



Convergence or Divergence in Future? Comparative Analysis between the WTO SCM Agreement and the Agreement on Agriculture

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Abstract: The World Trade Organization (WTO) has treated agricultural subsidies as exceptional. Under the General Agreement on Tariffs and Trade (GATT) 1994, subsidies are in general regulated under the Agreement on Subsidies and Countervailing Measures (the SCM Agreement) while agricultural subsidies are regulated under the Agreement on Agriculture (the AoA). This paper delves into the historical backgrounds of diverging regulatory patterns of the two by referring to the legal documents from the ITO Havana Charter in 1948 to the GATT 1994. Along with the historical review, rationales for justifying the exceptional status of agricultural products are thoroughly examined. This paper concludes that convergence of the SCM Agreement and the AoA is required in the long-run for strengthening the legal consistency and fairness of the WTO subsidies regime.

Keywords: WTO; Subsidies; Agreement on Subsidies and Countervailing Measures; the Agreement on Agriculture; Convergence.

Introduction

For the last two decades, the World Trade Organization (WTO) has played an enormous role in organizing the world trade system. WTO not only constructed a multilateral trade institution, but also became equipped with highly binding enforcement mechanisms to pressure its member countries to adopt trade policies that are consistent with the WTO's rules. A subsidy issue, one of the most controversial issues in the world trading system due to its trade-distorting nature, has also been ruled by the WTO under the two separate agreements: the Agreement on Subsidies and Countervailing Measures (the SCM Agreement) and the Agreement on Agriculture (the AoA).

Interestingly, the SCM Agreement strongly deters its member countries to use trade-distorting subsidies. On the other hand, the AoA, the subsidies agreement tailored

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to agricultural products, is relatively lenient by allowing member countries to take protectionist measures through its regulatory loopholes. How did the WTO happen to come up with these seemingly asymmetric regulations under the separate agreements? Should this divergence be encouraged or discouraged in the ongoing Doha Round negotiation?

A number of previous studies individually analyzed the texts of the SCM Agreement (Ahn, 2003) and the AoA (McMahon, 2006). However, few studies had been conducted so far in analyzing the relationship between the two agreements except Desta (2005), which pinpointed the interconnected structure of the two agreements. Research on prospective convergence or divergence of the two agreements is at an incipient stage. Connor (2005) and Haberli (2005) argued that the AoA's total integration into the SCM Agreement will not be possible in the foreseeable future, but these analyses more focus on feasibility rather than necessity of the convergence.

In this paper, historical evolutions of the WTO the SCM Agreement and the AoA will be thoroughly examined. Legal comparison between the two agreements will follow afterward. Ultimately, this paper aims to thoroughly understand diverging regulatory patterns of the SCM Agreement and the AoA, thereby guiding a long-term direction of the WTO subsidies regime.

Nature of Agriculture in the World Trading System

Agriculture has occupied a unique status in the world trading system. Special treatment of agriculture products different from that of ordinary goods in the world trading system is largely attributed to the widespread recognition that agriculture possesses a number of distinguished characteristics. Multifunctionality and inelasticity of demands are two representative characteristics of agriculture.

Multifunctionality

The fundamental assumption of separating treatment of agricultural products from other goods is multifunctionality of agriculture. Multifunctionality refers to the multiple goods and services provided by agriculture and the contribution that these goods and services make to the achievement of domestic non-food objectives.¹ Non-food objectives in multifunctionality are also known as non-trade concerns. The range of non-trade concerns is very wide, namely environmental services, natural resource protection, rural landscape and recreation areas. Fulfilling societal goals like viability of rural areas and their development, decentralised settlement of the territory, food security, and preservation of cultural heritage are also the components of the non-trade concerns.² Especially, food security and environment protection are stipulated as the non-trade concerns in the

1 OECD, Multifunctionality: a Framework for Policy Analysis, OECD, AGR/CA (98)9, Paris, 1998: para. 7.

2 WTO, G/AG/NG/W/36/Rev.1, Attachment 1, para.16.

Preamble of the AoA. Even though the word ‘multifunctionality’ does not appear in any of the existing WTO agreements, this word has been continuously used as a means for justifying the existence of the AoA.

Inelasticity in Demand

Inelasticity in demand is another logic that justifies the relatively lenient subsidy regulations on agricultural subsidies over the others. Therefore, each country should be equipped with measures to secure the equilibrium between supply and demand of agricultural products. Article 55 of Havana Charter for an International Trade Organization reflects the related concern. Article 55 provides that:

The Members recognize that the conditions under which some primary commodities are produced, exchanged and consumed are such that international trade in these commodities may be affected by special difficulties such as the *tendency towards persistent disequilibrium between production and consumption, the accumulation of burdensome stocks and pronounced fluctuations in prices*. These special difficulties may have serious adverse effects on the interests of producers and consumers, as well as widespread repercussions jeopardizing the general policy of economic expansion. *The Members recognize that such difficulties may, at times, necessitate special treatment of the international trade in such commodities through inter-governmental agreement.*

Historical Evolutions of the SCM Agreement and the AoA

Analysis of the previous legal documents helps to understand how agriculture became separately regulated under the current WTO subsidies regime. Before the establishment of the WTO, there were discussions on to what extent agriculture should be treated differently from ordinary goods.

The Havana Charter for an International Trade Organization

The history of agricultural subsidies regulation goes back to the Havana Charter for an International Trade Organization (ITO)³ in 1948. The Havana Charter stipulated prohibition on the export subsidies and the notification duties on any subsidy including any form of income or price support in Article 26.1 and Article 27.1, respectively. Article 26.1 prohibits ‘any subsidy on the export of any product,’ but subsidies on primary commodities are exempt from the prohibition under Article 27.1.

Article 26.1 provides that:

³ ITO is an intellectual precursor of the WTO. ITO could not be established because the US Congress did not ratify the Havana Charter. Nevertheless, the efforts to establish the ITO triggered the General Agreement on Tariffs and Trade (the GATT) into being. See Richard Toye, “The International Trade Organization” In *The Oxford Handbook on The World Trade Organization*, edited by Amrita Narlikar, et al. (New York: Oxford Press: 2012).

No Member shall grant, directly or indirectly, any subsidy on the export of *any product*, or establish or maintain any other system⁴, which subsidy or system results in the sale of such product for export at a price lower than the comparable price charged for the like product to buyers in the domestic market, due allowance being made for differences in the conditions and terms of sale, for differences in taxation, and for other differences affecting price comparability.

Article 27.1 provides that:

A system for the stabilization of the domestic price or of the return to domestic producers of a *primary commodity*, independently of the movements of export prices, which results at times in the sale of the commodity for export at a price lower than the comparable price charged for the like commodity to buyers in the domestic market, *shall be considered not to involve a subsidy on export within the meaning of paragraph 1 of Article 26, ...*

The above articles clarify the contrasting treatment of subsidies on a primary commodity and that of a non-primary commodity under the Havana Charter. A primary commodity in this context means “any product of farm, forest or fishery or any mineral, in its natural form or which has undergone such processing as is customarily required to prepare it for marketing in substantial volume in international trade.”⁵ Rather than clear-cutting the sectoral line between agriculture and non-agriculture, the Havana Charter gave exceptions based on a product-by-product basis.

The GATT 1947

Even though ITO could not be established in the end, the GATT 1947 reflected the institutional legacy of the Havana Charter. The GATT drafters certainly did not have a clear intention to separate subsidies regulations on agriculture from other sectors as there was no separate agreement tailored to agriculture in the GATT provisions. This means as far as the relevant provisions are concerned, agriculture was a nearly “normal” sector in the GATT until 1994.⁶ General principles of the GATT were fully applicable to agriculture. Yet, the GATT Article XI:2(c), Article XVI explicitly or implicitly acknowledge the unique status of agricultural products. Article XXV:5 was not the rule for preferencing agricultural products, but it weakened the regulatory power of the GATT 1947 including

4 The text note of Ad Article 11:2 (c) narrowly defines the term ‘in any form’ as “an early stage of processing and still perishable, which compete directly with the fresh product and if freely imported would tend to make the restriction on the fresh product ineffective.” This means to meet the terms of the interpretative note, it would be necessary before an imported processed product could be restricted that it was in an early stage of processing, perishable, in indirect competition with the fresh product; and necessary to restrict it to prevent the restriction on the fresh product from being ineffective.

5 Havana Charter for ITO Art. 56.1.

6 Daniel L. M. Kennedy, James D. South. *The Political Economy of International Trade Law, Essays in Honor of Robert E. Hudec*, Cambridge: Cambridge University Press, 2002: 257.

the rules governing agricultural products.

First, the only clause where agriculture is explicitly mentioned as an exception to subsidies regulation is stipulated in the GATT Article XI:2 (c). It regulates that “any agricultural or fisheries product, imported in any form” is not subject to prohibition on import restrictions. On the contrary, in the case of non-primary products, prohibitions or restrictions other than duties, taxes, or other charges, whether made effective through quotas, import or export licences or other measures are not allowed under Article XI.1. Originally the GATT Article XI:2(c) was not designed to allow protectionist measures on agriculture and fishery products, but to respect policy space of individual GATT Contracting Parties.⁷ Nevertheless, the GATT contracting Parties continuously attempted to justify their import restrictions on agricultural or fisheries product by bringing up this exception clause as in the cases of *European Economic Community – Restrictions on Imports of Dessert Apples*⁸ and *Canada-Restrictions on imports of ice cream and yoghurt*.⁹

Second, Article XVI was another provision that differentiated treatment of agricultural products from others under the name of ‘primary products.’ It is legally analogous to that of Article 27.1 of the Havana Charter for the International Trade Organization. The coverage of this exception is not restricted to agriculture products, but also fishery products and minerals as well.¹⁰ Yet, processed agriculture products are excluded from this exception.¹¹

Article XVI Section B paragraph 3 provides that:

7 This intention of the GATT drafters are well reflected in the text note of Ad Article XI:2(c) as well. the GATT drafters prevented future abuse of this exception by enunciating rigorous conditions for allowable import restrictions. To illustrate, The text note of Ad Article XI:2 (c) narrowly defines the term ‘in any form’ as “an early stage of processing and still perishable, which compete directly with the fresh product and if freely imported would tend to make the restriction on the fresh product ineffective.” This means to meet the terms of the interpretative note, it would be necessary before an imported processed product could be restricted that it was in an early stage of processing, perishable, in indirect competition with the fresh product; and necessary to restrict it to prevent the restriction on the fresh product from being ineffective.

8 The Panel judged that the EC’s import restriction on apples were not “necessary” because the apple production surpluses were not “temporary” as required by Article XI:2(c) (ii) but were the logical consequence of the EC’s Common Agricultural Policy that facilitated apple production by applying domestic prices higher than world prices. (Panel Report, *European Economic Community – Restrictions on Imports of Dessert Apples*, 18 April 1989, L/6491- 36S/93, para.12.19.).

9 Canada claimed that its import restriction is necessary to ensure the maintenance of Canadian quotas on raw milk production. The Panel concluded that the Canada’s import restriction on yoghurt and ice cream was not “necessary” since there is no sufficient evidence that future imports of ice cream and yoghurt would significantly affect Canadian producers ability to market raw milk. (Panel Report, *Canada- Import Restrictions on Ice Cream and Yoghurt*, 5 December 1989, L/6568-36S/68, para. 81.).

10 The interpretative note of the GATT Article XVI Section B provides that:

For the purposes of Section B, a “primary product” is understood to be any product of farm, forest or fishery, or any mineral, in its natural form or which has undergone such processing as is customarily required to prepare it for marketing in substantial volume in international trade.

11 In *European Economic Community - Subsidies on Export of Pasta Products*, EEC’s pay export refunds on pasta was not justified under the GATT Article XVI as the GATT viewed pasta as a processed industrial product which is not covered by the “primary product” exemption. (Panel Report, *European Economic Community - Subsidies on Export of Pasta Products*, SCM/43, adopted on 19 May 1983, para. 4.4.).

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

Article XVI Section B paragraph 3 provides that the use of subsidies on the export of primary products ‘should be avoided,’ and granting such subsidies should not be applied in a manner which results in that contracting party having more than an equitable share of world export trade in that product. This means the use of export subsidies on a primary product is not completely prohibited. On the other hand, the usage of export subsidies on a non-primary product is rigorously regulated. In regards to ‘a non-primary product,’ Following paragraph 4 requests ceasing to grant any direct or indirect export subsidies. The vagueness of the conditions attached to the provision such as ‘more than an equitable share of world trade’ or ‘special factors’ meant that it opened a huge hole in the GATT legal framework, allowing this notorious element of agriculture trade policies to go easily unrestrained.¹²

Third, the GATT Article XXV:5 seriously weakened the binding power of the GATT in general, including agricultural products. According to the GATT Article XXV:5, contracting parties was able to waive an obligation imposed upon them provided that any such decision shall be approved by the two-thirds majority of the votes cast and that such majority shall comprise more than half of the contracting parties. In the 1950s the US demanded the GATT waiver that would allow it to use import quotas for agricultural products that had price supports.¹³ The US threatened to withdraw from the GATT if the waiver was not granted, so the other members of the GATT had no other choice but to agree to the waiver.¹⁴ This waiver implies that the GATT did not have a sufficient enforcement mechanism to regulate agricultural subsidies of the contracting parties.

The Kennedy Round

Compared to the high protectionist agricultural policy in the 1950s, the emphasis of American agricultural policy changed in the 1960s. The US started to promote agricultural trade liberalization under the GATT. This change in policy emphasis led to another launch

12 *Supra* note 7, 258.

13 According to the the GATT ruling of *Dairy Products from Holland* in 1952, the US had to abandon its restrictions on milk imports.

14 Hathaway, Dale E. *The Impacts of US Agricultural and Trade Policy on Trade Liberalization and Integration via a US-Central American Free Trade Agreement* (Buenos Aires: Institute for the Integration of Latin America and the Caribbean IDB-INTAL, 2003), 17.

of multilateral negotiation—the Kennedy Round. Though the result of the negotiation was not successful, this round of negotiation was the first attempt in history to multilateralise agricultural negotiations in the WTO. From the Kennedy Round, the WTO took a sectoral approach in regulating agricultural subsidies.

During the Kennedy Round, there was a conspicuous structural conflict between the European Communities (EC) in pursuit of maintaining existing level of support and the US in pursuit of pro-liberalization. To be specific, EC actively persuaded the GATT contracting parties the necessity to compare the guaranteed domestic support price with the price of the product on the international market during the negotiation. EC also proposed to bind the levels of domestic support for future negotiations on agriculture.¹⁵ However, the Kennedy Round failed to reach an agreement because the contracting parties viewed the EC's proposal as an attempt to ensure international acceptance of the Common Agricultural Policy (CAP), the EC's domestic agricultural subsidies system. Moreover, the proposal failed to gain support from the US. The US sought arrangements for expanding international agricultural trade, but EC's proposal provided only limited trade expansion through securing present levels of support.¹⁶

The Tokyo Round (the Subsidies Code)

From the 1960s, developing countries actively incorporated subsidies for their economic development strategy. However, the GATT 1947 Article XVI was too simple to regulate all the subsidizing behaviour of the GATT contracting parties. Therefore, the first attempt to establish an agreement tailored to subsidies was made during the Tokyo Round. Agreement on Interpretation and Application of Article VI, XVI and XXIII of the GATT (the Subsidies Code) was completed in September 1978 and came into effect in January 1980. The Subsidies Code confirmed the prohibition of export subsidies on non-primary products. Compared to the previous the GATT document, the illustrative list of export subsidies was provided and the procedures for countervailing duties investigation became more clarified in the Subsidies Code. However, the Subsidies Code was a plurilateral agreement, meaning that a country which did not sign the Code was not bound by the newly regulated subsidies rule and could remain to be bound under the GATT 1947. This has created a “forum shopping” problem within the WTO subsidies regime. Against this backdrop, the GATT contracting parties initiated discussions on establishing a multilateral subsidies rule under the following Uruguay Round.

The Uruguay Round

During the late 1970s and early 1980s, international markets were challenged by a strong

15 McMahon, Joseph A. *The WTO the Agreement on Agriculture: A Commentary*, Oxford: Oxford University Press, 2006: 7.

16 Ibid.

period of economic turbulence, and the rising EU-US trade conflict worsened the impact of the global recession on trade balances.¹⁷ The US—the world’s number one exporter of agriculture products and number two importer of agriculture products—competed with the EC—the world’s number two exporter of agriculture products and number one importer of agriculture products—through accumulation of surpluses and a headlong race to subsidies.¹⁸ Other exporting countries joined this subsidy which pulled down the world prices of agriculture products. Consequently, every participant in the Uruguay Round negotiation agreed with the necessity to reduce the uncertainty and instability that plagued world agricultural markets.

Regardless of the consensus made by every participant to bring agriculture into the GATT, the process to reach an agreement in how to reduce the uncertainty and instability in the world agriculture market was arduous. Especially, the interests of the US and EU had paralleled for a long time. After a series of negotiations, the US and EC finally succeeded in compromising their views on agricultural subsidies through the Blair House Accord of 1992. Political backgrounds of the two countries pressured the two countries to quickly finish the negotiation. EC was under pressure from the Americans who were threatening trade sanctions in the soya case¹⁹ to push for an agreement on the agricultural negotiation. The US administration also wanted to quickly reach an agreement because the President Bush was standing for election and an international success would help him in the US presidential elections scheduled for November 1992.²⁰ Finally, the first multilateral agricultural negotiation was able to be concluded in the Uruguay Round under the name of Agreement on Agriculture in Brussels on 6 December 1993, just nine days before the end of the fast track procedure of the US administration.

Legal Comparison between the SCM Agreement and the AoA

After the conclusion of the Uruguay Round, subsidy issues have been ruled under the two different WTO agreements according to a product at issue. As the WTO dispute settlement cases dealing with subsidies and agricultural subsidies issues comprise nearly half of the total WTO dispute settlement cases, understanding the structural similarities

17 Tomas Garcia Azcarate, Marina Masstrostefano. “Agriculture and the WTO True Love or Shotgun Wedding?” In *Essays on the Future of the WTO: Finding a New Balance*, edited by Kim Van der Borgh, Eric Remack, Jarrod Wiener. London: Cameron May, 2003:131.

18 Fabian Delcros. “The Legal Status of Agriculture in the World Trade Organization, State of Play at the Start of Negotiations.” *Journal of World Trade* 36, no.2. 219-253: 227.

19 The soya case refers to *EC—Payments and subsidies paid to processors and producers of oilseeds and related animal-feed proteins*. The Panel found that the Community Regulations providing for payments to seed processors conditional on the purchase of oilseeds originating in the Community are inconsistent with Article III:4 of the General Agreement, according to which imported products shall be given treatment no less favourable than that accorded to like domestic products in respect of all regulations affecting their internal purchase.. (Panel Report, *EC—Payments and subsidies paid to processors and producers of oilseeds and related animal-feed proteins*, 25 January 1990, L/6627 – 37S/86, para. 155-156.).

20 *Supra* note 20, 230.

and differences of the two agreements is pivotal. The below comparative analysis of the two agreements indicates that the two agreements are fundamentally different in their structures even though the both agreements regulate subsidies in essence.

The SCM Agreement

Definition of a Subsidy

The definition of a subsidy in the SCM Agreement is in Article 1:1: “A subsidy shall be deemed to exist if there is a financial contribution by a government or any public body within the territory of a member country or there is any form of income or price support in the sense of Article 16 of the GATT 1994 and a benefit is thereby conferred.” Therefore, validating any form of government intervention or existence of a conferred benefit is a key process in defining a subsidy. When access to the subsidy is limited, explicitly or in fact, to certain enterprises, specificity criterion in Article 2 is fulfilled. Restricted to the subsidy which fulfilled specificity criterion, WTO allows its member country with adverse effects to levy countervailing duties to the other member countries.

Categories of Subsidies

The framework of the SCM Agreement is based on the traffic-light approach. All the subsidies are classified into the red, yellow, and green light subsidies. Each is subject to different treatment in terms of quantities of mandatory reduction and lengths of allowed grace periods. The red light subsidy is a prohibited subsidy.²¹ Both export subsidies and import substitution subsidies constitute the red light subsidy. Compared to the GATT 1947, the scope of prohibited subsidies is broad in a sense that it includes import substitution subsidies in addition to export subsidies. Developing and least developed countries (“LDCs”) are preferentially treated because they are granted with extended grace periods and exemption from particular types of the red light subsidy.

The green light subsidy, known as non-actionable subsidy, is expired on December 31st 1999. Hence, only prohibited and actionable subsidies currently exist in the traffic light classification. The green light subsidy was allowed under the SCM Agreement and had not been subject to countervailing duties as well.²² R&D, regional development, and environment subsidies were the examples of non-actionable subsidies.²³

The yellow light subsidy, also called as actionable subsidy, is not prohibited yet subject to countervailing measures. The yellow light subsidy is the subsidy that is not subject to red or green light subsidy. Country A can challenge country B’s actionable subsidies through a multilateral dispute settlement mechanism or through a countervailing measure against an adverse effect to the interests of the country A. Adverse effect is substantiated in

21 The SCM Agreement Art 3.

22 The SCM Agreement Art. 8.

23 The SCM Agreement Art. 8:2.

case there is an injury to domestic industry caused by subsidized imports in the territory of the complaining Member, serious prejudice, nullification or impairment of the benefits accruing under the GATT 1994.²⁴

The Agreement on Agriculture

The outline of the AoA is laid out in the Punta del Este Declaration in 1987.²⁵ The AoA concluded in 1994 is the most complete attempt to date to frame explicit multilateral rules for agricultural trade.²⁶ Export subsidy, market access, and domestic support are the three pillar of the AoA.

Export Subsidy

Rather than completely eliminating export subsidies, the WTO member countries agreed to cut both the amount of money they spend on export subsidies and the quantities of exports subsidies. Given 1986-1990 as the base level, developed countries are to cut their values of export subsidies by 36 percent over the six years starting from 1995. Developing countries are subject to 24 percent cut on their values of export subsidies over the ten years.

Market Access

The Uruguay Round set a 'tariff only' rule, meaning that tariff should be the only trade-restrictive measure in agricultural trade. In other words, usage of import quotas or other non-tariff measures are highly discouraged. Developed countries promised to cut the tariffs (the higher out-of quota rates in the case of tariff-quotas) by 36 percent over the six years from 1995. Developing countries reached an agreement to cut the tariffs by 24 percent over the ten years from the same year. Least-developed countries are not subject to tariff reduction.

Domestic Support

The domestic support mechanism of the AoA is often explained by the "boxes system."

24 The SCM Agreement Art. 5.

25 Part 1-D the GATT Punta del Este Declaration in 1987 The CONTRACTING PARTIES agree that there is an urgent need to bring more discipline and predictability to world agricultural trade by correcting and preventing restrictions and distortions including those related to structural surpluses so as to reduce the uncertainty, imbalances and instability in world agricultural markets. Negotiations shall aim to achieve greater liberalization of trade in agriculture and bring all measures affecting import access and export competition under strengthened and more operationally effective the GATT rules and disciplines, taking into account the general principles governing the negotiations by:

(i) improving market access through, inter alia, the reduction of import barriers;(ii) improving the competitive environment by increasing discipline on the use of all direct and indirect subsidies and other measures affecting directly or indirectly agricultural trade, including the phased reduction of their negative effects and dealing with their causes;(iii) minimizing the adverse effects that sanitary and phytosanitary regulations and barriers can have on trade in agriculture, taking into account the relevant international agreements.

26 World Trade Report 2006:193.

The boxes system is categorized into the green, blue, and amber boxes according to the level of distortion on world trade. Domestic support reduction commitments are expressed in terms of an Aggregate Measure of Support (AMS) and entered into Members' Schedules of Annual and Final Bound Commitment Levels, with the exception of the subsidies in blue, green, and S&D boxes.²⁷ Thirty-four WTO Members who made a commitment to reduce total AMS in the Uruguay Round negotiation bear an obligation to reduce amber subsidies according to their reduction schedule (Table1). In any year of the implementation period, the Current Total AMS value of non-exempt measures must not exceed the scheduled Total AMS limit as specified in the schedule for that year.²⁸ This means WTO bounds the maximum levels of such support.

Green box subsidies are defined in the Annex 2 of the Agreement on Agriculture. Green box subsidies are known to have most minimal trade-distorting effects or effects on production.²⁹ Therefore, green box subsidies are exempt from the reduction commitments as long as the support in question shall be provided through a publicly-funded government program not involving transfers from consumers and the support in question shall not have the effect of providing price support producers. They are usually decoupled from current production levels or prices.³⁰ Subsidies for food security purposes,³¹ structural adjustment assistance provided through producer retirement programmes,³² and regional assistance programmes³³ are classified as green box subsidies, thereby not bound to the reduction commitments.

Blue box subsidies are “amber box with condition.” This means amber box subsidies would be re-classified as blue box subsidies as long as there is a promise of reduction on production.³⁴ They are originally designed to relieve the WTO member countries' pain of dramatically removing amber box subsidies. Blue box subsidies are not subject to the reduction commitments analogous to that of green box subsidies.

Amber box subsidies are all the domestic support subsidies except green and blue box subsidies. Amber box subsidies are known to substantially distort world trade, thus it falls into the scope of the reduction commitments as stipulated in the Article 6. Measures to

27 Ibid.

28 WTO, Agreement on Agriculture Explanation (https://www.wto.org/english/tratop_e/agric_e/ag_intro03_domestic_e.htm).

29 The Agreement on Agriculture, Annex 2, part.1.

30 The Agreement on Agriculture, Annex 2.6.

31 The Agreement on Agriculture, Annex 2.3.

32 The Agreement on Agriculture, Annex 2.9.

33 The Agreement on Agriculture, Annex 2.13.

34 The Agreement on Agriculture, Art. 6:5 provides that: (a) Direct payments under production-limiting programmes shall not be subject to the commitment to reduce domestic support if: (i) such payments are based on fixed area and yields; or(ii) such payments are made on 85 percent or less of the base level of production; or(iii) livestock payments are made on a fixed number of head (b) The exemption from the reduction commitment for direct payments meeting the above criteria shall be reflected by the exclusion of the value of those direct payments in a Member's calculation of its Current Total AMS.

support prices or subsidies directly related to production quantities are the examples of amber box subsidies. Developed country members with a Total AMS have to reduce base period support by 20 per cent over six years. Developing country members with a Total AMS have to reduce it by 13.3 per cent over ten years.

S&D box and *de-minimis* support are content-wise supposed to be classified into the amber box, but are excluded from a Member's amber box subsidies calculation. Similar to the SCM Agreement, the AoA endows preferential treatments to developing countries. Subsidies encouraging agricultural and rural development of developing countries are not classified as amber box subsidies in the name of S&D box. In addition, domestic support which its portion is minimal is categorized as *de-minimis* support and thus exempt from amber box subsidies. Either product-specific or non-product specific domestic support which does not exceed 5 percent of a member country's total value of production is called *de-minimis* support. For developing countries, the *de-minimis* percentage extends to 10 percent.³⁵

Table 1) The AoA's Structure of the Domestic Support

Total Domestic Support	Amber Box (measured by AMS Index)	To be Reduced (20 percent or 13.3percent)
	Product-Specific <i>de minimis</i>	Ceiling (5 percent or 10 percent of AMS)
Non-product specific <i>de minimis</i>		
(Total AMS)	Blue Box	Must not exceed 1992 levels No reductions required
	Special and Differential Treatment Box (S&D Box)	
	Green Box	No ceiling No reductions required

Source: WTO

The Peace Clause

Article 13 of the Agreement on Agriculture, so called the peace clause shows the interrelation between the AoA and the SCM Agreement. The Peace Clause was inserted into the AoA almost at the last minute of the Uruguay Round negotiations as a temporary reassurance mechanism against action based on certain non-agriculture agreement rules of the WTO.³⁶ This clause exempts domestic measures on agricultural products from imposing countervailing duties and actions based on Article 5 and 6 of the SCM Agreement. This clause was effective for eight years and lapsed in December 31st 2003. Opinions diverge whether the peace clause is *de facto* effective after its official expiry date, but many WTO Members except the Cairns Group countries³⁷ agree that the provisions

³⁵ The Agreement on Agriculture. Art. 6:4.

³⁶ Desta, Melaku Geboye. "The Integration of Agriculture into the WTO Disciplines, Agriculture in the WTO Law." In *Agriculture in the WTO Law*, edited by Bernard O'Connor. London: Cameron May, 2005: 37.

³⁷ The Cairns Group is the coalition of agricultural exporting nations lobbying for agricultural trade

that make exceptions for agricultural subsidies will continue to apply even after the peace clause is expired.³⁸

Comparison of the two Agreements

The following is the comparison between the two agreements based on the legal analysis conducted above. The two agreements are linked in a sense they share the definition of a subsidy. The two agreements are differently treated in the WTO subsidies regime in terms of objectives, treatments of domestic support, and export subsidies.

Definition of a Subsidy

The AoA nowhere defines what is a ‘subsidy.’ Instead, it borrows the definition from Agreement on SCM in Article 1.1. In *Canada-Milk* case, the Appellate Body confirmed that all the components of a subsidy as defined by the SCM Agreement must exist to determine whether a subsidy exists within the meaning of Agreement on Agriculture.³⁹ This implies that Agreement on SCM lays down the legal basis of the AoA by lending its definition of a ‘subsidy.’

Differences in Objectives

Whereas the SCM Agreement aggressively regulates distorting subsidies through the traffic-light classification, the AoA’s long-term objective is “to establish a fair and market-oriented agricultural trading system.”⁴⁰ This difference stretches into sectional allowance of countervailing measures. The SCM Agreement allows retaliatory actions against prohibited or actionable subsidies by allowing ‘countervailing measures,’ but the AoA is devoid of such retaliatory mechanism. Compared to the highly-regulated SCM Agreement, the AoA is now at a rudimentary stage to regulate agricultural subsidies at a multilateral level.

Treatment of Domestic Support

The concept of domestic support is unique in the Agreement on Agriculture, meaning it is “a category with no roots in the GATT.”⁴¹ This implies that regulations on domestic subsidies were never subjected to any strict disciplines under the GATT. Desta (2005) argues that the fact that one half of the AoA is devoted to discipline domestic support measures is due to the drafters’ strong message to exempt agricultural domestic subsidies

liberalization. The Cairns Group countries maintain that the all agricultural subsidies will fall under the common ruling of the SCM Agreement as the peace clause is void after its expiry date.

38 *Supra* note 20, 250.

39 *Appellate Body Report, Canada- Measures affecting the exportation of dairy products and the importation of milk (Canada-Milk)*, WTO/DS103/AB/R, WT/DS113/AB/R, adopted on 27 October 1999.

40 Preamble, the Agreement on Agriculture.

41 *Supra* note 43, 23.

from rulings of the SCM Agreement.

Some scholars argue that the domestic support regulations on the AoA is unbalanced and biased in favour of developed and exporting countries because developed countries' internal support during a 1986-90 base period was larger than those of developing countries.⁴² This justified developed countries to continuously subsidize their agricultural product albeit at a decreasing annual rate. On the contrary, developing countries or net importing countries, even though given special and differential treatments stipulated under the Article 9.4 of the Agreement on Agriculture, do not have many AMS quotas for subsidizing their agricultural products as much as those of developed countries.

Treatment of Export Subsidies

The SCM Agreement prohibits any kind of export subsidies. On the other hand, the AoA allows export subsidies unless the total amount does not exceed the budgetary outlay and quantity commitment levels.⁴³ Analogous to the domestic support regulations, the export subsidy regulations have been criticized for granting more preferences to developed countries. By permitting past users of export subsidies to maintain these subsidies subject to certain reduction obligations, while prohibiting the introduction of the new subsidies, the regulations on export subsidy is condemned as institutionalizing the unfair competitive advantage held by developed country producers.⁴⁴

Table 2) Comparison between the SCM Agreement and the AoA

	the SCM Agreement	the AoA
Commonality	Definition of a Subsidy	
Product Coverage	Non-Agricultural Products	Agricultural Products
Objectives	Prohibition of Trade-Distorting Subsidies	Establishment of a Fair and Market-oriented Agricultural Trading system
Countervailing Measures	Allowed	Not Allowed under the Peace Clause
Export Subsidy	Prohibited except S&D	Allowed (But to be Reduced)
Domestic Support	-	Amber/Green/Blue/S&D/De-minimis

Divergence or Convergence in Future?

As the historical analysis in the previous section has shown, the regulatory patterns on agricultural and non-agricultural subsidies have diverged since the discussion on ITO

42 National Agricultural Cooperative Federation of Republic of Korea. "Coexistence of Diverse Forms of Agriculture in the DDA Agricultural Negotiations." Paper presented at the WTO Public Symposium, Geneva, Switzerland, May 25-27, 2003: 3.

43 The SCM Agreement Art.3:3, Art. 8.

44 Gonzalez, Carmen G. "Institutionalizing Inequality: The WTO the Agreement on Agriculture, Food Security, and Developing Countries." *Columbia Journal of Environmental Law* 27, no. 2, 433-90: 464.

establishment in the 1940s. In order to assure that the subsidies regime is consistent, there should be legal consistency between the two agreements. The regulatory asymmetry between the two agreements has generated confusion among WTO Members as well as the Members' dissatisfaction toward the subsidies regime. To strengthen the legal consistency of the WTO subsidies regime, attempts to converge the AoA and the SCM Agreement should be accompanied in the following rounds of multilateral negotiations.

Separation of the AoA from the SCM Agreement is lack of a solid reasoning. The historical analysis of the trade agreements vindicates that the exception on agricultural products was initially given on a product-by-product basis, not on a sectoral basis. Agriculture is known for unique features such as multifunctionality and inelasticity in demand, but there should be contemplation on whether the special treatment of agriculture within the WTO subsidies regime can be justified solely with these features. Under the *status quo* division of the two agreements, the preferential treatment of agriculture is likely to be further strengthened in the future given that the two agreements currently do not share a unified legal framework for regulating WTO Members' subsidizing behaviours.

Besides legal inconsistency, the asymmetric ruling of the WTO subsidies regime between agricultural and non-agricultural products is quintessentially related to the fairness of the regime. The convergence of the two agreements is necessary to respond to the growing complaints of developing countries that current the WTO subsidies regime is institutionalizing global inequality. As explained in the previous section, developed countries have been entitled with rights to distribute more subsidies to their farmers than those of developing countries because of their 1986-90 base period subsidies amount. Gradual attempts to converge the two agreements would alleviate the complaints of developing countries as the convergence would trigger agricultural subsidies to be regulated under a unified regulatory mechanism.

Conclusion

The WTO subsidies regime lacks legal consistency as there is a clear discrepancy in the rulings on agricultural and non-agricultural subsidies. Currently the rulings on agricultural subsidies and non-agricultural subsidies are bifurcated into the AoA and the SCM Agreement. This regulatory divergence is not a sudden outcome of the Uruguay Round negotiation but is the result of gradual historical evolution from the Havana Charter. Multifunctionality and inelasticity of the demand have been the prevailing rationales of justifying different treatment of agricultural products from others, yet whether these features are sufficient to justify preferential treatment of agriculture within WTO is contested.

To ensure the legal consistency and fairness of the WTO subsidies regime, the convergence of the two agreements is to be encouraged in the long-run. Specific modalities for the convergence of the two agreements are to be covered in subsequent research. Attempts

to converge the two may provide a potential clue to break the Doha Round negotiation deadlock. **GPR**

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