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The Subsidies Issue in International Trade: Musings of the Economic Partnership Agreement Negotiations

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The Subsidies Issue in International Trade: Musings of the Economic Partnership Agreement Negotiations

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The Subsidies Issue in International Trade: Musings of the Economic Partnership Agreement Negotiations

By Professor Paul Kuruk†

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I. Introduction

Multilateral trade is rife with complaints about trade distortions occasioned by the massive agricultural support that rich countries provide to domestic producers, with disastrous consequences for the economies of developing countries.\(^1\) A prominent example of such a system of support is the European Union (EU) Common Agricultural Policy (CAP) under which incentives are provided to European farmers to increase agricultural productivity\(^2\) through price supports,\(^3\) export subsidies,
export credits, direct payments to farmers,\(^4\) supply controls,\(^5\) and border measures.\(^6\) About 55 billion € are spent on the CAP each year.\(^7\) The CAP budget for 2010 was 43.8 billion €, which was 31% of the EU budget and up 6.4% from the previous year.\(^8\) Underscoring its significance, the CAP has, over the last forty

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\(^3\) Guaranteed intervention prices are maintained for major commodities such as some grains, dairy products, beef and veal, and sugar. See Pressures for Change, supra note 2, at 13. There are also subsidies provided to assist with surplus storage and consumer subsidies to encourage domestic consumption of products like butter and skimmed milk powder. See id. at 12.

\(^4\) As another category of support, decoupled or direct payments are made to farmers based on the average level of payments made during a reference year, and no production is required. See Briefing Room, supra note 2, ¶ 12. Under the 2003 reforms, "in the livestock sector, headage payments (payments per animal) are made in the beef and sheep sectors based on 2000-02 average payments, with no production required." Id.

\(^5\) Until 2008, mandatory, paid, set-aside programs were utilized as supply controls to limit production. Id. ¶ 13. "To be eligible for compensation payments in the 1992 reform, producers of grains, oilseeds, or protein crops had to remove a specified percentage of their area from production." Id. The 2000 reforms "set the base rate for the required set-aside for arable crops at 10 percent. Producers with an area planted with these crops sufficient to produce no more than 92 metric tons of grain [were] classified as small producers and [were] exempt from the set-aside requirement." Id. Although no longer used, set-asides could be reinstated to combat conditions of oversupply in the future. See id.

\(^6\) "In preferential trade agreements . . . the EU satisfies domestic consumer demand while protecting high domestic prices through import quotas and minimum import price requirements. The CAP also applies tariffs at EU borders so that imports cannot be sold domestically below the internal market prices (intervention prices) set by the CAP." Id. ¶ 13. Moreover, export subsidies are provided for bulk commodities to enable the EU to remain competitive in world markets. Id. ¶ 14. Even "EU exports of processed products that contain a portion of a CAP-supported commodity also receive an export subsidy, based on the proportion of the commodity in the product and the difference between the average cost of the raw material and the world price." Id. For more explanation of the CAP, see Alan Matthews, Int’l Ctr. for Trade and Dev., How Might the EU’s Common Agricultural Policy Affect Trade and Development After 2013? (Dec. 2010); Beginner’s Guide, supra note 2.

\(^7\) EU Domestic Supports and Policy Tools Protecting European Farmers: Implications for the EPA Negotiations, GDC-Partners 1 (Aug. 2010) [hereinafter GDC-Partners].

years, "brought about a massive reversal in the agricultural trading position of the EU, transforming the world’s largest importer of temperate-zone agricultural products into the world’s second-largest exporter of food and agricultural products." Global, rich countries now subsidize agriculture at a combined total of $1 billion a day.  

However, agricultural subsidies cause distortions in world trade by stimulating overproduction, which in turn frequently yields depressive effects on world market prices as subsidizing countries export their surpluses at lower prices. The governments of developing countries generally cannot afford to pay export subsidies, and thus lose some of their export competitiveness relative to developed countries. Even more damaging, subsidies enable agricultural exports from rich countries to drive small farmers out of business even in their home countries—a development that could threaten domestic food security as well as undermine export potential.

The European Union has been negotiating with African, Caribbean, and Pacific countries (ACP countries) to replace the existing trade agreement between the parties, the Cotonou Agreement, with new ones known as Economic Partnership

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9 Pressures for Change, supra note 2, at 5.
11 See Bureau, supra note 2, § 5.6.
15 See id. at 15.
Agreements (EPAs). The objective of the EPAs, to establish free trade areas between ACP countries and the European Union, warrants liberalizing trade by eliminating tariffs and most non-tariff barriers affecting ACP-EU trade. Because the EU CAP adversely impacts the competitiveness of ACP producers, in both ACP countries and EU markets, it constitutes a significant trade barrier to ACP-EU trade. Thus, the CAP is relevant to the trade liberalization objective of the EPAs and the implications of the trade policy fall within the scope of the EPAs negotiations. Accordingly, the negotiations provide an opportunity for the ACP countries to address the perceived restrictions on access to the EU market and other trade distortions caused by the EU CAP policy.

This article examines the international rules on subsidies in order to identify remedial measures that could be included in EPAs to mitigate the adverse consequences of EU support programs. As background, Section I describes the trade-distorting effects of subsidies, as illustrated by the West African cotton sector. Section II examines the World Trade Organization (WTO) regulatory framework on subsidies and assesses the status of WTO support reduction talks, including the Cotton Initiative. Section III explains the relevance of subsidies to the trade liberalisation objective of the EPAs and notes difficulties with reaching a compromise. Section IV proposes interim measures to be explored in the EPAs, including increased transparency in the application of WTO rules, preservation of adequate policy space for ACP countries, and payment of transitional compensation for

17 The EPAs are essentially trade agreements that envisage the creation of free trade areas between the EU and ACP Countries. See id. art. 36.
18 See infra notes 270-272 and accompanying text.
19 GDC-Partners, supra note 7, at 1.
20 The CAP has been described as “a form of protectionism designed to defend European producers from cheaper products outside the EU.” CIVITAS, Agricultural Policy, supra note 8, para. 6.
harm caused by the EU support regime.

II. The Impact of Subsidies

A. Trade-Distorting Effects of Subsidies

The term "subsidy" is described by the WTO as "a financial contribution by a government or any public body within the territory of a Member... where... a benefit is thereby conferred."\(^{22}\) Measures that represent financial contributions in this sense include grants, loans, equity infusions, loan guarantees, fiscal incentives, and the provision of goods or services.\(^{23}\) Specifically extending such benefits to some producers and not to others is considered problematic under trade rules, as they could distort the allocation of resources within the economy.\(^{24}\) The trade-distorting effects of subsidies include overproduction, artificial competitiveness of subsidized commodities in domestic and external markets, and global price suppression with adverse revenue implications for the non-subsidizing countries.

In general, countries embark on subsidy programs to boost domestic production and attain self-sufficiency, thereby yielding a reduction of imports.\(^{25}\) Subsidies reduce the producer's costs, which lead to more commodities being produced than an efficient marketplace would have allowed without the distortive subsidies.\(^{26}\) However, even after attaining self-sufficiency, the stimulus from the support price in question continues to encourage production, leading to a situation where domestic supply exceeds domestic

\(^{22}\) Agreement on Subsidies and Countervailing Measures, art. 1.1, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, 1869 U.N.T.S. 401.

\(^{23}\) Id.

\(^{24}\) As the WTO explains, "The basic principle is that a subsidy that distorts the allocation of resources within an economy should be subject to discipline. Where a subsidy is widely available within an economy, such a distortion in the allocation is presumed to occur." Subsidies and Countervailing Measures: Overview, World Trade Organization, http://www.wto.org/english/tratop_e/scm_e/subs_e.htm (last visited Oct. 30, 2012).


\(^{26}\) See RAMBOD BEHBOODI, INDUSTRIAL SUBSIDIES AND FRICITION IN WORLD TRADE: TRADE POLICY OR TRADE POLITICS 11 (1994).
demand. The surplus must be directed somewhere, and is often directed towards—or dumped within—external markets, effectively transforming a subsidizing country from a former importer into a net exporter. The release of the commodity into the global market then sets off a chain of events that have implications for international trade, including the distortion of other countries’ economies.

For example, releasing a subsidized commodity into the global market affects the world price of the commodity. Where the demand for the commodity in the world market is steady or falling, the increase in the global supply brought on by subsidies can lead to a fall in the world price. Even if the price remains the same, the subsidized exports can have price-suppressive effects where the increase in global supply prevents the price of the commodity from rising naturally in a market of steady demand and declining supplies.

Subsidies also protect firms in subsidizing countries from international competition. Since subsidies artificially lower the cost of production, subsidized firms can afford to keep domestic prices at levels much lower than foreign competition. Foreign competitors, on the other hand, lacking support from their own governments which are unable to provide export subsidies, cannot afford to sell the goods they export to the subsidizing

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28 PETERS, supra note 12, at 1.
29 For example, in 2003, subsidized cotton was exported at an average of 47% below the cost of production. See SOPHIA MURPHY ET AL., INST. FOR AGRIC. & TRADE POLICY, WTO AGREEMENT ON AGRICULTURE: A DECADE OF DUMPING 2 (Feb. 2005), http://www.iatp.org/files/451_2_48532.pdf.
30 FAO Effects of Subsidies, supra note 27, ¶ 39.
31 See BEHBOODI, supra note 26, at 11.
33 Id.
34 See BEHBOODI, supra note 26, at 12.
35 See id. at 11.
36 PETERS, supra note 12, at 2.
country at prices that are lower than their costs of production. As a result, the higher-priced exports to the subsidizing country will no longer be competitive, thereby impeding the foreign competitors’ access to the subsidizing country’s market. Therefore, an effect of subsidies will be the substitution of domestic products for imported goods in the subsidizing country.

Conversely, artificially lowered costs of production allow subsidizing countries’ firms to market their goods in non-subsidizing countries at prices well below those of local competitors. In this way, subsidy programs encourage dumping of the subsidized exports. Local producers in non-subsidizing countries would not be able to match lower-priced imports and would therefore no longer be competitive, even though they may be far more efficient in production than their foreign counterparts. Faced with declining sales and/or low market prices, local farmers may eventually be forced to reduce production or even abandon production altogether.

For individual producers in the non-subsidizing country, declining sales, low prices, or business closings result in a reduction or loss of income to local farmers whose products cannot compete with the cheap subsidized imports. Where the relevant commodities constitute the main sources of livelihood of the population, the loss of income can lead to poverty and have a devastating impact on the economic and social lives of the population. On a broader national level, the country whose production has been supplanted by cheap subsidized imports

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37 See FAO Effects of Subsidies, supra note 27, ¶ 40.
38 See BEHBOODI, supra note 26, at 12.
40 Subsidies distort the economy of the non-subsidizing country when “the lower costs of subsidised products cause a misallocation of output between the foreign and domestic markets, whereby resources are diverted to less efficient producers” leading to an expansion of exports. BEHBOODI, supra note 26, at 11.
41 See, e.g., FAO Effects of Subsidies, supra note 27, ¶ 42 (explaining that subsidies sometimes lead to more efficient producers supplanting local producers).
would no longer receive income from this production when local firms go out of business. Further, the government would be unable to generate export income from viable companies that are unable to gain access to international markets. Even for firms that could compete and export their products, the depressed global market prices caused by the subsidies would further reduce the country’s revenue potential. Budgetary constraints created by constricting export revenues would limit the government’s ability both to mobilize resources for sustainable development and to adopt policies to boost economic growth, reduce poverty, and promote greater social equity.

B. Examples from the African Cotton Sector

The trade-distorting effects of subsidies can be illustrated with reference to the cotton sector, on which there is a high level of dependence by a number of African countries. In Africa, cotton is typically a smallholder crop, often the main cash crop, and is grown in rainfed land with minimal use of purchased inputs, such as chemicals and fertilizers. Thirty-three African countries are producers and net exporters of cotton. In the West and Central African (WCA) countries of Benin, Burkina Faso, Chad, and Mali (the Cotton Four), over 90% of the cotton produced is for export. Furthermore, cotton dominates these countries’ exports, representing approximately 30% of total export earnings and over 60% of earnings from agricultural exports.

Collectively, the WCA countries are the seventh-largest global

43 See FAO Effects of Subsidies, supra note 27, ¶ 41.
46 The “Cotton Problem,” supra note 44, at 1.
47 Communication from the African Group, supra note 1, ¶ 1.1.
49 Communication from the African Group, supra note 1, ¶ 2.1.
producer of cotton with approximately 15% of the share of global exports. While cotton plays a relatively minor role in the economies of developed countries, it is a critical sector in the WCA countries. Indeed, "the cotton growing and processing sector currently provides the only real option for access to cash income and employment for an estimated 10 million poor people in rural areas." Incomes and wages, in turn, "stimulate local demand and markets, and pay for education and health care for their families, and tools and inputs for cultivation." Furthermore, revenues from cotton exports make it possible for governments to improve the physical and social infrastructure in cotton-producing regions, which could include roads, schools, and health centers. Cotton therefore occupies a strategic position in the development policies and poverty reduction programs of those countries.

Although the WCA countries are low-cost producers of cotton, with costs of production less than half of those of their competition, this comparative advantage has been eroded by the trade-distorting effects of massive subsidization provided by other countries. In one year alone, assistance to U.S. cotton producers reached $3.6 billion, China's totaled $1.2 billion, while the European Union provided almost $1 billion. During the same

50 Kennedy, supra note 48, at 338. "The world's four largest producing and consuming countries are China, the United States, India, and Pakistan, with the United States, China, and India together providing over half of the world's cotton." Id. at 336.

51 Id. at 338. The United States accounts for 40% of global trade in raw cotton, with 70% of cotton grown in the United States destined for export. Id. at 337.

52 In the U.S., for example, "[c]otton production accounts for just over three-hundredths of a percent (0.034%) of U.S. GDP (2002). Cotton accounts for 1.4% of total merchandise exports and 4% of agricultural exports." CHARLES E. HANRAHAN, CONG. RESEARCH SERV., RS21712, THE AFRICAN COTTON INITIATIVE AND WTO AGRICULTURE NEGOTIATIONS 2 (2004) [hereinafter AFRICAN COTTON INITIATIVE].

53 See Communication from the African Group, supra note 1, ¶ 2.


55 Id.

56 See OXFAM, FINDING MORAL FIBER, supra note 42, at 5.

57 In 2001, the average cost of production in Benin was 31 cents per pound compared to 68 cents per pound in the United States. AFRICAN COTTON INITIATIVE, supra note 52, at 3.

period, producers in Brazil, Egypt, Mexico, and Turkey received a combined total of $110 million, while India also supported its cotton sector by an estimated $500 million.59

Increased subsidies have been linked to lower global prices, as exemplified by the finding of a WTO dispute settlement panel in 2003 that U.S. cotton subsidies had price-suppressive effects.60 One researcher has determined that the elimination of U.S. cotton subsidies between 2003 and 2007 would have increased world prices by about 10%,61 while other studies have shown impacts as high as 30%62 or as low as 2-3%.63 Going with a simple average over all models, the annual income loss to WCA countries from exports as a result of subsidies provided during the period covered by the surveys is estimated at approximately $150 million,64 while the International Cotton Advisory Committee has put the revenue loss at $250 million for the same period.65 In some cases, the income loss exceeded—and thereby negated—the values of Western aid to those countries.66 Indeed, it has been observed that

59 Id.


62 The International Cotton Advisory Committee came to the conclusion based on a study of cotton prices in the 2000-01 cotton season. See The “Cotton Problem,” supra note 44, at 8.

63 A number of factors affect these findings, including the base year used for counting U.S. payments, which are often linked to prices and rise when prices fall, and to production in other countries. See FAO Trade Policy Brief, supra note 32, at 2-3.

64 See The “Cotton Problem,” supra note 44, at 9.

65 The model used by the International Cotton Advisory Committee assumes an 11 cent per pound increase in the world price of cotton as reported in 2001-02. See AFRICAN COTTON INITIATIVE, supra note 52, at 4.

66 In 2002, while Burkina Faso received $10 million in U.S. aid, it lost $13.7 million in export earnings. Togo received $4 million in U.S. aid, but lost $7.4 million in export earnings. OXFAM, FINDING MORAL FIBER, supra note 42, at 1.
“the elimination of the measures and policies that distort the international cotton trade would help to promote cotton production and trade in the African countries, particularly in the least developed among them, thereby acting as an important catalyst for poverty reduction in the countries concerned.”

Specifically, removal of support would “reduce production [in the subsidizing countries] and consequently boost prices, allowing third world farmers to compete to earn profit on their crops.”

III. Regulation of Subsidies by the World Trade Organization

There are two basic agreements addressing the regulation of subsidies by the WTO: the Agreement on Subsidies and Countervailing Measures (SCM), which applies to all subsidies; and the Agreement on Agriculture (URAA), which applies only to agricultural subsidies.

A. The Agreement on Subsidies and Countervailing Measures

1. Financial Contributions and Specificity

Under the SCM, a subsidy exists if “there is a financial contribution by a government or any public body within the territory of a Member” and “a benefit is thereby conferred.” The agreement provides illustrations of the term “financial contribution,” such as where “a government practice involves a direct transfer of funds (e.g., grants, loans, and equity infusion), potential direct transfers of funds[,] or liabilities (e.g. loan guarantees)” or where “government revenue that is otherwise due is foregone or not collected (e.g., fiscal incentives such as tax

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67 Communication from the African Group, supra note 1, ¶ 7.
68 Baffes, Cotton and Developing Countries, supra note 45, at 1.
71 Agreement on Subsidies and Countervailing Measures, supra note 69, art. 1.1(a)(1).
72 Id. at art. 1.1(b).
73 Id. at art. 1.1(a)(1)(i).
SUBSIDIES IN INTERNATIONAL TRADE

A financial contribution is also deemed to be made where "a government makes payments to a funding mechanism, or entrusts or directs a private body to carry out one or more of the... [preceding] functions... which would normally be vested in the government and the practice, in no real sense, differs from practices normally followed by governments." In addition to financial contributions as illustrated in the Agreement, a subsidy also includes "any form of income or price support in the sense of Article XVI of GATT 1994" and "a benefit is thereby conferred."

However, to come within the scope of the SCM, a subsidy must be specific to an enterprise or industry or group of enterprises or industries. Specificity is established where "the granting authority, or the legislation pursuant to which the granting authority operates, explicitly limits access to a subsidy to certain enterprises." Specificity does not exist where "the granting authority, or the legislation pursuant to which the granting authority operates, establishes objective criteria or conditions governing the eligibility for, and the amount of, a subsidy... provided that the eligibility is automatic and that such criteria and conditions are strictly adhered to." In such a case, the "criteria or conditions must be clearly spelled out in law, regulation, or other official document, so as to be capable of verification."

Subsidies which fall within the scope of the SCM are divided into three categories: prohibited, actionable, and non-actionable; they are often referred to in the literature by the colors used for traffic lights such as red (forbidden), amber (slow down) and...
green (permitted), respectively.  

2. Prohibited Subsidies

Prohibited subsidies are subsidies contingent upon export performance, or "the use of domestic over imported goods." These subsidies are presumed to be specific and hence not subject to evidentiary proof of specificity.

Annex I of the SCM provides an illustrative list of export subsidies including: (a) direct subsidies to an enterprise based on export performance; (b) "currency retention schemes which involve a bonus on export;" (c) government-mandated "internal transport and freight charges on export shipments" that are more favorable than for domestic shipments; (d) provision of goods and services for production of exports on terms more favorable than "those commercially available;" (e) tax breaks for export enterprises; (f) tax deductions directly and indirectly related to exports above those given to products consumed domestically; (g) export credits, and "export credit guarantee[s] or insurance programs." Examples of import substitution subsidies include


84 See Agreement on Subsidies and Countervailing Measures, supra note 69, art. 3.1(a).

85 Id. at art. 3.1(b).

86 Id. at art. 2.3.

87 See generally id. at art. 2.4 ("Any determination of specificity under the provisions of this Article shall be clearly substantiated on the basis of positive evidence.").

88 Id. Annex I(a).

89 Id. Annex I(b).

90 Agreement on Subsidies and Countervailing Measures, supra note 69, Annex I(c).

91 Id. Annex I(d).

92 Id. Annex I(e).

93 Id. Annex I(f-h).

94 Id. Annex I(k).

95 Export credit guarantee or insurance programs are prohibited where they insure or provide guarantees "against increases in the cost of exported products or of exchange risk programmes, at premium rates which are inadequate to cover the long-term operating costs and losses of the programmes." Id. Annex I(j).
local content subsidies such as grants of preferences for use of domestic rather than imported products.  

3. Actionable Subsidies

An actionable subsidy is one that meets the general definition of a subsidy and has adverse effects on other members of the WTO. Such adverse effects could be shown through proof of (i) "injury to the domestic industry of another Member;" or (ii) "nullification or impairment of benefits accruing directly or indirectly to other Members;" or (iii) "serious prejudice to the interests of another Member."

To determine injury to a domestic industry, an investigation looks into the "volume of the allegedly subsidized imports, the effects of these imports on prices of the like product in the domestic market and the consequent impact of the imports on the domestic industry." Nullification or impairment occurs when the effect of a member's subsidized goods alter the market and undercut the market access of another member.

Serious prejudice is presumed to exist if a subsidy is more than five percent of the value of the product, covers operating losses of an industry or an enterprise, or constitutes "direct forgiveness of debt," including "forgiveness of government held debt, and grants

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96 See Agreement on Subsidies and Countervailing Measures, supra note 69, Annex III(I-II).
97 See id. at art. 5.
98 Id. at art. 5(a).
99 Id. at art. 5(b).
100 Id. at art. 5(c).
101 Id. at art. 11.2(iv). Generally, the SCM requires "evidence that alleged injury to a domestic industry is caused by subsidized imports through the effects of the subsidies."
102 See Agreement on Subsidies and Countervailing Measures, supra note 69, at art. 6. The SCM notes that the term "nullification or impairment" is used in the same sense it is used in Article XXIII of GATT 1994. See id. at art. 5, n.12.
103 The SCM exempts a subsidy considered to be a "one-time measure[] which [is] non-recurrent and . . . given merely to provide time for the development of long-term solutions and to avoid acute social problems." See id. at art. 6.1(c).
to cover debt repayment." Serious prejudice can be established through proof that the effect of the subsidy is

(a) to displace or impede the imports of a like product of another Member into the market of the subsidizing Member;

(b) to displace or impede the exports of a like product of another Member from a third country market;

(c) a significant price undercutting by the subsidized product as compared with the price of a like product of another Member in the same market or significant price suppression, price depression or lost sales in the same market; or

(d) an increase in the world market share of the subsidizing Member in a particular subsidized primary product or commodity as compared to the average share it had during the previous period of three years and this increase follows a consistent trend over a period when subsidies have been granted.

Factors that may preclude a finding of displacement include export restrictions imposed by the complaining Member; failure to conform to standards and other regulatory requirements in the importing country; or occurrence of natural disasters, strikes, transport disruptions or other force majeure substantially affecting production, qualities, quantities or prices of the product available

104 Id. at art. 6.1.

105 Displacement or impeding of exports can be established by proof of "a change in relative shares of the market to the disadvantage of the non-subsidized like product (over an appropriately representative period sufficient to demonstrate clear trends in the development of the market for the product concerned, which, in normal circumstances, shall be at least one year)." Id. at art. 6.4. Evidence of such "change in relative shares of the market" may include: (a) an "increase in the market share of the subsidized product; (b) the market share of the subsidized product remains constant in circumstances in which, in the absence of the subsidy, it would have declined; and (c) the market share of the subsidized product declines, but at a slower rate than would have been the case in the absence of the subsidy." Id.

106 The comparison of "prices of the subsidized products with prices of non-subsidized like product supplied to the same market" is to be made "at the same level of trade and at comparable times, due account being taken of any other factor affecting price comparability. However, if such a direct comparison is not possible, the existence of price undercutting may be demonstrated on the basis of export unit values." Id. at art. 6.5

107 Id. at art. 6.3.

108 Id. at art. 6.7.
for export from the complaining Member.\textsuperscript{109}

4. Non-Actionable Subsidies

Non-actionable subsidies are subsidies which are either not specific or meet the criteria for exemption under the SCM.\textsuperscript{110} Subsidies classified as non-actionable include: (a) assistance for research activities conducted by firms or by higher education or research establishments on a contract basis with firms;\textsuperscript{111} (b) assistance to disadvantaged regions within the territory of a Member given pursuant to a general framework of regional development;\textsuperscript{112} and (c) assistance to promote adaptation of existing facilities to new environmental requirements imposed by law and/or regulations which result in greater constraints and financial burden on firms.\textsuperscript{113}

B. The Agreement on Agriculture

1. Export Subsidies

Similar to the SCM, the URAA distinguishes between export subsidies and domestic support.\textsuperscript{114} The URAA defines exports subsidies as subsidies contingent upon export.\textsuperscript{115} They are identified in the Agreement to include: (a) direct subsidies to

\textsuperscript{109} Agreement on Subsidies and Countervailing Measures, infra note 69, at art. 6.7.

\textsuperscript{110} Id. at art. 8.1.

\textsuperscript{111} To be non-actionable, the assistance for research activities must cover not more than 75% of the costs of industrial research or 50% of the costs of “pre-competitive development activity.” Id. at art. 8.2(a).

\textsuperscript{112} A determination that a region is disadvantaged can be made only “on the basis of neutral and objective criteria, indicating that the region’s difficulties arise out of more than temporary circumstances; such criteria must be clearly spelled out in law, regulation, or other official document, so as to be capable of verification.” Id. at art. 8.2(b).

\textsuperscript{113} However, to be non-actionable, the assistance must be a “one-time non-recurring measure . . . limited to 20% of the cost of adaptation . . . not cover the cost of replacing and operating the assisted investment . . . and . . . directly linked to and proportionate to a firm’s planned reduction of nuisances and pollution.” Id. at art. 8.2(c).

\textsuperscript{114} See generally Agreement on Agriculture, infra note 70 (discussing Article 6 and its domestic support commitments and Article 9, which addresses export subsidies).

\textsuperscript{115} See id. at art. 1(e).
farmers;\textsuperscript{116} (b) sale of goods for export at prices lower than those at which the goods are sold in the domestic market;\textsuperscript{117} (c) payments based on exports;\textsuperscript{118} (d) payments to reduce the costs of marketing exports;\textsuperscript{119} (e) preferential internal and freight charges on export shipments;\textsuperscript{120} and (f) subsidies on agricultural products that are incorporated in exported goods.\textsuperscript{121}

In marked contrast to the SCM, the URAA does not deem any export subsidies to be per se illegal.\textsuperscript{122} Instead, it subjects export subsidies to limits on both value and quantity of products to be subsidized.\textsuperscript{123} Under the URAA, developed countries are obligated over a six-year period to cut export subsidies 36% by value and 21% by quantity.\textsuperscript{124} For the developing countries, the cuts are 24% and 14%, respectively,\textsuperscript{125} but over a ten year period in recognition of the principle of special and differential treatment.\textsuperscript{126} No export subsidy reduction obligations were imposed on the least developed countries, as most do not have the resources to significantly subsidize exports.\textsuperscript{127}

\textit{2. Domestic Support Subsidies}

The URAA limits domestic subsidies to differing degrees, depending on how much a subsidy distorts production and trade. While the SCM takes a definitional approach to subsidies, distinguishing between prohibited export-related and actionable

\begin{footnotesize}
\textsuperscript{116} See id. at art. 9(a).
\textsuperscript{117} See id. at art. 9(b).
\textsuperscript{118} See id. at art. 9(c).
\textsuperscript{119} Under Article 9(d), an export subsidy includes “the provision of subsidies to reduce the costs of marketing exports of agricultural products (other than widely available export promotion and advisory services) including handling, upgrading and other processing costs, and the costs of international transport and freight.” \textit{id.} at art. 9(d).
\textsuperscript{120} See Agreement on Agriculture, \textit{supra} note 70, at art. 9(e).
\textsuperscript{121} See \textit{id.} at art. 9(f).
\textsuperscript{122} See generally \textit{id.} at art. 3 (limiting subsidization to levels specified by Members).
\textsuperscript{123} See \textit{id.} at art. 3.3.
\textsuperscript{124} See \textit{id.} at art. 9.2(b)(iv).
\textsuperscript{125} See \textit{id.}
\textsuperscript{126} See Agreement on Agriculture, \textit{supra} note 70, art. 15.
\textsuperscript{127} See \textit{id.}
\end{footnotesize}
domestic subsidies, the URAA uses an effects approach.\textsuperscript{128} It examines the total trade-distorting effect of a subsidy and caps the most damaging.\textsuperscript{129} The URAA distinguishes among highly trade-distorting subsidies,\textsuperscript{130} minimally trade-distorting subsidies,\textsuperscript{131} and non-trade-distorting subsidies,\textsuperscript{132} known respectively by their vernacular names as Amber Box, Blue Box, and Green Box subsidies.\textsuperscript{133}

\textit{a. Amber Box Subsidies}

Amber Box subsidies are any domestic support measures in favor of agricultural producers that do not fall under either the Blue or Green Box categories and are considered the most trade-distorting.\textsuperscript{134} Amber Box subsidies include price-support subsidies tied to the current market price of a product or those “subsidies directly related to production quantities.”\textsuperscript{135}

Amber Box subsidies are subject to reduction commitments imposed by the URAA, unless the subsidies qualify for exemption under one of two criteria: \textit{de minimis} limitations, or Total Aggregate Measurement of Support (AMS)\textsuperscript{136} commitments.\textsuperscript{137} Amber Box subsidies are limited to 5% of agricultural production for developed countries\textsuperscript{138} and 10% for developing countries.\textsuperscript{139} These subsidies are not limited for the least developed countries. In addition, WTO members are required to reduce the use of these

\textsuperscript{128} Compare discussion supra Part II.A, with Part II.B.
\textsuperscript{129} See, e.g., WTO Fact Sheet, supra note 83 (explaining the categories of subsidies under the Agreement on Agriculture).
\textsuperscript{130} See id. at art. 6(4).
\textsuperscript{131} See id. at art. 6(5).
\textsuperscript{132} See id. at Annex 2.
\textsuperscript{133} See WTO Fact Sheet, supra note 83.
\textsuperscript{134} See id.
\textsuperscript{135} Id.
\textsuperscript{136} See Agreement on Agriculture, supra note 70, at art. 1(h) ("'Total AMS' mean[s] the sum of all domestic support provided in favour of agricultural producers, calculated as the sum of all aggregate measurements of support for basic agricultural products, all non-product-specific aggregate measurements of support and all equivalent measurements of support for agricultural products . . . ").
\textsuperscript{137} See id.
\textsuperscript{138} See id. at arts. 6(3)-6(4)(a).
\textsuperscript{139} See id. at arts. 6(3)-6(4)(b).
subsidies. For developed countries, the obligation is to reduce their annual domestic support of AMS (based on 1986-88 levels)\(^{140}\) by 20% over a six-year implementation period,\(^{141}\) beginning in 1995.\(^{142}\) Developing countries agreed to a 13% reduction in AMS over a ten-year period and least-developed countries were exempt from support reduction commitments.\(^{143}\) Therefore, for all WTO members, support measures that exceed the \textit{de minimis} limits or commitment for the relevant year would not be in compliance and would be subject to challenge.

\textbf{b. Blue Box Subsidies}

Blue Box subsidies, also referred to as "[A]mber [B]ox with conditions,"\(^{144}\) are subsidies subject to "conditions designed to reduce distortion."\(^{145}\) Subsidies that normally would be in the Amber Box are placed in the Blue Box if the support also requires farmers to limit production.\(^{146}\) For example, to qualify direct payments as Blue Box subsidies, the payments must be based "on fixed area and yields; or . . . made on 85% or less of the base level of production; or . . . [for] livestock payments . . . made on a fixed number of head."\(^{147}\) Blue Box subsidies are viewed as less trade-distorting than Amber Box subsidies as they limit rather than encourage production,\(^{148}\) and are therefore less likely to cause price-suppressive effects.\(^{149}\) Under the URAA, Blue Box subsidies are not subject to any support reduction commitments.\(^{150}\)

\(^{140}\) \textit{See} id. at Annex 3 ¶ 11.


\(^{142}\) Agreement on Agriculture, \textit{supra} note 70, at art. 1(f).

\(^{143}\) \textit{See} id. at arts. 15-16; Shumaker, \textit{supra} note 141, at 561.

\(^{144}\) WTO Fact Sheet, \textit{supra} note 83.

\(^{145}\) \textit{Id}.

\(^{146}\) \textit{See} id.

\(^{147}\) Agreement on Agriculture, \textit{supra} note 70, at art. 6(5)(a).

\(^{148}\) \textit{See} WTO Fact Sheet, \textit{supra} note 83.

\(^{149}\) \textit{See} discussion \textit{supra} Part I.A.

\(^{150}\) \textit{See} Agreement on Agriculture, \textit{supra} note 70, at art. 6.5; WTO Fact Sheet, \textit{supra} note 83.
c. Green Box Subsidies

Green Box subsidies have “no, or at most minimal, trade-distorting effects or effects on production.”\(^{151}\) To qualify, such subsidies must meet certain policy-specific criteria,\(^ {152}\) be provided through a “publicly-funded government programme... not involving transfers from consumers,”\(^ {153}\) and “not have the effect of providing price support to producers.”\(^ {154}\) Examples of Green Box subsidies contained in Annex 2 of the Agreement are: (a) general services, such as research, pest and disease control, and “infrastructural services, including electricity reticulation, roads and other means of transport, market and port facilities, and water supply facilities;”\(^ {155}\) (b) public stockholding for food security purposes;\(^ {156}\) (c) domestic food aid;\(^ {157}\) (d) certain “direct payments to producers;”\(^ {158}\) (e) “decoupled income support;”\(^ {159}\) (f) “income insurance and income safety-net programmes;”\(^ {160}\) (g) natural disaster relief;\(^ {161}\) (h) “producer retirement programmes;”\(^ {162}\) (i) “resource retirement programmes;”\(^ {163}\) (j) “investment aids;”\(^ {164}\) (k)...

\(^{151}\) Agreement on Agriculture, supra note 70, Annex 2(1).

\(^{152}\) See id. at Annex 2(2)-(13).

\(^{153}\) Id. ¶ 1(a).

\(^{154}\) Id. ¶ 1(b).

\(^{155}\) Expenditures that qualify as “general services,” must be “directed to the provision or construction of capital works only, and shall exclude the subsidized provision of on-farm facilities other than for the reticulation of generally available public utilities. [Expenditures] shall not include subsidies to inputs or operating costs, or preferential user charges.” Id. ¶ 2(g).

\(^{156}\) Under the SCM, “[f]ood purchases by the government shall be made at current market prices and sales from food security stocks shall be made at no less than the current domestic market price for the product and quality in question.” Id. ¶ 3.

\(^{157}\) However, eligibility to receive domestic food aid must be “subject to clearly-defined criteria related to nutritional objectives... [and] be in the form of direct provision of food to those concerned or the provision of means to allow eligible recipients to buy food either at market or at subsidized prices.” Agreement on Agriculture, supra note 70, Annex 2 ¶ 4.

\(^{158}\) Id. ¶ 5.

\(^{159}\) Id. ¶ 6.

\(^{160}\) Id. ¶ 7.

\(^{161}\) See id. ¶ 8.

\(^{162}\) Id. ¶ 9.

\(^{163}\) Agreement on Agriculture, supra note 70, Annex 2 ¶ 10.

\(^{164}\) Id. ¶ 11.
“environmental programmes;”\textsuperscript{165} and (l) “regional assistance programmes.”\textsuperscript{166}

Green Box subsidies are not subject to any caps or limits.\textsuperscript{167} For this reason, the Green Box has become an attractive category for subsidizing countries that seek to structure their support programs to be immune from challenge under the URAA as described below.

\textit{C. Limitations in the WTO Framework}

\textit{1. Amber Box}

The \textit{de minimis} exception of five percent from Amber Box subsidies for developed countries\textsuperscript{168} has been criticized as unnecessary or excessive, and critics argue it should either be eliminated or significantly reduced.\textsuperscript{169} Exempting support measures that do not exceed five percent of the country’s total agricultural production can have a significant trade-distorting effect, especially where the national agricultural production is huge and support measures are mostly concentrated in a few agricultural products.\textsuperscript{170} Because the \textit{de minimis} rules focus on total production and do not place limits of support per product based on levels of production of particular products, the United States, for example, with an estimated total agricultural production valued at $200 billion, can subsidize a sector such as cotton by any amount not exceeding $10 billion and not breach its support reduction commitment.\textsuperscript{171} Proposals for reform of Amber Box subsidies have centered on “how much further these subsidies should be reduced, and whether limits should be set for specific products rather than continuing with the single overall ‘aggregate’ limits.”\textsuperscript{172}

\textsuperscript{165} \textit{Id. \S 12.}
\textsuperscript{166} \textit{Id. \S 13.}
\textsuperscript{167} \textit{See} WTO Fact Sheet, \textit{supra} note 83.
\textsuperscript{168} \textit{See} Agreement on Agriculture, \textit{supra} note 70, at arts. 6(3)-(4).
\textsuperscript{169} \textit{See} LOUIS GOREUX, PREJUDICE CAUSED BY INDUSTRIALIZED COUNTRIES SUBSIDIES TO COTTON SECTORS IN WESTERN AND CENTRAL AFRICA 16 (2d ed. 2004).
\textsuperscript{170} \textit{See} discussion \textit{supra} Part I.A.
\textsuperscript{171} \textit{See} GOREUX, \textit{supra} note 169, at 16.
\textsuperscript{172} WTO Fact Sheet, \textit{supra} note 83.
2. Green Box

Criticisms have been leveled against some Green Box subsidies on the grounds that they do not meet the requisite criteria, and "the trade distortion they cause might be more than minimal" due to the large sums paid or the nature of the subsidies. The subsidies targeted by the complaints include direct payments to farmers, such as decoupled income support and government financial support for income and insurance safety-net programs, and structural assistance through investment aid.

The subsidies targeted by the complaints include direct payments to farmers, such as decoupled income support and government financial support for income and insurance safety-net programs, and structural assistance through investment aid.

Most concerns about the abuse of Green Box subsidies have focused on the effects of decoupled income support and investment aid within the Green Box. Decoupled income support in the European Union aims to account for 25 billion€, while investment aid ("support given to farmers to modernize their farms, either in the form of a direct payment, or by subsidizing interest payments") is about 5 billion€. Investment aid could lead to overproduction as it both reduces current expenses and costs of production when money is used to buy more modern and more efficient equipment. To minimize this effect, the WTO rules require that investment assistance be strictly limited to structurally disadvantaged farms and that only the amount necessary to remedy that disadvantage be given, according to clear and transparent criteria. However, the EU regulation on investment assistance omits reference to disadvantaged farms, requiring only that applicants prove they can be commercially successful.

While decoupled aid is an improvement from previous subsidy

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173 Id.
174 See Agreement on Agriculture, supra note 70, Annex 2 ¶ 5.
175 See id. ¶ 6.
176 See id. ¶ 7.
177 See id. ¶ 11.
179 Id. at 3.
180 See Agreement on Agriculture, supra note 70, Annex 2 ¶ 11.
181 See OXFAM, GREEN BUT NOT CLEAN, supra note 178, at 4.
programs, the framework for decoupled aid contains loopholes that distort trade and can lead to dumping. These loopholes are principally found in implementation regulations, which consist of updating requirements, planting restrictions, and obligations to maintain land in suitable agricultural condition. The concentration of payments and the availability of both coupled and decoupled income programs to beneficiaries tend to amplify

182 See Tim Rice, 5 Reasons Why a Comprehensive Review of Green Box Subsidies is Required Within the WTO, at 1-2, ACTION AID INTERNATIONAL, (2004), http://www.actionaid.org.uk/doc_lib/greenbox_review.pdf (explaining a decoupling-proponent’s argument, which reasons that because decoupling breaks the link between subsidy and production, it removes the farmer’s incentive to maximize production, which “effectively free[s] farmers to produce what the market and consumers want rather than what the subsidy regimes dictate”).


184 See OXFAM, GREEN BUT NOT CLEAN, supra note 178, at 5 (explaining that “farmers know[, with updating requirements,] that reference years on decoupled payments may be changed with time . . . and this may provide them with incentives to keep production levels high”). Such an incentive might be motivated by the hope that the increased production levels would become the basis for decoupled payments in future reference years.

185 See Upland Cotton, supra note 60, at 105 (explaining Brazil’s main argument, which reasons that the legislation in the U.S. and EU, restricting planting based on acreage, yields countries funneling production towards crops that are eligible for support). Significantly, the WTO panel in the Upland Cotton case has ruled that planting restrictions rendered the support payments impermissible Green Box subsidies. See id. at 118.

186 See OXFAM, GREEN BUT NOT CLEAN, supra note 178, at 4 (“The standards that have to be met to satisfy these requirements entail little more than adhering to already compulsory environmental and animal welfare legislation. In other words, provided they are not breaking the law already, farmers can meet the standards without having to change any of their practices. On the other hand, if they decide to produce nothing on that land, they are required to keep it open and prevent both erosion and coverage by trees and shrubs. To ensure this, they have to either shred or mow everything that grows on the land at least once a year. This means it is more remunerative for farmers to produce, even at a small loss, provided the loss is smaller than the costs of keeping the fallow land in good condition.”).

187 See id. at 6. Green Box subsidies, especially decoupled payments, are being concentrated in relatively few producers. Id. As a result, the effect of support is augmented, since it allows those select producers to realize economies of scale. Id. For example, in the U.K., 2% of its farmers received 20% of its payments. Id. Realization of such economies of scale can “lead to overproduction, and thus to dumping.” Id.
the distorting effects of the support measures. In Upland Cotton, the WTO panel found that direct payments of about $617 million provided to U.S. cotton farmers, which were reported as Green Box payments, did not fall within the Green Box category as such payments constituted trade-distorting domestic support.

3. Blue Box

Because Blue Box subsidies contain no limits on spending, some WTO members advocate establishing caps or reduction commitments, while others call for transferring these supports into the Amber Box. Other countries prefer to retain the Blue Box as is, viewing it as “a crucial means of moving away from distorting [A]mber [B]ox subsidies without causing too much [financial] hardship.”

The United States’ proposals to reform the Blue Box have been attacked on the ground that they would, in effect, expand the Blue Box and create substantial opportunities for trade distortion. While the Blue Box currently permits only subsidies that have a “production-limiting” function, the United States promotes inclusion of subsidies “that do not require production.” For the United States, the apparent purpose of

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188 See id. (explaining that the preceding detrimental effects of certain Green Box subsidies are magnified when coupled and decoupled support are provided simultaneously, a situation termed “partial decoupling”).


190 See WTO Fact Sheet, supra note 83.

191 Id.

192 See Briefing Note, Oxfam International, A Little Blue Lie: Harmful Subsidies Need to be Reduced Not Redefined (July 21, 2005) [hereinafter Oxfam, A Little Blue Lie], available at http://www.oxfam.org/sites/www.oxfam.org/files/blue_0.pdf (“[The United States’ proposal] would allow the USA to shield counter-cyclical payments from cuts to trade-distorting subsidies . . . [permitting the] Blue Box . . . [to] serve as a safety-valve against the pressure to reduce subsidies, and could make it possible to avoid any subsidy reduction at all.”).

193 Agreement on Agriculture, supra note 70, at art. 6.5.

redefining the Blue Box is to permit the inclusion of counter-cyclical payments (CCPs),195 of which it had been required in the Upland Cotton case to notify the WTO.196 CCPs are subsidies that are paid to producers as a safety net when commodity prices fall below specific levels.197

However, U.S. CCP programs198 have been criticized for setting price targets so high199 based on such unrealistic projections200 that payments are perpetual, rather than cyclical. Thus, they provide more than just a safety net and they may be even more trade distorting than other forms of subsidy. For example, the calculation of payments is based on current prices, thereby maintaining linkages between market conditions and subsidies. In addition, farmers are restricted from planting many crops in order to receive CCPs—a requirement that undermines the intended planting flexibility available with decoupled

195 Oxfam, A Little Blue Lie, supra note 192, at 3.
196 Andersen & Taylor, supra note 60, at 4. Though the United States never officially notified the WTO about the nature of counter-cyclical payments since their creation in 2002, the United States was expected to classify these payments as trade-distorting in the Amber Box based on the findings of the recent WTO ruling in the Brazil/U.S. cotton dispute. In the WTO case, the panel concluded that U.S. counter-cyclical payments on cotton were trade distorting and had caused damage to other cotton exporting countries by encouraging U.S. production and depressing world cotton prices. See Daniel A. Sumner, U.S. Farm Programs and African Cotton 8 (2007). Creating new criteria for the Blue Box would, in effect, allow the United States to shield counter-cyclical payments from cuts to trade-distorting subsidies. For useful analyses of the Brazil/USA cotton dispute, see William A. Gillon, The Panel Report on the US-Brazil Cotton Dispute: WTO Subsidy Rules Confront US Agriculture, 10 Drake J. Agric. L. 7, 29-30 (2005); Phoenix X.F. Cai, Think Big and Ignore the Law: US Corn and Ethanol Subsidies and WTO Law, 40 Geo. J. Int'l L. 865, 886-98 (2009).
197 Oxfam, A Little Blue Lie, supra note 192, at 3.
199 For example, while counter-cyclical payments for wheat were targeted at $3.86 per bushel in 2002, the average wheat price for the previous 15 years had been $3.22 per bushel. Market prices for wheat have not reached $3.86 for decades, except for two exceptional years in the mid-1990s. Oxfam, A Little Blue Lie, supra note 192, at 3-4.
200 It appears the “[t]arget prices and the resulting counter-cyclical payments are set by political bargaining, not by any discernible policy foundation.” Id.
Furthermore, CCPs could distort agricultural production by shielding producers from price signals, reducing risk, and encouraging increased production.

D. Stalemate in the WTO Support Reform Agenda

1. General Negotiations on Agriculture

The URAA was intended to be the first step in a series of meaningful reforms of the agricultural support regime. Accordingly, the preamble describes the Agreement as beginning "a process of reform of trade agriculture" initiated through "the negotiation of commitments on support and protection" and providing for "substantial progressive reductions in agricultural support and protection sustained over an agreed period of time, resulting in correcting and preventing restrictions and distortions in world agricultural markets."

Formal negotiations on agriculture began in early 2000 as required under the URAA. By November 2001, over 121 countries had submitted negotiating proposals. The 2001 Ministerial Conference in Doha called for comprehensive

201 Id. at 5.

202 The impact of risk reduction relates not simply to the payments themselves, but to the expectation that subsidies may expand in the future. As noted by the U.S. Department of Agriculture in explaining the economic effects of counter-cyclical payments, "economic efficiency in production is reduced because producers would not be fully responding to signals from the marketplace, but instead would be responding to market signals augmented by expected benefits of future programs and future program changes." ECON. RESEARCH SERV., Counter-cyclical Income Support Payments, supra note 198.

203 An empirical study found that counter-cyclical payments had larger production impacts than other 'decoupled' payments. Oxfam, A Little Blue Lie, supra note 192, at 5.

204 Agreement on Agriculture, supra note 70, at pmbl.

205 Id.

206 Id.

207 The URAA provided: "Recognizing that the long-term objective of substantial progressive reductions in support and protection resulting in fundamental reform is an ongoing process, Members agree that negotiations for continuing the process will be initiated one year before the end of the implementation period." Id. at art. 20. This implementation period ended in 2001.

negotiations to reduce, with a view to phasing out, all export subsidies, and for substantial reductions for supports that distort trade.\textsuperscript{209} The pillars of the agriculture negotiations were identified as market access, domestic support and export subsidies.\textsuperscript{210} No progress was made at the next Ministerial Conference in Cancun in 2003, where the talks broke down over differences in the agenda for the conference.\textsuperscript{211} However, a compromise was worked out the following year by the General Council of the WTO in a decision that has come to be known as the July Package,\textsuperscript{212} where the General Council laid down the framework for establishing modalities in agriculture.\textsuperscript{213}

Regarding domestic support, the General Council called for the overall base of all trade-distorting domestic support to be "reduced according to a tiered formula."\textsuperscript{214} \textit{De minimis} reductions were to be negotiated, taking into account the principle of special and differential treatment, although developing countries that allocated almost all their \textit{de minimis} support for subsistence and resource-poor farmers would be exempt.\textsuperscript{215} Specific guidelines were provided on the review and reform of Blue Box\textsuperscript{216} and Green

\textsuperscript{209} World Trade Organization, Ministerial Declaration of 14 November 2001, WT/MIN(01)/DEC/1, 41 I.L.M. 746, 748 (2002).

\textsuperscript{210} Id.

\textsuperscript{211} The ministerial conference ended without consensus after chairperson Luis Ernesto Derbez concluded that despite considerable movement in consultations, members remained entrenched, particularly on the Singapore issues. \textit{Day 5: Conference Ends Without Consensus}, WORLD TRADE ORGANIZATION (Sept. 14, 2003), http://www.wto.org/english/thewtoe/ministe/min03_e/min03_14sept_e.htm.

\textsuperscript{212} Doha Work Programme, Decision Adopted by the General Council on 1 August 2004, WT/L/579 (2004) [hereinafter Doha Work Programme].

\textsuperscript{213} Id. at Annex 4.

\textsuperscript{214} Id. \textsuperscript{216} 7.

\textsuperscript{215} Id. \textsuperscript{216} 11.

\textsuperscript{216} The revised Blue Box criteria will permit WTO Members to make direct payments either under production-limiting programs or programs that do not require production. Direct payments qualify as being made under production-limiting programs if they are "based on fixed and unchanging areas and yields," or are "made on 85\% or less of a fixed and unchanging base level of production," or are livestock payments "made on a fixed and unchanging number of head." On the other hand, direct payments do not require production if "such payments are based on fixed and unchanging bases and yields; or [are] livestock payments made on a fixed and unchanging number of head; and are made on 85\% or less of a fixed and unchanging base level of production." Id. \textsuperscript{216} 13. Significantly, the General Council Decision also provided that the "Blue Box
Box subsidies. On the subject of export subsidies, the General Council agreed "to establish detailed modalities ensuring the parallel elimination of all forms of export subsidies and disciplines on all export measures with equivalent effect by a credible end date."\textsuperscript{218}

Subsequently, the 2005 Hong Kong Ministerial Conference set 2013 as the end date for eliminating all export subsidies,\textsuperscript{219} stating that this was to be "achieved in a progressive and parallel manner, to be specified in the modalities, so that a substantial part is realized by the end of the first half of the implementation period."\textsuperscript{220} However, the date for the elimination of all forms of export subsidies, together with the agreed progressivity and parallelism, would be subject to confirmation "only upon the completion of the modalities."\textsuperscript{221}

In July 2006, WTO Director-General Pascal Lamy suspended the Doha Round negotiations indefinitely after talks on modalities for agricultural subsidy reductions and market access provisions collapsed.\textsuperscript{222} In his address to the heads of the trade delegations, Director-General Lamy noted that "the gap in level of ambition between market access and domestic support remained too wide to bridge."\textsuperscript{223} The United States and the European Communities support will not exceed 5% of a Member's average total value of agricultural production during a historical period" to be established in the negotiations. \textit{Id.} \textsuperscript{17}.\textsuperscript{18}

\textsuperscript{217} Green Box criteria were to be reviewed and clarified with a view to ensuring that Green Box measures have no, or at most minimal, trade-distorting effects or effects on production. Such a review and clarification would ensure that the basic concepts, principles, and effectiveness of the Green Box remained and took due account of non-trade concerns. The revised framework would include "improved obligations for monitoring and surveillance." \textit{Id.} \textsuperscript{16}.\textsuperscript{19}

\textsuperscript{218} \textit{Id.} \textsuperscript{17}.\textsuperscript{20}

\textsuperscript{219} World Trade Organization, Ministerial Declaration of 22 December 2005, WT/MIN/05/DEC, ¶ 6 (2005) [hereinafter Hong Kong Ministerial Declaration].\textsuperscript{21}

\textsuperscript{220} \textit{Id.}\textsuperscript{22}

\textsuperscript{221} \textit{Id.}


preferred “broader reform packages that would enhance market access, while developing countries, which constitute the majority of the General Body, prefer[red] to focus on decreasing subsidies provided to producers in developed countries, with little interest beyond cotton and other sensitive crops.”

No significant progress has been reported since the collapse of the talks—the agriculture negotiations in the Doha Development Agenda have practically ground to a halt, with no new agreement in sight for the reduction of support measures. At the most recent Ministerial Conference in Geneva, in December, 2011, the conference chairman bemoaned in his closing statement that “despite full engagement and intensified efforts to conclude the Doha Development Agenda single undertaking . . . the negotiations [were] still at an impasse.”

2. The Cotton Initiative

In an attempt to mitigate losses to their export trade stemming from distortions caused by support to cotton producers in other countries, Benin, Burkina Faso, Chad, and Mali (the “Cotton Four”) submitted a joint proposal to the WTO on April 30, 2003. Under the proposal, they called for a “complete phase-out of support measures for the production and export of cotton,” contending that the internal market reforms they had undertaken to make their cotton sectors more globally competitive were virtually nullified by market-distorting subsidies given by other WTO members. Proponents of the Cotton Initiative argued that if these domestic and export subsidies were eliminated, “cotton production in [their] countries would be highly profitable and

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224 Shumaker, supra note 141, at 595.
226 See World Trade Organization, Chairman’s Concluding Statement at the Eighth Ministerial Conference, WT/MIN(11)/11 (Dec. 15-17, 2011) [hereinafter Chairman’s Concluding Statement].
228 Id. ¶ 6.
229 Id. ¶¶ 3, 15.
could act as an important catalyst for poverty reduction in the countries concerned." The Cotton Initiative requested that cotton growers in the least developed countries receive compensation offsetting income lost as a result of cotton subsidies until they were completely eliminated.

The Cotton Initiative was presented to the 2003 WTO Ministerial Conference in Cancun, Mexico, with proposed implementation modalities. At the Conference, the Cotton Four called for a relatively short period of three years, from 2004 to 2006, for the elimination of subsidies in "equal annual portions [to ensure] a reduction by one-third per year of all the cotton support measures." They also proposed a transitional compensation mechanism to be linked to the subsidy reduction period such that "the longer the period, the greater the overall amount of compensation to be paid."  

However, disagreement emerged at the Cancun Ministerial Conference on whether to discuss the Cotton Initiative "as a specific and separate issue or consider it under the three pillars of the agriculture negotiations (market access, domestic support and export subsidies)." The WTO members also differed over "the question of compensation, how it should be paid (for example whether it should be development assistance) and who should handle it." As a result of the ministerial conference's collapse, no action was taken on the Cotton Initiative at Cancun; thus, the debate continued on how the discussion would fit into the Doha

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230 Id. ¶ 4.
231 Id. ¶ 7.
233 World Trade Organization, Joint Proposal WT/MIN(03)/W/2, supra note 232, at 3.
234 World Trade Organization, Committee on Agriculture Special Session, Poverty Reduction: Sectoral Initiative in Favour of Cotton, Joint Proposal by Benin, Burkina Faso, Chad and Mali, TN/AG/GEN/6, ¶ 10 (Aug. 4 2003).
236 Id. at 74.
Development Agenda.\textsuperscript{237}

The following year, the General Council of the WTO announced a compromise that had been reached in relation to the Cotton Initiative.\textsuperscript{238} As part of its July 2004 package, the General Council agreed that: (1) cotton would be addressed “ambitiously, expeditiously, and specifically” as part of the Doha Round agriculture negotiations;\textsuperscript{239} (2) a subcommittee on cotton would be created to meet periodically with the WTO Committee on Agriculture and ensure “appropriate prioritization of the cotton issue independently from other sectoral initiatives;”\textsuperscript{240} and (3) the WTO Director General would work with international organizations to direct additional resources towards development of economies where cotton has vital importance.\textsuperscript{241}

The Hong Kong Ministerial Conference in December 2005 declared that all forms of export subsidies for cotton were to be eliminated by developed countries in 2006.\textsuperscript{242} Furthermore, trade-distorting domestic subsidies for cotton production were to be “reduced more ambitiously than under whatever general formula is agreed and that it should be implemented over a shorter period of time than generally applicable.”\textsuperscript{243} Thus, the reform of trade-distorting cotton subsidies was to go farther and faster than reforms on subsidies for other agricultural commodities.

To make the phrase “more ambitiously” more concrete, the Cotton Four proposed a formula in March 2006 that called for deeper subsidies cuts for cotton if reductions for other commodities were modest\textsuperscript{244} and a timetable for making such reductions that are one-third the time for agriculture as a whole.\textsuperscript{245}

\begin{itemize}
\item \textsuperscript{237} Id.
\item \textsuperscript{238} Doha Work Programme, supra note 212, ¶ 1(b).
\item \textsuperscript{239} Id. at Annex A, ¶ 4.
\item \textsuperscript{240} Id.
\item \textsuperscript{241} Id. ¶ 1(b).
\item \textsuperscript{242} Hong Kong Ministerial Declaration, supra note 219, ¶ 11.
\item \textsuperscript{243} Id.
\item \textsuperscript{244} The formula was designed so that the cut in Amber Box subsidies for cotton are deeper than those for agriculture as a whole. See Members Mull New Details in 'Cotton Four' Proposal, WORLD TRADE ORGANIZATION (Mar. 2, 2006), http://www.wto.org/english/news_e/news06_e/cotton_2march06_e.htm.
\item \textsuperscript{245} The proposal called on WTO members to agree on a date by April 2006, before
However, while some WTO members—including the EU, China, and Australia—welcomed the new proposals, the United States objected to a discussion of the issues until it knew what would happen in the general agriculture negotiations. Since then, there has been no further significant action taken at the WTO regarding the cotton issue. At the end of the most recent Ministerial Conference in Geneva in December 2011, the conference chairman noted, in a non-binding text summarizing deliberations, the commitment of trade ministers to “on-going dialogue and engagement to progress the mandate... of the Hong Kong Ministerial Declaration to address cotton ‘ambitiously, expeditiously[,] and specifically’ within the agriculture negotiations.”

IV. Subsidies and the Economic Partnership Agreement Negotiations

A. Trade Liberalization Objective of the Economic Partnership Agreement Negotiations

The current agreement governing trade relations between the European Union and ACP countries is the Cotonou Agreement, signed on June 23, 2000, which seeks to reduce poverty and promote the sustainable development and gradual integration of ACP countries into the world economy. The Cotonou Agreement is comprised of three pillars of cooperation: political, developmental, and economic and trade. Under the economic and trade pillar, the EU and ACP countries agreed to conclude new trading arrangements compatible with WTO

the end of the Doha Round for the elimination of all trade-distorting domestic supports.

Id.

246 Id.


248 See Chairman’s Concluding Statement, supra note 226, at 2.

249 Cotonou Agreement, supra note 16, at art. 1.

250 Id. at Part 1(II).

251 Id. at Part 3(I).

252 Id. at Part 3(II).
provisions called Economic Partnership Agreements (EPAs). \(^{253}\) EPAs are expected to replace non-reciprocal trade preferences of the earlier trading arrangements, which entails the progressive removal of trade barriers between the ACP countries and the EU, "leading ultimately to reciprocal trade liberalization." \(^{254}\)

The negotiations were launched on schedule in Brussels on July 5, 2002. \(^{255}\) At the opening ministerial conference, it was decided that the negotiations would be conducted in two phases. \(^{256}\) The first phase of negotiations, which was concluded a year later, was conducted between all-ACP countries and covered horizontal issues of interest to all parties. \(^{257}\) The second phase of the negotiations is being conducted at the group level. \(^{258}\) The groups include West Africa, East and Southern Africa, the Southern African Development Community, Central Africa, and the Caribbean (CARIFORUM). \(^{259}\)

The Cotonou Agreement requires any new trade agreement negotiated between the ACP countries and the European Union to comply with WTO rules. \(^{260}\) To make the EU-ACP countries' trade WTO compatible, the ACP countries and European Union decided to restructure their preferential trading system to conform to WTO rules on regional arrangements. \(^{261}\) In this regard, Article XXIV of

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\(^{253}\) Id. at art. 37(1).


\(^{256}\) Id. ¶12.

\(^{257}\) Id.

\(^{258}\) The issues tackled in the second phase include "tariff negotiations and any other specific sectoral commitments at national or regional level as the case may be and issues of specific interest to ACP countries or regions." Id.

\(^{259}\) See ACP Guidelines, supra note 255.

\(^{260}\) The Cotonou Agreement stipulated that the European Union and the ACP countries would "conclude new World Trade Organization... compatible trading arrangements, removing progressively barriers to trade between them and enhancing cooperation in all areas relevant to trade." Cotonou Agreement, supra note 16, at art. 3 ¶ 1.

\(^{261}\) See General Agreement on Tariffs and Trade, Apr. 14, 1994, Marrakesh
GATT allows for derogations from the WTO “most-favored nation” obligation among preferential partners in regional trade agreements under which all parties have agreed to liberalize trade. Specifically, “duties and other restrictive regulations of commerce ... [must be] eliminated with respect to substantially all the trade between the constituent territories of the union or at least with respect to substantially all the trade in products originating in such territories.”

The objectives of EPAs include establishing a free-trade area among ACP countries regions and the European Union, enhancing the competitiveness of ACP countries firms in ACP countries markets, and improving access for ACP countries exports to the EU market. In general, the term “free-trade area” denotes “a group of two or more countries that have eliminated tariff and most non-tariff barriers affecting trade among themselves, while each country applies its own independent schedule of tariffs to imports from countries that are not members....” Accordingly, trade liberalization under the EPAs should not only aim for the removal of tariffs, but also for the elimination of significant non-tariff barriers. Significantly, in the Cotonou Agreement, the European Union underscored its understanding that “trade liberalization ... shall aim at improving current market access for the ACP countries.” Similarly, the ACP countries considered the goals of the EPAs to be to “improve the market access by ... addressing export subsidies and domestic support, for all agricultural products originating from ACP States.”


262 See id. at art. XXIV.

263 See id. at art. XXIV ¶ 8.


266 Cotonou Agreement, supra note 16, at art. 37 ¶ 7.

267 ACP Guidelines, supra note 255, ¶ 35 (emphasis added).
Given this consensus on the need for trade liberalization, discussions on eliminating EU subsidies or establishing policies mitigating the adverse effects of EU subsidies as part of a bid to improve market access for ACP countries appear to fall clearly within the scope of EPA negotiations.

B. Proposals on Subsidies

At the beginning of EPA negotiations, the European Union submitted its draft text on the EPA with common terms on subsidies to the various ACP regions. Under the EU proposals, each party would agree not to "introduce any new subsidy payment of which is contingent upon export or increase any existing subsidy of this nature on products destined for the territory of the other Party." If an ACP region would commit to eliminate custom duties for a given product, the European Union would undertake "to phase out all existing subsidies granted upon the exportation of that product to the territory of the [ACP region]" in accordance with modalities to be set out in an Annex. The EU proposal applied to all products covered in the WTO Agreement on Agriculture.

CARIFORUM concluded an EPA in 2008—the first ACP region to do so. Article 28 of the EU-CARIFORUM EPA reflects an agreement on subsidies that closely resembles the EU proposal, suggesting that the proposal was adopted without much negotiation by the CARIFORUM negotiators. However, in at least one ACP country, subsidies have emerged as a key issue in negotiations. For example, in early 2008, West Africa
submitted a counterproposal calling for the elimination of all subsidies and related internal support measures. Specifically, the proposal provided:

The Parties... recognize that export subsidies and certain internal support measures can create distortions in agricultural products markets, and weaken policies implemented. The [European Union] shall undertake therefore to... [eliminate the impact of]... all subsidies and internal support on products whose exportation will harm the regions' efforts to achieve sustainable agricultural development and food security.

The EU negotiators objected to comprehensive discussions on subsidies in the context of the EU-West Africa EPA negotiations, contending that the WTO was the more appropriate forum for such negotiations. They expressed their reluctance to make commitments in an EPA that exceeded the EU's obligations to the WTO. Moreover, given the political sensitivity of CAP, they advised it was unlikely that the EU would endorse an EPA requiring the termination of such a policy. However, West Africa countered by pointing out that reliance on the WTO to develop the relevant framework to govern subsidy matters arising under EPAs was not realistic given the stalemate that had developed in the WTO negotiations on subsidies. It was equally untenable to the West African region that continuing harms to its trade with the European Union due to EU subsidies could be expected to go without remedy, pending resolution of the subsidy question at the WTO.

Despite some modest advances in the EU-West Africa EPA negotiations, such as a provision for consultations on subsidy

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between West Africa and the European Union, Article 3 on Cooperation in the Areas of Agriculture and Food Security, of Chapter 6 on Agriculture, Fishing and Food Security (on file with author) [hereinafter Draft Joint Text].

275 See id.
276 Id. at 20.
277 The description that follows in this section of developments about the EPA negotiations is based largely on personal knowledge of the author who was a member of West Africa's Technical Negotiating Team.
278 Id.
279 Id.
280 Id.
281 Id.
matters, negotiations stalled in September 2010.\textsuperscript{282} That month, the European Union withdrew all previous proposals and substituted a new text billed as a fresh proposal to advance the negotiations.\textsuperscript{283} On closer examination, however, this proposal did not differ much from the one the European Union had circulated at the start of the negotiations. Like the original proposal, the September 2010 offer focused narrowly on export subsidies and did not tackle the broader question of EU domestic subsidies or other internal support mechanisms that affect the competitiveness of West African products.\textsuperscript{284} It also included the condition that West Africa reciprocate by eliminating its tariffs on categories of products that are eligible for EU export subsidies.\textsuperscript{285} Such a condition proved problematic for two main reasons: first, the condition was misplaced since there was already an international obligation imposed on WTO members under the Hong Kong Ministerial Declaration to eliminate all export subsidies by


\textsuperscript{283} The September 2010 text reads:
1. Neither party can introduce a new export subsidy nor increase existing subsidies of such nature on all products destined for the territory of the other party.
2. Regarding all products or group of products such as defined in paragraph 3 for which the West African party has undertaken to eliminate tariffs, the European Union party will dismantle all export subsidies related to such products or group of products destined for the West African region. The modalities for progressive elimination will be determined by the Joint Committee for the Implementation of the EPA.
3. This article applies to products covered by Annex I of the WTO Agreement on Agriculture. The term group of products comprises all products, including processed goods, benefiting from export subsidies with regards to the base products.
4. The present article is without prejudice to the application by the West African Party of Article 9, paragraph 4, of the WTO Agreement on Agriculture and Article 27 of the WTO Agreement on Subsidies and Countervailing Measures.


\textsuperscript{284} See id.
\textsuperscript{285} See id.
and second, some of the affected products are sensitive products for West Africa that have been placed in the category of goods not subject to liberalization by West Africa.\footnote{287}

In response, West Africa submitted a counter-proposal that would subject issues regarding subsidies to the full scope of the dispute prevention and settlement mechanisms of the EPA.\footnote{288} The proposal provided that:

With respect to other measures of support, including domestic support mechanisms and without prejudice to Articles 21, 22, and 47, the parties may proceed in accordance with the provisions of Part V on dispute avoidance and settlement of this agreement to seek to resolve concerns that either party may raise regarding the support measures of the other party.\footnote{289}

As of the time of writing, the parties have yet to agree on a compromise text on the issue of subsidies.

V. The Way Forward in EPA Negotiations

A. Interim Solutions

1. Increased Transparency

The defects of the WTO regime noted earlier in the article\footnote{290} could be remedied most effectively by eliminating or reducing the \textit{de minimis} exception applicable to the Amber Box category, and tightening the provisions on decoupled income, investment aid, and other types of support susceptible to abuse in the Green and Blue Boxes. However, given the stall in the WTO agriculture talks, such a solution may not be available in the very near future. In the face of the European Union’s continued objections to concessions in EPA negotiations, it seems unlikely that the European Union would make commitments in an EPA that could be construed as new or different from its existing WTO obligations.

Under these circumstances, the preferred approach would be to

\footnotesize{\begin{itemize}
\item \footnote{286} Hong Kong Ministerial Declaration, \textit{supra} note 219.
\item \footnote{287} See \textit{id.}
\item \footnote{288} Author Notes on EU-West Africa EPA, \textit{supra} note 283.
\item \footnote{289} \textit{Id.}
\item \footnote{290} See \textit{supra} notes 155-188 and accompanying text.
\end{itemize}}
retain the current international rules as the basic framework for EPAs while insisting on greater transparency regarding the application of those rules by the European Union as they affect its trade with ACP countries. Transparency requirements would support measures, benefitting either product categories that feature prominently in current trade between ACP regions and the European Union, or that the region has potential capacity to supply to the EU market. To this end, EPAs need mechanisms for an assessment of whether the criteria of trade-distorting measures under the WTO framework are being met by all EU subsidies in the Green Box relevant to its trade with a particular ACP region. In this regard, a Joint Subsidy Committee could be established under EPAs to investigate and address concerns about trade-distorting domestic support and to provide a forum for regular discussions on whether aspects of support are, in turn, trade-distorting.

To facilitate effective monitoring of EU support measures, the European Union should be required to provide to such a Joint Subsidy Committee more detailed information about domestic support relevant to trade with the ACP countries region than is publicly available in EU notifications to the WTO. The information should include: (a) the specific amounts allocated as support, (b) to which enterprises and groups, and (c) over what period. The European Union should also be required to provide information on the average cost of production and export prices of commodities produced on lands benefitting from this type of support. Such information could be used to support challenges to exports as dumping where the costs of production exceed export prices.

2. Securing the Necessary Policy Space

As one observer noted:

The “problem in the . . . EPA negotiations between EU and the . . . ACP countries is that the latter do not have the financial means to provide support for their farmers. Yet, the key policy tools ACP countries do use to support their farmers—tariffs, export taxes, quantitative restrictions—are largely being targeted for removal in the EPAs, creating a major imbalance in the

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291 See Agreement on Agriculture, supra note 70, at Annex 2 § 1.
negotiations, as well as in the agricultural trade landscape between EU and the ACP.\textsuperscript{292}

The case for taking domestic supports provided by the EU to European farmers into account in the EPA negotiations and to provide for ACP countries policy space has been stated quite succinctly:

Large amounts of financial supports have the same impact as the EU availing of permanent safeguards since these financial supports protect European producers from the commercial consequences [sic] of competition from imports. [sic] Additionally, they also have the impact of making EU exports artificially competitive, hence taking over ACP markets and squeezing ACP local farmers out of their own markets. ACP countries should be able to take the necessary policy measures to shield themselves from EU’s domestic supports, and also have additional policy space, rather than less policy space to manage their own agricultural sectors, as compared to the EU.\textsuperscript{293}

One method of securing policy space would be to exempt categories of products, for which the European Union provides agricultural support, from liberalization by ACP countries. Significantly, the European Union has conditioned its offer to remove export subsidies in certain sectors on the ACP regions’ liberalization of trade in those sectors.\textsuperscript{294} In effect, if not in language, the European Union has acknowledged and sought to minimize the trade-distorting effects of CAP by offering to remove support extended to EU exports to overseas markets. However, the European Union offer provides only a partial remedy by proposing a solution limited to the loss of competitiveness of ACP producers in their home markets, as it fails to address the lack of competitiveness of ACP products exported to the EU market. For ACP products that could be more competitive in EU markets, but for the existence of domestic support to competing EU products, it would be necessary to eliminate the distortion in trade by removing domestic support as well. If the European Union is not willing to withdraw domestic support then, to level the playing field, ACP countries should

\textsuperscript{292} GDC-Partners, \textit{supra} note 7, at 1.

\textsuperscript{293} \textit{Id.} at 1-2.

retain the ability to apply tariffs on categories of EU exports that benefit from EU domestic support (and compete with ACP products in EU markets) to offset the market access restrictions. In this regard, the tariffs should apply to EU exports whether or not they were also given export subsidies.

Incidentally, the continued domestic support in the EU market for EU products that compete with ACP counterparts raises serious questions about the European Union’s offer to fully open its markets under the EPAs. Given the barriers to trade associated with the EU CAP, it is wrong to assume that there would indeed be full access to the EU market while CAP is maintained, lending further support to the need for a tariff-based solution to the CAP’s trade restrictions.

In the EU-West Africa EPA negotiations, the European Union has argued that current border measures should be a sufficient safeguard against the adverse effects of EU subsidies. For example, it pointed out that placing wheat and groat in the exclusion categories of West Africa’s liberalization schedule amounts to placing a five percent tariff on imports of those products after the EPA. However, because the exclusion list affects just a few of the EU products benefitting from CAP, the argument is flawed to the extent the border measures would not apply to all imports from the EU benefitting from CAP. Besides, some of the border measures are temporary, and would expire based on a schedule established in the EPA. Moreover, in many cases, the tariffs that would be applied would be relatively

295 Regarding market access commitments under free trade agreements that are WTO compatible, the EU interprets Article XXIV of the GATT provision on reciprocal trade arrangements to require liberalization of at least 90% of the total value of trade between the EU and ACP. Thus, if the EU were to liberalize 100% of its trade as it has offered to do in the EPAs, the ACP regions would have to liberalize 80% of their trade and would therefore be able to protect only 20% of their trade with the EU. See Mayur Patel, Economic Partnership Agreements between the EU and African Countries: Potential Development Implications for Ghana, 6 (2007), http://www.realizingrights.org/pdf/EPAs_between_the_EU_and_African_Countries_-_Development_Implications_for_Ghana.pdf.

296 Author Notes on EU-West Africa EPA, supra note 283.

297 Id.

298 To meet the WTO requirement of a progressive liberalization of trade by members of a free trade area, the final EPA should provide for a gradual phasing out of tariffs within a period of time to be agreed upon by the EU and West Africa.
insignificant when compared to the huge amounts of EU support and cannot offset the trade-distorting effects of EU support.\textsuperscript{299} Border measures would be effective only if they were permanent, applied to all EU exports to West Africa benefitting from EU support, and corresponded to the value of benefits gained from CAP.

The European Union has also suggested using the food and security clause of the proposed EPA to mitigate the adverse effects of subsidies. Article 2 of the draft EU-West Africa EPA provides in relevant part:

When implementing this Agreement causes or threatens to cause difficulties in the availability of or access to the food products necessary to ensure food security, and when such a situation causes or risks causing serious difficulties for the West African Party or a State of the WA region, the WA Party or the West African State can take appropriate measures.\textsuperscript{300}

While the food and security safeguard clause would be useful in situations where exports of goods from West Africa create scarcities for domestic consumers, the provision cannot be applied to resolve harms caused by the influx of cheap products from Europe that drive out or threaten to drive out local producers.\textsuperscript{301} Therefore, it is irrelevant in addressing a major problem caused by subsidies: diminishing competitiveness of local producers.

Neither would recourse to infant industry safeguards, as advocated by the EU, be effective. The current draft EPA authorizes safeguard measures including the suspension or reduction of custom duties, increase in custom duty, or tariff quotas\textsuperscript{302} to be adopted in response to imports "in such quantities and in such conditions as may cause or threaten to cause disturbances to an emerging industry producing similar or directly competitive goods."\textsuperscript{303} However, this infant safeguard clause is limited as it is applicable for only ten years from the date of the

\textsuperscript{299} If one assumes that it costs $100 to produce a commodity in the EU, which is then dumped in the West African market for $60, facilitated by a subsidy of $50, then assessing a 5\% tariff on the declared value of the product, which will likely be less than the cost of production, cannot offset the value of the subsidy.

\textsuperscript{300} Author Notes on EU-West Africa EPA, supra note 283.

\textsuperscript{301} See OXFAM, WHITE GOLD, supra note 54, at 11-13.

\textsuperscript{302} Author Notes on EU-West Africa EPA, supra note 283.

\textsuperscript{303} Id.
agreement;304 any safeguard measures taken under the clause cannot be in place for more than four years;305 and further, no new measures can be applied to a product unless a period of at least one year had passed since the expiration of the last measure for that product.306

3. Transitional Compensation

The European Union has acknowledged that aspects of its CAP policy have adverse consequences on trade with ACP countries.307 Yet it has been reluctant to commit to mitigation in the context of its current WTO obligations.308 However, the status quo is equally unacceptable and reasonable measures must be adopted to address continuing harms caused by CAP, including provision of transitional compensation. The case for compensation is supported by a well-known principle of international law articulated by the Permanent Court of International Justice in the Chorzow Factory case, which states: “[A]ny breach of an engagement involves an obligation to make reparation.”309 As the court emphasized, “reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed.”310 In this context, compensation should not be considered as an incentive designed to stimulate production, as compensation would be assessed mainly by the magnitude of the harm and would have the same effect as

304 Id.
305 Id.
306 Id.
310 Id. at 47.
temporary retaliatory schemes available under the WTO.  

The amount of compensation could be set based on the estimated loss of income to ACP producers arising from their inability to export to the EU market or to compete in the domestic market due to the trade distorting effects of CAP policy. Thus, in sectors like the cotton industry in West and Central Africa where subsidies from developed countries have had such a devastating impact, claims for transitional compensation would be well-founded. Compensation could be paid to national governments and allocated according to priorities set by the governments to reduce poverty. Where there are concerns that such forms of compensation may not benefit the producers, funds could be channeled through structures that already exist such as coalitions of producer groups in which the producers are well-represented.

B. Securing EU Commitment to CAP and WTO Support Reforms

It would be useful to include a general commitment by the European Union to continue CAP reforms and to work in support of the subsidy reform measures discussed at the WTO in the EPA, either as part of the text or in an annexed declaration. Although a declaration would not be legally binding, it would serve to clarify the European Union’s goals in international negotiations and affirm its resolve to tackle the subject of subsidies to ensure that its CAP policy does not go against the EPA’s development objectives. Specific measures include support for: (a) eliminating or significantly reducing the five percent de minimis exception or limiting it to production of particular products rather than total production; (b) closing trade-distorting loopholes in the Green Box category; (c) providing transitional compensation for harm in

311 See GOREUX, supra note 169, at 8.
312 See OXFAM, FINDING MORAL FIBER, supra note 42, at 8-9.
313 See OXFAM, WHITE GOLD, supra note 54, at 14.
314 As observed, “[i]n Burkina Faso, the allocation of compensation could be determined by the ‘Comité de gestion de la filière’ (managing board) where producers hold a majority of the seats and compensations to producers could be delivered free of cost in the same way as the bonus is delivered today.” GOREUX, supra note 169, at 8.
315 Remedial measures include granting payments to family farming and imposing strict ceilings on the amount that an individual farm can receive in order to avoid
obvious cases, such as cotton subsidies; (d) establishing financial and technical assistance for short term needs created by domestic support policies of developed countries; (e) jump starting and fast tracking talks on cotton subsidy reform; and (f) introducing a “development box” in the URAA, thereby providing developing-country governments the flexibility to protect their farmers from dumping.

VI. Conclusion

This article has identified overproduction as one category of trade-distorting effects resulting from subsidies. Overproduction leads to a surplus that is then directed at external markets with a potentially dampening impact on global prices. The influx of cheap subsidized imports in non-subsidizing developing country markets adversely affects the competitiveness of local farmers who are then forced to cut back production or close down altogether. Viable domestic farmers will have difficulties accessing the markets of subsidizing countries because their higher priced products cannot compete against subsidized goods. Furthermore, developing country governments will suffer a decline in revenues and, thus, lose the ability to carry out necessary social and economic programs to alleviate poverty as a result of budgetary constraints.

The WTO has responded to these trade-distorting effects by adopting two agreements that essentially prohibit export subsidies and distinguish between actionable and non-actionable domestic subsidies. Under the URAA, Amber Box subsidies are

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316 This will build on a two-part strategy unveiled on February 12, 2004 by the EU Commission for an EU-Africa partnership in support of the cotton sector: “general endorsement of the West African initiative to seek a reduction of trade-distorting subsidies in cotton; and trade-related technical assistance and support for African cotton-producing countries in their efforts to consolidate the competitiveness of their cotton sector.” OXFAM, WHITE GOLD, supra note 54, at 9.

317 See id.

318 See supra notes 87-116 and accompanying text.
prohibited subject to certain limits\textsuperscript{319} while Blue Box subsidies, being transitional in nature, are permitted, subject to restrictions regarding production.\textsuperscript{320} On the other hand, Green Box subsidies that meet certain requirements are allowed as minimally or non-trade-distorting.\textsuperscript{321}

The WTO envisaged progressive reductions in the amounts of domestic support permitted under the agreements adopted in 1994.\textsuperscript{322} However, it has not been possible to reform these domestic support measures due to differences among WTO members. The refusal of the European Union to discuss the issue of subsidies outside the WTO forum has made it impossible to explore meaningful and comprehensive reforms pertaining to subsidies in the context of EPAs. Notwithstanding, this article has proposed interim solutions: increased transparency by the European Union in the application of WTO rules, preservation of adequate policy space to respond to the adverse effects of subsidies, and the provision of transitional compensation for loss of income by ACP governments affected by the CAP.

\textsuperscript{319} See supra notes 125-131 and accompanying text.
\textsuperscript{320} See supra notes 132-133 and accompanying text.
\textsuperscript{321} See supra notes 138-171 and accompanying text.
\textsuperscript{322} See Agreement on Agriculture, supra note 70, at art. 20.