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THE WTO'S AGREEMENT ON AGRICULTURE: WHERE NEXT?

ALAN SWINBANK*

The Marrakesh Agreement of 1994 establishing the World Trade Organization (WTO) was a pivotal event in world affairs. The WTO Agreement on Agriculture (AoA) brought the regulation of farm support more firmly within the framework of rules first established by the General Agreement on Tariffs and Trade (GATT) in 1947; and held out the prospect that it was just the first step in an ongoing process of fundamental reform. The new Dispute Settlement Body (DSB), set up to oversee the collection of WTO accords, was given authority to definitively rule when WTO Members had different interpretations on how the rules should be applied. The AoA has three pillars, with constraints on import taxes, domestic support, and export subsidies. Nearly 30-years on, what can we say about the implementation of the AoA? For some, the AoA was never 'fair' as it 'rewarded' governments (mainly in the developed world) by locking-in the high levels of protection they had previously given their farm sectors, whilst strictly limiting the extent to which others could introduce new measures. Although the entitlements to grant export subsidies were subsequently withdrawn, expectations that a revised AoA would lead to further reductions in the 'bound' tariffs and domestic support commitments that governments had accepted in Marrakesh, have never materialised. The Doha Round is moribund, and many of the AoA's provisions have not dated well. There is evidence, nonetheless, that countries have tailored their farm policies to fit within the AoA's constraints and conform to DSB rulings. However, without a quorate Appellate Body, future dispute settlement proceedings might be jeopardised. Trade in agricultural products increasingly takes place within Free Trade Areas (FTAs), where additional conditionalities might apply before products

* Emeritus Professor of Agricultural Economics, University of Reading, United Kingdom. The author can be contacted at a.swinbank[at]reading.ac.uk. This article draws heavily on the writings and insights of many scholars, not all of whom are cited despite its length. If anyone feels their work has been misrepresented, unacknowledged, or ignored, the author apologises. Likewise, if others perceive an overly Eurocentric approach.

can take advantage of the 'free trade' provisions. Subsidies and mandates to encourage the use of biofuels in transport fuels do not appear to be disciplined by the AoA.

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I. INTRODUCTION

The focus of this article is the AoA governing support to agriculture, which interlocks with other agreements overseen by the WTO, notably the GATT — carried forward from the pre-WTO trade regime — and the Agreement on Subsidies and Countervailing Measures.[1] Thus, it does not consider the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement), the Agreement on Technical Barriers to Trade (TBT Agreement), the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement), or the General Agreement on Trade in Services (GATS Agreement), even though they can all impinge on trade in agri-food and drink products, and government regulation of these sectors.[2] All these interlocking agreements are subject to oversight by the DSB

[1] The WTO agreements cited in the text can be accessed at https://www.wto.org/english/docs_e/legal_e/legal_e.htm.

[2] Although now it is somewhat dated, for a classic text on the SPS Agreement, TBT Agreement and TRIPS Agreement, and their impact on trade in food see TIMOTHY JOSLING ET AL., FOOD REGULATION AND TRADE: TOWARD A SAFE AND OPEN GLOBAL SYSTEM (2004).

established by the Understanding on Rules and Procedures Governing the Settlement of Disputes.

Annex 1 of the AoA sets out its coverage. It includes Chapters 1 to 24 of the Harmonized System (HS) of tariff nomenclature, established by the World Customs Organization (WCO), but with the specific exclusion of "fish and fish products". In addition, it includes some other agricultural products such as natural fibres (raw cotton, flax, hemp, silk, and wool), leather and animal skins. But this supplementary list does not include crude rubber, cork or wood. In excluding these products from the purview of this article, perhaps the most egregious omission is that of fisheries subsidies, which has been a core concern of WTO members, and has attracted an active academic literature.[3] The wide remit of the AoA — covering farming systems from plantation agriculture to subsistence farming, from intensively housed livestock to cattle and sheep ranching — operating under a diverse array of climatic circumstances, hints at the difficulties policy-makers might face in devising a *one-size-fits-all* policy framework.

The article proceeds as follows. After two short scene-setting parts outlining the pressures faced by farming systems worldwide and introducing the WTO concept of "non-trade concerns", the text moves to the main discussion. Part IV explains that whilst agriculture was covered by the provisions of GATT in the pre-WTO world, agricultural exceptionalism prevailed. Part V introduces the AoA. Despite the length of this section, readers are warned that it is not a comprehensive survey! Part VI examines the role the DSB has played in interpreting the AoA's provisions. DSB rulings, and the AoA's constraints have, it is suggested, influenced the way governments have crafted their farm policies. The AoA was supposed to be the first tentative step in a longer-term process of farm policy reform, but as Part VII explains the Doha Round is moribund, if not already dead. Part VIII moves on to flag that FTAs have played an increasingly important role in agri-food trade, and to suggest that future agreements might include greater conditionality over the ways in which agricultural goods are produced if they are to benefit from an FTA's provisions. Part IX briefly considers the extent to which the AoA regulates biofuels, and Part X concludes.

Apart from a brief mention of one case, the article does not examine the circumstances in which countries can impose trade defence instruments — anti-dumping duties charged when foreign firms can be shown to be

[3] *See*, *e.g.*, Radika D. Kumar, *Fisheries Negotiations at the WTO: Small Bait for Large Catch*, *in* INDIAN AGRICULTURE UNDER THE SHADOWS OF WTO AND FTAS: ISSUES AND CONCERNS (Rajan Sudesh Ratna et al. eds., 2021).

'dumping' their product, causing material injury to firms in the import market; and countervailing duties offsetting subsidies granted by an exporting country — even when the products concerned fall within the ambit of the AoA.[4]

II. BACKGROUND NOTE 1: PRESSURES FACED BY FARMING SYSTEMS

As noted above, agriculture (both crop production and animal rearing) and farming systems are incredibly heterogeneous worldwide, but all operate within system constraints. In Figure 1, the author suggests that three particular system constraints are especially relevant. At the apex of the triangle are the 7.9 billion humans on the earth today, to which should be added, their domesticated livestock (pets and farmed animals). This number seems likely to grow. When Thomas Malthus published *An Essay on the Principle of Population* in 1797, the world's inhabitants numbered perhaps about 1 billion. By 1947, when GATT came into being, it had more than doubled to about 2.5 billion. At the time of writing this article, the world population is estimated to be in excess of 7.9 billion, and still rising, albeit at a slower pace than in the recent past.

Even since humankind began planting crops and tending animals, farming systems around the world have been subject to environmental pressures, leaving, in turn, their imprint on the environment, and for long periods these environmental constraints have limited population growth. The adoption of new technologies and improved managerial skills, the use of fossil fuels for motive power and to produce artificial fertilisers and other agrochemicals, the expansion of the farmed area (often with devastating impacts on the environment and indigenous populations), and trade, have for many kept the Malthusian spectre at bay, although millions of the world's citizens still suffer from inadequate diets, and face the threat of starvation. Hence, the bottom left-hand corner of the triangle — the sheer need to feed, clothe and sustain the world's population has led to deforestation, species extinction, and overall biodiversity loss. Of course, if more of us were to eat less meat, and fewer dairy products, or even more so, adopt a vegetarian or vegan diet, the human imprint on land-use for food production would be considerably lessened.

Another environmental consequence of the need to feed 7.9 billion humans is that agriculture has become a significant emitter of greenhouse gases:

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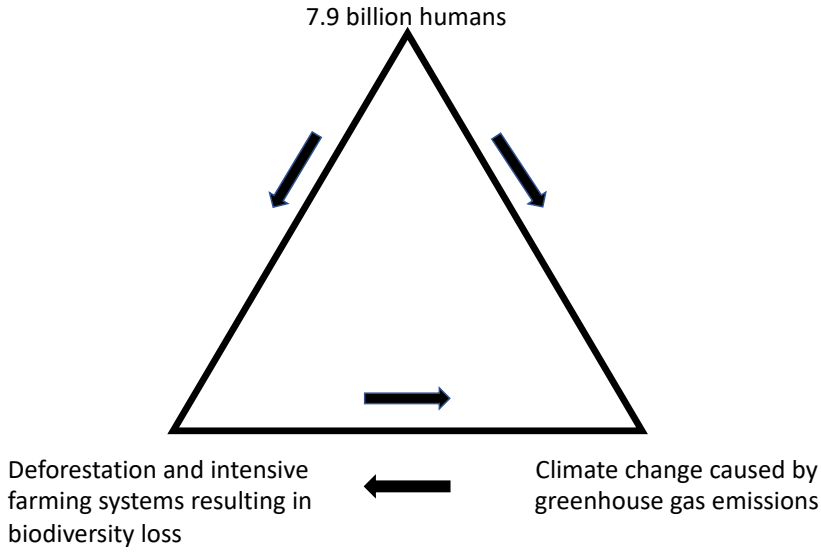
[4] *But see* CARSTEN DAUGBJERG & ALAN SWINBANK, IDEAS, INSTITUTIONS, & TRADE: THE WTO & THE CURIOUS ROLE OF EU FARM POLICY IN TRADE LIBERALIZATION 56-7 (2009) [hereinafter "DAUGBJERG & SWINBANK (2009)"].

methane and nitrous oxide more so than carbon dioxide.[5] The use of fossil fuels for transport, heating, manufacturing, etc., are other major anthropogenic emitters of greenhouse gases. Not all humans contribute equally — indeed evidence suggests that the lifestyles of the wealthy emit far more than those of the poor, and the industrialised countries have been contributing longer — but the overall impact of these greenhouse gas emissions has undoubtedly been global warming and climate change, which will continue into the immediate future, even if emissions were to cease immediately (bottom right-hand corner of the triangle). Climate change, resulting in changed weather patterns and rising sea levels, presents tremendous challenges to farming systems. Governments need to devise policies that help farmers *adapt* to these changing circumstances, help them avoid further carbon losses from deforestation and soil degradation, and encourage them to *mitigate* the effects through carbon sequestration and the adoption of farming practices that reduce methane and nitrous oxide emissions. It is not immediately obvious that the AoA is well designed to facilitate such policies.

Figure 1: A Triumvirate of Pressures Bearing on Farming Systems Worldwide

[5] The Food and Agriculture Organization (FAO) has highlighted research that suggests that food systems ("from land-use change and agricultural production to packaging and waste management") account "for more than one-third of global anthropogenic greenhouse gas emissions." Two-thirds "of the emissions from global food systems come from the land-based sector, comprising agriculture, land use and land use changes." *Food systems account for more than one third of global greenhouse gas emissions*, FAO (Mar. 09, 2021), https://www.fao.org/news/story/en/item/1379373/icode/.



Of the 17 Sustainable Development Goals (SDGs) in the UN's 2030 Agenda for Sustainable Development, several have clear linkages to the "non-trade concerns" that WTO Members have articulated in the Doha Round debates about the further AoA reform process, as will be evident in the next part. The SDGs of particular relevance are Goal 1: to "end poverty in all its forms everywhere", and Goal 2: to "end hunger, achieve food security and improved nutrition and promote sustainable agriculture", with in both instances particular targets to be met by 2030.[6] These are formidable, and unlikely to be achieved.

III. BACKGROUND NOTE 2: NON-TRADE CONCERNS, MULTIFUNCTIONALITY, AND OTHER EXPRESSIONS OF AGRICULTURAL EXCEPTIONALISM

The phrase "non-trade concerns" appears four times in the AoA. In one of its introductory paragraphs, the reference is to "non-trade concerns, including food security and the need to protect the environment;" and a similar phrase occurs in Annex 3: "non-trade concerns, such as food security and environmental protection." What other issues might be embraced by the term is left unspecified. Despite this lack of clarity, Article 20, in setting out the conditions for a "Continuation of the Reform Process", specified, *inter alia*, that this should take non-trade concerns into account. This was an open

[6] *Transforming our world: the 2030 Agenda for Sustainable Development*, UNITED NATIONS, https://sustainabledevelopment.un.org/Post2015/Transformingourworld.

invitation to the WTO's membership to populate this empty phrase with their list of non-trade concerns.

Within the WTO's Committee on Agriculture, a process of "analysis and information exchange" (AIE) had been established to facilitate Article 20's call for a continuation of the reform process. By the end of September 1999, prior to the WTO Ministerial Conference in Seattle, Norway, Japan, Argentina, the United States of America (USA), Australia, the Republic of Korea and India had submitted papers to the AIE with "non-trade concerns" in the title. Others referred to the multifunctional role of agriculture: Norway, the European Union (EU),[7] Mauritius and Switzerland for example. As the Chair of the Committee on Agriculture reported:

> it is worth noting that the range of policy objectives and factors considered relevant in the further analysis and exchange of information on non-trade concerns is very wide-ranging. In addition to such factors as food security and the need to protect the environment, which are explicitly referred to in the Agreement on Agriculture, reference was made in the contributions to: the viability of rural areas; the maintenance of rural employment generally, as well as in the specific regions; ensuring balanced territorial and socio-economic development; preservation of the landscape; protection from natural hazards and disasters; biodiversity and ecological issues; ensuring safe and high-quality food products; consumer concerns; and even cultural factors and concerns.[8]

Food security is a particularly complex, and contested, issue.[9] The Covid pandemic, with its appalling levels of mortality, morbidity, and financial and emotional stress, has only heightened concerns about the vulnerability of supply chains and food availability. Wars always cause suffering, distress, and death, to local populations, but that unleashed by Vladimir Putin's Russian Federation on Ukraine and its citizens on February 24, 2022, will have widespread geographical impact in the short, if not the longer term,

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[7] The EU started life as the European Economic Community (EEC). Its name has changed several times over the years, but it will mostly be referred to as the EU in this article.

[8] WTO Secretariat, *Report by the Chairman: Committee on Agriculture: General Council Overview of WTO Activities*, WTO Doc. G/L/322, 27-8, 43 (Oct. 06, 1999).

[9] Christian Häberli, *Food Crisis (cont'd): What's Wrong with Trade and Investment Rules?*, 13(2) TRADE, L. & DEV. 264 (2021).

disrupting supplies of wheat, maize, sunflower oil, fertilizers, and natural gas.[10]

In Europe towards the end of the 1990s, there had been talk about a European Model of Agriculture. In a fairly provocative statement, the EU's Commission wrote:

> [t]he fundamental difference between the European model and that of our major competitors lies in the multifunctional nature of Europe's agriculture and the part it plays in the economy and the environment, in society and in preserving the landscape, whence the need to maintain farming throughout Europe and to safeguard farmers' incomes.[11]

Whilst the ideas underpinning multifunctionality appealed to European and Asian countries, given their heavy population densities, long history of small-scale farming, and a complex mosaic of farms co-existing with wildlife and the rural landscape, they made less sense to farmers, policy-makers, and some academics in less-heavily populated regions in North America and the Antipodes. Elsewhere, according to Sharma et al., "farmers in developing members face multiple challenges on account of small and fragmented landholding, subsistence farming, and lack of institutional support, poor irrigation and marketing facilities."[12]

A short definition of "agricultural exceptionalism" is difficult, as it has many dimensions. But the basic thesis is that farming — food production — is different from other economic activities, and consequently that government intervention is needed in regulating markets to ensure a more appropriate outcome is achieved than that in a 'free' market.[13] These ideas underpin national debates over farm and food policies, and are also reflected in world trade rules.

IV. FROM GATT TO WTO

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[10] *The importance of Ukraine and the Russian Federation for global agricultural markets and the risks associated with the current conflict*, FAO (Mar. 16, 2022), https://www.fao.org/lebanon/news/detail-events/en/c/1477196/.

[11] Commission of the European Communities, *Proposals for Council Regulations (EC) concerning the reform of the common agricultural policy*, COM(1998)158 at 8.

[12] Sachin Kumar Sharma et al., *Revisiting domestic support to agriculture at the WTO: Ensuring a level playing field*, 31(3) J. INT'L TRADE & ECON. DEV. 358 (2022) [hereinafter "Sharma et al."].

[13] For a fuller explanation see Carsten Daugbjerg & Alan Swinbank, *Curbing Agricultural Exceptionalism: The EU's response to External Challenge*, 31(5) WORLD ECON. 631, 633 (2008).

It is sometimes suggested that trade in agri-food products was excluded from the purview of GATT and that it was only when the WTO came into being in 1995 that agriculture became subject to multilateral trade negotiations and disciplines. Ratna et al., declare that,"[p]rior to the WTO, agriculture was kept out of the General Agreement on Tariffs and Trade (GATT) negotiations."[14] Collantes was more explicit in stating:

> From the end of the Second World War and almost up to the fall of the Berlin Wall, there was great progress, led by the GATT, in the liberalisation of international industrial markets, but agriculture was excluded from these negotiations. Only during the Uruguay round of the GATT (1986–1993) was agriculture incorporated into international trade negotiations.[15]

Why this comment is not strictly true will be explained in this Part.

International attempts to regulate trade, including trade in agricultural products have, in fact, a long history which predates GATT. In the depths of the Great Depression, for example, nine countries of the British Empire met in Ottawa at the 1932 Imperial Economic Conference.[16] A number of their names are redolent of an earlier age. As well as the United Kingdom (UK), the Dominions of Canada (the host), Newfoundland (which became a Canadian province in March 1949), Australia, New Zealand, the Irish Free State, and the Union of South Africa, were joined by the self-governing territories of India and Southern Rhodesia (today's Zambia). The basic deal underpinning the Ottawa Agreements was preferential access for the UK's manufactured goods sold into Empire markets, whilst producers in the latter would have strengthened preferential access for their agricultural products (particularly cereals, meats, and dairy products) into the UK. The USA was not impressed, and its jaundiced view of Imperial (Commonwealth) preferences impacted on its subsequent discussions with the UK, during and after the Second World War, on financial aid to the UK, and future world

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[14] Rajan Sudesh Ratna et al., *Indian Agriculture under WTO and FTAs: An Assessment*, *in* INDIAN AGRICULTURE UNDER THE SHADOWS OF WTO AND FTAS: ISSUES AND CONCERNS 6–7 (Rajan Sudesh Ratna et al. eds., 2021) [hereinafter "Ratna et al."].

[15] FERNANDO COLLANTES, THE POLITICAL ECONOMY OF THE COMMON AGRICULTURAL POLICY: COORDINATED CAPITALISM OR BUREAUCRATIC MONSTER? 40 (1st ed. 2020).

[16] There is, of course, a substantial literature. For a commentary at the time, *see*, *e.g.*, D. GHOSH, THE OTTAWA AGREEMENT: A STUDY IN IMPERIAL PREFERENCE (1932).

trading rules.[17] But the USA too had been busy concluding trade deals: in the three years following the adoption of its Reciprocal Trade Agreements Act of 1934 it "concluded trade liberalisation agreements with 17 countries"; and in the next three years a further "six agreements were concluded."[18]

The GATT (now known as GATT 1947) was applied on a provisional basis to implement the outcome of the tariff conference held in Geneva that year by countries negotiating the Havana Charter.[19] The Charter would have created an International Trade Organization (ITO), had it been ratified. GATT covered trade in all goods, but from the outset it had agricultural exceptionalism built in, and its 1954-55 Review Session accentuated this.[20] There were now two agricultural exceptions to the normal rules. First, GATT Article XI — a general prohibition on quantitative restrictions to international trade — had a number of exceptions, including "import restrictions on any agricultural or fisheries product, imported in any form, necessary to the enforcement of governmental measures which operate . . . to restrict the quantities of the like domestic product permitted to be marketed or produced." Second, although export subsidies on manufactured products were now prohibited by GATT Article XVI, those on "primary products" (including agricultural raw materials) were allowed, provided these did not result in the exporting party capturing "more than an equitable share of world export trade in that product."

GATT Article XI, however, was in conflict with new quantitative import restrictions that in 1951, the USA imposed on imports of dairy products, as there were no corresponding controls on domestic production. Denmark and the Netherlands objected. Everyone, Hudec suggests:

> including the United States, was clear . . . that the US . . . was in violation of Article XI . . . The United States undertook to introduce legislation correcting the problem, and, when the proposed legislation failed to pass, the United States consented to a GATT decision authorising the Netherlands to retaliate.

With the Congress refusing to budge, in 1955, the USA sought, and obtained, a GATT waiver "that would remove almost all GATT legal restrictions on the type of trade restrictions used to protect U.S. agricultural support

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[17] DOUGLAS A. IRWIN ET AL., THE GENESIS OF THE GATT 12-22 (2008) [hereinafter "IRWIN ET AL."].

[18] Barry Eichengreen & Douglas A. Irwin, *Trade blocs, currency blocs and the reorientation of world trade in the 1930s*, 38(1-2) J. INT'L ECON. 1, 7 (1995).

[19] IRWIN ET AL., *supra* note 17, at 99-101.

[20] DAUGBJERG & SWINBANK (2009), *supra* note 4, at 48-50.

programs."[21] Josling et al. report that, "[t]he other member countries had no choice but to accede to this request, for the alternative might have been the withdrawal of the United States from the GATT." But with the USA benefiting from a broadly based waiver of unlimited duration, "no other major country was prepared to abide by the GATT rules."[22]

Consequently, the USA's position was rather compromised when at the end of the 1950s, GATT's Contracting Parties were asked to adjudicate on the formation of the European Economic Community (EEC) — it subsequently evolved into today's EU — which they were entitled to do by virtue of GATT Article XXIV governing the formation of Customs Unions (CUs) and FTAs. Many GATT members were deeply troubled by the prospect of a Common Agricultural Policy (CAP), yet to be formulated, which (*rightly as it turned out!*) they feared would be highly protectionist, particularly in its use of variable import levies.[23] In May 1960, for example, the Australian delegate remarked that, "sufficient information had been published to cause serious concern about some of the methods being contemplated for the protection of agriculture"; and even the USA — *usually supportive of the EEC's position* — warned that, "[t]he proposed use of variable import fees could well take the agricultural products subject to such fees out of the GATT."[24]

In spite of this criticism, the USA — the hegemonic power of the day in the GATT — wanted the EEC to succeed as a bulwark against what was seen as a Communist threat in the dark days of the Iron Curtain. Winand asserts that, "[t]he United States adopted a Janus-like posture towards regional discrimination. The EEC was tolerated, even encouraged because of its political implications; the EFTA [European Free Trade Association, a rival grouping] was not, precisely because it lacked those political implications."[25] With the USA unwilling to thwart the emergence of the EEC, or its policies,

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[21] Robert E. Hudec, *Does the Agreement on Agriculture Work? Agricultural Disputes After the Uruguay Round* 13 (Int'l Agric. Trade Res. Consortium, Working Paper No. 98-2, 1998) [hereinafter "Hudec"].

[22] TIMOTHY E. JOSLING ET AL., AGRICULTURE IN THE GATT 28 (1996) [hereinafter "JOSLING ET AL."].

[23] On variable import levies and the CAP's support mechanisms prior to the MacSharry Reform of 1992, and the implementation of the Uruguay Round Accords, see SIMON HARRIS ET AL., THE FOOD AND FARM POLICIES OF THE EUROPEAN COMMUNITY (1983).

[24] General Agreement on Tariffs and Trade, Contracting Parties Sixteenth Session, Summary Record of the Seventh Meeting held at the Palais des Nations, Geneva, on Friday 27 May 1960, at 2.30 p.m., SR.16/7 (Geneva: GATT, 1960) at 94-5.

[25] PASCALINE WINAND, EISENHOWER, KENNEDY AND THE UNITED STATES OF EUROPE 119 (1993).

the Europeans were free to go ahead and formulate what would become a highly protectionist agricultural trade regime, reliant upon variable import levies and export subsidies.[26]

Despite attempts in the Dillon (1960-62), Kennedy (1963-67), and Tokyo Rounds (1973-79), to regain control over support to the farm sector, these attempts were rebuffed by the Europeans. The Haberler Report, commissioned by GATT in 1957,[27] generated much discussion but little action. The Tokyo Round did result in a subsidies code that sought to strengthen GATT Article XVI disciplines on agricultural export subsidies. Still, when the "United States tried to enforce [this] new rule in a 1981 complaint against [EU] export subsidies on wheat flour . . . the panel was unable to find that [EU] exports had 'displaced', 'undercut' or taken 'more than an equitable share.'"[28] A recent report from the WTO Secretariat lists 316 'disputes' that were arbitrated in the GATT between 1947 and 1994.[29] The short titles of many of these do not indicate what products are involved, but about 120 of them do mention products that would subsequently be listed in Annex 1 of the AoA.

From the foregoing discussion, it seems fairly safe to conclude that trade in farm products was a hotly contested issue in the GATT between 1947 and 1994, even though GATT disciplines were not particularly restrictive. But that was to change as a result of the Uruguay Round of multilateral trade negotiations.

V. THE PROVISIONS OF THE AoA

What distinguished the Uruguay Round from earlier rounds of tariff negotiations in the GATT is that it was launched, negotiated, concluded, and implemented, as a *Single Undertaking*, accompanied by the mantra that *nothing is agreed until everything is agreed*.[30] It was a comprehensive set of agreements in

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[26] Timothy E. Josling & Alan Swinbank, *EU Agricultural Policies and European Integration: A Thematic Review of the Literature*, *in* MAPPING EUROPEAN ECONOMIC INTEGRATION (Amy Verdun & Alfred Tovias eds., 2013).

[27] TRENDS IN INTERNATIONAL TRADE: A REPORT BY A PANEL OF EXPERTS (1958) (The Panel consisted of Gottfried Haberler (Chairman), Roberto de Oliveira Campos, James Meade, and Jan Tinbergen.)

[28] Hudec, *supra* note 21, at 10.

29 WORLD TRADE ORGANIZATION, GATT DISPUTES: 1948-1995 (VOLUME 1: OVERVIEW AND ONE-PAGE CASE SUMMARIES) (2018).

[30] DAUGBJERG & SWINBANK (2009), *supra* note 4, at 90-3; Richard H. Steinberg, *In the Shadow of Law or Power? Consensus-Based Bargaining and Outcomes in the GATT/WTO*, 56(2) INT'L ORG. (2002) [hereinafter "Steinberg"].

which participants had to accept *all* the commitments if they were to transit to the new regime. This was in marked contrast to earlier rounds, in which countries were able to pick and choose which commitments to accept — *GATT à la carte*, as with the subsidies code in the Tokyo Round — and what tariff reductions to undertake, whilst benefiting from GATT's most-favoured-nation (MFN) clause to free-ride on the obligations other Contracting Parties undertook.

Although there were moments of high drama between the launch of the round in Punta del Este (in the Uruguay) in 1986, and its conclusion in Marrakesh (in Morocco) in 1994, as the twin hegemons (the USA and the EU) squabbled, their wider economic interests prevailed. The outcome was the creation of the WTO with its suite of agreements (including the AoA and a re-enactment of GATT 1947 as GATT 1994), and revised dispute settlement provisions. With the WTO agreed, the EU "and the United States withdrew from GATT 1947, thereby terminated their GATT 1947 obligations (including its MFN guarantee) to countries that did not accept the Final Act and join the WTO."[31] They all did; but many developing countries felt they were bamboozled or, worse, coerced into signing-up to the TRIPS Agreement and other WTO provisions, which they felt compromised their development needs.[32] Other countries have since joined (including China in 2001, and the Russian Federation in 2012), *none have left*, and the WTO's membership as of July 29, 2016 was 164.[33]

The provisions of the AoA have been extensively outlined in the literature,[34] and so no more than a cursory presentation will be attempted here. At the outset, it is probably useful to note that the AoA (and other WTO agreements), and subsequent accessions to the WTO, have resulted in four groups of countries and associated disciplines. The default option, at the outset, was that WTO members would be considered *developed* (the USA, the EU, etc.). However, a self-selecting group of *developing* countries (Brazil, India, etc.) would be entitled to *special and differential treatment* (SDT), although no graduation criteria — from developing to developed — were set. Both terms — developed and developing — embrace motley collections of countries with differing farm policies, structures, production, and agri-food trade

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[31] Steinberg*, id.* at 360.

[32] *See*, *e.g.*, CARLOS M. CORREA, INTELLECTUAL PROPERTY RIGHTS, THE WTO AND DEVELOPING COUNTRIES: THE TRIPS AGREEMENT AND POLICY OPTIONS (2000).

[33] MEMBERS AND OBSERVERS, WTO, https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm.

[34] *See*, *e.g.*, JOSLING ET AL., *supra* note 22, at 175-216; *see also* DAUGBJERG & SWINBANK (2009), *supra* note 4, at 53-62.

balances, rendering generalisations about the groups difficult. Less onerous demands are imposed upon the *least-developed* countries (LDCs) that meet objective criteria (of poverty, etc.) established by the United Nations Conference on Trade and Development (UNCTAD), of which, there are currently forty-six.[35] Inevitably, the boundary between very poor developing countries, which are not quite poor enough to qualify as LDCs, and the LDCs, is rather arbitrary. Rather different provisions can apply to countries, such as China, that subsequently acceded to the WTO, in accordance with Article XII of the Marrakesh Agreement Establishing the World Trade Organization, reflecting the terms they negotiated on accession.

Closely associated with the AoA is a Decision on Measures Concerning the Possible Negative Effects of the Reform Programme on Least-Developed and Net Food-Importing Developing Countries. Mindful of a possible increase in world prices consequent upon the AoA, Article 3 of this decision exhorts Ministers to "establish appropriate mechanisms to ensure" that implementation of the AoA "does not adversely affect the availability of food aid at a level which is sufficient to continue to assist in meeting the food needs of developing countries, especially least-developed and net food-importing developing countries." Accordingly, the Committee on Agriculture — a body established by the AoA — produced a list of net-food importing countries, which was last amended in September 2020, and undertakes an annual monitoring of the situation;[36] but there is rather little to show for this activity.

Scholars refer to the *three pillars* of the AoA as market access, domestic support, and export competition. Special and differential treatment meant that whilst developed countries progressively introduced the new constraints over a six-year implementation period (1995-2000), for developing countries this was extended to ten years to 2004; both dates, of course, long gone. Moreover, the reduction commitments imposed on developing countries were two-thirds those accepted by developed countries; whilst for LDCs, there were none.

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[35] UN LIST OF LEAST DEVELOPED COUNTRIES, UNCTAD, https://unctad.org/topic/least-developed-countries/list.

[36] Committee on Agriculture, *WTO List of Net Food-Importing Developing Countries for the Purposes of the Marrakesh Ministerial Decision on Measures Concerning the Possible Negative Effects of the Reform Programme on Least-Developed and Net Food-Importing Developing Countries ("The Decision")*, WTO Doc. G/AG/5/Rev.11 (Sept. 24, 2020); Committee on Agriculture (Note by the Secretariat), *Implementation of the Decision on Measures Concerning the Possible Negative Effects of the Reform Programme on Least Developed and Net Food-Importing Developing Countries*, WTO Doc. G/AG/W/42/Rev.21 (Nov. 12, 2020).

A. Market Access

On market access, countries first had to establish a base level of tariff protection. To the extent that countries already had tariffs in place (whether specific or *ad valorem*), this was not particularly problematic, but where more complex systems of border protection applied (such as the EU's variable import levies), these border measures had to be turned into tariff equivalents in a process dubbed *tariffication*. The tariff equivalent was the difference between a representative internal price and an appropriate external price for a 1986-88 base period. By way of example, as Daugbjerg and Swinbank point out, "the EU declared its internal price for white sugar to be 719 ecu/tonne, compared to an external price of 195 ecu/tonne, resulting in a tariff equivalent of 524 ecu/tonne".[37] The tariff (or tariff equivalent) was then to be reduced. On average (a simple arithmetical average) these had to be reduced by 36% for developed countries (24% for developing countries) over the implementation period, with no tariff line subject to a reduction of less than 15% (10% for developing countries).[38] The new tariffs were then *bound* — a binding being a solemn commitment not to apply a tariff in excess of this rate without resorting to complex procedures to negotiate an unbinding of the tariff.

Many developing countries had used rather informal systems of border control, prohibiting imports in some instances, which meant that tariffication was difficult or infeasible. Consequently, the modalities document offered special and differential treatment in that for "products subject to unbound ordinary customs duties developing countries [would] have the flexibility to offer ceiling bindings on these products."[39] In contrast, "in the case of unbound duties," *developed* countries were asked to apply the tariff reduction formula to "the level applied as at 1 September 1986."[40] *Ceiling bindings* were often set at arbitrary levels, and were not subject to reduction commitments.

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[37] DAUGBJERG & SWINBANK (2009), *supra* note 4, at 55.

[38] It should perhaps be pointed out that the AoA did not specify the so-called 'modalities' of the agreement, i.e. the numerical targets for reductions in tariffs, domestic support and export subsidies that countries were required to use in determining their Schedules of Commitments, or the methodologies to undertake tariffication and calculate levels of domestic support. These details were contained in GATT Secretariat, *Note by the Chairman of the Market Access Group: Modalities for the Establishment of Specific Binding Commitments under the Reform Programme*, GATT Doc. MTN.GNG/MA/W/24 (Dec. 22, 1993) [hereinafter "*Modalities of Specific Binding Commitments*"].

[39] *Id.* at 3.

[40] *Id.* at 2.

India, for example, adopted ceiling bindings, with an average rate on agricultural products of 113%.[41] Although the LDCs had to bind their tariffs, they were not subject to reduction commitments.

Despite these tariff bindings, some Members retained the right to charge *higher* tariffs in specified circumstances. If, for a particular product, a Member had used tariffication to determine its new tariff binding, then it was entitled to invoke the AoA's Special Safeguard Provisions provided it had the foresight to insert the letters 'SSG' in its tariff schedule. Apparently, thirty-nine Members did so (six of which subsequently joined the EU). Switzerland made most use of this facility, claiming Special Agricultural Safeguard (SSG) designation on 53% of its agricultural tariff lines; but others had high percentages too: Botswana at 39.5%, South Africa at 39.4%, and the EU at 31.1% for example.[42] With an SSG designation, a country is entitled to charge an additional duty if — on the basis of complex criteria — the product experiences an import surge, *or* if the price of imports falls below "a trigger price equal to the average 1986 to 1988 reference price for the product concerned."[43] By the late 2000s only eight Members (Barbados, the EU, Japan, South Korea, Norway, the Philippines, Taiwan, and the USA) were invoking these provisions.[44] Despite superficial similarities, this SSG designation is not the same as the proposed Special Safeguard Mechanism (SSM) for developing countries that has proved to be problematic in the Doha Round.

The bound tariffs, SSG designations, and Tariff Rate Quotas (TRQs) (see Box 1 below), together with the reduction commitments on domestic support and export subsidies discussed later, were then included in a Member's Schedule of Commitments.

Although the tariff reductions were rather modest, the result was that — subject to the SSG proviso — virtually *all* agricultural tariffs were now bound, which was in marked contrast to the prior situation when many countries were free to increase unbound tariffs at will. It would be wrong to conclude, however, that all, or even most, trade takes place over these bound tariffs. Much of the trade takes place within CUs (for example, the EU), or at preferential rates between FTA partners, as outlined in Part VIII. Many

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[41] Ratna et al., *supra* note 14, at 9.

[42] Special Session of Committee on Agriculture, *Note by the Secretariat: Special Agricultural Safeguard,* WTO Doc. TN/AG/S/29/Rev.1, 2 (Jan. 11, 2017) [hereinafter "*Special Agricultural Safeguard*"].

[43] Agreement on Agriculture, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, Article 5(1)(b), 1867 U.N.T.S. 410.

[44] *Special Agricultural Safeguard*, *supra* note 42, at 3.

developed countries offer a Generalized System of Preferences (GSP) giving non-reciprocal preferential treatment to products originating in developing countries. Further, TRQs, as explained in Box 1, might apply.

Moreover, countries are not obliged to charge the bound rate: they can have in place, lower *applied* rates, which then have to be applied on an MFN basis. In an evaluation of the implementation of the Uruguay Round accords, the WTO reported that most Latin American countries apply "a uniform ceiling level to most of their tariff lines." It continued, "[i]n Costa Rica, for instance, the average bound rate is close to 45%, while the average applied rate in 1998 was 6.4%."[45] With a large discrepancy between a bound rate and the tariff actually applied, countries could envisage with equanimity future tariff negotiations, provided these focussed on bound rather than applied rates. How to negotiate and apply future tariff reductions when a country has both: a bound and a much lower applied rate, is one of the unsettled issues from the Doha Round.

Box 1: Tariff Rate Quotas

TRQs are to be found in the AoA, and in various other settings in the WTO's regulation of world trade. A TRQ is a specified quantity of product that can be imported having paid an in-quota tariff which is lower (often zero) than the prevailing out-of-quota rate. Sometimes quite specific conditions are attached, relating to production conditions for example, creating different categories of what might otherwise be thought to be *like* products. This issue is explored further in Part VIII.

In this article, we do not consider who might capture the economic rent implicit in preferential access to a higher-priced market: the original producer, the trader, the official who issued the relevant licence, the government of the exporting country imposing a tax, or the final consumer. Traders might not take up (or *fill*) the TRQ for a variety of reasons: the tariff preference might be inadequate, the quantity involved might be too small to be commercially attractive (a particular issue when shipping bulk cargoes), policy changes might have reduced the commercial incentive, the administrative procedures might be overly bureaucratic, or a combination of these.

There are three situations in which TRQs might be encountered. First, TRQs are to be found in a country's bound Schedule of Commitments. These mainly stem from the Uruguay Round, when they took two forms. Pre-WTO

[45] WORLD TRADE ORGANISATION (SPECIAL STUDIES), MARKET ACCESS: UNFINISHED BUSINESS — POST URUGUAY ROUND INVENTORY AND ISSUES 13 (2001).

concessions were "grandfathered" and became *current access* TRQs. These were often country-specific. But it was also feared that the modest tariff reduction formula might in some instances, leave prohibitively high tariffs. Thus, in those instances in which current imports were less than 5% of domestic consumption, countries were obliged to introduce *minimum access* TRQs to enable imports to eventually reach 5% of the base period consumption. Special provisions applied for rice imports into Japan and South Korea.

Second, countries are free to introduce and subsequently withdraw *autonomous* TRQs, provided they do so on an MFN (*erga omnes*) basis, consistent with other WTO provisions. For example, the UK opened an autonomous TRQ for 260,000 tonnes of raw cane sugar for refining when it left the EU's CU.[46]

Finally, TRQs are often deployed in FTAs to limit the volume of trade that can benefit from the "free trade" provisions.

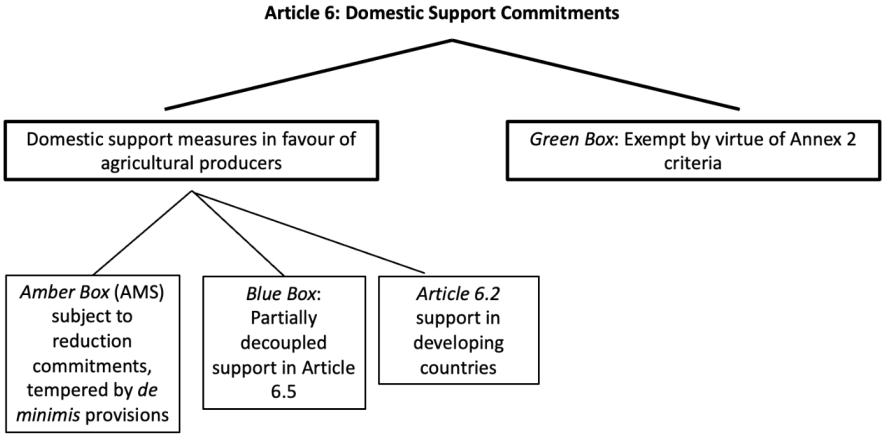
B. Domestic Support

Article 6 of the AoA sets the criteria for reduction commitments that "apply to all . . . domestic support measures in favour of agricultural producers," with the exception of some measures which are exempt. Again, this needs to be read alongside the modalities document. Figure 2 attempts, in a rather simplified way, to set-out the categories discussed below.[47]

Figure 2: The Amber, Green and Blue Boxes and Article 6.2 Support

[46] DEPARTMENT FOR INTERNATIONAL TRADE, PUBLIC CONSULTATION: MFN TARIFF POLICY – THE UK GLOBAL TARIFF. GOVERNMENT RESPONSE & POLICY 17 (2020).

[47] The definitive account of the AoA's domestic support provisions is probably that of Lars Brink, *The WTO disciplines on domestic support*, *in* WTO DISCIPLINES ON AGRICULTURAL SUPPORT: SEEKING A FAIR BASIS FOR TRADE (David Orden et al. eds., 2011).



The exempt measures are listed in the AoA's Annex 2, which is often referred to as the Green Box. This is an important list of exemptions, ranging from government services, through so-called "decoupled income support", to payments for the provision of environmental programmes (see Box 2 below). A crucial overarching requirement is "that they have no, or at most minimal, trade-distorting effects or effects on production." Support measures that are not exempted by virtue of Annex 2 are colloquially referred to as Amber Box, Blue Box, and Article 6.2 measures, although quite what authors mean when they write about the Amber Box is not always entirely clear.

Box 2: Annex 2 of the AoA: The Green Box

The Chapeau to Annex 2 reads:

> Domestic support measures for which exemption from the reduction commitments is claimed shall meet the fundamental requirement that they have no, or at most minimal, trade-distorting effects or effects on production. Accordingly, all measures for which exemption is claimed shall conform to the following basic criteria:
>
> (a) the support in question shall be provided through a publicly-funded government programme (including government revenue foregone) not involving transfers from consumers; and,
>
> (b) the support in question shall not have the effect of providing price support to producers;
>
> plus policy-specific criteria and conditions as set out below.

As can be seen, first there is the "fundamental requirement that they have no, or at most minimal, trade-distorting effects or effects on production." Some of the AoA's strictures present a binary choice: is an Aggregate Measurement

of Support (AMS) entitlement exceeded or not, for example? However, this criterion is more nuanced: what does 'at most minimal' mean, and how can it be operationalised? As far as I am aware, this particular question, although posed, has never been answered in a dispute settlement proceeding.[48]

Then twelve paragraphs go on to specify 'policy-specific criteria and conditions'. They are:

General services, including research, pest and disease control, extension and advisory services, etc.

Public stockholding for food security purposes, and *Domestic food aid*, both of which include elements of special and differential treatment for developing countries. The USA declares a particularly large expenditure on domestic food aid.

Direct payments to producers.

Decoupled income support, much used by the EU.

Government financial participation in income insurance and income safety-net programmes.

Payments . . . for relief from natural disasters.

Structural adjustment assistance provided through producer retirement programmes.

Structural adjustment assistance provided through resource retirement programmes.

Structural adjustment assistance provided through investment aids.

Payments under environmental programmes.

Payments under regional assistance programmes.

The modalities document set out the methodology to determine a country's Total Aggregate Measurement of Support (TAMS) for the base period 1986-88. For each 'basic agricultural product', countries were to calculate (on an annualised basis) an AMS. To the total of these product-specific AMSs was added any 'non-product-specific' support (e.g., fertiliser subsidies), giving the country's TAMS. But countries were not required to include any product-specific AMSs which did not exceed 5% (10% for developing countries) of the value of production of the relevant basic product (and likewise, for non-product-specific support, of the total value of agricultural production). Based on this *de minimis* provision some countries returned a figure of zero, either because they had not supported their agricultural producers in the base period or had done so below the *de minimis* thresholds. Nonetheless, in January 2005, of the then WTO membership of 148, thirty-five (counting the EU as one) had an AMS entitlement in excess of zero.[49] Sharma et al. quite rightly point out that, "those members who provided trade-distorting support

[48] *See*, *e.g.*, Alan Swinbank, *The Reform of the EU's Common Agricultural Policy*, *in* AGRICULTURAL SUBSIDIES IN THE WTO GREEN BOX: ENSURING COHERENCE WITH SUSTAINABLE DEVELOPMENT GOALS 78 (Ricardo Meléndez-Ortiz et al. eds., 2009).

[49] Special Session of Committee on Agriculture, *Note by the Secretariat; Total Aggregate Measurement of Support*, WTO Doc. TN/AG/S/13, 1 (Feb. 28, 2005).

above the *de minimis* level during the base period (1986–88) under the Uruguay Round, were *rewarded* in the form of Final Bound AMS entitlement" (emphasis added).[50]

The TAMS, reduced by 20% over the implementation period for developed countries (two-thirds of this for developing, with no reduction required for LDCs), then became a binding commitment, not to be exceeded, written into the country's Schedule of Concessions and Commitments. This is what the author refers to as a country's AMS entitlement in this article.

The Blue Box, and Article 6.2 measures, are carve outs from what would otherwise be considered as trade distorting measures subject to reduction commitments. Article 6.2 (sometimes referred to as the development box)[51] allows *developing* countries more scope to "encourage agricultural and rural development". In particular Article 6.2 specifies that:

> investment subsidies which are generally available to agriculture in developing country Members and agricultural input subsidies generally available to low-income or resource-poor producers in developing country Members shall be exempt from domestic support reduction commitments that would otherwise be applicable to such measures, as shall domestic support to producers in developing country Members to encourage diversification from growing illicit narcotic crops.

The Blue Box was predominantly designed to help the EU *reform* its farm policies. Concurrent with the latter half of the Uruguay Round negotiations (following an ill-fated Ministerial conference in Brussels in December 1990), the then EU Commissioner for Agriculture, Ray MacSharry, was attempting to partially decouple (delink) farm support from production decisions whilst keeping the overall level of support to farmers more-or-less the same. Thus, for example, in the MacSharry 'Reform' of 1992, the support (intervention) price of cereals was reduced, enabling a reduction in the level of border protection the EU afforded its cereal producers, and the unit rate of export subsidy necessary to place (some would say *dump*) its surplus on world markets. In compensation, farmers were entitled to claim area payments on land planted to grain crops which offset the expected fall in farm revenue the reduction in price support would entail. It was these area payments, "based on fixed area and yields," or "livestock payments . . . on a fixed number of

[50] Sharma et al., *supra* note 12, at 359.
[51] *See*, *e.g.*, *id.*

head", that the EU claimed comprised a "production-limiting programme" as set out in Article 6.5. Although EU ministers were unwilling to publicly acknowledge a link — the Portuguese farm minister who chaired the final negotiations later referred to "the *politically correct* official line of denying such a link in public"[52] — the two negotiations were intertwined. The MacSharry Reform would enable the EU to accept the emerging WTO disciplines on farm support *provided* the AoA included a Blue Box which would allow the EU to protect its partially decoupled farm payments from further scrutiny. Thus, *box shifting* had begun.

What is left, after excluding Blue Box and Article 6.2 payments, is often colloquially referred to as the Amber Box. In their annual determination of whether the AMS entitlement has been respected or not, countries calculate a Current Total AMS which, as in the calculation of the TAMS set out in the modalities document, is the sum of *current* product-specific AMSs and non-product-specific support. Moreover, they are entitled to invoke the same *de minimis* percentages that appeared in the modalities document. That is, if, in any one year, support for a particular basic product does not exceed 5% (10% for developing countries) of the total value of production of that basic agricultural product, then it is disregarded (and likewise for 'non-product-specific domestic support'). However, if, for any of these individual reckonings, the *de minimis* threshold is breached, then the whole of the AMS from that calculation is set against the country's annual AMS entitlement.

In theory, if a country with a *zero* AMS entitlement was able to juggle its policies successfully, pushing its *de minimis* allowances for each individual basic product and for non-product-specific support to the limit, its total *de minimis* allowance would then equate to 10% (developed countries) or 20% (developing countries) of the value of domestic production. But this would be a dangerous strategy as unforeseen circumstances could easily result in a breach of its AMS limits. Similarly, a country with a *positive* AMS entitlement could legally exceed this limit by judiciously keeping within some of its *de minimis* limits: keeping non-product-specific support just below the *de minims* limit for example.

But how is a product-specific AMS (or the equivalent measurements of support set out in the modalities document) calculated? It is the sum of subsidies paid and 'market price support.' When governments are making payments directly to farmers, the determination is simple: the budget outlay

[52] ARLINDO CUNHA & ALAN SWINBANK, AN INSIDE VIEW OF THE CAP REFORM PROCESS: EXPLAINING THE MACSHARRY, AGENDA 2000, AND FISCHLER REFORMS 82 (2011).

or revenue foregone. When it is a question of trying to determine the financial benefit producers derive from market price support, as with the EU's former mechanisms of import taxes, intervention buying, and export subsidies, the methodology is less clear-cut. Superficially the modalities text is clear: "[m]arket price support shall be calculated using the gap between a fixed external reference price and the applied administered price multiplied by the quantity of production eligible to receive the applied administered price."[53]

There are three problems with this. First, the "*fixed* external reference price" is, effectively, the world market price that prevailed in the base period 1986-88, and that is clearly not the same as experienced in today's markets. Consequently, the current AMS calculations can easily generate a positive AMS even though today's world market price is above the prevailing "applied administered price". This problem is compounded for countries with fixed external reference prices denominated in national currencies that have subsequently experienced massive inflation.

Second, what is an "applied administered price"? This is an issue that has dogged developing countries' attempts to operate public stockholding programmes for food security purposes; and led to a number of challenges under dispute settlement proceedings. It has also encouraged some somewhat suspect declarations. If there is no "applied administered price" then, *ipso facto*, there is no AMS. The EU managed to halve its AMS declaration between 2006-07 and 2007-08 by making modest changes to its support arrangements for fruits and vegetables without any noticeable impact on support for that sector.[54] Others have achieved similarly spectacular results by a judicious tweaking of policy: for example, the Japanese rice policy in 1998.[55] In the EU, product-specific levels of market price support were computed for butter and skim milk powder — with intervention prices deemed to be the applied administered prices — but there was no corresponding computation of market price support for the cows' milk sold fresh, as yoghurt, manufactured into cheese, etc.[56]

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[53] *Modalities of Specific Binding Commitments*, *supra* note 38, at 15.

[54] Alan Swinbank, *Fruit and Vegetables, and the Role They Have Played in Determining the EU's Aggregate Measurement of Support*, 12(2) ESTEY CTR. J. INT'L L. &TRADE POL'Y 54 (2011).

[55] Yoshihisa Godo & Daisuke Takahashi, *Japan*, *in* WTO DISCIPLINES ON AGRICULTURAL SUPPORT: SEEKING A FAIR BASIS FOR TRADE, *supra* note 48.

[56] *See*, *e.g.*, Committee on Agriculture, *Notification of European Communities' domestic support commitments for the marketing year 1995/96*, WTO Doc. G/AG/N/EEC/12 (Sept. 21, 1998) [hereinafter "*Notification for 1995/96*"].

Thirdly, what is meant by the phrase "the quantity of production eligible to receive the applied administered price"? Is it limited, for example, to the quantity *bought* by the authorities at the applied administered price, the quantity the authorities have the authority to buy at that price, or the total quantity marketed even though the authorities have not been called upon to buy anything at all?

The extent of the EU's box shifting is evident from Table 1. The MacSharry 'Reforms' of 1992, referred to above, were just the first in a succession of policy changes that progressively decoupled support, shifting it first from the Amber Box to the Blue Box, and then from there into the Green Box (specifically as decoupled payments in the Green Box).[57] In the first year of implementing the agreement, the EU (then comprising fifteen Member States) claimed an AMS entitlement of €78.7 billion. During the implementation period this was further reduced, and then augmented by later accessions as membership soared to twenty-eight, to stand at €72.4 billion in 2018-19. However, in the first year of implementation, the EU had already switched support from the Amber Box to the Blue Box, courtesy of the MacSharry Reforms. By 2018-19, the EU was declaring less than a tenth of its AMS entitlement as Amber Box support, but €37.6 billion as decoupled payments in the Green Box.

Table 1: Box shifting by the EU

	1995-96 **EU15** ECU/€ million	**2018-19** **EU28*** € million
AMS Entitlement	78,672.0	72,378,0
Current AMS *(Amber Box support)*	47,526.4	5,137.2
de minimis	106.2	1,855.0
Blue Box	20,845.5	4,736.6
Green Box	18,718.0	67,885.6
— *of which Decoupled payments*	*244.5*	*37,576.8*

* i.e., before the UK's exit from the EU

[57] As outlined in Alan Swinbank, *The WTO: No Longer Relevant for CAP Reform?*, *in* THE POLITICAL ECONOMY OF THE 2014-2020 COMMON AGRICULTURAL POLICY: AN IMPERFECT STORM (Swinnen J. eds., 2015) [hereinafter "Swinbank (2015)"].

Source: Committee on Agriculture [58]

It should perhaps be noted the countries themselves are responsible for calculating their levels of domestic support and deciding whether to report them as Green, Blue, Amber, or Article 6.2 compliant. The WTO Secretariat does not audit these returns. Complaints about delayed submissions are legion. Members may be queried in the Committee on Agriculture, and may eventually be challenged in a dispute settlement proceeding (as is shown below), potentially leading to the revision of past declarations and/or discovery of a WTO Member infringing its commitments. Whether the EU's decoupled payments, shown in Table 1, really belonged in the Green Box has been queried by some analysts, but has not been contested in the WTO. Basic maths may explain why. Even if these payments were deemed ineligible as Green (or Blue) Box payments, and that they properly belonged in the Amber Box, the EU's Current AMS would still have fallen short of its AMS entitlement. Why would any WTO Member have bothered to challenge the EU, given the time and expense involved in a formal dispute, and the likely diplomatic damage? On the other hand, had the Doha Round been concluded in 2008, and the reduction commitments envisaged adopted, the EU's revised AMS entitlement would have been a binding constraint.

C. Export Competition

The third *pillar* of the AoA focusses on export subsidies. Countries that had subsidised exports of AoA products in the base period (this time of 1986-90), and wished to continue doing so, had to determine — on a product-specific basis — their annualised expenditure on export subsidies in the base period, and the volume of subsidised exports. Developed countries then had to reduce expenditures by 36% and subsidised volumes by 21% over the implementation period (with developing countries again subject to two-thirds of these percentage reductions over their longer adjustment period, whilst LDCs were not obliged to reduce).

Without a product-specific entitlement written into a country's Schedule of Commitments, the effect was to immediately close-down the possibility of granting export subsidies on agricultural products, that GATT Article XVI's permissive stance on primary products had offered. Paradoxically though, the

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[58] *Notification for 1995/96*, *supra* note 56 (for the years: 1995-96); Committee on Agriculture, *Notification of European Union's domestic support commitments for the marketing year 2018/19*, WTO Doc. G/AG/N/EU/69/Corr.1 (Jan. 17, 2021) (for the years: 2018-19).

AoA provisions did legitimise the payment of export subsidies on raw materials incorporated into processed products, provided the unit rate of subsidy did not exceed that payable on the basic product, but only for those countries that had done so in the base period. A paradox because an unadopted panel report from the pre-WTO era, that considered a challenge the USA had mounted to the EU's grant of export subsidies on pasta, had reported that, "neither party had finally contended that pasta was a primary product", and had expressed its opinion that, "pasta was not a primary product but was a processed agricultural product."[59]

This all changed at the WTO's Tenth Ministerial Conference in Nairobi in 2015. It was decided that developed countries would eliminate their "export subsidy entitlements" with immediate effect, which with some slippage meant by the end of 2020, and developing countries would do likewise by the end of 2018. However, the latter were allowed to pay various marketing costs, and internal transport and freight costs, until the end of 2023 (for LDCs and net-food importing countries, 2030), provided these are not paid "in a manner that would circumvent reduction commitments".[60] As countries revise their Schedules of Commitments, these new constraints are being recorded.

D. The AoA: A Success?

It cannot be concluded that the AoA was either a 'fair' outcome, or one that free-trade economists would have advocated. This is understandable, given the political economy of trade negotiations. Whilst a country's negotiating stance might take into account geopolitical considerations, and even be flavoured by altruistic intent, on the whole, countries try to maximise what they perceive to be their national interests. Political pressures translate into producer interests taking precedence over those of consumers, and trade negotiators tend to act as mercantilists trying to ensure that the 'concessions' they concede on imports are more than offset by the 'gains' they secure in export markets. Consequently, it is not particularly surprising that numerous commentators have suggested that the outcome was unjust, and complain that the EU and the USA came out of the Uruguay Round with their levels of farm support more-or-less intact.

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[59] Panel Report, *European Economic Community – Subsidies on Export of Pasta Products*, GATT Doc. SCM/43 ¶4.2 (May 19, 1983); *see also* Alan Swinbank, *The EU's Export Refunds on Processed Foods: Legitimate in the WTO?,* 7(2) ESTEY CTR. J. INT'L L. & TRADE POL'Y 152 (2006).

[60] World Trade Organization, Export Competition: Draft Ministerial Decision of 19 December 2015, WTO Doc. WT/MIN(15)/W/47 (2015).

The agreement was certainly not as ambitious as some had hoped, but it did hold out the promise that it was the first in a series of agreements that would result in a progressive reduction in support. Unfortunately, the Doha Round has not (yet) delivered another round of reduction commitments, apart from the promised elimination of export subsidies. Nonetheless, Tangermann claimed that, "[t]he Uruguay Round . . . affected the nature of the policy debate in agriculture. The WTO has become a relevant factor in agricultural policy making."[61] This was arguably the case in the EU, not only for the MacSharry 'Reforms' of 1992, but also for the succession of policy changes that followed in the 2000s. Policy makers tried to ensure that they stayed one step ahead of an anticipated tightening of the AoA's rules in the Doha Round, and cited AoA provisions when justifying particular policy stances. Thus, the Agriculture Act 2020, recently enacted in the UK, includes a section headed 'WTO Agreement on Agriculture' which gives the Government power to "make regulations for the purpose of securing compliance with obligations of the United Kingdom under the Agreement on Agriculture."[62] Whether this was just window dressing, or will be reflected in policy decisions, remains to be seen. Further, governments continue to cite AoA provisions as they use the dispute settlement procedures to contest measures adopted by their trade partners, as will be demonstrated in the following Part.

Furthermore, as Josling et al. had earlier remarked:

> The UR Agreement on Agriculture takes a large step towards integrating trade in farm and food products fully into the GATT. It established binding and operationally effective rules and commitments for agricultural policies in participating countries. By doing so it begins to close the gap which has existed throughout the history of the GATT between industry and agriculture. However, some important differences between these sectors remain.[63]

True, in Nairobi in 2015, Ministers did decide to abolish export subsidies on agricultural products, thus reducing this aspect of agricultural exceptionalism, but they did not repeal the relevant section of the AoA or amend GATT Article XVI.

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[61] Stefan Tangermann, *Agricultural Policies in OECD Countries 10 Years After the Uruguay Round: How Much Progress?*, *in* AGRICULTURAL POLICY REFORM AND THE WTO: WHERE ARE WE HEADING? 40 (Giovanni Anania et al. eds., 2004).

[62] Agriculture Act, §43 (2020) (Eng.).

[63] JOSLING ET AL., *supra* note 22, at 214.

Article 13 of the AoA (titled 'Due Restraint') has long since lapsed. This was the so-called Peace Clause, another facet of agricultural exceptionalism built into the AoA, which sought to protect agricultural subsidies from challenges under other WTO provisions, but which probably never played the roles envisaged by this author and others.[64]

Another sector-specific agreement had been negotiated in the Uruguay Round: an Agreement on Textiles and Clothing. However, it included a sunset clause (in Article 9), and ceased to apply from January 2005. Thus, to quote a WTO web page, "trade in textile and clothing products is no longer subject to quotas under a special regime outside normal WTO/GATT rules but is now governed by the general rules and disciplines embodied in the multilateral trading system."[65]

As the AoA has no sunset clause, its remaining provisions will continue to apply until such time as they are amended (which was the aim of negotiators in the Doha Round) or repealed. Neither eventuality seems particularly likely given the current impasse over decision-making in the WTO. Thus, the AoA remains an emblematic statement of agricultural exceptionalism. But it has not aged well. Whilst (arguably) fit for purpose in 1994, the WTO's collective failure to update its provisions and address emerging policy concerns has sapped confidence in its ability to deliver. In the third decade of the 21st Century, trying to make sense of rules based on benchmarks from the 1980s is problematic.

VI. DISPUTE SETTLEMENT AND THE AOA

When the Uruguay Round was concluded in 1995, the establishment of a DSB was seen as one of its great achievements. The Understanding on Rules and Procedures Governing the Settlement of Disputes operates across the collection of WTO agreements, and the AoA has frequently been cited, as will be clear as this Part unfolds. In the old GATT, prior to 1995, disputes between Contracting Parties were adjudicated, but the *modus operandi* was that there had to be a consensus before GATT could accept a panel's report. If one of the Contracting Parties objected — for example, a country whose policies had been seen to be at fault — then the panel's report remained

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[64] *See*, *e.g.*, Richard H. Steinberg & Timothy E. Josling, *When the Peace Ends: The Vulnerability of EC and US Agricultural Subsidies to WTO Legal Challenge*, 6(2) J. INT'L ECON. L. 369 (2003).

[65] AGREEMENT ON TEXTILES AND CLOTHING, WTO, https://www.wto.org/english/docs_e/legal_e/16-tex_e.htm.

unadopted, i.e., blocked in effect. This is what had happened in the Pasta dispute involving the EU, as noted in the previous Part.

That *consensus to accept* rule was replaced by a *consensus to reject* provision. Only if the WTO's membership as a body decided to reject a panel's report, could it be blocked, and that has never happened. A panel, usually consisting of three learned experts, will be appointed to review a particular dispute. But a panel's report can be contested by one of the parties to the dispute, querying the panel's interpretation of WTO law and asking for a review by the WTO's Appellate Body. Members of the Appellate Body serve a four-year term, which can be renewed once. The Appellate Body played a non-trivial role in the process: an appeal had been lodged against 66% of the panel reports delivered by the end of 2020.[66] Until the Appellate Body's report is received, the panel's report is effectively in limbo.

Perhaps encouraged by the fact that their reports now mattered, it would seem that panels started putting more effort into their enquiries. Their reports were longer than those produced under the old GATT, and they had more bite. Soon, however, their efforts revealed that the Uruguay Round accords were often ambiguous, or the agreements incomplete, and so — like other judicial systems tasked with reaching definitive, unambiguous, judgements in the absence of a clear directive from the legislature — panels and the Appellate Body began filling the gaps: "judicial lawmaking", according to Barton and colleagues.[67]

The EU certainly expressed, or feigned, surprise when its export subsidy regime for sugar was found wanting by a panel report in October 2004. The EU had claimed that it believed its policies were in conformity with WTO rules, but the Panel (and Appellate Body) disagreed. The Panel had been established to adjudicate on complaints initiated by Australia, Brazil and Thailand; and the ruling was in itself a momentous outcome, as attempts in the old GATT to discipline the EU's use of export subsidies on sugar had come to nought. The EU did change its sugar policy to bring its sugar exports into line with the ruling. But whether the sugar "reform" was prompted by WTO disciplines, or rather that the EU used the ruling as a convenient excuse to justify a long overdue change to a discredited policy, is debated.[68]

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[66] DISPUTE SETTLEMENT ACTIVITY — SOME FIGURES, WTO, https://www.wto.org/english/tratop_e/dispu_e/dispustats_e.htm.

[67] JOHN H. BARTON ET AL., THE EVOLUTION OF THE TRADE REGIME: POLITICS, LAW, AND ECONOMICS OF THE GATT AND THE WTO 61 (2006).

[68] For different perspectives see Alan Swinbank, *EU Sugar Policy: An Extraordinary Story of Continuity, but then Change*, 43(3) J. WORLD TRADE 603 (2009); Robert Ackrill &

Young, for example, concludes that the "adverse WTO ruling was one factor among several that shaped the EU's policy change."[69] Either way, this was a successful AoA outcome for anyone who welcomed this somewhat limited policy reform.

The USA was unhappy. In 2017, President Trump's United States Trade Representative (USTR), Robert Lighthizer, stated at a conference that, "the United States sees numerous examples where the dispute-settlement process over the years has really diminished what we bargained for or imposed obligations that we do not believe we agreed to."[70] But the USA's assault on the dispute settlement system did not begin with Trump. As Charnovitz has reported:

> In the latter part of the Obama Administration, several countries won ten WTO cases against actions of the US Executive Branch or the Congress . . . Distressed at losing so many WTO cases, the Obama Administration struck back against the WTO Appellate Body in 2016 by blocking the reappointment of the distinguished Korean jurist, Seung Wha Chang.[71]

This resulted in a delay of six months — "*caused by Obama's intransigence"* — before a replacement could be installed, but then this individual resigned to become South Korea's trade minister. "The Trump Administration went further to block all new appellator appointments."[72]

The impasse continues. At the time of writing, a notice on the WTO website curtly reads: "[c]urrently, the Appellate Body is unable to review appeals given its ongoing vacancies. The term of the last sitting Appellate Body member expired on 30 November 2020."[73] And yet panels continue their deliberations, the USA has initiated new disputes (for example, against India

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Adrian Kay, *Multiple streams in EU policy-making: the case of the 2005 sugar reform*, 18(1) J. EUROPEAN PUB. POL'Y 72 (2011).

[69] ALASDAIR R. YOUNG, SUPPLYING COMPLIANCE WITH TRADE RULES: EXPLAINING THE EU'S RESPONSES TO ADVERSE WTO RULINGS 147 (2021).

[70] Robert Lighthizer, United States Trade Representative, Address on the U.S. Trade Policy Priorities (Sept. 18, 2017) (transcript available on the website of the Centre for Strategic and International Studies).

[71] Steve Charnovitz, *How American Rejectionism Undermines International Economic Law*, 10(2) TRADE, L. & DEV. 226, 229–33 (2018).

[72] *Id.*

[73] APPELLATE BODY, WTO, https://www.wto.org/english/tratop_e/dispu_e/appellate_body_e.htm.

in July 2019)[74], and countries appeal panel decisions. The same WTO web page lists six notifications of appeals launched by the USA since 2018.

Without an operative Appellate Body, a sub-group of WTO members (currently fifty-four of the WTO's 164 members), which includes neither India nor the USA, have established a Multi-Party Interim Appeal Arbitration Arrangement (MPIA). This is "an alternative system for resolving WTO disputes that are appealed by a Member," serving "as a temporary solution to the WTO Appellate Body gridlock."[75] Australia and Canada have already used this procedure to settle a case concerning the sale of wine in Canada,[76] and other cases involving AoA products are in train. Further discussion of the Appellate Body's future, the MPIA, and of dispute settlement in the WTO involving countries not party to the MPIA, is beyond the scope of this article.

The WTO website lists eighty-five instances in which the AoA has been cited when governments submitted a request for consultations, over the period 1995-2021, as depicted in Figure 3, with a further one to date in 2022.[77] Too much should not be read into this database. A request for consultation might not result in the formation of a panel, let alone the delivery of a panel report, as the dispute might be settled amicably, or discontinued. In January 2007, for example, Canada requested consultations with the USA over the latter's support for corn (maize) and other agricultural products. In December 2007, the DSB agreed to the establishment of a panel, but its members have never been appointed. Over the period 1995-2019, Glauber & Xing identified twenty-four disputes involving the AoA, which had resulted in a panel report.[78]

There is also an element of double counting, in that two or more disputes might involve largely the same complaint, although brought by different

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[74] Request for consultations by the United States, *India — Additional Duties on Certain Products from the United States*, WTO Doc. WT/DS585/1 (Jul. 04, 2019).

[75] THE MULTI-PARTY INTERIM APPEAL ARBITRATION ARRANGEMENT (MPIA), WTO PLURILATERALS, https://wtoplurilaterals.info/plural_initiative/the-mpia/.

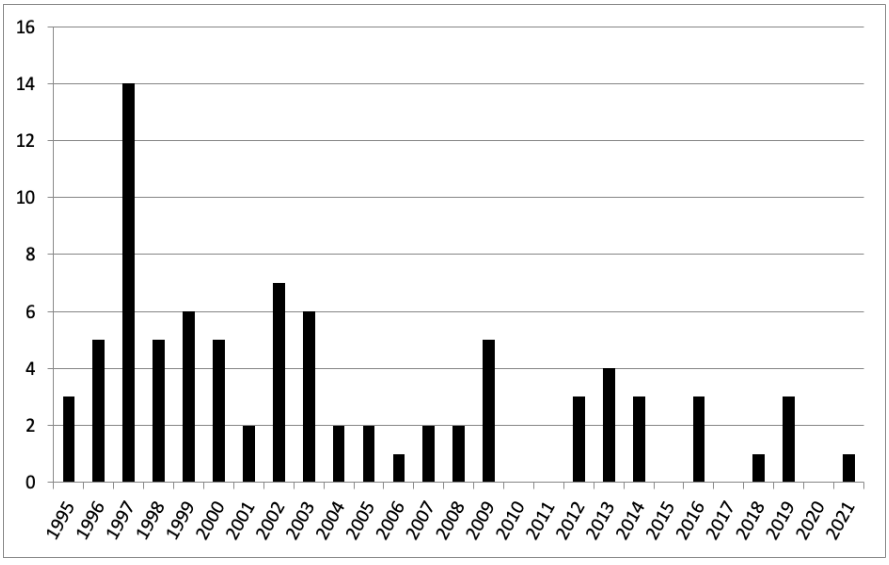
[76] Panel Report, *Canada — Measures Governing the Sale of Wine*, WTO Doc. WT/DS537/R (May 25, 2021).

[77] *See* DISPUTES BY AGREEMENT, WTO, https://www.wto.org/english/tratop_e/dispu_e/dispu_agreements_index_e.htm (last visited Feb. 01, 2022) from which this and other comments have been derived. For more descriptive statistics, see Joseph W. Glauber & Xiaorong Xing, *WTO Dispute Settlement Cases Involving the Agreement on Agriculture, 1995–2019* (Int'l Food Pol'y Res. Inst., IFPRI Discussion Paper No. 01917, 2020) [hereinafter "Glauber & Xing"].

[78] GLAUBER & XING, *supra* note 77, at 21.

WTO Members, with a single panel appointed to arbitrate them all. This was the case in the three challenges brought against the Indian Measures Concerning Sugar and Sugarcane in 2019 by Brazil, Australia, and Guatemala. The Panel reported in December 2021: India has appealed.[79] This case has been discussed below.

Figure 3: Disputes Citing the AoA, 1995-2021



To date, there are six Members with five or more cases citing the AoA brought against them: the EU and its Member States including countries that were sovereign states at the time (twenty-one), the USA and India (ten each), Indonesia (seven), China (six), and South Korea (five); although readers should perhaps be reminded that China only joined the WTO in 2001. Most WTO Members have not been arraigned, and quite important players have had relatively few cases brought against them (for example, Japan has three). What brings individual countries to the fore is not entirely obvious. One might hypothesise that a major determinant is the commercial interests of the complainant and the relative importance of the accused's market. Members that have high levels of protection, and that have not made sure that their measures are in full conformity with the AoA, might also find themselves more likely to be in the dock.

[79] Reports of the Panel, *India — Measures Concerning Sugar and Sugarcane*, WTO Docs. WT/DS579/R, WT/DS580/R, WT/DS581/R24 113 (adopted on Dec. 14, 2021) [hereinafter "Reports of the Panel, *India — Measures Concerning Sugar and Sugarcane*"].

All three pillars of the AoA have been cited, although Market Access (in sixty-one cases), predominates over Export Competition (nineteen) and Domestic Support (ten). A particular complaint might allege infringement of the provisions of more than one pillar, although Market Access tends to stand alone.

Moreover, cases will often cite other WTO provisions, particularly the Agreement on Subsidies and Countervailing Measures. This was so when Brazil challenged the USA over its subsidies to upland cotton. This was a long-drawn-out saga that began in 2002; but it was not until October 2014 that, "Brazil and the United States notified the DSB that . . . they had concluded a Memorandum of Understanding, and agreed that this dispute was terminated."[80]

Aspects of the USA policy were found to be "prohibited subsidies contingent on the use of domestic over imported goods", "export subsidies within the meaning of the AoA, and inconsistent with US export subsidy commitments," and "actionable subsidies within the meaning of the Agreement on Subsidies and Countervailing Measures that led to significant price suppression on world markets."[81]

In reaching this outcome, the Appellate Body "upheld the panel's finding that two challenged measures (production flexibility contract and direct payments) are related to the type of production undertaken after the base period and thus are not green box measures conforming fully to paragraph 6(b) of Annex 2 to the Agreement on Agriculture."[82] (More details of Annex 2, the Green Box, were given earlier in Box 2.) Paragraph 6 sets out the criteria for Decoupled payments. In particular, 6(b) states that, "The amount of such payments in any given year shall not be related to, or based on, the type or volume of production (including livestock units) undertaken by the producer in any year after the base period." If expenditure on these USA programmes could not be sheltered by the Green Box because they did not meet the policy-specific criteria of paragraph 6(b), then by default they must have been Amber (or possibly Blue) Box support, which, in turn, might imply that the USA was in breach of its AMS entitlement. However, this was not a challenge

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[80] *DS267: United States — Subsidies on Upland Cotton*: *Current Status*, WORLD TRADE ORGANIZATION,
https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds267_e.htm; *see also* Randy Schnepf, *Status of the WTO Brazil-U.S. Cotton Case* (Congressional Res. Service, Report No. R43336 2014).

[81] Swinbank (2015), *supra* note 57, at 204-5.

[82] *Supra* note 80.

that Brazil had raised, and consequently, the hypothetical possibility was left unresolved. The question might have been answered if follow-up cases by Canada and Brazil had not been allowed to lapse.

Although there have been four further dispute settlement cases centred on alleged infringements of domestic support commitments, none have focussed on the Annex 2 exemptions. This poses a dilemma for jurisdictions that want to develop new agri-environmental programmes ensuring they are Green Box compliant. In the UK, for example, following its departure from the EU, the government is developing a suite of agri-environmental programmes in England based on the slogan "public money for public goods". A strict reading of paragraph 12 of Annex 2, which specifies that the payment should be "limited to the extra costs or loss of income involved in complying with the government programme", suggests that it might be quite difficult for the UK to devise a policy that is Green Box compliant. In January 2022, nonetheless, the minister responsible for this programme assured a farming audience that, "[t]hese new payments will not begrudge farmers a margin for doing the right thing for the environment, and in that sense, they will represent a departure from the income foregone principle that was used by the European Union. Rates instead will be set at the level needed to incentivise uptake required on the scale we need to deliver our environmental objectives."[83] However, Brexit Britain has claimed a large AMS entitlement which could probably accommodate such expenditure if at some stage it was deemed not to be Green.

In *China — Domestic Support for Agricultural Producers*, brought by the USA, the Panel found that China had exceeded its domestic support commitments in four successive years, 2012–15. Its market price support for wheat, Indica rice, and Japonica rice were each in excess of its *de minimis* limit of 8.5% of the value of production (8.5% being the *de minimis* percentage China had negotiated on accession).[84] Although neither party appealed the Panel's report, allowing its adoption by the DSB in April 2019, and China agreed to implement its recommendations, the USA was not satisfied with the steps China then took, and compliance proceedings are currently underway.

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[83] ENVIRONMENT SECRETARY SHARES FURTHER INFORMATION ON LOCAL NATURE RECOVERY AND LANDSCAPE RECOVERY SCHEMES, UK GOVT., https://www.gov.uk/government/speeches/environment-secretary-shares-further-information-on-local-nature-recovery-and-landscape-recovery-schemes.

[84] Dukgeun Ahn & David Orden, *China — Domestic Support for Agricultural Producers: One Policy, Multiple Parameters Imply Modest Discipline*, 20(4) WORLD TRADE REV. 389 (2021).

In presenting their cases to the Panel, the contestants had disagreed on the parameters to be used to determine the level of "market price support", in particular, with regard to the "quantity of production eligible to receive the applied administered price". The USA argued that this meant "production which is fit or entitled to receive the administered price, whether or not the production was actually purchased", and "that where a market price support instrument places no limits on the volume of production that may be purchased, the entirety of the production is 'eligible.'" China disagreed. In the end, the Panel concluded:

> [T]hat based on the plain meaning of the entire phrase 'quantity of production eligible to receive the applied administered price', the QED [*quantity of eligible production*] should be determined as a current reflection of the amount of product which qualifies to be purchased from producers at the [*applied administered price*].[85]

Although subsequent panels will not be bound by this Panel's findings, precedents are important. In coming to its conclusion, for example, the Panel had referred back to an earlier report from 2001, in *Korea — Various Measures on Beef*, when

> the Appellate Body held that 'production actually purchased may often be less than eligible production', and reiterated that 'production eligible' refers to production that is 'fit or entitled' to be purchased rather than production that was actually purchased'. Contrary to China's argument, we consider the Appellate Body's reading of the phrase 'quantity of production eligible' to apply outside of the specific context of the dispute in *Korea – Various Measures on Beef*; when making that statement, the Appellate Body was determining the ordinary meaning of the term used in Paragraph 8 of Annex 3, rather than limiting it to the facts of that case.[86]

Within the space of three weeks in 2019, Brazil, Australia, and Guatemala launched very similar disputes against India, claiming, *inter alia*, that India was exceeding its *de minimis* limits on domestic support for sugar cane producers, and granting "WTO-inconsistent subsidies contingent upon export performance" on sugar. India refuted the claims. A single panel adjudicated on all three disputes, and reported in December 2021. With specific reference to the Brazilian case, the Panel found that, "for five consecutive sugar

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[85] *Id.* at 82-83, 86.
[86] *Id.* at 86.

seasons, from 2014-15 to 2018-19, India provided non-exempt product-specific domestic support to sugarcane producers in excess of the permitted level of 10% of the total value of sugarcane production," and that various subsidies were "contingent on export performance within the meaning of Article 9.1(a) of the Agreement on Agriculture." As India had not made export subsidy reduction commitments with respect to sugar in its Schedule of Commitments, this was an infringement. Accordingly, the panel recommended "that India bring its WTO-inconsistent measures into conformity with its obligations under the Agreement on Agriculture."[87] Within days, India appealed various aspects of the Panel's findings. In doing so, it noted that there are "currently no Appellate Body Members" to consider its appeal, and that it awaits further instructions.[88] As India is not party to the MPIA (although Australia, Brazil and Guatemala are), there seems to be no prospect of an early end to this dispute.

Once the panel and the Appellate Body have concluded their deliberations, if a country is found to have contravened WTO provisions, the DSB will rule that the offending Member should bring its policies into conformity with the WTO agreements within a reasonable time. This is the expected outcome. This might provoke a further round of WTO litigation trying to determine whether the offending party's policy changes have brought it into compliance with WTO rules. There are nonetheless circumstances in which the offending Member is unwilling, or unable, to comply, because for example of domestic political concerns and the inability to secure parliamentary approval of the requisite policy change. Then two possibilities arise. The Member (or Members) that brought the complaint might be willing to accept "compensation" to end the dispute. This could take the form of TRQs targeted to benefit the complainant. Thus, the USA secured a TRQ for hormone-free beef for sale in the EU in partial settlement of the EU beef hormones dispute (DS26).[89] Or some other financial package might be offered. Part of the deal brokered between the USA and Mexico in 2010 for

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[87] Reports of the Panel, *India — Measures Concerning Sugar and Sugarcane*, *supra* note 79, at 113.

[88] Notification of an Appeal by India under Article 16.4 and Article 17.1 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), and under Rule 20(1) of the Working Procedures for Appellate Review, *India — Measures Concerning Sugar and Sugarcane*, WTO Doc. WT/DS579/10, WT/DS580/10, WT/DS581/11, 4 (Jan. 11, 2022).

[89] OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, UNITED STATES AND EUROPEAN UNION SIGN BREAKTHROUGH AGREEMENT ON U.S. BEEF ACCESS TO EU, https://ustr.gov/about-us/policy-offices/press-office/press-releases/2019/august/united-states-and-european-union.

example, attempting to settle Upland Cotton, was a USA funding package for the Brazilian Cotton Institute.[90]

If compensation cannot be agreed, then the aggrieved parties are entitled to ask the DSB for authorisation to suspend concessions it was otherwise committed to extend to the guilty party. This is a complex process, as some measure of the 'harm' that the offending party's policies have caused, and of the appropriate level of 'retaliation' this implies, must be determined.[91] Retaliation would usually take the form of suspending tariff concessions; and agricultural products could well figure on the hit list. For example, in the US-EU dispute over beef hormones, in January 1999 the US "increased the retaliatory duty from 100 to 300 per cent on . . . Roquefort cheese."[92]

Whilst infringements of market access (or export subsidy) commitments might result in clearly demonstrable injuries to the commercial interests of other WTO Members, what is less clear is how such losses could be established if a WTO Member exceeded its AMS entitlement (or *de minimis* limits), particularly if this infringement stemmed from an environmental programme that had been disallowed entry to the Green Box. Simply establishing a breach would not suffice. The complaining Member(s) would have to demonstrate the extent of the damage to their commercial interests before the DSB could agree to the imposition of retaliatory measures.

It should perhaps be noted that agricultural products often figure in disputes that do not cite the AoA, particularly when Members challenge trade remedy measures. For example, the USA challenged China's continued use of anti-dumping and countervailing duty measures against broiler products (mainly chicken feet) from the USA,[93] despite an earlier ruling. Alcover and Crowley summarise the outcome as follows:

> The compliance Panel Report . . . concluded that China had failed to comply with its WTO obligations when allocating costs

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[90] Randy Schnepf, *Brazil's WTO Case Against the U.S. Cotton Program*, RL32571 CONG. RES. SERV. 28 (2011).

[91] Chad P. Bown & Joost Pauwelyn, *Introduction: Trade retaliation in WTO dispute settlement: a multi-disciplinary analysis*, *in* THE LAW, ECONOMICS AND POLITICS OF RETALIATION IN WTO DISPUTE SETTLEMENT (Chad P. Bown & Joost Pauwelyn eds., 2010).

[92] *Id.* at 14.

[93] Request for consultations by the United States, *China — Anti-Dumping and Countervailing Duty Measures on Broiler Products from the United States*, WTO Doc. WT//DS427/1 (Sept. 23, 2011).

> to construct US domestic prices for broiler products . . . Ultimately, after almost a decade of litigation, China removed the anti-dumping and countervailing duties on US broiler products in 2018.[94]

So, what, if anything, can we conclude from this Part? Some countries continue to contest aspects of the AoA in dispute settlement proceedings, suggesting that they see some merit in the exercise. Many however steer clear of the entire process. A panel report does not necessarily end the dispute, although instances can be found when governments make the requisite changes to their legislation. Countries might be unable — for example, because of legislative constraints — or unwilling to comply, and disputes can rumble on when the extent of compliance is disputed. So, the glass might seem half-empty or half-full depending on one's perspective. However, with the Appellate Body's activities suspended, and important players like the USA and India not, as of yet, participating in the MIPA, the omens are not good.

VII. THE DOHA ROUND: MORIBUND OR JUST DORMANT?

Article 20 of the AoA had recognised that "the long-term objective of substantial progressive reductions in support and protection resulting in fundamental reform is an ongoing process" and accordingly included a commitment to re-engage in negotiations "before the end of the implementation period." It was perhaps unrealistic to expect that this could proceed as a stand-alone negotiation, not offering the possibility to offset *gains* and *losses* between sectors. However, negotiators failed to agree to a new multilateral round of trade negotiations when they met in Seattle in 1999; and it was not until the WTO's Fourth Ministerial Conference in Doha, Qatar, in November 2001, that the Doha Round (or, as it is semi-officially known, Doha Development Agenda) was set in train.

On agriculture, there were, conceptually, three options. First, to decide that agricultural exceptionalism was no longer relevant in world trade policies, scrap the AoA, and consequently subject the sector to the same WTO disciplines that applied in every other economic sphere. Second, at the other extreme, to replace the existing AoA with an entirely new agreement that better reflected the food security and rural livelihood concerns expressed in Part III above. The third approach, the one pursued, was to update and amend the existing AoA: these would necessarily be *lengthy* amendments that,

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[94] Maria Alcover & Meredith Crowley, *China – Broiler Products (Article 21.5 – United States) (DS427) – can the sum of the parts be less than the whole?*, 19(2) WORLD TRADE REV. 282 (2020).

in part, would address the existent agreement's lacunae and ambiguities revealed by the dispute settlement process.

The negotiations got off to a slow start in that, until the EU had undertaken a second phase of CAP reform (the so-called Fischler Reforms begun in 2003), it was not in a position to engage constructively with its WTO partners. The Fifth Ministerial Conference in Cancún (in Mexico) in September 2003 was rather a disaster. Back in 2001, this meeting had been pencilled-in as the occasion when ministers would "take stock of progress in the negotiations, provide any necessary political guidance, and take decisions as necessary," with the aim of concluding the round "not later than 1 January 2005."[95] The EU and the USA perhaps misunderstood their role when, in August 2003, at a request, they said of their trading partners, they jointly put forward ideas "with a view to advancing the negotiations . . . towards a successful conclusion in Cancún."[96] The initiative was not well received, and resulted in a more ambitious proposal advanced by (initially) a twenty-strong group of developing countries. (This G20 is to be distinguished from another G20, or G20+, grouping of the world's largest economies.) Led by Brazil, it put forward a Framework Proposal for agriculture which advocated the elimination of the Blue Box, export subsidies, and the "Special Agricultural Safeguard (SSG) for developed countries." It also suggested that certain categories of Green Box payments should be "capped and/or reduced for developed countries;" and that, "[a]dditional disciplines shall be elaborated and agreed upon." Under Special and Differential Treatment, the scope of Article 6.2 was to be expanded, the *de minimis* provision for developing countries was to be maintained, and all developed countries were to "provide duty-free access to all tropical products . . . as well as to other agricultural products representing at least []% of imports from developing countries" (the square brackets indicating that a figure was yet to be determined). Moreover, for imports there was to be a "special safeguard mechanism (SSM) . . . for use by developing countries."[97]

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[95] World Trade Organization, Ministerial Declaration of 14 November 2001, WTO Doc. WT/MIN(01)/DEC/W/1, 9 (2001).

[96] DAUGBJERG & SWINBANK (2009), *supra* note 4, at 167. This document, apparently, was circulated as JOB(03)157, but is still classified as restricted, hence inaccessible, on the WTO's website. The author has a copy of the text on his hard disk.

[97] World Trade Organization, Ministerial Conference Fifth Session Cancún of 10 - 14 September 2003, *Agriculture - Framework Proposal: Joint Proposal by Argentina, Bolivia, Brazil, Chile, China, Colombia, Costa Rica, Cuba, Ecuador, El Salvador, Guatemala, India, Mexico, Pakistan, Paraguay, Peru, Philippines, South Africa, Thailand and Venezuela*, WT/MIN(03)/W/6 (2003).

The Cancún Ministerial could not resolve the differences evident amongst the WTO's membership, but the Doha negotiations nonetheless continued. By the summer of 2008, the chair of the agricultural negotiations committee, Crawford Falconer, had prepared a very detailed draft of the proposed modalities for agriculture.[98] This document contained very few square brackets, and the omens looked good for an agreement that delivered significant cuts in tariffs and in the bound levels of domestic support and export subsidy entitlements, particularly for developed countries. If this was the zenith for the agricultural trade negotiations in the Doha Round, by the end of 2008, all hopes were dashed, and the negotiations were put on hold. There were a number of issues that could not be resolved, including the vexed issue of cotton subsidies. However the:

> [O]stensible cause of the . . . deadlock on agriculture was a dispute between the United States and India over the proposed *Special Safeguard Mechanism* for developing countries under which, for a limited number of products, developing countries could impose an additional import tax if faced with an import surge or depressed import price . . . The United States wanted to limit the total import charge to the pre-Doha bound rate; India did not.[99]

Since 2008 there has been some progress, but much backsliding. As Ungphakorn has noted, "after almost 22 years of ups and downs, the talks have only produced results in two areas — eliminating export subsidies, and a temporary decision to shield developing countries' food security stocks from legal challenge over breaches of domestic support limits".[100] The decision on export subsidies was taken in Nairobi in 2015, as noted earlier in this article.

The second refers to a decision taken at the Ninth Ministerial Conference in Bali, in December 2013. Over many years, India had expressed its concern that the AoA's rules on domestic support constrained its ability to undertake "public stockholding for food security purposes." Ministers agreed an interim solution. They would:

> refrain from challenging through the WTO Dispute Settlement Mechanism, compliance of a developing Member with its

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[98] Special Session of Committee on Agriculture, *Revised Draft Modalities for Agriculture*, WTO Doc. TN/AG/W/4/Rev.3 (Jul. 10, 2008).

[99] DAUGBJERG & SWINBANK (2009), *supra* note 4, at 171.

[100] Peter Ungphakorn, *WTO farm talks head into 2022 with lots of "will" but not much "way"*, TRADE β BLOG (Jan. 25, 2022), https://tradebetablog.wordpress.com/tag/wto-negotiations/.

> obligations under . . . the Agreement on Agriculture (AoA) in relation to support provided for traditional staple food crops in pursuance of public stockholding programmes for food security purposes existing as of the date of this Decision.[101]

They agreed to negotiate a permanent solution for adoption at their Eleventh meeting. Negotiations have not produced the hoped-for outcome, but for the moment, a November 2014 decision of the WTO's General Council has kept the Bali 'peace clause' in place.[102]

The Twelfth Ministerial Conference was to have taken place in Kazakhstan in June 2021, but was postponed twice because of the Covid pandemic. It is now scheduled for June 2022 in Geneva. In the run-up to the Twelfth Ministerial Conference, there had been feverish activity in the negotiating committee on agriculture, and in November 2021, its chair produced the latest agricultural document.[103] Falconer's draft modalities of 2008 had been replete with concrete proposals; the latest document is not, despite its inclusion of a Draft Ministerial Decision on Trade, Food and Agriculture. Its ambition, if accepted, was simply to go on talking! Most of the sections of the Draft Ministerial Decision start with the phrase, "[w]e agree to continue negotiations . . . after MC12", although the section on Domestic Support does go further by adding "with a view to negotiating modalities by MC13".

The text outlined eight themes for the ongoing negotiations. In the order listed, they were: (i) domestic support ("at the heart of the agricultural negotiations since their commencement in 2000"); (ii) market access; (iii) export competition (including "effective implementation and monitoring of the Nairobi Ministerial Decision on Export Competition"); (iv) export prohibitions or restrictions (see below); (v) cotton; (vi) a Special Safeguard Mechanism (SSM) for developing countries; (vii) public stockholding for food security purposes; and (viii) transparency (which references "notification requirements and formats" for example).

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[101] World Trade Organization, Ministerial Conference Ninth Session Bali, 3-6 December 2013, *Public Stockholding for Food Security Purposes Ministerial Decision of 7 December 2013*, WT/MIN(13)/38, WT/L/913 (2013).

[102] General Council, *Public Stockholding for Food Security Purposes*, WTO Doc. WT/L/939 (Nov. 27, 2014).

[103] Special Session of Committee on Agriculture*, Report by the Chairperson, H.E. Ms Gloria Abraham Peralta, to the Trade Negotiations Committee*, WTO Doc. TN/AG/50 (Nov. 19, 2021).

GATT does not prohibit export taxes, any more than it prohibits import taxes. GATT Article XI does however ban export prohibitions or restrictions, other than taxes, *except* when they are "temporarily applied to prevent or relieve critical shortages of foodstuffs or other products essential to the exporting contracting party".[104] Article 12 of the AoA had gone a little further. For example, any Member "instituting" a *new* measure in accordance with this GATT provision should "give due consideration to the effects of such prohibition or restriction on importing Members' food security." When the Doha Round was launched, the focus was on depressed world market prices; and Meike reports that, "only five countries . . . explicitly mentioned export restrictions in their negotiating proposals."[105] On export restrictions, the views ranged from "[e]xport restrictions shall be prohibited for all Members except developing countries," to "[e]xport restrictions shall not be part of the negotiations." On export taxes, there was a similar diversity: from "[e]xport taxes shall not be part of the negotiation" to "[e]xport taxes shall be prohibited for all Members except developing countries."[106] But when in February 2003, Stuart Harbinson, the then chair of the negotiating committee, submitted his first draft modalities document the proposal was that — aside from the GATT Articles XI and XX exemptions — developed, but not developing, countries would be banned from introducing "new export prohibitions, restrictions or taxes on foodstuffs".[107] Net-food importers such as Japan were concerned that export restrictions could limit their access to food supplies, and thus compromise their food security; whilst many developing countries were concerned that without an ability to limit food exports their food security would be jeopardised. When the world food *crisis* erupted in 2008,[108] these discussions assumed greater saliency, and the extent to which any Doha agreement should address "export prohibitions or restrictions" has remained a core component of the negotiating agenda.

Cotton had erupted as a major issue in May 2003, in advance of the Cancún Ministerial when the *cotton-4* (the African states of Benin, Burkina Faso, Chad, and Mali) had called for a "complete phase-out of support measures for the production and export of cotton." They had pointed out that:

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[104] *See* General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 (Art. XX's General Exceptions are also pertinent).
[105] Karl Meilke, *Does the WTO Have a Role in Food Crises*?, 9(2) ESTEY CTR. J. INT'L L. & TRADE POL'Y 58 (2008).
[106] As reported in Special Session of Committee on Agriculture, *Negotiations on Agriculture*, WTO Doc. TN/AG/6, 64-5 (Dec. 18, 2002).
[107] Special Session of Committee on Agriculture, *Negotiations on Agriculture: First Draft of Modalities for the Further Commitments*, WTO Doc. TN/AG/W/1, 7 (Feb. 17, 2003).
[108] Jenifer Piesse & Colin Thirtle, *Three bubbles and a panic: an explanatory review of recent food commodity price events*, 34(2) FOOD POL'Y 119 (2009).

> Cotton production accounts for 5 to 10 per cent of the gross domestic product (GDP) in Benin, Burkina Faso, Chad, Mali, and Togo. It occupies an important place in their trade balance, with around 30 per cent of total export earnings and over 60 per cent of earnings from agricultural exports.[109]

However, despite their

> strenuous efforts to ensure that their production is competitive and to liberalise the sector . . . the impact of such reforms . . . has been virtually nullified by the fact that certain Member countries of the WTO continue to apply support measures that distort global market prices, contrary to the basic objectives of the WTO.[110]

This was a barely concealed attack on the USA. Indeed only a few weeks before both Benin and Chad had joined as Third Parties Brazil's assault on the USA's support for upland cotton (DS267). The upshot of the cotton-4's initiative was that in August 2004, as part of the Doha Work Programme, the WTO's General Council determined that the issues relating to cotton would be "addressed ambitiously, expeditiously, and specifically, within the agriculture negotiations." Accordingly, it decided that a subcommittee on cotton would "meet periodically and report to the Special Session of the Committee on Agriculture to review progress." This work would "encompass all trade-distorting policies affecting the sector in all three pillars of market access, domestic support, and export competition."[111] But, as noted above, seventeen years later, the Committee on Agriculture sitting in Special Session was still unable to finalise its deliberations. In retrospect, Heinisch's comment that, "[t]he West African campaign is an example of politically weak countries effectively exploiting the liberal economic principles of multilateral institutions to challenge protectionist policies in the industrialised world," seems overly optimistic.[112]

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[109] Special Session of Committee on Agriculture, *Poverty Reduction: Sectoral Initiative in Favour of Cotton*, WTO Doc. TN/AG/GEN/4 (May 16, 2003).
[110] *Id.*
[111] World Trade Organization, Decision Adopted by the General Council on Doha Work Programme, WTO Doc. WT/L/579, A-1 (Aug. 02, 2014).
[112] Elinor Lynn Heinisch, *West Africa versus the United States on Cotton Subsidies: How, Why and What Next?*, 44(2) J. MODERN AFRICAN STUD. 251, 251 (2006)

The WTO's website still has a webpage devoted to the Doha Development Agenda,[113] despite the verdict of many pundits that the project died long ago. Countries still send their delegates to meetings of the agriculture negotiating group, which produces periodic reports on 'progress' as evidenced by the chairperson's report to MC12 reported above. But if the world community is to progress beyond this, where will the initiative and drive arise? The USA President Joe Biden has more than enough difficulty trying to get his domestic legislation through Congress, leaving him little room to take the lead in agricultural trade policy reform in the WTO. As has happened in the past, maybe the current way forward lies with *regional* trade initiatives?

VIII. REGIONAL TRADE AGREEMENTS (AND THE POTENTIAL FOR DIFFERENTIAL TREATMENT OF LIKE PRODUCTS?)

Although this article has purposefully focussed on the AoA, and associated elements of the WTO system tied to the support of farmers and the rural economy, affecting trade in agri-food products, it should not be assumed that trade between WTO Members takes place predominantly on MFN terms. GATT Article XXIV permits the formation of CUs and FTAs, under specified conditions. In WTO parlance, CUs and FTAs are collectively referred to as Regional Trade Agreements (RTAs) (as of October 2021, there were over 350 in force).[114] The bulk of these are FTAs, with the EU the most prominent CU. Box 3 explains in simplified style the differences between a CU and an FTA.

Box 3: Regional Trade Agreements

In a CU, countries remove customs duties and quantitative controls on "substantially" all the trade between the members, and they apply "substantially the same duties and other regulations of commerce" on imports from third countries. Thus, the EU might be thought of as a perfect CU, in that all trade barriers between its members have been eliminated, and a common external tariff (CET) applies. Once the CET has been paid, an imported product is in free circulation within the EU.

An FTA is a more limited arrangement. This involves the removal of customs duties and quantitative controls on substantially all intra-FTA trade in *originating* products. Complex *rules of origin* are then needed to determine whether or not a product can qualify as originating. Thus, customs borders

[113] DOHA ROUND, WTO, https://www.wto.org/english/tratop_e/dda_e/dda_e.htm.
[114] REGIONAL TRADE AGREEMENTS DATABASE, WTO, http://rtais.wto.org/UI/publicsummarytable.aspx.

are still required to differentiate between originating products, which are let in duty-free, and non-originating products, which must pay the import tax. Members of an FTA determine their own customs duties.

The number of FTAs has grown exponentially in recent years, receiving a recent boost from Brexit. The UK, having broken free of the EU's CU, set about replicating the thirty-nine trade agreements with over seventy trading partners around the world, which it had been a party to as a member of the EU. It has since concluded an FTA with Australia (not yet in force), one with New Zealand is imminent, and it has started negotiations with India.[115] It is not entirely clear what percentage of world trade is undertaken within CUs and FTAs, but the British government elected in December 2019 had promised to ensure that, by December 2022, 80% of its trade would be undertaken with the FTA partners.[116] Not all trade between FTA partners will take place at preferential rates: some goods might not qualify as originating products, and for others, the cost of demonstrating that the rules of origin have been met might outweigh any potential saving in the tariff.

It was once commonplace to observe that negotiations on agriculture within an FTA were just as problematic as they were in *multilateral* agri-trade negotiations. The EU's negotiations with Mercosur — the South American trade bloc with Argentina, Brazil, Paraguay, and Uruguay as its core — for example, have persistently stumbled over agriculture.[117] Notwithstanding the requirement that an FTA cover "substantially all the trade between the constituent territories" in originating products, agri-food categories were frequently excluded, or the quantities that could benefit from the 'free trade' provisions were limited by TRQs. But that seems to be changing. The UK's FTA with Australia, for example, does include most agri-food products. The UK will not, however, liberalise trade in pigmeat, chicken meat, and eggs; and duty-free imports of long-grained rice will be constrained by a TRQ. For many products, there will be a long phase-in time before all restrictions are lifted.[118]

FTAs are also becoming bigger in their geographical coverage; and becoming multi-layered in that one FTA might overlay others. The UK's longer-term

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[115] Alan Swinbank, *The UK's Agri-food Trade Policies One Year On From Brexit*, EUROCHOICES (forthcoming 2022) [hereinafter "Swinbank (2022)"].
[116] Conservative and Unionist Party, *Get Brexit Done and Unleash Britain's Potential, The Conservative and Unionist Party Manifesto 2019* (2019).
[117] Julio J. Nogués, *Mercosur–EU Trade Negotiations: Ending Trade Diversion, Strengthening Trade Institutions*, 9(1) TRADE, L. & DEV. 1 (2017).
[118] Swinbank (2022), *supra* note 116.

ambition, for example, is to supplement its FTAs with Japan, Australia, Chile, etc., and become a member of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), comprising Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, Peru, New Zealand, Singapore and Vietnam.

FTAs were once fairly simple affairs, mainly concerned with tariff and quota elimination. The new generation of FTAs are often more complex and ambitious. Whilst they tend not to go beyond the WTO's SPS and TBT provisions, or intrude on the AoA's domestic support constraints, they increasingly include other conditions. The EU, for example, has quite aggressively insisted that its FTA partners protect a range of Geographical Indications (GIs) on food and drink products, before concluding an FTA.[119]

Such conditionality could extend to labour rights, greenhouse gas emission reductions, deforestation, protection of the environment, animal welfare, antimicrobial resistance, etc. France, in particular, has suggested that *mirror clauses* might be negotiated with trading partners. These would have "the aim of subjecting imported products to certain production requirements applied in the European Union . . . to strengthen the protection of health or the environment on the largest possible scale, in keeping with World Trade Organization rules."[120] The EU faces challenges in the WTO if it tries to impose such conditions unilaterally, but within an FTA they might be the price a trading partner is willing to pay in order to gain preferential access to the EU's market.

The GATT/WTO MFN trade regime has been fairly hostile to the suggestion that differential treatment might be applied to *like* products. GATT's MFN provision insists that any preferential treatment of imports should be extended "immediately and unconditionally to the like product originating in . . . all other contracting parties," and its National Treatment provisions similarly say that imported products should not be treated less favourably than "like domestic products". Whilst there is no easy way to determine whether or not a particular import is, or is not, *like*, a basic premise has been that if there is something intrinsically different about the two products (e.g., the imported product is demonstrably unsafe) then they are *not* like. However, if there is no way of telling the two apart, even though they

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[119] *See*, *e.g.,* Hazel Moir, *Geographical Indications: An Assessment of EU Treaty Demands*, *in* AUSTRALIA, THE EUROPEAN UNION AND THE NEW TRADE AGENDA (Annmarie Elijah et al. eds., 2017).

[120] FRENCH PRESIDENCY OF THE COUNCIL OF THE EUROPEAN UNION, RECOVERY, STRENGTH AND A SENSE OF BELONGING. PROGRAMME FOR THE FRENCH PRESIDENCY OF THE COUNCIL OF THE EUROPEAN UNION 60 (2022).

have been produced in a different way (one in sunnier climes, say, to take a far-fetched example) then they may well be judged to be like products. Analysts talk about non-product-related Process and Production Methods (npr-PPMs) which are not identifiable in the final product. Even so, if a WTO Member is found to be discriminating against a like imported product, all is not lost, because there may be other WTO provisions (in particular, GATT Article XX on General Exceptions) that might excuse this activity. Governments have, however, found the Chapeau to Article XX to be quite exacting; and often they have struggled to craft domestic legislation that meets its requirements.[121]

The high MFN tariffs that a number of jurisdictions maintain on some agricultural products (for example, the EU and the UK on meats, dairy, and sugar) could give potential FTA partners an economic incentive to accept differential tariffs on these products. Preferential access would then be limited to products that could demonstrate that their npr-PPMs comply with the importer's animal welfare, environmental, or other criteria, failing which the full MFN tariff would apply. Indeed, the EU has inserted an animal welfare clause in the still to be implemented FTA with Mercosur. To benefit from the preferential duties that will be applied to eggs, "producers will have to certify they respect EU-equivalent rules for laying hen welfare."[122] Similarly, the recently agreed FTA between the European Free Trade Association (EFTA) states and Indonesia makes Indonesia's access to EFTA's "preferential tariffs for palm oil conditional upon compliance with sustainability objectives."[123]

In a similar vein, the EU plans to introduce a Carbon Border Adjustment Mechanism in 2023. Initially, this would cover industrial sectors subject to the EU's Emissions Trading Scheme (ETS), with a heavy carbon emissions footprint, in particular iron, steel, cement, fertilisers, aluminium, and

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[121] There is a large literature. *See*, *e.g.,* Alan Swinbank & Carsten Daugbjerg, *Improving EU Biofuels Policy? Greenhouse Gas Emissions, Policy Efficiency, and WTO Compatibility*, 47(4) J. WORLD TRADE 813 (2013); Jason Potts, *The Legality of PPMs under the GATT: Challenges and Opportunities for Sustainable Trade Policy*, INT'L INST. SUSTAINABLE DEV. (Feb. 28, 2008), https://www.iisd.org/system/files/publications/ppms_gatt.pdf.

[122] Natasha Foote, *EU Implements First Animal Welfare-based Condition in Trade Agreement*, EURACTIV (July 28, 2021), https://www.euractiv.com/section/agriculture-food/news/eu-implements-first-animal-welfare-based-condition-in-trade-agreement/.

[123] TULIP CONSULTING & INSTITUTE FOR EUROPEAN ENVIRONMENTAL POLICY, DESIGNING ENVIRONMENTAL REGULATION OF AGRICULTURAL IMPORTS: OPTIONS AND CONSIDERATIONS FOR THE UK 14 (2022).

electricity. In 2026, the product coverage could be expanded.[124] There are no current plans to include agriculture, although fertilisers are included as noted above. The basic idea is that *imports* of covered products should pay the same charges as EU-based industries face under the ETS.

IX. AN ENIGMA? BIOFUELS

Agricultural products are covered by the strictures of the AoA regardless of the use to which they are put, be it for food, fibre, fuel, or as raw materials for the pharmaceutical and other industries. Over the years, though a number of authors have expressed frustration that support for biofuels — notably bioethanol and biodiesel used to replace petroleum products — does not appear to be disciplined. A further complication is that whilst bioethanol is an agricultural product, biodiesel is not. As the WTO has pointed out, "[i]n 2005, the World Customs Organization decided to put 'biodiesel' in Chapter VI on 'products of chemical and allied industries' (HS 382490). Bioethanol is still traded under HS 2207 in Chapter 22 on 'beverages, spirits and vinegar'."[125]

The use of agricultural materials to produce biofuels has been criticised from a number of perspectives. First, it is likely to increase food prices, which was a major concern when food prices spiked in the mid-2000s. Given concerns about food availability and food security, some claimed that it was immoral to promote the use of biofuels. Second, the extra demand for agricultural raw materials was likely to draw additional land into agricultural production. This Indirect Land-Use Change (ILUC) could lead to further biodiversity loss and the release of sequestered carbon. Third, particularly bearing in mind ILUC, the supposed reduction in greenhouse gas emissions in comparison to the use of fossil fuels was possibly small, if not non-existent. Moreover, some commentators saw the support for biofuels as support for farmers (as indeed it was, but in an indirect form), particularly in the EU, and felt that it should be subject to AoA disciplines.[126]

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[124] INSIGHT – THE LIMITED IMPACT OF THE EUROPEAN UNION'S CARBON BORDER ADJUSTMENT MECHANISM ON AUSTRALIAN AGRICULTURE, AUSTRADE, https://www.austrade.gov.au/news/insights/the-limited-impact-of-the-european-union-s-carbon-border-adjustment-mechanism-on-australian-agriculture.

[125] ACTIVITIES OF THE WTO AND THE CHALLENGE OF CLIMATE CHANGE, WTO, https://www.wto.org/english/tratop_e/envir_e/climate_challenge_e.htm.

[126] Alan Swinbank, *EU Support for Biofuels and Bioenergy, Environmental Sustainability Criteria, and Trade Policy* (ICTSD PROGRAMME ON AGRICULTURAL TRADE AND SUSTAINABLE DEVELOPMENT, Issue Paper No. 17, 2009).

Support for biofuels tends to take two forms. Either manufacturers can be paid a subsidy when they make biofuels, or blend them with petroleum products, or alternatively, transport fuel suppliers can be mandated to incorporate a specified volume or percentage of biofuels in their products.[127] If these subsidy policies or mandates favour domestic suppliers of raw materials, then this would seem to be a clear breach of Article 3 of the Agreement on Subsidies and Countervailing Measures which outlaws subsidies "contingent . . . upon the use of domestic over imported goods". There is no restriction, however, in the AoA, GATT, or the Agreement on Subsidies and Countervailing Measures, on measures that *increase* the demand for agricultural products, and hence their price on world markets. Whether there should be is another question.

What has proved controversial is the sustainability criteria that must be met if the use of a particular product is to be counted against a mandate or receive a subsidy. This has led both Indonesia[128] and Malaysia[129] to challenge aspects of the EU's regulations, claiming they contravene WTO provisions when applied against their products.[130] The Panel reports are pending. Neither case cites the AoA.

X. A CLOSING LAMENT

The Marrakesh accords of 1994, which saw GATT 1947 morph into the WTO and its family of agreements, was a seminal event in the regulation of world trade. It brought an end to the fractious Uruguay Round of negotiations. This was a consensual outcome, according to some, whilst others thought they had been coerced into acceptance by the USA and the EU. Nonetheless, all GATT's Contracting Parties signed-up to the WTO, others have since joined, and none have left.

The AoA inaugurated a tighter regime of constraints on support for the farm sector — although the outcome was rather less ambitious than Australia and

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[127] On the form biofuel mandates have taken in the UK, see Alan Swinbank et al., *Mandates, Buyouts and Fuel-tax Rebates: Some Economic Aspects of Biofuel Policies using the UK as an Example*, 39(3) ENERGY POL'Y 1249 (2011).

[128] Request for consultation by Indonesia, *European Union — Certain Measures concerning Palm Oil and Oil Palm Crop-Based Biofuels*, WTO Doc. WT/DS593/1 (Dec. 16, 2019).

[129] Request for consultation by Malaysia, *European Union — Certain Measures concerning Palm Oil and Oil Palm Crop-Based Biofuels*, WTO Doc. WT/DS600/1 (Jan. 19, 2021).

[130] Indonesia's case is discussed in Andrew D. Mitchell & Dean Merriman, *Indonesia's WTO Challenge to the European Union's renewable energy directive: Palm Oil & Indirect Land-Use Change*, 12(2) TRADE, L. & DEV. 548 (2020).

other *free-traders* had campaigned for — and held out the promise of further progressive reductions in support in an ongoing reform process. To their dismay, the Doha Round has failed, as yet, to deliver on their expectations, although export subsidies on agri-food products have been eliminated. Others felt that the AoA had rewarded the most egregious offenders from the base period by locking-in high AMS entitlements and protective tariffs, whilst they were constrained by the *de minimis* (and Article 6.2) provisions. Whilst thirty-plus years of inflation has subsequently reduced the real value of AMS entitlements and specific tariffs, it has also caused problems for countries that buy food at *applied administered prices* as part of their public stockholding for food security purposes.

The Dispute Settlement agreement, seen by some to have been the *jewel-in-the-crown* of the Marrakesh accords, no longer has a quorate Appellate Body, which will possibly mean that some trade disputes cannot be resolved.

There are plenty of ideas for reform of the AoA, tabled by governments, non-governmental organisations (NGOs) and Think Tanks advocating various perspectives, and academics and other analysts. Many pull in opposing directions. Moreover, for a consensus to emerge amongst the WTO's diverse membership, there must be scope for trade-offs between sectors. In return for a 'gain' on services, for example, a country might be willing to concede a 'concession' on agriculture. The USA and the EU were able to bring the Uruguay Round to its conclusion. It is difficult to believe the likes of Brazil, China, or India, would allow them to repeat the performance today, even if the USA had the political will, and the necessary cohesion between its executive and legislative branches, to do so. The Russian Federation's invasion of Ukraine in February 2022 risks unpicking the diplomatic ties blending the global economy into a coherent whole.

The author fears that WTO Ministerial Conferences in the foreseeable future will simply repeat the old mantras, that the existing provisions of the AoA will seem even more archaic, and that the multilateral MFN system will become less relevant as RTAs become more dominant. This is not an ideal scenario in which the global economy could develop trade rules that help the world's farmers adapt to (and hopefully help mitigate) the effects of climate change, and enhance food security and rural livelihoods, whilst protecting the environment and arresting the loss of biodiversity. Hopefully another scholar writing ten-years' hence will be able to come to a rather different conclusion.

POSTSCRIPT

The Twelfth Ministerial Conference (MC12) was held in Geneva on 12-17 June 2022, resulting in what was rather grandiosely described as an 'unprecedented package of trade outcomes' by the WTO Secretariat.[131] Although there was a Ministerial Declaration on the Emergency Response to Food Insecurity, and ministers decided that WTO Members "shall not impose export prohibitions or restrictions on foodstuffs purchased for non-commercial humanitarian purposes by the World Food Programme",[132] the 'Geneva Package' did nothing to advance reform of the AoA. Indeed, Director-General Ngozi Okonjo-Iweala revealed in her closing remarks that they could not even agree on "a new roadmap for future work":

> "While we all agree on the vital importance of agriculture in our economies, differences on some issues, including public stockholding for food security purposes, domestic support, cotton and market access, meant that we could not achieve consensus on a new roadmap for future work. But here too, Members found a renewed sense of purpose: they are determined to keep at it on the basis of existing mandates with a view to reaching positive outcomes at MC13".[133]

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[131] *WTO members secure unprecedented package of trade outcomes at MC12*, WTO (June 17, 2022), https://www.wto.org/english/news_e/news22_e/mc12_17jun22_e.htm.

[132] WTO, *Ministerial Conference Twelfth Session, Draft Ministerial Decision on World Food Programme Food Purchases Exemption from Export Prohibitions or Restrictions*, WTO Doc. WT/MIN(22)/W/18 (June 10, 2022).

[133] DG Ngozi Okonjo-Iweala, Address at the MC12 Closing Session (June 17, 2022), https://www.wto.org/english/news_e/spno_e/spno27_e.htm.