LOOKING BEYOND THE DOHA NEGOTIATIONS: A POSSIBLE REFORM OF THE WTO AGRICULTURAL SUBSIDIES RULES

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ABSTRACT

The World Trade Organization (WTO) has treated agricultural subsidies as exceptional. This paper delves into the historical origin of the agricultural subsidies rules of the GATT/WTO. During the era of the GATT 1947, agricultural subsidies were subject to rules for general subsidies with a few exceptions. Under the Uruguay Round Agreement (UR Agreement), subsidies in general were regulated under the Agreement on Subsidies and Countervailing Measures (SCM Agreement), while agricultural subsidies were separately regulated under the Agreement on Agriculture (AA). Institutionalization of the dual track approach under the UR Agreement enabled various policy measures to be developed inconsistently within the twofold regulatory framework. The special status of agricultural products stands out even more in the Peace Clause (Article 13 of the AA), yet its detailed relationship to the SCM Agreement is unanswered in the WTO dispute settlement mechanism. This paper suggests that convergence of the SCM Agreement and the Agreement on Agriculture is eventually required for resolving the structural inconsistency in the GATT/WTO subsidies regime.

KEYWORDS: *GATT/WTO, agricultural subsidies, Agreement on Subsidies and Countervailing Measures, Agreement on Agriculture, institutional convergence*

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I. INTRODUCTION

Agriculture has been protected from market liberalization in the world trading system. A relatively protectionist approach in agriculture was feasible because there was a general consensus among the GATT/WTO signatories in regards to the peculiarities of agriculture—namely multi-functionality,[1] inelasticity of demand, food security, and small sized and unorganized farmers. The design of the WTO rules has also respected the uniqueness of agriculture, and the primary example is the WTO rules on subsidies.

Subsidies are currently governed by two separate WTO agreements—the Agreement on Subsidies and Countervailing Measures (hereinafter "SCM Agreement") and the Agreement on Agriculture (hereinafter "AA"). Products with HS code specified in Annex 1 of the AA are separately ruled under the AA, distinct from the rules on subsidies incorporated in the SCM Agreement. Articles 13 and 21 of the AA make clear that subsidy rules on agricultural products are subject to separate provisions that are contained in the AA.[2] Articles 3 and 5 of the SCM Agreement further explain the boundary between the two agreements.[3]

This paper aims to answer the following two questions. How has the GATT/WTO preferentially treated agricultural subsidies over general subsidies? Are there any structural problems arising from the way the rules are designed? This paper tracks the history of the GATT/WTO subsidies rules, particularly focusing on the divergence of agricultural subsidies rules from general subsidies rules. Along with the historical analysis, this paper compares the legal framework of the SCM Agreement and the AA. After

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[1] OECD Secretariat, *Multifunctionality: A Framework for Policy Analysis*, 5-6, OECD Doc. AGR/CA(98)9 (1998), *quoted in* Margaret R. Grossman, *Multifunctionality and Non-trade Concerns*, *in* AGRICULTURE AND INTERNATIONAL TRADE: LAW, POLICY, AND THE WTO 85, 87 (Michael Cardwell et al. eds., 2003).

[2] Agreement on Agriculture art. 13, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 410 [hereinafter AA]:

> During the implementation period, notwithstanding the provisions of GATT 1994 and the Agreement on Subsidies and Countervailing Measures . . . (a) domestic support measures that conform fully to the provisions of Annex 2 to this Agreement shall be . . . (ii) exempt from actions based on Article XVI of GATT 1994 and Part III of the Subsidies Agreement . . . .

Id. art. 21 ("The provisions of GATT 1994 and of other Multilateral Trade Agreements in Annex 1A to the WTO Agreement shall apply subject to the provisions of this Agreement.").

[3] Subsidies and Countervailing Measures art. 3, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1869 U.N.T.S. 14 [hereinafter SCM Agreement] ("Except as provided in the Agreement on Agriculture, the following subsidies . . . shall be prohibited."). *Id.* art. 5 ("This Article does not apply to subsidies maintained on agricultural products as provided in Article 13 of the Agreement on Agriculture.").

addressing the problem of structural inconsistency, this paper suggests the long-term convergence of the bifurcated subsidies rules.

II. HISTORICAL EVOLUTION OF THE GATT/WTO SUBSIDIES REGIME

A. From Havana to the Uruguay Round

1. Havana Charter for an International Trade Organization — The history of the rules on subsidies traces back to the Havana Charter for the establishment of the International Trade Organization (hereinafter "ITO")[4] in 1948. The general and exception rules on quantitative restrictions in Article 20 of the Havana Charter took the special status of agriculture into account. Article 20.1 of the Havana Charter stipulated the general elimination of quantitative restrictions other than duties, taxes, or other charges. Import restrictions on agricultural products were nevertheless exempt from this general provision through Article 20.2(c).

> Article 20.1: No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licenses or other measures, shall be instituted or maintained by any Member on the importation of any product of any other Member country or on the exportation or sale for export of any product destined for any other Member country.[5]

> Article 20.2(c): The provisions of paragraph 1 **shall not extend to the following:** . . . (c) import restrictions on **any agricultural or fisheries product**, imported in any form, necessary to the enforcement of governmental measures which operate effectively . . . .[6] (Emphases added.)

Along with the rules on quantitative restrictions, an agricultural product under the name of "a primary commodity" was exempt from an obligation to prohibit export subsidies under the Havana Charter. A primary

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[4] The ITO is the intellectual precursor of the WTO. The unsuccessful efforts for establishment were due to the failure of the US Congress to ratify the Havana Charter. Nevertheless, efforts to establish the ITO eventually led to the establishment of the General Agreement on Tariffs and Trade (GATT). *See generally* THE OXFORD HANDBOOK ON THE WORLD TRADE ORGANIZATION (Amrita Narlikar et al. eds., 2012).

[5] United Nations Conference on Trade and Employment, *Havana Charter for an International Trade Organization*, art. 20.1, U.N. Doc. E/Conf. 2/78 (Apr. 1948) [hereinafter Havana Charter].

[6] *Id.* art. 20.2(c).

commodity in this context is defined 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."[7] Not only quantitative restrictions, but also export subsidies on agricultural products were legitimized in the Havana Charter under Article 26.1.[8] Deviating from these general regulations, agricultural products were exempt from the prohibition of export subsidies under Article 27.1 by being categorized as subsidies for "primary commodities". Still, Article 28.1 demarcates the upper limit in agricultural export subsidies through the expression "shall not apply the subsidy . . . more than an equitable share of world trade in that commodity."[9]

> Article 27.1: A system for the stabilization of the domestic price or of the return to domestic producers of **a primary commodity**, independently of the movements of export prices, which results at times in the sale of the commodity for export at a price lower than the comparable price charged for the like commodity to buyers in the domestic market, **shall be considered not to involve a subsidy on export within the meaning of paragraph 1 of Article 26,** if the Organization determines that . . . .[10] (Emphases added.)

> Article 28.1: Any Member granting any form of subsidy, which operates directly or indirectly to maintain or increase the export of **any primary commodity** from its territory, shall not apply the subsidy in such a way as to have the effect of maintaining or acquiring for that Member **more than an equitable share of world trade in that commodity**.[11] (Emphases added.)

Despite the failure to establish the ITO, the above clauses of the Havana Charter served as the regulatory origin of agricultural subsidies

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[7] *Id*. art. 56.1.
[8] *Id*. art. 26.1.

> No Member shall grant, directly or indirectly, any subsidy on the export of any product, or establish or maintain any other system, which subsidy or system results in the sale of such product for export at a price lower than the comparable price charged for the like product to buyers in the domestic market, due allowance being made for differences in the conditions and terms of sale, for differences in taxation, and for other differences affecting price comparability.

[9] *Id.* art. 28.1.
[10] *Id*. art. 27.1.
[11] *Id*. art. 28.1.

rules. Subsequent Article XI:2(c) and Article XVI Section B para. 3 of GATT 1947 succeeded what had been discussed in the Havana Charter.

2. GATT 1947 — The drafters of the GATT 1947 initially had no intention to separate subsidy regulations on agriculture from other sectors because there was no separate agreement tailored to agricultural products in the GATT 1947. This means that as far as the relevant provisions are concerned, agriculture was nearly a "normal" sector in the GATT system until 1994.[12] The general principles of GATT were fully applicable to agriculture, except for certain types of products. Despite this background, Article XI:2(c) and Article XVI Section B para. 3 explicitly acknowledge the special status of agricultural products. Furthermore, Article XXV:5 provides a general waiver to compliance of the obligations in GATT 1947, legally enabling contracting parties not to be bound by the GATT dispute settlement mechanism decisions under certain conditions, including those on the subsidization of agricultural products.

(a) GATT Article XI:2(c) — Analogous to Article 20 of the Havana Charter, GATT Article XI:1 stipulates a general prohibition of quotas, import or export licenses, and other measures (except duties, taxes or other charges). This general prohibition is partly toned down by Article XI:2(c), which carves out agriculture and fishery products from application of Article XI:1.

> GATT Article XI:2(c): The provisions of paragraph 1 of this Article **shall not extend to the following:** (c) Import restrictions on **any agricultural or fisheries product**, imported **in any form**, **necessary** to the enforcement of governmental measures which operate . . . .[13] (Emphases added.)

GATT Article XI:2(c) was not originally designed to overlook protectionist measures for agriculture and fishery products. It provides that "any agricultural or fisheries product, imported in any form" is not subject to the prohibition on import restrictions under certain conditions. Yet the related GATT dispute settlement decisions hardly upheld the application of this clause. Relevant GATT dispute settlement cases support the rigorous application of Article XI:2(c). In *European Economic Community — Restrictions on Imports of Dessert Apples*[14] and *Canada — Restrictions on*

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[12] Steven Tangermann, *Agriculture on the Way to Firm International Trading Rules*, *in* THE POLITICAL ECONOMY OF INTERNATIONAL TRADE LAW: ESSAYS IN HONOR OF ROBERT E. HUDEC 254, 257 (Daniel L. M. Kennedy & James D. Southwick eds., 2002).

[13] General Agreement on Tariffs and Trade art. XI:2(c), Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT 1947].

[14] Report of the Panel, *European Economic Community — Restrictions on Imports of Dessert Apple*, ¶ 12.19, L/6491 (June 22, 1989), GATT BISD (36th Supp.), at 9 (1990) [hereinafter EEC —

Imports of Ice Cream and Yoghurt[15], the Panels narrowly interpreted the meaning of Article XI:2(c), concluding that both measures were not "necessary" for the enforcement of government objectives. The agreement reached at the Havana Conference subcommittee which discussed adjusting the scope of exceptions on agricultural products sheds some light on the reasons for adding Article XI:2(c) to GATT 1947.

> [The Havana subcommittee] agreed that [Article 20(2)(c) GATT Article XI:2(c)] was not intended to provide a means of protecting domestic producers against foreign competition but simply to permit, in appropriate cases, enforcement of domestic governmental measures necessitated by the special problems relating to the production and marketing of agricultural and fisheries products.[16]

Article XI:2(c) had almost no practical effect as Article XI:2(c)(i) set a high criteria for allowing the use of quantitative restrictions for agricultural products, making it difficult to meet the relevant conditions.[17] The text note of Ad Article XI:2(c)(i), in defining the term "in any form,"[18] supports the rigorous application of this exception for agricultural and fisheries product. Among all the GATT dispute settlement cases which involved Article XI:2(c), there was no single trade measure which was found to be consistent with this article.[19] The narrow interpretation of Article XI:2(c)

Dessert Apples Report of the Panel]. The Panel judged that the EC's import restriction on apples were not "necessary" because the apple production surpluses were not "temporary" as required by Article XI:2(c)(ii) but were the logical consequence of the EC's policy (CAP) that facilitated apple production by applying domestic prices higher than world prices.

[15] Report of the Panel, *Canada — Import Restrictions on Ice Cream and Yoghurt*, ¶ 81, L/6568 (Dec. 5, 1989), GATT BISD (36th Supp.), at 68 (1990) [hereinafter Canada — Ice Cream and Yoghurt]. Canada claimed that its import restriction is necessary to ensure the maintenance of Canadian quotas on raw milk production. The Panel concluded that Canada's import restriction on yoghurt and ice cream was not "necessary" since there is no sufficient evidence that future imports of ice cream and yoghurt would significantly affect Canadian producers' ability to market raw milk.

[16] Havana Reports ¶ 16, *quoted in* WTO, GATT ANALYTICAL INDEX—GUIDE TO GATT LAW AND PRACTICE 328 (2012).

[17] Tangermann, *supra* note 12, at 258.

[18] The text note of GATT 1947 *ad* art. XI:2(c)(i) explains that the term "in any form" covers the products that are in the "early stage of processing and still perishable, which compete directly with fresh products, and if freely imported would tend to make the restriction on fresh products ineffective." GATT 1947, *supra* note 13, *ad* art. XI:2(c)(i).

[19] The cases that addressed Article XI:2(c)(i) are: Report of the Panel, *European Economic Community — Programme of Minimum Import Prices Licenses and Surety Deposits for Certain Processed Fruits and Vegetables*, L/4687 (Oct. 18, 1978), GATT BISD (25th Supp.), at 68 (1979); Report of the Panel, *European Economic Community — Restrictions on Imports of Apples from Chile*, L/5047 (Nov. 10, 1980), GATT BISD (27th Supp.), at 98 (1981); Report of the Panel, *Japan — Restrictions on Certain Agricultural Products*, L/6253 (Feb. 2, 1988), GATT BISD (35th Supp.), at 163 (1989); Report of the Panel, *Norway — Restrictions on Imports of Apples and Pears*, L/6474

again demonstrates the intention of the drafters to regulate trade in agriculture under the general principles of GATT.

(b) GATT Article XVI Section B Para. 3 — Succeeding Article 27 of the Havana Charter, Article XVI of GATT 1947 provides for the differential treatment of agricultural products from other products through the use of the term "primary products." This is analogous to the differentiation in Article 28.1 of the Havana Charter.

> Article XVI Section B para. 3: Accordingly, contracting parties should seek to avoid the use of subsidies on the export of primary products. If, however, a contracting party grants directly or indirectly any form of subsidy which operates to increase the export of **any primary product** from its territory, such subsidy shall not be applied in a manner which results in that contracting party having **more than an equitable share of world export trade** in that product, account being taken of the shares of the contracting parties in such trade in the product during a previous representative period, and any special factors which may have affected or may be affecting such trade in the product.[20] (Emphases added.)

This article provides that the use of subsidies for exports of primary products should be avoided, and if granted, such subsidies should not be applied in a manner which results in the contracting party having more than an equitable share of world export trade in that product. The coverage of this provision is not restricted to agriculture products, but also includes fishery products and minerals.[21] Among agricultural products, processed agriculture products are excluded from this provision.[22] This implies that

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(June 22, 1989), GATT BISD (36th Supp.), at 306 (1990); Communication from the United States, *Sweden — Restrictions on Imports of Apples and Pears: Recourse to Article XXIII:2 by the United States*, L/6330 (Apr. 22, 1988); Request for Consultations Under Article XXIII:1 by the United States, *Finland — Restrictions on Imports of Apples and Pears*, WTO Doc. DS1/2 (Sept. 18, 1989); Report of the Panel, *Republic of Korea — Restrictions on Imports of Beef*, L/6503, L/6504, L/6505 (Nov. 7, 1989), GATT BISD (36th Supp.), at 268, 202, 234 (1990); EEC — Dessert Apples Report of the Panel, *supra* note 14, GATT BISD (36th Supp.), at 93 (1990); Canada — Ice Cream and Yoghurt, *supra* note 15.

[20] GATT 1947, *supra* note 13, art. XVI, § B.3.

[21] Interpretative note of the GATT Article XVI Section B: "For the purposes 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." *Id. ad* art. XVI.

[22] Report of the Penal, *European Economic Community — Subsidies on Export of Pasta Products*, ¶ 4.4, WTO Doc. SCM/43 (May 19, 1983). In this case, EEC's payment of export refunds on pasta was not justified under GATT Article XVI as GATT viewed pasta as a processed agricultural product which is not covered by the "primary product" exemption.

the provision of subsidies for exporting primary products is not completely prohibited. On the other hand, the provision of export subsidies for non-primary products is rigorously regulated.[23]

The different treatment of primary products from non-primary products as stipulated in GATT Articles XI:2(c) and XVI Section B para. 3 paved the way for legitimizing preferential treatment for agriculture products. However, compared to the explicit differentiation in treatment, conditions for applying this exception are rather unclear.[24] Neither did the GATT Panels provide clear interpretations in regards to applying this exception. Out of the four cases which were brought under GATT Article XVI,[25] *European Communities — Subsidies on Exports of Wheat Flour (1958)* was the only case in which wheat subsidies were explicitly ruled to have resulted in "more than an equitable share of world export trade." While the Panel admitted that Article XVI does not explicitly define what constituted an "equitable" share of world export trade,[26] the Panel viewed the increase in absolute quantities of wheat and of wheat flour exported by France as representing an increase in France's share of world exports.[27] Rather than coming up with a specified definition of "equitable", the Panel focused on the causal relationship between the increase in exports of countries involved in trade disputes and other developments of the world market.[28]

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[23] GATT 1947, *supra* note 13, art. XVI, § B.4:

> Further, as from 1 January 1958 or the earliest practicable date thereafter, contracting parties shall cease to grant either directly or indirectly any form of subsidy on the export of any product other than a primary product which subsidy results in the sale of such product for export at a price lower than the comparable price charged for the like product to buyers in the domestic market. Until 31 December 1957 no contracting party shall extend the scope of any such subsidization beyond that existing on 1 January 1955 by the introduction of new, or the extension of existing, subsidies.

[24] Tangermann, *supra* note 12, at 258.

[25] Report of the Penal, *French — Assistance to Exports of Wheat and Wheat Flour*, L/924 (Nov. 21, 1958), GATT BISD (7th Supp.), at 46 (1959) [hereinafter French — Wheat Exports]; *United States Subsidy on Unmanufactured Tobacco* (Nov. 20, 1967), GATT BISD (15th Supp.), at 116 (1968); Report of the Panel, *European Economic Community — Refunds on Exports of Sugar*, L/4833 (Nov. 6, 1979), GATT BISD (26th Supp.), at 290 (1980); Report of the Panel, *European Economic Community — Refunds on Exports of Sugar*, L/5011 (Nov. 10, 1980), GATT BISD (27th Supp.), at 69 (1981) [hereinafter EC — Sugar Refunds (Brazil)].

[26] *See* French — Wheat Exports, *supra* note 25, at 52, ¶ 15.

[27] *See id.* at 53, ¶¶ 17-19.

[28] EC — Sugar Refunds (Brazil), *supra* note 25, at 88, ¶ 4.6:

> The Panel noted that no complete definition of the concept "equitable share" had been provided, and neither had it in the past been considered absolutely necessary to have an agreed precise definition of the concept. The Panel felt that it was appropriate and sufficient in this case to try to analyze main reasons for developments in individual market shares, and in light of the circumstances related to the present complaint try to determine any causal relationship between the increase in Community exports of sugar, the developments in Brazilian sugar exports and other developments in the

The reluctance of GATT Panels in defining the term "equitable" led complainant parties to bear a heavier burden in proving the causal relationship. In this sense, Article XVI Section B para. 3 failed to discourage the use of export subsidies for primary products.[29]

(c) GATT Article XXV: 5 (The Waiver) — GATT Article XXV:5[30] seriously weakened the binding power of the GATT rules on trade in agricultural products. According to Article XXV:5, contracting parties were able to waive the obligation imposed upon them provided that any such decision was approved by a two-thirds majority vote and that such a majority was comprised of more than half of the contracting parties. According to the GATT ruling in *Dairy Products from Holland* in 1952, the U.S. had to abandon their restrictions on milk imports. Holland, the complainant, was even allowed to take retaliatory measures against the U.S.[31] In lieu of conforming to the GATT ruling, the U.S. responded by demanding a waiver that would allow it to use import quotas for agricultural products with price support. The U.S. "threatened to withdraw from the GATT if the waiver was not granted", so the other contracting parties of the GATT had no choice but to agree to grant the waiver.[32] Holland gave up applying any retaliatory sanctions in the end, and in 1955 the U.S. obtained the waiver "allowing it to contravene the disciplines of Article XI and thus maintain import restrictions on a number of agricultural products", including sugar, peanuts and milk.[33] This waiver effectively worked to undermine the enforcement power in GATT 1947.

3. The Kennedy Round — Compared to the high protectionist level in agricultural policy in the 1950s, the U.S. shifted its stance in the 1960s by starting to promote agricultural trade liberalization under GATT. This change in policy emphasis led to another launch of multilateral negotiations—the Kennedy Round. Despite the lack of success in achieving

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world sugar market, and then draw a conclusion on that basis.

[29] Carmen G. Gonzalez, *Institutionalizing Inequality: The WTO Agreement on Agriculture, Food Security, and Developing Countries*, 27(2) COLUM. J. ENVTL. L. 433, 445 (2002).

[30] GATT 1947, *supra* note 13, art. XXV:5:

> In exceptional circumstances not elsewhere provided for in this Agreement, the CONTRACTING PARTIES may waive an obligation imposed upon a contracting party by this Agreement; Provided that such decision shall be approved by a two-thirds majority of the votes cast and that such majority shall comprise more than half of the contracting parties.

[31] *Dairy Products from Holland*, GATT BISD (vol. II), at 116 (1952).

[32] Dale Hathaway, *The Impacts of US Agricultural and Trade Policy on Trade Liberalization and Integration via a US–Central American Free Trade Agreement* 17 (Inst. for the Integration of Latin Am. and the Caribbean, Working Paper No. -SITI- 04, 2003).

[33] Fabian Delcros, *The Legal Status of Agriculture in the World Trade Organization, State of Play at the Start of Negotiations*, 36(2) J. WORLD TRADE 219, 222 (2002).

meaningful results from the trade negotiations, this round of negotiations marked the first attempt in trade history to multilateralize agricultural negotiations in the multilateral trading system.

During the Kennedy Round, the European Communities (hereinafter "EC") led the negotiations in designing the agricultural subsidies regime. More specifically, EC persuaded other contracting parties to establish a mechanism measuring the level of support provided by each contracting party to its agricultural producers through comparing the guaranteed domestic support price with the price of the product on the international market.[34] Based on this measurement mechanism, EC proposed to bind levels of the domestic support which would then be the basis for future negotiations on agriculture.[35] Despite all these efforts, the Kennedy Round failed to reach an agreement because contracting parties viewed the EC's proposal as an attempt to ensure international acceptance of the Common Agricultural Policy (CAP), the EC's unique agricultural subsidies system. Moreover, the EC proposal could not get support from the U.S. The U.S. sought arrangements for the expansion of international agricultural trade, but the EC's proposal provided only limited trade expansion based on its maintenance of present levels of support.[36] The U.S.'s liberalizing agriculture policy and the EC's relatively protectionist agriculture policy could not be reconciled during the Kennedy Round.

4. The Tokyo Round (Subsidies Code) — Since the 1960s, developing countries actively used subsidies as a means to achieve their economic development objectives. Article XVI of the GATT 1947 was not sufficiently articulated to regulate the various subsidizing behaviors of the contracting parties. The first attempt to introduce comprehensive rules for regulating subsidies was undertaken during the Tokyo Round. The Agreement on the Interpretation and Application of Article VI, XVI and XXIII of GATT (hereinafter "the Subsidies Code") was established in September 1978 and came into effect in January 1980. The Subsidies Code "confirmed the prohibition of export subsidies for non-primary products" (Article 9).[37] The GATT provisions on export subsidies for primary products were incorporated into Article 10 of the Tokyo Round Subsidies Code with minor variations.[38] In addition to the GATT 1947 text, an

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[34] Joseph A. McMahon, *The Agreement on Agriculture*, *in* THE WORLD TRADE ORGANIZATION: LEGAL, ECONOMIC, AND POLITICAL ANALYSIS: VOLUME 1, at 187, 194 (Patrick F. J. Macrory et al. eds., 2005).

[35] *Id.*

[36] JOSEPH A. MCMAHON, THE WTO AGREEMENT ON AGRICULTURE: A COMMENTARY 7 (2006).

[37] WORLD TRADE ORGANIZATION, WORLD TRADE REPORT 2006, at 191 (2006), https://www.wto.org/english/res_e/booksp_e/anrep_e/world_trade_report06_e.pdf.

[38] Agreement on Interpretation and Application of Articles VI, XVI and XXII of the General Agreement on Tariffs and Trade art. 10, Apr. 12, 1979, 1186 U.N.T.S. 204 (1980):

illustrative list of export subsidies was provided and the procedures for countervailing duties investigation were clarified in the Subsidies Code. The Subsidies Code was incorporated as a stand-alone agreement to the GATT 1947, meaning that contracting parties were bound by the provisions in the Subsidies Code only if they voluntarily signed it. This created "forum shopping" problems, undermining the effort to establish an integrated subsidies regulation framework within the multilateral trading system.[39] For example, Australia refused to apply the Subsidies Code and instead referred to the GATT 1947 when bringing a joint compliant on the EC sugar regime with nine other countries,[40] given that "the Code has done little, if anything, to integrate rules on subsidies on agricultural products more fully into the GATT framework."[41] Confusion created by such forum shopping practice provided an impetus to launch further negotiations for a multilateral agreement on subsidies and countervailing duties during the Uruguay Round.

5. The Uruguay Round: "Dual Track" Approach[42] — The subsidies rules on primary and non-primary products were completely separated as a result of the Uruguay Round (hereinafter "UR"). Subsidies for non-primary

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> 1. In accordance with the provisions of Article XVI:3 of the General Agreement, signatories agree not to grant directly or indirectly any export subsidy on certain primary products in a manner which results in the signatory granting such subsidy having more than an equitable share of world export trade in such product, account being taken of the shares of the signatories in trade in the product concerned during a previous representative period, and any special factors which may have affected or may be affecting trade in such product.
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> 2. For purposes of Article XVI:3 of the General Agreement and paragraph 1 above:
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> *(a)* "more than an equitable share of world export trade" shall include any case in which the effect of an export subsidy granted by a signatory is to displace the exports of another signatory bearing in mind the developments on world markets;
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> *(b)* with regard to new markets traditional patterns of supply of the product concerned to the world market, region or country, in which the new market is situated shall be taken into account in determining "equitable share of world export trade";
>
> *(c)* "a previous representative period" shall normally be the three most recent calendar years in which normal market conditions existed.
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> 3. Signatories further agree not to grant export subsidies on exports of certain primary products to a particular market in a manner which results in prices materially below those of other suppliers to the same market.

[39] DUKGEUN AHN, STUDIES ON THE WTO AGREEMENT ON SUBSIDIES AND COUNTERVAILING MEASURES 11 (2003) (in Korean).

[40] Adrian Kay & Robert Ackrill, *Institutional Change in the International Governance of Agriculture: A Revised Account*, 22(3) GOVERNANCE 483, 494 (2009).

[41] Committee on Subsidies and Countervailing Measures, *Contribution to Ministerial Meeting: Communication from Australia*, at 2, WTO Doc. SCM/24 (June 1, 1982).

[42] The "dual track" approach refers to the division of the subsidies rules on agricultural and non-agricultural products within the Uruguay Round Agreement. This paper borrowed the term "dual track" approach from Andrew L. Stoler, *The Evolution of Subsidies Disciplines in GATT and the WTO*, 44(4) J. WORLD TRADE 797 (2010).

products were to be regulated by the SCM Agreement. The SCM Agreement is more sophisticated than the Subsidies Code as it defines the term "subsidy" and provides detailed criteria for determining whether a subsidy exists: "financial contribution" by "a government or any public body" within the territory of a member which confers a "benefit".[43]

The rules on agricultural subsidies were incorporated into the WTO regime after the signatories reached a multilateral consensus during the Uruguay Round negotiations. During the late 1970s and early 1980s, international markets were suffering from years of economic turbulence, and the escalating conflict between the EC and the U.S. aggravated the impact of the global recession on trade balances.[44] The U.S.—the world's number one exporter of agriculture products and number two importer of agriculture products—competed with the EC—the world's number two exporter of agriculture products and number one importer of agriculture products—through accumulation of surpluses and pouring subsidies.[45] Other exporting countries joined this "subsidy war" which pulled down the global prices of agriculture products. Consequently, every participant in the UR negotiations agreed with the necessity of stabilizing the world agricultural markets. This is how agriculture started to be discussed at the UR negotiating tables in a multilateral format.

Regardless of the consensus reached by all participants to bring agricultural issues under the umbrella of the GATT/WTO, reaching an agreement on how to reduce uncertainty and instability in the world of agriculture markets has been arduous, especially since the interests of the U.S. and EC were running in parallel for a long time. After a series of negotiations, the U.S. and EC succeeded in compromising their seemingly contrasting views on agricultural subsidies through the Blair House Accord of 1992. Their respective political situations pressured them to quickly finish the negotiations. The U.S. Administration wanted to quickly reach an agreement as President Bush was running for election and the international agreement would help him in the U.S. presidential elections scheduled for November 1992.[46] The U.S. threatened EC that it would invoke trade sanctions on the soya case[47] in case the agriculture negotiations failed.[48]

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[43] Seung-Hwa Jang & In-Yeong Jo, *Import Substitution Subsidies Under the WTO Subsidies Agreement and GATT 3:4*, 44(1) SEOUL L.J. 1, 2 (2003).

[44] Tomás García Azcárate & Marina Masstrostefano, *Agriculture and the WTO True Love or Shotgun Wedding?*, *in* ESSAYS ON THE FUTURE OF THE WTO: FINDING A NEW BALANCE 129, 131 (Kim van der Borght et al. eds., 2004).

[45] Delcros, s*upra* note 33, at 227.

[46] *Id.* at 230.

[47] Report of the Panel, *EC — Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal-feed Proteins*, ¶¶ 155-56, L/6627 (Jan. 25, 1990), GATT BISD (37th Supp.), at 86 (1991):

> The Panel found that the Community Regulations providing for payments to seed

During the process of interest coordination, a new category of domestic support (the Blue Box) was created and the numerical target of export subsidies reduction was cut down from 24% to 21%.[49] After a series of efforts to attain a compromise, the first multilateral agricultural negotiation was concluded during the Uruguay Round under the name "Agreement on Agriculture" in Brussels on 6 December 1993, just nine days before the end of the fast track procedure of the U.S. Administration. The dual track approach adopted in the UR laid out the institutional basis to further diverge the treatment of agricultural products from that of non-agricultural products.

III. STRUCTURAL INCONSISTENCY BETWEEN THE TWO AGREEMENTS

A. Different Regulatory Mechanisms

The SCM Agreement and the AA is fundamentally interlinked under the definition of "subsidy" in the SCM Agreement. The AA borrows the definition of subsidy from the SCM Agreement in Article 1.1. In the *Canada — Milk* case, the Appellate Body confirmed that all the components of a subsidy as defined by the SCM Agreement must exist to determine whether a subsidy exists within the meaning of AA.[50]

Even though the two agreements adopt the same definition of a subsidy, they are strikingly different concerning their respective designs. The structural analysis of the SCM Agreement and the AA shows how distinct the treatment of agricultural products is in comparison to manufacturing products as institutionalized in these WTO agreements. Different from preceding legal texts, these agreements expressly distinguish

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> processors conditional on the purchase of oilseeds originating in the Community are inconsistent with Article III:4 of the General Agreement, according to which imported products shall be given treatment no less favourable than that accorded to like domestic products in respect of all regulations affecting their internal purchase. The Panel further found that benefits accruing to the United States under Article II of the General Agreement in respect of the zero tariff bindings for oilseeds in the Community Schedule of Concessions were impaired as a result of the introduction of production subsidy schemes which operate to protect Community producers of oilseeds completely from the movement of prices of imports and thereby prevent the tariff concessions from having any impact on the competitive relationship between domestic and imported oilseeds.

[48] Delcros, *supra* note 33, at 230.

[49] BYUNG-RIN YOO, AGRICULTURE AND COMMERCE 236 (2013) (in Korean).

[50] Appellate Body Report, *Canada — Measures Affecting the Importation of Milk and the Exportation of Dairy Products*, ¶ 87, WTO Doc. WT/DS103/AB/R, WT/DS113/AB/R (adopted Oct. 27, 1999).

the treatment of agricultural products over others based on the dual track approach. Specifically, the preferential treatment of agricultural products in the GATT/WTO subsidies regime is reflected in the agreements' objectives, the domestic support measures, the exemption from the prohibition of export subsidies, a lack of rules on import substitution subsidies, a lack of remedies for non-compliance, and the special safeguards.

First, whereas the SCM Agreement aggressively regulates trade-distortive subsidies through the traffic-light classification, the AA's long-term objective is "to establish a fair and market-oriented agricultural trading system" as stated in its preamble. The AA does not prohibit any type of subsidies at present. Instead, it is at a starting stage to regulate agricultural subsidies on the multilateral level. In this sense, the two agreements are asymmetrical in their expected levels of discouraging the use of subsidies.

Second, the concept of domestic support first appeared in the AA, which is the basis for considering the agricultural subsidy rules as "a category with no roots in the GATT".[51] Domestic subsidies were never subjected to any strict discipline under the GATT. The fact that one half of the AA text is devoted to disciplining domestic support measures represents the intention of the drafters at the Uruguay Round to provide separate rules on agricultural subsidies from those on general subsidies.[52] In the AA, domestic support subsidies are categorized based on the "boxes system". The boxes system refers to the categorization of domestic support in favor of agricultural producers into the green, amber and blue boxes according to the level of potential distortion on world trade. Green box subsidies which are known to have no or minimal trade-distorting effects on effects on production are allowed without any restriction (Annex 2, AA). Subsidies with trade-distorting effects are classified as amber box subsidies, and the total amount of amber box subsidies are subject to reduction (Article 6, AA). Blue box subsidies are amber box subsidies with condition. Amber box subsidies would be classified as blue box subsidies and thus would be exempt from aforementioned reduction obligation provided that there is a promise on production reduction (Article 6.5, AA).

Third, the SCM Agreement prohibits any kind of export subsidies, whereas the AA allows for export subsidies as far as the total amount does not exceed the budgetary outlay and quantity commitment levels.[53] Rather than completely eliminating export subsidies on agriculture, WTO members agreed to cut both the amount of money they spend on agriculture export subsidies and the quantities of agriculture exports subsidies, with the

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[51] Melaku Geboye Desta, *The Integration of Agriculture into WTO Disciplines*, *in* AGRICULTURE IN WTO LAW 17, 23 (Bernard O'Connor ed., 2005).
[52] *Id.*
[53] SCM Agreement, *supra* note 3, arts. 3.3, 8.

period from 1986 to 1990 as the base level.

Fourth, while the concept of an import substitution subsidy exists in the SCM Agreement, it does not exist in the AA. Article 3.1(b) of the SCM Agreement[54] categorizes an import substitution subsidy as a prohibited subsidy, together with export subsidies. On the other hand, the AA does not have such analogous regulation for agricultural products. The Appellate Body affirmed that import substitution subsidies on agricultural products are not regulated within the AA, but concluded that they can be subject to Article 3.1(b) of the SCM Agreement. According to the Appellate Body of *US — Subsidies on Upland Cotton*, "the drafters [of the WTO agreements] would have included an equally explicit and clear provision in the Agreement on Agriculture if they had indeed intended to authorize such prohibited subsidies provided in connection with agricultural goods."[55] It is also notable, however, that the Appellate Body eventually ruled that Step 2 payments to domestic users of United States are inconsistent with the Article 3.1(b) of the SCM Agreement.[56]

Fifth, the SCM Agreement allows retaliatory actions against prohibited or actionable subsidies through countervailing measures, but the AA is devoid of retaliatory measures as remedies for non-compliance. The Peace Clause in Article 13 of the AA (counterpart clauses in Articles 5, 6, 7 of the SCM Agreement)[57] legally discourages the application of countervailing measures against agricultural products. This clause was inserted into the AA almost at the last minute of the UR negotiations as a reassurance mechanism against other WTO agreements, the SCM Agreement and GATT 1994 in particular.[58]

Sixth, different procedures for invoking safeguards on agricultural and manufacturing products illustrate how the dual track approach reinforces the preferential treatment of agricultural products within the GATT/WTO subsidies regime. Unlike safeguards which have to go through rigorous inspection of serious injury in the pre-implementation stage for non-

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[54] *Id*. art. 3.1(b): "3.1 Except as provided in the Agreement on Agriculture, the following subsidies, within the meaning of Article 1, shall be prohibited: . . . (b) subsidies contingent, whether solely or as one of several other conditions, upon the use of domestic over imported goods."

[55] Appellate Body Report, *United States — Subsidies on Upland Cotton*, ¶ 547, WTO Doc. WT/DS267/AB/R (adopted Mar. 21, 2005) [hereinafter US — Upland Cotton Appellate Body Report].

[56] *Id*. ¶ 552.

[57] The Peace clause had been effective until 2003. Expiration of the Peace Clause means that all agricultural subsidies can be potentially challenged under the provisions of the SCM Agreement regardless of the way they are categorized. According to this interpretation, a green, blue box subsidy or an amber box subsidy not exceeding the AMS is now subject to countervailing duties of the SCM Agreement if they are proven to have trade-distorting effects. *See* Matthew C. Porterfield, *U.S. Farm Subsidies and the Expiration of the WTOs Peace Clause*, 27(4) J. INT'L ECON. L. 999, 1009 (2006).

[58] Desta, *supra* note 51, at 37.

agricultural products, special safeguards for agricultural products do not require demonstration of serious injury to the domestic industry. It is automatically triggered if the import volume surges to a certain level or prices plunge below a certain level.

In conclusion, the dual track approach has deepened the legal asymmetry in the GATT/WTO subsidies regime. The two subsidies agreements are stipulating discrepant objectives in their respective preambles, and the AA which was detached from the SCM Agreement during the UR negotiations embodies policy measures that are inconsistent with its regulatory origin. This inconsistency is supported by the AA's regulatory design of the qualified allowance of export subsidies as well as special safeguards on agricultural products. Furthermore, the drafters of the AA created an unprecedented policy measure within the AA—domestic support and the Peace Clause—and remained passive in designing a policy measure in harmony with the existing SCM Agreement—import substitution subsidy on agricultural products. The two agreements consequently contain irreconcilable structures despite their commonality as rules on subsidies with different regulatory mechanisms.

TABLE 1: Different Regulatory Mechanisms of the SCM Agreement and the AA

	SCM Agreement	**Agriculture Agreement**
Product Coverage	Non-agricultural Products	Agricultural Products (Annex 1)
Definition of Subsidy	SCM Agreement Article 1.1	
Objectives	Prohibition of Trade-distortive Subsidies	Establishment of a Fair and Market-oriented Agricultural Trading system (Preamble)
Domestic Support	-	Amber (Article 6)
		Green (Annex 2)
		Blue (Article 6.5)
		S&D (Article 6.2)
Export Subsidy	Prohibited (Article 3.1(a)) except S&D (Article 27)	Allowed—Yet to be Reduced (Article 3.3)
Import Substitution Subsidy	Prohibited (Article 3.2(b))	-
Countervailing Measures	Allowed (Article 10-23)	Not Allowed Under the Peace Clause, expired in 2003 (Article 13)
Safeguards	Safeguards (Safeguards Agreement)	Special Safeguards (Article 5)

B. Ambiguous Coverage of the Peace Clause

The Peace Clause, incorporated in Article 13 of the AA, is composed of three parts. The first part—Article 13(a) of the AA—protects green box subsidies from actions under GATT 1994 and the SCM Agreement including countervailing duties and non-violation nullification or impairment of tariff concessions. The second part—Article 13(b) of the AA—exempts other domestic support subsidies from the previously mentioned actions in addition to those based on Articles 5 and 6 of the SCM Agreement, provided that the subsidy amount given does not exceed

that of the 1992 marketing year. The third part—Article 13(c) of the AA—discourages countervailing duties and actions based on Articles 3, 5 and 6 of the SCM Agreement on agricultural export subsidies.

The Peace Clause contributes to exacerbating the structural problem of the WTO subsidies rules as it blurs the application boundary of the AA and the SCM Agreement. The Peace Clause is not a panacea in separating the rules on agricultural subsidies from the rules on general subsidies. It protects agricultural products from being subject to countervailing duties and other GATT 1994 obligations under specific conditions—when the agricultural subsidies amount does not exceed the Aggregate Measurement of Support (hereinafter "AMS") commitment levels. If not, the measures at issue brought to the dispute settlement mechanism are supposedly subject to regulations under the SCM Agreement and GATT 1994. This means that while the AA's rules on agricultural subsidies are substantially divergent from the rules on general subsidies, the legal basis for enforcing these rules is not completely separated from the SCM Agreement. Neither has the Appellate Body come up with any clarified decision explaining the boundary of the Peace Clause in linkage with the SCM Agreement.

Notwithstanding, the Panel in *Canada — Milk* did recognize the overall interconnectedness of the Peace Clause with the SCM Agreement. The U.S. and New Zealand argued that the export subsidies of Canada on milk not only violated Articles 3 and 9 of the Agriculture Agreement, but also Articles 1.1 and 3.1 of the SCM Agreement. In regards to this argument, the Panel concluded that the portion of the export subsidies paid in excess of Canada's commitments could be considered prohibited and thus should be withdrawn on the basis of the SCM Agreement.[59] The Panel emphasized the importance of the phrase "conform fully to the provision of Part V of this Agreement" in reaching its decision. The Panel stated that:

> Accordingly, our conclusion with respect to whether the Special Milk Classes Scheme constitutes an export subsidy within the meaning of the Agreement on Agriculture that fully conforms with Part V of that Agreement . . . , may be dispositive of the US claim for breach of Article 3 of the SCM Agreement.[60]

In other words, agricultural subsidies which did not fully conform to Part V of the Agreement on Agriculture are to be regulated under the SCM Agreement. Such limited applicability of the Peace Clause makes treatment of agricultural subsidies granted in excess of original commitment levels

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[59] WORLD TRADE ORGANIZATION, DISPUTE SETTLEMENT REPORTS 2001: VOLUME XIII: PAGES 6479 TO 6953, ¶ 6.101 (2004).

[60] Panel Report, *Canada — Measures Affecting the Importation of Milk and the Exportation of Dairy Products*, ¶ 7.22, WTO Doc. WT/DS103/R, WT/DS113/R (adopted Oct. 27, 1999).

rather tricky. Following this interpretation, in theory, the same agricultural subsidies can be regulated either under the AA or the SCM Agreement.

The Appellate Body in *US — Subsidies on Upland Cotton* evaded answering this theoretical puzzle. Among the numerous domestic support measures that are discussed in this dispute, the Appellate Body is of the view that the Production Flexibility Contract (hereinafter "PFC") and the Direct Payment (hereinafter "DP") are not fully protected by the Peace Clause as the AMS exceeded the amount of domestic support given in the 1992 marketing year.[61] Once these measures are no longer subject to the Peace Clause of the AA, the Appellate Body subsequently examined whether these domestic support measures caused serious prejudice to the interests of Brazil according to Article 6.3(c) of the SCM Agreement. The Appellate Body viewed that the measures did not trigger serious prejudice, meaning that the measures were found not to be inconsistent with Article 6.3(c) of the SCM Agreement.[62] The Appellate Body's view was equivocal in the sense that it did not confirm that agriculture subsidies provided in excess of the AMS commitments can be simultaneously subject to the application of both the AA and the SCM Agreement. In any case, the PFC as well as the DP exceeding the AMS commitments was not penalized under the SCM Agreement.

The unanswered question of whether agricultural subsidies can be subject to the SCM Agreement even under the shelter of the Peace Clause raises doubts on the legal interpretation of a "new" Peace Clause which started to be discussed in the Bali Ministerial Conference.[63] In November 27, 2014, the General Council adopted a decision that WTO Members shall not challenge developing countries' stockholding for food security through the WTO Dispute Settlement Mechanism.[64] This "new" Peace Clause is more powerful than the previous Peace Clause in a sense that its *de jure* validity lasts forever unless a permanent solution is reached.[65] While this General Council decision further approves the uniqueness of agriculture by recognizing the importance of food security, the coverage of the carve-out in relation to the AA is unclear. The current legal text does not address the treatment of public stockholding for food security given in excess of

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[61] US — Upland Cotton Appellate Body Report, *supra* note 55, ¶ 93.

[62] *Id.* ¶ 507. Both the Panel and the AB ruled that the PFC and the DP are not inconsistent with the SCM Agreement Article 6.3(c), as Brazil failed to prove the necessary causal link between these programs and significant price suppression.

[63] *See generally* Committee on Agriculture, *G-33 Non-paper*, WTO Doc. JOB/AG/25 (Oct. 3, 2013), *quoted in* WTO AGRICULTURE NEGOTIATION FACT SHEET: THE BALI DECISION ON STOCKHOLDING FOR FOOD SECURITY IN DEVELOPING COUNTRIES, WTO, https://www.wto.org /english/tratop_e/agric_e/factsheet_agng_e.htm (last visited Feb. 12, 2017).

[64] General Council, *Public Stockholding for Food Security Purposes: Draft Decision*, ¶ 1, WTO Doc. WT/GC/W/688 (Nov. 24, 2014).

[65] *Id.*

predetermined targets specified in Annex 2.3 of the AA. The approach of coming up with a new type of Peace Clause without clarification of its exact coverage may further undermine the regulatory stability of the WTO subsidies rules.

IV. CONVERGENCE OF THE TWO AGREEMENTS

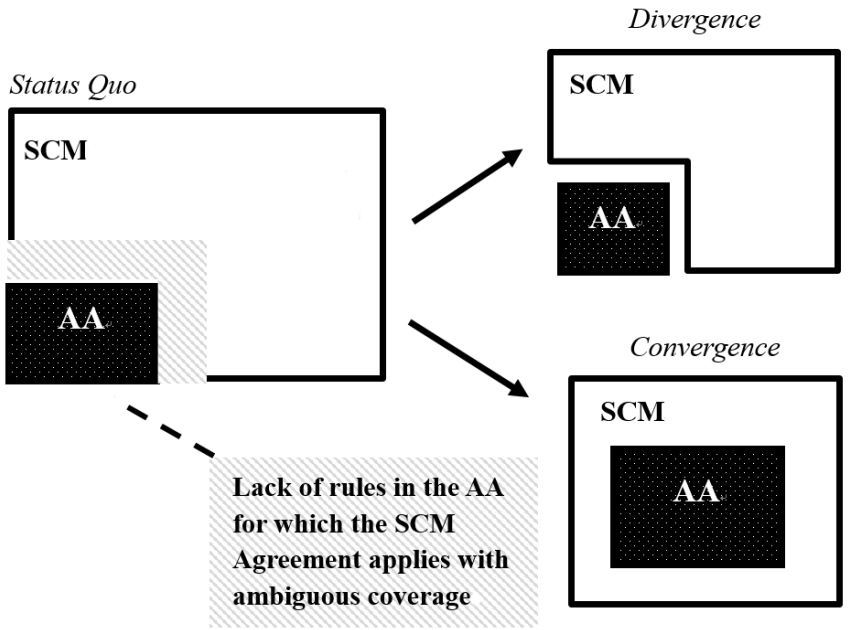
A. Why Convergence?

The AA is the only remaining WTO agreement tailored to a specific industry as its component.[66] The current status of agricultural subsidies rules in the GATT/WTO is bizarre. They are neither completely separated from nor completely integrated into the rules on general subsidies. This is the institutional legacy of the WTO agreements' dual track approach and incorporation of the GATT 1947 into the GATT 1994.

From the perspective of the drafters of the WTO agreements, the following two options may be suggested. The first option is to completely separate AA from the SCM Agreement, including both the regulatory and enforcement mechanisms (see *Divergence* in Figure 1). The other option is to merge the two agreements to strengthen the legal consistency of the GATT/WTO subsidies regime (see *Convergence* in Figure 1). The former enables further lenient regulations on agricultural subsidies, whereas the latter brings agricultural subsidies under a regulatory framework that is compatible with that of subsidies in general.

[66] The Agreement on Textiles and Clothing existed until 2004, but was later integrated into the WTO/GATT rules.

FIGURE 1: Relationship Between the AA and SCM Agreement in the WTO



Not many studies have analyzed the relationship between the two agreements except Desta (2005)[67] and Bartels (2015), who pinpointed the interconnected structure of the two agreements. Fabian (2002) analyzed the legal status of agriculture in the WTO, but was unable to conclude to what extent agriculture subsidies should be allowed to enjoy a status that deviates from the general rules of the WTO. Research on prospective convergence or divergence of the two agreements is at an incipient stage. O'Connor (2005)[68] and Haberli (2005)[69] argued that the AA's total integration into the SCM Agreement will not be possible in the foreseeable future, but these analyses focus more on feasibility rather than necessity of convergence.

This paper concludes that convergence of the two agreements is needed in the long-run for the WTO to function as an effective institution regulating the world trading system based on the following two reasons:

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[67] *See generally* Desta, *supra* note 51.
[68] *See generally* Bernard O'Connor, *Should There Be an Agreement on Agriculture?*, *in* AGRICULTURE IN WTO LAW, *supra* note 51, at 417.
[69] *See generally* Christian Häberli, *The July 2004 Agricultural Framework Agreement*, *in* AGRICULTURE IN WTO LAW, *supra* note 51, at 401.

First, convergence is required for constructing a "fair and market-oriented" agricultural trading system,[70] which is the fundamental objective of the AA. If the AA is even further separated from the SCM Agreement, the objective of establishing a "fair and market-oriented" system will become even more difficult to achieve. Unique regulatory mechanisms in the AA would create further exceptions limited to agricultural subsidies, endangering the trade-friendly environment that the WTO has pursued for the last twenty years. Opponents may argue that the agricultural trading system can still be "fair" within the divergence approach, but "fairness" with other industries that are regulated by the WTO is likely to be compromised as the AA may further diverge from the SCM Agreement.

Second, maintaining the current framework of regulating agricultural subsidies might create further confusion for the WTO dispute settlement mechanism, and to WTO members. Subsequent Doha Round negotiations on agricultural subsidy rules within this confusing framework may further decouple the future rules on agricultural subsidies from the rules on general subsidies. The lack of institutional root is what makes the AA dependent on the SCM Agreement in enforcing certain rules that are original to the AA. Future rules on agricultural subsidies rules would need firm institutional roots to prevent the abovementioned structural problems.

It is conventionally acknowledged that ambiguous language in international agreements is expected and may be even desirable as it enables room for interest coordination.[71] Henry Kissinger initially came up with the term "constructive ambiguity" in the 1970s to explain deliberate ambiguity in sensitive issues for advancing negotiations. Extrapolating this argument, the current confusing structure of the WTO subsidies regime may not be a problem subject to revision, but a natural consequence of signatories' rational choices.

However, such general argument may not apply to the specific case of the WTO subsidies regime, since the WTO is different from other international organizations. The WTO dispute settlement system actually provides binding decisions based on this ambiguous language. Levying exorbitant burden on the dispute settlement mechanism to explain the exact meaning of ambiguous WTO legal texts is not necessarily beneficial for the WTO members. Tricky interpretations of ambiguous WTO legal texts discourage efficient and consistent decision-making of the dispute settlement mechanism, consequently leading the WTO members to be

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[70] AA, *supra* note 2, pmbl.

[71] *See generally* Drazen Pehar, *Use of Ambiguities in Peace Agreements*, *in* LANGUAGE AND DIPLOMACY 163 (Jovan Kurbalija & Hannah Slavik eds., 2001), *available at* http://www.diplomacy.edu/resources/general/use-ambiguities-peace-agreements; Anthony D'Amato, *Purposeful Ambiguity as International Legal Strategy: The Two China Problem* (Northwestern U. Sch. of L., Faculty Working Papers No. 94, 2010).

dissatisfied with the content of the dispute settlement decisions. The cost of maintaining structurally inconsistent rules is bound to become too heavy in the long run.

B. Principles of Convergence

The main objective of this paper is to trace the evolution of the WTO agricultural subsidies rules and to analyze the structural inconsistencies emerging from the way the rules are designed. Presuming that the regulatory convergence of the SCM Agreement and the AA will be discussed in subsequent rounds of the WTO negotiations, the next step would be to depict possible scenarios of convergence. Below are some principles that future drafters of the convergence scenario may need to consider:

1. The Appellate Body's Clarification of Conceptual Discrepancies — In the short run, discrepancy between the rules on agricultural subsidies and general subsidies need to be clarified by the Appellate Body. The conceptual discrepancy between the agricultural and general subsidies rules so far has led to unclear dispute settlement rulings involving agricultural subsidies. The Appellate Body's efforts to highlight the conceptual discrepancies existing in the current WTO subsidies rules could provide a momentum for discussing concrete models of convergence in the subsequent rounds of WTO negotiations.

2. No Simple Integration — The SCM Agreement and the AA need to seek long-term convergence, but the way of convergence should not be a mere integration of the latter into the framework of the former. Simple integration of the AA to the SCM Agreement is not desirable due to the following two reasons:

First, simple integration may lead many developing member countries for which the agriculture sector is important to their economy to disengage from the WTO negotiations. Since the AA is asymmetrically lenient compared to the SCM Agreement, simply putting the former inside the framework of the latter at a certain point can be considered as overly enforcing market liberalization without any flexibility. Developing country members that emphasize special flexibility in agriculture subsidies would not be attracted to the idea of mere integration without flexibilities.

Second, mere integration of the AA into the SCM Agreement would create further confusion in the WTO subsidies regime as the regulatory mechanisms of the two agreements do not perfectly match. Rules pertinent to domestic support measures of the AA that cap total amount of subsidization according to their expected trade distorting effects (AMS) do not have a conceptual counterpart in the SCM Agreement. Furthermore, procedures and preconditions of countervailing duties are only stipulated in

the SCM Agreement, while the Peace Clause in the AA prevents the application of duties on agricultural products. In addition, the amber box subsidies in the SCM Agreement are different from the amber box subsidies in the AA as the former is exposed to the risk of countervailing duties while the latter is not, unless the subsidy amount is more than the total AMS commitment level. Hence, literal integration of the two agreements without considering these mismatches would lead to even larger regulatory loopholes.

3. Cushioning Devices — The long-term design of convergence should fully incorporate policy measures that allow certain levels of discretion in domestic-level policy making. At first glance, regulating agricultural and non-agricultural subsidies under one institutional umbrella may seem overly supportive of the stance of agriculture exporting countries. Importing countries have feared that such institutional convergence would substantially undermine discretionary domestic-level policy-making, thereby binding themselves too tightly to the WTO regulations. Unfortunately, this perception has frequently discouraged progress in the WTO agriculture negotiations for a long time. In order to draw consensus from all the WTO members Through a single-undertaking principle, future drafters of the convergence model would need to come up with a careful balance between legal consistency with the WTO regime and regulatory flexibility for domestic policy-making authorities.

The balance can be reached by proposing a cushioning device at the negotiation table that would endow future regulatory discretions to domestic policy-making authorities within the framework of the WTO rules while negotiating regulatory convergence. Drafters can devise completely new cushioning devices, and also upgrade existing cushioning devices of current WTO agreements. Expanding the existing Special Safeguard Clause or the Special and Differential Treatment Clause such as through expanding the scope of product coverage under the exceptions can be one possible approach.[72] The two mechanisms have been criticized for complicating the Doha negotiation,[73] but the essence of this entanglement derives from the way the rules are designed, not from the roles they play in the multilateral

[72] Already, in the recently concluded "Nairobi package" at the 10th WTO Ministerial Conference in Kenya, Nairobi, the Ministerial Decision contains commitment to eliminate agricultural exports subsidies—immediately as of the date of adoption for developed member countries, and by the end of 2018 for developing member countries. For further "flexibility", developing country members may continue to benefit from the provisions in Article 9.4 of the AA (waiver from the commitment to reduce subsidies for marketing exports of agricultural products, and subsidies for internal transport and agricultural export shipments) until the end of 2023.

[73] For Special Safeguard Clause, see generally *Lamy Calls for "Serious Reflection" on Next Steps*, WTO (July 30, 2008), https://www.wto.org/english/news_e/news08_e/meet08_chair_30july08_e.htm. For Special and Differential Treatment Clause, see generally Akiko Yanai, *Rethinking Special and Differential Treatment in the WTO* (IDE-JETRO, Discussion Paper No. 435, 2013).

trading system. Considering the conflicting interests of WTO Members, expansion of these cushioning devices can facilitate renegotiation of agricultural subsidies rules. Even WTO Members that had been reluctant to liberalize their agricultural markets would have an incentive to participate in renegotiations if they are informed of the heavy cost of abiding structurally inconsistent rules as well as the possibility of securing more domestic policy space through these devices. Nevertheless, reinforcing cushioning devices should not be mistaken with usage of loose regulatory language in agreement texts. As already experienced during the era of the GATT 1947, stipulating exceptions without clear requirements and conditions may result in unexpected regulatory abuses.

Therefore, to ensure that the expansion of cushioning devices that allow for more regulatory flexibility are within the legal boundaries of WTO rules, they would need to be implemented with clear conditions attached. Some ways to discipline the exceptions would be to provide time limits in accordance with the level of development of countries, or other customized ways that consider the differences in the development stages of country groups. The WTO Trade Facilitation Agreement (TFA), which was successfully concluded at the WTO Ministerial Conference in Bali, may serve as a model for facilitating the adoption of the proposal for introducing "cushioning devices" as a way of achieving regulatory convergence in the subsidies area. It is important to note that for multilateral trade negotiations to be successful, trade deals have to be more inclusive and considerate of the goal of sustainable development.

V. CONCLUSION

The WTO rulings on agricultural subsidies and general subsidies are currently separated into the SCM Agreement and the AA. The adoption of the dual track approach which was first incorporated in the WTO agreements has triggered serious challenges in interpreting and applying the agricultural subsidies rules in the dispute settlement mechanism. Various policy measures are uniquely designed in the AA in comparison to those of the SCM Agreement, yet the rules for enforcing the regulatory uniqueness are structurally feeble. The Appellate Body's reluctance to clarify the status of agricultural subsidies in relation to the application of the Peace Clause also enervates the institutional root of the AA within the WTO system.

Based on the historical and the legal analysis of the WTO subsidies rules, convergence of the SCM Agreement and the AA is encouraged. In the short run, the DSB's attempts to pinpoint conceptual discrepancy existing in the two agreements are likely to facilitate discussions about regulatory convergence in future WTO negotiations. In the long run, a new regulatory

design incorporating the two subsidies agreements that are equipped with adequate cushioning devices is needed. Specific modalities for convergence remain an area for future research.

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