
World Trade Organization

Economic Research and Statistics Division

**"AGRICULTURAL PRODUCTS" AND "FISHERY PRODUCTS" IN THE GATT AND
WTO: A HISTORY OF RELEVANT DISCUSSIONS ON PRODUCT SCOPE
DURING NEGOTIATIONS**

Cédric Pene
World Trade Organization

Xiaolu Zhu
*World Trade Organization**

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ABSTRACT: The WTO Agreement on Agriculture applies to those "agricultural products" as defined in its Annex 1. This definition expressly excludes "fish and fish products" from the scope of application of the Agreement. In light of this exclusion, the paper is intended to provide a historical account of the relationship between agricultural products and fishery products in the context of the negotiations leading to and during the GATT period up to the conclusion of the Uruguay Round, and some of its implications for WTO negotiations. The paper reviews documents emanating from past trade negotiations, including minutes and reports of meetings, Members' submissions, draft and final texts from negotiations, as well as background notes by the GATT and WTO Secretariats. The review suggests that the differentiation between agricultural and fishery products dates back to the early days of trade negotiations in the last century, even though the line between them was not consistently drawn in negotiations. Over time, the answer to the question of whether fish and fish products should be separate from agricultural products appears to have evolved with the context in which the question arose, in view of the issues at stake. In addition, the types of measures on which negotiations were focused could also help to explain, to an extent, the separation of fish and fishery products from agricultural products at the end of the Uruguay Round.

KEY WORDS: agricultural products; fish and fish products (fishery products); protective measures; tariffs; natural resources; GATT negotiations; WTO negotiations.

JEL CLASSIFICATIONS: F13, F18, N50, Q17.

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1 INTRODUCTION

1.1. The Agreement on Agriculture applies to those "agricultural products" defined as Chapters 1 to 24 of the Harmonized System (HS) "less fish and fish products", plus 13 additional categories also defined by reference to the HS nomenclature¹ Under this definition, "fish and fish products" are expressly excluded from the product scope of the Agreement, although exactly what these products are is not defined.² Several provisions of the GATT 1994 also identify "agricultural" and "fish and fishery products" as two separate categories. This distinction is reflected in the WTO negotiations, in which the negotiations on market access for fish products and fishery subsidies are conducted separately by different negotiating bodies from the negotiations relating to trade in agriculture.

1.2. In light of this distinction, this paper is intended to provide a historical account of the relationship between agricultural products and fishery products in the context of the negotiations leading to and during the GATT period up to the conclusion of the Uruguay Round, and some of its implications for WTO negotiations. Section 2 of this paper reviews the existing provisions in WTO agreements that contain references to both groups of products. Section 3 traces the early history of this relationship in pre-GATT trade negotiations, beginning with how agricultural and fishery products were treated in the period shortly before World War II. Section 4 describes the evolution of this relationship, including whether fish was considered part of agricultural products in the negotiations under the GATT, covering the period from the Ninth Session of the GATT Contracting Parties) to the end of the Uruguay Round (1994). Section 5 briefly discusses certain implications of this distinction for current trade negotiations in the WTO. Finally, Section 6 recapitulates the evolution of the relationship between "agricultural products" and "fishery products" reviewed in the preceding sections.

2 RELEVANT PROVISIONS IN THE AGREEMENT ON AGRICULTURE AND GATT 1994

2.1. Article 2 of the Agreement on Agriculture states that "[t]his Agreement applies to the products listed in Annex 1 to this Agreement, hereinafter referred

¹ Agreement on Agriculture, Article 2 and Annex 1, reproduced in Annex 1 to this paper.

² For purposes of this paper, fish and fishery products are considered to be covered by Chapter 03 and several additional Headings and Subheadings. (See para. 4.49 below and *infra* fn. 243 (referring to Product coverage for non-agricultural products, Note by the Secretariat, JOB(05)/32 (11 March 2005))

to as *agricultural products*".³ Annex 1, in turn, provides that the Agreement applies to the products under "HS Chapters 1 to 24 *less fish and fish products*"⁴, plus 13 categories of products defined by reference to specific HS Codes (4-digit) or HS Headings (6-digit). Under this definition, common examples of "agricultural products" subject to the application of the Agreement on Agriculture include, *inter alia*, farm products such as wheat, dairy, live animals and products derived from them, as well as processed products such as confectionery, alcoholic and non-alcoholic drinks and tobacco products.⁵ In contrast, "fish and fish products" are excluded from the scope of "agricultural products" as defined in the Agreement.⁶

2.2. The distinction between "agricultural products" and "fish and fish products" in the Agreement on Agriculture echoes a similar differentiation found in Article XI:2(c) of the GATT 1994, a provision that dates back to 1947.⁷ This provision excludes certain types of measures from the application of the requirement under Article XI:1 of the GATT 1994 to eliminate quantitative restrictions. Pursuant to Article XI:2(c), Article XI:1 "shall not extend to ... [i]mport restrictions on *any agricultural or fisheries product*, imported in any form, necessary to the enforcement of governmental measures" defined in the subparagraphs of that provision. By listing "agricultural" or "fisheries" product separately in the same provision, the text of Article XI:2(c) appears to indicate the views of the drafters of this provision that the two groups of products are distinct.

2.3. In a similar vein, the *Ad Note* to Article XVI:3 of the GATT 1994, concerning "the use of subsidies on the export of primary products", defines the term "primary product" as "any product of *farm, forest or fishery*, or any mineral, in its natural form or which has undergone such processing as is customarily required to prepare it for marketing in substantial volume in international trade". The

³ Emphasis added.

⁴ See *supra* fn. 2.

⁵ With respect to certain products, a line was drawn depending on the degree of processing in the production chain. Thus, partially processed products (e.g., raw hides and skins) are considered "agricultural", whereas products resulting from subsequent production stages (e.g. leather) are considered to be outside the definition of "agricultural products" under Annex 1 of the Agreement on Agriculture.

⁶ In addition to fish and fishery products, forestry products (HS Chapter 44) are also excluded, in contrast to the definition of "agriculture products" in the context of the Food and Agriculture Organization. (See *infra* fn. 38) The present paper only addresses the exclusion of fish and fishery products.

⁷ According to its Article 1, the GATT 1994 consists of, *inter alia*, "the provisions in the General Agreement on Tariffs and Trade, dated 30 October 1947, annexed to the Final Act Adopted at the Conclusion of the Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment (excluding the Protocol of Provisional Application), as rectified, amended or modified by the terms of legal instruments which have entered into force before the date of entry into force of the WTO Agreement".

juxtaposition among "farm", "forestry" and "fishery" in this provision again indicates they are regarded as distinct, in the same way as farm products (e.g., wheat, dairy, live animals and products derived from them) are differentiated from fish and fishery products under the scope of "agricultural products" as defined in Annex 1 to the Agreement on Agriculture.

2.4. Finally, it is worth recalling that, in comparison to the product scope of the Agreement on Agriculture, the product scope of the SPS Agreement is wider. Footnote 4 of Annex I to the SPS Agreement provides that, for the purpose of the definitions contained in that Agreement, "'animal' includes *fish* and wild fauna". Thus, measures subject to the disciplines of the SPS Agreement also cover those relating to fish and fish products, including measures applied "to protect animal life or health" and "to protect human life or health ... from risks arising from diseases carried by animals".

3 AGRICULTURAL AND FISH PRODUCTS IN PRE-GATT NEGOTIATIONS

3.1. The relationship between "agricultural products" and "fish and fish products" can be traced to the early days of international trade negotiations in the 20th century leading to the creation of the GATT 1947. In order to situate the evolution of this relationship in its context, this section begins with a brief discussion of certain international agreements prior to World War II, before turning to the relevant aspects of the negotiations for the International Trade Organization (ITO) and the GATT 1947.

3.1 Pre-World War II

3.2. Before World War II, a series of intergovernmental commodity agreements, each specific to one commodity or a group of closely-related commodities, provided the multilateral regulatory framework for trade in such commodities. Several of these agreements concerned agricultural commodities, such as the International Wheat Agreement of 1933⁸, the Tea Regulation Scheme of 1933⁹, and the International Sugar Agreement of 1937.¹⁰ According to a report by the

⁸ International Wheat Agreement, Aug. 25, 1933, 141 L.N.T.S. 71.

⁹ See Joseph S. Davis, "Experience under Intergovernmental Commodity Agreements, 1902-1945", *Journal of Political Economy*, Volume LIV, No. 3 (June 1946), 193, at 199.

¹⁰ International Agreement regarding the Regulation of Production and Marketing of Sugar, Series of League of Nations Publications, 1937, II. B. 8.

Interim Coordinating Committee for International Commodity Agreements¹¹, there were 12 intergovernmental commodity agreements as of 1947, including on agricultural products¹² as well as on products considered as non-agricultural products.¹³ In addition, several international agreements existed with the primary objective of curbing depletion and promoting replenishment of certain marine resources and reducing international tensions over their exploitation. These included, for example, the 1929 agreement to preserve the stocks of plaice and flounder in the Baltic Sea¹⁴, the Convention for the Preservation and Protection of Fur Seals of 1911¹⁵, and the International Convention for the Regulation of Whaling of 1931.¹⁶

3.3. Thus, until the late 1940s, international trade in commodities, both agricultural and non-agricultural was primarily regulated through product-specific agreements, and there existed no comprehensive international framework for regulating a broad group of agricultural products (or, for that matter, any other broad group of commodities).¹⁷ The issue regarding the separate treatment of fish and fish products thus did not appear to arise in that context. At the same time, it is interesting to note that marine products (including fish) received special attention in the form of international conventions relating to conservation of shared marine resources in view of their economic value, while the main considerations for the other commodities related to international trade and market functioning. As further discussed below, certain considerations regarding natural resources and conservation also played a role in subsequent negotiations relating to fish and fish products.

¹¹ See TRE/W/17/Rev.1 (7 September 1993), fn. 2.

¹² These included, for example, agreements on beef, coffee, cotton, rice, sugar, tea, tin wheat and wool.

¹³ These included, for example, agreements on rubber, timber, and petroleum. (Ibid.)

¹⁴ See Tuomas Kuokkanen, *International Law and the Environment: Variations on a Theme*, Kluwer Law International, 2002, p. 125.

¹⁵ See J. S. Davis, "Experience under Intergovernmental Commodity Agreements, 1902-1945", *Journal of Political Economy*, Volume LIV, No. 3 (June 1946), 193, at 210.

¹⁶ Convention for the Regulation of Whaling, 24 September 1931, 155 L.N.T.S. 349. Although whales and seals are marine mammals and not fish as such, the products of commercial relevance that can be derived from them are generally considered as marine products, thus falling within the same category of "marine resources" as fish and fish products.

¹⁷ Horizontal work on intergovernmental commodity agreements was also undertaken under the auspices of the League of Nations between 1927 and WWII. (See International Labour Office, *Intergovernmental Commodity Control Agreements*, (Montreal, 1943))

3.2 ITO negotiations and the creation of the GATT (1946-1948)

3.4. The Bretton Woods Conference of 1944, which established an international institution for monetary policy, recognized the need for a comparable international institution for trade to complement the International Monetary Fund and the World Bank.¹⁸ The subsequent negotiations to form an International Trade Organization (ITO) resulted in the "Havana Charter for an International Trade Organization", contained in the Final Act of the United Nations Conference on Trade and Employment held in the Cuban capital in 1947-1948 (the Havana Charter).¹⁹ While the Havana Charter never entered into force, tariff negotiations conducted in parallel to the ITO negotiations led to the creation of the GATT 1947. The latter, initially envisaged as an interim mechanism pending the establishment of the ITO²⁰, provided the legal framework for the multilateral trading system and subsequent trade negotiations until the founding of the WTO. Documents from both the ITO negotiations and those leading to the creation of the GATT may help to shed some light on the origin of the separation between "agricultural" and "fishery" products in trade negotiations.

3.2.1 ITO Charter Negotiations

3.5. Negotiations on a charter for an International Trade Organization began in 1946, when the United States circulated a proposal on the Charter²¹ in advance of the first session of the Preparatory Committee of the United Nations Conference on Trade and Employment (the Preparatory Committee).²² The Preparatory Committee convened a first session of meetings in London in October to November 1946, during which a draft Charter for the ITO (Draft ITO Charter) was prepared

¹⁸ P. v. d. Bossche and W. Zdouc, "The Origins of the WTO", *The Law and Policy of the World Trade Organization: Text, Cases and Materials*, Cambridge University Press (2017), p. 82.

¹⁹ UN Document E/CONF.2/78.

²⁰ In December 1945, the United States had invited a group of 15 countries to participate in a meeting that would negotiate tariff reductions, in parallel with the negotiation of the ITO Charter itself. The objective was to ultimately include these tariff reductions into the ITO Charter, as a first concrete outcome under the Charter. It was also agreed that an Agreement (the General Agreement on Tariffs and Trade) consisting of the tariff schedules resulting from this tariff negotiation and of relevant provisions on commercial policies of the draft Charter would enter into force on a provisional basis pending the entry into force of the Charter. (See D. Irvin, P. Mavroidis and A. Sykes, *The Genesis of the GATT*, Cambridge University Press (2009), pp. 72-97. See also paras. 3.19-3.20 below)

²¹ Report of the First Session of the Preparatory Committee of the United Nations Conference on Trade and Development (Report of the First Session), E/PC/T/33, Annexure 11.

²² The Preparatory Committee was constituted in February 1946 and entrusted with the task of "elaborating an annotated draft agenda, including a draft convention for consideration by the Conference, and suggested certain topics to be included in the agenda of the Preparatory Committee". Several working committees were established to examine various topics in detail, including Committee IV on Inter-governmental Commodity Arrangements. (Introduction, Report of the First Session, E/PC/T/33, paras. 1 and 8.)

and embodied in a report by the Committee (First Report).²³ The Report noted that the Draft ITO Charter would "receive further editing, first by a Drafting Committee, ... and again at the second session of the Preparatory Committee" scheduled to take place in Geneva in April 1947.²⁴ As discussed below, reports of meetings at both Committees regarding the following aspects of the Draft ITO Charter may provide some insight on the relationship between "agricultural" and "fishery" products: (i) product scope of, and relevant exceptions to, the provisions of the chapter on inter-governmental commodity arrangements; and (ii) the derogation excluding agricultural and fishery products from the application of the general elimination of quantitative restrictions relating to agricultural and fishery products.

3.2.1.1 Chapter on Inter-Governmental Commodity Arrangements

3.2.1.1.1 Product scope

3.6. The Draft ITO Charter contained a chapter (Chapter VII) on Inter-Governmental Commodity Arrangements (the Commodity Chapter), which called for its members to "adhere to [several] principles governing the operation of all types of intergovernmental commodity arrangements".²⁵ According to the First Report, international trade in certain primary commodities was subject to "special difficulties" not generally associated with manufactured goods²⁶, and there was a need for international agreements on the general principles to govern the use of governmental actions "restrictive of world trade and production of primary commodities".²⁷

3.7. With respect to the issue of product scope, in its commentary in the First Report, the Preparatory Committee noted the agreement among the negotiating

²³ Report of the First Session, E/PC/T/33, p.4.

²⁴ Report of the First Session, E/PC/T/33, p.4.

²⁵ Draft ITO Charter, Article 51, Report of the First Session, E/PC/T/33, p. 36. The precursor of the Commodity Chapter in the Draft ITO Charter was Chapter VI in the United States' proposed charter. The notion of "commodity" was not defined in the United States proposal, although the proposal limited the scope of its Chapter VI to primary commodities by distinguishing such commodities from manufactured goods. Article 41 of the United States proposal read:

The Members recognize that in the relationship between production and consumption of some primary commodities there may arise special difficulties different in character from those which generally exist in the case of manufactured goods

(Report of the First Session, E/PC/T/33, Annexure 11, p. 62.)

²⁶ Such special difficulties were due to "inelasticities of supply and demand, often involving the accumulation of surpluses, which cause serious hardship particularly to small producers". (Report of the First Session, E/PC/T/33, p. 19)

²⁷ Report of the First Session, E/PC/T/33, p. 19.

countries that, "subject to certain limited exceptions, [the Commodity Chapter] should apply solely to primary commodities", and that a primary commodity "is taken to be any mineral or agricultural product, including foodstuffs and forestry products."²⁸ Accordingly, Article 60 of the Draft ITO Charter, which set out the definitions of the terms used in the Commodity Chapter, defined a "primary commodity"²⁹ as "any *agricultural product* or mineral which enters world trade in substantial volume in a form customarily called primary".³⁰ In addition, the Preparatory Committee suggested that the Drafting Committee "examine the use of the terms, 'primary', 'agricultural', ' mineral', 'commodity' and 'product' *throughout the Charter* in order to ensure uniformity and consistency in their application."³¹ The Preparatory Committee also noted in the First Report that "[o]ne delegate made a reservation that the term 'agricultural products' in this context should not include fish or fisheries products."³² Records of the relevant meetings indicate that the reservation was made by the Norwegian delegate, who considered that "'agricultural products' would relate to products of the land and not to products from the sea".³³

3.8. Acting upon the Preparatory Committee's instructions from the first session, the Drafting Committee, following its meetings in January and February 1947, further specified the definition of a "primary commodity" for purposes of the Commodity Chapter.³⁴ The revised definition stated that: "[f]or the purposes of this Chapter, the term 'primary commodity' means any product of *farm, forest or fishery*, or any mineral ...".³⁵ In contrast to the definition in the Draft ITO Charter contained in the First Report, this definition replaced the words "agricultural product" with the words "product of farm, forest, or fishery", thus indicating that

²⁸ Report of the First Session, E/PC/T/33, p. 19.

²⁹ As further described below, the definition for the term "primary commodities", as adopted at the Second Session of the Preparatory Committee, was later used for the term "*primary product*" in the *Ad Note* to Article XVI:3 of the GATT 1994 on export subsidies. (See below paras. 3.9 and 4.3)

³⁰ Emphasis added.

³¹ Report of the First Session, E/PC/T/33, p. 19. (emphasis added)

³² Report of the First Session, E/PC/T/33, p. 19.

³³ Verbatim Report of the Eighth Meeting, E/PC/T/C.IV/PV/8 (19 November 1946), at p. L-8.

³⁴ Report of the Drafting Committee – 20 January to 25 February 1947 (Report of the Drafting Committee), E/PC/T/34 (5 March 1947), p. 44. In its commentary, the Drafting Committee recalled that it was requested to examine the use of the terms "primary", "agricultural", "mineral", "commodity" and "product" throughout the Charter, in order to ensure uniformity and consistency in their application, and noted its finding that the terms were properly used throughout the Charter except in some cases where amendments had been made. (Ibid., p. 38)

³⁵ The full definition reads: "the term 'primary commodity' means any product of farm, forest or fishery, or any mineral, which enters world trade in substantial volume in a form customarily called primary, and may include such a product on which minor processing has been performed in preparation for export." (Ibid., p. 44)

fishery products were regarded as distinct from products of farm. Nonetheless, the Drafting Committee noted that "[o]ne delegate reserved his position regarding the inclusion of fishery products", referring to the reservation by Norway that fishery products should *not* be regarded as a sub-group of "agricultural products".³⁶

3.9. Subsequently, following the second session of the Preparatory Committee in April to October 1947, the definition of a "primary commodity" was further revised, although the differentiation between "farm" and "fishery" products remained unchanged.³⁷ The revised definition was maintained in the final version of the ITO Charter adopted in Havana. Specifically, Article 56:1 of the Havana Charter stated:

*For the purposes of this Charter, the term "primary commodity" means any product of farm, forest or fishery or any mineral, in its natural form or which has undergone such processing as is customarily required to prepare it for marketing in substantial volume in international trade.*³⁸

Given that this term was defined "[f]or the purposes of this Charter", the same definition of the term "primary commodity" was used throughout the Havana Charter, including in several provisions on subsidies in Chapter IV on Commercial Policy that referred to this term. As further discussed below, this definition was later adopted for the term "primary product" in the *Ad Note* to Article XVI:3 of the GATT 1994 on export subsidies.

3.2.1.1.2 Exception relating to conservation

3.10. By the time of the ITO Charter negotiations, the protection of the products of the sea had long been an area of international regulation. While international conventions in the late 19th century were primarily aimed at preventing disputes in boundary waters, scientific studies began to support the establishment of

³⁶ Ibid.

³⁷ See Report of the Second Session of the Preparatory Committee of the United Nations Conference on Trade and Development (Report of the Second Session), E/PC/T/186 (10 September 1947), p. 42, Article 53.

³⁸ Havana Charter, UN Document E/CONF.2/78, p. 69. (emphasis added) It may be interesting to compare this definition with that adopted by the Food and Agriculture Organization (FAO) around the same time. The FAO actively participated as an observer in negotiations leading to and during the GATT period, especially in relation to Inter-Governmental Commodity Arrangements. (See Report of the Drafting Committee, E/PC/T/34 (5 March 1947), p. 1) The FAO Constitution, enacted on 16 October 1945, set out the definition still in use today, whereby "the term 'agriculture' and its derivatives *include* fisheries, marine products, forestry and primary forestry products". (FAO Constitution, Article I.1 (available at <http://www.fao.org/3/K8024E/K8024E.pdf>, at p. 3). Despite this definition, the General Rules of the FAO make it clear that, for purposes of the rules applicable to the FAO Committee on Agriculture, "the term 'agriculture' *does not* include fishery and forestry matters which are within the terms of reference of the Committee on Fisheries and the Committee on Forestry respectively." (FAO General Rules of the Organization, Rule XXXII.7, available at <http://www.fao.org/3/K8024E/K8024E.pdf>, p. 54 (emphasis added))

international conservation regulations in the early 20th century.³⁹ Examples of the latter include agreements regarding the prevention of overfishing in specific oceans⁴⁰, and those relating to the exploitation of a particular marine species.⁴¹ Commercial interests appear to have been the main reasons that justified the protection of living resources, as the purpose of such regulation was to preserve marine resources that were useful due to their economic value.⁴²

3.11. Against this background, discussions regarding certain exceptions under the Commodity Chapter of the ITO Charter suggest that natural resources, including but not limited to fisheries resources, were regarded as deserving special attention owing to concerns over conservation. During the first session of the Preparatory Committee, participants discussed the applicability of the Commodity Chapter on conventions aimed at protecting natural resources from exhaustion. The Preparatory Committee noted the "general agreement" that one of the objectives of the Inter-Governmental Commodity Arrangements was "to maintain and develop the natural resources of the world and protect them from unnecessary exhaustion"⁴³, as specified in Article 47 of the Draft ITO Charter.⁴⁴ In light of this objective, the Preparatory Committee called on the Drafting Committee to further examine the wording of the Commodity Chapter, noting, among other things, that the arrangements envisaged in this Chapter were "*not intended to ... apply to international fisheries conventions*".⁴⁵ In view of this instruction, the Drafting Committee revised the list of exceptions under the Commodity Chapter to include a provision stating that the Commodity Chapter "shall not apply", inter alia, "to international fisheries or wildlife conservation agreements with the sole objective of conserving and developing these resources".⁴⁶

³⁹ See Tuomas Kuokkanen, *International Law and the Environment: Variations on a Theme*, Kluwer Law International (2002), pp. 122-124.

⁴⁰ Examples include the 1921 agreement between Canada and the United States for the preservation of the halibut fisheries of the Northern Pacific Ocean, the 1929 agreement to preserve the stocks of plaice and flounder in the Baltic Sea, and the 1946 convention to regulate fisheries in the Atlantic and Arctic oceans. (See *ibid.*, pp. 124-125).

⁴¹ Examples include the 1911 Convention for the Preservation and Protection of Fur Seals, and the 1946 International Convention for the Regulation of Whaling. (See *ibid.*, pp. 127-130)

⁴² See *ibid.*, pp. 120-121.

⁴³ Report of the First Session, E/PC/T/33, p. 19.

⁴⁴ *Ibid.*, p. 35.

⁴⁵ *Ibid.*, p. 19. (emphasis added)

⁴⁶ Report of the Drafting Committee, E/PC/T/34, p. 43; see also Report of the Drafting Committee – Chapter VII Inter-Governmental Commodity Arrangements, E/PC/T/C.6/103 (24 February 1947), p. 31.

3.12. Following the second session of the Preparatory Committee, this provision was removed from the list of exceptions, while another exception regarding conservation, albeit limited to "commodity control agreements"⁴⁷, was added. Pursuant to this exception, "[t]he provisions [concerning inter-government commodity control agreements] shall not apply to commodity control agreements found by the [ITO] to relate solely to the conservation of exhaustible natural resources."⁴⁸ In the final version of the ITO Charter adopted in Havana, however, the exception relating specifically to conservation of fisheries resources (together with migratory birds and wild animals) was added to the Commodity Chapter⁴⁹, following Norway's proposal.⁵⁰ It stated that the provisions of the Commodity Chapter "shall not apply to ... any inter-governmental agreement relating solely to the conservation of fisheries resources, migratory birds or wild animals", provided that certain conditions are met.⁵¹

3.2.1.2 Derogation from the General Elimination of Quantitative Restrictions

3.13. Article 19 of the ITO charter proposed by the United States before the first session of the Preparatory Committee may be regarded as the precursor of Article XI of the GATT 1994. Article 19:1 of the US proposal, in the chapter entitled "General Commercial Policy", set out the rules concerning general elimination of quantitative restrictions, while Article 19:2 of the proposal excluded certain types of measure from the scope of Article 19.1. Article 19:2(e), in particular, provided that the rules set out in Article 19:1 "shall not extend to ... import restrictions *on*

⁴⁷ A commodity control agreement was defined as an agreement involving the regulation of production, quantitative control, or prices of a primary commodity. Specifically, Article 58 of the draft text contained in the Report of the Second Session stated:

a commodity control agreement is an inter-governmental agreement which involves: (a) the regulation of production or the quantitative control of exports or imports of a primary commodity and which has the purpose or might have the effect of reducing, or preventing an increase in, the production of, or trade in, that commodity; or (b) the regulation of prices.

(Report of the Second Session, E/PC/T/186 (10 September 1947), p. 44)

⁴⁸ *Ibid.*, p. 46. See also Report of Sub-Committee on the Commodity Chapter, E/PC/T/W/228 (27 June 1946). According to the latter, the new text of the exceptions "is designed to graduate the extent to which certain types of agreement are to be excepted from" the Commodity Chapter, and to "bring conservation agreements partly within the provisions of" this Chapter. (Report of Sub-Committee on Chapter VII, E/PC/T/W/228, p. 8)

⁴⁹ The Commodity Chapter was contained in Chapter VI of the Havana Charter.

⁵⁰ UN Conference on Trade and Development, Fifth Committee: Inter-Governmental Commodity Agreements, Draft Charter, Norway: Proposed Amendments, E/CONF.2/C.5/3/Add.10 (6 December 1947). Norway explained that, in its view, the exception relating to fisheries should be made distinct from the exception regarding "exhaustible natural resources" because "[f]isheries might be considered rather as renewable than as exhaustible resources". (UN Conference on Trade and Development, Fifth Committee: Inter-Governmental Commodity Agreements, Summary Record of the Seventh Meeting, E/CONF.2/C.5/SR.7 (12 December 1947), p. 2) Norway's proposal was supported by the United States. (*Ibid.*, p. 3)

⁵¹ Havana Charter, UN Document E/CONF.2/78, Chapter VI, Article 70.1(d).

any agricultural product, imported in any form, necessary to the enforcement of" specific governmental measures defined in that provision.⁵² Thus, unlike Article XI:2(c) of the GATT 1994, the precursor to this provision as set out in the United States' proposal contained no explicit differentiation between "agricultural" and "fisheries products".⁵³

3.14. The United States' proposal on the general elimination of quantitative restrictions and the relevant derogations therefrom were reflected in Article 25 of the Draft Charter contained in the First Report of the Preparatory Committee. In the Draft Charter, however, the terms "or fisheries products" were added to the scope of the derogation discussed above, following discussions at the first session of the Preparatory Committee⁵⁴ As a result, Article 25:2(e) of the Draft Charter in the First Report provided that the provisions on the general elimination of quantitative restrictions "shall not extend to ... [i]mport restrictions on any agricultural or fisheries product, imported in any form, necessary to the enforcement of governmental measures" defined in that provision.⁵⁵ In its commentary in the First Report, the Preparatory Committee noted "the suggestion that there should be an exception permitting import restrictions on *agricultural or fisheries* products to accompany measures restricting the domestic production or sale of like products and to remove a temporary domestic surplus".⁵⁶ More specifically, according to the Verbatim Report of the meeting where this was discussed, the Rapporteur noted that he added the words "or fisheries", which was a point raised by the United Kingdom delegation, as he "saw no challenge to that

⁵² Report of the First Session, E/PC/T/33, Annexure 11, p. 37.

⁵³ The notion of "shortage of foodstuffs" in Article XI:2(b) of the GATT 1994 also finds its origin in the US proposal. Its Article 19:2(b) stated: "[e]xport prohibitions or restrictions temporarily imposed to relieve conditions of distress which are local to the exporting country and which are caused by severe shortages of foodstuffs or other essential products". (Report of the First Session, E/PC/T/33, Annexure 11, p. 57) The question of whether fish products constituted foodstuffs does not seem to have been discussed.

⁵⁴ See Report of the First Session, E/PC/T/33, pp. 12 and 29.

⁵⁵ Report of the First Session, E/PC/T/33, p. 29. (emphasis added) Specifically, these were defined as "measures which operated (i) to restrict the quantities of the like domestic product permitted to be marketed or produced; or (ii) to remove a temporary surplus of the like domestic product by making the surplus available to certain groups of domestic consumers free of charge or at prices below the current market level". (Ibid.)

⁵⁶ Report of the First Session, E/PC/T/33, p. 12. (emphasis added) This paper is not intended to address the legal distinction drawn in certain disputes between "exceptions" (such as the general exception of Article XX of the GATT 1994) and "limitations of the scope of an obligation" (such as Article XI:2(a)) of the GATT 1994, which begins with the same opening sentence as Article XI:2(c). (See e.g. Appellate Body Reports, *China – Raw Materials*, para. 334; *Canada – Renewable Energy / Canada – Feed-in Tariff Program*, fn 416; and *Indonesia – Import Licensing Regimes*, para. 5.78) In view of this distinction, when discussing Article XI:2(c) and its precursor provisions, the paper will refer to the word "exception" only when quoting the historical documents in which it was used.

addition".⁵⁷ At the same time, "one delegate", i.e. Norway, "took the position that the exception should cover only agricultural products", and not fishery products.⁵⁸ The Preparatory Committee further noted that, while "[t]here was wide agreement for the view that a clause on these lines was desirable", "two delegates proposed that, in order to give similar protection to agricultural or underdeveloped countries, the exception should not be confined to agricultural and fisheries products".⁵⁹

3.15. The debate as to the desirability and scope of this derogation from the general elimination of quantitative restrictions continued at the second session of the Preparatory Committee, including discussions regarding whether it should be extended to manufactured goods.⁶⁰ Records of these discussions indicate that some delegates viewed agricultural and fishery products as *sharing certain common features* that differentiated them from manufactured goods. Such common features were regarded as the rationale for granting the derogation to agricultural and fishery products only, without extending it to manufactured goods. For example, the delegate from the United Kingdom made the following observation:

[i]t is desired to deal with a particular situation of difficulty which affects agriculture and fisheries ... [namely,] that in agriculture and fisheries you have to deal with the precious bounty of nature, which will sometimes give you a huge catch of fish or a huge crop, which knocks the bottom out of prices. You also have the phenomenon peculiar to agriculture and fisheries of a multitude of small unorganised producers that cannot organise themselves. It often happens that the Government has to step in to organise them. But if it does so, it cannot allow the results of its organisation to be frustrated by uncontrolled importers. That is, as we see it, the 'raison d'etre' of this paragraph. ... [C]ertain

⁵⁷ Verbatim Report of the Fourth Meeting of the Sub-Committee of Committee II on Quantitative Restrictions and Exchange Control. (E/PC/T/C.II/QR/PV/4 (15 November 1946), p. 14)

⁵⁸ Ibid. This appears to be explained by Norway's export interests in fish. (See also para. 4.8 below).

⁵⁹ Ibid. For instance, Chile advocated for extending the provision to cover measures protecting underdeveloped industries. (See, e.g., Report of the First Session, E/PC/T/33, p. 22; and Verbatim Reports of the Fourth and Fifth Meetings of the Sub-Committee of Committee II on Quantitative Restrictions and Exchange Control, E/PC/T/C.II/QR/PV/4 (15 November 1946), p. 13, and E/PC/T/C.II/QR/PV/5 (18 November 1946), p. 77)

⁶⁰ Countries such as Chile, China, and Cuba suggested not confining the provision to agricultural and fisheries products so as to provide the manufacturing industry in developing countries similar protection. In contrast, the United States, the United Kingdom, France, and Brazil supported the provision being limited to agricultural and fishery products. Closely related to this debate, the participants also discussed the conditions attached to the use of such import restrictions, with some delegations willing to allow governments more flexibility while others favouring a limited recourse to such measures. (See e.g., Verbatim Report of the Nineteenth Meeting of Commission A, E/PC/T/A/PV/19 (27 June 1947), pp. 25, 28-29, 32, and 40; Note of the Netherlands Delegation with regard to the Proposed Abolishment of Quantitative Restrictions, E/PC/T/C.II/21 (28 October 1946); Amendments proposed by the Delegate for India, E/PC/T/C.6/W.16 (23 January 1947); Amendment proposed by the Cuban Delegation, E/PC/T/W/194 (13 June 1947), p. 1; Wording Suggested by the Chinese Delegation, E/PC/T/W/260 (5 August 1947), p. 1; and Observations on "Quantitative Restrictions" by the Chinese Delegation, E/PC/T/C.II/34 (30 October 1948))

other Delegations have suggested that this should apply, if it be adopted, to industry as well as agriculture. The answer to that, I think, is that industry is in quite a different case. It does not suffer from the *capricious bounty of nature*...⁶¹

3.16. The term "in any form" in the draft text of this provision was also debated among the participants. Similarity between agricultural and fishery products was again noted in this context, as it related to problems posed by imports of products in their processed forms. Certain delegations considered that restrictions on domestic production could be made ineffective by unrestricted imports of processed products. For instance, the delegate from the United Kingdom noted that measures to regulate landings of fresh fish caught by domestic fishing vessels to prevent an excessive supply would not be effective if the government could not at the same time regulate imports of fish at the next stage of processing (e.g., smoked fish).⁶² Similar considerations would also apply to agricultural products in their primary and processed forms.

3.17. During these discussions, the Norwegian delegate, while recognizing the necessity to distinguish between agricultural products and manufactured goods, considered that fishery products should not come under this provision, and should instead be regulated separately through a commodity agreement on fishery products.⁶³ In addition, a request made by Chile to exclude whales from the fisheries products was opposed by the United Kingdom. It was finally agreed that the decision as to whether whales were included within fisheries products should be made by the ITO when it was established.⁶⁴

⁶¹ Verbatim Report of the Nineteenth Meeting of Commission A, E/PC/T/A/PV/19 (27 June 1947), p. 42. (emphasis added)

⁶² Verbatim Report of the Nineteenth Meeting of Commission A, E/PC/T/A/PV/19 (27 June 1947), p. 15. According to the delegate from the United Kingdom:

It may become necessary for us in the United Kingdom to regulate the landings of fresh fish from British fishing vessels, so as to avoid as far as possible the glut landings of fish that ... make the price ... suddenly collapse. In these circumstances, we should [have to] regulate ... imports within the provisions of this Article so as to counterbalance the regulation of the landings of the home caught fish. Clearly, it is no use regulating the landings of home caught fish, if fish caught by other countries' fishing boats can be brought in and produce those gluts which the scheme would be designed to avoid. ... [This was], because in the first place the fresh fish is a raw material from which the smoked fish is made, and secondly, because the smoked fish competes directly with the consumer of the fresh fish.

(Ibid.)

⁶³ Ibid., p. 35.

⁶⁴ Verbatim Report of the Fortieth Meeting of Commission A, E/PC/T/A/PV/40(1) (15 August 1947), pp. 11 and 13-15.

3.18. The discussions in the second session of the Preparatory Committee, described above, did not result in any changes to the product scope of this provision. Thus, the words "agricultural or fishery products, imported in any form" were maintained in the draft ITO Charter following the second session. A clarification of the term "in any form" was added, however, such that the term "covers the same products when in an early stage of processing and still perishable, which compete directly with the fresh product and if freely imported would tend to make the restriction on the fresh product ineffective".⁶⁵ The other conditions for imposing the import restrictions covered by the provision were also revised.⁶⁶ The text of this provision (including its explanatory note) following the second session of the Preparatory Committee is identical to that in Article XI:2(c) of the GATT 1994.⁶⁷

3.2.2 GATT 1947 Negotiations

3.19. During the ITO Charter negotiations, 23 members of the Preparatory Committee decided to negotiate tariff concessions among themselves and established a sub-committee for this purpose. The negotiations on tariff concessions resulted in the signing of the GATT on 30 October 1947 (the GATT 1947) by its 23 contracting parties. The GATT 1947 entered into force on 1 January 1948 under a "Protocol of Provisional Application"⁶⁸, whereby the signatory nations undertook to apply fully Part I and Part III of the GATT 1947, and to apply Part II of the GATT 1947 "to the fullest extent not inconsistent with existing legislation".⁶⁹ While negotiations on the ITO charter continued in parallel and were concluded with the signing of the Havana Charter in March 1948, the

⁶⁵ Report of the Second Session, E/PC/T/186, p. 20.

⁶⁶ Ibid.

⁶⁷ This provision and its explanatory note were further revised in the final version of the ITO Charter adopted in Havana, although the product scope remained the same. (See Havana Charter, UN Document E/CONF.2/78, Article 20:2(c) and ad Note. See also Report of Working Party No. 6 on Item 24 (Geneva Draft Note), E/CONF.2/C.3/E/W.16/Add.1 (1 February 1948))

⁶⁸ 55 U.N.T.S. 308. See also "GATT 1947 and the gruelling task of signing", at https://www.wto.org/english/tratop_e/gatt_e/task_of_signing_e.htm.

⁶⁹ Protocol of Provisional Application (55 U.N.T.S. 308), Article 1(a) and (b). The legal technique of "provisional application" was chosen to avoid the necessity of changes in the domestic legislation of the contracting parties, or of ratification by legislative organs, where such was required under domestic law. The provisional application and the priority given to "existing legislation" over the obligations under Part II of the GATT, however, have had little practical effect. (See *International Encyclopaedia of Comparative Law, Volume XVII: State and Economy*, Chapter 25: Universal Economic Organizations, by Ernst-Ulrich Petersmann, Christian Tomuschat, and Albert Bleckmann, (Tübingen: J.C.B. Mohr (Paul Siebeck) and Alphen a/d Rijn: Sijthoff & Noordhoff, 1981), p. 8)

Havana Charter never entered into force, primarily because the United States Senate did not ratify it.

3.20. Thus, although the ITO did not come into existence, the GATT 1947 survived despite being initially conceived as an interim measure. However, most of the draft ITO Charter, including its Chapter VI on intergovernmental commodity agreements, did not make it into the text of the GATT 1947.⁷⁰ The ITO Charter provisions retained by the GATT 1947 consisted of those found in Chapter IV, i.e. the Chapter on General Commercial Policy, in the version of the Draft Charter following the Second Session of the Preparatory Committee.⁷¹ One of these provisions concerned the general elimination of quantitative restrictions and related provisions excluding its application, including that regarding "agricultural or fishery products" as discussed above.⁷² This was the only provision in the GATT 1947 that specifically referred to these products. Two provisions of Chapter IV⁷³, relating to export subsidies for primary commodities, were however not included in the GATT 1947.⁷⁴

4 "AGRICULTURAL" AND "FISHERY" PRODUCTS IN GATT NEGOTIATIONS

4.1. This section follows the evolution of the relationship between "agriculture products" and "fish and fishery products" under the GATT during the following periods: (i) from the Ninth Session of the GATT Contracting Parties (GATT Session) to the Dillon Round; (ii) from the 1963 Ministerial Meeting to the Kennedy Round; (iii) from the 24th GATT Session to the Tokyo Round; and (iv) from the 34th GATT Session to the Uruguay Round. Records from these periods indicate that, as the

⁷⁰ A link was nevertheless kept through the exception provided in Article XX (h) of the GATT adopted in 1947 regarding measures "undertaken in pursuance of obligations under inter-governmental commodity agreements conforming to the principles approved by the Economic and Social Council of the United Nations in its Resolution of 28 March 1947". (The General Agreement on Tariffs and Trade, 30 October 1947, 55 U.N.T.S. 194, Article XX(h)). The Resolution of 28 March 1947 stated, in relevant part, that pending the establishment of the ITO, "members of the United Nations adopt as a general guide in intergovernmental consultation or action with respect to commodity problems...the principles laid down" in the Commodity Chapter appended to the Report of the First Session of the Preparatory Committee. (Resolution of the Economic and Social Council on Establishing an Interim Co-Ordinating Committee for International Commodity Arrangements, E/PC/T/54 (15 April 1947)) This exception and its Ad Note, albeit in revised language, is also contained in the GATT 1994.

⁷¹ See Report of the Second Session, E/PC/T/186, Part II. The amended text contained in the Havana Charter was therefore not taken into account in the GATT 1947.

⁷² GATT text Lake Success, New York 1947 (55 U.N.T.S 194), p. 23.

⁷³ Articles 27 and 28 of the Havana Charter.

⁷⁴ In contrast to Article XVI of the GATT 1994, Article XVI of the GATT signed in 1947 contained only its present-day paragraph 1, and not the additional provisions on export subsidies found in Section B of Article XVI of the GATT 1994. As further discussed below, these additional provisions, together with the Ad Note defining the term "primary product" were added following the Ninth Session of the GATT Contracting Party. (See paras. 4.2-4.3 below)

focus of trade negotiations shifted progressively towards developing specific disciplines for agricultural products, the need for a defined scope of products subject to these negotiations also became increasingly prominent.

4.1 From the Ninth Session of the GATT Contracting Parties (1955) to the Dillon Round (1960-1962)

4.1.1 (Re-)introduction of the definition of "primary product"

4.2. The Ninth GATT Session took place between October 1954 and March 1955, at which the GATT Contracting Parties reviewed the operation of the GATT and adopted several amendments. One of the changes to the GATT concerned the inclusion in Article XVI of the disciplines on export subsidies and the limited exceptions for primary commodities, as previously envisaged in the General Commercial Policy Chapter of the Havana Charter.⁷⁵ As a result of these discussions, the Contracting Parties approved the Protocol amending the text of Article XVI, thereby adding to Article XVI a new section: "Section B – Additional provisions on Export Subsidies", i.e., paragraphs 2 to 5 of the current text of Article XVI, together with the *Ad Notes* to Article XVI.⁷⁶

4.3. In Article XVI, Section B, of the revised GATT, the term "primary commodity" used in the Havana Charter was replaced by the term "primary product". The explanatory note of this provision, i.e. *Ad Note 2* to Section B, introduced a definition of "primary product" that is identical to the definition of a "primary commodity" in the Commodity Chapter of the Havana Charter. As noted above⁷⁷, *Ad Note 2* reads that: "[f]or the purpose of Section B, a 'primary product' is understood to be any product of *farm, forest or fishery*, or any mineral, in its natural form or which has undergone such processing as is customarily required to prepare it for marketing in substantial volume in international trade".⁷⁸

4.4. It is also worth noting that attempts were initiated during this period to resurrect provisions of Chapter VI of the Havana Charter on intergovernmental

⁷⁵ These disciplines were set out in Articles 27 and 28 of the Havana Charter, which were not among those provisions initially retained by the GATT in 1947. See also "Analysis of the drafting history of article XVI and of the work of past panels and working parties as regards subsidies on agricultural products", GATT Secretariat, AG/W/4 (12 September 1983), pp. 10-16.

⁷⁶ *Ibid.*, pp. 17-20.

⁷⁷ See para. 2.3 above.

⁷⁸ Emphasis added.

commodity agreements.⁷⁹ Work in this area resulted in a resolution concerning the difficulties arising in trade in primary products in November 1956⁸⁰, and an agreement a year later to "continue the study of the special problems connected with the trade in primary products".⁸¹ The work on commodities continued in the following years⁸² in cooperation with United Nations led bodies.⁸³

4.1.2 Increased scrutiny of the use of protective measures in agriculture among GATT Contracting Parties

4.5. During the 12th GATT Session (October-November 1957), "various Trade Ministers ... raised the question of the widespread use of protective devices in international trade in agricultural products", and called for "a thorough and objective examination of the trends and consequences" of agricultural protectionism.⁸⁴ The Contracting Parties therefore adopted a decision in November 1957 to set up a panel of experts to examine, *inter alia*, "excessive short-term fluctuations in prices of *primary products*, and widespread resort to agricultural protection".⁸⁵ Pursuant to the decision, the panel of experts was requested to assess, among other things, "medium-term prospects for international trade ..., including such increases as it believes may reasonably be expected in the level of consumption of *agricultural products* and of the volume and efficiency of

⁷⁹ A Working Party on Commodity Problems was established to consider proposals for principles addressing problems in primary commodity trade and the form of an agreement to administer those principles. (Working Party on Commodity Problems established by decision of the Contracting Parties on 22 December 1954, L/301 (22 December 1954)). The Working Party prepared a draft special agreement that was finally not adopted by the GATT Contracting Parties. (Final Report of the Working Party on Commodity Problems, Annex, L/416 (3 October 1955))

⁸⁰ Report of the Working Party on Commodity Problems as approved by the Contracting Parties, Annex, L/592/Rev.1 (20 November 1956).

⁸¹ GATT Contracting Parties Twelfth Session, Summary Record of the Tenth Meeting, SR12/10 (2 November 1957), p.50.

⁸² A Working Party on commodities was notably established on 28 October 1958 by the GATT parties (See GATT Contracting Parties Thirteen Session, Summary Record of the Tenth Meeting, SR.13/10 (6 November 1958), pp. 54 and 58; Commodity Developments in 1960-1961, Note by the Executive Secretary, L/1595 (30 October 1961) and Impact of Commodity Problems on International Trade, Report of Working Party on Commodities, L/1656 (1 December 1961))

⁸³ The UN Economic and Social Council established in 1954 a permanent advisory Commission on International Commodity Trade (see note by the Executive Secretary L/442 (28 October 1955)). Another important body was the Interim Coordination Committee for International Commodity Arrangements (ICCICA) established by the UN Resolution of 28 March 1947 (in document E/PC/T/54 of 25 April 1947), which Chairperson was nominated by the GATT contracting parties (see e.g., Report by the Chairman of ICCICA, L/1329 (1 November 1960)). This body was finally replaced in its functions by the advisory committee to the trade and development board of UNCTAD in 1965. (See report by the Chairman of ICCICA, L/2379 (12 March 1965) and Advisory Committee to the UNCTAD Board and to the Committee on Commodities, Note by the Director-General, L/2450 (7 July 1965))

⁸⁴ Twelfth Session of the Contracting Parties - Summary Record of the Tenth Meeting, SR.12/10 (2 November 1957), p.50.

⁸⁵ "Trends in International Trade", Decision adopted by the Contracting Parties on 30 November 1957, L/775 (5 December 1957). (emphasis added)

agricultural production in all countries".⁸⁶ The decision thus appears to have used the terms "primary products" and "agricultural products" in a connected but distinct manner, with the emergence of "agricultural products" and agricultural protection as a topic of interest *per se*, going beyond the traditional analysis on primary commodity markets.⁸⁷ At the meeting where a draft of this decision was discussed, the delegate from Norway "wished to record his delegation's understanding that 'agricultural products' referred to in the draft decision included fishery products".⁸⁸ The decision neither defined the notion of "agricultural products" nor made specific reference to fishery products.

4.6. The report of experts on trends in international trade was circulated in October 1958 (Haberler Report)⁸⁹, containing, *inter alia*, several conclusions and recommendations regarding agricultural protectionism in developed countries. In particular, the Haberler Report identified three broad categories of protective measures, that is, those measures which (i) directly discourage imports, (ii) directly encourage exports, and (iii) directly encourage home production⁹⁰, and suggested ways to mitigate their effect on international trade.⁹¹ The Haberler Report formed the basis for the discussions regarding obstacles facing trade in agriculture at the 13th GATT Session held in October 1958. These discussions, in turn, led to the establishment of Committee II⁹², which was entrusted with the

⁸⁶ Ibid. (emphasis added) The Decision also requested the GATT secretariat to "provide the data and documentation required for this study, including a factual account of the extent to which trade in agricultural products has failed to benefit from the progressive liberalization of international trade in general." (Ibid.)

⁸⁷ Discussions concerning commodities continued in a parallel track. (See para. 4.4 above)

⁸⁸ Twelfth Session of the Contracting Parties - Summary Record of the Twentieth Meeting, SR.12/20 (11 December 1957), p. 171.

⁸⁹ "Trends in International Trade" (Haberler Report), MGT/80/58 (August 1958). The report was known as the "Haberler report" after Gottfried Haberler, chairman of the group of experts. The report distinguished in its analysis five categories of primary products: petroleum, tropical foodstuffs, mineral, agricultural raw materials and non-tropical foodstuffs. According to the report, the definition of "agricultural products" in the EEC included fishery products. (Haberler Report, p. 128)

⁹⁰ Ibid., pp. 87-88.

⁹¹ For instance, as regards measures that discourage imports, such as certain internal taxes, the Report noted that "[t]here is little justification ... to impose the main burden of taxation on non-competing imports in the form of 'special internal taxes', *less accessible to the bargaining process applicable to ordinary customs duties under GATT's rules*". (Haberler Report, p. 8 (emphasis added)) On domestic support, it stated that, "[s]ince in North America and Western Europe ... net imports of agricultural products represent the relatively narrow margin by which their large domestic consumption exceeds their ... domestic production, a relatively small restraint on domestic production or stimulus to domestic consumption could lead to a large percentage increase in their net imports". (Ibid.) With respect to export subsidies, the report noted that "[s]ubsidized exports are unreliable and hurt low-cost producers ... [and agricultural] protectionism should ... be moderated in exporting as well as importing countries". (Haberler Report, p. 9)

⁹² Two other committees – Committee I and Committee III – were established at the same time to examine, respectively: (i) tariff reduction negotiations; and (ii) other obstacles to trade expansion with particular reference to the importance of the maintenance and expansion of export earnings of the less developed countries to the development and diversification of their economies. The three committees were expected to "initiate immediate consideration of a co-ordinated programme of action directed to a substantial advance towards the attainment of the objectives of the General Agreement through the further reduction of

tasks of: (i) gathering data regarding the use of measures for the protection of agriculture or in support of incomes of agricultural producers; (ii) examining the effects of such measures; and (iii) considering how the existing rules could be improved.⁹³

4.7. In this context, Norway submitted a memorandum entitled "Fish and Fish Products", in which Norway reiterated that the work carried out by Committee II also covered fish and fish products, and that "[a]n analysis of the structural problems and factors affecting the trade in these products [was] desirable as the trade in these products [had] never been discussed" before.⁹⁴

4.8. In its memorandum, Norway noted that "the export of products of fish and marine animals is probably of a greater importance to Norway than to any other contracting party to the GATT as export of these products represents from 20 to 25 per cent of the total Norwegian exports", and that "[a] free and unrestricted trade in fish and fish products in Europe as well as in overseas countries is thus vital to the foreign trade of Norway".⁹⁵ Norway highlighted the "special difficulties confronting the export trade of countries traditionally dependent on the sale of fish and marine animal products" as a result of "the frequent use of support schemes and protective devices in most importing countries".⁹⁶ Norway noted, in particular, "high or even excessive duties" on imports of fish, quantitative import restrictions, ... less favourable rules for marketing imported fish than for domestic fish", and "[t]he extensive use of subsidies granted in various forms to the domestic fishing industry".⁹⁷ Notably, Norway continued to draw the distinction between "agricultural" and "fishery" products in its memorandum, stating that:

In certain cases *fish and products of fish* and marine animals are regarded as *competitive to agricultural products* in the consumption.

barriers to the expansion of international trade." (Expansion of International Trade – Decision of 17 November 1958 and Appointment of Committees (Decision of 17 November 1958), L/939 (27 November 1958), p. 1)

⁹³ Decision of 17 November 1958, L/939 (27 November 1958); and document series COM.II/....

⁹⁴ Trade in Fish and Fish Products, Memorandum by the Norwegian Government (Memorandum by Norway), COM.II/3 (27 February 1959), para. 1.

⁹⁵ Memorandum by Norway, COM.II/3 (27 February 1959), para. 2.

⁹⁶ Ibid.

⁹⁷ Memorandum by Norway, COM.II/3 (27 February 1959), paras. 3-4. According to Norway, the subsidies took the form of "support schemes ... in the construction of new or the modernization of old fishing vessels", "subsidies in connexion with the operation of the fishing fleet", and "[s]pecial supporting arrangements ... in connexion with the internal sale to the processing industry of fish of domestic origin". (Ibid.) Examples of the special supporting arrangements in connection with internal sale included "tax reductions, credit facilities, governmental guarantees, special loans at low interest rates ... [and] payment of subsidies on materials used in the earlier stages of the processing of fish". (Memorandum by Norway, COM.II/3 (27 February 1959), para. 4)

This is particularly the case for fish oils. In such instances agricultural protection is extended to cover fish and fish products.⁹⁸

4.9. A consultative process on country-specific agricultural policies was initiated following the 14th GATT Session⁹⁹, in which consultations on fish-related policies were also included. To facilitate the process, the Secretariat collected information and prepared papers on a wide range of commodities, including, for example, dairy products, meat cereals, sugar, vegetable oils, and *fish*.¹⁰⁰ The papers prepared by the Secretariat seem to have further confirmed that "fish and fish products" were not treated separately from "agricultural products", but rather as a sub-category in the context of the technical discussions and consultations regarding protective measures in trade in agriculture during this time.

4.10. As described above, two other committees – Committee I and Committee III – were established alongside Committee II. Committees I and III were in charge of, respectively: (i) further negotiations for tariff reduction; and (ii) other obstacles to trade expansion, with particular reference to less developed countries.¹⁰¹ It may be worth noting that, while fish was initially not among the list of products covered by its work, Committee III progressively expanded the product scope for its consideration, which eventually included canned fish.¹⁰² Finally, as a result of the work carried out by Committee I, the Dillon Round was launched in May 1960 and concluded two years later.¹⁰³

⁹⁸ Memorandum by Norway, COM.II/3 (27 February 1959), para. 5. (emphasis added). This memorandum thus suggests that Norway's request to include fishery products in this scoping exercise was driven by its export interests in this sector.

⁹⁹ See GATT Contracting Party Fourteenth Session, Summary Records of the Tenth Meeting, SR.14/10 (10 June 1959), pp. 124-125; and Procedures and Timetable for Consultations on Agricultural Policies, Note by the Executive Secretary, COM.II/4 (28 May 1959).

¹⁰⁰ See e.g., Consultations on Agricultural Policies - Note by the Executive Secretary, COM.II/6 (9 June 1959); List of Additional Products for First Round of Consultations on Agricultural Policies - Note by the Executive Secretary, COM.II/7 (24 July 1959); Expansion of Trade - Documentation for Future Work of Committee II, COM.II/85 (27 July 1960) and addenda, and Documentation for Future Work of Committee II, COM.II/86 (31 August 1960) and addenda.

¹⁰¹ See *supra* fn. 92.

¹⁰² Second Report of Committee III on Expansion of Trade, L/1063 (12 October 1959), paras. 2 and 17; and Expansion of Trade - Report of Committee III on the Meetings of March-April 1963, L/1989 (10 April 1963), Annex II. Work dedicated to Tropical products was also initiated under Committee III with the establishment of a Special Group on Trade in Tropical Products in February 1962 (See e.g., Special Group on Trade in Tropical Products - Membership and Terms of Reference - (Appointed by Council in February 1962), L/1751 (12 April 1962); Special Group on Trade in Tropical Products - Record of Discussions and Conclusions Reached at the Meeting Held from 4-8 June 1962, L/1817 (1 August 1962); and Special Group on Trade in Tropical Products - Report to the Council of Representatives, L/2001 (29 April 1963)). For more information on the negotiations on tropical products, see Secretariat notes in documents MTN.GNG/NG6/W/1 (20 February 1987), and TN/AG/S/17 (10 February 2005).

¹⁰³ See Sixteenth Session of GATT Contracting Parties - 16 May-4 June 1960 - Summary Record of the Sixth Meeting, SR.16/6 (13 June 1960), and document series TN.60 of 1960 to 1962.

4.11. While the negotiations during the Dillon Round focused on tariff negotiations, certain developments regarding the negotiations on agriculture are worth noting. At the November 1961 Ministerial Meeting, "Ministers expressed great concern about the degree and extent of agricultural protectionism [and] widespread resort to non-tariff devices", as well as "the serious effects which these devices had on international trade in agricultural products", and "requested the Parties to adopt procedures to prepare negotiation in this regard."¹⁰⁴ Ministers also requested the creation of "preparatory groups as may be necessary", starting with a group aimed at "a preliminary examination of possibilities for solution of the problem of cereals", to be followed by possible discussions on "other commodities with differing characteristics, for example meat".¹⁰⁵ The groups on cereals and meat, respectively, were subsequently established¹⁰⁶, as well as a group on butter.¹⁰⁷ As further discussed in the next section, the creation of these groups foreshadowed several product-specific initiatives in the agriculture negotiations during the Kennedy Round.

4.2 From the 1963 Ministerial Meeting to the Kennedy Round (1964-1967)

4.12. The GATT Ministerial Meeting held in May 1963¹⁰⁸ adopted a resolution on the "Arrangements for the reduction or elimination of tariffs and other barriers to trade, and related matters and measures for access to markets for agricultural and other primary products" (May 1963 Resolution)¹⁰⁹, launching a new round of trade negotiations in May 1964, i.e. the Kennedy Round. During these negotiations, which specifically addressed agricultural products for the first time, the question regarding the definition of these products generated considerable debate, and a standard framework – i.e., Chapters 1 to 24 of the Brussels Tariff Nomenclature

¹⁰⁴ Contracting Parties Nineteenth Session – Meeting of Ministers (Conclusions adopted on 30 November 1961), L/1657 (1 December 1961), p. 3.

¹⁰⁵ Ibid.

¹⁰⁶ See e.g., Group on Cereals, Summary of Discussion, L/1728 (19 February 1962); Council, 22-28 February 1962, Minutes of Meeting, C/M/9 (8 March 1962), p. 4; and Group on Meat, Note by the Secretariat, L/1772 (21 May 1962).

¹⁰⁷ See Contracting Parties Nineteenth Session, Summary Record of the Twelfth Session, SR.19/12 (21 December 1961), Subject No. 5, and Report of the Working Group on marketing of Butter, L/1720 (31 January 1962).

¹⁰⁸ Meeting of Ministers 16-21 May 1963, Summary Record of the Meeting, MIN(63)SR (30 May 1963).

¹⁰⁹ MIN(63)9 (22 May 1963). This Resolution was accompanied by another one regarding measures for the expansion of trade of developing countries as a means for furthering their economic development (MIN(63)(8) (22 May 1963)).

(BTN)¹¹⁰ – was introduced for the first time to guide this discussion. Ultimately, however, no definition was agreed upon at the conclusion of the Kennedy Round.

4.2.1 The debate on the definition of "agriculture products" and the role of the Committee on Agriculture

4.13. The May 1963 Resolution stated that the negotiations it launched "shall cover all classes of products, industrial and non-industrial, including agricultural and primary products", and "deal not only with tariffs but also with non-tariff barriers".¹¹¹ To this end, the Resolution established a Trade Negotiations Committee (TNC), which was tasked with elaborating a Trade Negotiating Plan and supervising the conduct of negotiations. The Resolution set out in its paragraph 3 specific issues that the Trade Negotiating Plan should address. Paragraph 3(d) of the Resolution, regarding trade in agriculture, referred to "[t]he rules to govern, and the methods to be employed in, the creation of acceptable conditions of access to world markets for agricultural products in furtherance of a significant development and expansion of world trade in such products". In addition, paragraph 3(d) highlighted three agricultural products – cereal, meat, and dairy products – for separate negotiating processes. It stated that, "[s]ince cereals and meats are amongst the commodities *for which general arrangements may be required*, the Special Groups on *Cereals* and *Meats* shall convene at early dates to negotiate appropriate arrangements", and that "[f]or similar reasons a special group on *dairy products* shall also be established."¹¹² Subsequently, the Committee on Agriculture was created as a subordinate body under the TNC¹¹³, whose mandate was to address the agriculture-related issues set out in paragraph 3(d) of the May 1963 Resolution, as described above.

¹¹⁰ The Brussels Convention on Nomenclature for the Classification of Goods in Customs Tariffs was prepared by the European Customs Union Study Group and came into force on 11 September 1959. This Nomenclature was initially known as the Brussels Tariff Nomenclature (BTN), and in 1974 was renamed the Customs Co-operation Council Nomenclature (CCCN). The CCCN was subsequently replaced by the Harmonized Commodity Description and Coding System (HS), when the latter went into force in 1988. ("Harmonized System Compendium – 30 Years On", World Customs Organization, 2018. (available at <http://www.wcoomd.org/-/media/wco/public/global/pdf/topics/nomenclature/activities-and-programmes/30-years-hs/hs-compendium.pdf?la=en>)

¹¹¹ May 1963 Resolution, MIN(63)9 (22 May 1963), para. 2.

¹¹² May 1963 Resolution, MIN(63)9 (22 May 1963), para. 3(d). (emphasis added)

¹¹³ Proceedings of the First Meeting of the TNC, TN/64/SR (1 July 1963), p. 3. Three other subsidiary bodies were created at the same time, namely: (i) the Sub-Committee on the Tariff Negotiating Plan; (ii) the Sub-Committee on Non-Tariff Barriers and other Special problems; and (iii) the Sub-Committee on the Less Developed Countries. (Ibid.)

4.14. It appears, therefore, that the negotiations on trade in agriculture began in the Kennedy Round with an approach that prioritized certain products, in the absence of an agreed definition of "agricultural products", and that certain categories of products may have been treated separately depending on whether general arrangements for such products were "required" or "appropriate". Compounding the lack of a definition of "agricultural products" was the debate among Contracting Parties as to the role of the Committee on Agriculture vis-à-vis the other negotiation bodies. For instance, at a TNC meeting held in September 1963, some delegations (EEC, Japan, Sweden) expressed the view that "the whole complex of questions relating to trade in agricultural products should be dealt with as a whole" in the Committee on Agriculture.¹¹⁴ In contrast, other delegations (the United States, New Zealand, Canada, Denmark, and Australia) considered that "the Committee on Agriculture should only deal with agricultural products which did not fall within the competence of the other subordinate bodies of the Trade Negotiations Committee."¹¹⁵

4.15. In a communication entitled "Definition of Agricultural Products" circulated after the meeting, the Swedish delegation noted that "no definition as to what is to be understood by agricultural products has so far been agreed upon."¹¹⁶ The Swedish delegation highlighted the importance of such a definition for the negotiations on tariff reductions, noting, in particular, that "[t]he special conditions which prevail in the agricultural field are likely to make it difficult for many countries to accept an automatic formula for the reduction of customs duties ... on agricultural products."¹¹⁷ The Swedish delegation therefore considered that such a definition was "a precondition for a successful negotiation both in the agricultural and the non-agricultural field" and concluded that "we have raised this question of defining agricultural products in order to facilitate a speedy opening of fruitful negotiations".¹¹⁸

¹¹⁴ Proceedings of the First Meeting of the TNC, TN/64/SR.2 (4 October 1963), p. 5.

¹¹⁵ Proceedings of the First Meeting of the TNC, TN/64/SR.2 (4 October 1963), p. 5.

¹¹⁶ Definition of Agricultural Products, Communication from the Government of Sweden, TN.64/9 (11 November 1963), p. 1.

¹¹⁷ Ibid.

¹¹⁸ Ibid., p. 2.

4.2.2 The introduction of Chapters 1-24 of the BTN in the negotiations on trade in agriculture

4.16. Against the backdrop of the debate described above, the Secretariat circulated a note in November 1963, in which it suggested certain procedures to guide the work of the Committee on Agriculture, given that the work of the Committee was "new" and that "there [were] few precedent and no established procedures".¹¹⁹ The Secretariat noted that "[t]he first twenty-four chapters dealing with agricultural produce in the Brussels Nomenclature Tariff lists ... account for one fifth of total world trade", and that "[t]his trade is governed by a much greater variety of protective devices (often for the same commodity) than is the case in the industrial field".¹²⁰

4.17. The Secretariat therefore suggested that "[t]he most practical way seems to be for the Committee to examine, in a first and general survey, the appropriate chapters in the tariff list (e.g. the chapters 1-24 under the Brussels Nomenclature)", and to "select the products or groups of products which have been or are to be referred to special groups for the negotiation of general arrangements".¹²¹ As noted above, these groups of products were cereal, meat, and dairy. In addition, the Secretariat proposed for the Committee "to determine which products, such as tropical products, are to be discussed by the Committee at a later stage", and "to attempt ... to identify the *products for which the general rules of the Trade Negotiating Plan do not appear to be appropriate*, and for which, therefore, the Committee eventually has to devise *special rules and methods*."¹²²

4.18. To facilitate this discussion, the Secretariat circulated two technical notes containing, respectively, the list of chapters 1-24 of the Brussels nomenclature¹²³ and the data on trade flows on selected agricultural products.¹²⁴ The data in the latter covered products under chapters 1-24, including fish, crustaceans and molluscs under Chapter 3.¹²⁵ Following the technical notes, several countries

¹¹⁹ Procedures suggested by the Secretariat, Committee on Agriculture, Spec(63)301 (18 November 1963), para. 4(a).

¹²⁰ Ibid., para. 4(b).

¹²¹ Ibid., para. 6(i).

¹²² Ibid., para. 6(iii). (emphasis added)

¹²³ Brussels Nomenclature, chapters 1-24, Technical Sub-Committee of the Committee on Agriculture, Spec(64)56 (20 March 1964).

¹²⁴ "Data on Trade Flows and Trade Measures on Selected Agricultural Products", Technical Committee of the Committee on Agriculture, Spec(64)58 (1 April 1964) and Spec(64)79 (10 April 1964).

¹²⁵ See e.g., "Data on Trade Flows and Trade Measures on Selected Agricultural Products", Technical Committee of the Committee on Agriculture, Spec(64)79 (10 April 1964), p. 3.

submitted notifications indicating which products under BTN Chapters 1-24 should be *subject to the general rules for tariff reductions* (with some indicating that fish and fish products as within this scope)¹²⁶, while some countries added products not in Chapters 1-24 to the list of products to be treated as agricultural products.¹²⁷

4.19. At the TNC meeting on 28 May 1964, it was recalled that "one issue still unresolved was the definition of agricultural products", and that this issue was related not only to the negotiation in agriculture, but also to other areas of negotiations, because "governments might not be able to compile their lists of exceptions until they know with precision what products would be dealt with in the context of the negotiations on agriculture."¹²⁸ After several months of stalemate, in March 1965, the TNC adopted procedures for the negotiations on agriculture and on a method that "would be to proceed by means of *specific offers on individual products* designed to achieve the objectives set out by Ministers."¹²⁹ It was therefore agreed that negotiations would continue on cereal, meat and dairy products in the relevant groups.¹³⁰ As regards all other products, participants would table "concrete and specific offers on individual products relating to all relevant elements of agricultural support or protection or to the total effect of these elements".¹³¹

4.20. In May 1965, the Committee on Agriculture proposed that the discussions on these other products would "in principle relate to products included in the first twenty-four chapters of the Brussels Nomenclature" and would be arranged in ten

¹²⁶ For example, Canada, Iceland, Israel, Norway and Denmark submitted such notifications. Norway and Iceland listed fish and fish products, as well as meat of whale to that list. (See Definition of Agriculture Products and Addendum 1, TN.64/AGR/3 (29 April 1964) and TN.64/AGR/3.Add1 (29 April 1964)).

¹²⁷ Examples in this regard included Finland, Japan and Sweden. (See Definition of Agriculture Products and Addendum 2, TN.64/AGR/3 (29 April 1964) and TN.64/AGR/3.Add2 (17 June 1964))

¹²⁸ Proceedings of the Seventh Meeting, TN.64/SR.7 (8 June 1964), p. 5.

¹²⁹ Proposals for the Negotiations on Agriculture – Revision, TN.64/39/Rev.1 (18 March 1965), para. 2. (emphasis added)

¹³⁰ See Documents series TN/64/Ce, TN/64/Me and TN/64/DP regarding the work in these groups. In the case of cereals, these discussions led to the signing of a memorandum by some parties in June 1967, which then served as a basis for the International Grains Arrangement adopted by the International Wheat Council at its Ministerial Conference in July-August 1967 (See e.g., Group on Cereals, Memorandum of Agreement, TN.64(SECRET)/7 (19 May 1967); Trade Negotiations Committee, Memorandum of Agreement on Basic Elements for the Negotiation of A World Grains Arrangement, TN.64/105 (26 June 1967); and Memorandum of Agreement on Basic Elements for the Negotiation of a World Grains Arrangement L/2814 (12 July 1967). See also Edward M. Leonard, "Commodity Price-Fixing: The International Grains Arrangement of 1967", Stanford Law Review, Vol. 23, No. 2 (1971), pp. 306-329) By contrast, an attempt by the European Communities to establish a group on sugar was unsuccessful (See Trade Negotiations Committee, Meeting on Sugar, Report by Chairman, TN.64/88 (21 April 1967))

¹³¹ Proposals for the Negotiations on Agriculture – Revision, TN.64/39/Rev.1 (18 March 1965), para. 3(c).

groups as listed in the annex to the proposal, with the tenth group covering products not under Chapters 1-24.¹³² Fish and fish products, however, were *not* among the ten groups listed in the annex. The list of agricultural products was amended in September 1965 to exclude BTN Chapter 15.04¹³³, i.e., "fats and oils of fish and marine mammals". The process of tabling of offers and subsequent exchanges between participants went on and the Kennedy round negotiation concluded in June 1967¹³⁴, without further apparent discussion on the scope of the agricultural products.

4.3 From the 24th GATT Session (1967) to the Tokyo Round (1973-1979)

4.21. During the period from the end of the Kennedy Round to the Tokyo Round, the discussions regarding the product scope for the negotiations on trade in agriculture continued. As described below, by relying on Chapters 1-24 of the BTN, the overall contour of "agricultural products" became clearer during this time. While it appears that fish and fish products were not treated separately as a group distinct from "agricultural products", the precise scope of "agriculture products" remained undefined in the absence of any agreement on specific disciplines applicable to trade in agriculture.

4.3.1 The 24th GATT Session and relevant preparatory work

4.22. Shortly after the conclusion of the Kennedy Round, and in preparation for the 24th GATT Session, the GATT Director General circulated a note concerning obstacles to trade in agricultural products. The note highlighted the "rather limited results in the agricultural area" despite "agricultural problems [playing] an important part" in the trade negotiations during the Kennedy Round, and called for the Contracting Parties to "consider ways of continuing the useful and indeed vital work which [had] been begun".¹³⁵ At the 24th GATT Session, the Contracting

¹³² Proposals for the Negotiations on Agriculture, TN.64/AGR/6 (5 May 1965), para. 1. The proposal also noted that: "[p]roducts which ... may be covered by negotiations in the Commodity Groups or the Group on Tropical Products are not included, with some exceptions for practical reasons such as tropical oils and seeds." (Ibid., p. 3)

¹³³ Grouping of Products, TN.64/AGR/W/8 (15 September 1966). Furthermore, a detailed list of headings covered by the first nine groups of products was circulated in May 1965, and a list of products not included in chapters 1-24 but considered as agricultural products by some delegations was also circulated in May. (List of Products to be Examined in the Committee on Agriculture, TN.64/AGR/W.4 (10 May 1965); and Products not included in Chapters 1-24 of the Brussels Nomenclature, TN.64/AGR/7 (21 May 1965))

¹³⁴ Preparation of Schedules of Concessions - Note by the Secretariat, TN.64/93 (17 May 1967); Final Act of the 1964-67 Trade Conference - Acceptance of Instruments on 30 June, TN.64/97 (19 June 1967); and Final Act and Protocol, TN.64/99 (23 June 1967).

¹³⁵ Programme for Expansion of International Trade - Obstacles to Trade in Agricultural Products - Note by the Director-General, L/2860 (6 October 1967), para. 3.

Parties "agreed to establish an Agricultural Committee", whose mandate was "to examine the problems in the agricultural sector, and to explore the opportunities for making progress in the attainment of the objectives of the [GATT] in the agricultural field."¹³⁶ The Contracting Parties decided that "[t]he examination would cover all agricultural products *important in international trade*."¹³⁷

4.23. The Agriculture Committee began its preparatory work in January 1968 by circulating a questionnaire to the Contracting Parties in order to "clarify the situation as it existed" and "arrive at the identification of the principal problems affecting international trade" in agriculture.¹³⁸ The Committee "agreed *for practical reasons* to select certain products" for purposes of the questionnaire, and to "leave open the possibility of including other products at a later date."¹³⁹ Eight categories of products were covered by the questionnaire¹⁴⁰, which did *not* include fish and fishery products. Upon receiving the questionnaire responses¹⁴¹, the Committee carried out its work following a problem-by-problem approach (rather than country-by-country or product-by-product approaches), while allowing participants to raise any product-specific issue.¹⁴² The Committee also set up four working groups to deal with specific types of measures¹⁴³, and one working group in charge of "techniques and modalities" for future negotiations.¹⁴⁴ Despite the work undertaken and the amount of data collected, however, the Committee could

¹³⁶ Review of the Work of the Contracting Parties through the Last Two Decades and Conclusions on Their Future Work Programme – Text Adopted by the Contracting Parties on 24 November 1967 at the Close of their Twenty-Fourth Session, GATT/1012 (30 November 1967), p. 3. (emphasis added); see also Agriculture Committee, Membership and Terms of Reference, COM/AG/2 (12 January 1968) and revisions.

¹³⁷ Ibid. (emphasis added)

¹³⁸ Programme of Work of Agriculture Committee, COM.AG/9 (26 January 1968), p. 1. The questionnaire addressed the following topics: (i) production measures and policies; (ii) protection and support measures and policies; (iii) consumption and internal prices; and (iv) international trade and prices. (Ibid., Annex II)

¹³⁹ Ibid., p. 1. (emphasis added)

¹⁴⁰ The eight sectors were: (i) Dairy products; (ii) Grains; (iii) Beef and veal, live cattle, processed meat; (iv) Other meats: poultry, pig meat, live pigs, mutton and lamb, processed meat; (v) Fruits and vegetables; citrus, deciduous fruits, tropical fruits, canned products; (vi) Vegetable oils and seeds; (vii) Unmanufactured tobacco; and (viii) Wine. (Ibid., Annex I)

¹⁴¹ The replies to the questionnaire were assembled and distributed in documents COM.AG/W/2 to COM.AG/W/35, and COM.AG/11 in 1968.

¹⁴² See "Summary of the Discussions – Meeting of the Committee, 29-31 October 1968", COM.AG/11 (12 November 1968).

¹⁴³ See Agriculture Committee, Report to the Council, L/3320 (3 February 1970). The different types of measure were: measures affecting exports (see e.g. inventory of measures in COM.AG/W/81 and addenda (3 May 1972)), measures affecting imports (see e.g. summary inventory of measures in COM.AG/W/90 and addenda (29 January 1973)), measures affecting production (see e.g. meeting report in COM.AG/W/56 (15 May 1970)) and other relevant measures (see e.g. meeting report in COM.AG/W/62 (1 July 1970)). Agricultural products were explicitly defined as BTN chapters 1 to 24 in COM.AG/W/81 and the EEC made reference to export refunds for fishery products in COM.AG/W/81/Add.1 (10 May 1972), page 7.

¹⁴⁴ Note by the Chairman of the Meeting of the Committee on 23-25 February 1972, COM.AG/24 (28 February 1972), p. 1. The report of the working group was submitted to the GATT Council on September 1972. (Working Group on Techniques and Modalities – Report to the Agriculture Committee, COM.AG/W/88 (4 August 1972))

not reach any consensus on the way forward and the objectives of a future negotiation on agriculture.¹⁴⁵

4.3.2 Debate regarding the product scope of agriculture negotiations during the Tokyo Round

4.24. The 1973 Tokyo Declaration launched a new round of trade negotiations. As regards agriculture, the Declaration provided in its subparagraph 3(e) that the negotiations should aim to include "an approach to negotiations which, while in line with the general objectives of the negotiations, should take account of the special characteristics and problems in this sector."¹⁴⁶ The negotiation on agriculture started in group 3(e) of the Trade Negotiations Committee (TNC) established on 7 February 1974¹⁴⁷, which was subsequently renamed the "Agriculture Group".¹⁴⁸ Parallel trade negotiations took place in the negotiating groups on, respectively, tariffs, non-tariff measures, sectoral approaches, safeguards and tropical products.¹⁴⁹

4.25. As in the Kennedy round, one of the challenges closely linked to the discussion on the definition of agricultural products was the function of the Agriculture Group vis-à-vis the other negotiating groups.¹⁵⁰ In terms of product scope, the Agriculture Group was responsible for "all agricultural products (Chapters 1-24 BTN)", while the Tariff Group and Non-Tariff Measures Group were in charge of "industrial products, chapters 25-99 BTN".¹⁵¹ The Agriculture Group was also mandated to study the applicability to agricultural products of the new disciplines under negotiation on countervailing duties and technical barriers, and to continue the studies on sanitary and phytosanitary regulations. Pursuant to this mandate, the Agriculture Group updated and compiled a substantial amount of

¹⁴⁵ See Note by the Secretariat on the Meeting of the Committee on 29-30 January 1973, COM.AG/27 (14 February 1973).

¹⁴⁶ Declaration of Ministers Approved at Tokyo on 14 September 1973 (Tokyo Declaration), MIN(73)1, p. 4.

¹⁴⁷ See Programme of Work adopted by the TNC on 7 February 1974, MTN/2 (11 February 1974).

¹⁴⁸ See Chairman's Proposals at the TNC meeting on 11-13 February 1975, MTN/W/10 (14 February 1975).

¹⁴⁹ They were groups, respectively, 3(a), 3(b), 3(c), 3(d), and 3(f). (See Programme of Work adopted by the Trade Negotiations Committee on 7 February 1974, MTN/2 (11 February 1974)) They were renamed groups on tariffs, non-tariff measures, sectoral approaches, safeguards, agriculture and tropical products in February 1975 (See Chairman's Proposals at the TNC meeting on 11-13 February 1975, MTN/W/10 (14 February 1975)) For an history of the negotiations on tropical products, see Secretariat notes in documents MTN.GNG/NG6/W/1 (20 February 1987) and TN/AG/S/17 (10 February 2005).

¹⁵⁰ See e.g., Group 3(e) – Report to the TNC, MTN/5 (16 July 1974).

¹⁵¹ Programme of Work adopted by the TNC on 7 February 1974, MTN/2 (11 February 1974), p. 1.

data on tariff and non-tariff measures applied by the Contracting Parties¹⁵², including data on certain specific products.¹⁵³ The latter, however, did not include fish products.

4.26. The relationship between the Agriculture Group and the other groups was discussed at a meeting of the Agriculture Group in May 1975, at which "[i]t was noted that matters of a global nature, including tariff and non-tariff measures affecting agriculture, would be taken up in a number of contexts within the overall framework of these negotiations." It was confirmed¹⁵⁴ that, in such cases, "the [Agriculture] Group and its subgroups [would] concern themselves with the agricultural aspects of these matters ... in conjunction with the work of the 'Tariffs and Non-tariff Measures' Groups", and would communicate the results of its work to the other groups "with a view to arriving at the harmonious and balanced development of all the elements subject to negotiation".¹⁵⁵

4.27. In this context, the Agriculture Group agreed in July 1977 that the participants in the Multilateral Trade Negotiations would "submit lists of requests regarding any agricultural products by 1 November 1977", and that "the requests should indicate in specific terms the tariff items and the products for which the participant concerned wishes to secure concessions on any tariff or non-tariff measure, and the nature of the concession or concessions being sought."¹⁵⁶ It was noted in that context that: "[f]or the purpose of the negotiations, *agricultural products shall in general be deemed to be the products falling within Chapters 1 to 24 inclusive*" of the Customs Co-operation Council Nomenclature (CCCN)¹⁵⁷, and participants may indicate to the Secretariat any differences between this definition and their own.¹⁵⁸

¹⁵² Result of this work can be found in Documents series MTN/3E/...

¹⁵³ These specific products were: wheat; maize; butter and skimmed milk powder; sugar; cattle and chilled and frozen meat thereof; soya and soya oilcake; wine; and citrus fruit. (See Group 3(e) – Report to the TNC, MTN/5 (16 July 1974)) This initial list was complemented by "products of particular interest to developing countries", including rice; tobacco; preserved meats; grapes; vegetable oils; tomatoes; and strawberries". (See Group 3(e) – Reports to the TNC, MTN/5 (16 July 1974) and MTN/11 (17 October 1974))

¹⁵⁴ See Chairman's Proposals at the TNC meeting on 11-13 February 1975, MTN/W/10 (14 February 1975), para. 4.

¹⁵⁵ Summing-up by the Chairman of Group "Agriculture" of the TNC, MTN/AG/1 (9 May 1975), p. 1.

¹⁵⁶ Chairman's Summing-Up and Record of Decisions of Group "Agriculture" Meeting of July 1977, MTN/AG/7 (28 July 1977), Annex, paras. 1-2.

¹⁵⁷ As noted above, the BTN was renamed the CCCN in 1974. (See *supra* fn. 110)

¹⁵⁸ *Ibid.*, para. 3. (emphasis added)

4.28. In the following weeks, the European Communities¹⁵⁹, the United States¹⁶⁰, Japan¹⁶¹, Norway¹⁶², Sweden¹⁶³, Finland¹⁶⁴, Switzerland¹⁶⁵ and Austria¹⁶⁶ indicated the list of products they were considering to be agricultural products, by including certain additional headings beyond chapters 1 to 24. Norway was the only delegation to consider that "*fish, marine mammals and products thereof should, for the purpose of the CCCN, not be regarded as agricultural products and not be dealt with under the same procedure*".¹⁶⁷ The Tokyo Round negotiations ended in April 1979 without any further debate on the definition of agricultural products, in the absence of any specific negotiated provision applicable to the group of agricultural products as such.¹⁶⁸

4.4 From the 34th GATT Session (1979) to the Uruguay Round (1986-1995)

4.29. The Uruguay Round trade negotiations finally resulted in specific disciplines applicable to agricultural products, in the form of the Agreement on Agriculture and the concessions and commitments WTO Members undertook mainly in the following three areas, also known as the "three pillars": market access, domestic support and export competition. For the first time, the product scope of such disciplines was clearly defined as the products under Chapters 1-24 of the HS Code "less fish and fish products", as well as additional 13 groups of products in the other chapters of the HS Code. As discussed in this section, records from the periods preceding and during the Uruguay Round negotiations, including those on

¹⁵⁹ Definition of Agricultural Products – Note by the European Communities, MTN/AG/W/30 (21 September 1977).

¹⁶⁰ Definition of Agricultural Products – Note by the United States, MTN/AG/W/31 (28 October 1977).

¹⁶¹ Definition of Agricultural Products – Note by Japan, MTN/AG/W/32 (31 October 1977).

¹⁶² Definition of Agricultural Products – Note by Norway, MTN/AG/W/33 (10 November 1977).

¹⁶³ Definition of Agricultural Products – Note by Sweden, MTN/AG/W/34 (14 November 1977).

¹⁶⁴ Definition of Agricultural Products – Note by Finland, MTN/AG/W/35 (14 November 1977).

¹⁶⁵ Definition of Agricultural Products – Note by Switzerland, MTN/AG/W/36 (18 November 1977).

¹⁶⁶ Definition of Agricultural Products – Note by Austria, MTN/AG/W/40 (11 January 1978).

¹⁶⁷ Definition of Agricultural Products – Note by Norway, MTN/AG/W/33 (10 November 1977), p. 1.

(emphasis added). Thus, while having supported the inclusion of fish products in the analytical work on agriculture resulting from the Haberler report, Norway and later the Nordic group favoured their exclusion from the scope of further agriculture negotiations. This may be interpreted as being related to the expectations of the results under each negotiation track.

¹⁶⁸ Product specific negotiations also continued for grains, dairy products and meat in three sub-groups. (See Documents series MTN/GR/, MTN/ME and MTN/DP, TN/64/Me and TN/64/DP) The Tokyo Round negotiations resulted in two plurilateral agreements concerning specific agricultural products, namely, the International Bovine Meat Agreement and the International Dairy Agreement. Both Agreements entered into force on 1 January 1980, and were terminated at the end of 1997, as countries that had signed the agreements decided that the sectors were better handled under the Agreement on Agriculture and the SPS Agreement. (See "Understanding the WTO – Plurilaterals: Of Minority Interests", at https://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm10_e.htm)

agriculture, SPS measures, and natural resource-based products, provide further insight into the discussions that resulted in the above definition.

4.4.1 Discussions on the product scope before the Uruguay Round

4.30. Shortly after the conclusion of the Tokyo Round, the TNC recommended that the Contracting Parties "further develop active cooperation in the agricultural sector within an appropriate consultative framework".¹⁶⁹ The GATT Contracting Parties endorsed the TNC's recommendations as part of the GATT work programme at the 34th Session in 1979, including an update by the Secretariat of the information on agriculture-related measures.¹⁷⁰ The Secretariat was subsequently asked by the Group of Eighteen¹⁷¹ to prepare relevant analyses on: (i) the GATT rules as they related to agriculture; (ii) the economic situation in the sector; and (iii) recent agricultural policy measures taken by the Contracting Parties.¹⁷² The Secretariat circulated its analyses in January 1982, in which it noted that:

There is no internationally accepted definition of the term "agriculture" as used in trade. The General Agreement does not define "agriculture". For purposes of negotiations, it was agreed in the Multilateral Trade Negotiations and in previous rounds, that agricultural products in general were deemed to be products falling within Chapters 1 to 24 inclusive of the CCCN (MTN/AG/7). Participants were free to indicate differences between this definition and their own. Certain countries indicated that in addition to the above products, they considered one or more products under one or more of the following CCCN Chapters to be agricultural products: 29, 31, 33, 35, 38, 39, 44, 50, 53, 54, and 55; while one country notified that fish, marine mammals and products thereof (Chapters 2, 3, 5, 15, 16, 21, 23) should not be regarded as agricultural products for the purpose of the MTN (MTN/AG/W/30-36 and 40). No two of these notifications had the same definition.¹⁷³

4.31. Amid the global economic recession of the early 1980s, the Contracting Parties issued a Ministerial Declaration (the 1982 Ministerial Declaration) at the

¹⁶⁹ Multilateral Agricultural Framework, MTN/27 (11 April 1979).

¹⁷⁰ Council of Representatives – Report on Work since the Thirty-Fourth Session, Addendum, L/4884/Add.1 (26 November 1979), p. 16. This work included an update of the inventories of Non-Tariff Measures relating to trade in both agricultural and industrial goods. (See Documentation on Non-Tariff Measures – Proposal by the Director-General, C/110 (14 March 1980))

¹⁷¹ The Consultative Group of Eighteen was created in July 1975. (See Consultative Group of Eighteen – Note by the Director General, L/4189 (27 June 1975), and documents series CG.18). It was agreed in November 1980 that the Group "is fully competent to deal with agricultural trade issues." (Multilateral Agricultural Framework – Director-General's Report on Consultations, L/5077 (25 November 1980), p. 2)

¹⁷² Note on the Fourteenth Meeting of the Consultative Group of Eighteen, CG.18/14 (28 April 1981), para. 33.

¹⁷³ Agriculture in the GATT – Note by the Secretariat, CG.18/W/59/Rev.1 (20 January 1982), fn. 1.

38th GATT Session to "reaffirm their commitment to abide by their GATT obligations and to support and improve the GATT trading system", and "draw up the work programme and the priorities for the 1980s".¹⁷⁴ With respect to agriculture, the Contracting Parties agreed "to bring agriculture more fully into the multilateral trading system by improving the effectiveness of GATT rules, provisions and disciplines and through their common interpretation; to seek to improve terms of access to markets; and to bring export competition under greater discipline".¹⁷⁵ Shortly thereafter, the Committee on Trade in Agriculture was constituted to carry out the above mandate¹⁷⁶, and met for the first time in early 1983 to discuss its work programme.¹⁷⁷ With respect to the product scope of negotiations, the Chairman of the Council of Representatives (the GATT Council)¹⁷⁸ noted at the meeting that:

throughout the history of the GATT, agricultural products had in general been deemed to be the products falling within Chapters 1 to 24 inclusive of the CCCN, while individual contracting parties have been free to indicate differences between this definition and their own. *Since this had proved to be a practical solution in the past, it could be applied also for the present exercise.*¹⁷⁹

4.32. The product coverage suggested by the Chairman "appeared to be acceptable by most delegates".¹⁸⁰ Interestingly, the representative of Spain suggested that "*fish and fish products should be left aside*", as these products were going to be dealt with in other studies while the representatives of Chile, New Zealand, Poland and the United States were opposed to this view and insisted on a complete product coverage as suggested by the Chairman."¹⁸¹ In the ensuing months, the Committee carried out an examination of trade measures affecting

¹⁷⁴ Ministerial Declaration adopted on 29 November 1982 (1982 Ministerial Declaration), L/5424 (29 November 1982), pp. 2-3.

¹⁷⁵ 1982 Ministerial Declaration, L/5424 (29 November 1982), p. 5.

¹⁷⁶ 1982 Ministerial Declaration, L/5424 (29 November 1982), pp. 8-9.

¹⁷⁷ Council - Minutes of Meeting - Held in the Centre William Rappard on 26 January 1983, C/M/165 (14 February 1983), p. 4.

¹⁷⁸ The GATT Contracting Parties decided in 1960 to set up a Council of Representatives, replacing the intersessional committees, in view of the increasing membership and workload. The GATT Council thus established derived its functions and powers by delegation from the Contracting Parties. (See *A history of law and lawyers in the GATT /WTO*, p. 145. See also L/1243 (13 June 1960))

¹⁷⁹ Committee on Trade in Agriculture – Minutes of the meeting on 2 and 3 March 1983, AG/M/1 (15 April 1983), para. 34. (emphasis added) The same approach was also referred to in the programme of work of the Committee on Trade in Agriculture that was adopted in March 1983. (AG/1 (7 March 1983), p. 2)

¹⁸⁰ Committee on Trade in Agriculture – Minutes of the meeting on 2 and 3 March 1983, AG/M/1 (15 April 1983), para. 36.

¹⁸¹ *Ibid.* (emphasis added)

market access and supplies, and the operation of the GATT as regards subsidies.¹⁸² In the context of these discussions, it was noted that "some difference of view was still persisting with respect to product coverage and the measures to be included" in the notifications of subsidies.¹⁸³ Until the launch of the Uruguay Round, the Committee engaged in an in-depth examination of new disciplines applicable to agricultural products in general, with no reported discussion on a differentiation between fisheries products and agricultural products.¹⁸⁴

4.4.2 Relevant discussions during the Uruguay Round negotiations on trade in agriculture

4.33. The Uruguay Round of trade negotiations was launched following the Ministerial Declaration at the Punta des Este Ministerial Conference in 1986.¹⁸⁵ With respect to trade in agriculture, the Ministerial Declaration stated that "[n]egotiations shall aim to achieve greater liberalization ... and bring all measures affecting import access and export competition" under strengthened rules and disciplines.¹⁸⁶ This goal was to be achieved by "improving market access", "increasing discipline on the use of all direct and indirect subsidies and other measures" affecting agricultural trade, and "minimizing the adverse effects" of sanitary and phytosanitary regulations and barriers.¹⁸⁷

4.34. In light of this mandate, the Negotiating Plan for the Group on Agriculture¹⁸⁸ called for the submission of supplementary information on measures and policies affecting trade, "including full notification of all direct and indirect subsidies and other measures affecting directly or indirectly agricultural trade".¹⁸⁹ In an explanatory note regarding such notifications, the Secretariat specified that information was to be "required for all agricultural products in CCCN Chapters 1 to 24 inclusive", although "countries are free to indicate differences between the

¹⁸² See e.g., Committee on Trade in Agriculture Progress Report, L/5563 (17 October 1983), and Draft Report of the Committee on Trade in Agriculture - Note by the Secretariat, AG/W/5 (13 February 1984).

¹⁸³ Committee on Trade in Agriculture Progress Report, L/5563 (17 October 1983), para. 8.

¹⁸⁴ See e.g., Recommendations: Draft Elaboration - Note by the Secretariat, Revisions 1, 2, and 3, AG/W/9/Rev.1 (12 July 1985), AG/W/9/Rev.2 (12 March 1986), and AG/W/9/Rev.3 (4 June 1986).

¹⁸⁵ Ministerial Declaration on the Uruguay Round, MIN.DEC (20 September 1986).

¹⁸⁶ *Ibid.*, p. 6.

¹⁸⁷ *Ibid.*

¹⁸⁸ The negotiating Group on agriculture (NG5) was one of the 14 negotiating groups established by the Group of Negotiations on Goods, and distinct from the Groups on Natural Resource-Based Products (NG4) and Tropical Products (NG6). (See Fifth Meeting of the Group of Negotiations on Goods - Record of Decisions Taken, MTN.GNG/5 (9 February 1987), p. 11)

¹⁸⁹ *Ibid.*

above definition of agricultural products and their own definition."¹⁹⁰ However, "the inclusion of products in this notification does not imply that they will be the subject of negotiations in the Negotiating Group on Agriculture or in any other group."¹⁹¹

4.35. During the ensuing negotiations, some negotiating parties expressed a preference for a comprehensive product coverage of the negotiations.. The United States proposed that the negotiation "should focus on all agricultural commodities, food, beverages, forest products, and fish and fish products".¹⁹² Likewise, the first official proposal by Japan included "[a]ll agricultural, fishery, forestry products (HS 01-24, and 44 as well as the relevant products notified by participating countries)".¹⁹³ The Cairns Group also appears to have advocated a comprehensive product coverage, noting that "the range of agricultural products to be covered would be as comprehensive as possible", although fish was not specifically mentioned.¹⁹⁴ In contrast, the Nordic countries indicated in a joint statement that, although "[i]n principle the coverage should be as wide as possible ... [they] would not intend to include those products [that they] feel do not belong to [the Negotiating Group on Agriculture], i.e., fishery and forestry products".¹⁹⁵ The European Communities appears to have preferred a broad coverage of the agriculture negotiations, submitting that "[t]he negotiations will cover all agricultural products, raw and processed, giving priority to sectors in structural surplus and those where serious disruptions are foreseeable"¹⁹⁶, although the terms "agricultural products" were not defined.

4.36. The GATT Secretariat reported in late 1987 that, while the "broad product coverage proposed by the United States" could "discourage diversion of trade-distorting support measures to other sectors", the proposal "attracted mixed reactions, with one delegation welcoming it while a number of others queried the

¹⁹⁰ Submission of Supplementary Information on Measures and Policies Affecting Trade in the AG/FOR/- Series - Explanatory Note by the Secretariat, MTN.GNG/NG5/W/1 (3 March 1987), p. 1.

¹⁹¹ Ibid.

¹⁹² United States Proposal for Negotiations on Agriculture, MTN.GNG/NG5/W/14 (7 July 1987), p. 3.

¹⁹³ Japanese Proposal for Negotiations on Agriculture, MTN.GNG/NG5/W/39 (26 December 1987), p. 3.

¹⁹⁴ Cairns Group Proposal to the Uruguay Round Negotiating Group on Agriculture, MTN.GNG/NG5/W/21 (26 October 1987), para. 18. The Members of the Cairns Group were Argentina, Australia, Brazil, Canada, Chile, Colombia, Hungary, Indonesia, Malaysia, New Zealand, Philippines, Thailand and Uruguay.

¹⁹⁵ Uruguay Round - Group of Negotiations on Goods (GATT) - Negotiating Group on Agriculture - 15 - 17 February 1988 - Aggregate Measurement of Support, including Decoupled Income Support - Statement by the Nordic Countries, MTN.GNG/NG5/W/49 (3 March 1988), para. 4.

¹⁹⁶ European Communities Proposal for Multilateral Trade Negotiations on Agriculture, MTN.GNG/NG5/W/20 (26 October 1987), p. 2.

inclusion of fish and forestry products."¹⁹⁷ In the same vein, the GATT Secretariat summarized discussions held in early 1988 on product coverage as follows:

As concerns product coverage, a few countries supported the inclusion of forestry and fishery products into the negotiations on agricultural trade on the grounds that all products of interest to either exporting or importing countries should be included, while others strongly resisted the inclusion of these product categories as they considered them to be outside the competence of the Group.¹⁹⁸

4.37. The discussions on product coverage were also driven by the negotiations on future Domestic Support commitments, held in particular in the Technical Group on Aggregate Measurement of Support (AMS) and related matters established in March 1988.¹⁹⁹ As noted by the Secretariat, the methodology envisaged to measure the support, based on the Producer Subsidy Equivalent (PSE) developed by the OECD²⁰⁰, influenced the product coverage:

The determination of the commodity coverage would be influenced by a number of general and practical considerations. On general grounds, the commodity coverage should be broad enough to cover a large proportion of international agricultural production and trade, as well as the main interests of the participating countries. On practical grounds, account would have to be taken of the fact that it may not be feasible to undertake aggregate support measurements for commodities in respect of which representative international prices and relevant government financial data are not readily available.²⁰¹

4.38. The Secretariat thus noted that "[p]roduct coverage should be as broad as possible, although the use of an AMS could tend, in practice, to be limited to those commodities already covered by relevant international work programmes."²⁰² Nevertheless, many participating parties agreed that all products should be

¹⁹⁷ Summary of Main Points Raised at the Third Meeting of the Negotiation Group on Agriculture, 6-7 July 1987, MTN.GNG/NG5/W/18 (8 October 1987), pp. 1-2.

¹⁹⁸ Summary of Main Points Raised at the Sixth Meeting of the Negotiation Group on Agriculture, 15-17 February 1988, Note by the Secretariat, MTN.GNG/NG5/W/52 (17 March 1988), p. 2.

¹⁹⁹ Draft Annotated Agenda for the Meeting of the Technical Group in the Week Beginning 21 March 1988, MTN.GNG/NG5/TG/W/1 (1 March 1988). For an introduction to the concept of AMS, see for example https://www.wto.org/english/tratop_e/agric_e/ag_intro00_contents_e.htm or https://www.wto.org/english/res_e/booksp_e/agric_agreement_series_3_e.pdf

²⁰⁰ The origin of the PSE concept goes back to the "Standard Method" which was developed in the pre-Kennedy Round GATT Committee II. (See Quantitative Measurement of Support: The PSE, Note by the Secretariat, Spec(87)37 (8 September 1987), p.2)

²⁰¹ Aggregate Measurement of Support - Note by the Secretariat, MTN.GNG/NG5/W/34 (27 November 1987), para. 22. This note also added that "[t]he commodities for which aggregate measurements have been developed for certain countries are: wheat, coarse grains and rice; soyabeans and rapeseed; corn gluten feed and manioc; milk and dairy products; sugar; beef, pigmeat, poultry and sheepmeats; eggs; and wool. ... A related issue would be the applicability of the aggregate support approach to products other than the major internationally traded commodities and to processed products". (Ibid., para. 23)

²⁰² Summary of the Main Points Raised at the Meeting of the Technical Group on 3 - 4 November 1988 - Note by the Secretariat, MTN.GNG/NG5/TG/W/16 (14 November 1988), para. 4.

subject to the negotiations, although not necessarily on the basis of the PSE methodology.²⁰³ A summary of views prepared by the Secretariat²⁰⁴ reflected the range of options proposed, which are similar to those described in paragraphs 4.35 to 4.36 above.

4.39. In a new proposal tabled in November 1988, the United States restated its preference to achieve disciplines with a broad product coverage by proposing that, "[a]t the Mid-Term Review, Ministers would agree, with respect to any agricultural commodity or product, food, beverage, forest product, fish or fish product, to undertake fundamental policy reforms, within an agreed upon period of time, that would bring all countries into compliance with the following free-trade principles".²⁰⁵ However, later that year, the GATT Secretariat reported on continued disagreement as to the inclusion of fish and forestry products within the coverage of prospective rules.²⁰⁶

4.40. At the "TNC Meeting at Level of High Officials" in April 1989, the negotiating parties adopted a decision (the Mid-Term Review Decision)²⁰⁷ that constituted an important step in the negotiations including on agriculture, although it was silent as to its specific product coverage. With respect to the "general direction and procedures to be followed in the final phases of the [agriculture] negotiations"²⁰⁸, the Decision endorsed a framework comprising several interrelated long-term and short-term elements. The latter were aimed at preventing the increase of agricultural protective measures before the completion of the negotiations expected by the end of 1990, and reducing the support and protection levels of 1990.²⁰⁹ It may be interesting to note that, in its notifications in compliance with paragraph 15 of the Decision (on support reduction), New Zealand differentiated

²⁰³ Summary of the Main Points Raised at the Third Meeting of the Technical Group on Aggregate Measurement of Support and Related Matters - (23 - 24 June 1988) - Note by the Secretariat, MTN.GNG/NG5/TG/W/12 (6 July 1988), para. 15. It was also noted that "agricultural trade involved about 3,000 tariff line items, whereas PSEs to date had been calculated for less than twenty-five major primary commodities." (Ibid.)

²⁰⁴ MTN.GNG/NG5/TG/W/13 (August 1988).

²⁰⁵ A framework for Agricultural Reform – Submitted by the United States, MTN.GNG/NG5/W/83 (9 November 1988), para. 4.

²⁰⁶ Summary of Main Points Raised at the Twelfth Meeting of the Negotiating Group on Agriculture, 14-15 November 1988, Note by the Secretariat, MTN.GNG/NG5/W/93 (13 January 1989), p. 2 (noting that "[s]ome other questions raised in connection with [the US proposal] concerned [inter alia] the inclusion of forestry and fishery products").

²⁰⁷ Trade Negotiations Committee Meeting at Level of High Officials, Geneva, 5-6 April 1989, MTN.TNC/9 (11 April 1989).

²⁰⁸ Ibid., p. 3, para. 1.

²⁰⁹ Ibid., p. 6, paras. 14-15.

between the products of "*pastoral agriculture*" and other agricultural products, including "*pisciculture, fisheries and forestry products*".²¹⁰ In contrast, the notification from the European Community referred to the "arable and livestock" sector, with no reference to fish and fishery products.²¹¹ Indeed, the vast majority of the compliance notifications did not include measures regarding the fishery sector.²¹² This was likely due to the fact that commitments on the level of domestic support could only have been made for the products that were relevant to the main interests of the participating countries and covered by available data (such as the PSE).²¹³

4.41. In a submission in October 1989 on "comprehensive long-term agricultural reform", the United States once again included fishery products in the scope of future disciplines and liberalization plans.²¹⁴ The paper indicated that the United States continued to advocate a wide product coverage for the prospective rules and reform programme. However, the Secretariat reported once more on mixed views expressed by the negotiating countries in this regard:

As concerned the product coverage, some participants were heartened by the extended coverage proposed in the United States paper. Others, however, questioned the advisability of including products which were the subject of discussion in other negotiating groups... The representative of the United States, responding to comments and requests for clarification on its proposal ... [a]s concerned product coverage, ... pointed out that the United States had from the start maintained that all agricultural products, including tropical ones, should be covered; the list in Annex I [of MTN.GNG/NG5/W/118] was consistent with this position...."²¹⁵

²¹⁰ Undertaking pursuant to Paragraph 15 of the Mid-Term Review Decision on Agriculture, Notification from New Zealand, MTN.GNG/NG5/W/127 (23 November 1989), paras. 5 and 7. (emphasis added)

²¹¹ Undertaking pursuant to Paragraph 15 of the Mid-Term Review Decision on Agriculture, Notification from the European Community, MTN.GNG/NG5/W/125 (23 November 1989), para. 3. The arable sector covered wheat, barley, maize, rice, sugar, rapeseed and soya beans, and the livestock sector covered milk, beef and veal. (Ibid.)

²¹² See e.g., Notifications from Finland (MTN.GNG/NG5/W/115 (24 October 1989)), Australia (MTN.GNG/NG5/W/116 (25 October 1989)), Austria (MTN.GNG/NG5/W/120 (2 November 1989)), Iceland (MTN.GNG/NG5/W/122 (2 November 1989)), Sweden (MTN.GNG/NG5/W/124 (15 November 1989)); Norway (MTN.GNG/NG5/W/129 ((27 November 1989)), the United States (MTN.GNG/NG5/W/136 (7 December 1989)), South Africa (MTN.GNG/NG5/W/141 (19 December 1989)), and Canada (MTN.GNG/NG5/W/152 (13 February 1990)).

²¹³ See para. 4.37-4.38 above.

²¹⁴ Submission of the United States on Comprehensive Long-term Agricultural Reform, MTN.GNG/NG5/W/118 (25 October 1989), p. 17.

²¹⁵ Summary of the Main Points Raised at the Sixteenth Meeting of the Negotiating Group on Agriculture - (25 - 26 October 1989) - Note by the Secretariat, MTN.GNG/NG5/W/123 (10 November 1989).

4.42. In a synoptic table circulated in February 1990 and revised in April 1990 on the negotiating parties' proposals under the three pillars ("Internal Support, Border measures and export competition"), the United States was the only party that referred to HS nomenclature (chapters 1-23 and 24.01) for its proposals²¹⁶ Most of the other parties (e.g., Cairns Group, European Community, Japan, Nordic States, Switzerland, Korea or Morocco) submitted proposals with respect to "all agricultural products", although the term was not defined in their proposals.²¹⁷ Indeed, the Cairns Group noted that "[a] precise definition of the products negotiated in NG5 is required."²¹⁸ In addition, while it also referred to "all agricultural products", Austria proposed to cover "initially only major traded commodities (e.g., cereals, milk)" with respect to domestic support. Some developing countries (Egypt, Jamaica, Mexico, Morocco, Peru, Brazil and Colombia) focused on "products of export interest to net-food importing developing countries".²¹⁹ Furthermore, a note by the Secretariat in May 1990 regarding net food-importing developing countries²²⁰ included references to "fish and fish products" among the food products to be considered when assessing the measures proposed by these countries to offset the possible negative effects of the agricultural reform process.²²¹

4.43. In the meantime, the Market Access proposals submitted in the context of the Negotiating Groups on Tariffs (NG1)²²² covered all the tariff lines (HS Chapters 1-99) for some Members, and for others only so-called industrial products

²¹⁶ See Synoptic Table of Negotiating Proposals Submitted Pursuant to Paragraph 11 of the Mid-Term Review Agreement on Agriculture - Notes by the Secretariat (Synoptic Table), MTN.GNG/NG5/W/150 (12 February 1990), MTN.GNG/NG5/W/150/Corr.1 (28 March 1990), and MTN.GNG/NG5/W/150/Rev.1 (2 April 1990).

²¹⁷ See e.g., Synoptic Table, MTN.GNG/NG5/W/150 (12 February 1990), pp. 10 and 13.

²¹⁸ Ibid. p. 10.

²¹⁹ Ibid., pp. 6 and 17.

²²⁰ Food balances in Selected Countries, MTN.GNG/NG5/W/167 (28 May 1990). It should be noted however that Egypt, on behalf of the net food-importing developing countries, contested the list of products suggested by the Secretariat, noting that "most of the products contained under sub-total B, (i.e., the category including fish and fish products), belong to the Negotiating Groups of Tropical Products or Natural Resource-Based Products. These negotiating Groups have a different mandate than that of the Negotiating Group on Agriculture which is concerned not only with market access but, inter alia, with support." (Statement by the Delegation of Egypt on Behalf of Net Food-Importing Developing Countries, MTN.GNG/NG5/W/171 (21 June 1990))

²²¹ See Ways to Take Account of the Negative Effects of the Agriculture Reform Process on Net Food Importing Developing Countries - Proposal by Egypt, Jamaica, Mexico, Morocco and Peru (Other Developing Countries Have Indicated Their Support), MTN.GNG/NG5/W/119 (2 November 1989).

²²² Pursuant to the applicable procedures, proposals were to be submitted by 15 March 1990. (Negotiating Group on Tariffs - Procedures for the Negotiations, MTN.GNG/NG1/17 (1 February 1990), para. 1)

(chapters 25-99), i.e., by carving out agricultural products in chapters 1-24,²²³ with fishery products implicitly considered as agricultural products in such cases.

4.44. The draft text by the Chairman for a "Framework Agreement on Agriculture Reform Programme" circulated in July 1990 (the so-called "De Zeeuw Paper")²²⁴, again lacked specific indications of the product coverage for the agriculture negotiations. This did not pass unnoticed, as demonstrated by several reactions. The Ministers of the Cairns Group noted that "the Chairman's text neglected the issue of product coverage", while recalling that "the Cairns Group sought commitment on all agricultural products".²²⁵ The European Community regretted that "[t]he paper is silent on product coverage but seems to imply that all agricultural products are covered without defining them".²²⁶ Other contracting parties, such as Mexico, also called for clarification of the product coverage of the negotiations, quoting the Punta Del Este Declaration and the Mid-term Review texts as the legal bases confirming wide product coverage for the agriculture negotiations.²²⁷ Mexico referred to horticulture products in particular. No such direct claim could be found with respect to fishery products.

4.45. The Negotiating Group on Agriculture, after discussing the De Zeeuw Paper in July 1990, could not formally adopt the draft proposal, but agreed to use the text as a means to intensify the negotiations.²²⁸ The Chairman's report of the meeting, as well as the note circulated subsequently by the Secretariat to assist participants in the preparation of country lists, registered the shared understanding that "all agricultural products are within the scope of the negotiations" without further precision.²²⁹ At a meeting of the Negotiating Group

²²³ With some possible addition of agricultural products beyond HS24.

²²⁴ MTN.GNG/NG5/W/170 (11 July 1990). The framework covered "internal support, border protection, export competition, reduction targets, sanitary/phytosanitary regulations and barriers, rules, surveillance, and provides a basis for taking account in the negotiation of non-trade concerns, special and differential treatment for developing countries, and the situation of net food-importing developing countries." (Ibid., para. 1)

²²⁵ Santiago Meeting of Cairns Group Ministers: 4-6 July 1990 – Press Communique and Conclusions, MTN.GNG/N65/W/175 (24 July 1990), para. 21.

²²⁶ Twenty-Third Session of the Negotiating Group on Agriculture: July 1990 – Comments on the Draft Text by the Chairman on a Framework Agreement on the Agriculture Reform Programme – Statement by the European Community, MTN.GNG/NG5/W/181 (19 July 1990), p. 1.

²²⁷ Twenty-Third Session of the Negotiating Group on Agriculture: July 1990 – Statement by Mexico, MTN.GNG/NG5/W/177 (24 July 1990), p. 1.

²²⁸ Report by the Chairman of the Negotiating Group on Agriculture to the 23 July 1990 Meeting of the GNG (Report by the Chairman), MTN.GNG/NG5/23 (23 July 1990); and Concluding remarks by the Chairman, MTN.GNG/NG5/24 (23 July 1990).

²²⁹ Report by the Chairman, MTN.GNG/NG5/23 (23 July 1990), para. 2; and Country Lists on Internal Support, Border Protection and Export Competition: Formats, Note by the Secretariat, MTN.GNG/NG5/W/190 (31 July 1990), Introduction.

on 4 October 1990, a Chairman's proposal on the product coverage was agreed upon as "the guideline for the submission of offers".²³⁰ This proposal suggested that the product coverage for the negotiations should be "Harmonized System Chapters 1 to 23 *less fisheries*", with "fisheries" further defined by reference to several HS headings.²³¹ The Chairman also proposed 10 additional product categories to be covered beyond HS Chapters 1 to 23.²³²

4.46. Subsequently, the "De Zeeuw Paper" was incorporated in the revised "Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations" (Draft Final Act)²³³, circulated in December 1990 in advance of the Brussels Ministerial Meeting. The question of product coverage was one of the principal issues left for the consideration of Ministers.²³⁴

4.47. Following the failure of the Brussels Ministerial Meeting in December 1990, the Chairman of the TNC put forward a work programme for the continuation of consultations on various technical issues under the three pillars of Domestic Support, Market Access, and Export Competition.²³⁵ In the context of these negotiations²³⁶, a detailed options paper was circulated by the Chairman of the Negotiating Group on Agriculture in June 1991, which stated in its paragraph 2 that the paper "is based on the assumption that all agricultural products will be covered in the negotiations".²³⁷ This statement was further clarified by an addendum in August 1991 that contained an explicit carve-out of fish and fish products from the product coverage of the negotiations on the three pillars of the forthcoming Agreement on Agriculture. The addendum stated that: "[t]he following product coverage could be considered in relation with paragraph 2 of the options paper: Harmonised System Chapters 1 to 23 *less fish and fish products...*",

²³⁰ Twenty-Fifth Session of the Negotiating Group on Agriculture, Note by the Chairman, MTN.GNG/NG5/26 (4 October 1990), p. 1. The offers, which were different from the country lists, were to be submitted by 15 October 1990. (TNC Chairman's summing-up at meeting of 26 July 1990, MTN.TNC/15, 30 July 1990), p.3)

²³¹ Ibid., p. 2.

²³² Ibid. In the agricultural country lists and offers subsequently submitted in the last quarter of 1990, some contracting parties, such as Japan, Romania or Uruguay nevertheless continued to include fishery products.

²³³ MTN.TNC/W/35/Rev.1 (3 December 1990), p. 139.

²³⁴ Ibid., p. 140.

²³⁵ See Trade Negotiations Committee - Programme of work - Proposal by the Chairman at Official Level, MTN.TNC/W/69 (16 February 1991), p. 2.

²³⁶ The negotiating group on agriculture was one of the remaining groups in place after the TNC decided to reduce their number from 15 to 6. See Trade Negotiation Committee - Sixteenth meeting: 25 April 1991, MTN.TNC/20 (7 May 1991); Group of Negotiations on Goods - Nineteenth meeting: 25 April 1991, MTN.GNG/26 (29 April 1991) and document series MTN.GNG/AG...

²³⁷ Options for the Agriculture Negotiations, Note by the Chairman, MTN.GNG/AG/W/1 (24 June 1991), para. 2.

plus 11 categories outside these chapters.²³⁸ In contrast to the Chairman's proposal, agreed upon in October 1990 described above, "fish and fish products" were not further defined by reference to HS headings²³⁹.

4.48. The phrase "less fish and fish products" was later incorporated into the product coverage contained in Annex 1, paragraph 1 of the draft Agreement on Agriculture incorporated in the Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, circulated by the Chairman of the TNC in December 1991 (the Dunkel Draft).²⁴⁰ The content of Annex 1 remained unchanged in the modalities for the establishment of specific binding commitments under the reform programme circulated by the Chairman of the Market Access Group in December 1993²⁴¹, and was finally incorporated in the Uruguay Round Agreement on Agriculture.

4.49. As noted in section 2, the definition of "fish and fish products" was not specified in terms of HS nomenclature. This resulted in some contracting parties using different definitions of fish and fish products in their Uruguay Round schedules. For the sake of comparability, the GATT Secretariat at the time established a uniform list in HS terms, which was used in the review and assessment of the final bound duties of the 93 contracting parties.²⁴² Fish and fishery products were defined in HS 1992 terms as follows: Chapter 03, Headings 05.09, 15.04, 16.03-16.05 and Subheading 2301.20.²⁴³ As further discussed in Section 5 below, the issue concerning a uniform list of "fish and fish products" in terms of HS nomenclature, as well as divergences in Members' Schedules of

²³⁸ Options for the Agriculture Negotiations, Note by the Chairman, Addenda, MTN.GNG/AG/W/1/Add.1 (2 August 1991), p. 1. (emphasis added)

²³⁹ Some differences regarding the additional headings (outside HS Chapters 1-24) also exist compared to the October 1990 text.

²⁴⁰ MTN.TNC/W/FA (20 December 1991), p. L.12. The product coverage contains some differences regarding the additional headings as compared to the previous version in document MTN.GNG/AG/W/1/Add.1. (See *supra* fn. 238).

²⁴¹ MTN.GNG/MA/W/24 and MTN.GNG/MA/W/25 (20 December 1993). Following the circulation of the Dunkel draft, the preparation of market access concessions and commitments on domestic support and export competition in agriculture were regrouped under the market access "track". See Trade Negotiation Committee, twenty first meeting: 13 January 1992, MTN.TNC/25 (5 February 1992); Negotiation Group on Market Access, meeting of 5 March 1992, MTN.GNG/MA/7 (26 March 1992). The subsequent offers on agriculture did not include fishery products.

²⁴² See Product coverage for non-agricultural products, Note by the Secretariat, JOB(05)/32 (11 March 2005)), paras. 2-4.

²⁴³ *Ibid.*, Annex 2. The list of fish and fish products in the list prepared by the GATT Secretariat definition is reproduced in Annex 2 to the present paper.

Concessions in this regard, was subsequently addressed in the context of WTO non-agricultural market access (NAMA) negotiations.

4.50. The effects of the exclusion of fish and fish products from the product scope of the Agreement on Agriculture are reflected in two aspects of the market access conditions of these products following the Uruguay Round, namely, the percentage of tariff lines subject to bindings, and the level of bound tariffs.²⁴⁴ First, while the percentage of tariff lines covered by tariff bindings increased to 100 per cent for agricultural products as a result of the Uruguay Round (from 26.9 per cent of tariff lines pre-Uruguay Round), the increase for fish and fish products was more modest (from 23.4 per cent to 58.7 per cent).²⁴⁵ Second, similar to a pattern generally exhibited by non-agricultural products, the simple average bound tariffs for fish and fish products (44.6 per cent) was lower than that of agricultural products subsequent to the Uruguay Round (65.1 per cent).²⁴⁶

4.4.3 Parallel negotiations on SPS during the Uruguay Round

4.51. The negotiation plan of the Group on Agriculture (NG5)²⁴⁷, agreed in February 1987, also included negotiations on minimizing the adverse effects that sanitary and phytosanitary regulations and barriers can have on trade in agriculture.²⁴⁸ The product coverage of what would finally become the Agreement on Sanitary and Phytosanitary Measures (SPS Agreement) was the object of discussions in parallel to those undertaken in relation to the commitments and future disciplines on agriculture. Initially, the synoptic table of SPS-related proposals prepared by the Secretariat in May 1990 included *inter alia* the following draft language in brackets:

Product coverage of the discipline has yet to be determined and will be related to that agreed by NG5, although it has been proposed that

²⁴⁴ Another aspect is the fact fish and fish products were not covered by the tariffication exercise resulting from article 4.2 of the Agreement on Agriculture.

²⁴⁵ See Table 1 in Annex 4 for more details regarding developed and developing countries, respectively.

²⁴⁶ The difference was however much smaller for applied tariffs, with simple average applied tariffs for fish/fish products and agricultural products and at 14.6 per cent and 15.9 per cent, respectively, following the Uruguay Round. (See Table 2 in Annex 4 for more details regarding developed and developing countries, respectively)

²⁴⁷ See *supra* fn. 188.

²⁴⁸ Fifth Meeting of the Group of Negotiations on Goods – Record of Decisions Taken, MTN.GNG/5 (9 February 1987), p. 10. Negotiations on SPS related issues were held in the Working Group established to this effect (see series of documents MTN.GNG/NG5/WGSP)

fisheries and forest products be included regardless of their inclusion in the rest of the NG5 agreement.²⁴⁹

4.52. The draft text for the framework of an SPS Agreement circulated by the Secretariat in June 1990 defined an SPS measure as "[a]ny measure relating to an agricultural product which is designed or operates to protect human, animal or plant life or health".²⁵⁰ A note further qualified this definition by stating that "[a]n agricultural product is here taken to include all products falling within Chapters 1 - 24 of the Harmonized System."²⁵¹

4.53. The "De Zeeuw paper" revised the draft definition of an SPS measure to include two alternative options, one of which defined it as "any measure designed and applied to protect human, animal or plant life or health from risks arising from or created for agricultural, fishery or forestry products."²⁵² While both options were reflected (albeit in brackets) in a revised draft text circulated on 1 October 1990²⁵³, the definition was further modified subsequently to read: "[a]ny measure designed and applied to protect human, animal or plant life or health from risks arising from the establishment and spread of pests, diseases, disease-causing organisms and disease-carrying organisms, or from exposure to additives, contaminants and toxins in foods, feedstuffs and beverages".²⁵⁴ This revised definition thus contained no reference to agricultural and fish products.

4.54. Finally, a new iteration was presented by the Chairman of the working group on SPS measures in November 1990, setting out a definition nearly identical to the one incorporated in the final version of the SPS Agreement. It also contained a footnote specifying that: "[f]or the purpose of these definitions 'animal' includes fish and wild fauna; 'plant' includes forests and wild flora; 'pests' include weeds;

²⁴⁹ Working Group on Sanitary and Phytosanitary Regulations and Barriers - Synoptic Table of Proposals relating to Key Concepts - Note by the Secretariat - Revision, MTN.GNG/NG5/WGSP/W/17/Rev.1 (29 May 1990), p. 3.

²⁵⁰ Working Group on Sanitary and Phytosanitary Regulations and Barriers - Draft Text for the Framework of an Agreement on Sanitary and Phytosanitary Measures, MTN.GNG/NG5/WGSP/W/23 (28 June 1990), p. 10.

²⁵¹ Ibid.

²⁵² De Zeeuw Paper, MTN.GNG/NG5/W/170 (11 July 1990), p. 19. The other definition was : "[a]ny measure intended to control or prevent the movement across national boundaries of pests, diseases, disease-causing organisms and disease-carrying organisms which can adversely affect human, animal or plant life or health or otherwise cause damage, together with measures intended to control or prevent the use of additives and the presence of contaminants in foods and beverages in order to protect human health". (Ibid.)

²⁵³ Draft Text for a Decision by CONTRACTING PARTIES on Sanitary and Phytosanitary Measures, MTN.GNG/NG5/WGSP/W/26 (1 October 1990), p. 9.

²⁵⁴ Draft Text for a Decision by CONTRACTING PARTIES on Sanitary and Phytosanitary Measures, MTN.GNG/NG5/WGSP/W/26/Rev.1 (29 October 1990), p. 10.

and 'contaminants' include pesticide and veterinary drug residues and extraneous matter".²⁵⁵ This text was also incorporated in the final version of the SPS Agreement, as shown in its footnote 4. The Agreement on Agriculture echoes this difference between the product scopes of these agreements by stating, in Annex 1, paragraph 2, that the definition of "agricultural products" as set out in Annex 1, paragraph 1 "shall not limit the product coverage" of the SPS Agreement. Thus, while the negotiations regarding SPS matters took place within the Group on Agriculture, the product scope of the SPS Agreement, which covers fish, is wider than that of the Agreement on Agriculture in view of the nature of the measures covered by the former.

4.4.4 Fish and fish products as "natural resource-based products" before and during the Uruguay Round

4.55. Although fish and fishery products stayed on the side-lines of the agriculture negotiations and were ultimately excluded from its product scope, such products were also addressed specifically in the negotiations regarding natural resource products (alongside minerals, non-ferrous metals, and forestry products) before and during the Uruguay Round. As described below, problems affecting trade in such products received attention in 1982 and prompted several comprehensive studies. In launching the Uruguay Round in 1986, Ministers made particular reference to the importance of natural resource-based products. Issues in this regard were considered of sufficient importance to establish a separate negotiating group and therefore constituted an autonomous element of the overall negotiations. Ultimately, however, negotiations on fish and fishery products were absorbed into other negotiating groups, notably on market access. The final negotiating outcome on these products consisted primarily of the reduction of tariffs and technical barriers.

4.56. The draft text of the 1982 Ministerial Declaration²⁵⁶ contained two draft decisions inviting the GATT secretariat to undertake studies on, respectively, "minerals, metals and forestry products" and "fisheries products".²⁵⁷ The

²⁵⁵ Draft Text on Sanitary and Phytosanitary Measures, MTN.GNG/NG5/WGSP/7 (20 November 1990), p. 12.

²⁵⁶ See para. 4.31 above and *supra* fn. 174.

²⁵⁷ See Preparatory Committee – Draft Text, PREP.COM/W/33 (18 October 1982) p. 18, and Preparatory Committee – Record of Meetings held on 20 and 22 October 1982, PREP.COM/R/10 (26 October 1982), pp. 19, and 26-27.

proposals concerning fisheries products were notably supported by Canada, which noted certain features of the fishery sector that would justify its inclusion in the general work programme on the reductions of tariffs and non-tariff barriers:

Trade in fisheries products tends to be constrained by high trade barriers and few tariff bindings. Tariffs on fisheries products, for instance, have not been subject to the broad tariff cutting formulae used in recent negotiations but were negotiated on a line-by-line and request-offer basis that has led to fewer concessions, in terms of tariff levels and bindings, than is the case for industrial products in general. There is also a range of non-tariff barriers that affect trade in fisheries products. ...²⁵⁸

4.57. In the final version of the Ministerial Declaration adopted in 1982, the GATT Contracting Parties agreed that "problems relating to trade in the following natural resource products ... falling under the competence of the General Agreement relating to tariffs, non-tariff measures and other factors affecting trade, should be examined with a view to recommending possible solutions" on three categories of products: (i) non-ferrous metals and minerals; (ii) forestry products; and (iii) fish and fisheries products.²⁵⁹

4.58. Two decisions were subsequently adopted in April 1983, inviting the Secretariat to undertake background studies on problems of trade in, respectively, fish and fisheries products, and forestry products.²⁶⁰ The study on fish and fisheries products was circulated in March 1984²⁶¹, containing a detailed discussion on the types of measures affecting trade. It found that:

... more than 80 per cent of total trade in fish and fisheries products takes place under bound duties. ... [Other] measures reportedly affecting imports include, *inter alia*, tariff quotas, quantitative restrictions ..., import levies, sanitary regulations, labelling and marketing regulations, internal taxes, and minimum price systems. With respect to measures affecting exports, the most commonly referred to are subsidies, blended credits, drawbacks and other forms of favourable credit for exports. ...²⁶²

²⁵⁸ See Preparatory Committee – Trade in Fisheries Products – Communication from Canada, PREP.COM/W/25 (21 July 1982), p.2.

²⁵⁹ 1982 Ministerial Declaration, L/5424 (29 November 1982), p. 13.

²⁶⁰ See Problems of Trade in Forestry Products, L/5484 (4 May 1983); and Problems of Trade in Fish and Fisheries Products – Decision of 20 April 1983, L/5485 (4 May 1983).

²⁶¹ The study on forestry products was circulated around the same time. (See Spec(84)13 (19 March 1984)).

²⁶² Problems of Trade in Fish and Fisheries Products - Background Study by the Secretariat, Spec(84)7 (9 March 1984), pp. 24-25.

4.59. Building on the above work, the GATT Council agreed on 13 March 1984 to establish a Working Party to address "[p]roblems in trade in certain natural resource products", and to study and make separate reports on the three categories described above.²⁶³ The Report of the Working Party on fish and fishery products was circulated on 25 October 1985.²⁶⁴ Having conducted a comprehensive review of the measures affecting trade in these products, the Report concluded, *inter alia*, that:

[m]any members of the Working Party expressed the view that any future negotiating modalities relating to fish and fisheries products should be elaborated taking into account the following trade measures which were [within] the purview of the [GATT]: the level of nominal tariffs (including unbound tariffs), tariff escalation, effective rates of tariff protection, production and export subsidies, quantitative restrictions, licensing systems, reference price systems, the administration of certain fiscal compensatory taxes, health and sanitary regulations, packaging and labelling requirements.²⁶⁵

4.60. Following this preparatory work, the Punta del Este Declaration²⁶⁶ launching the Uruguay Round in 1986 included a heading on natural resource-based products under the section "subjects for negotiation", focusing on tariffs and non-tariff measures but *not* covering subsidies.²⁶⁷ According to this mandate, negotiations "shall aim to achieve the fullest liberalization of trade in natural resource-based products ... [and] shall aim to reduce or eliminate tariff and non-tariff measures, including tariff escalation."²⁶⁸

4.61. At the first meeting of the Negotiating Group on Natural Resource-Based Products (NG3), it was agreed that the findings of the Working Party on these products established in 1984 should permit the Negotiating Group to make an early start on its work.²⁶⁹ Some debates also took place concerning the relationship between this Negotiating Group and "the broader tariff and NTM

²⁶³ Minutes of Meeting Held on 13 March 1984, C/M/176 (10 April 1984), p. 15; and Working Party on Trade in Certain Natural Resource Products – Communication from the Chairman of the Council, C/126 (30 April 1984), p.1.

²⁶⁴ Problems of Trade in Certain Natural Resource Products - Fish and Fisheries Products - Report of the Working Party, L/5895 (25 October 1985).

²⁶⁵ *Ibid.*, p. 8.

²⁶⁶ Multilateral Trade Negotiations - The Uruguay Round - Ministerial Declaration on the Uruguay Round, MIN.DEC (20 September 1986).

²⁶⁷ Contrary to the section on agriculture.

²⁶⁸ *Ibid.*, p.5.

²⁶⁹ Negotiating Group on Natural Resource-Based Products - Meeting of 11 February 1987 - Note by the Secretariat, MTN.GNG/NG3/1 (26 February 1987), para. 7.

negotiations in the appropriate functional Negotiating Groups".²⁷⁰ In particular, while some delegations envisaged NG3 as having primarily a monitoring and surveillance function, other delegations expressed the view that negotiations relating to natural resource-based products merited a certain specificity.

4.62. Indeed, from the outset, disagreements existed within NG3 regarding the mandate of the group, the product coverage of the negotiations, and the scope of negotiations vis-à-vis the other negotiating groups.²⁷¹ For fish and fishery products, one of the main areas of contention was whether to include issues regarding the control of access to fishery resources by coastal States as part of the negotiations. While some negotiating parties, notably the EC²⁷², wished to include this issue in the discussions, other parties felt strongly that it was outside the purview of the GATT and instead regulated by other international agreements.²⁷³ These conflicts stalled the progress in the group²⁷⁴, and the focus of discussions gradually turned to the possibility to move the negotiations of these products to the other groups.²⁷⁵

4.63. In this context, participating parties also discussed the relationship between the work of NG3 and the Negotiating Group on Agriculture (NG5).²⁷⁶ At a meeting at the end of 1989, for instance, the United States considered that NG3 could work as a complementary group to negotiations being carried out in other groups and

²⁷⁰ Ibid., para. 9.

²⁷¹ See Summary of Statements and Proposals Made Concerning Negotiations on Natural Resource-Based Products - Note by the Secretariat - Revision, MTN.GNG/NG3/W/8/Rev.1 (14 January 1988), paras. 3-14, and 21-51.

²⁷² See e.g., Summary of Statements and Proposals Made Concerning Negotiations on Natural Resource-Based Products - Note by the Secretariat, MTN.GNG/NG3/W/8 (13 November 1987), p. 4; and Negotiating Group on Natural Resource-Based Products - Meeting of 7 May 1990 - Note by the Secretariat, MTN.GNG/NG3/18 (18 May 1990), p. 2 (noting the EC delegation's intervention that "the discriminatory aspects of measures concerning access to fishery resources ... could be significantly reduced or eliminated through negotiations"). See also a pre-Uruguay Round submission on this subject. (Working Party on Trade in Certain Natural Resource Products - Fish and Fisheries Products - Note Submitted by the EEC, MDF/W/36 (28 May 1985)).

²⁷³ See e.g., Negotiating Group on Natural Resource-based Products - Meeting of 8 June 1988 - Note by the Secretariat, MTN.GNG/NG3/7 (30 June 1988), p.4 (noting that "[s]ome participants reiterated their views that the issue of access to fishery resources was not a GATT matter but rather a question which should be exclusively addressed in the context of the [Law of Sea] Convention").

²⁷⁴ According to a commentator, "[t]he insistence of the European Communities, Japan and Korea on linking access to resources with access to markets partly resulted in the failure of the work in the Negotiating Group on NRBP's". (Chen CJ. (2010) Chapter 2: Fisheries Subsidies Negotiations within the WTO Framework, in *Fisheries Subsidies under International Law*, vol. 20 (Berlin, Heidelberg: Springer), pp. 45-111, at 47)

²⁷⁵ See e.g., Negotiating Group on Natural Resource-based Products - Meeting of 13 and 14 July 1989 - Note by the Secretariat, MTN.GNG/NG3/W/24 (10 August 1989), pp. 1-3.

²⁷⁶ See e.g., Summary of Statements and Proposals Made Concerning Negotiations on Natural Resource-Based Products - Note by the Secretariat, MTN.GNG/NG3/W/8 (13 November 1987) and Rev.1 (14 January 1988).

that fish and fisheries products (along with forestry products) ought to be covered by the negotiating group on agriculture. As in the agriculture negotiation, however, this view was not universally shared, including amongst the delegations favouring a horizontal approach to the negotiation. A delegation, speaking on behalf of several countries, opposed the inclusion of these products in the agriculture negotiation, and maintained that fish and forestry products should be covered by a formula approach in market access groups. A last group continued to defend a "vertical" approach whereby fisheries and forestry would be fully addressed in NG3.²⁷⁷

4.64. Finally, in the interest of transparency, negotiating parties agreed to notify their proposals, offers and requests made in other negotiating groups (other than NG3) in relation to natural resource-based products.²⁷⁸ For the most part, these submissions related to the reduction or elimination of tariff and technical barriers to trade.²⁷⁹

4.65. By the end of 1990, NG3 was reduced to a monitoring role, as the majority of its members confirmed their position that the Group "should essentially monitor negotiations regarding natural resource-based products carried out in other negotiating groups".²⁸⁰ Meanwhile, the Contracting Parties' proposals for fishery and the other natural resource-based products were primarily notified to the Negotiating Groups on Tariffs (NG1) and Non-Tariffs Measures (NG2) and the offers submitted for the natural resource-based products were incorporated in the

²⁷⁷ Negotiating Group on Natural Resource-Based Products - Meeting of 6 November 1989 - Note by the Secretariat, MTN.GNG/NG3/14 (5 December 1989), paras. 4-6. According to WTO internal archives of negotiating positions in NG3 at the end of 1989, the majority of participants appear to have favoured a horizontal approach in dealing with fish and fishery products, i.e., not limiting the negotiations to NG3 only. Amongst those, some participants such as the United States, Japan or Korea considered that fish products should be covered by the agriculture negotiations in NG5. Other participants expressed a preference for a sectoral approach, including notably the European Communities, who favoured keeping fish and fishery negotiations within NG3. Nordic countries noted their flexibilities in having fish and fishery products to be covered by either NG3 or NG5, depending on the consensus.

²⁷⁸ See e.g., Negotiating Group on Natural Resource-Based Products - Draft Procedures for the Negotiations - Proposal by the Chairman, MTN.GNG/NG3/W/34 (20 March 1990); Negotiating Group on Natural Resource-Based Products - Procedures for the Negotiations - Adopted on 22 March 1990, MTN.GNG/NG3/16 (27 March 1990); and Negotiating Group on Natural Resource-Based Products - Submission of Proposals and Notifications (Situation on 26 April 1990), MTN.GNG/NG3/W/36 (30 April 1990) and its revisions.

²⁷⁹ It was the view of many delegations that the purpose of negotiations in the Negotiating Group on Natural Resource-Based Products was reduction or elimination of tariff and non-tariff barriers. (See e.g., MTN.GNG/NG3/18 (18 May 1990), para. 5) Notably, however, Canada appears to have been the only country that had pursued questions in relation to production subsidy practices in relation to fishery issues. (See MTN.GNG/NG3/20 (3 August 1990), p. 1)

²⁸⁰ Negotiating Group on Natural Resource-Based Products - Meeting of 8 June 1990 - Note by the Secretariat, MTN.GNG/NG3/19 (5 July 1990), para. 5. The representative of the EEC, however, held a different view, noting that given its "clear mandate", the role of the Group should not be limited to surveillance and monitoring. (Ibid., para. 13)

revised Draft Final Act embodying the results of the Uruguay Round of multilateral trade negotiations circulated in December 1990²⁸¹, and subsequently in the final outcome of the Uruguay Round in December 1993 as part of the market access negotiations.

5 FISH AND FISHERY PRODUCTS IN THE NEGOTIATIONS SINCE 1995

5.1. As part of the Doha Round negotiations launched in 2001, market access issues relating to fish and fish products were addressed in the NAMA negotiations between 2005 and 2008, and subsidies for fishing have been discussed in the rules negotiations. This section is intended to complement the historical overview on how fish and fish products had been addressed in the negotiations under the GATT by briefly touching upon the following three aspects of the negotiations in the WTO: (i) the definition of "fish and fish products" in terms of HS nomenclature; (ii) the sectoral initiative on fish and fish products in the NAMA negotiations; and (iii) considerations relating to conservation and sustainable development in the fishery subsidies negotiations. As further discussed below, NAMA negotiations regarding fish and fishery products have been primarily concerned with further tariff reductions. As for the fishery subsidies negotiations, the main driving force behind these negotiations is the concern that subsidies contribute to illegal fishing and lead to overfishing and overcapacity.

5.2. Another difference between NAMA and fisheries subsidies negotiations relates to the coverage of fish and fish products. A significant development in this sector since 1947 has been the growth of aquaculture, which was a marginal industry in 1947 but now accounts for nearly half of total fish consumption in the world. However, HS headings, hence NAMA negotiations, do not distinguish between fish raised by aquaculture and wild marine capture. In contrast, because the latter is the principal cause of overfishing and target for illegal fishing, wild marine capture is the focus of the negotiations on fisheries subsidies in the WTO.

²⁸¹ Draft Final Act, MTN.TNC/W/35/Rev.1 (3 December 1990), fn. 1. At the beginning of 1991, the TNC reduced the number of negotiating groups from fifteen to six, and natural resources-based products were regrouped along with tariffs, non-tariff measures and tropical products in a "new" Market Access Negotiating Group. See Group of Negotiations on Goods - Nineteenth meeting: 25 April 1991, MTN.GNG/26 (29 April 1991), and Documents in series MTN.GNG/MA/...

5.1 NAMA negotiations

5.3. According to paragraph 16 of the Doha Ministerial Declaration²⁸², the aim of the NAMA negotiations, to be achieved "by modalities to be agreed", was "to reduce or as appropriate eliminate tariffs, including the reduction or elimination of tariff peaks, high tariffs, and tariff escalation, as well as non-tariff barriers, in particular on products of export interest to developing countries".²⁸³ This section focuses on two aspects of these negotiations specifically related to fish and fish products, namely, the definition of such products, and a sectoral initiative for these products.

5.1.1 Definition of fish and fishery products (as part of non-agricultural products)

5.4. As noted in paragraph 4.49 above, under Annex 1 of the Agreement on Agriculture, while agricultural products were defined in terms of Chapters, headings and subheadings of the 1992 version of the HS, the definition of "fish and fish products" was not specified in terms of HS nomenclature. In order to ensure comparability in the contracting parties' offers during the Uruguay Round, the GATT Secretariat established a uniform list of fish and fish products in the HS 1992 nomenclature.²⁸⁴ With this definition of fish and fish products, it was possible for the Secretariat to establish a complete list in the 1992 HS nomenclature of non-agricultural products.

5.5. Following changes to the HS nomenclature in 1996 and 2002²⁸⁵, certain new or revised subheadings combined parts of the HS 1992 subheadings that contained both agricultural and non-agricultural products.²⁸⁶ These changes posed some challenges for defining uniform lists of non-agricultural and agricultural products,

²⁸² Ministerial Declaration adopted on 14 November 2001 (Doha Ministerial Declaration), WT/MIN(01)/DEC/1 (20 November 2001).

²⁸³ Doha Ministerial Declaration, WT/MIN(01)/DEC/1 (20 November 2001), para. 16.

²⁸⁴ See Product coverage for non-agricultural products, Note by the Secretariat, JOB(05)/32 (11 March 2005), paras. 2-4.

²⁸⁵ Since entering into force on 1 January 1988, the HS has been partially amended every four to six years. (See WTO Staff Working Paper, "The Harmonized System – Amendments and Their Impact on WTO Members' Schedules" (HS Amendments and their Impact) (ERSD-2008-02 (February 2008)), p.1) For example, amendments were introduced in 1992, 1996, 2002 and 2007, with each covering several hundred changes on product codes or descriptions. (Ibid.) The latest amendments went into effect in 1 January 2017. (See <http://www.wcoomd.org/ru-ru/topics/nomenclature/instrument-and-tools/hs-nomenclature-2017-edition/amendments-effective-from-1-january-2017.aspx>)

²⁸⁶ See Product coverage for non-agricultural products, Note by the Secretariat, JOB(05)/32 (11 March 2005), Annex 3. See also HS Amendments and their Impact, ERSD-2008-02 (February 2008), p. 15) None of these changes, however, concerned "fish and fishery products".

as WTO Members took different approaches in transposing HS1996 and HS2002 amendments into their schedules of concessions. While some assigned the complete subheadings as agricultural or non-agricultural products, others broke down these subheadings into two breakouts with one of them classified as agricultural and the other as non-agricultural. As noted in a WTO Staff Working Paper, both approaches could have raised certain problems.²⁸⁷

5.6. In view of the challenges described above, the WTO Secretariat, at the request of the Negotiating Group on Market Access (NGMA), circulated a Note on Product Scope of Non-Agricultural Products (JOB(05)/32) regarding how to re-classify those subheadings with a mixture of agricultural and non-agricultural product.²⁸⁸ According to the Note, the classification of the redefined subheading or heading is used for purposes of product definitions, so as avoid "ex-outs", i.e., defining only part of a subheading as agricultural.²⁸⁹ On this basis, the Note sets out, in its annexes, the Secretariat's working definitions of non-agricultural products (including fish and fish products) in terms of HS 1992, HS 1996, and HS 2002 nomenclature.²⁹⁰

5.7. Following the circulation of JOB(05)/32, the NGMA requested the Secretariat to prepare a compilation of tariff lines in Members' schedules of concessions that differed from the Secretariat's working definitions. For this purpose, the Chairman requested Members to notify the divergences in their schedules of concessions from the Secretariat's working definitions of non-agricultural products, and to indicate how they would anticipate classifying such products in the future. In April 2006, the Secretariat circulated document JOB(05)/154/Rev.8, containing the

²⁸⁷ As the Working Paper notes, simply combining agricultural and non-agricultural products without reflecting their different levels of duties may potentially breach the bindings if the higher duties are selected. However, keeping the new breakouts of previous subheadings could result in more complicated tariff structures, and undermine the uniformity of the definition across Members. (See WTO Staff Working Paper, HS Amendments and their Impact, ERSD-2008-02 (February 2008), p. 15)

²⁸⁸ Product coverage for non-agricultural products, Note by the Secretariat, (JOB(05)/32 (11 March 2005)). See also *supra* fn. 243, fn. 284, and fn. 286.

²⁸⁹ *Ibid.*, paras. 2-4.

²⁹⁰ Annexes 2 and 3 to the Note on Product Scope of Non-Agricultural Products (JOB(05)32) contain, respectively, Definition of Fish and fish products in HS 1992 nomenclature as used by the Secretariat, and Definition of non-agricultural products in HS 1992, HS 1996 and HS 2002 nomenclatures as used by the Secretariat. Annex 2 of this document is reproduced in Annex 2 of the present paper.

final compilation of such divergences on the basis of information submitted by 18 Members.²⁹¹

5.8. These divergences were divided into two categories: (i) non-agricultural products in the Secretariat's working definitions that are classified as agricultural products by some Members; and (ii) agricultural products in the Secretariat's working definitions that are classified as non-agricultural by some Members. As noted in this document, "divergences mainly relate to the definition of 'fish and fish products' which Annex 1 of the Agreement on Agriculture does not specify in terms of HS codes."²⁹² More specifically, with respect to the relevant divergences in the first category²⁹³, the Members concerned indicated that they could accept the Secretariat's working definition and re-classify the products as "fish and fish products" in their own schedules. With respect to the relevant divergences in the second category²⁹⁴, the Members concerned did not agree with the Secretariat's classification of the relevant products as "agricultural", and considered, instead, that they should be regarded as "fish and fish products" and hence "non-agricultural".

5.9. In December 2008, the Chairman of the NGMA circulated a revised draft text of NAMA modalities (2008 Draft NAMA Modalities)²⁹⁵, building upon previous texts and providing "further details and wider options for ministers to negotiate a balanced final package for the full modalities" for the NAMA negotiations in the Doha Round.²⁹⁶ These draft modalities included a detailed list of Non-Agricultural Products at the tariff line level in the HS 2002 Nomenclature (including fish and fish products), which takes into account, *inter alia*, the discussions on the divergences between the classifications in Members' schedules and Secretariat's

²⁹¹ Product Coverage of Non-Agricultural Products – Revision, Note by Secretariat, (JOB(05)/154/Rev.8 (3 April 2006). The 18 Members included Chile and Singapore, which indicated that their schedule of concessions had no divergences from the Secretariat's definition. (Ibid., para. 3)

²⁹² Product Coverage of Non-Agricultural Products – Revision, Note by Secretariat, (JOB(05)/154/Rev.8 (3 April 2006), para. 1.

²⁹³ Such divergences concerned, for example, natural sponge (HS code 0509.00) and flours, meals, and pellets of fish and crustaceans (HS code 2301.20), which the Secretariat classified as "fish and fish products". (See *ibid.*, pp. 3-4).

²⁹⁴ These divergences concerned, for example, corals and shells of molluscs (HS code 0508.00), and products of fish or crustaceans, molluscs or other aquatic invertebrate, and dead animals thereof unfit for human consumption (HS code 0511.91), which the Secretariat classified as "agricultural". (See *ibid.*, pp. 7-8)

²⁹⁵ Fourth Revision of Draft Modalities for Non-Agricultural Market Access – Revision, TN/MA/W/103/Rev.3 (6 December 2008).

²⁹⁶ See The December 2008 NAMA modalities text made simple, at https://www.wto.org/english/tratop_e/markacc_e/guide_dec08_e.htm

working definitions as described above.²⁹⁷ As shown in the list²⁹⁸, there was broad agreement to define fish and fish products on the basis of specific HS nomenclature. The few exceptions from the definition contained in the list were specified in a footnote. By defining "fish and fish products" in terms of HS 2002 nomenclature, the 2008 Draft NAMA Modalities was thus contributing to a common understanding of the term "less fish and fish products" in Annex 1 of the Agreement on Agriculture, thereby establishing uniform lists of both agricultural and non-agricultural products.

5.1.2 "Sectoral initiative" regarding fish and fishery products

5.10. In several rounds of negotiations in the GATT, the Contracting Parties explored the so-called "sectoral approach" as a negotiating modality to address tariff reductions in a specific sector. Sectoral approaches were proposed for fish products during the Kennedy Round and the Uruguay Round, albeit unsuccessfully.²⁹⁹ The approach has also been utilized since the beginning of the NAMA negotiations in the WTO.³⁰⁰ Sectoral initiatives constitute a key element of the NAMA negotiations to achieve the objectives set out in Paragraph 16 of the Doha Ministerial Declaration described above.³⁰¹

5.11. With respect to fish and fishery products, six Members (Canada, Iceland, New Zealand, Norway, Singapore and Thailand) submitted a communication in October 2005, suggesting a sectoral agreement for which the "ultimate goal would be to eliminate or substantially liberalise tariffs and address unjustified non-tariff barriers for the sector".³⁰² Shortly thereafter, the Ministerial Declaration adopted in Hong Kong in December 2005 called on Members to identify sectoral initiatives that could garner sufficient participation for negotiations on further liberalization.³⁰³ In April 2008, the original six Members of the initiative on fish and fish products, joined by Hong Kong China, Oman, and Uruguay, circulated a revised communication with draft modalities for the liberalization of tariffs in this

²⁹⁷ 2008 Draft NAMA Modalities, TN/MA/W/103/Rev.3 (6 December 2008), Annex 1.

²⁹⁸ This list is reproduced in Annex 3 to the present paper.

²⁹⁹ See Sector Specific Discussions and Negotiations on Goods in the GATT and WTO, TN/MA/S/13 (24 January 2005), paras. 10-27 and Annex 1.

³⁰⁰ See e.g. Negotiating Group on Market Access – Minutes of the Meeting Held in the Centre William Rappard on 2 August 2002, TN/MA/M/2 (9 September 2002), paras. 1.8, 1.12, 1.22, 1.36, 1.38, and 2.13.

³⁰¹ See para. 5.3 above.

³⁰² Market Access for Non-Agricultural Products - Liberalisation of trade in fish and fish products, TN/MA/W/63 (18 October 2005), para. 8.

³⁰³ Hong Kong Ministerial Declaration, WT/MIN(05)/DEC (22 December 2005), para. 16.

sector.³⁰⁴ This sectoral initiative was incorporated in the 2008 Draft NAMA Modalities³⁰⁵, along with 13 other sectoral proposals.³⁰⁶

5.12. While participation in sectoral initiatives was on a non-mandatory basis³⁰⁷, it was also recognized at the time that, for some Members, outcomes in sectoral initiatives that reach a "critical mass"³⁰⁸ of participation would help to balance the overall results of the negotiation on non-agricultural market access.³⁰⁹ The 2008 Draft NAMA Modalities, however, underscored the fact that there was "far from a consensus among Members" on the sectoral initiatives³¹⁰, and identified several open questions revolving around the participation of Members.³¹¹

5.2 Rules negotiations on fishery subsidies

5.13. It is beyond the scope of the present paper to discuss in detail the substantive issues and proposals in the on-going fishery subsidies negotiations. Instead, this section highlights the principal considerations driving these negotiations, i.e., access to and conservation of marine resources, and sustainable development. These considerations, to an extent, hark back to similar concerns voiced in discussions on fish and fishery products in the negotiations before 1995.

5.14. WTO negotiations on fisheries subsidies were launched in 2001 at the Doha Ministerial Conference, with a mandate to "clarify and improve" existing WTO disciplines on fisheries subsidies.³¹² As noted on the WTO web page dedicated to this topic, "since their launch, the WTO's fisheries subsidies negotiations have had sustainability concerns as their core focus (given that the WTO's existing rules on subsidies already address potential trade distortions that can result from

³⁰⁴ Market Access for Non-Agricultural Products - Liberalisation of trade in fish and fish products - Addendum, TN/MA/W/63/Add.3 (8 April 2008)

³⁰⁵ See para. 5.9 above and *supra* fn. 296.

³⁰⁶ 2008 Draft NAMA Modalities, TN/MA/W/103/Rev.3 (6 December 2008), Annex 6. The other sectoral proposals were on: automotive and related parts; bicycles and related parts; chemicals; electronics/electrical products; forest products; gems and jewellery; hand tools; open access to enhanced health care; industrial machinery; raw materials; sports equipment; toys; and textiles, clothing and footwear. (Ibid.)

³⁰⁷ Ibid., para. 9.

³⁰⁸ Such "critical mass" was calculated as a percentage of the global trade of the corresponding groups of products in the 2008 Draft NAMA Modalities. (See 2008 Draft Modalities, TN/MA/W/103/Rev.3 (6 December 2008), p. 74-123, and in particular p. 97 on fish and fish products (stating that "critical mass" is reached "if WTO Members representing at least [90] per cent of world trade in fish and fish products have indicated their intent to participate")

³⁰⁹ Ibid., para. 9.

³¹⁰ 2008 Draft NAMA Modalities, TN/MA/W/103/Rev.3 (6 December 2008), p. 1.

³¹¹ Ibid., paras. 9-12.

³¹² Doha Ministerial 2001 Declaration, WT/MIN(01)/DEC/1 (20 November 2001), para. 28.

subsidization)".³¹³ This core focus is reiterated in most of the documents relating to these negotiations.

5.15. According to a 2009 statement by the Chair of the Negotiating Group on Rules (NGR), for example, the mandate on fishery subsidies negotiations reflected "the increasing attention" being paid in many international fora "to the problems of overcapacity and over-fishing in marine capture fisheries, and the role that subsidies could play in contributing to those problems."³¹⁴ The Chair noted, among other things, that FAO members had adopted the International Plans of Action on Capacity Management and on Illegal, Unreported and Unregulated Fishing (IUU Fishing) by 2001, both of which call for the elimination of subsidies contributing to overcapacity and over-fishing. The Chair also noted that, as early as 1997, certain WTO delegations in the Committee on Trade and Environment (CTE) identified the reduction of fisheries subsidies as a potential win-win-win for trade, development and the environment.³¹⁵ Growing out of this work in the CTE, in 1999 the Seattle Draft Ministerial Declaration contained language for a mandate to negotiate the creation of new disciplines on fisheries subsidies.³¹⁶ In short, as the Chair noted, "it was clear and widely recognized long before the launch of the [Doha Round] that the situation of the world's fisheries was dire, that many poor populations were depending on increasingly precarious natural resources for their livelihoods, and that the WTO could make an important contribution to improving those situations through the development of new disciplines on fisheries subsidies."³¹⁷

³¹³ Introduction to Fisheries negotiations in https://www.wto.org/english/tratop_e/rulesneg_e/fish_e/fish_intro_e.htm

³¹⁴ Statement by the Chairman, Rules Negotiating Group – Informal Open-Ended Meeting with Senior Officials: 25 November 2009 (Chairman's Statement), TN/RL/W/246 (27 November 2009), p. 5.

³¹⁵ Outside the context of negotiations, fish and fish products are also addressed in various WTO regular bodies overseeing the implementation of relevant WTO agreements and decisions. This is notably the case for the CTE, where Members discussed the impact of fisheries subsidies on the conservation of fisheries resources. These discussions served as a basis for the negotiation on fisheries subsidies. Issues regarding conservation and sustainable development of fisheries resources were also covered in the Doha Round in the negotiations on trade and environment, under paragraph 31 (i) of the Doha Mandate on "the relationship between existing WTO rules and specific trade obligations set out in multilateral environmental agreements (MEAs)". With respect to fisheries and marine resources, three MEAs have been identified as relevant: The Convention on the Conservation of Antarctic Marine Living Resources (CCAMLR); the International Convention for the Conservation of Atlantic Tunas (ICCAT), and the United Nations Fish Stocks Agreement (UNFSA). (See Matrix on Trade-related Measures Pursuant to Selected Multilateral Environmental Agreements – Note by the Secretariat, WT/CTE/W/160/Rev.8 and TN/TE/S/5/Rev.6 (9 October 2017))

³¹⁶ Chairman's Statement, TN/RL/W/246 (27 November 2009), p. 5.

³¹⁷ Ibid.

5.16. By the time of the Hong Kong Ministerial, the NGR had made considerable progress in clarifying the nature of the issues before it, including those on fishery subsidies. The Ministerial Declaration called on the Group to "strengthen disciplines on subsidies in the fisheries sector, including through the prohibition of certain forms of fisheries subsidies that contribute to overcapacity and overfishing".³¹⁸ Two documents circulated since then – the draft consolidated Chair's text in November 2007³¹⁹ and the April 2011 communication from the Chair of the Trade Negotiations Committee³²⁰ – successively attempted to capture the state of play in the negotiations. While acknowledging the persisting divergences of views between Members, these two texts show how Members have attempted during the years following the Hong Kong Ministerial Conference to craft new disciplines covering IUU fishing and subsidies contributing to overcapacity and overfishing. As noted in the April 2011 communication:

The longstanding blockage in these negotiations exists in spite of the strong consensus among delegations of all sizes and levels of development that the state of global fisheries resources is alarming and getting worse. Indeed all delegations, when referring to data, rely on the same statistics – those published by the FAO – the latest of which show that 85 per cent of world fish stocks are either fully- or over-exploited. All recognize that this is a crisis of exceptionally serious implications for all humankind ... Furthermore, most agree that subsidies play a major role in contributing to these problems, and that this is what is behind the negotiating mandate to strengthen disciplines on fisheries subsidies, including through a prohibition.³²¹

5.17. The negotiations received new impetus in September 2015, after the adoption by world leaders of the UN Sustainable Development Goals (SDGs). In particular, SDG 14 calls on countries to "[c]onserve and sustainably use the oceans, seas and marine resources for sustainable development".³²² One of the specific targets under this goal, namely, target 14.6, sets 2020 as the deadline for rules to eliminate subsidies that contribute to IUU Fishing, and to prohibit certain forms of fisheries subsidies that contribute to overcapacity and overfishing.³²³ At the 11th Ministerial Conference held in Buenos Aires in December 2017, Members

³¹⁸ Hong Kong Ministerial Declaration, WT/MIN(05)/DEC (22 December 2005), Annex D, para. 9.

³¹⁹ Draft Consolidated Chair Texts of the AD and SCM Agreements, TN/RL/W/213 (30 November 2007).

³²⁰ Communication from the Chairman, TN/RL/W/254 (21 April 2011).

³²¹ *Ibid.*, para. 12.

³²² Sustainable Development Goal 14, available at <https://sustainabledevelopment.un.org/sdg14>.

³²³ "Introduction to fisheries subsidies in the WTO", at https://www.wto.org/english/tratop_e/rulesneg_e/fish_e/fish_intro_e.htm.

agreed "to continue to engage constructively in the fisheries subsidies negotiations, with a view to "adopting by the Ministerial Conference in 2019 an agreement on comprehensive and effective disciplines that prohibit certain forms of subsidies that contribute to overcapacity and overfishing, and eliminate subsidies that contribute to IUU-fishing (...)"³²⁴

5.18. After the 11th Ministerial Conference, WTO negotiations on fisheries subsidies continued with a renewed energy with a view to achieving this goal and related target.³²⁵ WTO Members decided at the end of 2019 to extend the deadline to the 12th WTO Ministerial Conference (MC12) to be held in Nur-Sultan on 8-11 June 2020.³²⁶ MC12 was subsequently postponed due to the outbreak of the COVID-19 pandemic in March 2020. Following renewed invitation by Kazakhstan, June 2021 was regarded as the new "working hypothesis" for the date of MC12, subject to the evolution of the sanitary conditions by the time of the WTO General Council scheduled for July 2021. As of the end of 2020, no final Decision was made on the date and venue of MC12.

5.19. Despite these uncertainties and the disruptions posed by the COVID-19 outbreak, WTO Members resumed their work based on a draft consolidated text circulated in June 2020 by the Chair of the NGR³²⁷ and committed to work towards reaching an agreement by the end of 2020. Negotiations intensified in the second half of 2020³²⁸, with the Chair of the NGR circulating a revised consolidated text in November 2020, although Members could not reach an agreement as expected by the end of 2020.

5.20. The growing concern on access to and conservation of marine resources, and the risk of overfishing to which certain subsidies contribute have continued to be the core focus of the negotiations as well-illustrated by the NGR Chair's message on the occasion of World Fisheries Day on 21 November 2020:

³²⁴ Fisheries Subsidies – Ministerial Decision of 13 December 2017, WT/MIN(17)/64 and WT/L/1031 (18 December 2017), para. 1.

³²⁵ See e.g., Fisheries Subsidies – Working Document – Communication from the Chair, TN/RL/W/274/Rev.6 (14 November 2018).

³²⁶ See e.g., Fisheries Subsidies – Report by the Chair, TN/RL/32 (6 December 2019), and General Council, minutes of meeting held on 9-10 December, WT/GC/M/181 (24 February 2020), Annex 1, pp. 97-98.

³²⁷ See e.g., Trade Negotiations Committee, minutes of meeting held on 20 July 2020, TN/C/M/39 (4 September 2020), pp. 3-5.

³²⁸ See e.g., General Council, minutes of meeting held on 13 October 2020, WT/GC/M/187 (25 November 2020), Annex 1 pp. 59-60.

As we mark World Fisheries Day, it is important to be reminded of the perilous state of the world's fish stocks, which jeopardizes the livelihoods of some 39 million people around the world who are dependent on capture fisheries," the chair said. "The World Trade Organization's negotiations on fisheries subsidies have an important role here, with delegations working hard to fulfil the mandate from Heads of Government in the Sustainable Development Goals, and the mandate from WTO Ministers, to curb harmful fisheries subsidies that deplete global fish stocks.³²⁹

6 CONCLUDING OBSERVATIONS

6.1. The review of historical documents emanating from past trade negotiations indicates that the differentiation between "agricultural" and "fishery" products dates back to the early days of trade negotiations in the last century. Over the years, however, the line between "agricultural products" and "fish and fishery products" was not consistently drawn in negotiations. Debate had persisted in various rounds of negotiations on whether they should be separate, until the dust finally settled in the form of Annex 1 to the Agreement on Agriculture in 1995. In concluding the paper, this section is intended to recapitulate the evolution of the relationship between "agricultural products" and "fishery products" by setting out the following observations gleaned from the materials reviewed above.

6.2. The separation between "agricultural" and "fishery" products could be seen, in part, as logically stemming from the common distinction drawn between "land" or "pastoral" agricultural products (i.e. relating to farms), on the one hand, and "aquatic", or "fishery" products, on the other hand. This appears to be supported by the interventions of several negotiating parties in the past, notably those of Norway during the ITO negotiations, and New Zealand during the Uruguay Round. At the same time, it seems that this linguistic distinction, alone, is unlikely to be sufficient as an explanation. Indeed, New Zealand, among others, supported a comprehensive coverage of "agricultural products" that would have included fish and fishery products, despite the linguistic distinction it drew.

6.3. Over time, the answer to the question of whether fish and fish products should be a sub-category of "agricultural products" appears to have evolved with the context in which the question arose, in view of the issues at stake and taking

³²⁹ WTO News Item, 21 November 2020, at https://www.wto.org/english/news_e/news20_e/fish_21nov20_e.htm.

into account the specificities of each sector. During the pre-GATT period and the first years of the GATT, the Contracting Parties moved from the product-specific approach traditionally used in commodity agreements to a new, comprehensive approach whereby primary commodities could be addressed as one group under the same agreement. In this context, they focused their attention on how to address problems common to primary products and commodity markets through a chapter on Intergovernmental Commodity Arrangements in the draft ITO charter, as well as a provision excluding the application of the elimination of quantitative restrictions. As noted above, it was agreed that agricultural and fishery products shared enough common features to be treated in the same manner in both cases, while being formally identified as two distinct groups.

6.4. The question of the relationship between "agricultural products" and "fish and fish products" re-emerged in a different manner in the late 1950s, when the GATT Contracting Parties turned their attention to the widespread protective measures on trade in agriculture implemented by various countries. Since then, the Contracting Parties began to focus their efforts on finding appropriate responses and disciplines to address the trade-distorting effects of such measures. Thus, it became necessary to demarcate the product scope covered by these negotiations. In this context, the question of whether fish and fish products should be included became a recurring issue in subsequent rounds of negotiations and related discussions. In particular, one of the underlying questions appears to have been whether the problems caused by the protective measures applied to fish products shared similar nature or importance as those applied to (other) agricultural products, therefore justifying similar responses. Ultimately, while there was some agreement to consider "agricultural products" as encompassing all products falling within chapters 1 to 24 of the applicable tariff nomenclature, the relationship between agricultural products and fish and fisheries products was not settled before the Uruguay Round, in the absence of an agreement on disciplines specific to agricultural products.

6.5. The treatment of "fish and fishery products" was again on the agenda of the Uruguay Round launched in 1986, mostly in two parallel settings, namely, the negotiating group on natural resource-based products and that on agriculture. Intensive discussions continued among the GATT Contracting Parties to decide on

the best possible approach to establish future disciplines on measures identified as being prevalent in the fish and fisheries sector, including tariffs, different types of non-tariffs measures, domestic support measures, and export subsidies. As described above, three main options were on the table during these negotiations for the treatment of fish and fish products: (i) product-specific negotiations in the natural resource-based products group; (ii) treating these products as part of the agriculture negotiations; or (iii) a horizontal approach under the respective negotiating groups on tariffs, non-tariff measures and subsidies.

6.6. The third approach was finally retained, and the following three considerations could perhaps shed some light on this outcome. First, the absence of consensus on whether to address the question of access to fisheries resources hampered the Contracting Parties' ability to develop an approach specific to fish and fish products in the negotiations on natural resource-based products. Second, the Contracting Parties seem to have focused on customs duties as the main protective measures on trade in fish and fishery products in the 1980s. As a result, negotiations on these products were directed primarily at tariff reductions or eliminations towards the latter part of the Uruguay Round. Indeed, the sectoral initiative on fish and fishery products in the NAMA negotiations in 2005 appears to echo the same focus on tariff reductions. Third, domestic support measures and export subsidies, both of which constituted core elements of the negotiations on agriculture, seem to have been of relatively less importance for fish and fish products during the Uruguay Round, as illustrated by the absence of readily available data on the relevant indicators (e.g., PSEs). Thus, the type of measures on which negotiations were focused could therefore also help to explain, to an extent, the separation of fish and fishery products from agricultural products.

6.7. Finally, their special status as an exhaustible natural resource product may also help to explain, to some extent, the separate treatment of fish and fishery products vis-à-vis agricultural products. Unlike the "agricultural products" as defined in the Agreement on Agriculture, fish and fishery products resulting from wild marine capture are not only products for human and animal consumption and industrial use but have also been regarded as natural resources that require adequate protection to prevent exhaustion.

6.8. Such concerns were present in the conservation agreements in the early 20th century and voiced during the ITO negotiations. This dimension was also taken into account in the context of the negotiations on natural resource-based products during the Uruguay Round, albeit not as a central element at that time. While the question of subsidies had not been prominent during these previous negotiations, the relationship between trade and conservation eventually took central stage in the WTO negotiations on fisheries subsidies, in which the potential contribution of certain fishery subsidies to over-fishing and unsustainable developments has been a core focus of the negotiations since the launch of the Doha Round. Thus, conservation considerations regarding fish and fishery products, present from the early years of multilateral trade negotiations, continue to resonate in the on-going WTO negotiations in which the link between conservation and rules on subsidies is firmly established.

ANNEX 1

Excerpt from the Agreement on Agriculture:

ANNEX 1

PRODUCT COVERAGE

1. This Agreement shall cover the following products:

(i)	HS Chapters 1 to 24 less fish and fish products, plus*		
(ii)	HS Code	2905.43	(mannitol)
	HS Code	2905.44	(sorbitol)
	HS Heading	33.01	(essential oils)
	HS Headings	35.01 to 35.05	(albuminoidal substances, modified starches, glues)
	HS Code	3809.10	(finishing agents)
	HS Code	3823.60	(sorbitol n.e.p.)
	HS Headings	41.01 to 41.03	(hides and skins)
	HS Heading	43.01	(raw furskins)
	HS Headings	50.01 to 50.03	(raw silk and silk waste)
	HS Headings	51.01 to 51.03	(wool and animal hair)
	HS Headings	52.01 to 52.03	(raw cotton, waste and cotton carded or combed)
	HS Heading	53.01	(raw flax)
	HS Heading	53.02	(raw hemp)

2. The foregoing shall not limit the product coverage of the Agreement on the Application of Sanitary and Phytosanitary Measures.

*The product descriptions in round brackets are not necessarily exhaustive.

ANNEX 2

Excerpt from Product Coverage For Non-Agricultural Products, Note by the Secretariat (JOB(05)/32)

ANNEX 2

Definition of Fish and fish products in HS 1992 nomenclature as used by the Secretariat

HS92	Description
03	FISH AND CRUSTACEANS, MOLLUSCS AND OTHER AQUATIC INVERTEBRATES
0301	Live fish.
0302	Fish, fresh or chilled, excluding fish fillets and other fish meat of heading No. 0304.
0303	Fish, frozen, excluding fish fillets and other fish meat of heading No. 0304.
0304	Fish fillets and other fish meat (whether or not minced), fresh, chilled or frozen.
0305	Fish, dried, salted or in brine; smoked fish, whether or not cooked before or during the smoking process; fish meal fit for human consumption.
0306	Crustaceans, whether in shell or not, live, fresh, chilled, frozen, dried, salted or in brine; crustaceans, in shell, cooked by steaming or by boiling in water, whether or not chilled, frozen, dried, salted or in brine.
0307	Molluscs, whether in shell or not, live, fresh, chilled, frozen, dried, salted or in brine; aquatic invertebrates other than crustaceans and molluscs, live, fresh, chilled, frozen, dried, salted or in brine.
0509	Natural sponges of animal origin.
1504	Fats and oils and their fractions, of fish or marine mammals, whether or not refined, but not chemically modified.
1603	Extracts and juices of meat, fish or crustaceans, molluscs or other aquatic invertebrates.
1604	Prepared or preserved fish; caviar and caviar substitutes prepared from fish eggs.
1605	Crustaceans, molluscs and other aquatic invertebrates, prepared or preserved.
230120	- Flours, meals and pellets, of fish or of crustaceans, molluscs or other aquatic invertebrates

ANNEX 3

Excerpt from 2008 Draft NAMA Modalities (TN/MA/W/103/Rev.3)

ANNEX 1

Product Coverage of Non-Agricultural Products at the tariff line level
in the Harmonized System 2002 Nomenclature

The modalities for non-agricultural products shall cover the following products¹¹:

(a) Fish and fish products defined as:

<u>Code/ Heading</u>	<u>Product Description</u> ¹²
Chapter 3	Fish and crustaceans, molluscs and other aquatic invertebrates
05.08	Coral and similar materials, unworked or simply prepared but not otherwise worked; shells of molluscs, crustaceans or echinoderms and cuttle-bone, unworked or simply prepared but not cut to shape, powder and waste thereof
05.09	Natural sponges of animal origin
0511.91	-- Products of fish or crustaceans, molluscs or other aquatic invertebrates; dead animals of Chapter 3
1504.10	- Fish-liver oils and their fractions
1504.20	- Fats and oils and their fractions, of fish, other than liver oils
ex 1603.00	- Extracts and juices fish or crustaceans, molluscs or other aquatic invertebrates
16.04	Prepared or preserved fish; caviar and caviar substitutes prepared from fish eggs
16.05	Crustaceans, molluscs and other aquatic invertebrates, prepared or preserved
2301.20	- Flours, meals and pellets, of fish or of crustaceans, molluscs or other aquatic invertebrates

(b) Chapters 25 to 97, except the following agricultural products:

<u>Code/ Heading</u>	<u>Product Description</u> ¹²
2905.43	-- Mannitol
2905.44	-- D-glucitol (sorbitol)
2905.45	-- Glycerol
33.01	Essential oils (terpeneless or not), including concretes and absolutes; resinoids; extracted oleoresins; concentrates of essential oils in fats, in fixed oils, in waxes or the like, obtained by enfleurage or maceration; terpenic by-products of the deterpenation of essential oils; aqueous distillates and aqueous solutions of essential oils
ex 3302.10	--Of a kind used in the manufacture of beverages
35.01	Casein, caseinates and other casein derivatives; casein glues
35.02	Albumins (including concentrates of two or more whey proteins, containing by weight more than 80% whey proteins, calculated on the dry matter), albuminates and other albumin derivatives
35.03	Gelatin (including gelatine in rectangular (including square) sheets, whether or not surface-worked or coloured) and gelatin derivatives; isinglass; other glues of animal origin, excluding casein glues of heading 35.01

Code/ Heading	Product Description¹²
35.04	Peptones and their derivatives; other protein substances and their derivatives, not elsewhere specified or included; hide powder, whether or not chromed
35.05	Dextrins and other modified starches (for example, pregelatinised or esterified starches); glues based on starches, or on dextrins or other modified starches
3809.10	- With a basis of amylaceous substances
38.23	Industrial monocarboxylic fatty acids; acid oils from refining; industrial fatty alcohols
3824.60	- Sorbitol other than that of subheading 2905.44
41.01	Raw hides and skins of bovine (including buffalo) or equine animals (fresh, or salted, dried, limed, pickled or otherwise preserved, but not tanned, parchment-dressed or further prepared), whether or not dehaired or split
41.02	Raw skins of sheep or lambs (fresh, or salted, dried, limed, pickled or otherwise preserved, but not tanned, parchment-dressed or further prepared), whether or not with wool on or split, other than those excluded by Note 1 (c) to this Chapter.
41.03	Other raw hides and skins (fresh, or salted, dried, limed, pickled or otherwise preserved, but not tanned, parchment-dressed or further prepared), whether or not dehaired or split, other than those excluded by Note 1 (b) or 1 (c) to this Chapter
43.01	Raw furskins (including heads, tails, paws and other pieces or cuttings suitable for furriers' use), other than raw hides and skins of heading 41.01, 41.02 or 41.03
50.01	Silk-worm cocoons suitable for reeling
50.02	Raw silk (non-thrown)
50.03	Silk waste (including cocoons unsuitable for reeling, yarn waste and garnetted stock)
51.01	Wool, not carded or combed
51.02	Fine or coarse animal hair, not carded or combed
51.03	Waste of wool or of fine or coarse animal hair, including yarn waste but excluding garnetted stock
52.01	Cotton, not carded or combed
52.02	Cotton waste (including yarn waste and garnetted stock)
52.03	Cotton, carded or combed
53.01	Flax, raw or processed but not spun; flax tow and waste (including yarn waste and garnetted stock)
53.02	True hemp (<i>Cannabis sativa L.</i>), raw or processed but not spun; tow and waste of true hemp (including yarn waste and garnetted stock)

Original fn 11: The following deviations are noted without prejudice to the rights and obligations of Members and without creating a precedent for future negotiations. Firstly, Japan will schedule as non-agricultural products the following HS2002 Codes: 1212.20 (Seaweeds and other algae), 1302.31 (Agar-agar) and ex 2106.90 (Other food preparations not elsewhere specified or included, with the largest single ingredient consisting of products specified in sub-heading 1212.20 by weight; Hijikia fusi-formisu; and seaweed products). Secondly, the following Members will schedule some of the HS2002 Codes and Headings covered by paragraphs (a) and (b) as agricultural products: Tunisia (0511.91, ex1603.00 and 2301.20); Turkey (ex1603.00, 1604 and 1605) and Switzerland (05.08, 0511.91, 1504.10, 1504.20 and 2301.20).

Original fn 12: The product descriptions for HS Codes with ex-outs are specific and do not cover the entire 6-digit HS Code.

ANNEX 4

TABLE 1

	Agricultural products		Fisheries products	
	Percentage of tariff lines bound		Percentage of tariff lines bound	
	<i>Pre Uruguay Round</i>	<i>Post Uruguay Round GATT contracting parties</i>	<i>Pre Uruguay Round</i>	<i>Post Uruguay Round GATT contracting parties</i>
All Members	26.9	100	23.4	58.7
Developed economies	72.9	100	70.4	98.6
Developing economies	22.5	100	18.9	54.9

TABLE 2

	Agricultural products		Fisheries products	
	<i>Simple average bound tariffs Post Uruguay Round GATT contracting parties</i>	<i>Simple average applied MFN tariffs Post Uruguay Round GATT contracting parties</i>	<i>Simple average bound tariffs Post Uruguay Round GATT contracting parties</i>	<i>Simple Average applied MFN tariffs Post Uruguay Round GATT contracting parties</i>
	All Members	65.1	15.9	44.6
Developed economies	39.5	16.0	3.0	2.4
Developing economies	67.5	15.9	48.6	15.7

Source: Consolidated Tariff Schedules database and WTO World Tariff Profiles, 2020