Article XX(b) GATT, as this would limit the exemption’s application whereas it is clear from the submissions made in the Shrimp/Turtle dispute, that members support as broad an interpretation as possible.

(ii) Actual and Perceived Threats to Human Health and the Environment

GATT panels interpreted Article XX(b) narrowly, so that it was only available where the trade control was “necessary.” The panel in Thailand Cigarettes stated that the test should be equated with the one for Article XX(d) GATT, so that trade restrictions would only be “necessary” and therefore within the Article XX(b) exemption, where no other measure that placed less constraints on international trade was available to the member.

The panel’s narrow interpretation of Article XX(b) in Thailand Cigarettes meant that it was easier to justify a regime based on labelling hazardous materials, than a

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145 The Appellate Body used the Preamble to the Marrakesh Agreement Establishing the World Trade Organisation to incorporate the protection of the environment into Article XX(g) GATT: see Shrimp/Turtle dispute Appellate Body report supra n. 140 at para 129
146 Shrimp/Turtle dispute, Appellate Body report ibid. at paras 10 & 34
147 Ibid.
148 To ensure consistency with national laws which are not themselves in breach of the other provisions of the GATT
149 ‘Member’ is used here to make it clear that this would be the position for parties to the WTO. However, parties to the GATT were referred to as Contracting Parties due to GATT’s status: see J.H. Jackson, W.J. Davey & A.O. Sykes: ‘Legal Problems of International Economic Relations: Cases, Materials and Text’ 3rd ed. (1995) West at 298
150 Thailand Cigarettes supra n. 143 at paras 73-81
complete prohibition on imports. This was because the former at least allowed the
opportunity of compliance, whereas a prohibition did not as it would almost certainly
contravene Articles XI or III GATT. As labelling could achieve the same result in
the short term, and would place the least constraints on trade, a ban was unlikely to be
deemed “necessary” under the _Thailand Cigarettes_ test. The member’s sovereign
rights would not be affected because it could still introduce mechanisms designed to
protect the consumer against the food safety risk as GATT only affects the choice
of measure used by the member, not the policy behind it. The Appellate Body in _Asbestos_ widened the impact of the _Thailand Cigarettes_ test so
that the member’s measure will be deemed “necessary” if no other measure is
“reasonably available.” Rather than accepting the Canadian argument that this
meant “that an alternative measure is only excluded ...if implementation of that
measure is “impossible,” the Appellate Body argued that a measure would be
“necessary” if it was not possible to achieve the member’s policy aim in any other
way. The Appellate Body’s interpretation allows the member to determine the level
of risk it wishes to attain, which arguably facilitates the introduction of a higher
standard of protection than that adopted by other members. On this view, a member
would have the right to introduce food safety measures based on perceived, rather
than actual risks to human health or the environment, because this would be
effectively establishing a higher level of consumer protection.

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151 This depends on the scope of the measure
152 See generally _United States-Restrictions on Imports of Tuna_ BISD29S/91 (1982 report adopted) and
1991 report which was not adopted BISD 39S/155 (the _Tuna/Dolphin_ dispute) also _United States-
Restrictions on Imports of Tuna (Tuna-Dolphin II)_ GATT Doc. DS29/R (16 June 1994) unadopted
153 _Ibid._ at para 5.24
154 _Asbestos_ Appellate Body report _supra_ n. 28 at para 169
155 _Ibid._
156 _Ibid._ at para 172
157 _Ibid._ at para 174
However, Article XX does not specify how the panel should determine what risks should be included in Article XX(b). The Appellate Body noted in Asbestos that the panel made its finding on the conformity of the French measure with Article XX(b) on the basis of scientific evidence.\(^{158}\) This raises the question whether non-scientific considerations would be relevant. This is particularly important where a perceived threat to human health or the environment arising from genetically modified foods leads a member to introduce measures that also take consumer fear and ethical considerations into account. It is clear from the SPS Agreement, that such issues are difficult to address scientifically.\(^{159}\)

In contrast to the panel, the Appellate Body in Asbestos argued that any risk could be shown qualitatively as well as quantitatively.\(^{160}\) Although this suggests that it would then be possible to rely on non-scientific issues for a measure to qualify under Article XX(b), the Appellate Body distinguished between “actual risks” which could be revealed in a risk assessment and perceived risks or mere “hypotheses,”\(^{161}\) indicating that the risk must still be identifiable through scientific evidence, even if the exact nature of the risk cannot be quantified.\(^{162}\) In the context of actual risks to human health or the environment, this issue will not be difficult to satisfy, but a measure imposed as a reaction to political pressure generated by consumer fear of the hazards of genetically modified foods, is unlikely to be covered because it is more likely to be a mere hypothesis than an actual clearly identifiable risk.

\(^{158}\) Ibid. at para 162
\(^{159}\) See Chapter 4 section A:1(b) (thesis)
\(^{160}\) Asbestos Appellate Body report supra n. 28 at para 167
\(^{161}\) Ibid. at para 168
\(^{162}\) Ibid. at para 167
2. The Relationship Between the Agreement on Agriculture, the SPS and TBT Agreements and the GATT: Is the Application of the Agreements Effective?

Emphasis on the measures adopted, rather than the policies behind them means that more than one of the WTO Agreements and the GATT can apply to food safety measures. Where such measures are introduced to counteract an actual or perceived threat to human health or the environment, the following conflicts potentially arise: between the Agreement on Agriculture and the SPS Agreement; the Agreement on Agriculture and the TBT Agreement; the Agreement on Agriculture and the GATT; the SPS Agreement and the TBT Agreement; the SPS Agreement and the GATT and finally, the TBT Agreement and the GATT. Even before discussing the relationship between the agreements, the existence of such an extensive range of possible permutations for the rules’ interaction alone raises significant complications, as it will be left to the dispute settlement system at first instance to try and sort out the hierarchy of the agreements.

a. The Agreement on Agriculture and the SPS Agreement

There are two provisions in the Agreement on Agriculture that governs its interaction with the SPS Agreement: Article 14 and Article 4 on market access disciplines.

Article 14 Agreement on Agriculture states that members should “give effect to” the SPS Agreement. It does not go further and state what this means, but it seems evident that if members wish to impose measures that come within the scope of the SPS Agreement, they should ensure they comply with that agreement’s rules. On this interpretation, there is no conflict between the two agreements because they both deal with different aspects.163

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163 See Chapter 1 section B: 1(a) & (b) (thesis) for a detailed explanation of the application of the provisions of the Agreement on Agriculture and the SPS Agreement
Article 4 Agreement on Agriculture poses a more difficult problem for the relationship between the two agreements. It prohibits the further introduction of measures designed to restrict market access for agricultural products, except those which have been introduced under other “non-agriculture-specific provisions of the GATT 1994 or of the other Multilateral Trade Agreements in Annex 1A.”\textsuperscript{164} The SPS Agreement is within Annex 1A and so, \textit{prima facie}, measures introduced in compliance with its rules are exempt from the Agreement on Agriculture’s. However, this exclusion from liability under the Agreement on Agriculture presupposes that the member has adopted SPS measures that restrict market access. The discussion in this chapter has already stated that not all food safety measures will take the form of market access restrictions. Although an import ban may be the preferred method to prevent genetically modified foods in particular entering the domestic market, the member may also discourage domestic production of such foods by subsidising potentially more expensive traditional crops. Dependent on the agricultural products listed in the member’s schedule,\textsuperscript{165} breach of its domestic support commitments under Article 6 Agreement on Agriculture may then occur. The footnote does not mention any specific type of measure for the exclusion, but the fact that it is located as a footnote to Article 4 arguably means that it only applies to market access restrictions.

This narrow interpretation mirrors the Appellate Body’s reluctance to liberally interpret the wording in the WTO Agreements on the grounds that if members had intended wider coverage, they would have expressly stated it in the text of the relevant agreement.\textsuperscript{166}

\textsuperscript{164} Footnote to Article 4 Agreement on Agriculture
\textsuperscript{165} Article 3:1 Agreement on Agriculture
\textsuperscript{166} Hormones Appellate Body report \textit{supra} n. 12 at para 165
Another difficult problem arises where a member wishes to adopt a food safety measure which is in breach of the SPS Agreement’s rules, but which is permitted by the Agreement on Agriculture. A pertinent example occurs where members wish to subsidise the growth of traditionally cultivated crops by domestic producers to ensure they are more attractive to consumers in terms of price than genetically modified crops. The earlier discussion has indicated that scientifically proving the risks associated with genetically modified foods sufficiently to justify imposing the level of measures required to address consumer fears under the SPS Agreement’s rules is difficult.\(^{167}\) This means that such measures will not come within the SPS Agreement if they are not “based on” the findings of the risk assessment.\(^{168}\) However, if the measures are used to address food safety concerns arising from perceived threats to the environment, then these may fall outside the domestic support reduction commitments under Article 6 Agreement on Agriculture because they come within the exemption in the Green Box.\(^{169}\) Consequently, the member could retain the measures under the Agreement on Agriculture when the SPS Agreement would require their removal.

In both examples one agreement sanctions the use of the measures, whereas another potentially finds them outside the rules. This is a bizarre circumstance, which members could not have intended because the primary motivation for the WTO agriculture regime was to promote free trade.

**b. Agreement on Agriculture and the TBT Agreement**

Article 1:3 TBT Agreement states that the agreement covers “(a)ll products, including industrial and agricultural products.” This means the TBT Agreement will *prima facie* simultaneously apply to the same products as the Agreement on Agriculture.

\(^{167}\) See Chapter 4 section A: 1(b) (thesis)  
\(^{168}\) *Hormones Appellate Body report* supra n. 12 at para 168  
\(^{169}\) Annex 2:12 Agreement on Agriculture
Problems do not arise in the interaction between the Agreement on Agriculture and the TBT Agreement for two reasons: firstly, the TBT Agreement only applies to "technical regulations" and "standards." Previously it has been argued that members are more likely to choose "technical regulations" in the case of food safety rather than "standards," as compliance with the former is deemed mandatory under the TBT Agreement.\(^{170}\) Annex 1:1's definition means that "technical regulations" are unlikely to fall within the scope of the Agreement on Agriculture as they relate specifically to controls on "product characteristics" and "related processes and production methods" on imported goods, rather than to methods of agricultural support provided by members which the Agreement on Agriculture covers.

Secondly, as a corollary to this, even if the technical regulation amounts to an import ban and consequently, comes within the scope of Article 4 Agreement on Agriculture, the footnote to Article 4 should excuse liability if the regulation meets the terms of the TBT Agreement because the TBT Agreement is an Annex 1A Agreement and therefore excluded from the operation of the Agreement of Agriculture in such circumstances.

Complying with the TBT Agreement only requires transparency in the application and administration of the measure, thus placing a lesser burden on the member. The member is therefore more likely to try and argue that their measure is a "technical regulation" and within the scope of the TBT Agreement because they can choose the appropriate level of protection to fulfil their goal.\(^{171}\) Consequently, this may be a loophole in the Agreement on Agriculture if a member can successfully argue that

\(^{170}\) Annex 1:2 TBT Agreement; see Chapter 4 section A: I(c) (thesis)

\(^{171}\) Under Article 2:2 TBT Agreement, the measure must "fulfil a legitimate objective" and be the "least-trade restrictive" in order to fulfil that objective. Arguably, it is open to the member to adopt a restrictive measure, provided they can justify it by the nature of the risk. The fact that non-scientific issues play a role in the member's decision is not important; see Article 2:2 which states that scientific evidence is only one consideration for the legality of the measure.
their import ban is a technical measure under the TBT Agreement and so outside Article 4 Agreement on Agriculture.

c. The Agreement on Agriculture and the GATT

The relationship between the Agreement on Agriculture and the GATT in the area of food safety is complex. A different legal outcome results dependent on the type of measure adopted by the member. This is because the Agreement on Agriculture and the GATT both focus on the measures adopted by the member, rather than the motivation behind the policy, as both agreements presume that members are primarily motivated by the need to protect their domestic agricultural markets.

If Article 4 Agreement on Agriculture covers the measure, then its footnote excludes the operation of GATT’s agricultural provisions. Although the footnote does not exclude the operation of GATT’s non-agricultural-specific provisions, in the case of market access measures, Article XI:1 GATT specifically prohibits the adoption of quantitative restrictions so there is no conflict and the General Interpretative Note to Annex 1A WTO Agreements (the General Interpretative Note) does not apply.

Between the operation of the Agreement on Agriculture and the GATT, members will not be permitted to impose any form of quantitative restriction to guarantee food safety, otherwise than in conformity with the special safeguard clause in Article 5 Agreement on Agriculture.\(^\text{172}\)

If the member chooses to address food safety issues through subsidies, a distinction must be made between export and domestic subsidies. Article 8 Agreement on Agriculture states that members cannot impose export subsidies unless they comply with the Agreement on Agriculture’s rules. Article 8’s emphatic statement apparently excludes the operation of GATT completely and places the question of the legality of

\[^{172}\text{Note however, the problems associated with tariff-quotas: see Chapter 1 section B: 3(a)(i)a (thesis)}\]
export subsidies solely within the Agreement on Agriculture. This result is not surprising, as one of the purposes of the inclusion of agriculture in the WTO regime was to promote free trade which was distorted by the use of such subsidies.

Using domestic subsidies to address food safety concerns also results in regulation firmly within the Agreement on Agriculture, though for different reasons than those for export subsidies. Article 6 Agreement on Agriculture requires members to reduce the level of domestic support calculated using the Total Aggregate Measurement of Support (Total AMS) by the amounts specified in the agreement.173 If a member introduces food safety measures that come within the Green Box in Annex 2 Agreement on Agriculture, then such measures do not come within that member’s total AMS for the purposes of the agreement and do not require reduction.

Unfortunately, the Agreement on Agriculture does not then specify whether Article XVI GATT174 applies to those measures. The General Interpretative Note to Annex 1A WTO Agreements applies because on this view the Agreement on Agriculture would permit the use of the domestic subsidy, whereas the GATT would prohibit it,175 so the rules in the Agreement on Agriculture would prevail.

If the Green Box does not exclude the food safety measures from domestic support reduction commitments, the General Interpretative Note does not apply because there is no conflict between the Agreement on Agriculture and the GATT. Measures within the terms of Article XVI, or which are excluded from its operation because they fall within Article XVI:3 will be deemed to be compatible subsidies under the GATT. Likewise, domestic subsidies that come within Articles 6 and 7 will be permitted under the Agreement on Agriculture. In both cases the subsidies will be compatible with the rules and therefore there is no conflict between the agreements because the

173 For further detail see Chapter 1 section B:1(a) (thesis)
174 i.e. Subsidy commitments
175 Subject to Article XVI:3 GATT: see Chapter 1 section A: 2(a)(ii) (thesis)
GATT does not go further and govern the member’s actions once the subsidy has been ‘cleared.’

Following the panel’s interpretation of the relationship between the SPS Agreement and the GATT in *Hormones*, it can be argued that the Agreement on Agriculture’s terms contain “obligations which are not already imposed by GATT” which must still be complied with therefore even if the GATT’s provisions are fulfilled. Despite the lack of conflict, the result is that the Agreement on Agriculture’s terms on domestic subsidies would prevail because they are more detailed than GATT’s.

d. The SPS and TBT Agreements

Article 1:5 TBT Agreement states that that agreement’s rules do not apply to SPS measures, as defined in Annex A of the SPS Agreement. The relationship seems clear and was reiterated by the panel in *Hormones*, which stated that as the measures in that case were clearly SPS measures, the TBT Agreement would not apply.

This interpretation means that the role of the TBT Agreement in regulating international agricultural trade is minimised. The SPS Agreement defines SPS measures in terms of both subject matter and the method by which the measure is imposed. Annex A:1 SPS Agreement states it regulates those measures which have both a broad territorial scope protecting human, animal or plant life, or health and which are implemented using numerous specified methods.

Despite the fact that the TBT Agreement’s scope appears wider than the SPS Agreement because it covers TBT measures introduced to protect the environment, as well as “human health or safety, animal or plant life or health,” in fact the

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176 *Hormones* dispute, USA panel report *supra* n. 12 at paras 8.31-8.42
177 *Ibid.* at para 8.40
178 *Hormones* USA panel report *ibid.* at para 8.29
179 Annex A:1 SPS Agreement
180 Article 2:2 TBT Agreement: such coverage alleviates the interpretational difficulties associated with the SPS Agreement discussed in Chapter 3 section A:1(b) (thesis)
application of the agreement is more limited than the SPS Agreement because Annex 1 TBT Agreement only defines that agreement’s coverage in terms of the method of execution of the measure. The SPS Agreement’s wider definition means that it is possible to introduce “SPS measures” through “technical regulations” and, despite the existence of the TBT Agreement, the SPS Agreement will apply to those measures. This consequently limits the ability of members to bypass the need to undertake an appropriate risk assessment requirement when introducing restrictions on international agricultural trade.

In addition, it is unclear which agreement should be applied first. It is arguable that the logical approach would be to apply the SPS Agreement first, because if the measures come within that agreement, then the TBT Agreement is excluded by Article 1:5 TBT Agreement. This approach was automatically adopted by the panel in Canada’s and the United States’ Hormones panel reports without any further analysis and was not appealed before the Appellate Body. However, in the case of genetically modified foods, which can be protected by food safety measures that are introduced as a result of a perceived risk to human health or the environment, it will be politically expedient for the member to argue that the measures do not come within the SPS Agreement for two reasons.

Firstly, it is not entirely clear that the SPS Agreement would cover food safety measures following a threat to the environment. Secondly, food safety measures introduced to address difficulties posed by genetically modified foods might be difficult to justify through a scientific based risk assessment, as they are often introduced as a response to consumer fear, rather than on the basis of an actual risk.

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181 i.e. as “technical measures” or as “standards” in Annex 1:1 & 1:2 TBT Agreement
182 Hormones supra n. 12 at para 8.29 (United States panel report) & at para 8.32 (Canadian panel report)
183 See Chapter 4 section A and Chapter 3 section A (thesis)
Such measures are more likely to be compliant with the TBT Agreement which merely accepts the member’s investigation into the nature of the risk, rather than requiring an independent investigation. Whether attempting to use this argument would be effective is debateable, as the panel and Appellate Body appear to follow their previous jurisprudence.184

e. The SPS Agreement and GATT

Although the relationship between these two agreements raises problems because the GATT’s more general exclusion in Article XX(b) and (g) would allow members to introduce food safety measures, where the more restrictive SPS Agreement’ rules could prevent it, the relationship has been addressed.

On one level, the conflict between Article XX(b) and the SPS Agreement is resolved by Article 2:4 SPS Agreement. This introduces a presumption of compliance with Article XX(b) GATT when measures comply with the terms of the SPS Agreement. Article 2:4 solves the problem when the SPS Agreement is applied first, but it does not go on and state that the SPS Agreement must be applied first.

Fortunately, the panel in the Hormones dispute has closed this potential loophole.185 The European Communities claimed that as the SPS Agreement only informed the existing rules in Article XX(b),186 a violation of GATT must be found first, which then necessitated a finding under the SPS Agreement. Their argument seems predicated on the fact that no difference exists between the application of Article XX(b) GATT and the SPS Agreement’s “substantive” rules.187 Referring to Article 31 of the Vienna Convention on the Law of Treaties, the panel argued that the “ordinary

184 See the panel and Appellate Body in the series of cases interpreting the SPS Agreement: Hormones supra n. 12 Australia-Salmon supra n. 12 & Japanese Varietals supra n. 12
185 See Hormones Canada panel report ibid. at paras 8.34-8.45
186 Ibid. at para 8.36
187 European Communities’ classification: ibid. at para 8.36
meaning" must be given to the terms of the SPS Agreement and GATT. The panel went on to state that as Article 1:1 SPS Agreement did not specifically refer to the need to prove a prior violation of GATT, this was unnecessary. The panel argued that the purpose of both Article XX(b) GATT and the SPS Agreement was different because the GATT was a general exception to specific rules, whereas the SPS Agreement contained substantive obligations which had to be fulfilled before the measures imposed applied. In this way, the SPS Agreement could not be an ‘exception’ in the same way.

The panel concluded that it would apply the SPS Agreement first and then refused to consider the GATT because it stated that as the European Communities had only relied on Article XX(b) which was similar to the terms of the SPS Agreement anyway, analysing the exemption was unnecessary. This aspect of the panel reports was not appealed before the Appellate Body.

This finding arguably means that Article XX(b) GATT no longer has any effect in disputes concerning SPS measures. Although the panel’s approach clarifies the conflict, difficulties remain because the wider SPS test in relation to the measures imposed prevails over the narrower one in Article XX(b). This means that any SPS measure is permitted, as long as it is scientifically justified.

Priority of the SPS Agreement’s rules over the GATT will apply in the case of food safety measures. Despite the fact that members may introduce food safety measures predicated on the need to protect the environment, it is clear that Article XX(b) GATT would be the relevant exemption, rather than Article XX(g). This is because the

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188 See *Hormones* dispute USA panel report *supra* n. 12 at para 8.35. There are significant questions about the role of the Vienna Convention in the interpretation of WTO rules: see Cameron & Gray: "Principles of International Law in the WTO Dispute Settlement Body" (2001) 50 ICLQ 248

189 *Hormones* ibid. at para 8.39


191 i.e. those covered by the SPS Agreement
measures would be imposed to ensure food safety and therefore human health, rather than to primarily conserve an exhaustible natural resource.192

f. TBT Agreement and GATT

In its report in the Asbestos dispute, the Appellate Body observed193 that the TBT Agreement did “further the objectives of the GATT,” but that the TBT Agreement went further and created a specific legal regime for technical regulations and standards which was “different from and additional to” their obligations under GATT,194 but it refused to go further and analyse what that relationship would be.195 Two issues are outstanding therefore: firstly, what is the legal result when there is a conflict between the rules and secondly, the consequence if there is no conflict? The General Interpretative Note resolves the first issue because in the event of conflict between the GATT and the TBT Agreement, the TBT Agreement applies to the extent of that conflict. However, it is unclear whether there will in fact be a conflict between the two agreements because of the operation of their rules. The TBT Agreement applies to “technical regulations” and “standards” introduced on all industrial and agricultural products.196 Once the measures come within the agreement, the member only has to ensure transparency in the operation of the relevant measures to comply with the rules. Articles 2:1 and 2:2 TBT Agreement mean that the member must ensure that the measure does not operate to unfairly discriminate against imported products vis-à-vis ‘like’ domestic products, but the rules do not go further and dictate how these requirements must be fulfilled.

On this view the TBT Agreement creates a general transparency requirement for such measures, but the precise rules governing how the MFN obligation must be satisfied

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192 i.e. under Article XX(g)
193 Asbestos dispute Appellate Body report supra n. 28 at para 80
194 Ibid. at para 80 (emphasis in the original)
195 Ibid. at paras 81-83
196 Article 1:5 TBT Agreement
and when the TBT measure does in fact unnecessarily restrict international trade are contained in the GATT. If this interpretation is accepted, then both the TBT Agreement’s rules and the GATT’s will always be relevant to a dispute involving the TBT Agreement.

Applying this to food safety issues undermines some of the positive aspects of relying on the TBT Agreement, rather than the SPS Agreement. It has been argued above that if a food safety measure comes within the TBT Agreement, then the member need not justify the motivation behind the imposition of the measure. However, if the GATT still plays a fundamental role in areas covered by the TBT Agreement, then once the TBT Agreement’s threshold criteria has been satisfied, then the member must go on and prove that the measure fulfils the most favoured nation (MFN) rules in Article I GATT and does not contravene Article III by treating imported products differently to “like” domestic products. Although the member does not have to provide a risk assessment, fulfilling the GATT rules in addition to the TBT Agreement’s places a more onerous burden on the member than is apparent from merely applying the TBT Agreement alone. This is because the member must prove that both the national treatment and the most favoured nation obligations in GATT are satisfied, whereas the TBT Agreement only requires the member to show that it its TBT measure does not contravene the national treatment obligation in Article 2:1 TBT Agreement.

Dependent on the food safety measure adopted, this construction means that the Agreement on Agriculture also will be relevant where the member chooses to use subsidies to achieve its food safety objective. Article XVI GATT allows the member to impose subsidies provided certain criteria are satisfied, but this thesis has already

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197 i.e. national treatment: see the Asbestos dispute, Appellate Body report supra n. 28 at paras 84-132
argued\textsuperscript{198} that the Agreement on Agriculture’s rules mean that export subsidies will be wholly within the scope of that agreement, consequently excluding the operation of Article XVI GATT. Domestic subsidies are more problematic, but the Agreement on Agriculture, rather than the GATT will still regulate them. This view is likely to be adopted by the panels and Appellate Body because it promotes the free trade goal as any type of subsidy will inevitably be analysed under the amended agriculture regime.\textsuperscript{199}

3. Developing Countries

Food safety measures represent a fundamental regulatory challenge to the WTO agriculture regime when developing countries’ needs are considered. The previous discussion has concentrated on general interpretational questions for the application of the WTO agriculture regime’s rules to the food safety question, so this part of the analysis will focus on specific developing country questions. The discussion operates at two levels.

On one level it can be argued that developing countries will have fewer difficulties introducing compliant food safety measures, than developed countries. If such countries adopted measures as a response to an actual or perceived threat to human health or the environment, then they would encounter the same interpretational difficulties as developed countries under the Agreement on Agriculture.\textsuperscript{200}

In contrast to developed countries, developing countries have more flexibility in the implementation of the Agreement on Agriculture’s rules. Although Article 16 does not exempt developing countries from the reduction commitments, these can be undertaken over a ten year period, rather than the five years required for developed

\textsuperscript{198} See Chapter 1 section B: 1 (thesis)
\textsuperscript{199} i.e. The Agreement on Agriculture’s and the SPS Agreement’s rules
\textsuperscript{200} See Chapter 1 section B: 4 (thesis)
countries. Additional allowances are given for *de minimis* reductions in relation to domestic subsidies and complete relief from reduction is granted on specified export subsidies during the implementation period of the Agreement on Agriculture. Consequently, if developing countries use domestic subsidies to achieve their food safety measures, then, although such subsidies could still fall within their AMS calculation, *prima facie* the subsidies can be retained for a longer period because developing countries have longer to reach the required reduction level for their domestic support.

If the country is categorised as least-developed, they are not required to undertake any reduction commitments at all. Consequently, subject to the problem whether the Agreement on Agriculture would apply to food safety measures at all, such countries could use subsidies or market access measures to further food safety goals.

Despite recognising the need to accord special and differential treatment to developing and least-developed countries, both the SPS and TBT Agreements do not allow such countries concessions from the adoption of the rules. However, the SPS Agreement grants an extended period for implementation, whereas the TBT Agreement merely states that the level of development that the relevant country has attained should be a relevant consideration when assessing their ability to meet a certain standard or conform to a technical regulation.

On this view, although the difficulties encountered by developed nations in the SPS Agreement will also apply to developing countries, under the TBT Agreement, it may

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201 For more detail on this, see Chapter 1 *ibid.* (thesis)
202 Article 6:4(b) Agreement on Agriculture
203 Article 9:4 Agreement on Agriculture
204 Subject to the possibility that they may be excluded under the Green Box in Annex 2 Agreement on Agriculture
205 Article 15:2 Agreement on Agriculture
206 Articles 10 & 14 SPS Agreement
207 Article 12 TBT Agreement
be possible for developing and least-developed countries to argue that their stage of
development means that they must introduce more restrictive measures to achieve
food safety goals.

A second more pragmatic view of the relationship between developing countries and
food safety measures can also be taken. In reality such countries are unlikely to be
interested in introducing food safety measures themselves. It is evident that their
major negotiating priority is still achieving their development needs, which could be
restricted due to food safety measures introduced by developed countries.208 This
interpretation means that they are unlikely to endorse any amendment to the
agriculture regime’s rules predicated on the free trade goal.209

4. Summary and Conclusions

In the area of food safety the Agreement on Agriculture does not play a primary role.

To determine whether the WTO’s agricultural regime is effective at all it is therefore
necessary also to consider all the relevant agreements’ provisions. There are several
reasons why these rules are not effective under the test formulated by this thesis.

Firstly, in the case of an actual risk to human health or the environment the agriculture
regime’s rules presuppose that the member will be introducing SPS and not other
types of measure to achieve the food safety goal.210 The Agreement on Agriculture
merely refers to enhancing market access through reducing levels of support, and the
TBT Agreement looks at technical requirements relating to goods. Article 2:1 SPS
Agreement states that any measures designed to protect human or plant life, or health

208 See Chaytor & Wolkewitz: “Participation and Priorities: An Assessment of Developing Countries
Concerns in the Trade/Environment Interface” (1997) 6(2) RECIEL 157 at 158
209 See Chapter 1 section B:2(b) (thesis); see generally: Guyomard, Mahé, Munk & Roe: ‘Agriculture
Commission
210 See Preamble to SPS Agreement para 1
will be covered by the SPS Agreement, so that agreement’s rules automatically should address food safety issues.

Although this thesis has argued that this is not necessarily the case, even if the SPS Agreement was the main agreement in this context, problems arise because its rules assume that SPS measures will either protect human health or the environment but not both.\(^1\) Inevitably, in the case of food safety, it could be argued that the primary role is to protect human health, but this is not always the case, as ‘food safety’ can also refer to ensuring crops grown for food do not harm the environment. In this latter example, human health is a secondary goal, albeit still an important one. The SPS Agreement does not cover measures aimed at multiple goals, which is problematic as members are likely to introduce food safety measures to achieve both single and multiple objectives.

Secondly, paragraph 1 of the Preamble to the SPS Agreement, Paragraph 6 of the Preamble to the TBT Agreement and Paragraph 2 of the Preamble to the Agreement on Agriculture, all stress that the WTO’s agriculture regime is designed to eradicate protectionism. Whilst this subject is still important,\(^2\) it means that all the regime’s rules are oriented towards achieving this goal and suggests that alternative objectives are not recognised and therefore not accommodated within the rules. Where members introduce food safety measures as a response to a perceived threat to human health or the environment, they may do so for reasons based on consumer fear, without

\(^1\) See Article 2:1 SPS Agreement. It is arguable that these requirements could be applied cumulatively. This is supported by paragraph 2 of the Preamble to the SPS Agreement, which does not distinguish between the different types of health risk. However, the Appellate Body has consistently stressed the importance of applying the ‘ordinary meaning’ to the wording of the agreements and has stated that all the constituent words must be given meaning: See Brazil-Measures Affecting Desiccated Coconut WT/DS22/AB/R, 13\(^{th}\) July 1998 at pp. 12 & 13. Following this reasoning, ‘or’ is defined by the Concise Oxford Dictionary (1985) as “introducing the second of two alternatives.” This supports the view that Article 2:1 SPS Agreement should be applied on a disjunctive, rather than a cumulative basis.

\(^2\) See Chapter 1 section B generally (thesis) on the remaining problems with international agricultural trade
necessarily being able to justify them through an appropriate risk assessment.

Adoption of such policies may be based on legitimate goals and may not be aimed at protecting domestic agriculture, but at protecting the consumer. It has been argued that the SPS Agreement is unlikely to allow adoption of such measures if they cannot be justified by an appropriate risk assessment.

Both these problems indicate that the application of the agriculture regime's rules to food safety measures is uncertain. This raises difficult issues for the retention of the free trade goal in international agricultural trade because uncertainty facilitates the exploitation of loopholes in the rules. Uncertainty means that it is difficult to adapt the rules to address new aspects of international agricultural trade. It will not always be possible for the Appellate Body to use the Marrakesh Agreement to 'update' the rules, because it will not always be the GATT that requires modification. This also leads to the question whether such an important reinterpretation of the rules should be left to the judicial process, or whether it should be addressed through the renegotiation of the agreements.

The relationship between the agriculture regime's agreements also leads to ambiguity. Two problems can be seen. Firstly, the drafting of the individual agreement's rules suggests that negotiators envisaged a clear delineation between the subject matter in each agreement. Not only does this lead to problems with the application of the agreement's rules, it also leads to conflicts over which agreement to apply first.

The way the General Interpretative Note to Annex 1A is drafted presupposes that the only conflict will be between the Annex 1A Agreements and the GATT, rather than between the agreements themselves. This is because all the agreements are motivated by a common goal, which is to liberate all aspects of international trade

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212 See *Shrimp/Turtle Appellate Body report*. supra n. 140 at para 129
214 Such conflicts which did exist were allegedly addressed in the agreements: e.g. Article 1:5 TBT Agreement
through enhancing market access. However, food safety policies are not based on the liberation of trade objective, but are designed to protect domestic markets instead. Consequently, the line between the WTO agreements is blurred as many agreements apply to food safety measures, where only one might previously have done so. This means that conflicts between the agreements’ rules arise.

Secondly, as a corollary to the first problem, it is not necessarily certain that a conflict will arise through the multiple application of the agreements. This is a challenge to the dispute settlement process, as it must determine which agreement applies first.

Finally, exploring the effects of food safety measures on developing countries’ trade reveals that the agriculture regime is not effective. This is because food safety measures involve, *inter alia*, imposing import restrictions until the threat to food safety has been eradicated. Inevitably, this curbs developing countries’ ability to export their agricultural products, which cause balance of payments difficulties. This series of events starts to look very similar to the problems such countries experienced during the GATT era.

This analysis is based on the presumption that the ideal goal in international trade regulation is to achieve free trade. If free trade is the goal, then developing countries must always have a right to trade their products, irrespective of the circumstances. The difficulty with food safety measures is that the decision to impose them is based on non-trade motives: the member wishes to protect its consumer from harm, rather than protect its domestic producers from trade.

On this view, the question is whether food safety concerns modify the developing countries’ right to freely trade their agricultural products? Following on from this question, a further issue is whether the developing country always loses their right to trade in such circumstances, or whether there is a distinction between those measures
imposed based on a threat to human health and those imposed in response to a threat to the environment. These two questions must be balanced against the ubiquitous concern over how to achieve free trade in agricultural products. This balance has not been achieved adequately under the existing system, so the next section of the analysis will explore whether any of the solutions proposed address these problems.

B. Imposing Food Safety Measures under the WTO Agreements:

How Effective Are the Solutions Proposed?

1. Multifunctionality

This concept has already been discussed in detail in chapter 2,\textsuperscript{215} so this part of the discussion will focus on the application of the principle to food safety measures. In principle, if members wish to introduce food safety measures as a consequence of an actual risk to human health or the environment, multifunctionality does not present any revolutionary change to the existing system. There are two reasons for this dependent on how the Agreement on Agriculture and the SPS Agreement are interpreted. Firstly, as many members agree that food safety concerns are a legitimate non-trade concern,\textsuperscript{216} measures predicated on this should be permitted under the existing Agreement on Agriculture by exempting them through the Green Box in Annex 2. This would require an additional requirement in Annex 2, or even the expansion of the definition of “environmental programme” in Annex 2:12 to ensure that food safety measures involving actual threats to the environment are expressly exempted.

\textsuperscript{215} See Chapter 2 section A:1(b) (thesis). Also note the problems raised by the application of multifunctionality in environmental regulation in Chapter 3 section B:1 (thesis).

Secondly, as has already been argued, the SPS Agreement should already cover food safety measures introduced as a result of an actual threat to human health or the environment because the threat should be assessable in an appropriate risk assessment which complies with Article 5:1 SPS Agreement.

Where food safety measures are adopted by members predicated on a perceived threat, primarily for example, due to problems raised by genetically modified crops, adopting multifunctionality into the Agreement on Agriculture and the SPS Agreement presents significant problems because there is little consensus over how this issue should be addressed.

Despite the important trade implications presented by genetically modified crops, there is no consensus between members on how they should be treated. During the Geneva Ministerial Declaration process, members made submissions on the issue under a broad range of the WTO agreements. This meant that it was not addressed in one forum, and so the crucial relationship between the proposed rules for such products in the various WTO agreements was not addressed.

The United States’ submission to the WTO General Council summarises the problem. The primary difficulty is to successfully promote the liberalisation of the whole of international agricultural trade, whilst simultaneously allowing members to restrict the entry of such crops on health grounds, which cannot be scientifically

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217 See Chapter 4 section A: 1(b)(i) (thesis)
218 WT/MIN(98)/DEC/1; note that members’ early first submissions to the second special session of the Committee on Agriculture do not put forward any definite proposals for reform of this area. The United States is the only state to submit comprehensive proposals so far, and they do not include the issue: see ‘Proposals for Comprehensive Long-Term Agricultural Trade Reform, Submission to the United States’ G/AG/NG/W/15, 23 June 2000
219 e.g. The United States submitted documentation specifically to the Committee on Technical Barriers to Trade ‘Genetically Modified Agricultural and Food Products: Submission by the United States’ G/TBT/W/115, 17 June 1999); whereas the European Community and Japan included their observations in their submissions to the General Council (‘Preparations for the 1999 Ministerial Conference, EC Approach on Agriculture, Submission by the European Communities’ WT/GC/W/273, 27 July 1999; ‘Preparations for the 1999 Ministerial Conference, Negotiations on Agriculture, Communication by Japan’ WT/GC/W/220, 28 June 1999
justified. Although this is a laudable goal, it presents problems. This is because it inevitably leads back to the discussion of the inclusion of 'non-trade concerns' into the Agreement on Agriculture.\textsuperscript{221} Most members focussed on health protection in their discussions of 'non-trade concerns'\textsuperscript{222} and it was also included as a specific example of a 'non-trade concern' in the draft Seattle Ministerial Declaration.\textsuperscript{223} Chapter 2 of this thesis has already analysed the problems raised by the general incorporation of such issues into the Agreement on Agriculture, so this discussion will focus on the difficulties raised in relation to genetically modified crops.

Despite Article 20(c) Agreement on Agriculture referring to 'non-trade concerns,' there has been disagreement over the correct terminology, as some members prefer 'multifunctionality.'\textsuperscript{224} Although superficially focussing on the same issue, this thesis has argued that the core of the difference between the two terms relates to the purpose that they are designed to fulfil.\textsuperscript{225} Those members who refer to 'non-trade concerns' support the promotion of non-agricultural issues, but within the existing disciplines of the Agreement on Agriculture.\textsuperscript{226} Whereas, in contrast, those who advocate 'multifunctionality' argue that measures benefiting non-agricultural sectors should come within a distinct category.\textsuperscript{227} These measures may not form part of the reduction commitments in Article 6 Agreement on Agriculture, and even if they do, they would

\textsuperscript{221} Article 20(c) Agreement on Agriculture; see Chapter 2 section A:1(c) (thesis)
\textsuperscript{222} e.g. WT/GC/W/273 supra n. 219 at para 4(c); & 'Nineteenth Ministerial Meeting of the Cairns' Group 27-29 August 1999, Communication from the Cairns' Group'WT/L/312, 3 September 2000 at para 11
\textsuperscript{223} Article 29bis: no official text has been released by the WTO, but see Agra Europe: “Final revision of WTO draft text on agriculture” No. 1879, 10 December 1999 at EP/5
\textsuperscript{224} i.e. European Communities and Japan
\textsuperscript{225} See Chapter 2 section A: 1(b) (thesis)
\textsuperscript{226} i.e. subject to the reduction commitments in Article 6 Agreement on Agriculture, unless justified by the Green Box exemption in Annex 2: WT/L/312 supra n. 222 at para 10
still be exempt, not because they are covered by the existing Green Box, but because they come within their own exemption category.\textsuperscript{228}

If this interpretation of ‘multifunctionality’ is accepted, so that trade measures placed on genetically modified crops justified on health grounds\textsuperscript{229} are exempt from the Agreement on Agriculture, there is a danger that the concept could be used to mask protectionist policies because such measures would be introduced because of political expediency, rather than as a reaction to an objectively provable scientific risk.\textsuperscript{230} This could be prevented if the measures were covered by another WTO agreement.\textsuperscript{231} For example, in the case of restrictions on, or complete prohibitions to trade in genetically modified crops, paragraph 1 Annex 1 SPS Agreement states that the SPS Agreement would cover such measures. Consequently, import restrictions would only be permitted if they were justified by an appropriate risk assessment.\textsuperscript{232} This seems to deal with the possibility of using measures based on ‘multifunctionality’ to protect domestic agricultural markets because it allows exemption from the Agreement on Agriculture whilst catching protectionist policies through the SPS Agreement’s rules. However, it does lead to a bizarre situation. This is because the Agreement on Agriculture, which was designed to promote free trade, allows the measures, whereas the SPS Agreement may not.\textsuperscript{233} The question, which must then be addressed, is if measures are specifically exempted by the Agreement on Agriculture, should the SPS Agreement then prohibit them? A conflict therefore exists between the two agreements.

\textsuperscript{228} See Chapter 2 section A: 1(b) (thesis) for a detailed explanation of this argument
\textsuperscript{229} Which therefore came within the definition of ‘non-trade concerns’ in the Agreement on Agriculture
\textsuperscript{230} This is the Cairns’ Group’s concern: WT/L/312 supra n. 222 at para 9
\textsuperscript{231} See Chapter 5 section B:5 (thesis) generally for a proposed solution to these problems
\textsuperscript{232} Article 2:2 & 5.1 SPS Agreement
\textsuperscript{233} Unless an appropriate risk assessment is carried out: Article 5:1 SPS Agreement. The difficulties of obtaining such an assessment in relation to genetically modified products has already been discussed: see Chapter 4 section A generally (thesis)
Article 14 Agreement on Agriculture ostensibly addresses this issue. It states that members must "give effect" to the SPS Agreement. On one level this means that members must comply with both agreements' rules. In this case, even though members may escape the terms of the Agreement on Agriculture, they would still have to provide the appropriate risk assessment under Article 5:1 SPS Agreement in order to justify the application of the trade restriction. The question remains whether the fact those members purposely decide to exempt measures from the Agreement on Agriculture means that they are also outside the SPS Agreement's rules. On this interpretation, members would only need to "give effect" to the SPS Agreement for measures which also came within the Agreement on Agriculture.

Clearly, the former interpretation would be in line with achieving free trade and would seem to be the logical choice. Following the latter interpretation would mean go against free trade principles because the new measures would not be controlled either by the Agreement on Agriculture or the SPS Agreement.234

2. The Cartagena Protocol235

Article 19(3) of the Convention on Biodiversity states that the parties to the convention "shall consider the need for...a protocol...in the field of the safe transfer, handling and use of any living modified organism resulting from biotechnology..."

Despite a very troubled history,236 the Biosafety Protocol was finally concluded in

234 Note that the inclusion of multifunctionality into the Agreement on Agriculture will not lead to any additional interpretational problems other than those discussed earlier in this chapter. (See Chapter 4 section A: 1(a) (thesis)). This is because multifunctionality goes to the exemption of the measures from legality under the Agreement on Agriculture. Consequently, the interpretational problems relating the relationship between the Agreement on Agriculture and the SPS Agreement will give rise to similar relationship difficulties for the interaction of the Agreement on Agriculture and the TBT Agreement.


January 2000. In this respect its provisions apply primarily to food safety measures introduced in response to a perceived risk to human health or the environment, rather than an actual risk, because the provisions are directly aimed at genetically modified foods.

The Cartagena Protocol is annexed to the Convention and inevitably mirrors many of its goals. Accordingly, the focus is clearly on balancing the relationship between safety and biodiversity. The close nexus between biosafety and trade is not ignored, with paragraph 9 of the Preamble to the Protocol specifically calling for trade and environmental agreements to be “mutually supportive.”

The Protocol’s rules only cover “living modified organisms.” These are very widely defined so that the provisions apply to most genetically modified material and are not just confined to genetically modified crops. However, as a result of intervention of the Miami Group in the negotiating process, separate regimes exist for those organisms that are directly used as food, feed or processing and those which are merely intentionally introduced into the environment.

Decisions relating to the latter organisms are subject to a rigorous decision making process, referred to as the Advance Informed Agreement, or AIA procedure. It applies to the first transboundary movement of the organism, and stipulates that exporting countries must first notify the importer in writing of the intended

http://www.sustain.org/biotech/htm . The Protocol is not yet in force and requires 50 ratifications for entry into force: Article 37:1

237 (2000) 39 ILM 1027
238 See Article 1 Convention on Biodiversity
239 Para 7 Preamble Biosafety Protocol
240 Defined as “any biological entity capable of transferring or replicating genetic material, including sterile organisms, viruses and viroids”: Article 3(h) Biosafety Protocol
241 Except pharmaceutical products which are specifically excluded from the scope of the Protocol: Article 5 ibid.
242 Article 4 ibid.
243 i.e. Canada, United States, Argentina, Chile, Australia and Uruguay
244 Article 11 Biosafety Protocol
245 Article 10 ibid.
246 Article 10 ibid.
247 Article 7:1 ibid.
transportation of the organism, before it is exported. This notification must include
specific information detailed in Annex 1, which includes information about the
exporter and importer, as well as complex information about the organism which is
being transported and its intended use in the importer’s territory, suggestions for
its safe handling and any risk assessments which have been carried out on it. The
importing party must then inform the exporter of its decision in writing within a
maximum of 270 days from the notification. Failure to comply with the latter
time limit does not necessarily imply consent on the part of the importer. The
approval mechanism also incorporates a rigorous risk assessment requirement. This is
a standardised assessment that must comply with the terms of Annex III.

In contrast, organisms designed for direct use under Article 11 are not subject to the
AIA procedure, but have their own more lenient regime. The AIA procedure does not
apply, but notification of the importer’s decision does have to be made in writing and
must include at least the information specified in Annex II of the Protocol.

Whilst the regime for organisms intended for release into the environment is
specifically governed by the procedure included in the Protocol, organisms intended
for direct use are governed specifically by the signatories’ own domestic regimes.

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247 Article 8:1 ibid.
249 Annex 1:a & ibid.
250 Annex 1: e, f, g, h ibid.
251 Annex 1: i ibid.
252 Annex 1:j ibid.
253 This is both the present one required by the Protocol carried out as detailed in Article 15 and Annex 3, as well as any previous ones: Annex 1:k ibid.
254 Article 10:5 Biosafety Protocol
255 Receipt must be acknowledged within 90 days of receipt of the notification: Article 10:2(b) ibid.
256 Article 10:5 ibid.
257 Article 15 ibid.
258 It must be given within 15 days of making the decision: Article 11:1 ibid.
259 Ibid. This information is more limited than for Annex I so that details of the organism must still be included, although the description of the type of DNA and process used for its insertion do not have to be specified; Annex II:d, e & f ibid. In addition, only the current risk assessment carried out in relation to Annex III of the Protocol needs to be included (Annex II:j ibid) and no mention needs to be made of the regulatory status of the organism in the exporter’s territory: Annex II: k ibid. (by implication)
260 Article 11:4 ibid. Their regime must still follow the spirit of the Protocol: ibid.
This means that the risk assessment must still be carried in accordance with Annex III, but unlike those organisms covered by Article 10, the decision made by the importer under the Article 11 procedure cannot be reviewed. The Protocol makes it clear that signatories are not precluded from entering into other agreements covering international movement of organisms, including those concluded under the auspices of the WTO. Such agreements should be consistent with the objectives of the Protocol and signatories are under a duty to notify their accession to any agreements.

Residual issues relating to general handling of all the organisms, the procedures on the application of emergency measures on the accidental release of such organisms into the environment, illegal transboundary movements, as well as a dispute settlement system are also included within the Protocol. The whole scheme will be reviewed five years following its entry into force.

Problems with the Application of the Biosafety Protocol to Perceived Risks to Human Health or the Environment

Unlike proposed international solutions to the reform of international agricultural trade discussed in chapter 2, the Biosafety Protocol applies at the same time as the WTO's own rules. Although this means that it should fill any gaps left by the

261 Members are supposed to notify their decision within 270 days, but the fact that this does not imply consent means that this is not fatal to the importation decision: Article 11:6(b) ibid.
262 Article 12 ibid.
263 Article 14:1 ibid.
264 Ibid.
265 Article 14:2 ibid.
266 Article 18 ibid.
267 Article 17 ibid.
268 Article 25 ibid.
269 Article 27 ibid.
270 Article 35 ibid.
271 Chapter 2 generally (thesis)
272 Article 14 Biosafety Protocol. Once the Protocol comes into effect, there may be significant problems of treaty interpretation, especially regarding its general status in WTO disputes. This problem is particularly acute as the United States is not a party to the Protocol. The general problems raised by the application of international law principles in the interpretation of the WTO agreements are outside
WTO's rules, difficulties remain. These can be divided into two categories: firstly, problems within the Protocol itself and secondly, those which arise because of its co-existence with WTO rules.

The main problem within the Protocol is its twin track regime. This has major implications for trade in technologically enhanced crops because these are likely to be governed by the looser regime in Article 11 of the Protocol as they are usually intended for direct use as food or feed, rather than for intentional release into the environment. The Protocol's regime is not based on the free trade principle and so members may use it as an excuse to use protectionist barriers to trade on health grounds, because signatories are not required to give detailed reasons for their refusal to import the crops.

Although standardisation of the risk assessment is welcome, if no reason for the decision is given, then it is difficult to determine whether the measure imposed bears any relationship to that risk assessment. Likewise, the considerable degree of discretion inherent in allowing signatories to impose measures on a precautionary basis means they may not even bother with the risk assessment before imposing the measure. It would be difficult to tell whether any such assessment was even undertaken, as no reason needs to be given for the trade restriction in this case.

Problems also arise with the Protocol's simultaneous application with the WTO rules. In terms of the international regulation of agricultural trade, the conflict will occur

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273 The Biosafety Protocol will apply to crops developed by traditional breeding techniques and those developed by genetic engineering, but it is clear that the latter are more likely to be subject to trade restrictions on health grounds.

274 The detailed decision procedure in Article 10 does not apply to products covered by Article 11 Biosafety Protocol.

275 There is no requirement that members carry out a risk assessment following the imposition of the measure on a precautionary basis: Article 11:8 ibid.
between the Protocol's rules and the SPS Agreement. On one level, the Protocol fills a gap in the latter because it specifically provides a harmonised procedure for the appropriate risk assessment. Paragraph 4 Annex A SPS Agreement does list several issues that are included in the Annex III risk assessment, but the Protocol goes further and specifies the appropriate methodology that signatories should use.

Further conflicts arise between the two agreements. The Appellate Body's interpretation of the SPS Agreement in the Hormones dispute means that WTO members must show a link between the measures they impose and the risk assessment carried out. This is not the case for the Protocol, where members do not need to justify their refusal to import organisms for direct use, or incorporation into feed. Signatories to the Protocol recognise that disputes over its content may be brought to the WTO dispute settlement body. This conflict becomes a problem if a signatory to the Protocol argues that their right to refuse to disclose their reasons for the measure under the Protocol overrides their obligation as a member of the WTO to show a link between the measure and the risk assessment under the SPS Agreement.

The Protocol also allows signatories to impose measures on a precautionary basis. This is likely to be welcomed by those who are also WTO members because it would allow them to restrict the importation of genetically modified crops without further justification. Unfortunately, the Appellate Body's interpretation of the precautionary principle in the SPS Agreement is more restrictive, so that members may impose measures on an interim basis justified by the precautionary principle, but will still be

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276 Conflicts may also occur between the TBT Agreement and the Protocol in relation to food labelling; this discussion is outside the scope of this thesis
277 Annex III Biosafety Protocol
278 Ibid. at paras 7-9
279 Supra n. 12
280 I.e. the imposition of a trade ban
281 See Swenarchuk supra n. 236 at 6
required to carry out the risk assessment.\textsuperscript{282} The Protocol does not specify this same requirement.

The application of the Protocol to perceived risks also means that risks to human health and the environment are not subject to as restrictive regime as actual risks. This is because actual risks are more likely to be covered by the SPS Agreement, so that members must carry out an appropriate risk assessment before the measures based on actual risks can be imposed. The application of the Protocol to perceived risks means that there would be a more liberal regime for measures that were not scientifically justified.

The WTO agreements are predicated on the free trade theory, so that any amendments that facilitate the adoption of ‘protectionist’ measures without objective justification are against the underlying theory of all the WTO agreements. It is not necessarily a case of merely recognising the Protocol’s rules within the existing agriculture regime because this interpretation shifts the emphasis away from free trade. Incorporating the Protocol will require a fundamental reconsideration of the purpose of the WTO’s rules.

It is not clear that Article 2:4 of the Protocol, which addresses conflicts between its rules and other agreements, would cover these issues. This is because Article 2:4 states that in the event of a conflict, the more restrictive regime applies. It can be argued that the requirements in Article 2:2 and 5:1 SPS Agreement mean that that agreement should prevail as these provisions require extra action by members before the measure will be justified. However, in the case of genetically modified foods, it is then difficult to state when the Protocol would apply at all. If measures introduced as a result of a perceived risk can come within the SPS Agreement, then arguably that

\textsuperscript{282} See Chapter 4 section A: 1(b) (thesis)
agreement will always prevail over the Protocol, so the Protocol’s rules are redundant in this area.

Like the other suggestions for the full recognition of a member’s ability to implement food safety measures, the Protocol is unlikely to promote the needs of developing countries because these issues will not address food security or other development issues.

3. The Precautionary Principle

The precautionary principle allows members to impose measures that are designed to prevent harm to human health or the environment whether or not the risks can be scientifically proven. Cameron and Abouchar refer to the concept as a “guiding principle” which facilitates adoption of measures before any definite harm can be detected. In the case of environmental protection, the aim would be to prevent members adopting practices before they inflict harm.

The concept is found in environmental treaties, but its application to food safety is debatable. However, the European Commission’s ‘Communication on the Precautionary Principle’ (hereafter, the Communication) submitted to the Committees on Sanitary and Phytosanitary Measures, the Environment and Technical Barriers to Trade advocates a broader application of the principle. The general detail of the Communication has already been discussed in chapter 3 of this thesis, so this

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283 See ‘Communication from the European Commission on the Precautionary Principle’ supra n. 31
285 Ibid. at 2
287 Communication on the Precautionary Principle supra n. 31 at para 6.1
discussion will concentrate on the European Communities' suggestion of extending the use of the precautionary principle to food safety questions.

The Communication states that the principle could be applied to risks "to the environment, or human, animal or plant health."288 This means that notwithstanding interpretational problems already discussed,289 the precautionary principle prima facie could be applied to food safety concerns.

Despite this broad coverage, the principle should be unnecessary where there is an actual risk to human health or the environment. This is because such a risk should be scientifically proven in an appropriate risk assessment that satisfies Articles 2:2 and 5:1 SPS Agreement. The principle might be useful where the risk assessment establishes a minimal risk, but where the member wishes to impose food safety measures that impose greater protection than is established by the risk assessment.

Article 2:2 SPS Agreement states that the member is only permitted to adopt measures to "the extent necessary" to address the harm. Following the Appellate Body's interpretation in Hormones,290 for the measure to satisfy the criteria in Article 2:2, it must be "based on" the findings of the risk assessment. This prohibits members legitimately adopting measures under the SPS Agreement that guarantee a higher level of protection than that indicated in their risk assessment.

The European Communities' proposal would allow such action. The Communication makes it clear that the first step towards the implementation of the relevant measures should be a scientific risk assessment. However, this "may" be the basis for the decision, but "(t)he absence of scientific proof of a cause/effect relationship....should

288 Ibid. at para 6.1
289 See Chapter 3 section B: 2 (thesis) on the possible interpretation of "plant life or health" from Article 2:1 SPS Agreement & Chapter 4 section A: 1(b) (thesis) on possible difficulties for food safety
290 Hormones Appellate Body report supra n. 12
not be used to justify inaction"291 and the decision whether to impose measures or not should be "wider in scope and include non-economic consideration."292 Both these statements allocate the decision on the appropriate level of protection to the member, rather than justifying the measure imposed in any objective criteria. This would enable members to impose measures which granted greater protection where this was not otherwise objectively justifiable.

When the Communication is applied to food safety measures introduced in response to perceived risks to human health or the environment, it is apparent that the precautionary principle, as interpreted by the European Communities, authorises members to introduce measures which would otherwise only be permitted on a temporary basis, if at all, under the SPS Agreement.293 The Communication offers five "general principles of application" for the precautionary principle:

"proportionality, non-discrimination, consistency, examination of the benefits and costs or lack of action and examination of scientific developments."294 All five principles propose a more flexible approach than the existing rules in the WTO’s agriculture regime.

Firstly, the Communication states that "the measures envisaged must make it possible to achieve the desired level of protection."295 This must not be "disproportionate to the desired level of protection,"296 but should not aim for a zero risk, even though the Appellate Body argued that this could be an option under the SPS Agreement if the risk assessment indicated that this was the appropriate alternative.297 The decision on

291 The Communication supra n. 31 at para 6.2
292 Ibid. at para 6.3.4
293 i.e. under Article 5:7 SPS Agreement. Note the Appellate Body's limited acceptance of the precautionary principle in Hormones, but that the Communication advocates a much broader acceptance of it: see Hormones Appellate Body report supra n. 12 at para 124-5
294 Communication supra n. 31 at para 6.3
295 Ibid. at para 6.3.1
296 Ibid. at para 6.3.1
297 Australia-Salmon Appellate Body report supra n. 12 at para 125
which measures to impose and what level of risk is appropriate lies with the member, rather than an exterior regulatory authority.\textsuperscript{298} It is not even clear whether the European Communities is suggesting that the decision should be transferred to the WTO if the precautionary principle is incorporated into the WTO agreements.

Secondly, the definition of proportionality in the Communication differs to the WTO agreements.\textsuperscript{299} Although the Communication states that the measure imposed should be proportionate to the level of risk, mirroring Article 2:2 SPS Agreement, because it does not rely solely on scientific justification for the decision to impose the measure, in reality it will be the member who determines the appropriate level of risk and therefore the measure it wishes to impose. This means that the Communication's suggestion for the implementation of the precautionary principle would make transparency difficult thereby potentially facilitating the reintroduction of protectionist measures.\textsuperscript{300}

Thirdly, the Communication suggests that an effective way of applying the precautionary principle would be to reverse the burden of proof, so that the onus for providing scientific evidence would fall on the party trying to import the hazardous product to show that it was safe, rather than on the member to justify its measure.\textsuperscript{301} This suggestion is problematic for two reasons. Firstly, this would reverse the burden of proof in the SPS Agreement and would place the emphasis on preventing harmful behaviour, rather than on free trade. Consequently, this suggestion has implications for the wider constitutional debate over whether the WTO agreements should remain based on free trade principles.\textsuperscript{302}

\textsuperscript{298} Communication supra n. 31 at para 5
\textsuperscript{299} Ibid. at para 6.3.1
\textsuperscript{300} This is despite the Communication's insistence that measures imposed be transparent: Ibid. at para 6.2
\textsuperscript{301} Ibid. at para 6.4
\textsuperscript{302} See Chapter 5 (thesis) generally for a fuller discussion of this issue
The second implication for the reversal of the burden of proof is that in the case of food safety measures based on a perceived risk, it will be difficult for importers to show that foods are safe when there is little scientific evidence to indicate whether they are or not. This again moves the emphasis away from free trade, but in the case of agricultural trade, this is problematic because it could facilitate the introduction of protectionist measures. As the importing member will have to show the goods are safe first, in the case of genetically modified foods, for example, the panel may never get the opportunity to examine the member’s measures because the importing member is unlikely to be able to overcome the first burden of proof hurdle. An appropriate balance between the acceptance of market access restrictions may need to be imposed and ensuring that protectionism does not return needs to be found. Developing countries are unlikely to benefit from the introduction of the Communication because it will introduce further barriers to agricultural trade that are not transparent. Such members may not have the resources or expertise to carry out the necessary scientific assessment so their agricultural products can be exported. The cost of carrying out the scientific assessment will also increase developing countries’ overall costs of production, so that their exports will not be as competitive as they may have been previously, because they are unable to build on their comparatively cheap labour costs.

The shift in the burden of proof onto the developing country will ensure that it is difficult to challenge the measures in the dispute settlement system because such countries may not even be able to satisfy the initial burden of proof so that the measures can be analysed. This could either deter developing countries from using the

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dispute settlement process at all, and could even lead to their emigration to alternative international organisations.\textsuperscript{304}

C. Conclusions

Regulating food safety within the WTO agriculture regime presents problems on two levels. Firstly, the existing rules do not always cover the measure that the member wishes to impose. For example, if the member introduces an import ban to prevent an agricultural product with known carcinogenic effects entering the domestic market, the SPS Agreement will cover this because it is a clearly identifiable and scientifically provable risk.

Problems arise when the matter only poses a perceived risk to human health or the environment. Here, the rules are more difficult to apply because the measures imposed in response are not introduced primarily on scientific grounds, but instead are motivated by the promotion of non-trade issues. It has already been shown that the WTO is not able to fully accommodate such issues.

Secondly, even if the rules were adjusted so that it was clear to members which agreements applied to which measures, it is not certain that this would resolve the dilemma. This is because the WTO agreements are drafted on the assumption that members' motivation for the introduction of any agricultural measure is always to restrict imports of agricultural products into their domestic markets. Whilst this might be the case, in relation to genetically modified foods, an additional motivation is the response to consumer concerns. Consequently, tinkering with the rules and the relationship between the agreements will not resolve the problem.

\textsuperscript{304} e.g. UNCTAD
The food safety debate therefore requires analysis of wider considerations. The WTO's regime was based on the underlying assumption that agricultural trade regulation would only be effective when the three issues that troubled GATT were addressed. Chapter 3 argued that a change in members' policies towards the altruistic consideration of environmental concerns required a re-evaluation of the WTO's theory away from the premise that all members' agricultural policies are based on protectionism. The question then is how far the 'effectiveness' test based on protectionist assumptions is still relevant in relation to food safety questions?

On one level it can be argued that the effectiveness test should be modified. Like environmental issues discussed in chapter 3, genetically modified foods' significant impact on international agricultural trade was not anticipated at the time the WTO agreements were concluded in 1995. Consequently, the agriculture regime was not designed to deal with the broader questions posed by food safety. Particularly, members' need to respond to consumer fear and the ancillary potentially adverse environmental effects which might not be scientifically provable, but which could have irreversible consequences.

If this view is accepted, then the proposals for reform should be evaluated against this new criteria. Multifunctionality allows modification of the Agreement on Agriculture's rules at first instance and therefore allows members to adopt food safety measures that are excluded from the scope of the current rules. Whether exemption from the Agreement on Agriculture will automatically lead to exemptions from the SPS and TBT Agreements' rules, as argued earlier, is questionable. However, the logical conclusion of moving the emphasis away from protectionism to broader goals also is to exclude the operation of those two agreements' rules.

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305 See Chapter 4 section A.2(a)&(b) (thesis)
The consequence of this approach would be to ensure that the WTO agriculture regime amended to accommodate both these non-economic objectives. Food safety measures adopted as a response to perceived risks to human health and the environment arising from genetically modified foods could therefore be addressed, rather than being subjected to the interpretational problems highlighted in this chapter. This address some of the concerns highlighted by the European Communities.\(^{306}\)

However, it is important that there is a balance between eliminating protectionism (the pursuit of economic goals) and pursuing non-economic objectives like food safety. There are several reasons for this. The Uruguay Round negotiators did address generic safety issues in the SPS and TBT Agreements. Some commentators assume that the SPS Agreement covers market access measures, whereas the TBT Agreement addresses internal measures.\(^{307}\) Whilst this thesis has argued that this division is not without ambiguity, it is evident that there are two agreements that deal with broadly defined ‘safety measures’ either imposed through TBT or SPS measures. In addition, both these agreement share their genesis in the pre-WTO era, so measures imposed on safety grounds are not an entirely new phenomenon.\(^{308}\)

In addition, it is not clear whether members always have an altruistic goal in mind when they are imposing food safety measures. Although it is difficult to be certain about the motivation behind each member’s policies, it is evident from the dispute settlement reports that have considered members’ measures’ legality under the SPS and TBT Agreements that no member’s regime has yet complied with the rules. It could be argued that this means that members are still implementing the rules, but the


\(^{307}\) Eggers & Mackenzie supra n. 235 at 535-6

\(^{308}\) See the Agreement on Technical Barriers to Trade, or ‘Standards Code’ BISD 26S/8 introduced following the Tokyo Round
Hormones dispute suggests that the WTO agriculture regime has not conquered protectionism in all its guises yet, so any changes must not neglect preventing a resurgence of protectionist agricultural policies.

All these considerations mean that it is difficult to state that the application of the existing rules and the proposals for reform to cover food safety measures are effective for developing countries. If it is accepted that high levels of agricultural support still adversely affect such countries, then facilitating adoption of less transparent measures309 which guarantee higher support levels could be problematic for developing countries.

It is also not certain whether such countries would even benefit from the ability to impose food safety measures within their own jurisdiction because such countries have already made it clear in their submissions to the Committee on Agriculture’s negotiating sessions that they are more interested in food security, rather than food safety. Developing countries argue food safety is a developed country issue,310 and as the developing and least-developed nations make up such a significant proportion of the WTO’s membership, it is unlikely to remain a priority for the negotiating agenda for agriculture.

It is evident that members will still wish to protect their domestic territories from food safety threats. A balance must therefore be achieved between preventing protectionism, whilst recognising that members may be motivated by the need to pursue non-trade, or ‘non-economic’ objectives in their agricultural policies. The free trade theory is not the most suitable way to accommodate this balance.

309 i.e. in the case of the adoption of the precautionary principle
310 WTO: ‘Second Special Session of the Committee on Agriculture 29-30 June 2000, Statement by India’ G/AG/NG/W/33, 13 July 2000 at 3
Chapter 5:

The Way Forward?

31st December 2000 marks the conclusion of the first stage of international agricultural trade reform that was started by the World Trade Organisation (WTO)'s Agreement on Agriculture in 1995. Article 20 Agreement on Agriculture states that prior to the end of this stage, renegotiation talks should consider how to implement the next reform phase to achieve the long-term objective of "substantial progressive reductions in [the] support and protection" placed on international agricultural trade by WTO members (members). 2001 is therefore a crucial year when significant changes to the Agreement on Agriculture must be finalised.

The historical regulation of international agricultural trade under GATT indicates deficiencies on three levels: firstly, the rules only had residual effect, as regulation was limited to general rules on quantitative restrictions and subsidies. Secondly, inadequate supervision through various GATT committees meant that the interaction of the relevant rules on particularly difficult aspects of agricultural trade were not considered. This was acute in relation to the United States' waiver from its agricultural commitments and the legality of the European Communities' Common Agricultural Policy (CAP) under Article XXIV GATT. Finally, an analysis of the effect of GATT's agricultural trade regime revealed that developing countries

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1 This is the end of the implementation period: Article 1(f) Agreement on Agriculture
2 The agreements were signed at Marrakesh in 1994, but the regime came into effect on 1st January 1995: Article 1(f) Agreement on Agriculture
3 Paragraph 1 & 2 Preamble & Article 20 Agreement on Agriculture
4 Articles XI & XIII GATT
5 Article XVI GATT
6 Chapter 1 section A: 2(b)(i) (thesis)
7 Waiver Granted to the United States in Connection with Import Restrictions Imposed under s.22 Agricultural Adjustment Act (of 1933) as amended BISD 3S/32
8 Note Section C in 'Trade in Agricultural Products' BISD 6S/81; Interim Report 7S/69; future GATT Working Parties consider the European Communities following enlargement
suffered significantly more from these problems because of their high dependency on agriculture. The WTO agriculture regime was designed to address the problems of international agricultural trade by overcoming these issues. However, the effectiveness of the amended rules is questionable.10

The discussion in chapter 1 indicated that following the implementation of the WTO rules in 1995, the levels of agricultural support did not significantly drop11 and developing countries still found it difficult to obtain market access for their products.12 In addition, increasing concerns over the preservation of the environment and food safety issues led members to use measures which were either on the fringe of the rules, or outside them.13

Some commentators14 argued that the reason for this was that the reduction commitments in the Agreement on Agriculture would only start to take effect towards the end of the implementation period for some members. However, it is apparent from the analysis in chapter 1 that the most contentious disputes involving agricultural products dominating proceedings under the WTO Understanding on the Rules and Procedures Governing the Settlement of Disputes (Dispute Settlement Understanding) concerned issues that were completely outside the scope of the Agreement on Agriculture.15 Although the Hormones dispute did fall within the WTO's agriculture

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9 See R.E. Hudec: 'Developing Countries in the GATT Legal System' (1987) Trade Policy Research Centre at 40

10 This thesis categorised these three issues as the 'effectiveness' test

11 A 1997 joint UNCTAD/WTO study revealed that tariffication of non-tariff barriers in compliance with Article 4:2 Agreement on Agriculture resulted in rates that mostly exceeded 30%, with higher increases for MFN rates: UNCTAD/WTO Joint Study: 'The Post-Uruguay Round Tariff Environment for Developing Country Exports' (6 October 1997) at 4

12 Ibid.

13 See Chapter 3 section A: 1(a) (thesis) on the agriculture regime's application of environmental issues & Chapter 4 section A: 1 (a) (thesis) for the regime's application to food safety measures


regime because it came within the WTO Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement), that dispute has yet to be resolved. The conclusion that can be drawn from the discussion is that the existing rules may be ineffective, but failure is also occurring on a more fundamental level. This is because the WTO scheme is built on the same free trade goal as GATT and was based on the theory that GATT’s problems lay in its lack of comprehensive rule structure. This thesis suggests that the solution to effective international agricultural trade regulation lies in a shift away from the assumption that pursuing the free trade goal will solve agricultural trade’s problems. This is because free trade is an economic goal that neglects agriculture’s inextricable link with non-economic issues, particularly the protection of the environment and food safety. A solution that fails to adequately address both the economic and non-economic aspects of international agricultural trade will inevitably fail because it only regulates half the issue.

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16 As at 1st August 2001
17 This assertion does not deny the importance of economic theory. On one level, economic theory has been crucial in measuring the levels of support placed on domestic agricultural sectors. However, even the most sophisticated modelling techniques contained in the complex Global Trade Analysis Project (GTAP) do not address the reasons why members impose agricultural restrictions; see generally T.W. Hertel (ed.): ‘Global Trade Analysis: Modeling and Applications’ (1997) Cambridge University Press
18 This is based on the economic assumption that pursuing free trade will yield welfare effects: OECD: ‘Assessing the Effects of the Uruguay Round’ Trade Policy Issues 2 (1993) at 21
19 This definition seems to mirror the ‘multifunctionality’ debate already discussed in detail in this thesis in Chapter 2 section A: 1(c) Chapter 3 section B: 1 and Chapter 4 section B: 1 (thesis). However, the discussion in Chapter 5 offers a different solution to the polarised debate reflected in members’ proposals based on multifunctionality. See Chapter 5 section B: 1(c) (thesis)
20 The solutions in chapter 2 (thesis) were inappropriate on two levels: firstly, most did not even overcome the basic test of addressing the three problematic areas identified in the GATT era. In addition, member models were largely based on the free trade ideal, which was perpetuating the existing problem. Multifunctionality was an exception to this, but problems relating to the application of the term meant that it was also an inappropriate model: see Chapter 5 section B: 1(c) (thesis) on multifunctionality
This chapter suggests the free trade goal should be removed and that international agricultural trade rules should be modified to achieve sustainable development, or more specifically, sustainable agriculture instead. Under this proposal there is a shift towards a regulatory system that takes all aspects of international agricultural trade into consideration. This is a radical solution because it questions the fundamental criteria on which the whole of the WTO regime is based although it is only offered in the limited context of international agricultural trade regulation. However, as Elizabeth Dowdeswell pointed out in the context of environmental regulation:

"...law is the governing of the living by the dead, and that has always struck me as an incentive not to look backwards and rely on precedent, but rather to try and set some forward-thinking objectives and to aim towards them...it is very important that we are future oriented and do not simply blindly follow the past."

The discussion explores the amendments of the existing system of international agricultural trade regulation based on sustainable development principles in three parts. Firstly, the notion of sustainable development is analysed to determine its general parameters and isolate a specific concept that can form the basis of a goal on which a regulatory framework can be built on. The discussion then applies this to international agricultural trade to identify the relevant sustainable development objectives in the agricultural context.

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21 This phrase was first used by the Brundtland Commission: ‘Our Common Future: The World Commission on Environment and Development’ (1987) OUP at 322

22 A detailed discussion of the broader implications of this suggestion are outside the scope of this thesis, but note that paragraph 1 of the Preamble to the Marrakesh Agreement Establishing the World Trade Organisation (the Marrakesh Agreement) states that members should conduct their trade policies whilst allowing for “the optimal use of the world’s resources in accordance with the principles of sustainable development.” As this principle is already expressed in the WTO agreements, it is not unreasonable to suggest that it could be prioritised above the free trade, which is not mentioned in paragraph 1 at all, but is implicit in the structure of the WTO agreements. Arguably, the Appellate Body has already achieved this on an incremental basis by using paragraph 1 of the Preamble to the Marrakesh Agreement to modify members’ commitments in the Shrimp/Turtle dispute: United States-Import of Certain Shrimp and Shrimp Products WT/DS58/AB/R, 12 October 1998 at para 129

Once the boundaries of the new assumption have been established, secondly, the analysis considers how to amend the WTO’s agriculture regime in the light of sustainable agriculture.\(^{24}\) The specific rules in the Agreement on Agriculture, the SPS and TBT Agreements, as well as the interaction of all the relevant rules will be evaluated. The discussion will also assess the potential implications of the changes for developing countries.

Finally, the strengths and weaknesses of this new innovative approach are considered to determine the practical viability of the proposed changes. This thesis assesses ‘practicality’ in the terms expressed by Dowdeswell,\(^{25}\) rather than purely in terms of immediate political viability.

A. Defining Sustainable Development in International Agricultural Trade

If sustainable development is to replace the free trade goal in the WTO’s agriculture regime, then two issues must be considered: firstly, sustainable development as a general concept must be clear so that it is possible to draft rules which accurately achieve the stated objective. Failure to establish a coherent goal in this way will inevitably undermine, rather than enhance the effectiveness of all the existing WTO agreements.\(^{26}\) Secondly, as a corollary to this, sustainable development’s specific application to international agricultural trade also must be explored. Agriculture’s historic tendency to spill over into other areas of regulatory activity,\(^{27}\) its ability to

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\(^{24}\) Under the test already discussed above. See also Chapter 1 section A (thesis) for a fuller discussion of the origins of the test

\(^{25}\) Dowdeswell supra n. 23

\(^{26}\) The discussion in Chapter 1 section A (thesis) has already demonstrated that GATT’s erratic regulatory framework ensured that its agriculture regulation was ineffective

\(^{27}\) e.g. Regional Agreements under Article XXIV GATT were complicated by the European Communities’ Common Agricultural Policy (CAP): see GATT: ‘Trade in Agricultural Products:
dominate dispute settlement proceedings and renegotiation discussions means that it is crucial to ensure that any change to the WTO agriculture regime results in a more effective regulatory system, rather than inducing a return to previous difficulties.

1. Sustainable Development

Delineating the exact scope of sustainable development in its general context is not straightforward. In 1987 the Brundtland Commission defined it as “development which meets the needs of the present without compromising the ability of future generations to meet their own needs.” Although the Commission did not go on and define what it meant, its report offers insights into an ideal embracing social and ecological goals which it recommended should permeate all levels of activity designed to regulate the method of resource use for future generations. The report argued that ‘sustainable development’ incorporated “meeting the needs of all and extending to all the opportunity to satisfy their aspirations for a better life,” as well

Reports of Committee II on Consultations with the European Economic Community, the United States and the United Kingdom (1965) GATT at 68, para 11

The infamous oilseeds dispute under GATT was not settled by the dispute settlement proceedings and dominated the Uruguay Round renegotiation discussions: see Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal Feed Proteins BISD 37S/86 & BISD 39S/91; also Josling: "Agricultural Trade Issues and Transatlantic Trade Relations" (1993) 5 World Economy 553 at 561


If sustainable development is adopted as the primary goal for all areas of international trade regulation, then the concept's application to each specific area of regulation is also important so that the specific problems of each subject area can be anticipated: e.g. textiles regulation has also been historically challenging, see generally: C.J. Cortes: 'GATT, the WTO and the Regulation of International Trade in Textiles' (1997) Ashgate at Ch. 1

It is unclear exactly who invented the term, but Reid suggests either Eva Balfour, founder of the Soil Association, or Wes Jackson an American geneticist: see D. Reid: ‘Sustainable Development’ (1995) Earthscan at xiii. W.W. Rostow has also been credited with the discovery as early as 1956: Rostow: "The Take-Off into Self-Sustained Growth" [1956] Economic Journal 25

The Brundtland Commission supra n. 21 at 43

It did state that sustainable development contained two concepts: meeting the essential needs of the world's poorer populations and ensuring that states' future policies did not adversely affect the "environment's ability to meet present and future needs:" Brundtland Commission ibid. at 43. Sands suggests that the Brundtland Commission definition was only building on existing legal principles enshrined in many international law instruments, so that further definition by the Commission was unnecessary: see Sands: “International Law in the Field of Sustainable Development: Emerging Legal Principles” in Lang supra n. 23, 53 at 58

Ibid. at 44
as ensuring that “the rate of depletion of non-renewable resources should foreclose as few future options as possible.”

The Brundtland Commission report’s broad description means that it is difficult to set the concept’s parameters in a way that allows it to be used as the new goal for international agricultural trade regulation. However, finding a more specific definition of sustainable development as a general concept is difficult. Although other suggestions have been made, these are also expressed in terms of aspirational goals, rather than precise expectations. On one level, this does not seem to take the debate further because such statements only mirror the Brundtland Commission statement in the sense that they specify what the objective of sustainable development should be, rather than what the term means as a theoretical construct.

For example, Handl states that sustainable development involves “integrating environmental preservation and developmental objectives” in a way which “bolster[s] an increasingly precarious balance between human enterprise and environmental stability.” Similarly, Sands suggests that it requires “states to ensure that they develop and use their natural resources in a manner which is sustainable.” Paragraph 1 of the Preamble to the Marrakesh Agreement Establishing the WTO (the Marrakesh Agreement) also follows this aspirational model: it offers a list of competing norms including “raising standards of living, ensuring full employment...[and] allowing for the optimal use of the world’s resources,”

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35 Ibid. at 46
36 See Handl: “Sustainable Development: General Rules versus Specific Obligations” in Lang supra n. 23, 35 at 36
38 This approach is also adopted by the United States which uses the general goals expressed in paragraph 1 of the Preamble to the Marrakesh Agreement: see WTO: ‘Preparations for the 1999 Ministerial Conference: Trade and Sustainable Development: Communication from the United States’ WT/GC/W/304, 6 August 1999 at paras 1 & 2
39 See Handl supra n. 36 at 35
40 Ibid. at 35
41 Sands: “International Law in the Field of Sustainable Development: Emerging Legal Principles” supra n. 33 at 57
specifying that these should be achieved in accordance with sustainable development objectives, without going further and stating what those are.

Although these descriptions do not define sustainable development accurately in a way that allows one of them to form the basis of a single legal definition, their failure to define the concept in the abstract does imply that looking for a precise distinct concept may be inappropriate. Instead they suggest that 'sustainable development' is an internationally recognised expression for a mechanism that facilitates the objective of continued exploitation of world resources in a way that equitably balances potentially conflicting goals. On this interpretation, it does not matter that there is no precise definition at the general level since a balance between competing objectives cannot be achieved in the abstract. This is because the importance of each issue relative to the others will inevitably change dependent on the context in which each is considered. For the purposes of using sustainable development as the basis of a new rule system, it is more meaningful therefore to determine the definition of sustainable development in each specific subject area. Although the general analyses do not offer guidance on the exact factors that should be taken into account in each subject area, there is consensus that three broad issues principally should be addressed in the balancing process.

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42 It is suggested that if anything further could be gained from offering a precise definition, then commentators would have built on the Brundtland Commission statement, rather than merely reiterating it and then offering examples of how it can be achieved: e.g. European Commission: 'The Non-Trade Impacts of Trade Policy-Asking Questions, Seeking Sustainable Development' Informal Discussion Paper, 8 January 2001 at para 1
44 This view is supported by Article 1:2 Agenda 21, which states that states' policies must balance economic objectives with the need to pursue developmental and environmental concerns. Note that the European Commission automatically assumes this definition in its informal discussion paper. It states that the Brundtland Commission definition encompasses economic, development and environmental preservation goals and then goes on to state that "[t]he balance to be struck between these three components is the subject of much controversy." See 'The Non-Trade Impacts of Trade Policy' supra n. 42 at para 1
45 Handl advocates distinguishing between sustainable development as a single concept and its adoption in a specific policy supra n. 36 at 36
Firstly, all the definitions emphasise the importance of anticipating the long term effects of any economic activity in line with the sustainable development goal, rather than focussing only on the short term;\textsuperscript{46} secondly, the definitions suggest that states should integrate non-economic issues into their domestic economic policies in a way which allows such non-economic considerations to share equal importance with economic issues.\textsuperscript{47} Finally, there is broad consensus that the most important non-economic considerations within the scope of sustainable development are the preservation of the environment and development issues.\textsuperscript{48}

It can be concluded therefore that the general concept of sustainable development is the reorientation of economic policy in a way that allows an equal balance between environmental and developmental concerns into consideration to ensure the availability of resources for future generations. This goes beyond free trade theory because that theory assumes that all policies based on it will automatically yield welfare benefits including developmental and environmental objectives.\textsuperscript{49} In contrast, sustainable development requires \textit{active} consideration of non-economic issues and an investigation into whether the policy undertaken \textit{de facto} results in benefits to the environment and developing countries. In addition, because sustainable development only operates meaningfully in a specific subject area, only the environmental and developmental issues specific to that subject area are included. Consequently, a better

\textsuperscript{46} Brundtland Commission \textit{supra} n. 21 at 43; also WT/GC/W/304 \textit{supra} n. 38 at para 3
\textsuperscript{47} WT/GC/W/304 \textit{ibid.} at paras 4 & 5
\textsuperscript{48} Note that Sands also suggests that human rights are a relevant issue: see Sands: “International Law in the Field of Sustainable Development: Emerging Legal Principles” \textit{supra} n. 33 at 53. Note that the European Commission’s mandate on the adoption of a sustainable development policy for the European Communities was based on the assumption that sustainable development comprises social, economic and environmental aspects; with social issues encompassing “reducing the gap between rich and poor regions;” European Commission: ‘Consultation Paper for the Preparation of European Union Strategy for Sustainable Development’ SEC(2001) 517 at 4 & 5. Although social considerations were expressed in terms of the European regions, the strategy paper also states that it is important that the poverty gap is addressed in relation to all developing countries: SEC(2001) 517 \textit{ibid.} at 9; see also WT/GC/W/304 \textit{supra} n. 38 at paras 5& 6
balance between the competing objectives should result because the explicit competing norms are actually considered.50

2. Sustainable Agriculture

If sustainable development is the act of balancing general economic and non-economic considerations, then sustainable agriculture is the balancing of agriculture-specific economic and non-economic factors,51 particularly those relating to the environment and development issues in order to “meet today’s needs without jeopardising future generations chances of meeting their needs.”52 Two questions arise when ascertaining the definition of sustainable agriculture: firstly, what are the relevant economic and non-economic factors and secondly, what weight should be accorded to each to ensure sustainable agriculture is achieved?

a. Identifying Economic and Non-Economic Factors in Sustainable Agriculture

In relation to the relevant factors to be considered in the balancing exercise, a distinction should be drawn between economic and non-economic factors. The economic factors cannot be ascertained in isolation, but can be found from two sources: general factors apparent from the international trade context in which the

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50 This is apparently similar to the basis of multifunctionality advocated primarily by the European Communities and Japan in several of their submissions as part of the renegotiation process of the Agreement on Agriculture (e.g. see WTO: ‘Preparations for the 1999 Ministerial Conference: Negotiations on Agriculture: Communication from Japan’ WT/GC/W/220, 28 June 1999 also WTO: ‘Preparations for the 1999 Ministerial Conference: EC Approach on Agriculture-Communication from the European Communities’ WT/GC/W/273, 27 July 1999 & WTO: ‘Note on Non-Trade Concerns-Submission to the Third Special Session of the WTO Committee on Agriculture by Barbados, Burundi, Cyprus, Czech Republic, Estonia, the European Communities, Fiji, Iceland, Israel, Japan, Korea, Latvia, Liechtenstein, Malta, Mauritius, Mongolia, Norway, Poland, Romania, Saint Lucia, Slovak Republic, Slovenia, Switzerland and Trinidad and Tobago’ G/AG/NG/W/36, 22 September 2000).

51 Note that Steenblik, Maier & Legg refer to the need to further consider agriculture’s ‘economic sustainability’: i.e. whether the domestic support policies are sustainable from a continuing high cost viewpoint: see Steenblik, Maier & Legg: “Sustainable Agriculture” in OECD: ‘Sustainable Development: OECD Policy Approaches for the 21st Century’ (1998) 117 at 117-8

WTO agreements operate and those specific to agriculture. Trade-specific economic factors are those generally associated with the WTO and GATT, including profit maximisation through lower barriers to trade, achieving full employment and raising standards of living through higher income levels generated by enhanced trading opportunities. In this sense, these factors are fixed because their reiteration in the Preambles to the GATT and the WTO means that they will be considered automatically in every subject area covered by the WTO agreements and the GATT. In addition to the general economic factors associated with all aspects of international trade, agriculture-specific economic factors must also be evaluated in the determination of sustainable agriculture.

Isolating the non-economic factors in the determination of sustainable agriculture is easier because Chapter 14 of Agenda 21 is expressly devoted to applying sustainable development in the context of agriculture and therefore provides an appropriate starting point. These non-economic factors can be sub-divided into two categories: those adversely affecting the environment and those relating to developmental issues.

Increasing need for food leads to pressure to cultivate more land so that agricultural production can meet growing demand. This results in pressure on the natural environment on several levels. Firstly, production on traditionally cultivated land has

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53 Para 1 Preamble to the Marrakesh Agreement
54 Paras 2 & 3 Preamble to the General Agreement on Tariffs and Trade (GATT)
55 i.e. 'Promoting Sustainable Agriculture and Rural Development.' Note also Chapter 32 ('Strengthening the Role of Farmers') which suggests that sustainable development policies should be oriented towards the farmer
intensified through the greater use of pesticides. High pesticide use can lead to damage to fragile ecosystems, most notably to a decline in water quality. The resulting drop in water quality then results in the spread of disease and can cause pests to become resistant to some pesticides, which subsequently leads to further pesticide use. Secondly, higher yields can trigger soil erosion and loss of valuable nutrients. In certain cases, intensive water use on such badly irrigated soil results in "salinization, waterlogging soil pollution and loss of soil fertility" and consequentially lower yields that either causes land to be abandoned in favour of new sites, or result in increased use of fertilizers.

The consequence of higher yields from agricultural production has broader adverse environmental effects in terms of the general depletion of natural resources. Hazell and Lutz show that pressure to increase agricultural production in some developing countries with extensive rainforests causes significant deforestation with resulting loss of biodiversity, soil erosion due to the exposure of fragile soils and the possibility of climate change.

The discussion so far has shown possible adverse effects resulting from increased agricultural production. These issues relate to the 'natural' environment, which this thesis has already argued is only part of the interaction between agriculture and the environment. The pressure to increase yields also has wider 'environmental' effects resulting from increased agricultural production. These issues relate to the 'natural' environment, which this thesis has already argued is only part of the interaction between agriculture and the environment.

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57 A European Commission report identified that pesticide usage was up to 300,000 tonnes per year in 1996: European Commission: 'Directions Towards Sustainable Agriculture' COM(1999) 22 at 8
58 This has been referred to as 'eco-toxicity:' see COM(1999) 22 ibid. at 9 & Chapter 14.25 Agenda 21
59 Hazell & Lutz state that some studies in Indonesia, Sri Lanka and Malaysia show that approximately 12-15% of their farmers have been poisoned by fertilizer use during their farming careers: Hazell & Lutz: "Integrating Environmental and Sustainability Concerns into Rural Development" in Lutz supra n. 49, 9 at 12
60 Hazell & Lutz ibid. at 11
61 Chapter 14.44 Agenda 21
62 Hazell & Lutz supra n. 59 at 11; COM(1999) 22 supra n. 57 at 9
63 COM(1999) 22 ibid. at 8
64 Hazell & Lutz supra n. 59 at 11; also Chapter 14.25 Agenda 21
65 See Chapter 3 generally (thesis)
implications because it causes a decrease in the number of farms, as only large farms
are able to benefit from economies of scale.⁶⁶ Inevitably, expansion in farm sizes
means fewer individuals are involved in farming with the potential for population
migration to the cities⁶⁷ and the loss of traditional cultures,⁶⁸ particularly in
developing countries.⁶⁹

This final aspect reveals the overlap and potential conflict between agriculture,
development and environmental issues. Even though sufficient food could be
produced to meet the needs of the growing world population, over 800 million people,
mostly in developing countries, do not have sufficient access to food.⁷⁰ In such
countries, maintaining food security is as important⁷¹ as preserving the natural
environment,⁷² although many are also concerned about the potential loss of
biodiversity⁷³ following the patenting of certain indigenous plant species to develop
new seed types to contribute to enhanced crop yield.⁷⁴

The non-economic issues relating to developing and least-developed countries
encompass wider issues than just environmental matters. The most prominent are
those relating to the traditional difficulties developing countries experienced in
international agricultural trade, which the WTO agriculture regime was supposed to

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⁶⁶ e.g. lower costs of fertilizers and pesticides due to the large farm's ability to buy in bulk
⁶⁷ "Global Trade Forces Exodus from Land" The Guardian, 28 February 2001
⁶⁸ COM(1999) 22 supra n. 57 at 17; also European Commission: 'A Framework for Indicators for the
Economic and Social Dimensions of Sustainable Agriculture and Rural Development' 5 February 2001
at 7
⁶⁹ Chapter 14.2 Agenda 21
⁷⁰ Pretty: "Towards More Conducive Policies for Sustainable Agriculture" in Lutz supra n. 49, 35 at 35
⁷¹ If not more important
⁷² Chapter 14.6 Agenda 21
⁷³ See Starr & Hardy: "Not By Seeds Alone: The Biodiversity Treaty and the Role of Native
Agriculture" (1993) 12 Stanford Environmental Law Review 85 at 89
⁷⁴ Significant advances have been made in relation to pesticide resistant crop varieties, e.g. Roundup
Ready Canola © developed by Monsanto: see Monsanto: "Responses to Questions Raised and
Statements Made by Environmental/Consumer Groups and Other Critics of Biotechnology and
Roundup Ready© Soybeans" 21st April 1997, Monsanto. Also Riley, Hoffman & Ash: "US Farmers
are Rapidly Adopting Biotech Crops" ERS/USDA Agricultural Outlook August 1998, 21
alleviate. This thesis has already discussed these issues in detail,\textsuperscript{75} so this part of the discussion will only reiterate these briefly.

The emphasis on primary product production in many developing countries means that they are dependent on commodity exports for growth. High barriers to international agricultural trade imposed by developed nations ensure that it is difficult for developing countries’ products to enter the former’s markets at prices that are competitive with domestic ones.\textsuperscript{76} Reliance on commodity exports for growth is difficult, as exports then do not generate sufficient income. Further problems occur because developed country imports to developing countries are heavily subsidised\textsuperscript{77} which means that domestic agricultural products are unable to compete with cheaper developed country ones. Developing countries are unable to counteract the subsidies’ effect with their own trade barriers due to the prohibitively high costs involved, with the result that they are unable to rely on their comparative advantage in primary products to assist their growth.\textsuperscript{78}

Although this explanation understates the complex economics involved, it does illustrate the adverse effects that international trade barriers have on developing nations. On one level, these issues could be categorised as ‘economic’ ones because they relate to the adverse effects following protectionism on international agricultural trade. Nevertheless, the discussion has categorised these issues as non-economic because such countries’ concerns are wider than just market access issues and active

\textsuperscript{75} See Chapter 1 generally (thesis)
\textsuperscript{76} e.g. the operation of the European Community’s variable import levy under the pre-WTO CAP ensured that the price of imported goods remained above the inflated prices of domestically produced agricultural products: see B.L. Gardner: ‘European Agriculture: Policies, Production and Trade’ (1996) Routledge at 15-62
\textsuperscript{77} Article 6:1 Agreement on Agriculture only requires members to reduce their levels of domestic support in accordance with reduction commitments. Articles 8 & 9 Agreement on Agriculture deal with export subsidies, but again, such subsidies only need to be reduced in accordance with reduction commitments, rather than eliminated completely. On the reduction commitments, see generally Chapter 1 section B: 1(a) (thesis)
\textsuperscript{78} UNCTAD: ‘Trade and Development Report 1998,’ 133 at Table 37
consideration of all countries’ needs should be balanced against the elimination of protectionism.\textsuperscript{79}

b. Concluding Remarks: Balancing Economic and Non-Economic Factors

Replacing the free trade goal with sustainable agriculture in the WTO’s agriculture regime means a shift away from the traditional prioritisation of economic, or ‘trade’ goals towards a balancing of economic and non-economic factors to facilitate greater developing country participation in international agricultural trade and to ensure that agricultural production is not increased to the detriment of rural communities and the natural environment.

This offers both a goal and the beginning of a methodology, but difficulties are still apparent because it is not possible to determine how the balance between economic and non-economic factors in the agriculture context should be accomplished. The Brundtland Commission’s definition of the general concept of sustainable development also failed to address the priority between the competing factors, which, Handl argues, then facilitated the adoption of potentially conflicting instruments in the international environmental arena.\textsuperscript{80} It is particularly important that the appropriate balance is specified in international agricultural trade because this thesis has shown that any amendment to the WTO’s agriculture regime will only be deemed effective if the nature of members’ obligations is clear in the rules so that a return to protectionism does not result.\textsuperscript{81}

The solution to the correct balance between economic and non-economic factors in agriculture lies in the general context in which the rules operate. This thesis advocates a shift towards sustainable agriculture only in the context of international agricultural

\textsuperscript{79} The methods by which such consideration can be achieved is discussed in the second part of this chapter.

\textsuperscript{80} A detailed explanation of this problem is outside the scope of this thesis, but see Handl \textit{supra} n. 36 at 37.

\textsuperscript{81} i.e. the first element of the ‘effectiveness’ test: see Chapter 1 section A (thesis)
trade regulation under the WTO. Paragraph 1 of the Marrakesh Agreement states that all the WTO agreements are enacted to regulate members' "relations in the field of trade and economic relations." This statement makes it clear that the WTO is therefore designed to regulate trade activities, so non-trade factors are only relevant to the extent that they impinge on trade issues.82

The success of the WTO regime has been measured both in terms of adherence to the amended rule structure83 and by the increased use of the dispute settlement mechanism.84 This success has led some members to argue that the WTO scheme of agreements could be expanded into non-trade areas, like preservation of the environment.85 Whilst it is important to consider the adverse effects that trade can have on the environment for example, it is not certain that the WTO's system could regulate an entire area more successfully than the existing multilateral agreements under the auspices of the United Nations.86 Biermann has noted already88 that there are conflicts between the international environmental agreements and the WTO rules, and merely placing existing international commitments into the WTO framework would not of itself lead countries like the United States to adopt their provisions.89

82 Article II:2 Marrakesh Agreement states that the functions of the WTO are inter alia, to "provide a forum for negotiations among its Members concerning their multilateral trade relations in matters dealt with under the agreements..." (emphasis added)
84 Note that even in the controversial Bananas dispute, the United States sought permission from the WTO Dispute Settlement Body before it imposed sanctions on the European Communities for its failure to adhere to the Appellate Body's findings on its bananas regime: see WT/DS27/43, 14 January 1999
85 Most notably, the European Communities: see European Commission: 'The EU Approach to the Millennium Round: Communication from the Commission to the Council and the European Parliament' (1999)
87 This view is supported by Biermann: “The Rising Tide of Green Unilateralism in World Trade Law: Options for Reconciling the Emerging North-South Conflict” (2001) 35 JWT 421 at 423
88 Ibid. at 423-4
89 See Statement made by the United States: (1992) 21 ILM 848
The solution to the difficulties of achieving the appropriate balance between economic and non-economic issues in the context of sustainable agriculture is to build on the WTO’s success which lies in its concentration on trade issues by firstly focussing on the elimination of protectionism, because these are synonymous with the trade ethos of the WTO agriculture regime. Following this, the policy’s impact on non-economic factors should also be evaluated so that the effect of the policy on all aspects of international agricultural trade can be measured.

This thesis suggests the following amendments to the WTO’s agriculture regime to allow its rules to be based on sustainable agriculture, rather than the existing free trade principle.

B. Achieving Sustainable Agriculture: Amending the WTO Agriculture Regime

1. The Agreement on Agriculture

Despite the limitations of the Agreement on Agriculture, consolidating the rules on the traditional instruments used to protect members’ domestic agricultural sectors into one agreement has proved successful for two reasons. Firstly, following the agreement’s entry into force in January 1995, it was possible to accurately determine members’ obligations in relation to the continued employment of export subsidies, domestic support and market access measures in international agricultural trade and to precisely establish the permitted levels of agricultural support. Secondly, the agreement’s concentration on such traditional measures meant that it was possible to examine the extent to which the new rules contributed to the decline in the overall levels of agricultural protectionism by measuring the drop in the levels of domestic

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90 See Chapter 1 section B: Chapter 3 section A: 1(a) & Chapter 4 section A: 1(a) (thesis)
agricultural support in terms of the Aggregate Measurement of Support (AMS). The number of agricultural disputes brought before the amended dispute settlement system also illustrated the extent to which the traditional methods of support were being used and whether the Agreement on Agriculture’s rules were effectively curbing the worst excesses of agricultural protectionism seen under the GATT.

The transparency created by the Agreement on Agriculture is important in international agricultural trade because its regulatory history shows that it was characterised by the use of non-tariff barriers and other measures that are difficult to detect and therefore regulate. It is therefore appropriate to use the existing framework of the Agreement on Agriculture as the starting point for changes to the rules. The discussion therefore suggests that the first stage of reform should incorporate sustainable agriculture into the Agreement on Agriculture by retaining the existing rule structure but amending the rules on export subsidies, domestic support and market access to reflect the change in emphasis.

a. Export Subsidies

Part V Agreement on Agriculture regulates the use of export subsidies: Article 8 prohibits their continued use except in conformity with the provisions of Articles 9 and 10, which only permit the use of such subsidies in limited circumstances. This thesis has discussed the detailed application of the Agreement on Agriculture’s rules

92 See generally Chapter I section A (thesis) on agricultural regulation under GATT
93 Note also all the problems encountered by the imposition of Voluntary Export Restraints (VERs) and Orderly Market Arrangements (OMAs) outside Article XIX GATT: Preusse “Voluntary Exports Restraints-An Effective Means Against a Spread of Neo-Protectionism” (1991) 25 JWTL 5
94 On the history of international agricultural trade regulation under GATT see Chapter I section A (thesis)
on export subsidies in Chapter 1, so this part will concentrate on the amendments to the rules prompted by the incorporation of the principle of sustainable agriculture. Commentators have indicated that the rules on export subsidies have been the most effective in economic terms. A report in the OECD revealed that the reduction commitments were being respected overall and that the expected shift away from production-specific support towards non-production specific measures had taken place. Although Article 9:2(b) Agreement on Agriculture allows members to transfer the burden of their reduction commitments between products, this is only permitted during the implementation period. This means that even if the export subsidy rules are not amended, developed country members still must achieve the 36% reduction in value and the 21% reduction in quantity subsidised by the end of 2001, which would result in a significant reduction in the contribution of export subsidies to the levels of protection on international agricultural trade.

If export subsidies are reduced further, or even eliminated in the way suggested by a number of WTO members, additional favourable economic effects are likely. Article 8 Agreement on Agriculture prohibits the use of new export subsidies except in conformity with the agreement, but it is clear that the permitted subsidies still in place are production-specific. This means that incentives to produce quantities in excess of the amount that the market will support remain, consequently ensuring agricultural trade is still distorted, unless further reductions are instituted by the reform of the rules.

96 Chapter 1 section B: 1(a) (thesis)
97 As defined in Chapter 5 section A: 2 (thesis)
98 This has been particularly noticeable in relation to the European Community's CAP: see Tangerman: "An Ex-Post Review of the MacSharry Reforms" in supra n. 14 at 20
100 WTO: 'Cairns' Group's Submission on Export Subsidies' WT/GC/W/168, 9 April 1999 at para 2
101 e.g. the export subsidies at the centre of the United States-Canadian dispute were only available for milk: Canada Milk dispute Appellate Body report supra n. 95 at paras 14-18
Although it could be argued that positive consequences flow from such subsidies continued use, including protection of rural communities through the guaranteed income from the subsidies, these must then be balanced against the adverse effects that export subsidies have on developing countries and the natural environment to ensure sustainable agriculture. This assessment differs from the Agreement on Agriculture’s existing methodology because there is no automatic assumption that the elimination of export subsidies will result in favourable consequences. Instead, the determination of such effects on development and the natural environment comes from an actual assessment of export subsidies’ adoption or removal. The previous chapters\textsuperscript{102} have already indicated that the Agreement on Agriculture’s rules do not always have the positive welfare effects in these areas that free trade theory assumes.\textsuperscript{103}

On one level the existing rules on export subsidies do address developmental concerns because Article 9:4 Agreement on Agriculture states that developing countries are exempt from reduction commitments in relation to a limited number of export subsidies.\textsuperscript{104} However, this concession is based on the assumption that such countries can afford to impose export subsidies and also that they will automatically benefit if they liberalise their agricultural sectors.

The discussion in chapter 1\textsuperscript{105} has already shown that developing countries have not benefited from the special and differential treatment provisions in relation to export subsidies during the implementation period. This is because such countries’ ability to

\textsuperscript{102} See Chapter 1 section B: 1(a) (thesis) (the scope of export subsidy regulation under the WTO); Chapter 3 section A:1(a) (the effect of export subsidy regulation on the environment) & Chapter 4 section A: 1(a) (thesis) (the problems of export subsidies and food safety)


\textsuperscript{104} i.e. Article 9:1(d) marketing costs and Article 9:1(c) transport costs on export shipments

\textsuperscript{105} See Chapter 1 section B: 4 (thesis)
shift their reduction commitments towards products they wish to continue protecting
means that export subsidies on key agricultural products remain at very high levels.
During this implementation period, developing countries were still under an
obligation to reduce their own export subsidies' levels where such subsidies were in
place, so their own markets were gradually liberalised while they remained unable to
access developed country markets.106 Artificially cheap agricultural imports inevitably
place pressure on developing countries’ rural communities’ ability to compete, which
force farmers to look for income outside agriculture and reduces developing
countries' ability to generate important revenue to increase their Gross Domestic
Product (GDP) which consequently inhibits further development.
Retaining export subsidies to facilitate developmental concerns relating to food
security and guaranteeing future income for poor rural communities is ineffective.
This is because the subsidy is paid contingent on export performance of a specific
product and so cannot be accurately targeted in a ways which will guarantee
continued income to all producers. More importantly in relation to food security,
export subsidies encourage production of food for export, rather than for domestic
consumption. Consequently, food security does not automatically follow as food
produced may not be retained for domestic consumption at all and even if it is it might
not be appropriate for the domestic population.
Finally, the effects of export subsidies on the environment must be measured. Chapter
3 has already indicated that their use adversely affects the natural environment both
directly and indirectly,107 by encouraging intensive farming techniques to boost
production of those agricultural commodities that are the subject of the subsidies.

106 WT/GC/W/168 supra n. 100 at para 4
107 See Chapter 3 section A (thesis)
Increased use of fertilizer and pesticides can lead to the effects already described,108 but further adverse consequences result.

It has already been argued that export subsidies are paid contingent on a specific agricultural product. This means that farmers will be encouraged to concentrate on production of particular crops, rather than a range, which could potentially result in a loss of biodiversity. This would arise if the concentration on increasing subsidised crop production leads to the cultivation of previously unfarmed areas, as well as the loss of indigenous crops through neglect in favour of the subsidised commodity.109

The analysis indicates that the continued use of export subsidies is detrimental both in terms of protecting domestic agricultural markets and because they have proven adverse effects on the environment and developing countries.110 Consequently, this thesis suggests that the Agreement on Agriculture’s rules should be amended to prohibit the adoption of further export subsidies111 for all members, with no exclusions for developing nations. The elimination of existing export subsidies should take place over a fixed period specified in the amended agreement.

b. Domestic Support

Members are required to reduce their agricultural support levels in accordance with commitments in Article 6 Agreement on Agriculture to facilitate a shift away from production specific support which distorted free trade in agricultural products,112 towards the use of direct payments.113 Existing domestic support levels are calculated

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108 See Chapter 5 section A (thesis)
111 This mirrors the Cairns’ Group’s proposals: see WTO: ‘Cairns’ Group Negotiating Proposal: Export Competition‘ G/AG/NG/W/11, 16 June 2000 at 2
112 See generally Thomson: “The CAP and the WTO after the Uruguay Round Agreement on Agriculture” in Ingersent, Rayner & Hine (eds.) supra n. 14 at 175
113 Article 6:5 Agreement on Agriculture
using the AMS,114 with specific exemptions from the commitments contained in the
Green and Blue Boxes in Annex 2 Agreement on Agriculture. The details of the rules
have already been discussed in chapter 1,115 so this analysis concentrates on the
necessary amendments following the incorporation of the principle of sustainable
agriculture.116

The objective of the shift to sustainable agriculture is to preserve resources for future
generations by preventing protectionism in international agricultural trade, but in a
way that takes the non-economic aspects of agricultural production into
consideration.117 This means that in certain circumstances merely reducing all levels
of agricultural support may not be the most appropriate way of attaining the goal
because it fails to adequately address these non-economic issues.

Under the existing rules, the assumption underlying the Agreement on Agriculture is
that the transition from product-specific to non-product specific support will lead to
the liberation of international agricultural trade, which will inevitably give rise to
benefits in relation to the non-economic aspects of agriculture.118 Adverse effects on
the natural environment and developing countries occur in two ways: firstly, the mere
existence of domestic production-specific support measures119 means that farmers will
continue to produce at levels which cannot be sustained by demand in the market. To
maximise their income from the subsidy farmers will adopt intensive production
techniques with high fertilizer and pesticide use which will have the same adverse
consequences for the environment as the use of export subsidies, including soil

114 The criteria is specified in Annex 3 Agreement on Agriculture
115 Chapter 1 section B: 1(a) (thesis)
116 See Chapter 5 section A: 2 (thesis) for the basis of this principle
117 Such factors include shaping the landscape, providing environmental benefits including land
conservation “sustainable management of renewable natural resources...the viability of rural areas” as
well as preserving biodiversity: see OECD ministers meeting in 5-6 March 1998 in their Communiqué:
cited by Lindland supra n. 103 at 3
118 Article 6 & Annex 2:1 Agreement on Agriculture
119 This section of the discussion will not repeat the detail on export subsidies, but the economic
arguments relating to export subsidies remain the same as above: see Chapter 5 section B: 1(a) (thesis)
erosion, pollution of existing fragile eco-systems, as well as the possible loss of biodiversity because of the concentration on specific crops.\textsuperscript{120}

Secondly, product-specific domestic support affects developing countries' ability to compete in international agricultural markets because of the incidental consequences such support has on the existence of other subsidies. If farmers are encouraged to produce a certain type of crop because the state buys the stock over a certain price, then farmers will continue to produce it irrespective of the demand. This has two consequences: domestic demand for the product may be satisfied, meaning that no imports from third countries are necessary. In addition, the state may be left with excess stocks that it can dispose of on world markets only by using export subsidies.\textsuperscript{121}

Developing countries enjoy comparative advantage in agricultural commodities,\textsuperscript{122} but in both the above cases demand for developing country products is significantly diminished: in the first case there is no demand for their products and in the second the use of export subsidies artificially reduces the price of developed country products below the market price, making developing country products more expensive and therefore less attractive to purchase. Inevitably, this leads to a loss of important revenue that could assist such countries' ability to develop.\textsuperscript{123}

The assumption underlying the Agreement on Agriculture's rules on domestic support is that the reduction in product-specific support and the transition to direct payments

\textsuperscript{120} See Pretty \textit{supra} n. 70 at 43
\textsuperscript{121} This was how the original CAP worked: see A. Matthews: 'The Common Agricultural Policy and Less Developed Countries' (1985) Gill & Macmillan at 55
\textsuperscript{122} Stiglitz: 'Two Principles for the Next Round, Or, How to Bring Developing Countries in from the Cold' Geneva, 21 September 1999 at 19
\textsuperscript{123} This is a very simplistic reflection of the complex economics involved in the operation of export subsidies and domestic support mechanisms. For a more detailed explanation, see the international agricultural economics literature generally: Warley: "Europe's Agricultural Policy in Transition" (1991-92) 47 International Journal 112 at 114-115 on the interaction of the CAP's subsidy support systems; also Josling \textit{supra} n. 28, Ford Runge: "The Environmental Effects of Trade in the Agricultural Sector" in OECD: 'The Environmental Effects of Trade' (1994) at 19
will then automatically reverse these adverse consequences. However, this presumes two things: firstly, that freeing trade will automatically yield these positive results and more importantly, that the benefits which flow from free trade will be specific enough to address all the intricate difficulties that occur in an area like agriculture. Although this might be the case, it is arguable that the consideration of non-economic factors can only be guaranteed when the effects of agricultural policies on them are specifically evaluated. This thesis suggests that domestic support measures, rather than export subsidies, should be retained because of such policies' positive effects on non-economic measures.

When considering the changes to export subsidies, this thesis suggested that sustainable agriculture required their continued reduction and eventual elimination, despite the possible positive consequences from their retention. There are two reasons for this: firstly, the WTO is a trade agreement designed to liberalise the international trading regime, including agriculture. This thesis suggests that sustainable agriculture operates within this framework. On this interpretation, the liberalisation of markets should be an important concern, but the special circumstances in agriculture mean that in certain cases other non-economic factors take precedence. In this way, sustainable agriculture operates as a balance between competing factors, rather than as a pseudonym for the protection of domestic agricultural sectors.

As a corollary to this, if two different types of economic instrument can achieve the same positive effect on non-economic factors, then it is only necessary to use one


\[125\] e.g. preservation of rural communities through guaranteed income: see Chapter 5 section A: 2 (thesis)

\[126\] See Chapter 5 section A: 2 (thesis)
type. Export subsidies can provide a guaranteed income to farmers, which, *inter alia*, protect rural communities by ensuring there is adequate remuneration. However, Annex 2:13 Agreement on Agriculture recognises that this positive effect can also be reached through domestic support programmes. The difficulty then is which instrument is the most appropriate to fulfil the goals put forward by sustainable agriculture? This question leads to the second reason for the elimination of export subsidies and the retention of domestic support, which is inextricably bound up with the definition of sustainable development in Agenda 21.

Chapter 14 of Agenda 21 specifically concerns the incorporation of sustainable development into domestic agricultural policies. Chapter 14:5 states that the best method is for each member to fully “integrate sustainable development considerations with [its] agricultural policy analysis and planning.” It goes on to suggest that the best method for this is to introduce sustainable development considerations purely at the domestic level and only when this has been achieved, should the member work towards international obligations.

If this is extrapolated to international commitments under the WTO, it is arguable that the best method for achieving sustainable agriculture is to concentrate on domestic support mechanisms because such instruments are inevitably inwardly focussed on the needs of the member’s territory and can therefore more accurately target specific concerns. For example, the World Wildlife Fund for Nature (WWF) report argues that domestic farmers could be rewarded “for the production of agricultural goods not recognised or rewarded by markets, such as maintenance of on-farm biodiversity.”

In addition, specific rural concerns can be addressed through targeted policies and it should be possible to tackle particular environmental concerns related to that.

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127 Chapter 14:9 Agenda 21
128 Chapter 14:11 Agenda 21
129 COM/AGR/CA/TD/TC/WS(98)120 *supra* n. 124 at 6-7
developing country, rather than trying to achieve environmental preservation in the abstract. This thesis has already indicated that one of the failures of previous suggestions for the incorporation of environmental norms into the WTO agriculture regime was the lack of specificity in the policies used. By concentrating on domestic support measures, if members suffer significant deforestation, then agricultural production can be altered in ways that discourage such practices. Likewise, developing nations could adopt the most appropriate measures for their territory to target their food security concerns.

If domestic support policies are used as the basis of achieving sustainable agriculture policies, then the Agreement on Agriculture must be amended to reflect the new balance inherent in the concept. This thesis has argued that any changes to the regime must not permit a return to protectionism. On that basis, the rules should specify that wherever possible, members should use the least-trade restrictive measure possible. Further reductions in the levels of product-specific support should therefore be made, measured by the AMS calculation. This methodology is desirable because it concedes that such support can produce unfavourable effects for both the natural environment and developing countries and that the move towards liberalisation is desirable in this context.

However, this approach addresses only one aspect of the problem because it is still based on the existing Agreement on Agriculture’s hypothesis that liberalisation in international agricultural trade will automatically solve the difficulties indicated by this thesis. It is recommended therefore that further amendments are also made. Firstly, it should be open to members to use product-specific support in circumstances where this has a positive effect on either the natural environment, or developing

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130 See Chapter 1 section A (thesis)
countries. For example, a member may wish to promote the cultivation of crops that are not traditionally profit-making in order to preserve biodiversity.\textsuperscript{131} Under the existing rules, such incentives would only be eligible for Green Box exemption under Annex 2:12 Agreement on Agriculture, if the payments were limited to the “extra costs or income involved in complying with the government programme.”\textsuperscript{132} This approach is problematic because it does not offer an incentive to move over to different types of farming, as compensation is so limited.

The burden of proof would be on members to show why such programmes were necessary and what positive effect they were hoping to achieve with the incentive scheme. In addition, members would be required to show how long they were intending to run the scheme and whether it was designed to shift over to direct payments. If the economic effects of the policies were considered to be too restrictive in the long term, then it would be possible to impose a deadline on the period of product-specific support. This would operate in a similar way to the existing Green Box exemption for production-specific payments made under rural assistance programmes,\textsuperscript{133} so that such payments would have to be made on a degressive basis in these circumstances.\textsuperscript{134}

If members wished to adopt product-specific domestic support, they would also have to show how those measures affected developing countries. If the effects were particularly severe, then the members should be either prohibited from using that method of support entirely, or should pay compensation to the affected countries.\textsuperscript{135}

\textsuperscript{131} COM/AGR/CA/TD/TC/W(98)120 supra n. 124 at 7
\textsuperscript{132} Annex 2:12(b) Agreement on Agriculture
\textsuperscript{133} Annex 2:13 Agreement on Agriculture
\textsuperscript{134} Annex 2:13(e) Agreement on Agriculture
\textsuperscript{135} The amount could be agreed between the parties, or could be set through arbitration proceedings under the auspices of the WTO dispute settlement procedure
All these product-specific support programmes should be subject to scrutiny in the Committee on Agriculture. The Committee should have the power to issue an order which specified if and how the schemes did not comply with the rules. In these circumstances, the order could be used as the basis for an action under the Dispute Settlement Understanding for any member who was unfavourably affected by the measures used. The burden of proof should then be on the member imposing the measure to show why that form of measure was necessary.

c. Sustainable Agriculture v Multifunctionality

So far the discussion has advocated a shift away from a purely economic solution to a one that addresses both the economic and non-economic aspects of international agricultural trade to maximise the availability of resource for future generations. Although the suggestion put forward centres on sustainable agriculture, it could be argued that it bears significant similarities to the solutions based on ‘multifunctionality’ suggested by members in the renegotiation discussions. This is because their proposals also focus on the effects that agricultural production has on rural communities, the natural environment, its inextricable link to food security questions and developing countries’ economies. Despite these apparent similarities, significant distinctions between the two concepts can be identified. These lie in the scope of the definitions of sustainable agriculture and multifunctionality and also in the instruments that are used to implement them.

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136 Multifunctionality has already been discussed in detail in various contexts in this thesis: see Chapter 2 section A: 1(c) Chapter 3 section B: 1 Chapter 4 section B: 1 (thesis)

137 Multifunctionality is the core of the Japanese, Norwegian and European Community submissions to the Analysis and Information Exchange Process (AIE Process), the Geneva Ministerial Declaration procedure, as well as the subsequent discussions in the Committee on Agriculture: see WT/GC/W/273 supra n. 50 at para 7; WTO: ‘Committee on Agriculture: Council Overview of WTO Activities (1999)’ G/L/322, 6 October 1999 Annex III (especially AIE/40); WT/GC/W/220 supra n. 50 at paras 11-14

138 See G/AG/NG/W/36 supra n. 50 at 2
Multifunctionality has been defined as the recognition of the impact of agriculture "beyond its primary function of supplying food and fibre"\textsuperscript{139} to its effects on "shaping the landscape, ... environmental benefits such as land conservation, the sustainable management of renewable natural resources and the preservation of biodiversity,"\textsuperscript{140} as well as its influence on rural development. In essence, this is a formal recognition of the fact that a subject can have effects outside its narrow economic sphere and influence wider societal goals at the same time as it achieves traditional 'trade' or economic objectives.\textsuperscript{141}

Superficially, there is no distinction between multifunctionality and sustainable agriculture because the latter also advocates recognition of these wider non-economic objectives. However, it can be argued that sustainable agriculture is broader because it goes beyond merely stating that a subject can have multiple effects, to looking at how both economic and non-economic effects can be achieved in a manner that preserves natural resources for the next generation.\textsuperscript{142} The OECD report argues that the inherent distinction between the two concepts is that sustainable agriculture is goal oriented, so that any rule that does not promote it must be amended. In contrast, multifunctionality is only a "characteristic" of production because there "is no imperative to make [an activity] multifunctional" when it is not.\textsuperscript{143}

When this distinction is translated into the context of international agricultural trade regulation, the fact that multifunctionality is only descriptive of agriculture's non-economic impact means that no changes need to be made to the fundamental free trade assumption in the existing WTO regime. This is because multifunctionality is not a goal in itself, so it can be fitted into the existing regime with no changes to the

\textsuperscript{139} OECD: 'Multifunctionality: Towards An Analytical Framework' (2001) at 5
\textsuperscript{140} Ibid.
\textsuperscript{141} Ibid. at 6
\textsuperscript{142} Ibid. at 6
\textsuperscript{143} Ibid. at 6
rules, as the existing agriculture regime already recognises the sector’s non-economic effects or ‘multifunctional’ characteristics in the Green Box exemptions from domestic support commitments.\textsuperscript{144}

In contrast, sustainable agriculture requires a shift away from the free trade goal because it substitutes its own maximisation of resources goal for ‘free trade.’ On this view, sustainable agriculture must become the core of any agricultural trade regime, rather than just an exception to it.\textsuperscript{145} The discussion has already argued that the problems of agricultural trade regulation will only be addressed when there is a shift away from the free trade ideal, so it is evident that multifunctionality cannot fulfil this role.

In addition to the conceptual distinction between multifunctionality and sustainable agriculture, a further divergence is apparent from the documentation submitted pursuant to the renegotiation of the Agreement on Agriculture, particularly by the European Communities and Japan.\textsuperscript{146} Both submissions emphasise the multifunctional characteristics of agriculture\textsuperscript{147} and suggest that they be permitted automatically to retain production-specific support in their domestic agricultural policies to fulfil these non-economic aspects\textsuperscript{148} as a legitimate exception to the free trade ideal. The European Communities and Japanese versions of multifunctionality are a smokescreen for protectionism because the preferred instrument is production specific support.

\textsuperscript{144} This is the view taken by the Cairns’ Group in their submission to the Geneva Ministerial Declaration procedure: WTO: ‘Nineteenth Ministerial Meeting of the Cairns’ Group, 27-29 August 1999; Communication from the Cairns’ Group’ WT/L/312, 3 September 1999 at paras 3 & 10

\textsuperscript{145} Once a concept is categorised as an exception to the rules, there is a possibility that legal interpretation could render it otiose: note Dowdeswell’s fear of lawyers in international environmental regulation: supra n. 23

\textsuperscript{146} These submissions have already been addressed in detail: see Chapter 2 section A: 1(c) (thesis)

\textsuperscript{147} WT/GC/W/273 supra n. 50 at para 4(c) & WT/GC/W/220 supra n. 50 at para 14

\textsuperscript{148} See Smith: “Multifunctionality and ‘Non-Trade Concerns’ in the Agriculture Negotiations” (2000) 3(4) JIEL 707 for a more detailed discussion
This thesis argues that satisfying the sustainable agriculture goal does not require production-specific support per se. Instead, it maintains that the actual effects of domestic support mechanisms should be measured first to ascertain their long term implications for developing countries and the natural environment. Although it is possible that production-specific support may be a successful method for achieving sustainable agriculture, it should not be necessarily the first instrument members use.

d. Market Access

Article 4:2 Agreement on Agriculture requires members to convert non-tariff barriers on those products in their schedules to tariffs and then reduce the overall total by 36%, including a reduction in each tariff line of 15% over the implementation period. Commentators have already identified significant difficulties with the tariffication methods, with high tariffs adversely affecting developing countries’ ability to exploit their comparative advantage in agricultural products.

Under the free trade goal in the existing WTO agriculture regime, it is difficult for developing countries to benefit directly from the tariffication process because tariff levels remain high. If the rules are amended to require further reductions, then it can be argued that developing countries will benefit because they will be able to access developed country markets and therefore earn valuable revenue.

Although this seems to be an argument for not replacing the free trade goal in relation to market access, developing countries benefit more under sustainable agriculture because their specific needs must be considered in addition to other non-economic aspects of agriculture. Under sustainable agriculture, the objective of the rules

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149 See Chapter 5 section B: 1(b) (thesis)
150 J.J. Schott: ‘The Uruguay Round: An Assessment’ (1994) Institute for International Economics at 50; also Chapter 1 section B: 1(a) (thesis)
151 Known as ‘dirty tariffication’ due to the artificial inflation of the tariff value of the non-tariff barrier prior to tariffication: see Schott ibid. at 50
152 Stiglitz supra n. 122 at 19
153 UNCTAD/WTO Joint Study supra n. 11 at 4
changes to guaranteeing the provision of 'resources for future generations.' This goal can be viewed both in terms of natural resources and biodiversity, as well as ensuring food security so that future generations exist to enjoy the natural resources preserved. Despite the modification in policy objectives, developing countries benefit because they would still need access to developed country markets in order to earn important revenue to support their own rural populations and prevent migration to the cities. In addition, they can also ensure that they use the most suitable support mechanisms to provide food security, even if these are product-specific. Control is left therefore to the developing countries to help their domestic sectors in the way that is most appropriate for them in line with the focus on bottom-up implementation of sustainable agriculture advanced in Agenda 21.154

Environmental issues raise different concerns for market access. Here members want to restrict access either to promote ‘environmentally friendly’ trading practices,155 or to protect their domestic territories from potential hazards to the natural environment or risks to human health.156 This is directly opposed to the free trade ideal inherent in the Agreement on Agriculture because it is difficult to liberalise markets whilst simultaneously allowing members to follow policies that restrict market access.157 Market access regulation reveals a dichotomy between developing country requirements for enhanced market access opportunities to promote their needs and all members’ ability to protect their domestic territories from risks either to the environment, or human health. The difficulty then arises whether the sustainable development goal automatically requires developing country access to markets. These

154 Chapter 14
155 This is the product-process dilemma which has previously been criticised by GATT panels: see Chapter 3 section A generally (thesis) & Jackson: “Comments on Shrimp/Turtle and the Product/Process Distinction” (2000) 11 EJIL 303
156 This latter problem is inextricably bound up with the food safety debate: see Chapter 4 generally (thesis)
157 See Chapter 4 (thesis) generally
issues must still be interpreted in the light of the inherent tension in international agricultural trade between preventing a return to protectionism and addressing the non-economic aspects of agriculture.

The sustainable development principle requires the following amendments to the Agreement on Agriculture to accommodate this problem. Firstly, there should be a presumption that developing countries are allowed access to developed country markets. This would address the protectionism issue because there would be an obligation to keep agriculture trade free unless the balance indicated that the emphasis should be on non-economic factors.¹⁵⁸ To achieve this, tariff barriers could be lowered in a similar way to the existing scheme under Article 4 Agreement on Agriculture, but the tariffication calculation method for each series of products should be made available to the Committee on Agriculture and should be open to challenge through the dispute settlement procedure. This change would assist transparency and at least allow the opportunity to change the high level of tariffs currently imposed on developing country markets because the investigation of the adverse effects of the tariffication method would have been carried out already. Consequently, this would reduce the costs of bringing the case under the Dispute Settlement Understanding because part of the evidence for the case would already be available.

The second way that market access could be improved in line with the sustainable agriculture goal could be offered in addition to, or as an alternative to the tariffication provisions. Each developed country could be required to implement a generalised system of preferences for developing countries, which would guarantee access for a certain percentage of the latter's products. To assist the least-developed nations, the percentage could be higher for these countries. This would guarantee a minimum

¹⁵⁸ Inevitably, this would depend on the nature of the problem which was being assessed
income level for these countries dependent on the exact nature of the schemes.

Developed country members could also encourage production of developing country indigenous crops by offering guaranteed markets for those crops. Inevitably, this will have helpful consequences for the preservation of biodiversity.

Even though these proposals enhance market access, they do not make provision for the use of restrictions predicated on the need to tackle health risks. It is clear from the earlier discussion that this issue should be addressed through amendments to the SPS and TBT Agreements. The thesis will therefore consider limitations to market access in that context.

2. The SPS Agreement

Paragraph 1 of the Preamble to the SPS Agreement reveals the dilemma that currently exists in the WTO agriculture regime in relation to limitations on market access on health grounds: it states that “no Member should be prevented from adopting or enforcing measures necessary to protect human, animal or plant life,” but that if measures are employed they should not be applied on a discriminatory basis, or in a manner which “would constitute a disguised restriction on international trade.”

Problems arise because paragraph 3 of the Preamble to the Marrakesh Agreement Establishing the World Trade Organisation suggests that the WTO’s regulatory framework is based on the principle of free trade, whereas the SPS Agreement allows exceptions to that general principle. An inherent difficulty is therefore ascertaining what the appropriate balance should be between achieving free trade, whilst allowing members to protect their domestic territories from threats to health and the environment. The political reality is that members will protect their domestic

159 See Chapter 3 (environment) and Chapter 4 (food safety) (thesis)
territories from such risks so any system of agricultural trade regulation must accommodate this.

The existing SPS Agreement resolves the problem by primarily focussing on the measure adopted, rather than on the nature of the risk. Paragraph 1 of the Preamble to the SPS Agreement refers to the adoption of “measures” which potentially affect international trade. This is reiterated by Article 1:1, which makes it clear that the agreement only regulates the “measures” adopted, apparently leaving the members to decide whether the risk is significant enough to warrant the imposition of market access restrictions.

The SPS Agreement is constructed in this way because it is based on the assumption that if a member adopts the most trade restrictive measure where a lesser one would achieve the required goal, that member’s aim is to protect their domestic sectors from the effects of agricultural trade, rather than the risk to the natural environment or health. Consequently, if a member wishes to impose a measure that is in excess of any existing international standards, this must be adequately supported by an appropriate risk assessment. This issue has already been discussed in detail in chapter 4, so this part of the discussion will focus on the requisite changes to market access caused by the change to the sustainable agriculture principle.

The starting point for the change is the acknowledgement that instead of the pursuit of free trade, the WTO rules would require a balance between economic and non-economic factors to guarantee the availability of resources for future generations. In

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160 These can be to plant and animals as well as humans.
161 Article 2:3 SPS Agreement; Paragraph 3 of the Preamble to the Agreement on Agriculture states that the overall objective in the WTO’s agriculture regime which includes the SPS Agreement, is to reduce the levels of support on domestic markets: see also Chapter 4 section A: 1 (thesis).
162 See the Appellate Body’s interpretation of the relationship between Articles 3:3 & 5 in the Hormones dispute: supra n. 15 at para 193.
relation to market access two issues must be considered: the preservation of the natural environment and protection on the grounds of health risks.

On one level, it is possible to argue that to preserve the natural environment, it is important to undertake agricultural production in an 'environmentally friendly' way. Existing agricultural production techniques that concentrate on maximising output have visible unfavourable effects on the natural environment, including loss of biodiversity, soil erosion and watercourse pollution. Problems arise over the method for implementing those changes. In relation to market access, the rationale would be to prohibit or restrict access of agricultural products unless such products had been produced in accordance with ‘environmentally friendly’ techniques. This approach is problematic in the trade context.

If a member prohibits access to its market because commodities are not produced in a certain manner, then it is exporting its own environmental norms to other members because products are only imported when they reach the same standard of environmental protection that exists in the importing member’s territory. Whilst this may help promote ‘environmentally friendly’ production techniques, it is based on the assumption that the member’s environmental policies are appropriate within other members’ territories.

Chapter 14 in Agenda 21 states that sustainable agriculture is best achieved by the individual member using the most suitable mechanisms for its territory. Agenda 21

163 Including flora and fauna
164 See Pretty supra n. 70 at 37
165 Ibid. at 37
167 Chapter 14:3 Agenda 21
is suggesting therefore that exporting environmental norms is not the best method for achieving environmental goals, so on this view the SPS Agreement should not be amended to allow market access restrictions in these circumstances. If members desire homogenised environmental norms, then it is better to undertake this through multilateral negotiations on international environmental issues. This is because the WTO is a trade agreement and imposing single environmental standards would prioritise environmental issues above trade ones because as well as the difficulty of protectionism, it would neglect other non-economic aspects in the pursuit of a single environmental objective.

Whilst this does not negate the importance of preservation of the natural environment, this thesis advocates sustainable agriculture, which requires a balance between competing norms, rather than the automatic prioritisation of one. The corollary to this is that if members have undertaken multilateral commitments in relation to the environment, then these should be enforceable separately under the dispute settlement mechanisms of those agreements.\textsuperscript{168}

By enforcing environmental norms through the multilateral environmental agreements themselves, environmental issues can be prioritised. If they were incorporated into the WTO scheme, such issues would operate as part of a series of competing factors which occur in the trade context. Members may decide that certain environmental issues are too important to be left to the WTO in these circumstances.\textsuperscript{169}

\textsuperscript{168} e.g. the Cartagena Protocol has dispute settlement resolution mechanisms built into it: see (2000) 39 ILM 1027 & Chapter 4 section B: 2 (thesis). Although its dispute settlement mechanism also states that disputes can be brought before the WTO, it is arguable that currently these would be settled by prioritising free trade goals, so the most favourable environmental outcome may not occur: see Qureshi: “The Cartagena Protocol on Biosafety and the WTO-Co-existence or Incoherence?” (2000) 49 ICLQ 835 & Eggers & Mackenzie: “The Cartagena Protocol” (2000) 3 JIntEconL 525 also Schoenbaum: “International Trade in Living Modified Organisms: The New Regimes” (2000) 49 ICLQ 856

\textsuperscript{169} e.g. Climate change which inevitably has world-wide effects
So far the discussion has considered market access limitations in terms of production methods, however, a distinction should be made between this ground, and imposing restrictions on the grounds of such products' adverse effects on environmental or human health. Although both indicate that market access is limited or prohibited, the former is imposed on the grounds of changing the production technique in the exporting state, whereas the latter involves the direct effects of the product in the importing state. It is arguable that market access measures imposed on health grounds refer to the effects in the importing state and are legitimate because there is no break in the chain of causation between the effect and the measure imposed, as both the risk and the measure take effect in the same member’s territory.

In this situation, the SPS Agreement states that the least-trade restrictive measure should be chosen to alleviate the risk and that that risk is clearly shown in an appropriate risk assessment.\textsuperscript{170} Currently, the emphasis is on the measure used, with the nature of the risk only being relevant to the measure employed by the member.\textsuperscript{171} In contrast, sustainable agriculture requires the emphasis to be shifted onto the risk first and then the measure for two reasons. Firstly, if the goal is the preservation of resources for future generations, then the nature of the threat is important because the greater the threat, the more important that it should be alleviated. Secondly, the emphasis on the risk also allows measures to be imposed where the consequences of the risk on the environment or human health are uncertain or only 'perceived.'\textsuperscript{172} This is because tackling the threat in the same way is as important as ensuring that markets remain open. The most significant example of this is genetically modified crops, where members wish to protect their domestic agricultural sectors because they are

\textsuperscript{170} See Chapter 4 section A: 1(b) (thesis) on the problems this raises
\textsuperscript{171} i.e. the interpretation placed on the relationship between Articles 3:3 & 5 SPS Agreement by the Appellate Body: \textit{Hormones supra} n. 15 at para 193
\textsuperscript{172} See Chapter 4 section A: 1(b)(ii) (thesis)
uncertain of the effects either to human health or to environmental risks including biodiversity. These non-economic goals only form part of the fulfilment of the sustainable agriculture goal; economic issues must not be neglected. Prioritising risk in this way is dangerous because members may exploit it as an excuse to protect their domestic agricultural sectors, especially if there is insufficient evidence to indicate the exact extent of the risk. However, it has been argued earlier that even though the emphasis under sustainable agriculture is on maximising resource use for future generations, rather than on free trade, developing countries still require access to developed country markets to ensure growth. This means that returning to the levels of protection experienced in the GATT era is still undesirable and any measures adopted must promote the balance between pursuing non-economic goals, whilst preventing a return to protectionism.

If all these problems are taken into consideration, reform should focus on the scope of the SPS Agreement. Chapter 3 has already discussed the problems of applying the agreement’s rules to the environment due to the uncertain coverage of Article 2:1 SPS Agreement. This thesis therefore suggests that Article 2:1 is broadened to make it clear that the SPS Agreement also includes market access restrictions introduced to avoid environmental harm. The main area of difficulty is the nature of the risk assessment under Article 5 SPS Agreement. Under the existing rules, the risk assessment is designed to show a direct correlation between the nature of the risk and the measure imposed. On this view, the risk assessment supports the measure chosen by the member, rather than showing the general incidence of the problem. A shift towards the coverage of perceived risks like those arising from genetically

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174 See Chapter 5 section A:1 (thesis)
175 See Chapter 3 section A: 1(b) & Chapter 4 section A: 1(b) (thesis)
176 Hormones Appellate Body report para 193 supra n. 15
modified crops would suggest that the risk assessment should give a general indication of the risk, and if appropriate, should illustrate the circumstances where measures could be imposed on a precautionary basis.\textsuperscript{177}

The limitations of adopting the precautionary principle in the free trade context have already been examined,\textsuperscript{178} so this part of the discussion will be limited to its incorporation in a regulatory system based on sustainable agriculture. Beneficial effects flow from the adoption of the precautionary principle as members can restrict market access where there is no or insufficient scientific evidence, but where a risk still exists, the problem is that the decision whether or not to impose the measure rests with the member under these circumstances and can therefore be difficult to review. This is particularly problematic as one of the objectives of sustainable agriculture is to prevent a return to non-transparent protectionist agricultural measures.

The European Communities' version of the precautionary principle\textsuperscript{179} is problematic because it could be used where there is no threat at all. This could adversely affect developing countries' trading opportunities because it prioritises environmental and general health considerations above the market access needs of developing countries, whereas this thesis suggests an equitable balance between the competing goals. A balance needs to be struck between trade and the non-trade goals which could be achieved through the adoption of a less measure-oriented system.

There are two ways that the requisite amendments would be undertaken. Firstly, where there is no scientific evidence at all, the members should be allowed to impose market access restrictions on a precautionary basis for a limited period as is currently the case under Article 5:7 SPS Agreement.\textsuperscript{180} Secondly, where there is some evidence

\textsuperscript{177} See COM(2000)1 \textit{supra} n. 173
\textsuperscript{178} See Chapter 3 section B: 2 (thesis) & Chapter 4 section B: 3 (thesis)
\textsuperscript{179} COM(2000)1 \textit{supra} n. 173
\textsuperscript{180} See \textit{Hormones} Appellate Body report \textit{supra} n. 15 at paras 120-125
which is either inconclusive, or it does not support the type of measure that the member wishes to impose, the member could impose it on a precautionary basis, but it would be under an obligation to show why the measure was necessary. As the emphasis is on the nature of the risk, rather than wholly on the measure used, the measure could be imposed on the basis of extrinsic non-scientific evidence if such evidence had influenced the member’s decision. In both cases, the measure and its justification would be transparent. If developing countries felt that the measure was a disguised restriction on international agricultural trade, then there should be an obligation on the member imposing the measure to make the general risk assessment available to the developing country complainant through the auspices of the Committee on Agriculture.

The real difficulty in relation to market access restrictions on the grounds of health risks is that developing countries will inevitably suffer. The best that can be achieved in these circumstances is to ensure that any measure imposed is transparent.

3. TBT Agreement

Article 1:3 specifies that the TBT Agreement’s rules also apply to trade in agricultural products. Chapter 4 has discussed the complexities of the TBT Agreement’s application to agricultural trade, so only the amendments necessary to accommodate the sustainable agriculture objective will be analysed in this context. Paragraph 6 of the Preamble to the TBT Agreement states that members retain the right to impose technical restrictions or standards on imported goods to ensure that imported products meet the same benchmark as those produced domestically. Like the Agreement on Agriculture and the SPS Agreement, the TBT Agreement’s rules are based on the free trade objective, so that any measure placed on imported goods must

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181 TBT Agreement
182 See Chapter 4 section A: 1(c) (thesis)
not constitute "a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or disguised restrictions on international trade."\textsuperscript{183}

Although Article 2:2 TBT Agreement reiterates this free trade objective in relation to technical restrictions,\textsuperscript{184} it states that such measures will be deemed legitimate if they satisfy one of the agreement’s threshold criteria, including food safety issues and environmental preservation.\textsuperscript{185} Members are encouraged to use existing international principles,\textsuperscript{186} but even if they choose to adopt different measures, these will be presumed to comply with the TBT Agreement’s rules if they fulfil one of the legitimate objectives in Article 2:2.\textsuperscript{187} Only these restrictions that comply with Annex 1:1 TBT Agreement as interpreted by the Appellate Body in \textit{Asbestos} will be permitted.\textsuperscript{188}

Whilst this is not problematic for actual threats to human health or the environment because it is possible to see the exact nature of the problem and determine it as a legitimate objective,\textsuperscript{189} difficulties arise where a member wishes to protect its domestic territory from a perceived risk. This is because the Appellate Body’s test requires that the document containing the technical restriction states clearly the nature of the risk the restriction is imposed to prevent.\textsuperscript{190} Such clarity is difficult to achieve when the risk is only perceived, because in relation to perceived threats, members will impose such restrictions on the basis that there is insufficient evidence to declare a

\textsuperscript{183} Paragraph 6 Preamble TBT Agreement
\textsuperscript{184} Members are more likely to use technical restrictions rather than standards as defined in the TBT Agreement, because compliance with the former is compulsory: Annex 1:1 TBT Agreement
\textsuperscript{185} See Chapter 4 section A: 1(c) (thesis) for a more detailed discussion
\textsuperscript{186} Article 2:4 TBT Agreement
\textsuperscript{187} Article 2:5 TBT Agreement
\textsuperscript{188} 1. It must be within a "document"; 2. That document must lay down “product characteristics”; 3. The measure must include “applicable administrative provisions and 4. Compliance with those provisions must be “mandatory”: see \textit{European Communities-Measures Affecting Asbestos and Asbestos Containing Products} Appellate Body report WT/DS135/AB/R, 12 March 2001 at para 67
\textsuperscript{189} See Chapter 4 section A: 1(c)(i) (thesis)
\textsuperscript{190} In the description of the relevant product characteristics: WT/DS135/AB/R \textit{supra} n. 188 at para 67
product safe, \textsuperscript{191} rather than because the risk is obvious. Even if the Appellate Body's test is satisfied, any restriction imposed must still comply with the free trade objectives reiterated in Articles 2:1 & 2:2 TBT Agreement. These problems could be overcome if the TBT Agreement was modified to accommodate the principle of sustainable agriculture. Under the free trade goal, it was imperative that the rationale for the adoption of technical restrictions on a particular risk be stated in the relevant document, because it was possible then to establish whether the measures adopted were \textit{de facto} protectionist as the link between the risk and measure could be clearly seen from the information in the document. \textsuperscript{192} Although this is still important to meet the economic objectives of sustainable agriculture, moving away from the primary reliance on free trade means that uncertain risks should also be accommodated within the TBT Agreement's rules because such risks could impact adversely on resource availability in the future. \textsuperscript{193} The dilemma is how to permit the imposition of measures based on perceived risk, whilst simultaneously preventing a return to the use of measures designed to protect agriculture.

This thesis suggests that this could be overcome by instituting a limited form of the precautionary principle on similar grounds to that in the SPS Agreement. Under this proposal, members would be able to institute technical restrictions when there was insufficient scientific evidence, but where a perceived risk existed. As the goal would not be free trade, but resource maximisation, if members opposed the imposition of the measures completely, the burden of proof would be on the complainants to show that the risk did not exist. However, to ensure that such TBT measures were not

\textsuperscript{191} Either from an environmental preservation viewpoint, or from that of food safety
\textsuperscript{192} This echoes the Appellate Body's test of the relationship between the risk assessment and the measure imposed under the SPS Agreement: see \textit{Hormones supra} n. 15 at para 193
\textsuperscript{193} Note the difficulties arising from genetically modified foods: see generally Mahé & Ortalo-Magné: 'International Co-operation in the Regulation of Food Quality and Safety Attributes' Session IIB of the OECD Workshop on Emerging Trade Issues in Agriculture 26-27 October 1998, COM/AGR/CA/TD/TC/WS(98)102, 26 October 1998
protectionist barriers to trade, it would be up to the member imposing the measure to show that they had opted for the least-trade restrictive measure possible under the circumstances. Although this might not be the optimum measure for the prevention of the environmental harm, or threat to food safety, the WTO is a series of trade agreements and so the outcome must be a balance between such economic, or ‘trade’ objectives, and the protection of non-economic factors. If members wish to go further and use further restrictive measures, then they should undertake this through multilateral negotiation where the environment or food safety is the single, rather than a combination of goals.

4. GATT

The significance of GATT’s application to international agricultural trade following the WTO regime’s entry into force is through its general exceptions in Article XX. This thesis has already demonstrated\textsuperscript{194} that these have been used for a variety of reasons, including furthering preservation of the natural environment,\textsuperscript{195} as well as ensuring general aspects of food safety.\textsuperscript{196}

It is arguable that the shift towards sustainable agriculture means that members no longer need to resort to exemptions from their WTO commitments to justify their domestic agricultural policies because the amended rules will acknowledge the central importance of non-economic policies in the WTO agriculture regime. This means that Article XX GATT will diminish in importance in the context of international agricultural trade and therefore the difficult interaction between its jurisprudence and that of the WTO need not be evaluated under the amended scheme.\textsuperscript{197}

\textsuperscript{194} See Chapter 3 section A: 3 (thesis) & Chapter 4 section A: 1(d) (thesis)
\textsuperscript{195} See WT/DS58/AB/R \textit{supra} n. 22 at para 129
\textsuperscript{196} See \textit{European Communities-Measures Affecting Asbestos and Asbestos-Containing Products (Asbestos) \textit{supra} n. 188 generally
\textsuperscript{197} This thesis has suggested that product-process measures in relation to the reform of international agricultural trade should not be used. Consequently, if members wish to resort to such measures, then
5. The Interaction of the Agreements

This thesis has argued that the WTO's failure to adequately regulate international agricultural trade rests on two factors. Firstly, its amended rules did not significantly reduce protectionism in international agricultural trade, even though the agreements purported to cover the three deficiencies in GATT's scope of regulation. Secondly, the reason for failure also goes deeper because both the WTO and GATT rest on the principle of free trade, which assumes a single motivation for any measure used by members that restricts international agricultural trade. The inextricable link between economic and non-economic factors in agriculture means that this assumption is flawed. This thesis has offered the principle of sustainable agriculture as a more cogent alternative.

Whilst it is important to recognise the influence of non-economic factors in agriculture, members' tendency to protect their domestic sectors must also not be neglected. This thesis has already argued that these economic factors are equally important, as they impact adversely on developing countries' ability to trade. Although sustainable agriculture has been put forward as a viable alternative to free trade, the suggested amendments to the rules have been constructed on the basis that merely resolving the problems caused by the non-economic factors will be insufficient to unravel all the difficulties. As a corollary to this therefore, it is important to ensure that all the agreements fit together so that loopholes are not created which can then be exploited by members for protectionist purposes.

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Article XX(g) GATT may have some residual effect in that context. However, this thesis suggests that product-process issues should be dealt with through multilateral negotiations because they involve imposing developed country norms on exporting countries. This has been something that developing countries particularly have resented in relation to environmental reforms.

198 See Chapter 4 section A: 2 (thesis) for the problems of the interaction of the agreements
199 This thesis has used these three factors as the 'effectiveness' test to establish whether the WTO agreements alleviated the problems created by GATT
200 i.e. that the members wish to protect their domestic agricultural sector from the impact of free trade in agricultural products
One of the main problems of the agreement’s interaction lay in which to apply first as all seemed to address different aspects of international agricultural trade regulation. The Agreement on Agriculture considers members’ mechanisms for supporting their domestic agricultural markets; the SPS Agreement concentrates on market access prohibitions on health grounds and the TBT Agreement addresses technical restrictions, which limit access to those products that fail to meet the homogenised standards. However, all the agreements are designed to open markets for agricultural products because domestic support, import bans and technical restrictions all impede free trade in agricultural products. In this way, all the agreements can be regarded as *lex specialis* in relation to their specific aspects of international agricultural regulation.

This interpretation does not take the argument any further, as it is still unclear which agreement to apply first when a conflict arises between the two. It can be argued that the current dilemma lies in the agreements’ emphasis on the pursuit of free trade. This is because all the agreements restrict free trade through market access restrictions in some way. On this view, there is a conflict between the agreements, because all the rules work slightly differently and so choosing which to apply first is an important part of the panel or Appellate Body’s deliberations. Moving towards the principle of sustainable agriculture and then viewing the potential conflict in a different way resolves these difficulties.

Sustainable agriculture requires balancing potentially conflicting economic and non-economic goals to maximise resources for future generations. Consequently, the emphasis in regulation moves away from primarily concentrating on the measure, to considering the nature of the risk that the measure is imposed to alleviate.
It is arguable that the next stage of the analysis should consider which form of measure the member has applied to address the risk and whether this is the most appropriate one considering both the nature of the risk and also the balance between economic and non-economic factors. If the measure is deemed appropriate, then the agreement that relates to that type of measure could be applied. If an alternative measure is more suitable, then the measure the member has used can be subjected to the terms of the agreement covered by the correct type of measure. The effect of this would inevitably mean that the nature of the protection used by the member would need to be changed so that it became a relevant SPS, TBT Agreement, or Agreement on Agriculture measure. This process of analysis would mean that the hierarchy of the agreements was not directly relevant because the emphasis would be both on the nature of the risk and the measure used to address that risk. Inevitably, this means that the choice of measure is not always left with the member who imposes it.\textsuperscript{201}

Superficially, this is a radical suggestion because it advocates removing free choice away from a 'sovereign' entity and giving it to a third party. If the outcomes of the existing dispute settlement reports are reviewed however, then it is clear that members whose measures are in breach of the existing rules have to modify their domestic systems until they comply with the rules. Even when members do institute a different series of measures, it is not inevitable that the matter will be resolved because the Dispute Settlement Understanding’s arbitration mechanism allows members involved in the original to question the amended regime before a panel until the measures are changed in line with WTO rules.\textsuperscript{202} It is axiomatic that the member’s right to choose the measure to alleviate the risk in these circumstances is significantly curtailed.

\textsuperscript{201} Under this suggestion, either the dispute settlement body could determine the appropriate measure, or it could be discussed in the Committee on Agriculture.

\textsuperscript{202} e.g. the Bananas dispute was the subject of several Article 21:5 Dispute Settlement Understanding references: European Communities-Regime for the Importation, Sale and Distribution of Bananas-
The solution to the interaction of the agreements proposed means that repeated recourse to the dispute settlement procedure is reduced because the most suitable measure is determined when the dispute is originally brought, rather than through multiple Article 21:5 Dispute Settlement Understanding actions. Although this could involve the panel or Appellate Body relying on provisions of the WTO agreements that were not pleaded before it, Article 7:2 Dispute Settlement Understanding makes it clear that any of the "covered agreements" can be drawn upon when making the decision, so this would not necessarily involve a wholly innovative change in the dispute settlement procedure.

C. Conclusions

Shifting the emphasis away from free trade towards the principle of sustainable agriculture fundamentally changes the nature of international agricultural trade regulation under the WTO. This new radical approach advocates a paradigm shift for agriculture in the same way that the WTO with its separate legal personality and comprehensive series of agreements were from the GATT's diplomacy based approach. As Dowdeswell recognised in the context of international environmental law, sometimes it is necessary to completely amend a system which continues to fail despite a series of significant reforms that were designed to alleviate all the problems associated with the area.

Sustainable agriculture has clear benefits for international agricultural trade on several levels: firstly, it comprehensively straddles both the trade and non-trade issues which are inextricably linked in agriculture. In this way, it recognises agriculture’s

Recourse to Article 21:5 DSU by Ecuador WT/DS27/RW/ECU, 12 April 1999 & Follow-up panel report requested by the European Communities under Article 21:5 procedure WT/DS27/R/EEC, 12 April 1999

203 Supra n. 23
multifunctional characteristics, especially in relation to agriculture’s impact on the preservation of the natural environment and the potential adverse effects on general food safety issues that are the subject of significant contemporary concern.

Secondly, the sustainable agriculture solution is politically viable because it moves the debate in the WTO outside the traditional free trade versus protection discussion that has previously led to polarisation in multilateral trade talks and agriculture’s consequential ability to stifle other areas of debate while members resolve their fundamental divergence of opinion. Instead, the centre of the debate in sustainable agriculture is on sustainable production methods to ensure available resources for future generations. Although members may still retain their traditional views about free trade, it will no longer be sufficient to operate on the assumption that free trade automatically provides the welfare goals; members must go further and institute measures which have an appreciable effect on non-economic aspects of agricultural trade.

Thirdly, this thesis has argued that the reasons for the WTO agriculture regime’s failure are based both on the use of the inappropriate free trade assumption and also on the fact that the WTO rules did not expressly prevent the use of protectionist measures seen during the GATT era. This means that any modifications to the WTO regime should address the problems faced by GATT to ensure they are ‘effective.’ Rules based on the sustainable agriculture principle do not automatically assume that protectionism is the motivation for the imposition of trade restrictive measures, but the principle does offer a way to balance the competing factors inherent in the economic and non-economic aspects of agricultural production because both elements of the problem are considered. The modifications to the rules suggested by this thesis

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204 This occurred in the Uruguay Round where the entire round was held up whilst talks on agriculture were concluded: see T.P. Stewart (ed.): ‘The GATT Uruguay Round: A Negotiating History 1986-1992: A Commentary’ (1993) Kluwer
are based on achieving this balance. Adaptations have also been made in the way that the agreements interact, so that members are required to investigate which is the most appropriate instrument taking into consideration the balance between achieving non-economic goals, whilst preventing a return to protectionism.

Fourthly, the nature of the balance between economic and non-economic concerns can only be determined in a specific context, because it must be clear exactly what competing factors are being balanced for the sustainable agriculture goal to be met. This solution is therefore more effective than those proposed in the relation to the incorporation of general environmental goals into the WTO agreements because it addresses the specific environmental concern in the balancing process.

Finally, the nature of sustainable agriculture guarantees developing countries’ needs are taken into consideration on two levels: on one level, members are discouraged from using protectionist measures calculated to limit market access for third country products. Effectively curbing the use of such measures through the least-trade restrictive measures enables developing countries to access markets and therefore gain valuable revenue for their own development.

In addition, sustainable agriculture means members must evaluate the specific effects of their policies on the non-economic aspects of agricultural trade. Developing countries will benefit here because the solution promotes food security, the preservation of biodiversity, as well as general developmental goals. Under this proposal, the actual needs of developing countries would be considered, instead of assuming that every free trade policy would automatically benefit developing countries.

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205 See Chapter 3 section A: 3 (thesis)
However, there are a number of weaknesses in adopting sustainable agriculture instead of free trade as the fundamental policy goal on which the WTO's agriculture regime is based. Several difficulties can be identified. Firstly, members could argue that paragraph 1 of the Preamble to the Marrakesh Agreement already mentions the need to achieve sustainable development, so no further action is required. This thesis has already demonstrated that although this has been used successfully in the Shrimp/Turtle\textsuperscript{206} dispute, the principle must still be interpreted in the light of the overall goal of free trade. Consequently, sustainable development as it currently appears in the WTO agreements is only one of many factors that should be analysed in the assessment of a measure's impact on international trade. In contrast, this thesis suggests changing its importance, so that sustainable development, or more specifically, sustainable agriculture, is the focus of the assessment of the measure.

This means that the emphasis is on preservation of resources, rather than on the protection of free trade.

Secondly, such an elementary change to the existing WTO scheme may not be politically feasible because members may be reluctant to move away from a policy that has been at the heart of the international trade regime since 1947. The discussion has already established that neither the GATT nor its successor, the WTO has effectively regulated international agricultural trade. It is arguable that any system of rules that perpetuates the existing GATT/WTO norms will be equally unsuccessful because it will not adequately address all aspects of the problem. In order to retain the free trade goal, it would be necessary to build in significant derogations into the WTO rules to accommodate the non-economic aspects of international agricultural trade.

The extent to which the amended regime could then be regarded as still perpetuating

\textsuperscript{206} United States-Import of Certain Shrimp and Shrimp Products WT/DS58/AB/R, supra n. 12 at para 129; also Recourse to Article 21:5 DSU by Malaysia WT/DS58/R, 15 June 2001
the free trade goal is questionable, because trade would be restricted in these circumstances. Such amendments may not offer the best solution, because they would only tinker with an existing system, rather than offer the most appropriate changes to resolve the problem.

Finally, the biggest fear would be that sustainable agriculture leads to a return to protectionism in international agricultural trade with the consequential adverse effects witnessed under GATT. There are two aspects to this concern: primarily, sustainable agriculture is a nebulous concept that has not been adequately delineated in the literature in a way that allows it to form the basis of an amended rule based system.

Whilst it is true that the literature has not addressed the exact scope of the concept, it is possible to identify the resource maximisation goal and the method of balancing economic and non-economic factors used to achieve that goal. Both can then be used as a framework for regulation because they can be adapted to fit the needs of international agricultural trade. If the goal and the methodology to achieve it are clear, then the relevant rules can be constructed within that framework.

In addition, allowing members to pursue non-trade objectives through market access restrictions is protectionism in another guise. It could be argued that this is correct, but the political reality is that it is impossible to prevent members from insulating their domestic agricultural sectors from risks to health or the environment. If it is accepted that members will act in this way, then sustainable agriculture directs this action towards the altruistic goal of protecting future generations, rather than the protection of trade for its own sake. Free trade may have favourable effects, but sustainable agriculture will have favourable effects.

208 See Chapter 5 section A: 2 (thesis)
Conclusion

The successful resolution of regulation of international agricultural trade proved so difficult for the General Agreement on Tariffs and Trade (GATT) that even the mere existence of the World Trade Organisation (WTO) Agreement on Agriculture was regarded as a triumph. Although the importance of the Agreement on Agriculture and its associated agreements should not be underestimated, the agreements did not achieve the anticipated significant changes in the difficulties associated with international agricultural trade. In fact, agriculture is a problematic issue for multilateral trade negotiations once again.

This thesis analysed the reasons for the difficulties of international agricultural trade regulation from the beginning of the attempts at regulation under GATT to the renegotiation discussions in the aftermath of the failed third WTO Ministerial Meeting in Seattle in 1999. The discussion also evaluated the WTO regime’s ability to cope with international agricultural trade’s contemporary problems epitomised by food safety risks and the preservation of the environment. A number of conclusions can be drawn.

During the GATT era, significant barriers to agricultural trade were in place, so regulation concentrated on eradicating protectionism and consequently achieving free trade in agricultural products. The reason for this emphasis was inherent in GATT’s transition from only being a part of a more complex International Trade Organisation (ITO) to becoming the sole source of the rules on international trade. GATT was designed to control the economic aspects of trade, with non-economic aspects falling under the auspices of the ITO. When the ITO failed, only the GATT’s free trade rules remained and the legitimacy of its free trade approach was not questioned as it strove to establish itself as a valid international ‘organisation.’
GATT's failure to adequately regulate international agricultural trade occurred on three levels: firstly, its rules on quantitative restrictions and subsidies were too vague to be helpful; its regulatory structure was inadequate which allowed contracting parties to impose policies which protected their domestic agricultural markets. This was further exacerbated by GATT's inadequate dispute settlement mechanism as the contracting parties could block the adoption of the panel reports thereby ensuring that the 'loser' did not need to comply with the panel's findings. Finally, GATT did not address developing countries' needs, but tried to rectify their problems through piecemeal changes to its rules. However, such amendments did not facilitate greater market access for developing country agricultural products.

Whilst the three reasons for failure are important because the levels of protection on trade in agricultural products during the GATT era had clear adverse effects on developing nations, the negotiators in the Uruguay Round's multilateral trade talks assumed that these three factors were the only cause of the problems. The WTO agriculture regime is drafted on the basis that solving the three problems seen in the GATT era will resolve the difficulties of international agricultural trade regulation. Despite modifications to domestic agricultural policies in line with WTO commitments, this has not occurred.

Failure within the WTO regime occurs on two levels: firstly, the WTO regime does not effectively deal with GATT's three problems. Drafting difficulties within the rules have not been completely resolved through the amended dispute settlement mechanism: notably, the tariffication method in Article 4:1 Agreement on Agriculture permits members to artificially inflate the value of their non-tariff barriers prior to tariffication, therefore restricting market access. In addition, regulatory problems arise, as the relationship between the relevant agreements on agricultural trade has not
been resolved, despite the important ruling in the *Hormones* dispute. Finally, developing countries' needs are not being addressed which is indicated by the high incidence of barriers to international agricultural trade still in existence. This pattern is further reflected in the WTO's application to the contemporary problems of food safety and environmental preservation.

The second reason for failure is more readily apparent now that the WTO regime has been established. Notwithstanding its flaws, the WTO regime is a comprehensive regulatory structure based on an effective dispute settlement mechanism. The amended dispute settlement mechanism indicates that problems outside the scope of the WTO agriculture regime's rules remain. It can be concluded therefore that there are more reasons for failure than simply badly drafted rules: problems also occur at a more fundamental level.

GATT's rules were based on the presumption that any restrictions placed on international agricultural trade must be motivated only by contracting parties' desire to protect their domestic sectors. The WTO did not question this assumption, but based its own rules on the GATT's free trade goal and concentrated on the three obvious difficulties witnessed during the GATT era.

When members' contemporary agricultural policies are reviewed, it is possible to establish that members have complied with the WTO reduction commitments, but that they still wish to protect their domestic agricultural sectors. This is because members see 'protection' in broader terms than just protection of trade: this thesis had shown that preservation of rural communities and food security issues are equally important. Agricultural trade regulation's reliance on free trade is derived from the assumption that free trade necessarily results in welfare benefits that encompass these broader non-economic aspects. However, the early effects of the WTO regime indicate that
even when the levels of agricultural protection have been reduced, developing countries do not automatically benefit because specific measures may need to be taken to address their needs, which are currently beyond the scope of any system based on the free trade goal.

Solutions presented by members and other commentators do not adequately resolve the problems either. Several difficulties arise. On one level, there is no solution that addresses all aspects of the problem. Members' suggestions reflect the seeming political polarisation between those who support protection and those who do not, whilst academic commentators only focus narrowly on specific issues. It is important that all views are not dismissed, but the danger of relying on narrowly focussed solutions is that they only address part of the problem and may not be capable of being extrapolated to deal with all aspects. There is also a danger that applying the solution to one part of the problem only shifts the difficulties to another area. For example, concentrating on environmental regulation may be seen to be a good idea, but this may allow members to impose 'protectionist' measures on the grounds of environmental protection, which can then prevent market access for developing countries.

Economic solutions are very useful to predict the actual impact of any amendments to the rules on trade flows. Inevitably, important issues can be excluded because economic models do not try to find legal solutions and so the impact of their suggestions can be lost in their 'translation' into a regulatory framework. This is particularly problematic in the context of international agricultural trade because it is important that the solution adopted adequately accommodates both protection and non-economic issues.
Overall, the main problem with the solutions reviewed by this thesis is that they only deal with half the issue. Most presume that free trade will automatically resolve the problems and build their solutions on that presumption, but this presupposes that members always impose restrictions on international agricultural trade because they wish to protect domestic markets from, *inter alia*, enhanced competition. This is not necessarily the case for environmental protection and food safety.

Whilst it is important to recognise that members may wish to impose barriers to agricultural trade to address non-economic aspects of international agricultural trade, there is a tension between allowing such policies and ensuring that they are not disguised restrictions designed to reintroduce protectionism. The solution to the problem must acknowledge this tension and look at members’ actual motivation for the measures adopted. Consequently, an appropriate balance must be struck between drafting rules in a way that restricts the use of protectionist measures and allowing the consideration of non-economic issues, whilst recognising the significant effects that all agricultural policies have on developing countries.

This thesis has advocated the adoption of the sustainable agriculture goal as the key to solving the problems of international agricultural trade regulation. Sustainable agriculture means that members must adopt policies that balance the economic and non-economic aspects agriculture to ensure that resources are maximised for future generations. Such a solution is beneficial because it only works effectively when specific competing norms are addressed. This means it is possible to consider a policy and ask whether it is designed to protect a member’s domestic agricultural sector, or whether it has been imposed to pursue a non-economic goal. In addition, it is also possible to assess the exact effects of the particular policy on developing countries either through measuring the effects in terms of market access, or by evaluating the
effects in terms of food security or environmental preservation. Sustainable agriculture is advantageous therefore because it moves the consideration of the effects on developing countries away from market access issues towards other non-economic aspects instead of assuming that all forms of product-specific support are, by their nature, ‘bad.’

Shifting the emphasis on to a completely new goal may not be politically viable because it requires a complete re-evaluation of the way in which the international trade system operates. Members may be reluctant to accept the need to operate a twin track regulatory system where agricultural products are treated differently to manufactured ones. There are two aspects to this issue: firstly, it would be possible to move the WTO’s emphasis away from free trade towards sustainable development. Following the protests in Seattle, USA and then in Genoa, Italy over the adverse effects of ‘globalisation’ on developing countries and the environment, resting a rule system on norms that require specific recognition of these non-economic concerns would help to meet the legitimate concerns of the protesters.

Secondly, agriculture is inextricably linked to non-economic issues in a different way to manufactured products. Agricultural production has a direct impact on the shape of the rural landscape and affects the natural environment both through its influence on the climate through pesticide use, but also on the land itself due to the potential of soil erosion and loss of biodiversity. In addition, agriculture is inextricably linked to the basic human need for food. Sustainable agriculture recognises this need by permitting the use of product-specific support where it is necessary to meet food security objectives.

The solution to effective international agricultural trade regulation is complex. The WTO regime shows that doggedly pursuing the free trade goal will not of itself rectify
all the difficulties. However, in an area where economics and law are inextricably linked, it is important to recognise that a solution based on either economics or law will not succeed: both must be relied upon to provide the resolution to an issue which remains problematic even after 54 years.
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