The Legal Policy Space of WTO Members for Import Protection under the Agreement on Agriculture (AOA)

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List of Acronyms and Abbreviations

AB	Appellate Body
ACP	African, Caribbean and Pacific Group of States
ACRE	Average Crop Revenue Election (US)
ALIC	Agriculture and Livestock Industries Corporation (Japan)
AMS	Aggregate Measurement of Support
AOA	Agreement on Agriculture
ARC	Agriculture Risk Coverage (US)
AT	Applied Tariff
AU	African Union
AU	Auctioning (TRQ allocation method)
AVE	ad valorem equivalents
BPS Scheme	Basic Payment Scheme (EU)
BTAMS	Bound Total AMS
CAIS	Canada's Agricultural Income Stabilization
CAP	Common Agriculture Policy (EU)
CCC	Commodity Credit Corporation (US)
CCP	Counter-Cyclical Payments (US)
CFS	Committee on World Food Security
CMO	Common Market Organization (EU)
CTAMS	Current Total AMS
DCP	Direct and Counter –Cyclical Program (US)
DDA	Doha Development Agenda
DELAP	Dairy Disaster Payments (US)
DP	Direct Payments
DPDP	Dairy Product Donation Program (US)
DPPSP	Dairy Product Price Support Program (US)
EC	European Communities
ECOSOC	Economic and Social Council of the United Nations
EMS	equivalent measurement of support
EU	European Union
FAIR Act	Federal Agriculture Reform and Improvement Act (US)
FAO	Food and Agriculture Organization of the United Nations
FC	First Come, First Served (TRQ allocation method)
FYROM	Former Yugoslavian Republic of Macedonia
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GHG	greenhouse gas
HI	Historical Importers (TRQ allocation method)
HLPE	High Level of Panel of Experts on Food Security and Nutrition
HRBA	Human Rights-Based Approach
HS	Harmonized Commodity Coding and Classification System
ICESCR	International Convent on Economic, Social and Cultural Rights
IFS	International Financial Statistics
ILP Agreement	Agreement on Import Licensing Procedures
IMF	International Monetary Fund

INDCs	Intended Nationally Determined Contributions
INR	initial negotiating right
LD	Licenses on Demand (TRQ allocation method)
LDCs	Least Developed Countries
LDP	Loan Deficiency Payments
LFP	Livestock Forage Payment (US)
LIP	Livestock Indemnity Program (US)
MAFF	Ministry of Agriculture, Forestry and Fisheries (Japan)
MAL	Marketing Assistance Loans Program (US)
MDGs	Millennium Development Goals
Mercosur	Southern Common Market
MFN	Most-Favored-Nation
MILC	Milk Income Loss Contract (US)
MLA	Market Loss Assistance Payments (US)
MPP-Dairy	Margin Protection Program for Dairy (US)
MPS	Market Price Support
MPSP	Milk Price Support Program
MSP	Minimum Support Price (India)
MX	Mixed Allocation Method (TRQ allocation method)
NAMA	Non-Agricultural Market Access
NAV duties	non-ad-valorem duties
NDCs	Nationally Determined Contributions
NPS Support	non-product-specific support
NTBs	non-tariff barriers to trade
NTMs	non-tariff measures
OECD	Organization for Economic Co-operation and Development
PBS	price band system (Chile)
PCIJ	Permanent Court of International Justice
PFC	Production Flexibility Contract (US)
PLC	Price Loss Coverage (US)
PS AMS	product specific AMS
PSA	Private Storage Aids (EU)
PSI	principal supplying interest
RAMs	Recently Acceded Members
RtFG	Right to Food Guidelines
S&DT	special and differential treatment
SAPS	Single Area Payment Scheme (EU)
SARD	Sustainable Agriculture and Rural Development
SCM Agreement	Agreement on Subsidies and Countervailing Measures
SDGs	sustainable development goals
SG Agreement	Agreement on Safeguards
SIDS	Small Island Developing States
SP	Special Products
SPS Agreement	Agreement on the Application of Sanitary and Phytosanitary Measures
SPS measures	sanitary and phytosanitary measures
SPS Scheme	Single Payment Scheme (EU)
SSG	Special Safeguards
SSM	Special Safeguard Mechanism
ST	Imports Undertaken by State Trading Entities

STEs	State-Trading Enterprises
SURE	Supplemental Crop Revenue Assurance (US)
TBT	Technical barriers to trade
TBT Agreement	Agreement on Technical Barriers to Trade
TRIMs	trade-related investment measures
TRIMs Agreement	Trade-Related Investment Measures Agreement
TRIPS	Trade-Related Aspects of Intellectual Property Rights Agreement
TRQ	tariff-rate quota
UNCTAD	United Nations Conference on Trade and Development
UNFCCC	UN Framework Convention on Climate Change
AOA	Uruguay Round Agreement on Agriculture
USDA	United States Department of Agriculture
VAP	value of agricultural production
VoP	value of production
WCO	World Customs Organization
WTO	World Trade Organization
WTO Agreement	Marrakesh Agreement Establishing the World Trade Organization

Chapter 1
Introduction

1.1 Background of the Research

As the first specific multilateral agreement regulating agricultural trade after GATT 1947, the Uruguay Round Agreement on Agriculture (AOA) concluded in 1994 has brought about some profound legal issues to the multilateral trading system or more broadly to international economic law. Among them, the most outstanding issue has resulted in the strong political call for sufficient policy space for developing Members to allow them to pursue their development policies. In nature, it is an issue of how to help Members to strike the subtle balances between their loss of policy space at national level and strengthening international governance and rule of law over agricultural trade at the multilateral level. However, as a legal issue, the term or concept of policy space remains quite elusive and lacks precise legal definition in the AOA, though it has been the subject of heated debates in the WTO negotiations and by academia. Therefore, it is always necessary and instrumental to revisit this complicated issue by starting to explore the broad literature about policy space, and we will be better positioned to understand the development of law in this regard, or more ideally, to come up with some valuable and feasible solutions.

Having said that, the following points deserve clarifications before we jump to the debate:

1) The main purpose of this thesis is to explore WTO Members' policy space for import protection under the framework of the AOA. Though the AOA has three pillars: market access, domestic support and export competition, this paper will focus only on examining Members' policy space in the first two pillars. This means it will examine Members' policy space for import protection[1]or protective and supportive policy space, [2] and will not overstretch itself to the domain of export competition. For most

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[1]Alain McLaren, 'Policy Space in Agricultural Markets' <http://unctad.org/en/PublicationsLibrary/itcdtab75_en.pdf> accessed 29 December 2017.

[2] Robert Hamwey, 'Expanding National Policy Space for Development: Why the Multilateral Trading System Must Change' (EconWPA 2005).

developing Members, the biggest concern about agricultural trade liberalization remains whether they will be still capable of protecting their domestic agricultural sectors or farmers from imports? If this concerned is not well addressed, it will be very difficult to persuade or make them prepared for further commitments in agricultural trade liberalization.

2) The thesis aims to present a comprehensive picture of the status quo of WTO members' policy space for import protection. Though progresses have been made in the Doha Development Agenda (DDA) negotiations since the AOA was concluded in 1994, such as the July 2008 package,[3] there are tremendous uncertainties surrounding the status of the recent law-making achievements. Given the pending status of these developments as well as the precarious global trade suffering from the trade war between the United States and China, it is premature to evaluate the implications of these developments for Members' policy space for import protection under the AOA. For instance, at the current stage it is impossible for the thesis to predict whether or to what extent a number of important mechanism, such as the Special Safeguard Mechanisms (SSM) and Special Products (SP), as proposed by the July 2008 package, will be finally accepted and approved by Members. In this context, it is more realistic to take a look-behind approach to take stock of the specific contributions that each Member has made to agricultural trade liberalizations, than to adopt a look-forward approach to predict what is going to happen.

3) It is also worth clarifying that policy space for import protection for agricultural products is a complex crosscutting issue under a number of other WTO Agreements, such as Agreement on Import Licensing Procedures (ILP Agreement), [4]Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement), Agreement on Technical Barriers to Trade (TBT Agreement), Agreements on Rules of Origin, Agreement on Subsidies and Countervailing Measures (SCM Agreement), and Agreement on Safeguards (SG Agreement), however, this thesis will only deal with Members' lawful instruments of protection and their derivative legal policy space for

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[3] 'WTO | Doha Development Agenda | The July 2008 Package' <https://www.wto.org/english/tratop_e/dda_e/meet08_e.htm> accessed 16 January 2019.

[4] 'WTO | Understanding the WTO - Non-Tariff Barriers: Red Tape, Etc' <https://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm9_e.htm> accessed 24 June 2018.

import protection under the AOA. For instance, non-tariff barriers to trade (NTBs) also entail a complex issue of policy space, however, they are not a big issue under the AOA as most of non-tariff measures (NTMs) for agricultural import have been tariffied in the Uruguay Round. It would be more appropriate to examine the issue of policy space concerning NTBs under the ILP Agreement, but that is beyond the coverage of this thesis.

1.2 Central Questions

With these clarifications, this thesis aims to answer the following overarching questions:

1) With what kinds of legal policy space has the AOA provided Members to protect their domestic agricultural sectors or producers from imports?

2) How have these different types of legal policy space been used by Members to protect their sensitive products or key defensive interests?

3) If compared to the original Members, Recently Acceded Members (RAMs) made bigger concessions in terms of agricultural trade liberalization upon their accessions to the WTO. Here arises an allegation about the "WTO-Plus Obligations and WTO-Minus Rights" for RAMs. Two fundamental questions need to be answered: is this allegation legally grounded under the AOA? Does the AOA provide the RAMs with sufficient policy space for import protection?

1.3 Methodology

In order to guarantee the objectivity and soundness of the research, a comprehensive approach is adopted to collect relevant data concerning the trade profiles of all WTO Members available from public sources. For instance, with a view to showing a Member's level of border protection, the WTO annual flagship statistical publication---world tariff profiles or more specifically the WTO Tariff Download Facility database has been used to collect all relevant information, mostly the average final bound tariff and the average applied tariff rates for agricultural products of that Member. Meanwhile, it uses the annual notifications made by a specific WTO Member to get its level of domestic support. As domestic support in most WTO Members is expressed in their own local currencies, the annual average exchange rate in a certain year from the International Monetary Fund (IMF) database---"International Financial Statistics" (IFS)

--- is adopted to convert all the local currencies into the US dollar, so as to capture the picture of WTO Members' domestic support at the global level. The comprehensive approach is quite useful in presenting an overall picture about how each legal instrument of protection as approved by the AOA has been used by which members.

The purpose of collecting WTO Members' data is not only to present a general picture of the global landscape of border protection and domestic support, but also to find out the primary users of a relevant lawful instrument of protection and its functioning mechanism. A comparative approach is also adopted to focus on the major players' relevant policies and practices. For instance, with a view to locating the sensitive products, a banded approach is applied to examine the tariff line structure of WTO Members for agricultural products as Members normally put their sensitive products in the highest band of their tariff profiles. Besides that, on the basis of the average final bound tariffs of WTO Members, all WTO Members have been allocated into four tiers to compare their policy space in tariff protection. Moreover, it moves on to examine another category of policy space for import protection, the entitlement to the tariff-rate quota (TRQ) administration and the special safeguards (SSG) provisions. It also makes great efforts to explore the multi-layer protection mechanism that some Members have established for the protection of their sensitive products. The same methodology has been applied to examining the two categories of policy space in domestic support, namely the exemption and the limited policy space, but most of time it focuses on the agricultural reforms undertaken by the EU for its Common Agriculture Policy (CAP) and the United States for its Farm Bill. The comparative approach is instrumental in comparing policy space of the major users of a legal instrument for import protection and in most cases they are normally the United States and the European Union. In some cases, China and India are emerging as the major users of a specific legal instrument of protection.

The social-legal approach as advocated by Perry-Kessaris also sheds great light. It posits that any approach to law includes three components: analytical, empirical and normative, that determines what, how and why it is approached respectively. It further illustrates that the analytical components are the concepts and relationship, which can be broken down to text, context and subtext, that it deploys to organize the field of the research. The empirical components are the facts and methods that can be used to verify

the analytical components, while the normative components are the values and interests that the approach foregrounds and privileges. In other words, the substantive focus (what), analytical and empirical tools (how) and normative underpinnings (why) of a social-legal approach are all strictly legal.[5] All these three dimensions are relevant to the current research. The study will start with the "what" dimension by giving a brief introduction to the basic rules of the AOA in import protection and the relevant policy space that derives from the rules. Then, it will move to the how dimension by examining how Members have used these policy space provided by the AOA to protect their sensitive products. It will end with the why dimension by giving a clear answer to the central questions as articulated in the previous part of this Chapter. There is no need to stress the importance of social aspect of policy space for import protection as it concerns not only production, unemployment, subsistence of local farmers in the narrow sense, but also hunger, poverty alleviation, food security, millennium development goals (MDGs) and sustainable development in the broad sense. However, the legal aspect of the approach is more important as it shows how the multilateral system for import protection is functioning at the country and regional level.

Besides the social-legal approach, the method of critical thinking in identifying the nature of the problems and rules[6] in import protection from the tremendous amount of data and notifications concerning WTO Members' border protection and domestic support as well as their relevant domestic policies are also essential to a legal reasoning with sound and well-grounded arguments.

1.4 Content

Chapter 1 will embark on a brief introduction to the research, focusing on the background, the central questions and the methodology of the research.

Chapter 2 will examine the concept "policy space" in both the WTO law and the AOA. It will examine its root causes, namely the legal tensions between the multilateral governance of free trade through international organizations and its constrictions on Member governments' sovereignty or legislative discretion over domestic protection.

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[5] Amanda Perry-Kessaris, *Socio-Legal Approaches to International Economic Law: Text, Context, Subtext* (Routledge 2013).

[6] Sharon Hanson, *Legal Method & Reasoning* (Routledge 2003).

In the same vein, Members confront the same challenges in regulating the legal tensions between agricultural trade liberalization and trade protection under the AOA. It will also look at the factors affecting the balancing of Members' policy space for import protection.

Chapter 3 will examine Members' policy space in market access. It will start with a brief introduction to the basic rules on market access, particularly the three lawful instruments of protection: tariff, TRQ administration and the SSG provisions. Then it will move on to examine the functioning mechanisms of these instruments with a view to finding out where Members stand in terms of agricultural trade liberalization and their relevant policy space for import protection. At the same time, it will examine Members' two categories of policy space in border protection: tariff protection and the entitlements to the TRQ administration and SSG provisions.

Chapter 4 will move on to examine the policy space of WTO Members in domestic support. It will follow more or less the same structure as Chapter 3. It will start with a brief introduction to the AOA rules on domestic support, focusing on introducing two types of categorization of domestic support measures: one is the traffic light analogy which normally refer to grouping domestic support measures into green box, amber box and blue box according to the traffic light rules; the other one is the exempt and non-exempt domestic support measures, which is based on whether the domestic measures are exempt from the reduction commitments or not. Two types of policy space in domestic support have been created on the basis of this categorization: limited policy space which are subject to legal limits, and exemption policy space which allows limitless domestic support. Then it proceeds to examine the landscape of Members' limited policy space for amber box support. After that, it will review the landscape of exemption policy space under green box, the public service programs and direct payments programs in particular.

Chapter 5 will explore the policy space of RAMs. It will start to examine the policy space of RAMs in border protection and domestic support, and then proceed to revisit the plausibility of the "WTO Plus Obligations and WTO Minus Rights" allegation by examining both the procedural and substantive aspect of claim. And it will try to answer the question whether the policy space for import protection provided by the AOA is enough for them or not.

Chapter 6 will come to the overall conclusions. Bearing in mind all those central questions as put forward in Chapter 1, this Chapter will present the key findings of the research.

1.5 Special Contributions of the Thesis

Despite the existing broad literature concerning the development of the AOA and Members' policy space for import protection, the thesis makes some special contributions in following domains.

Firstly, most research up to now has been undertaken primarily from the perspective of agricultural economics, while this thesis makes great efforts to examine this complex issue more through a legal lens. That's why it has been reiterated on various occasions that its purpose aims at evaluating Members' "legal" policy space for import protection under the current AOA. Members' legal policy space derives from those legal instruments of protection that are already approved by the AOA. To that end, the thesis starts with providing a brief reflection of the AOA rules in import protection to identify Members' derivative policy space in this respect, and then it moves forward to examine how these rules or policy space have been used by Members to protect their sensitive products or legitimate policy interests.

Secondly, the existing literature leans more towards an examination of the policy space for import protection of a specific Member or some Members under the AOA, while what this thesis aims to present is an overall and comprehensive picture of the status quo of Members' legal policy space for import protection. In this context, this thesis makes some unique contributions in terms of collecting all the WTO Members' profiles about their final bound tariffs and subsidies and sorting them in a consistent fashion. Based on this classification, this thesis goes further to explore Members' legal policy space and the relevant working mechanisms in both border protection and subsidies protection. The concept of policy space for import protection remains political propaganda since the AOA was created as very few people examine how the AOA works as a system to protect the divergent interests of WTO Members. Therefore, the thesis helps to visualize and instrumentalize this vague term in a thorough and meticulous fashion. For instance, the thesis examines not only how each of the instruments of border protection that is recognized by the AOA functions individually,

but also how developed Members design their sophisticated mechanisms for import protection based on the combination of the individual instruments of border protection. After reading the thesis, if you feel that Members' policy space for import protection has never been so concrete and materialized, that will be the biggest accomplishment of the research.

Chapter 2

Defining the Concept of Policy Space in the WTO Law

2.1 The Concept of Policy Space in the WTO Law

The AOA is one of the multilateral agreements on trade in goods that have been concluded in the Uruguay Round,[7] which is regarded as the most important milestone towards fully integrating agriculture into the rule-based multilateral trading system.[8] In the view of the WTO secretariat, the contributions of the AOA rest on the following aspects: it provides a framework for the long-term reform of agricultural trade and domestic policies over the years to come, makes a decisive move towards the objective of increased market orientation in agricultural trade, meanwhile strengthening the rules governing agricultural trade that will lead to improved predictability and stability for importing and exporting countries alike.[9]

Like any other newly born international trade agreement, the AOA has also brought about some profound legal challenges to the multilateral trading system or more broadly to the WTO law. These legal challenges have been exemplified by a number of tensions between the multilateral governance of free trade through international organizations and Member governments' sovereignty or legislative discretion over domestic protection. [10] These tensions are inherent to all the other disciplines of WTO law, such

[7] World Trade Organization, *The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations* (Cambridge University Press 1999).

[8] Melaku Desta, *The Law of International Trade in Agricultural Products: From GATT 1947 to the WTO Agreement on Agriculture* (Kluwer Law International 2002) 66.

[9] 'WTO | Legal Texts - A Summary of the Final Act of the Uruguay Round' <https://www.wto.org/english/docs_e/legal_e/ursum_e.htm#aAgreement> accessed 23 December 2017.

[10] "The extension of the scope international law and governance in their subject matters as well as their intrusiveness in domestic administrative, legislative and judicial process brings to the fore a number of tensions. These include the tension between international governance and domestic government, the tension between societies at different stages of economic development and with different forms of government, the tension between international legal regimes that promote overlapping or contradictory objectives, and finally the tension between, on the one hand, the constant flux of societal preferences and realities and, on the other hand, the rigidity of traditional international law-making instruments, in

as the environment, human rights, health and energy, and are not peculiar to agricultural trade. The source of the conflict rests on the implications of these international agreements on Members' sovereign decision-making power or national regulatory competence over domestic policies.[11] Jackson further articulates the different dimensions of the sovereignty concept, and suggests that the principle of balancing interests and of proportionality regarding the allocation of decision-making authority is needed to deal with the multiple goals for a particular undertaking.[12] Underneath the strong criticisms about the WTO membership undermining Members' national sovereignty,[13] or constituting a perceived loss of sovereignty competencies over multilateral trade lies an issue of WTO Members' loss of their domestic policy space.[14]

However, the issue of policy space and grey areas in some new domains of international law is not a zero sum game between two or more layers of governance, as what a Member has lost in term of its domestic policy space has been compensated by the

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particular international treaties." Isabel Feichtner, *The Law and Politics of WTO Waivers: Stability and Flexibility in Public International Law*, vol 7 (Cambridge University Press 2011) 1.

[11] "Nation state's regulatory decision-making powers are subject to real and effective limits under the WTO treaty. Whether fully appreciated or not, the parameters of these limits are, at least theoretically, agreed to by each WTO Member at the time of joining the Organization. However, as a practical matter, an international treaty dealing with subjects as diverse as those dealt with under the WTO treaty can neither anticipate nor seek to address specifically all the precise issues of allocation of decision-making power between domestic and international levels…Yes it is certain that, through their acceptance of the WTO treaty and its dispute settlement mechanism, WTO Members have parted with some of their 'sovereign decision-making power and thereby agreed to a reallocation of power between domestic and international levels." Sharif Bhuiyan, *National Law in WTO Law: Effectiveness and Good Governance in the World Trading System*, vol 55 (Cambridge University Press 2007) 14.

[12] Jackson believes that the sovereignty concept is a three-dimensional puzzle. Its vertical dimension involves the allocation of decision-making power at the international, regional, national or sub-national institutions level. Its horizontal dimension is about the allocation of decision-making power among various institutions at the same level. And its third-dimension deals with the different types of institutions, for instance, the government versus the non-government. John H Jackson, *Sovereignty, the WTO, and Changing Fundamentals of International Law*, vol 18 (Cambridge University Press 2006).

[13] 'WTO | Seattle - Misinformation' <https://www.wto.org/english/thewto_e/minist_e/min99_e/english/misinf_e/09sov_e.htm> accessed 23 December 2017.

[14] Patrick Tangney, 'The New Internationalism: The Cession of Sovereign Competences to Supranational Organizations and Constitutional Change in the United States and Germany' (1996) 21 Yale J. Int'l L. 395.

expansion of its international policy space. For instance, Members might have lost their domestic policy space for import protection, but they have also gained their international policy space in free trade. What Members have gained is normally more than what they have lost in terms of policy space, otherwise there would be no reason for them to join the WTO. The purpose of international disciplines shall primarily serve to avoid economic rent seeking that does not produce welfare effects for the public and to foster fair competition by means of market access.[15] In this respect, there are also strong voices arguing that Members' integration into the multilateral trading system is an issue of balancing between their loss of policy space at national level and strengthening international cooperation and rule of law at the multilateral level, and it has nothing to do with ceding of Members' sovereignty [16]or it remains a sort of interdependence of sovereignty.[17] Wolgang, De Feyter, Marrella and others rightly observe that there are three categories of views on how globalization may impact on the state: (1) The policy options that the state can effectively exercise in the economic realm will wither away; (2) With some necessary modifications, existing policy instruments of economic policy are sufficient to handle the challenges posed by globalization; (3) States will need to redefine themselves by ceding some economic and political functions and adopting new ones. Nevertheless, economic globalization will not lead to the demise of the state, but to a system of multi-level governance, with agents at different levels (global, regional, national, local) ideally working together to achieve common goals. The result may be that the state exercises less control over the regulation of the market than before, a situation may require compensatory protection

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[15] Thomas Cottier, 'Renewable Energy and WTO Law: More Policy Space or Enhanced Disciplines' [2014] Renewable Energy L. & Pol'y Rev. 40.

[16] "The acceptance of the ceding of sovereignty to international organizations goes very far and the WTO does not intervene in sovereignty in that sense. Yet the WTO does have competencies and powers that were previously the monopoly of states. Ultimately what count is whether the balance between some loss of 'policy space' at the national level and the advantages of cooperation and the rule of law at the multilateral level is positive or negative. Our view is that it is already a positive for all WTO Members and will increasing be so in the future." Consultative Board WTO, 'The Future of the WTO: Addressing Institutional Challenges in the New Millennium'.

[17] Joshua Meltzer, 'State Sovereignty and the Legitimacy of the WTO' (2005) 26 U. Pa. J. Int'l Econ. L. 693.

action at other regulatory levels.[18]In order to manage globalization in a world of wide variation, Jackson suggests an "interface mechanism" at the international structures level to allow different economies to trade in a friendly and sustained manner and necessary "policy space" at individual national economic systems level to appropriately reconcile or balance the competing goals of desirable coordination and competition.[19]

The United Nations Conference on Trade and Development (UNCTAD) has always been the strongest advocate among the United Nations agencies or international organizations for the concept of "policy space" in development. For instance, the term "policy space" acquired its first official status[20] in the UNCTAD XI Conference Report (Paragraph 8 of Part II São Paulo Consensus), which reads as follows:

> The increasing interdependence of national economies in a globalizing world and the emergence of rule-based regimes for international economic relations have meant that the space for national economic policy, i.e. the scope for domestic policies, especially in the areas of trade, investment and industrial development, is now often framed by international disciplines, commitments and global market considerations. It is for each Government to evaluate the trade-off between the benefits of accepting international rules and commitments and the constraints posed by the loss of policy space. It is particularly important for……developing countries, bearing in mind development goals and objectives, which all countries take into account the need for appropriate balance between national policy space and international disciplines and commitments.[21]

The Secretariat of the UNCTAD further argues in the Trade and Development Report 2014 that

> "Developing countries should carefully consider the loss of policy space when engaging in bilateral and regional trade and investment agreements. Such

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[18] Benedek Wolfgang, Koen De Feyter and Fabrizio Marrella, *Economic Globalisation and Human Rights* (Cambridge University Press 2007) 2.

[19] Jackson (n 12) 230–233.

[20] Sheila Page, 'Policy Space: Are WTO Rules Preventing Development?' <https://www.odi.org/sites/odi.org.uk/files/odi-assets/publications-opinion-files/106.pdf>.

[21] UNCTAD, 'Report of the UNCTAD Eleventh Session' <http://unctad.org/en/Docs/td412_en.pdf> accessed 24 December 2017.

agreements often come with stricter commitments in areas covered by multilateral agreements or extend to new areas, requiring policymakers to forsake the use of instruments that have proved effective in supporting industrialization. Conventional wisdom suggests that accepting such stricter policy and regulatory commitments is necessary to attract foreign direct investment and to enable firms from developing countries to join global value chains. The report, by contrast, suggests that while these commitments may provide short-term trade and employment benefits, in the longer run they can trap producers into commodity enclaves or low-value niches of manufacturing."[22]

A broad literature has emerged at the theoretical level to examine Members' national policy space under the WTO multilateral trading system. Mayer articulates that the integration process of a WTO Member into the global economy is a double-edged sword. On the one hand, it can impose restrictions on its national policy space through two sources of external constraints: the multilateral rules and disciplines, (the constraints on de jure policy sovereignty in reducing the choices of available policy instruments as a result of legal commitments to international rules and practices) and integration into international economic relations (the constraints on de facto policy autonomy by allowing foreign actions and conditions to influence the effectiveness of its national macroeconomic policy targets). On the other hand, it can enlarge its national policy space through concerted actions with other WTO Members with a view to improving its de facto control over cross-border disturbances (the behind-the-border regulatory issues or agenda)[23] or preventing Members with disproportionately large influences from adopting discriminatory or beggar-thy-neighbour trade policies. With the workings of all these different forces, policy space is an issue of finding the right balance between maintaining flexibility in national economic policy-making and reducing it through multilateral disciplines and collective governance. However, he concludes that policy space remains a contentious issue and there is no quantifiable single balance between multilateral disciplines and national policy autonomy that suits

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[22] UNCTAD, 'Developing Countries Need Sufficient Policy Space to Advance Post-2015 Development Agenda, UNCTAD Report Says' <http://unctad.org/en/pages/PressRelease.aspx?OriginalVersionID=200> accessed 24 December 2017.

[23] Bernard M Hoekman, Aaditya Mattoo and Philip English, *Development, Trade, and the WTO: A Handbook*, vol 1 (World Bank Publications 2002).

all countries or applies across all spheres of economic activity.[24] Rodrik asserts that it is encouraging that the multilateral trade talks are paying more attention (or at least lip service) to the issue of "policy space" for developing Members. In the past developing Members compromised on policy space in exchange for greater market access to developed Members. This effort has turned out to be a bad bargain or strategy and they should push hard for "policy space" in future trade negotiations. The purpose of international rules should be not to impose common rules on Members with different regulatory systems, but to accept these differences and regulate the interface between them so as to reduce adverse spillovers.[25] Gallagher stresses that the key concern for developing Members in the WTO Doha Round negotiations is the notion that additional commitments in further trade liberalization will not give them the "policy space" to use the very instruments and tools that many industrialized Members took advantage of to reach their current levels of development,[26] so developed Members seem to be genuinely kicking away the ladder through the WTO agreements.[27] He further argues that the multilateral trading regime and the increasing bilateral and regional trade negotiating agenda are restricting the ability of developing Members to put in place the proper development policies and shrinking their policy space to an even greater degree. Four WTO agreements have been singled out as not being friendly toward development, including Trade-Related Investment Measures Agreement (TRIMs), Trade-Related Aspects of Intellectual Property Rights Agreement (TRIPS), General Agreement on Trade in Services (GATS) and SCM Agreement.[28] Chang posits that the policy space that a WTO Member possesses imposes enormous influence on its ability to achieve economic development. The shrinking policy space that started since the 1980s will

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[24] Jörg Mayer, 'Policy Space: What, for What, and Where?' (2009) 27 Development Policy Review 373, 373–395.

[25] Dani Rodrik, 'Industrial Policy for the Twenty-First Century' <https://drodrik.scholar.harvard.edu/files/dani-rodrik/files/industrial-policy-twenty-first-century.pdf>, last accessed 24 December 2017.

[26] Kevin Gallagher, 'Globalization and the Nation-State: Reasserting Policy Autonomy for Development', *Putting development first: the importance of policy space in the WTO and IFIs* (Zed Books 2005).

[27] Ha-Joon Chang, 'Kicking Away the Ladder:'good Policies' and'good Institutions' in Historical Perspective' [2005] Putting Development First–The Importance of Policy Space in the WTO and IFIs, Zed Press, London.

[28] Gallagher (n 26).

make the use of any meaningful policy for economic development impossible. Therefore, the principles that dominate international negotiations, especially in relation to trade and industrial policies shall be critically re-examined, meanwhile the principles of a level playing field, special and differential treatment, less-than-full reciprocity, flexibility, and national autonomy shall be critically reviewed.[29]

The broad literature on the definition of policy space indicates that the term normally refers to the restriction imposed by an international agreement on Members' freedom of domestic policy option, and essentially it deals with the coordination between Member's national governance and their international governance over a subject matter if conflicts arise between the two different layers of governance. Besides policy space, commentators have used other terminology, such as policy or regulatory autonomy, [30]regulatory space,[31] regulatory authority or regulatory jurisdiction[32] to define the notion of policy space in the various WTO disciplines or more broadly in international trade and investment law. The various names suggest that the concept of policy space is only

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[29] Ha-Joon Chang, 'Policy Space in Historical Perspective with Special Reference to Trade and Industrial Policies' [2006] Economic and Political Weekly 627, 627–633.

[30] Aaditya Mattoo and Arvind Subramanian, 'Regulatory Autonomy and Multilateral Disciplines: The Dilemma and a Possible Resolution' <http://econstor.eu/bitstream/10419/90662/1/775928712.pdf> accessed 24 December 2017.

Emily Reid, 'Regulatory Autonomy in the EU and WTO: Defining and Defending Its Limits' (2010) 44 J. World Trade 877.

[31] "The regulation of domestic economic activities was traditionally a matter of a state's regulatory power, subject mostly to domestic legal and political constraints. International legal obligations existed to the extent that a state entered into binding international obligations to regulate or abstain from regulating with respect to particular goods or services. States entered into trade obligations that required them to lower tariff levels in exchange for reciprocal benefits that at least part of its constituency regarded as important. Similarly, states concluded treaties that provided foreign investors the same treatment accorded to their own nationals. In short, countries had almost unlimited 'regulatory space'. They possessed a large degree of regulatory autonomy, especially when making decisions that implicated noneconomic values such as human health, human safety, the environment or social mobility." Markus Wagner, 'Regulatory Space in International Trade Law and International Investment Law' (2014) 36 University of Pennsylvania Journal of International Law 1.

[32] Joel P Trachtman, 'Regulatory Jurisdiction and the WTO', *The future of international economic law* (Oxford University Press 2008).

grounded in both theoretical and empirical arguments,[33] and no official recognition of the concept can be found from any of the current WTO agreements. As a legal term, policy space still lacks a consistent and precise definition in the WTO law. Nevertheless, the following three elements emanate from the concept of policy space:

1) Policy space is an issue of governance

The concept of policy space first touches upon Members' obligations under international law and domestic law. At the core of the concept lies the tensions between the jurisprudence of the WTO multilateral disciplines and their constraints on the regulatory autonomy or policy making power of the Member states.[34] In this context, policy space means the scope of freedom that a Member has obtained to pursue its own domestic policies despite of the restrictions of WTO rules and disciplines. Cottier rightly points out that the relationship between international law and domestic law is increasingly perceived as a matter of multilevel governance. He further articulates that multilevel governance amounts to a "five-storey house", under which vertical checks and balances of power operate among the different levels of governance, offsetting state failures and allocating regulatory powers ideally suitable to produce appropriate public goods at appropriate levels of governance—local, sub-federal, federal, regional or global. In this framework, policy space amounts to an inherent and necessary component of regulatory theory. It is a perfectly neutral term, serves to describe and define the scope and degree of the regulatory power assigned to a particular level of government within the overall regulatory system. However, the term applies to all levels of governance alike. In other words, policy space is not a one-way street, but depicts the interaction of different layers of governance. In reality, allocation of policy space is often driven by interests and does not produce optimal results. Such distortions, however, do not alter the basic or neutral functions of policy space in law and regulation. The quest for appropriate policy space is informed by overarching values and principles

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[33] Kevin Gallagher, 'Measuring the Cost of Lost Policy Space at the WTO' <http://www.ase.tufts.edu/gdae/policy_research/AmerProgWTOMar07.pdf> accessed 24 December 2017.

[34] "It lies in the nature of a trade accord that governments accept far-reaching trade liberalization concessions, which severely limit their domestic policy discretion in the future." Simon AB Schropp, *Trade Policy Flexibility and Enforcement in the WTO: A Law and Economics Analysis*, vol 1 (Cambridge University Press 2009) 1.

which seek to produce appropriate public goods, such as market access and level playing fields, while taking into account the need for differential treatment commensurate with the needs of the subsequent government as they may vary with changes in societal and economic structures and levels of development.[35] In this sense, Members' policy space under the WTO law functions as a buffering zone between the different levels of governance, national governance and global governance in particular. The purpose is to allow Member States to have a proper degree of discretion to deliver appropriate public goods at both domestic and international level.

2) Policy space is an issue of balance

The goals of multilateral trading system and Members' national policies might run counter to each other. The multilateral trading system is oriented at trade liberalization, while Members' national policies might aim at offering proper protection to domestic industry. With the increasing legalization and judicialization of WTO multilateral disciplines, Member states will have less freedom of implementation in terms of developing their own national policies.[36] Therefore, the concept of policy space in the WTO law is an issue of striking balances between trade liberalization and the legitimate non-discriminatory and transparent protection over domestic industry. Member governments face the pressure of balancing at the national and international level. At the national level, trade policy has always been, and will always remain, a hostage to domestic politics. On the one hand, Member governments must have proper mechanisms to compensate domestic groups or sectors that might suffer from import competition if they decide to open up their markets and trade with other Members. It is often difficult for Member governments to find the balance between the need to placate powerful groups or sectors that call for protection and the economic incentives to trade broadly. Members' support for liberalization will very much depend upon how they choose to balance these two factors.[37] At the international level, the multilateral trading

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[35] Thomas Cottier, International Trade, Human Rights and Policy Space, in Ljiljana Biukovic and Pitman B Potter (ed), *Local Engagement with International Economic Law and Human Rights* (Edward Elgar Publishing 2017) 3–10.

[36] Feichtner (n 10).

[37] Amrita Narlikar, Martin Daunton and Robert M Stern, *The Oxford Handbook on the World Trade Organization* (Oxford University Press 2012) 242.

system must first redress past imbalances resulting from the Uruguay Round. Though new trade rules and domestic disciplines were introduced, they reflected the priorities and needs of developed Members. Many of the rules constrained developing Members' trade policy options. In some cases, developing Members were even prohibited from the use of certain policy instruments that had been used by their developed Member counterparts at comparable stages of development, for instance, export subsidies. Moreover, the estimated market access gains from the trade liberalization in the Uruguay Round have been distributed unevenly, a big share of them have accrued to developed Members, while most of the rest have gone to a relatively few large export-oriented developing Members,[38] and many of the poorest Members have been actually worse off as a result of the Uruguay Round.[39] The concept of policy space can play an important role in addressing the two factors that affect the WTO negotiation outcomes: domestic political institutions and time pressure at the international level.[40] As the political economy of protection or the political "market for protection" still has a great weight on the decision-making or political bargaining process for free trade policies in Member governments,[41] Members tend to keep more "policy space" to protect their key interests or sensitive products. Therefore, the concept of policy space itself is, more often than not, a synonym for protecting entrenched sector interests rather than a step towards progressive liberalization for the good of the national and global economy.[42] As the greatest concern raised by the exercise of policy space in international trade

[38] There are different views on this point. A World Bank Research "suggested that the gains to developing countries from the Uruguay Round would be much bigger, relative to their GDPs, than the gains made by developed countries. And two-thirds of the estimated welfare gains to developing countries resulted from their own trade policy liberalization." Merlinda D Ingco and L Alan Winters, *Agriculture and the New Trade Agenda: Creating a Global Trading Environment for Development* (Cambridge University Press 2008) 6.

[39] Joseph E Stiglitz and Andrew Charlton, *Fair Trade for All: How Trade Can Promote Development* (Oxford University Press on Demand 2005) 46–49.

[40] Eugénia da Conceição-Heldt, *Negotiating Trade Liberalization at the WTO: Domestic Politics and Bargaining Dynamics* (Springer 2011) xiii.

[41] Nicholas Perdikis, Robert Read and International Economics Study Group, *The WTO and the Regulation of International Trade: Recent Trade Disputes between the EU and the United States* (Edward Elgar Publishing 2005) 1–15.

[42] Philipp Aerni, Christian Haberli and Baris Karapinar, 'Reframing Sustainable Agriculture', *The prospects of international trade regulation: From fragmentation to coherence* (Cambridge University Press 2011) 189.

context is about protectionism,[43] how to strike proper balances between trade liberalization and protection will remain to be the primary legal challenges to the GATT/WTO multilateral trading system.[44]

3) Policy space is an issue of flexibility

Policy space is normally couched in those WTO provisions granting Members flexibility in international commitments, therefore in many cases the term "policy space" has been interpreted by international lawyers as a synonym of the "special and differential treatment" (S&DT) provisions in the WTO agreements. For instance, Rolland points out that more generally, the call for policy space at the WTO translates into demands for flexibility in the regulations of trade policy.[45] Corrales-Leal says that in the policy space dimensions of trade rules, developing Members might deserve implying flexibilities in international trade regimes, mainly in disciplines related to "behind the border measures" to implement active policies to tackle supply-side constraints and improve competitiveness.[46] Hoekman argues that traditionally the S&DT has been sought by developing Members in the GATT/WTO to increase the development relevance of the multilateral trading system by bargaining for greater flexibility and "policy space" to protect their infant industry from foreign competition for a period of time. However, this old approach to S&DT has not been effective and a new framework or a soft law approach that operationalizes the concept of policy space beyond the S&DT is needed.[47] Van den Bossche observes that S&DT provisions are

[43] "With the growth of economic integration, and with the growth of national regulation, the question of the scope of application of regulatory law may increasingly be understood as a trade issue and has increasingly been addressed in international trade law. This seems appropriate to the extent that the greatest concern raised by the exercise of regulatory authority is protectionism." Trachtman (n 32).

[44] "The URAA (Uruguay Round Agreement on Agriculture) created a new structure of protection, which was intended to make future liberalization more straightforward and created new rules and agreements that should also open markets up. On the other hand, there is widespread agreement that it did not actually liberalize trade very much itself." Ingco and Winters (n 38).

[45] Sonia E Rolland, *Development at the WTO* (Oxford University Press 2012) 266.

[46] Werner Corrales-Leal, *Basic Concepts and Proposals on the Use of Policy Spaces in Trade-Supported Strategies for Sustainable Development* (ICTSD International Centre for Trade and Sustainable Development 2007) ix.

[47] Bernard Hoekman, 'Operationalizing the Concept of Policy Space in the WTO: Beyond Special and Differential Treatment' (2005) 8 Journal of International Economic Law 405.

accommodated into almost all WTO agreements and they include provisions allowing for flexibility of commitments, of actions, and use of policy instruments.[48] Qureshi further explains that key elements of S&DT include transitional periods for implementing obligations, temporary departures from WTO commitments, certain obligations on developed Members to accord preferential treatment to developing Members and technical assistance. In Brief, S&DT involves departures from certain basic free-trade tenets set out in the WTO--in particular non-discrimination.[49] A WTO staff working paper argues that S&DT provisions should be tailored to a clear and systematic formulation of the national economic needs of developing Members. Therefore, there shall be development-related eligibility thresholds. Once these measurable needs diminish and disappear, so too would the right of a Member to the S&DT provision in question.[50] A working paper from the South Centre illustrates that S&DT dates back to Articles XVIII and XXVIII bis of GATT 1947. However, with the scope of the multilateral trading system having been expanded to an array of new agreements in the Uruguay Round, including the AOA, the wide scope and integrated nature of S&DT in GATT 1947 was not replicated in the Uruguay Round Agreements. Appearing only as an 'add-ons' in these agreements, S&DT has largely taken the form of a transitional device providing developing Members with longer timeframes to implement their commitments and only slightly reduced obligations vis-à-vis developed Members. Anyway, S&DT remains developing Members' preferred mechanism in the multilateral trading system to improve and restore national policy space for development. The expansion of policy space of developing Members depends on how the S&DT provisions in key areas are improved.[51] And it seems that this point has been inexplicitly supported by the Doha Declaration, which takes notice of concerns expressed regarding the operation of S&DT provisions in addressing specific constraints faced by developing Members. In that connection, the S&DT provisions

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[48] Peter Van den Bossche, *The Law and Policy of the World Trade Organization: Text, Cases and Materials* (Cambridge University Press 2008).

[49] Asif H Qureshi, *Interpreting WTO Agreements: Problems and Perspectives* (Cambridge University Press 2015) 92–93.

[50] Alexander Keck and Patrick Low, 'Special and Differential Treatment in the WTO: Why, When and How?' 30 <https://www.wto.org/english/res_e/reser_e/ersd200403_e.doc> accessed 26 December 2017.

[51] Hamwey (n 2)17.

should be reviewed with a view to strengthening them and making them more precise, effective and operational.[52]

However, there is a need to reiterate that flexibility in policy space is not a privilege just for developing Members or policy space does not mean S&DT provisions only. In most cases, WTO agreements are made on the basis of necessary flexibility in rules for developed Members as policy space is quite important for them as well. In this light, Rodrik argues that the only way for developing Members to get out of the conundrum about the inconsistency between their demands for maneuvering space to implement their development policies and their complaints about Northern protectionism in agriculture, textiles, and labor and environmental standards is to restrict the policy space of developed Members in exchange for defense of their legitimate need for maneuvering space. He also argues that a key implication of the shift for the WTO from being devoting largely to bargaining over market access to a developmental mindset would be that developing Members have to articulate their needs not in terms of market access, but in terms of the policy autonomy that will allow them to exercise institutional innovations that depart from prevailing orthodoxies.[53]

Governance, balance and flexibility are very important elements to the definition of policy space. However, the definition of the term is quite context bound, and it might vary with the specific circumstances when it is referred to. For instance, when we talk about policy space of developing Members, it may mean the balance of rights and obligations of developing Members compared to their developed Member counterparts. It may also mean the flexibility in terms of obligations enjoyed by developing Members. For the purpose of the current research, the term "policy space" means the maneuvering space of regulatory autonomy or discretion that WTO Member governments have enjoyed under the multilateral agricultural trading system to pursue their own development policies without violating their international obligations resulting from the AOA and other WTO agreements. As the study focuses more specifically on the import

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[52] World Trade Organization, 'Doha Declaration' <https://www.wto.org/english/res_e/booksp_e/ddec_e.pdf> accessed 15 December 2017.

[53] Dani Rodrik, 'The Global Governance of Trade As If Development Really Mattered', *Harvard University* (Citeseer 2001) <https://drodrik.scholar.harvard.edu/files/dani-rodrik/files/global-governance-of-trade.pdf> accessed 25 December 2017.

protection for agricultural products, policy space purports to be the maneuvering room provided by the lawful instruments of protection as approved or acquiesced by the AOA, against the backdrop that the long-term objective of the AOA aims at substantial progressive reductions in agricultural support and protection or correcting and preventing restrictions and distortions in world agricultural markets. Policy space is a transitional or comprised arrangement of the AOA to achieve a balance between agricultural protection and agricultural trade liberalization. The bigger policy space for import protection a Member is entitled to, the less obligations in agricultural trade liberalization it has, and vice versa.

2.2 Members' Policy space for import protection under the AOA

Nowhere is the tension between the critics and the proponents of the existing multilateral trading system more evident than in matters of agricultural policy.[54] As far as the AOA is concerned, there are also some deeply grounded legal tensions. On the one hand, the AOA stresses that its mandate is to phase out the agricultural support and protection with a view to achieving the long-term objective for establishing a fair and market-oriented agricultural trading system. To do with that, the AOA imposes legal restrictions on Members' choices for policy instruments concerning barriers to trade or trade-distorting domestic support.[55] On the other hand, it calls upon in its preamble that the AOA should aim at not only correcting market intervention of Member governments that distort trade, but also providing them with even playing fields or equal footing in order to allow them to pursue such key policy objectives as "raising standards of living, ensuring full employment, optimal use of world's resources in accordance with the objective of sustainable development, protecting and preserving the environment and enhancing the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development" as identified in the Preamble of Marrakesh Agreement Establishing the World Trade Organization (the WTO Agreement). For that purpose, the AOA has authorized a range of legal instruments of protection to guard WTO Members against the risks of market

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[54] Carmen G Gonzalez, 'Institutionalizing Inequality: The WTO Agreement on Agriculture, Food Security, and Developing Countries' (2002) 27 Colum. J. Envtl. L. 433, 433–437.

[55] Tim Josling, 'New Trade Issues in Food, Agriculture and Natural Resources', *The Oxford Handbook on the World Trade Organization* (Oxford University Press 2012) 1512.

disruption or price fluctuations stemming from their commitments in market access and agricultural subsidies. As agricultural trade liberalization and trade protection represent two conflicting policy orientations, there is an inevitable tension between the long-term objective of the AOA for establishing a fair and market-orientated multilateral agricultural trading system and the short and mid-term policy objectives of WTO Members for providing effective protection to their farmers against import surges or unfair competition at international market. Therefore, how to strike a delicate balance between the two contradictory policy objectives that are harbored in the AOA will remain to be a great challenge to WTO Members. [56]

2.2.1 Factors Affecting the Balancing of Members' Policy space for import protection

Given the critical importance of agriculture to the economic development of developing Members, there has always been a strong call from developing world for re-discovering the importance of national policy space in domestic industry protection,[57] so as to enable them to have reasonable policy space to pursue agricultural policies that are supportive of their development goals, poverty reduction strategies, food security and livelihood concerns.[58] For instance, African, Caribbean and Pacific (ACP) Group of States, the African Union (AU) and the Least Developed Countries (LDCs) (commonly known as G90) reaffirm "balanced rules that provide developing Members the policy space to pursue development policies most suited to their levels of development and needs" as one of the three benchmarks to assess the development dimension of the Doha

[56] Michael J Trebilcock and Robert Howse, *The Regulation of International Trade* (3rd edn, Routledge 2005) 349–379.

[57] "The developing countries fought to re-affirm the need for countries to have 'policy space'. This concept…implies that developing countries should be given the right to make use of policies and instruments required for their development. Many trade and investment agreements have been identified as containing provisions that restrict or even eliminate the ability of developing countries to pursue pro-development policies." Martin Khor, 'The South Centre | UNCTAD XIV Reaffirms UNCTAD Mandates, but Only after Significant Wrangling' <https://www.southcentre.int/question/unctad-xiv-reaffirms-unctad-mandates-but-only-after-significant-wrangling/> accessed 26 December 2017.

[58] Annex A, Framework for Establishing Modalities in Agriculture, the General Council's Decision on the Doha Agenda Work Program on 1 August 2004 (the "July package 2004"), https://www.wto.org/english/tratop_e/dda_e/draft_text_gc_dg_31july04_e.htm, accessed Oct.23, 2017.

Round.[59] These political calls from developing Members for balanced policy space came into being as a response to the contraction of their national policy space resulting from the domestic "endogenous" constraints and international "exogenous" constraints.[60]

As a multilateral agreement, the AOA also sets up the boundary of Member governments' policy space by relevant rules on the type of border protection allowed and the conditions of export competition and the nature of domestic support programs.[61] Each of these disciplines implies a reduction of policy space, regardless of whether or not they had been used at the time of ratification.[62] However, the scope or magnitude of policy space of Members are determined by their individual or collective capacity to negotiate the terms of contract with other Members for their rights and obligations and the eventual flexibility embodied in their scheduled concessions. For instance, Mathews argues that a WTO member's policy space in agricultural subsidies is defined by its right to exempt support under some policies from being calculating into its current AMS, which is subject to certain limits.[63] Here, a Member's right is not automatically granted, it has been gained through harsh and asymmetric bilateral or multilateral negotiations with other business partners who have strong commercial interests in entering its domestic markets. This is particularly the case for the RAMs or Article XII Members, who became a Member after the WTO was founded in 1995 in accordance with the Article XII of the WTO Agreement. In this respect, the unique commitments of the 8.5 per cent *de minimis* support made by China and Kazakhstan (normally 5 or 10 per cent

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[59] The other two benchmarks are: enhanced market access of interest to the developing countries; and capacity building programs and technical assistance for strengthening supply-side capacity of G-90 countries. G90, 'G90 Declaration on the WTO Hongkong Ministerial Conference' <http://cms2.caricom.org/documents/10071-g90_declaration_on_the_sixth_wto_ministerial_conference.pdf> accessed 26 December 2017.

[60] Hamwey (n 2).

[61] Stefan Tangermann and Tim Josling, 'The Interests of Developing Countries in the next Round of WTO Agricultural Negotiations', *UNCTAD Workshop on Developing a Proactive and Coherent Trade Agenda for African Countries, Pretoria* (1999).

[62] Aerni, Haberli and Karapinar (n 42) 189.

[63] Alan Matthews, 'Food Security and WTO Domestic Support Disciplines Post-Bali', *ICTSD Issue Paper No. 53* (2014) 19 <https://www.ictsd.org/sites/default/files/research/Food%20Security%20and%20WTO%20Domestic%20Support%20Disciplines%20post-Bali.pdf> accessed 7 December 2017.

for developed or developing Members respectively) have always been cited as an immediate example to challenge the legal issue about the trade-offs between the fairness of the WTO rules and the need for policy space.[64] However, there is a different voice that Members are taking advantage of the wide policy space available under the AOA and exploiting the loopholes in the AOA rules to ensure that they can continue with their highly protectionist policies or using the ample policy space in ways that are hardly in line with the spirit of the AOA.[65]

The AOA is an important first step towards the formation of a legitimate global trade regime capable of removing barriers to trade[66] so as to put an end to agriculture's long-protected status or "exceptionalism" from international disciplines[67] and integrate it into the multilateral trading system. At this important juncture, the AOA has laid down rules and disciplines to guide WTO Members to undertake the necessary reform process of their domestic agricultural policies to fulfill their relevant international commitments in agricultural trade liberalization. Considerable accomplishments have been achieved in this regard, such as improvements in market access and transparency from tariffication, and classification and reduction of domestic support measures that most distort trade.

However, under the current framework of the AOA, protection of agriculture is still perceived by Member governments as an effective means of ensuring consumers reasonable prices and protecting producers against fluctuations in the price of agricultural products so as to guarantee stable food supply at home.[68] Therefore, protection has not been outlawed by the AOA. Instead it has been recognized and shaped into a number of instruments of protection in both the market access and domestic support pillars of the AOA. That is why the WTO considers “freer trade:

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64 Irene Musselli, ‘Farm Support and Trade Rules: Towards a New Paradigm under the 2030 Agenda’ 13 <http://unctad.org/en/PublicationsLibrary/itcdtab76_en.pdf> accessed 26 December 2017.

65 Aerni, Haberli and Karapinar (n 42) 169, 188.

66 Cody A Thacker, ‘Agricultural Trade Liberalization in the Doha Round: The Search for a Modalities Draft’ (2004) 33 Ga. J. Int’l & Comp. L. 721, 721–731.

67 Randy Green, ‘The Uruguay Round Agreement on Agriculture’ (1999) 31 Law & Pol’y Int’l Bus. 819, 819–820.

68 Fabian Delcros, ‘Legal Status of Agriculture in the World Trade Organization, The’ (2002) 36 J. World Trade 219, 219.

gradually, through negotiation" as one of the founding principles of the multilateral trading system, and believes that "opening markets can be beneficial, but it also requires adjustment. The WTO agreements allow Members to introduce changes gradually, through 'progressive liberalization'. Developing Members are usually given longer period of implementation to fulfil their obligations."[69] Moreover, various S&DT provisions or exceptional arrangements have been made to accommodate Members' concerns over food security,[70] animal welfare, food quality[71] or non-trade concerns,[72] which have, to a great extent, derogated or undermined the strictness of the rules or raise difficulties for the future liberalization of international agricultural trade. All of these political economy considerations will continue to prevail when Member governments consider further commitments in trade liberalization.[73] As the WTO itself says, that balance is the key to rule-making deals in the WTO. The balance that emerged from the AOA is between agricultural trade liberalization and governments' rights to pursue legitimate policy goals in the agriculture sector.

The AOA does not give a specific explanation about on what basis these abstract political economy considerations that claim import protection can be considered as legitimate, which has made it hard to measure the exact spectra of Members' policy space. For instance, many developed Members claim import protection on the grounds

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[69] 'WTO | Understanding the WTO - Principles of the Trading System' <https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm> accessed 9 December 2017.

[70] Melaku Geboye Desta, 'Food Security and International Trade Law' (2001) 35 J. World Trade 449, 449.

[71] 'WTO | Agriculture - Negotiations Backgrounder - Animal Welfare, Food Quality' <https://www.wto.org/english/tratop_e/agric_e/negs_bkgrnd12_animalw_e.htm> accessed 27 December 2017.

[72] Fiona Smith, '"Multifunctionality'and'non-Trade Concerns" in the Agriculture Negotiations' (2000) 3 Journal of International Economic Law 707, 707–713.

[73] "Although there is no dispute over the logic of the terms of trade argument, there is disagreement over its practical relevance for trade agreements. In tariff-setting discussions among policymakers, one does not typically observe any reference to the terms of trade. Instead, in providing protection to particular sectors, policy makers cite such justifications as equality considerations, e.g. protecting employment and income levels of unskilled labor, offsetting unfair practices on the part of foreign countries, such as dumping, and responding to the pressures of politically powerful industries… In other words, government pursue political objectives in their tariff-setting actions". Narlikar, Daunton and Stern (n 37) 129.

of non-trade concerns (NTCs) or multi-functionality of agriculture, which seems to be hard to determine of the boundaries of this vague and controversial term. For this reason, it is believed that the purpose of claiming NTCs by the European Union and some other developed Members is to create some sort of "negotiating space" in the Doha Round, rather than policy space for import protection.74However, the AOA does provide for quantitative and qualitative criteria for every specific instrument of protection, and these criteria are not only instrumental in incarnating Members' political economy considerations for import protection, but also essential in calibrating Members' policy space resulting from the various limitations as imposed by these criteria.

2.2.1.1 Legitimate Policy Objectives for Agricultural Import Protection

(i) **Food Security**

As previously articulated, food security has become the paramount legitimate justification or concern for most WTO Members to claim the need of relevant policy space for import protection under the AOA. The reasons are very simple. Agriculture and related land uses are multi-functional, serving environmental, economic and social functions.[75] However, the first and foremost role of agriculture remains the production of food and other primary goods and contributing to food security.[76] In this context, the primary responsibility of the national governments of WTO Members is to guarantee their national food security and to make sure their citizens not to suffer from hunger,[77]

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[74] Joseph McMahon and Melaku Geboye Desta, *Research Handbook on the WTO Agriculture Agreement: New and Emerging Issues in International Agricultural Trade Law* (Edward Elgar Publishing 2012) 277–278.

[75] World Trade Organization, 'The WTO Agreements Series: Agriculture' <https://www.wto.org/english/res_e/booksp_e/agric_agreement_series_2.pdf> accessed 27 December 2017.

[76] Issues Paper: The Multifunctional Character of Agriculture and Land, Paper prepared for FAO/Netherlands Conference on "The Multifunctional Character of Agriculture and Land", Maastricht, Netherlands, September 12-17, 1999. http://www.fao.org/mfcal/

[77] "Food security exists when all people, at all times, have physical, social and economic access to sufficient, safe and nutritious food which meets their dietary needs and food preferences for an active and healthy life. Household food security is the application of this concept to the family level, with individuals within households as the focus of concern. Food insecurity exists when people do not have adequate physical, social or economic access to food as defined above." Food and Agriculture Organization of the United Nations, 'Trade Reforms and Food Security: Conceptualizing the Linkages' 29 <http://www.fao.org/3/a-y4671e.pdf> accessed 22 May 2018.

as the food riots associated with food price spikes or food shortages may threaten the sociopolitical stability of Members.[78] This commitment has been translated into Goal 2 of the sustainable development goals (SDGs), which calls for an end to hunger and to ensure access by all people, in particular the poor and people in vulnerable situation, to safe, nutritious and sufficient food all year round by 2030. Moreover, achieving food security will greatly improve the chances of meeting other SDGs goals, for instance, poverty reduction (Goal 1), education (Goal 4), and health (Goal 3).[79] In order to better monitor progress towards the achievement of SDGs in agriculture, Food and Agriculture Organization of the United Nations (FAO) has identified more than 20 indicators across 6 SDGs under its own custodianship. These indicators include hunger and food security (SDG indicator 2.1.1 and 2.1.2), the income and productivity of small-scale food producers (SDG indicator 2.3.1 and 2.3.2), the sustainability of agricultural production (2.4.1), the biodiversity of plants and animals (2.5.1 and 2.5.2) , the investment in agriculture (2.a.1), food price volatility (2.c.1), women's access to agricultural land ownership (5.a.1 and 5.a.2), water use efficiency and water stress (6.4.1 and 6.4.2), food loss (12.3.1). As we can see, these SDGs indicators are related to three fundamental issues: food security, right to adequate food and sustainable agricultural development. Though these highest profile SDGs commitments are not legally binding, WTO Members governments are expected to take ownership and establish a national framework or relevant food policies for achieving these goals, including ending hunger and achieving food security.[80] It is well accepted that food security encompasses four dimensions: availability, stability of supply, access and utilization,[81] open markets and free trade have a pivotal role to play in ensuring global food security by making contributions to some aspects of food security. However, there are legitimate concerns about potentially negative effects that may follow from greater trade openness on Members' national food security and how those effects should be

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[78] Christopher B Barrett, *Food Security and Sociopolitical Stability* (OUP Oxford 2013).

[79] Basudeb Guha-Khasnobis, Shabd S Acharya and Benjamin Davis, *Food Security: Indicators, Measurement, and the Impact of Trade Openness* (Oxford University Press 2007).

[80] 'Hunger and Food Security - United Nations Sustainable Development' <https://www.un.org/sustainabledevelopment/hunger/> accessed 24 May 2018.

[81] 'FAO: An Introduction to the Basic Concepts of Food Security' <http://www.fao.org/docrep/013/al936e/al936e00.pdf> accessed 23 May 2018.

managed.[82] Generally speaking, there is a broad consensus among WTO Members about the need for protecting Members' policy space in food security, the only concern is how to make sure that food security will not be abused as an excuse for trade protectionism.

Food security has been translated into various provisions of the AOA concerning: 1) food production (e.g. input credit and agricultural subsidies, capital expenditure and investment promotion); 2) marketing (e.g. market development, parastatal reform and food price stabilisation); 3) labour (e.g. promotion of high-value export crops and small and medium enterprises); 4) transfers and safety nets (e.g. labour-intensive public works programmes and 5) targeted feeding programmes). These provisions cover all the three pillars of the AOA, including market access (tariff reduction, sensitive products or special products, TRQ administration and SSG or SSM), domestic support (Green Box, food stockpile, Amber Box, Development Programs, de miminis), and export competition (export subsidies, export credit, export state-trading enterprises and food aid).

(ii) Right to Adequate Food

The human right dimension embedded in the food security concept shall also be taken into account when we examine the need of Members' policy space in agricultural protection. The right to adequate food is deemed to be the major legal expression of food security,[83] which has been first recognized by Article 11 of the International Convent on Economic, Social and Cultural Rights (ICESCR).[84] Article 11 of the

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[82] OECD, *Global Food Security: Challenges for the Food and Agricultural System* (OECD Publishing 2013) 12 <http://www.oecd-ilibrary.org/agriculture-and-food/global-food-security_9789264195363-en> accessed 24 May 2018.

[83] "The Economic and Social Council of the United Nations defines the right to adequate food in terms that are quite similar to the ones used by FAO to describe food security; except that the Council adopts a human rights language and speaks of 'every man, woman and child' instead of 'all people': 'The right to adequate food is realized when every man, woman and child, alone or in community with others, has physical and economic access at all times to adequate food or means for its procurement.'" Otto Hospes and Irene Hadiprayitno, Governing Food Security: Law, Politics and the Right to Food (Wageningen Academic Pub 2010) 20.

[84] Article 11 of the ICESCR provides that "1. The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will

ICESCR reinforces the importance of international cooperation to the achievement of the right to adequate food, though it does not specify the relevant forms of international cooperation. The multilateral or bilateral free trade agreements among WTO Members could be counted as a kind of international cooperation in this regard. The Economic and Social Council of the United Nations (ECOSOC) has further elaborated the notion of adequate food in Article 11 of the ICESCR, but it is believed that the right to adequate food is understood as addressing issues of nutrition, safety and cultural acceptability.[85]

Human rights serve dual purposes in terms of defining the scope of state obligations. At the national level, they intend to set limits on and give direction to the exercise of state power and policy choice, and to establish guarantees that cannot be neglected or set aside by policy makers. Meanwhile at international level, they urge state Parties to international human rights conventions to abide by legally binding obligations in human rights as established by those conventions.[86] For instance, Article 2(1) of the ICESCR urge the State Party to take steps…to the maximum of its available resources, with a view to achieving **progressively** the full realization of the recognized human rights. It is widely recognized that States have three types or levels of obligations or the so-called tripartite typology of obligations under the international human rights law: the obligations to respect (the duty to respect is a duty to refrain from activities that harm human rights), to protect (the duty to protect is the duty to take reasonable measures to protect people from harm to their human rights by other entities) and to fulfil (the duty to fulfill includes the duty to take the measures necessary to ensure that

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take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent. 2.The States Parties to the present Covenant, recognizing the fundamental right of everyone to be free from hunger, shall take, individually and through international co-operation, the measures, including specific programs, which are needed:
(a) To improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge, by disseminating knowledge of the principles of nutrition and by developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilization of natural resources; （b）Taking into account the problems of both food-importing and food exporting countries, to ensure an equitable distribution of world food supplies in relation to need." 'OHCHR | International Covenant on Economic, Social and Cultural Rights' <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx> accessed 25 May 2018.

[85] Hospes and Hadiprayitno (n 83) 91–94.

[86] Hospes and Hadiprayitno (n 83) 109.

individuals enjoy their human rights).[87] The obligation to fulfil incorporates both an obligation to facilitate and an obligation to provide.[88] These human rights obligations will have tremendous weight on Members' legal policy space for import protection as any move towards agricultural trade liberalization will have profound implications on Members' national food security as well as their people's right to adequate food.

Trade has an important role to play in achieving the right to adequate food: trade can help guarantee the enjoyment of human rights by improving opportunities for economic growth, job creation and the diffusion of technology and capital, and can contribute to development and the eradication of poverty. Trade can, however, also threaten human rights in some situations. As regards multilevel governance, it is a national responsibility to promote and protect human rights when negotiating and implementing international rules on trade liberalization. In order to ensure the most appropriate human rights regulations, assessments of the impact of trade policies are fundamental. It is the role of national governments to study the impact of trade agreements and liberalization. If trade is being liberalized, then Members with well-designed social and labour market policies are better positioned to reap the benefits and cope with possible adverse effects.

In practice, the FAO Voluntary Guidelines to Support the Progressive Realization of the Right to Adequate Food in the Context of National Food Security (Right to Food Guidelines, RtFG) not only provide practical tools that focus primarily on national responsibilities and actions for the implementation of the right to food, but also require the AOA to adopt a human rights-based approach (HRBA) to deal with trade and investment issues in the multilateral trading negotiations. The RtFG and the HRBA require Members to take those aspects into account: the multilateral agricultural trading system needs to provide fairer trading opportunities so that all countries can benefit from trade, and the agricultural producers can gain better outcomes, and the resources available for use in implementing state obligations under the right to adequate food will be increased. Therefore, the RtFG call for the adoption of measures at the national level that ensure that "the widest number of individuals and communities, especially disadvantaged groups, can benefit from opportunities created by competitive

[87] Sarah Joseph, *Blame It on the WTO: A Human Rights Critique* (Oxford University Press 2013) 22–23.

[88] Hospes and Hadiprayitno (n 83) 110–117.

agricultural trade". Member States are also urged to implement commitments expressed in several occasions to limit the potential negative impact of their own trade policies on other countries and their producers, particularly in relation to improvements in market access, the elimination of export subsidies, and the substantial reduction in trade distorting domestic support. States need to maintain an adequate policy space in international trade agreements in order to guarantee that all individuals and communities, especially disadvantaged groups, can benefit from opportunities created by agricultural trade as well as trade in other sectors, meanwhile they need to take into account the shortcomings of market mechanisms in protecting the environment and public goods. [89]

(iii) Sustainable Agricultural and rural Development (SARD)

Sustainable development means meeting the needs of the present whilst ensuring future generations can meet their own needs. This broad definition originated from the so-called Brundtland Report[90] or Commission on Environment and Development in 1987 and were confirmed by the 1992 Rio Declaration.[91] It is widely accepted that the concept of sustainable development has three pillars: economic, environmental and social, however the concept serves primarily as a widely accepted objective for the management of natural resources. To achieve sustainable development, policies in these three areas have to work together and support each other.[92]

As the main economic activity and the primary industry in most developing countries, agriculture holds key to the achievement of sustainable development. There are a number of critical environmental, social, economic and institutional challenges for rural transformation and sustainable agriculture to be overcome, including the elimination of rural poverty and strengthening rural-urban linkages, intensification of agricultural production and sustainable land and water management to feed growing

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[89] Sisay Yeshanev and Michael Windfuhr, 'International Dimensions of the Right to Adequate Food' (FAO 2014) 2 <http://www.fao.org/3/a-i3896e.pdf> accessed 22 January 2019.

[90] 'Brundtland Commission' <http://www.un-documents.net/our-common-future.pdf> accessed 11 July 2018.

[91] Peter Orebech and others, *The Role of Customary Law in Sustainable Development* (Cambridge University Press 2005) 12–15.

[92] 'Sustainable Development - Trade - European Commission' <http://ec.europa.eu/trade/policy/policy-making/sustainable-development/> accessed 11 July 2018.

population, fresh water scarcity, increased land degradation and deforestation, wasteful land conversion control, greenhouse gas emission and climate change, environmental protection and biodiversity loss, and creation off-farm economic opportunities. [93] The food-energy-water or climate-land-energy-water-development nexus is crucial to agricultural sustainability. Besides that, other priority themes, including employment, education, health, biodiversity and sustainable consumption and production, gender equality and women's empowerment, and the special concerns of Africa, LDCs and Small Island Developing States (SIDS) are also of relevance to sustainable agriculture.[94]

There is growing concern regarding the relationship between agricultural trade liberalisation under the World Trade Organisation (WTO) and policy measures taken to protect the environment and promote sustainable agriculture and rural development (SARD). SARD is about the management and conservation of the natural resource base, including land, water, plant and animal genetic resources and the orientation of technological and institutional change in such a manner as to ensure the attainment and continued satisfaction of human needs for present and future generations. SARD is environmentally non-degrading, technically appropriate, economically viable and socially acceptable. Growth, equity, efficiency and sustainability are the four policy objectives that SARD pursues.[95]

The direct embodiment of SARD in the AOA is the environmental programs as prescribed by Paragraph 12 of the Annex II. However, SARD is a multi-faceted issue. Besides that, there are three other fundamental issues deserving attention: biofuel production and expansion, climate changes and the concerns over smallholder agriculture or farmers. The first two issues might have some close links to each other

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[93] World Bank, *World Development Report 2003: Sustainable Development in a Dynamic World: Transforming Institutions, Growth, and Quality of Life* (Oxford University Press 2002) xviii.

[94] 'TST Issues Brief: Sustainable Agriculture' (2013) <https://sustainabledevelopment.un.org/content/documents/1802tstissuesagriculture.pdf> accessed 24 June 2018.

[95] 'Issues Paper: The Multifunctional Character OF Agriculture and Land Table of Contents' <http://www.fao.org/docrep/x2775e/X2775E00.htm#TopOfPage> accessed 22 January 2019.

as a main motivation for the promotion of biofuels is the potential contribution to climate change mitigation by reducing GHG emissions from transport.[96]

1) Biofuel production and expansion. With many major countries increasing their financial support for biofuel production and world food prices spikes taking place one after the other in 2008 and 2012, biofuel expansion is emerging as a common concern of WTO Members as it may have negative impacts on food security and sustainable development due to the competition that it has brought about between food-based biofuel production and food for human consumption for agricultural resources, such as land, water, fertilizer use, etc. [97]It is widely accepted that energy security, climate change mitigation, foreign exchange savings and rural development are the principal driving forces for biofuel expansion, which has been associated with a number of positive and negative socioeconomic and environmental impacts, including land use change, biodiversity loss, water consumption, and deforestation. However, none of these impacts is more emblematic than the potential impacts of biofuel expansion on food prices and food security.[98] The controversy of biofuel production and expansion rests on the fact that corn production in the United States, the biggest corn exporter around the world, has been used for ethanol production rather than for export, which has caused the short supply of corn at international market and has driven up the prices for corn, wheat or any other related agricultural products. In the long run, biofuel expansion will continue to exert upward pressure on commodity prices. It will have profound implications for food security and poverty levels in developing countries on the one hand, meanwhile it will present an opportunity for promoting agricultural growth and rural development in developing countries on the other hand. [99] How to make sure Members' emerging legitimate policy objectives, such as biofuel expansion,

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[96] Mohamed Abdel Rahim M Salih, *Climate Change and Sustainable Development: New Challenges for Poverty Reduction* (Edward Elgar Publishing 2009) 238.

[97] Tatsuji Koizumi, *Biofuels and Food Security--Biofuel Impact on Food Security in Brazil, Asia and Major Producing Countries* (Springer 2014).

[98] Alexandros Gasparatos and Per Stromberg, *Socioeconomic and Environmental Impacts of Biofuels: Evidence from Developing Nations* (Cambridge University Press 2012) 3–5.

[99] FAO, *The State of Food and Agriculture. Biofuels: Prospects, Risks and Opportunities* (FAO, Roma (Italia) 2008) 85.

to be reflected in WTO law remains at issue.[100] It has been widely acknowledged that without various forms of government subsidies, biofuel production would not be economically viable, even with higher oil prices.[101]An immediate legal issue is that whether these subsidies for biofuel production are compliant with relevant WTO agreements, such as the SCM and the AOA. However, the WTO believes there are two major developments in disciplining trade in biofuel. First, trade in biofuel is not currently very significant and Members normally notify their measures on biofuel in the context of the TBT Agreement. Second, Members are still working on the HS classification of biofuel. Both biodiesel and bioethanol have been classified as agricultural products now, with biodiesel being put by the World Customs Organization (WCO) in Chapter VI on "products of chemical and allied industries" (HS 382490), while bioethanol being allocated to HS 2207 in Chapter 22 on "beverages, sprits and vinegar". However, the HS classification of biofuels might be subject to the outcome of the Doha negotiations on agriculture and non-agricultural market access (NAMA).[102] Besides that, biofuel measures used by the major producing Members include output-related assistance (mandates or targets that require a particular percentage of ethanol or biodiesel included in the total fuel supply, tax credits for biofuel production, producer incentives), support for factors of production (loans, infrastructure capital grants), distribution and use. Due to the various subsidies for biofuel production, biofuel production concerns mostly the domestic support pillar of the AoA.[103]

2) Climate change. Climate change and global warming has a profound impact on all agricultural sectors as agriculture is essentially a man-made adjunct to natural

[100] Robert Howse, Petrus van Bork and Charlotte Hebebrand, 'WTO Disciplines and Biofuels: Opportunities and Constraints in the Creation of a Global Marketplace', *Washington, DC: International Food & Agricultural Trade Council* (2006) <http://www.agritrade.org/Publications/DiscussionPapers/WTO_Disciplines_Biofuels.pdf>.

[101] Salih (n 96) 238.

[102] 'WTO | Trade and Environment - WTO and the Challenge of Climate Change' <https://www.wto.org/English/tratop_e/envir_e/climate_challenge_e.htm> accessed 4 July 2018.

[103] Toni Harmer, *Biofuels Subsidies and the Law of the WTO* (International Centre for Trade and Sustainable Development 2009) 4 <https://www.ictsd.org/sites/default/files/downloads/2012/02/biofuels-subsidies-and-the-law-of-the-wto.pdf>.

ecosystems and is weather and climate dependent.[104] At the same time agricultural sectors make significant contributions to GHG emissions. Due to this double significance of agriculture in climate change, the UN Framework Convention on Climate Change (UNFCCC) has identified agriculture as particularly vulnerable and particularly critical in terms of global impacts of climate change and urges Member governments to carry out international action to ensure the ultimate objective of stabilizing the GHG concentrations at a level that would prevent dangerous anthropogenic interference with the climate system shall be achieved within a time-frame sufficient to allow ecosystems to adapt naturally to climate change, to ensure that food production is not threatened and to enable economic development to proceed in a sustainable manner (Article 2, UNFCCC, 1992).[105] The Paris Agreement commits to curbing the effects of climate change by limiting the increase in global temperatures to well below two degrees Celsius and, if possible, substantially lower. To reach this ambitious goal, countries have made individual climate commitments, normally referred to as Intended Nationally Determined Contributions (INDCs), which have been converted to Nationally Determined Contributions (NDCs) once they ratify the Paris Agreement. [106]Hence, maintaining agricultural production has remained central to the policy objectives of both international and national climate change actions. To address the challenges brought about by climate change, two major options for policy intervention in agriculture have been suggested. The first strategy is mitigation, which aims to reduce the rate and magnitude of climate change itself through reducing the human causes of climate change i.e. mitigation of GHGs. The second or the complementary option is adaptation, which is to promote adaptation to climate change to minimize the negative impacts and take advantage of new opportunities. Adaptation in the climate change context may also involve adjusting to changes resulting from climate impacts elsewhere in the world (such as the possible effects on markets, changing comparative advantage, and increased migration) or changes resulting from

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[104] Wreford Anita, Moran Dominic and Adger Neil, *Climate Change and Agriculture--Impacts, Adaptation and Mitigation: Impacts, Adaptation and Mitigation* (OECD publishing 2010) 17.

[105] 'United Nations Framework Convention on Climate Change' <https://unfccc.int/resource/docs/convkp/conveng.pdf> accessed 4 July 2018.

[106] 'The Paris Agreement | UNFCCC' <https://unfccc.int/process-and-meetings/the-paris-agreement/the-paris-agreement> accessed 4 July 2018.

mitigation actions, such as increased biofuel production and changes in land-use. [107] Analyses show that agricultural sectors are among the main priorities in countries' mitigation contributions and adaptation objectives, such as crop and livestock production, land use and forestation, meanwhile countries' mitigation and adaptation actions are crucial for protecting and enhancing global food security and nutrition and achieving sustainable development. Therefore, it is important that countries shall prioritize their agricultural sectors in order to achieve the potential adaptation-mitigation synergies, meanwhile take into account the strong links between climate change and sustainable development. [108] It is believed that climate change adaptation is critical for agriculture and food security, [109] and thus it shall be incorporated into countries' national strategies through a climate-smart approach with a view to achieving agricultural development goals, for instance, building resilience in the entire food system, not just production systems. [110] As regards the relevance of WTO rules to Members' measures for climate change mitigation and adaptation, Article 3.5 of the UNFCCC and Article 2.3 of the Kyoto Protocol provide that measures taken to combat climate change should not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade and should be implemented so as to minimize adverse effects, including on international trade, and social, environmental and economic impacts on other Parties. Climate change issues fall squarely within the disciplines of the TBT Agreement. As regards to the AOA, one question is likely to arise on how payments made to incentivize agricultural producers to mitigate or adapt to climate change, deserves clarifications. Will these payments fit squarely into the

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[107] Anita, Dominic and Neil (n 104) 59.

[108] FAO, 'Turning Nationally Determined Contributions into Action-- FAO Support to Countries' <http://www.fao.org/3/a-i7791e.pdf> accessed 4 July 2018.

[109] "The five most important climate change adaptation categories include health, forestry, water, food and energy. Further findings show that the prioritization order of the adaptation approaches to climate change is as follows: health education, public sensitization, water supply infrastructure development, microfinance, and infrastructure and technology enhancement." Edward Saja Sanneh, *Systems Thinking for Sustainable Development* (Springer International Publishing AG 2018) 3.

[110] FAO, 'Sustainable Agriculture, Food Security and Climate Change' <http://www.fao.org/climatechange/35104-03138d212ca671c9c7a4551da1ba42e9f.pdf> accessed 4 July 2018.

‘green box' category remains unanswered.[111] In any circumstance, WTO rules leave sufficient policy space to accommodate under certain conditions the use of trade measures to protect the environment.[112]Properly interpreted, the existing WTO law should encourage, rather than pose obstacles to domestic or global policies designed to address climate change. Problems are most likely to arise where policies are intended in whole or in part to address competitiveness or ‘level playing field’ concerns about divergent domestic policies and regulatory burdens, as opposed to being intended to achieve climate change goals themselves, including by using trade pressure to induce countries not controlling emissions appropriately to adopt effective policies.[113]

(iv) Concerns over Smallholder Agriculture

Protection of smallholder agriculture[114] remains one of the biggest concerns in most developing Members for agricultural trade liberalization. Information from the FAO indicates that there are about 1.5 billion people around the world living in smallholder households and many of those households are extremely poor. However, smallholder farmers provide up to 80 percent of the food supply in Asian and sub-Saharan Africa, and they are the backbone of the national food security in most developing Members. Smallholder farmers detached from any type of market exchange are no longer significant in social or economic terms, and it is quite common that smallholder farmers

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[111] ‘Climate Change, Agriculture and Trade: Understanding the Linkages | International Centre for Trade and Sustainable Development’ <https://www.ictsd.org/bridges-news/biores/news/climate-change-agriculture-and-trade-understanding-the-linkages> accessed 22 January 2019.

[112] ‘WTO | Trade and Environment - WTO and the Challenge of Climate Change’ (n 102).

[113] Thomas Cottier, Olga Nartova and Sadeq Z Bigdeli, *International Trade Regulation and the Mitigation of Climate Change: World Trade Forum* (cambridge university Press 2009) 92.

[114] The definition of “smallholder agriculture” cannot be rigid or “one size fits all”: there are many variations in each specific context at the regional, national and local levels, and also over time as economies transform. Classifications of smallholder agriculture based only on farm size can be misleading. A smallholding is “small” because resources are scarce, especially land, and using it to generate a level of income that helps fulfil basic needs and achieve a sustainable livelihood consequently require a high level of total factor productivity, requiring in turn a significant level of investment. Smallholder agriculture is also defined in relation to, and in contrast with, two opposites – larger commercial holdings with hired labour on the one hand, and landless workers on the other. FAO High Level Panel of Experts on Food Security and Nutrition, ‘Investing in Smallholder Agriculture for Food Security’ <http://www.fao.org/fileadmin/user_upload/hlpe/hlpe_documents/HLPE_Reports/HLPE-Report-6_Investing_in_smallholder_agriculture.pdf>.

are producing only or mainly for subsistence. These farms rely on their own production for food consumption, as a complement to low monetary incomes. Their economic viability and contributions to diversified landscape is threatened by competitive pressure from globalization and integration into common economic areas.[115] The sustainability of smallholder farmers are subject to a series of constraints, such as limited or no access to market information, poor or non-existent infrastructure, difficulty in complying with increasing stringent quality and safety standards and other non-tariff measures (NTMs), imbalances in market power, productivity, technology and infrastructure-related constraints, and business environment-related constraints.[116]FAO summarizes the diversity of constraints to investing in smallholder agriculture can be attributed to three dimensions: assets (natural and productive assets, among which the natural resource endowment of the holding is a key factor), markets (markets and markets agents, unfavorable conditions, such as price volatility, lack of access to appropriate markets, lack of collective negotiating power and high transaction costs) and institutions (institutions and policy design, innovative and enabling institutional environments, smallholder organizations and collective action, recognition of their basic rights).[117]For that purpose, the UNCTAD recommended that the outcomes of the Doha Round benefit smallholder farmers, promote food security.[118] An appropriate strategy from the perspective of the right to food, and poverty reduction generally, is needed to empower small farmers so that they can sell their stocks at prices which enable them to become food secure and to maintain their livelihoods. Otherwise, smallholder farmers would be likely to lose from the trade liberalization process if no significant reform in better education, infrastructure, risk management, land tenure, safety nets was undertaken, or the trade liberalization was likely to favor large

[115] FAO, 'Factsheet_Smallholders.Pdf' <http://www.fao.org/fileadmin/templates/nr/sustainability_pathways/docs/Factsheet_SMALLHOLDERS.pdf> accessed 11 July 2018.

[116] UNCTAD Secretariat, 'The Role of Smallholder Farmers in Sustainable Commodities Production and Trade' (2015) TD/B/62/9 5–17 <http://unctad.org/meetings/en/SessionalDocuments/tdb62d9_en.pdf> accessed 7 November 2018.

[117] High Level Panel of Experts on Food Security and Nutrition (n 114) 13–16.

[118] UNCTAD Secretariat (n 116) 15–16.

agribusiness farms and exacerbate the gap and dichotomization between smallholders and agribusiness. [119]

These legitimate policy objectives are crucial to the definition of Members' policy space for import protection. As they are common concerns [120] to the whole WTO Membership, they have been accepted and reflected in various WTO laws or rules. They can be used as the legal benchmark to evaluate the soundness of Members' agricultural policies for carrying out import protection. For instance, if there is a Member asking for extra policy space for the protection of its sensitive agricultural products, let's say maintain TRQ administration over garlic, then we need to see to what extent the garlic sector will contribute to that Member's food security, right to adequate food or the relevance of its garlic sector to the achievement of sustainable development goals, such as climate change adaptation or mitigation, or concerns over smallholder farmers.

2.2.1.2 Four Dimensions That Deserve Consideration

However, in the long run, the thorny issue will continue to be how to strike subtle balances between making full use of the lawful instruments of import protection (defensive interests) to protect those sensitive products which are economically, socially or politically crucial to these legitimate policy objectives and advancing the mandate for greater agricultural trade liberalization (offensive interests). [121] In this

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[119] Joseph (n 87) 204.

[120] "Issues of common concern are those that inevitably transcend the boundaries of a single state and require collective action in response……They require cooperation. Furthermore, they necessarily imply a constraint on states' sovereignty. Concerns cannot be addressed by all stall agreeing that there is concern-like an interest-but by doing something about it. Yet, common concerns presuppose common interests. 'No state can resolve the problem they pose or receive all the benefits they provide. Harm to a matter of common concern is often widespread and diffuse in origin, making it difficult if not impossible to rely on traditional bilateral notions of state responsibility to enforce international norms. When the harm is mitigated, all or at least large parts of the community benefit. It is thus no surprise that common concern norms evolved at a time in international law, where it is 'at a turning point from a system balancing conflicting sovereign interests to one of constructive interaction for the common good'". W Benedek and others, 'The Common Interest in International Law' 19.

[121] Biswajit Dhar, 'Agricultural Trade and Government Intervention: A Perspective from A Developing Country', *Agricultural Trade: Planting the Seeds of Regional Liberalization in Asia, A Study by the Asia-Pacific Research and Training Network on Trade* (United Nations Publications 2007) 211.

context, there are four dimensions that affect the balancing of Members' policy space for import protection under the AOA:

1) The first immediate dimension refers to the balance between sensitive products and other agricultural products in terms of their pace of trade liberalization in an individual Member's trade profile.[122] A combination of average and minimum reduction approach has been adopted in the Uruguay Round for tariff cuts of agricultural products,[123] which allows Members the flexibility to vary their actual tariff reductions on individual tariff lines for agricultural products. Even if there are basic requirements for average and minimum reduction, some cuts will be more, some will be less, and it is quite possible that no single tariff for sensitive agricultural products is actually reduced by that amount.[124] In the Doha Round, sensitive products remain a quite contentious issue, because although they might help to reduce the political costs of individual Members for accepting the negotiated outcomes through discretionary smaller cuts on sensitive products,[125] they might also have the potential to undermine the overall ambition to reduce tariffs substantially. Ironically, the greater the ambition, the greater the potential effects of exemptions for sensitive products to undermine it. On the other hand, it has repeatedly been shown that WTO Members, both developed and developing, demand flexibility to protect their politically sensitive sectors.[126] Therefore, no one can deny that at the current stage the multilateral agricultural trading system aiming at trade liberalization still needs necessary and proper mechanisms for the protection of Members' sensitive agricultural products. The slow evolution of WTO negotiations gives a quite clear answer. The Chairperson's Texts 2008 or the latest

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[122] "Agriculture is also a socially and politically sensitive area which frequently leads to the exclusion of a certain number of agricultural products from tariff liberalization in regional and multilateral trade negotiations." David Vanzetti and Ralf Peters, 'Do Sensitive Products Undermine Ambition?', *52nd Annual Conference of the Australian Agricultural and Resource Economics Society* (2008).

[123] 'WTO | Agriculture - Negotiations Backgrounder - Market Access' <https://www.wto.org/english/tratop_e/agric_e/negs_bkgrnd11_ssg_e.htm> accessed 8 December 2017.

[124] 'WTO | Agriculture - Tariff Reduction Methods' <https://www.wto.org/english/tratop_e/agric_e/agnegs_swissformula_e.htm> accessed 27 December 2017.

[125] Sébastien Jean, David Laborde and Will Martin, 'Formulas and Flexibility in Trade Negotiations: Sensitive Agricultural Products in the World Trade Organization's Doha Agenda' (2010) 24 the world bank economic review 500, 500–519.

[126] Vanzetti and Peters (n 122).

revised draft “modalities” text (TN/AG/W/4/Rev.4),[127] which is believed to be the most updated document to reflect the state of play and the high level of convergence reached among Members on substantive issues of the multilateral negotiations, proposes a “tiered” formula with larger proportional cuts in higher bound tariffs for agricultural products while allowing, as exceptions, smaller cuts for “sensitive" agricultural products selected by members. Though Members have not reached consensus on the specific treatment of sensitive products, the concept of flexibility in sensitive products protection or trade liberalization has been widely accepted.

2) The second dimension is about the internal balance between the market access pillar and the domestic support pillar of the AOA in terms of import protection. The two pillars are closely intertwined. Though economists estimate that nearly 90 percent of the costs of protection or trade distortions arise from market access barriers and appeal for agricultural negotiations to focus primarily on market access pillar,[128]developing Members have a big stake in tariff protection as it constitutes their primary policy space for import protection. Meanwhile most developing Members have very little policy space in domestic support due to the constraints of financial resources. It is an area where developed Members have vested interests in disciplining and limiting Members’ policy space in using agricultural subsidies for expected objectives. However, without constraints on domestic support it is hard to envision success in multilateral negotiations to reduce agricultural tariffs, as some Members provide support for their farmers primarily through domestic measures while others rely more heavily on border protection.[129] The AOA has to strike a balance between the different vested interests of developing and developed Members in their policy space for import protection.

3) The third dimension relates to the balance between agriculture and any other subject of the negotiations, such as NAMA, TRIPs, GATS, competition, investment,

[127] ‘WTO | Agriculture - Chairperson’s Texts 2008’ <https://www.wto.org/english/tratop_e/agric_e/chair_texts08_e.htm> accessed 16 December 2017.

[128] Laborde Debucquet and Will Martin, ‘Agricultural Trade: What Matters in the Doha Round?’ (2013) IFPRI Discussion Paper 01251 1 <http://ssrn.com/abstract=2235660> accessed 27 December 2017.

[129] David Orden, David Blandford and Tim Josling, *WTO Disciplines on Agricultural Support: Seeking a Fair Basis for Trade* (Cambridge University Press 2011) 3.

trade facilitation and transparency in government procurement, under the principle of a single undertaking. The single undertaking means that all the WTO subjects for negotiations[130] form a single package to be signed by each Member with a single signature without any option to pick and choose between different subjects [131] or in the WTO-speak, “nothing is agreed until everything is agreed”.[132] The concept was initially designed to prevent Members from “cherry-picking” results or “harvesting” early outcomes from the negotiations unless all Members agreed.[133] It has been incorporated into Paragraph 47 of the Doha Declaration, which states that: "with the exception of the improvements and clarifications of the Dispute Settlement Understanding, the conduct, conclusion and entry into force of the outcome of the negotiations shall be treated as parts of a single undertaking. However, agreements reached at an early stage may be implemented on a provisional or a definitive basis. Early agreements shall be taken into account in assessing the overall balance of the negotiations." As regards the correlation between the single undertaking approach and the overall balance of outcomes of the multilateral negotiations, Kessie precisely observes that the overall balance of a package includes both the internal balance within each agreement and the external balance among all negotiated agreements.[134] The two dimensions of balancing have been reflected in the July 2008 package or the so-called draft “modalities” texts. The internal balance centers on the balance between the tiered formula for tariff reduction of agricultural products as indicated in revised draft modalities for agriculture (TN/AG/W/4/Rev.4) and the flexibility that Members have in designating a certain

[130] ‘WTO | Doha Development Agenda — Subjects Treated under the DDA’ <https://www.wto.org/english/tratop_e/dda_e/dohasubjects_e.htm> accessed 27 December 2017.

[131] ‘WTO | Doha Development Agenda — Texts Introduction’ <https://www.wto.org/english/tratop_e/dda_e/texts_intro_e.htm> accessed 27 December 2017.

[132] ‘WTO | How the Negotiations Are Organized’ <https://www.wto.org/english/tratop_e/dda_e/work_organi_e.htm> accessed 27 December 2017.

[133] Patrick Low, ‘WTO Decision-Making for the Future’ <https://www.wto.org/english/res_e/reser_e/ersd201105_e.pdf> accessed 27 December 2017.

[134] “One of the main advantages of the single undertaking approach is that it encourages countries to agree to tradeoffs in order to reach agreements. Thus, in evaluating the overall balance of a package, countries could look not only at the internal balance in each agreement, but across all the negotiated agreements to decide whether a careful balance has been struck between competing interests.” Edwini Kessie, ‘The Future of the Doha Development Agenda’, *European Yearbook of International Economic Law 2013* (Springer 2013) 481.

percentage of tariff lines as sensitive products to deviate from the otherwise applicable tiered reduction formula; while the external balance is the balance between different revised draft modalities for agricultural products (TN/AG/W/4/Rev.4) and non-agricultural products (TN/MA/W/103/Rev.3).[135] The external balance between agriculture and NAMA was recognized even earlier. For instance, Paragraph 24 of the 2005 Hong Kong Ministerial Conference Declaration states that "we recognize that it is important to advance the development objectives of this Round through enhanced market access for developing countries in both Agriculture and NAMA. To that end, we instruct our negotiators to ensure that there is a comparably high level of ambition in market access for Agriculture and NAMA. This ambition is to be achieved in a balanced and proportionate manner consistent with the principle of special and differential treatment." Agriculture is not in isolation in the multilateral trade talks, and its pace towards trade liberalization has linkages with broader negotiations, so the agricultural negotiations cannot precede or lag behind a comprehensive negotiating package to any great degree.[136] Agreement on modalities for both agriculture and NAMA, once reached, would allow WTO Members to prepare their detailed list of commitments or schedules.[137] The latter would, together with agreed disciplines in other areas of negotiations, such as services or intellectual property, constitute the elements for the final agreement concluding the Round.[138]

4) The fourth dimension involves the balance between the rights and obligations among the major players in the WTO negotiations. Extensive literature focuses on examining this issue from the perspective of trade dispute settlement, as Article 3.3 of

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[135] 'WTO | Doha Development Agenda | The July 2008 Package - Latest Negotiating Texts' <https://www.wto.org/english/tratop_e/dda_e/meet08_texts_e.htm> accessed 27 December 2017.

[136] Hans J Michelmann and others, *Globalization and Agricultural Trade Policy* (Lynne Rienner Publishers 2001).

[137] "The negotiations on agricultural and on nonagricultural reforms were undertaken independently, although it is clear that members would, in the final analysis, weigh up perceived benefits in one negotiation against any perceived losses in the other. Of course, in the WTO, nothing is agreed until everything is agreed, so some modifications to the proposals currently on the table would be likely if an overall—or a partial—agreement were to be reached." Debucquet and Martin (n 128) 1.

[138] European Commission on Agriculture and Rural Development, 'Agriculture in the Doha Round | Agriculture and Rural Development' <https://ec.europa.eu/agriculture/wto/doha-round_en> accessed 27 December 2017.

the Understanding on Rules and Procedures Governing the Settlement of Disputes provides that "the prompt settlement of a dispute between Members is essential to the effective functioning of the WTO and the maintenance of a proper balance between the rights and obligations of Members". However, Pauwelyn challenges it from a new angle by saying that both the weaknesses and strengths of the WTO enforcement regime need to be understood and interpreted as a balance of negotiated concessions, not primarily as a set of legal rules. At the foundation of a member-member relationship lies a delicate negotiated balance not only of rights and obligations explicitly enshrined in WTO agreements, but also of trade concessions exchanged at entrance and through a series of subsequent trade rounds.[139] He further argues that WTO obligations are not of the multilateral, integral or erga omnes partes type, but bilateral/reciprocal in nature. And WTO obligations are also of a continuing nature.[140] In the same vein, Schropp argues that the negotiated balance of rights and obligations among WTO Members hinges upon the political cooperation-equilibrium reached among them on their reciprocal market access entitlements, which are bilateral in nature.[141] Those remarks are partially subscribed to. The WTO obligations include two sets of distinctive obligations: WTO rule obligations that are set out in the WTO Agreement and its annexes, which are uniform and binding for all WTO Members, and the market access obligations of each specific Member, which are contained in that Member's goods schedules annexed to GATT 1994. Conversely, the market access obligations are country-specific or "tailor-made". Nevertheless, all the WTO obligations are made on the basis of negotiations, and even those market access obligations that are normally made on the basis of bilateral negotiations will have to be applied to all the other Members in accordance with the most-favored-nation (MFN) treatment principle. In this way, it does make sense to say that the fundamental GATT/WTO principle of balanced rights and

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[139] Joost Pauwelyn, 'Enforcement and Countermeasures in the WTO: Rules Are Rules-Toward a More Collective Approach' (2000) 94 The American Journal of International Law 335, 339.

[140] Joost Pauwelyn, 'The Nature of WTO Obligations' [2002] Jean Monnet Working Papers <http://www.jeanmonnetprogram.org/2002-jean-monnet-working-papers> accessed 27 December 2017.

[141] "The reciprocal market access entitlement is the single most important primary rule of the WTO. Parties bilaterally exchange market access concessions. They negotiate the liberalization of sectors and industries up to a political cooperation-equilibrium which is reached once the first government hits its optimal domestic political level." Schropp (n 34) 202.

obligations[142] is a negotiated balance of rights and obligations.[143] Power play is unavoidable in the WTO negotiations and rule-making process. Given the asymmetric bargaining position of Members,[144] it is always Members who have more leverage in the bilateral or multilateral negotiations that wring commercial advantages out of weaker economic partners. As the leading exporting and importing countries[145] play a dominant role in the rule-making process of the WTO negotiations, the balance of negotiated rights and obligations of WTO Members center normally on the balance of their rights and obligations. The AOA is still lacking on the balance of contributions and benefits between the US, the European Union (EU), Japan and the like on the one side, and India, China, Brazil and the like on the other side.[146] However, the direct

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[142] OECD believes that the principle of balanced rights and obligations is one of the guiding principles for agricultural legislation. OECD, *China's Agriculture in the International Trading System* (OECD 2001) 251.

[143] "With the increased interdependence of the global economy, the negotiated balance of rights and obligations in WTO have a greater importance since any deviation from the balance is more likely than ever to affect WTO Members. The growing international interdependence in the trade relations, on the other hand, is expected to complicate possible trade disputes because each Member will try to protect domestic commercial, social and political stability, using measures to the extent of not shattering International stability negotiated in the WTO. This 'liberal' international trading system has been retained in the WTO legal system in the shape of negotiated rights and obligations". Dae-Won Kim, *Non-Violation Complaints in WTO Law: Theory and Practice*, vol 9 (Peter Lang 2006) 5–6.

[144] "Although the organization operates on a one-country-one-vote basis and on a consensus mechanism (which formally also considers members on an equal basis), the reality of negotiations and of the decision-making process is much more complex and susceptible to the arbitrage of economic power. As a result, in most instances, developing countries have to act in coalitions in order to gain sufficient leverage and some developing country members have little—if any—voice if they do not ally with others. Despite their increased number and activity in the WTO, developing countries still find themselves in a relatively marginalized position and experience difficulties in linking their development agenda to multilateral trade negotiations." Sonia E Rolland, 'Developing Country Coalitions at the WTO: In Search of Legal Support' (2007) 48 Harv. Int'l LJ 483, 483.

[145] "Power capacities (as part of structural power) are usually defined as the degree of market access a country can offer. Thus, the size of the market is the main currency in a system characterized by a mix of mercantilist and liberal incentives for participating actors. In addition, it could be defined as the degree to which a country's policies impact on third parties' markets through existing (export) subsidies and other "unfair" trade tools." Manfred Elsig, 'Different Facets of Power in Decision-Making in the WTO' <http://phase1.nccr-trade.org/images/stories/publications/IP2/WP_ELSIG_FACETSOFPOWER.pdf,> accessed 27 December 2017.

[146] 'WTO | News - Speech - DG Pascal Lamy - Lamy: "Putting Geopolitics Back at the Trade Table"' <https://www.wto.org/english/news_e/sppl_e/sppl264_e.htm> accessed 27 December 2017.

expression of this dimension of balancing in the revised draft modalities (TN/AG/W/4/Rev.4) rests on the special and differential treatments for developing Members[147] and the special provisions for the very RAMs, such as Saudi Arabia, the Former Yugoslavian Republic of Macedonia (FYROM), Viet Nam and Ukraine.

2.2.2 Members' Policy space for import protection under the Framework of the AOA

As the ultimate goal of the WTO is to maximize trade by reducing or eliminating trade barriers,[148] the remaining trade barriers have been recorded in Members' Schedules in Goods in the Uruguay Round as a way to guarantee the stability and predictability of business environment through binding and transparency.[149] These regulatory trade barriers have become an integral part of the terms of contracts between WTO Members for the exchange of rights and obligations in accordance with the principle of reciprocity.[150] These scheduled regulatory trade barriers have become WTO Members' legally binding commitments or concessions towards each other, which will bind Member governments or their successors not to raise the barrier beyond a certain level without compensating other Members.[151] Therefore, these scheduled concessions have not only legalized their limits on Member governments' future freedom of action, but also constituted the legitimate policy space of Member governments in import

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[147] "The impact of WTO Agreements on domestic regulatory policy space has long been a concern for developing countries. Recently however, it has been raised emphatically, and increasingly linked to the concept of special and differential treatment." Victor Mosoti and Ambra Gobena, *International Trade Rules and the Agriculture Sector: Selected Implementation Issues* (Food & Agriculture Org 2007) 110.

[148] "It is widely accepted, not least in the agreement establishing the WTO itself, that the purpose of the world trade regime is to raise living standards all around the world--rather than to maximize trade per se. In practice, however, these two goals--promoting development and maximizing trade--have come to be increasingly viewed as synonymous by the WTO and multilateral lending agencies, to the point where the latter easily substitutes for the former. The net result is a confounding of ends and means. Trade has become the lens through which development is perceived, rather than the other way around." Rodrik (n 53).

[149] 'WTO | Understanding the WTO - Principles of the Trading System' (n 69).

[150] "The principle of reciprocity is a GATT norm under which one country agrees to reduce its level of protection in return for a reciprocal 'concession' from its trading partners." Kyle Bagwell and Robert W Staiger, 'An Economic Theory of GATT' (1999) 89 American Economic Review 215, 216–217.

[151] World Trade Organization Secretariat, *A Handbook on Reading WTO Goods and Services Schedules* (Cambridge University Press 2009) 2-6.

protection.[152]

Reading through the AOA, Members' policy space for import protection is embedded in those legal instruments in the two pillars of the AOA: market access and domestic support.

For market access, the AOA allows Members to carry out necessary protection against imports through the following legal instruments or mechanisms: tariffs, TRQ administration and SSG provisions. Thanks to the tariff-only regime, Members' scope of policy space in this pillar is decided primarily by their relevant levels of average final bound tariff rates in the general sense or the specific final bound tariff rates for each agricultural tariff line. Besides tariff protection, some Members are also entitled to maintaining TRQ administration or SSG provisions over their tariffied agricultural products under certain conditions. The entitlements to these two mechanisms have been turned into their additional policy space in protecting their sensitive products from imports. There is no need to go into details here, Chapter 3 will further explore Members' policy space in market access.

As far as domestic support is concerned, the AOA allows Members to provide necessary protection through various categories of agricultural subsidies to their agricultural producers or sensitive products, including Green Box, Blue Box, Amber Box, Development Programs or Box, and *the de minimis* support. As Members' policy space varies with the categorization of domestic support measures, the legal criteria or limits imposed on the various types of domestic support are instrumental in defining Members' obligations as well as their policy space. Two types of policy space have been created in the domestic support pillar: limited policy space and exemption policy space. The former one derives from the entitlement of a Member to provide support under non-exempt policies up to the Member's limit(s), while the latter one derives

[152] "As an outcome of the Uruguay Round Agreement on Agriculture, all agricultural products now have a bound tariff rate on their imports. This system of bound tariffs combines the rigidity of an upper limit that is independent of future economic conditions but discretion as governments have a whole array of choices in terms of applied tariffs as long as they are set below the bound rate. One recurring argument is that bound rates may limit countries' policy flexibility, or policy space, in response to particular economic circumstances." Joseph H Bragdon, Giovanni Maggi and Robert W Staiger, 'Trade Agreements as Endogenously Incomplete Contracts' (2010) 100 The American Economic Review 394, 394–419.

from the entitlement of Members to separate policies that meet given criteria from those policies under which support counts against the Member's limit(s), i.e., exemption space allows limitless support. Chapter 4 will examine Members' policy space in domestic support.

Chapter 3

WTO Members' Legal Policy Space in Border Protection

3.1 A Brief Introduction

The AOA clearly states at the very beginning of its preamble that "Members have decided to establish a basis for initiating a process of reform of trade in agriculture in line with the objectives of the negotiations as set out in the Punta del Este Declaration."[153] Among the four objectives of the multilateral negotiations as laid out by the Punta del Este Declaration, the primary one is to "bring about further liberalization and expansion of world trade to the benefit of all countries, especially less-developed contracting parties, including the improvement of access to markets by the reduction and elimination of tariffs, quantitative restrictions and other non-tariff measures and obstacles". [154] As part of the so-called post-Uruguay Round built-in

[153] "The major task for the future in agricultural trade is to continue the start made in the Uruguay Round towards a rule-based system which allows countries to develop their agricultural potential in a transparency and stable environment. This task will have to accomplished alongside other developments in the trade system, ranging from the incorporation of new members in the GATT/WTO multilateral system to the consideration of 'new' agenda items in international negotiations and in trade rules." Timothy Josling, Stefan Tangermann and Thorald K Warley, *Agriculture in the GATT* (Macmillan Press LTD 1996) 223.

[154] The other three objectives of the multilateral negotiations are: (ii) strengthen the role of GATT, improve the multilateral trading system based on the principles and rules of the GATT and bring about a wider coverage of world trade under agreed, effective and enforceable multilateral disciplines; (iii) increase the responsiveness of the GATT system to the evolving international economic environment, through facilitating necessary structural adjustment, enhancing the relationship of the GATT with the relevant international organizations and taking account of changes in trade patterns and prospects, including the growing importance of trade in high technology products, serious difficulties in commodity markets and the importance of an improved trading environment providing, inter alia, for the ability of indebted countries to meet their financial obligations; (iv) foster concurrent cooperative action at the national and international levels to strengthen the inter-relationship between trade policies and other economic policies affecting growth and development, and to contribute towards continued, effective and determined efforts to improve the functioning of the international monetary system and the flow of financial and real investment resources to developing countries." GATT, 'Ministerial Declaration on the Uruguay Round' <https://www.wto.org/gatt_docs/English/SULPDF/91240152.pdf> accessed 7 December 2017.

agenda, [155] Article 20 of the AOA calls for the continuation of the reform process towards achieving the long-term objective of substantial progressive reductions in support and protection. Meanwhile, it urges Members to take into account a few factors, such as the experience from implementing the Uruguay Round reduction commitments, the effects of reduction commitments on world trade in agriculture, non-trade concerns, special and differential treatment as well as the objectives outlined in the preamble, and further necessary commitments for achieving the long-term objectives. The Doha Declaration also recognizes the work undertaken in the "built-in' agenda of the negotiations under Article 20 of the AOA,[156] and confirms in Paragraph 13 and 14 that the said long-term objective will be approached through a work program of fundamental reform encompassing strengthened rules and specific commitments on support and protection and modalities for the future commitments.

With these cross-cutting special arrangements between the AOA rules, by which a legal framework and the long-term objective have been established as a way to set the stage for initiating the reform process, and the built-in agenda of the Doha Declaration,[157] through which more specific mandate about the follow-up to the reform process are given and the work program and modalities for further commitments are elaborated, the AOA has been conferred dual roles to play in pushing agricultural trade liberalization. First, as the role of the WTO is to provide Member governments with a legal framework to negotiate and monitor the gradual reduction of their barriers to trade that are normally used by them to protect sectional interests, which has been broadly accepted as the raison d'être of the WTO, and with its legal jurisprudence extending to agriculture

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155 'WTO | Understanding the WTO - The Uruguay Round' <https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact5_e.htm> accessed 7 December 2017.

156 Ricardo Meléndez-Ortiz, Christophe Bellmann and Jonathan Hepburn, *Agricultural Subsidies in the WTO Green Box: Ensuring Coherence with Sustainable Development Goals* (Cambridge University Press 2009) 38.

157 "The built-in agenda of the WTO Agreement constituted the nucleus of the Doha Round, and that includes negotiations on agriculture, services, and some aspects of intellectual property rights. In both agriculture and services, it was not the extent of liberalization that had given the participants in the Uruguay Round a sense of achievement, but the framework that had been established for future liberalization of these areas. The idea behind the built-in agenda, therefore, was not to use those frameworks to further dismantle barriers to trade in these sectors and consolidate the trade reform gains in the Uruguay Round." Anwarul Hoda and Ashok Gulati, *WTO Negotiations on Agriculture and Developing Countries*, (The Johns Hopkins University Press 2007) 3–4.

where still abounds in barriers to trade, the first and foremost task of the AOA is to draw a clear-cut line between the legitimate barriers to trade and those used for protecting sectional interests by Member governments.[158] To do that, the AOA has developed a two-thronged approach. It first serves as a stepping stone in the Uruguay Round to bring agriculture into the rule-based multilateral trading system, and then relies on the future agreements on built-in agenda for further commitments to pave the way for its gradual but full integration.[159] This strategy is not new for the WTO. As a matter of fact, this is how the WTO has dealt with the negotiations on the GATS. In accordance with Article XIX,[160] the GATS, another an international agreement signed by WTO Members in the Uruguay Round, is only the first step in achieving the long process of progressive liberalization in service sectors through successive rounds of negotiations.[161] The progressive liberalization in the GATS is very much in line with the long-term objective of the AOA for substantial but progressive reductions in support and protection. Secondly, for the sake of transparency, the protection measures or instruments that restrict agricultural trade have been eventually incorporated into Members' schedules in goods in the Uruguay Round and these boundaries and constraints have constituted Members' legitimate policy space in border protection. In this regard, there are a few points that deserve further elaboration: 1） Given the diversity of Members' commitments in agricultural trade liberalization, the scopes of their legal policy space in border protection are quite dynamic and divergent. There is no one-size-fit-all policy space in border protection under the AOA among WTO

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[158] Arvid Lukauskas, Robert M Stern and Gianni Zanini, *Handbook of Trade Policy for Development* (Oxford University Press 2013) 62–63.

[159] Joseph McMahon and Melaku Geboye Desta, *Research Handbook on the WTO Agriculture Agreement: New and Emerging Issues in International Agricultural Trade Law* (Edward Elgar Publishing 2012) 21.

[160] Paragraph 1 of Article XIX provides that "in pursuance of the objectives of this Agreement, Members shall enter into successive rounds of negotiations, beginning not later than five years from the date of entry into force of the WTO Agreement and periodically thereafter, with a view to achieving a progressively higher level of liberalization. Such negotiations shall be directed to the reduction or elimination of the adverse effects on trade in services of measures as a means of providing effective market access. This process shall take place with a view to promoting the interests of all participants on a mutually advantageous basis and to securing an overall balance of rights and obligations."

[161] Peter Van den Bossche, *The Law and Policy of the World Trade Organization: Text, Cases and Materials* (Cambridge University Press 2008) 484.

Members; 2) In accordance with the principle of reciprocity, a WTO Member will benefit from the legal restraint on other Member's policy as well as the restraint on its own domestic policy; [162] 3) The AOA has recognized three legitimate instruments of border protection: final bound tariffs, the TRQ administration and the SSG provisions. Two categories of policy space in border protection have derived from these instruments: tariff protection and the entitlements to the TRQ administration and the SSG provisions; 4) Many existing mechanisms under the AOA are transitional in nature, Members' policy space deriving from these transitional protection arrangements is not final. Based on the outcomes of the Uruguay Round, Members are committed to work out relevant modalities to cut off their border protection so as to achieve further agricultural trade liberalization. Their scope of policy space will evolve with the new progress in the multilateral negotiations on both tariff cuts and these transitional protection arrangements.

The immediate implication of this two-step strategy is that Members have been put at different paces in achieving agricultural trade liberalization at the outset of reform process in the Uruguay Round. The most urgent task for them is to strike a subtle balance between their legitimate defensive interests of making further commitments in opening domestic markets and offensive interests of pushing further trade liberalization. Normally, the bigger the concessions or contributions of a WTO Member to agricultural trade liberalization that have been made in the Uruguay Round or upon accession, the more legal remedies or instruments of protection are envisaged when it negotiated its terms of conditions for opening its domestic markets or accession to the WTO in accordance with the fundamental GATT/WTO principle of balanced rights and obligations[163] or the negotiated balance of rights and obligation.

Therefore, from the legal point of view the credibility of a WTO Member's agricultural trade policy profile hinges on whether it can keep enough leeway or maintain adequate maneuvering policy space in balancing the two contradictory policy objectives under the framework of the multilateral agricultural trading system: trade liberalization and industry protection. In that sense, a fair and market-orientated multilateral agricultural

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[162] Lukauskas, Stern and Zanini (n 158) 335–372.

[163] OECD believes that the principle of balanced rights and obligations is one of the guiding principles for agricultural legislation. OECD, *China's Agriculture in the International Trading System* (n 142) 251.

trading system as called upon by the AOA should not only correct government market interventions that distort trade, but also provide level playing fields or equal footing for all WTO Members in order to allow them to pursue, within their scope of policy space, such key social and economic policy objectives as "raising standards of living, ensuring full employment, optimal use of world's resources in accordance with the objective of sustainable development, protecting and preserving the environment and enhancing the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development" as identified in the WTO Agreement. [164]

Having said that, this part of the paper intends to explore the border protection mechanisms that Members have built upon under the current legal framework of the AOA as well as the derivative policy space.

3.2 The Basic Rules on Market Access

"Market access" means the terms and conditions under which agricultural products could be imported into the territory of a WTO Member.[165] The Uruguay Round resulted in a systemic change[166] away from various non-tariff border measures, including quotas and import restrictions, and towards a tariff-only regime.[167] To do that, the AOA has designed three steps to guide WTO members to fulfill their market access commitments: tariff binding and reduction, TRQ administration and the SSG provisions, which are

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[164] Preamble of "Marrakesh Agreement Establishing the World Trade Organization".

[165] Article 4(1) of the Agreement on Agriculture provides that "market access concessions contained in Schedules relate to bindings and reduction of tariffs, and to other market access commitments as specified therein".

[166] "The Uruguay Round resulted in a key systemic change: the switch from a situation where a myriad of non-tariff measures impeded agricultural trade flows to a regime of bound tariff-only protection plus reduction commitments. The key aspects of this fundamental change have been to stimulate investment, production and trade in agriculture by (i) making agricultural market access conditions more transparent, predictable and competitive, (ii) establishing or strengthening the link between national and international agricultural markets, and thus (iii) relying more prominently on the market for guiding scarce resources into their most productive uses both within the agricultural sector and economy-wide." 'WTO | Agriculture - Explanation of the Agreement - Market Access' <https://www.wto.org/english/tratop_e/agric_e/ag_intro02_access_e.htm#and_tariff_quota> accessed 7 December 2017.

[167] David Cheong, Marion Jansen and Ralf Peters, *Shared Harvets: Agriculture, Trade, and Employment*, p 76.

spelled out in Article 4, Annex 5 and Article 5 of the AOA respectively.

3.2.1 The Tariff-Only Regime

Customs duties, also referred to tariffs, are the most common and widely used barrier to market access for goods. A tariff is a financial charge for imported products in the form of a tax.[168] The "tariff-only" regime is an old principle that has applied to trade in non-agricultural goods since the origin of the GATT.[169] However, its legal basis in the AOA is laid down in Article 4.2, [170] which requires that Members shall not maintain, resort to, or revert to any measures of the kind, which have been required to be converted into ordinary customs duties.[171] Footnote 1 to this provision has further listed what non-trade measures that have to be converted. In ordinary parlance, the exercise for the tariff-only regime is known as "tariffication". The key objectives of tariffication are to make agricultural market access conditions more transparent and predictable, and to establish or strengthen the link between national and international agricultural markets with a view to reducing the uncertainty, imbalances and instability in world agricultural market by a progressive negotiated reduction of protection in agricultural

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[168] Van den Bossche (n 48) 377.

[169] Andreas F Lowenfeld, *International Economic Law* (Oxford University Press, USA 2008) 321.

[170] "Article 4 of the Agreement on Agriculture is appropriately viewed as the legal vehicle for requiring the conversion into ordinary customs duties of certain market access barriers affecting imports of agricultural products". World Trade Organization, 'Appellate Body Report on Chile-Price Band and Safeguard Measures Relating to Certain Agricultural Products' 64 <https://www.wto.org/english/tratop_e/dispu_e/207abr_e.pdf> accessed 8 December 2017 para. 201.

[171] Article 4.2 prohibits the use of agriculture-specific non-tariff measures. Such measures include quantitative import restrictions, variable import levies, minimum import prices, discretionary import licensing procedures, voluntary export restraint agreements and non-tariff measures maintained through state-trading enterprises. All similar border measures other than "normal customs duties" are also no longer permitted. Although Article XI:2(c) of the GATT continues to permit non-tariff import restrictions on fisheries products, it is now inoperative as regards agricultural products because it is superseded by the URAA. However, Article 4.2 does not prevent the use of non-tariff import restrictions consistent with the provisions of the GATT or other WTO agreements which are applicable to traded goods generally (industrial or agricultural). Such measures include those maintained under balance-of-payments provisions (Articles XII and XVIII of GATT), general safeguard provisions (Article XIX of GATT and the related WTO agreement), general exceptions (Article XX of GATT), the Agreement on the Application of Sanitary and Phytosanitary Measures, the Agreement on Technical Barriers to Trade or other general, non-agriculture-specific WTO provisions. 'WTO | Agriculture - Explanation of the Agreement - Market Access' (n 166).

trade [172]

The tariff-only regime can be regarded as the most direct expression of two fundamental WTO principles: more open and predictable trade and transparency. In the words of the WTO Appellate Body, "ordinary customs duties are more transparent and more easily quantifiable than non-tariff barriers, they are also more easily compared between trading partners, and thus the maximum amount of such duties can be more easily reduced in future multilateral trade negotiations. The Uruguay Round negotiators agreed that—both in the short term and in the long term—through binding and reductions of tariffs, and minimum access requirements, which were to be recorded in Members' Schedules." [173] The tariff-only regime or the tariffication is the most significant aspect of the AOA,[174] or pivotal to the establishment and protection of a fair and market-oriented agricultural trading system in the area of market access. [175]

On the basis of tariffication, each Member has been required to determine a maximum, or ceiling level, bound tariff rate for each agricultural product in its schedule of tariff concessions. A tariff concession or a tariff binding [176] is a legal commitment or obligation made by a WTO Member not to levy customs duties or tariffs beyond a certain multilaterally agreed level, and its legal basis can be dated back to Article II of the GATT 1947.[177] This means that once a Member has bound a tariff, it has made a legal commitment not to charge more than that level of duty on the imported goods in

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[172] World Trade Organization, 'Report of the Panel, Chile--Price Band System and Safeguard Measures WT/DS207/R' 123 <https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=62149&CurrentCatalogueIdIndex=0&FullTextHash=&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True> accessed 7 December 2017.

[173] World Trade Organization, 'Appellate Body Report on India-Additional and Extra-Additional Duties on Imports from the United States' 64 <https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds360_e.htm> accessed 8 December 2017.

[174] McMahon and Desta (n 159) 3.

[175] World Trade Organization, 'Report of the Panel, Chile--Price Band System and Safeguard Measures WT/DS207/R' (n 172).

[176] WTO defines tariff binding as "Commitment not to increase a rate of duty beyond an agreed level. Once a rate of duty is bound, it may not be raised without compensating the affected parties". 'WTO | Glossary - a Guide to "WTO Speak"'
<https://www.wto.org/english/thewto_e/glossary_e/glossary_e.htm> accessed 7 December 2017.

[177] Petros C Mavroidis, *Trade in Goods: The GATT and the Other Agreements Regulating Trade in Goods* (Oxford University Press 2007) 70.

question, though it might also choose to temporarily waive or permanently changed its level of bound tariff on the basis of certain conditions.[178] The extent of tariff binding varies from one WTO Member to another and is up to the outcome of the trade negotiations. Moreover, in a bid to facilitate the exchange of tariff concessions on a reciprocal basis, all WTO Members follow the Harmonized Commodity Coding and Classification System up to the six-digit-level (HS-6) as elaborated by the WCO,[179] and based on that Annex 1 of the AOA defines "agriculture" as all products from Chapter 1-24 of HS code, excluding fish products and forestry. Tariff binding is one of the achievements in the Uruguay Round. In agriculture, 100 per cent of products now have bound tariffs. The result of all this: a substantially higher degree of market security for traders and investors.[180] Tariff binding is a milestone in terms of agricultural trade liberalization because if tariffs for agricultural products remained unbound, they are open to increases and thus would not offer legal security. Since the Uruguay Round, bound or consolidated tariffs are the rule, and unbound tariffs the exception.[181]

On the basis of tariff binding, WTO Members have been committed to reduce both the traditional tariffs and those new ones resulting from the tariffication process, with

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[178] "Sometimes, however, a Member may need to change its tariff to a level above the bound rate. This is foreseen in the GATT, which contains provisions on renegotiation of concessions. These provisions are found in GATT Article XXVIII, GATT Article XXVIII bis, GATT 1994 Understanding on the interpretation of Article XXVIII, and the Note Ad Article XXVIII. It is important to note that renegotiating a tariff concession is not without cost. To the contrary, the Member renegotiating its tariff must compensate the affected exporting Members. If a Member wishes to withdraw a negotiated commitment and impose a higher customs duty than the bound rate in its Schedule, two alternatives are available under GATT Article XXVIII: 1. the level of the tariff concession can be temporarily "waived" - where the Member has, under exceptional circumstances, received specific authorization from all the other Members; 2. the level of the tariff concession can be permanently changed (decreased or increased). As noted, in either case the affected exporting Members must be compensated." World Trade Organization, 'WTO E-Learning: Trade Remedies and the WTO' <https://ecampus.wto.org/admin/files/Course_628/CourseContents/TR-R3-E-Print.pdf> accessed 7 December 2017.

[179] 'World Customs Organization' <http://www.wcoomd.org/en/topics/nomenclature/overview/what-is-the-harmonized-system.aspx> accessed 7 December 2017.

[180] 'WTO | Schedules of Concessions on Goods' <https://www.wto.org/english/tratop_e/schedules_e/goods_schedules_e.htm> accessed 7 December 2017.

[181] Thomas Cottier, Olga Nartova and Anirudh Shingal, 'Potential of Tariff Policy for Climate Change Mitigation: Legal and Economic Analysis, The' (2014) 48 J. World Trade 1007.

developed Members and developing Members having a different average tariff cut of 36 per cent and 24 per cent or a 15 per cent and 10 per cent reduction respectively per tariff line.[182]

However, as a result of agricultural trade liberalization, the reduction or elimination of import tariffs in particular, non-trade measures (NTMs) have become relevant instruments of protection for Members that have traditionally protected specific economic sectors from international trade. The increase in the adoption of NTMs over the years indicates that the targeted scenario of free trade within the principles of the WTO is far from being achieved. [183] NTMs are generally defined as policy measures other than ordinary customs tariffs that can potentially have an economic effect on international trade in goods, changing quantities traded, or prices or both.[184] In practice, NTMs are measures that have the potential to substantially distort international trade, whether their trade effects are protectionist or not.[185] However, it is necessary to distinguish NTMs from non-tariff barriers (NTBs), which can be easily confused with each other. The difference between them is that NTMs comprise a wider set of measures than NTBs, which are now generally intended only as discriminatory NTMs imposed by Member governments to favour domestic over foreign suppliers.[186] The NTMs classification comprises technical and non-technical measures. Technical NTMs include sanitary and phytosanitary measures (SPS measures), technical barriers to trade (TBT), and pre-shipment inspection and other formalities, while non-technical NTMs include contingent trade-protective measures, non-automatic licensing, quotas, prohibitions and quantity control, price-control measures, finance measures, measures

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[182] Those developing Members which bound tariffs at ceiling levels did not, in many cases, undertake reduction commitments. Least-developed Members were required to bind all agricultural tariffs, but not to undertake tariff reductions.

[183] Luis Felipe Torres and Fabio Tamburrini, 'Are Non-Tariff Barriers the New Walls to Trade?' (*The Governace Post*, 1 November 2014) <https://www.hertie-school.org/the-governance-post/2014/11/are-non-tariff-barriers-the-new-walls-to-trade-a-case-analysis-from-argentina-and-ecuador/> accessed 7 July 2018.

[184] UNCTAD DITC, 'Non-Tariff Measures: Evidence from Selected Developing Countries and Future Research Agenda' (2010) xvi <http://unctad.org/en/Docs/ditctab20093_en.pdf>.

[185] UNCTAD, 'Non-Tariff Measures to Trade–Economic and Policy Issues for Developing Countries.' (2013) 1 <http://unctad.org/en/PublicationsLibrary/ditctab20121_en.pdf>.

[186] UNCTAD, 'Non-Tariff Measures to Trade–Economic and Policy Issues for Developing Countries.' (n 185) 2.

affecting competition, trade-related investment measures (TRIMs), distribution restrictions, restrictions on post-sales services, subsidies (excluding export subsidies), government procurement restrictions, intellectual property, rules of origin.[187] A survey carried out by the Organization for Economic Co-operation and Development (OECD) indicates that technical measures, internal taxes and charges, customs rules and procedures, competition-related restrictions on market access and quantitative import restrictions are the 5 most reported NTMs. In fact, these border and behind-the-border measures or government interventions can become a "procedural barrier to trade", in this sense NTBs are usually more trade-restrictive and distorting than tariffs, not least because they are less transparent in their price effects. The cost of protection caused by NTBs--in terms of trade flows, international resource allocation and productive efficiency, can be high. [188]

In practice, the WTO agreements allow countries to achieve legitimate objectives through the use of NTMs, but in the case of technical regulatory measures, as a general rule, they should not be implemented in such a way as to pose unnecessary obstacles to trade. In other words, the WTO disciplines regarding technical NTMs such as TBTs and SPS measures are largely meant to prohibit "regulatory protectionism".[189] For that purpose, a number of WTO agreements are created to regulate various NTMs, including the SPS Agreement for SPS measures, TBT Agreement for TBT measures, ILP Agreement for import licensing procedures. [190]

3.2.2 The TRQ System and Its Administration

As an essential part of the tariffication package, Members were allowed in the Uruguay Round to establish the TRQ system as a way to safeguard at least the previous market access realities by a minimum or current import access commitment for all tariffied

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[187] UNCTAD, 'Non-Tariff Measures to Trade–Economic and Policy Issues for Developing Countries.' (n 185).

[188] OECD, *Looking beyond Tariffs: The Role of Non-Tariff Barriers in World Trade* (Organisation for Economic Co-operation and Development 2005) 13.

[189] UNCTAD, 'Non-Tariff Measures to Trade–Economic and Policy Issues for Developing Countries.' (n 185) 55.

[190] 'WTO | Understanding the WTO - Non-Tariff Barriers: Red Tape, Etc' (n 4).

products in their Schedules.[191]

The term "TRQ" can be defined from more than one dimension. As an economic term, a TRQ means a two-tiered tariff, and involves the interactions between three elements: in-quota tariff, quota volume, and out-of-quota tariff. [192] It is a combination of an import tariff and an import quota in which imports below a specified quantity enter at a low (or zero) tariffs and imports above that quantity enter at a higher tariff. [193] Besides these elements, the administrative methods to allocate the quota volume also have positive impacts on the functioning of a TRQ.[194] Depending on the magnitude of net import demand relative to the tariffs and volumes in a TRQ schedule as well as the world price for the TRQ commodity, three alternative market outcomes may result from a TRQ import. It may act like a pure tariff with relatively weak demand for import. It may operate as a two-tiered tariff regime with strong demand for import. It may also act like a pure quota with intermediate demand or a very high most-favored Nation (MFN) out-of-quota tariff. The functioning of a TRQ system as a protection tool very much relies on the proper design of the subtle correlations among these three elements as well as the administration method. A TRQ is not only defined by the in-quota and out-of-quota tariffs and the quota quantity, but also by the methods by which the quantitative restriction is enforced, i.e. by the rationing system.[195]

As a legal term, TRQ is a policy mechanism sanctioned by the AOA for Members to regulate the import of sensitive products so as to ensure both tariffication and market

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[191] McMahon and Desta (n 159) 4.

[192] OECD, 'Alternative Liberalization Scenarios and Their Impacts on Quota Rent and Tariff Revenues in Selected OECD Agricultural Markets' 4 <http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=COM/AGR/TD/WP(2002)23/FINAL&docLanguage=En> accessed 8 December 2017.

[193] Alan V Deardorff, *Terms of Trade: Glossary of International Economics* (World Scientific 2014) 423.

[194] William Alexander Kerr and James D Gaisford, *Handbook on International Trade Policy* (Edward Elgar Publishing 2007) 258.

[195] Christina Mönnich, *Tariff Rate Quotas and Their Administration: Theory, Practice, and an Econometric Model for the EU*, vol 9 (Peter Lang Publishing 2004) 5.

access.[196] The motivation behind such an instrument is to guarantee minimum levels of market access and to safeguard current levels of access in the face of the high MFN tariffs resulting from tariffication.[197] The TRQ system is a product of compromise in the Uruguay Round,[198] which decides that it serves dual functions. On the one hand, it has been designed as a market access instrument to achieve minimum market access opportunities; on the other hand, it might be used as an instrument of protection in practice as a substantial proportion of agricultural production in developed Members is protected by TRQ. This has put the real effect of the TRQ system in liberalizing agricultural trade into question.[199] As regard to its legal basis, there is no direct reference to the term "TRQ" in the AOA. However, it has been indirectly introduced into Article 4.1 of the AOA and framed as "other market access commitments". A document entitled Modalities for the Establishment of Specific Binding Commitments under the Reform Program[200] (Modalities Paper)[201] issued in December 1993 in the Uruguay Round negotiations further set out these other market access commitments in how to carry out the tarrification. However, this Modalities Paper was eventually not adopted by the Uruguay Round, and thus not part of the AOA, but it remains a technical

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[196] Aziz Elbehri and others, 'Liberalizing Tariff-Rate Quotas: Quantifying the Effects of Enhancing Market Access', *Agriculture and the new trade agenda: creating a global trading environment for development* (Cambridge University Press 2004).

[197] Alan Matthews and Catherine Laroche Dupraz, 'Agricultural Tariff Rate Quotas as a Development Instrument' [2001] Economie internationale 89, 89.

[198] "The tariff quota arose in the 1994 Uruguay Round GATT Agreement on Agriculture as a compromise between those seeking improved market access for agricultural exports and those emphasizing tariffication (replacing quotas and other nontariff barriers with tariffs) as a means of liberalizing agricultural import regimes", Philip Abbott and B Adair Morse, 'Tariff Rate Quota Implementation and Administration by Developing Countries' (2000) 29 Agricultural and Resource Economics Review 115, 115.

[199] Harry De Gorter and Erika Kliauga, 'Reducing Tariffs versus Expanding Tariff Rate Quotas', in Anderson, K. and Martin, W. (ed.) *Agricultural Trade Reform and the Doha Development Agenda* (Copublication of Palgrave Macmillan and World Bank 2006) 117.

[200] World Trade Organization, 'Modalities for the Establishment of Specific Binding Commitments under the Reform Programme' <https://www.wto.org/english/tratop_e/agric_e/1993_ur_modalities_w24_e.pdf> accessed 8 December 2017.

[201] Lowenfeld (n 169) 322.

guideline for the TRQ administration.[202]

There are two kinds of TRQs—minimum access and current access. The former requires relevant Members to provide a minimum volume of market access, namely, 5 per cent of average domestic consumption in the base period 1986-1988, while the latter ensures that the volume of market access is not reduced if compared to the import before the Uruguay Round.[203]

The TRQ administration is also an important element in evaluating the role of TRQ in achieving trade liberalization. The average fill rate of TRQs is only 61 per cent.[204] There is a widespread agreement that quota under-fill is in part contributable to the administration methods employed to implement TRQs.[205] As far as the TRQ administration is concerned, the AOA itself does not specify any particular rule and it is governed by Article XIII of GATT 1994 in non-discriminatory administration of quantitative restrictions.[206] Article XIII reads that no prohibition or restriction shall be applied by any Member on the importation of any product of the territory of any other Member or on the exportation of any product destined for the territory of any other Member, unless the importation of the like product of all third countries or the exportation of the like product to all third countries is similarly prohibited or restricted. In practice, as Table 1 shows, various methods have been used by Members to allocate TRQ. Applied tariff is the predominant method, while license on demand and first-come, first-served are also the most widely used means for TRQ administration.

Table 1 Number of TRQ by Principal Administration Method

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[202] Matthews and Dupraz (n 197) 100.

[203] Kerr and Gaisford (n 194) 262.

[204] World Trade Organization, 'Tariff Quota Administration Methods and Fill Rates 2002-2011, Background Paper by the WTO Secretariat, TN/AG/S/26/Rev.1' 8, para 3.6 <https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=115821,114047,50374,32024,81827,44671,12521&CurrentCatalogueIdIndex=0&FullTextHash=&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True> accessed 8 December 2017.

[205] De Gorter and Kliauga (n 199) 118.

[206] FAO Technical Cooperation Department, 'Multilateral Trade Negotiations on Agriculture: Agreement on Agriculture' <http://www.fao.org/docrep/003/x7353e/x7353e00.htm> accessed 8 December 2017.

	2002	2007	2011
Applied Tariff (AT) of total scheduled tariff quotas	602 42.1	498 45.7	476 43.6
Licenses on Demand (LD) of total scheduled tariff quotas	347 24.3	225 20.7	226 20.7
Auctioning (AU) of total scheduled tariff quotas	94 6.6	76 7.0	97 8.9
Historical Importers (HI) of total scheduled tariff quotas	105 7.3	89 8.2	89 8.2
Mixed Allocation Methods (MX) of total scheduled tariff quotas	68 4.8	83 7.6	84 7.7
First Come, First Served (FC) of total scheduled tariff quotas	170 11.9	76 7.0	81 7.2
Imports Undertaken by State Trading Entities (ST) of total scheduled tariff quotas	26 1.8	23 2.1	24 2.2

Source of data: World Trade Organization, 'Tariff Quota Administration Methods and Fill Rates 2002-2011, Background Paper by the WTO Secretariat, TN/AG/S/26/Rev.1' 7 <https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=115821,114047,50374,32024,81827,44671,12521&CurrentCatalogueIdIndex=0&FullTextHash=&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True> accessed 8 December 2017.

3.2.3 The SSG Provisions

The SSG provisions are the third essential element of the tariffication package. They were created by the AOA to address concerns that tarifffication and removing non-tariff measures might result in either a flood of imports that would hurt domestic production or depress domestic prices because duties bound through the tariffication process alone might not be sufficient.[207]The legal basis of the SSG provisions is Article 5 of the AOA, which allows certain Members to take recourse to temporary duty increases, above the bound levels, on specified agricultural products against import price or quantity surges on the basis of two preconditions: 1) it can only be taken with respect to tariffied products, which amount to less than 20 per cent of all agricultural products as defined by "tariff lines". 2) the Member must have designated the product in question with the symbol 'SSG' in its schedule, which means that the SSG provisions can only be used if the government reserved the right to do so in its schedule of commitments on agriculture and they cannot be used on imports within TRQs.[208] If the two preconditions are met, Article 5.1 of the AOA creates two types of special safeguard measures that

[207] FAO Technical Cooperation Department (n 206).

[208] 'WTO | Agriculture - Negotiations Backgrounder - Market Access' (n 123).

may be taken, one based on the volume of imports (volume-based) and the other based on the price of imports (price-based). A Member may take either type of special safeguard but not both at the same time.[209]

It is worthy of clarifying the difference between the SSG provisions of the AOA and the general safeguard measures of the Agreement on Safeguards (SG Agreement). Safeguard measures are defined as "emergency" actions with respect to increased imports of particular products, where such imports have caused or threaten to cause serious injury to the importing Member's domestic industry. Such measures, which in broad terms take the form of suspension of concessions or obligations, can consist of quantitative import restrictions or of duty increases to higher than bound rates.[210] The distinctions between these two categories of legal remedies, which are all named as "safeguards", are obvious. Firstly, the SSG provisions only apply to agricultural products, while safeguard measures are open to all products, including agricultural products. That means the scope of safeguard measures is much broader than the SSG provisions. Secondly, the SSG provisions are only a privilege to a limited WTO Members, who have reserved their rights in their schedules by designing the SSG status for certain tariff lines for agricultural products, while safeguard measures are open to all Members. Thirdly, the causal relation between imports of a certain product and serious injury to the competing domestic industry needs to be proved before safeguard measures are imposed, while it is not necessary for the SSG provisions to do so, and they can be automatically triggered once certain conditions are met. In this sense, the SSG provisions are easier to use than safeguard measures. Fourthly, the Member imposing safeguard measures must pay compensation to those Members whose trade is affected, while it would be not necessary if it imposes SSG provisions.

3.2.4 Case Study: Chile Price Band System and Safeguard Measures Relating to Certain Agricultural Products (Chile-PBS)

In January 2001, Argentina filed a challenge against Chile concerning its price band system and the provisional safeguard measures imposed on the importation of various

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[209] McMahon and Desta (n 159) 5.

[210] 'WTO | Trade Topics - The Agreement on Safeguards' <https://www.wto.org/english/tratop_e/safeg_e/safeint.htm> accessed 5 July 2018.

agricultural products. The legal matter at issue in this case was Chile's Price Band System (PBS) and Chile's provisional and definitive safeguards measures on imports of wheat, wheat flour and edible vegetable oils, as well as the extension of those measures. For the sake of relevance to the current debate, the thesis will focus only on the Chilean PBS and the AOA.

1. Workings of the PBS

Chile's applied tariff rates for wheat, wheat flour, and edible vegetable oils were significantly below their bound rate, however, the applied rate could be increased by means of duty increases provided through the operation of the PBS. In each case, the PBS involved an upper and a lower threshold determined on the basis of certain international prices. The price bands for each product were determined on a yearly basis and then published with a table containing reference prices and related specific duties. When the "reference price" lied below the lower threshold of the band, a duty increase was triggered, the amount of which was equivalent to the absolute difference between the lower threshold of the band and the "reference price". Conversely, when the "reference price" lied above the price that determines the upper threshold of the band, a tariff rebate was triggered and the amount of which was equivalent to the absolute difference between the "reference price" and the upper threshold of the band.

Chile also applied specific duties expressed in US dollars per tariff unit or ad valorem duties, or both, as well as rebates on the amount payable as specific or ad valorem duties or both. For that purpose, Chile decided the price bands of these agricultural products on the basis of average monthly prices observed for the last 60 months on specific exchanges. For instance, the calculation of the price band for wheat was based on Hard Red Winter No. 2, f.o.b. Gulf (Kansas Exchange). These average prices were adjusted by the percentage variation in the external price index drawn by the Central Bank of Chile. After the prices had been readjusted, they were listed, with up to 25 per cent of the highest and lowest values being eliminated for wheat and edible vegetable oils. Tariff and importation costs (such as freight, insurance, opening of a letter of credit, interest on credit, taxes on credit, customs agents' fees, unloading, transport to the plant and wastage costs) were added to those prices thus determined in order to fix the lower and upper thresholds on a c.i.f. basis.

Argentina believed that the Chilean PBS was inconsistent with Article II.1(b) of the GATT 1994 and Article 4.2 of the Agreement on Agriculture as the Chilean PBS lacked the kind of transparency and predictability that only ordinary customs duties could provide and constituted an instrument limiting access to markets. Therefore, the Chilean PBS should have been tariffied. While Chile argued that the PBS was not a measure "of the kind which [has] been required to be converted into ordinary customs duties". The dispute between the two parties focused on how to define the nature of Chilean PBS or whether it should be defined as an ordinary customs duty or not.

2. Findings and Recommendations of the Panel

The Panel noted that both Article 4.2 of the AOA and Article II:1(b) of GATT 1994 used the phrase "ordinary customs duties" and concluded that this phrase had the same meaning in both provisions, neither provision could therefore be interpreted independently from the other. However, Article 4.2 of the AOA dealt more specifically and in detail with measures affecting market access of agricultural products.

The Panel concluded that the Chilean PBS applied exclusively to imported goods and was enforced at the border by Chilean customs authorities. The Panel further defined the fundamental characteristics of variable import levies and minimum import prices.[211] A variable levy generally represented the difference between two prices, on the basis of which it operated: a threshold, or minimum import entry price and a border or c.i.f. price for imports, with a view to preventing the entry of imports priced below the threshold or minimum entry price or insulating the domestic market from external price variations. A minimum import price was very similar to a variable levy in many respects, including in terms of their protective and stabilization effects, but that its mode of operation was generally less complicated. Unlike variable import levies which were generally based on the difference between the above two prices, minimum import price schemes generally operated in relation to the actual transaction value of the imports. The working of the Chilean PBS was very much in line with how a variable import levy or a minimum import price operated. Therefore, the Panel concluded that the Chilean PBS was a border measure similar to a variable import levy or a minimum import price.

[211] Para.436, Report of Panel, Chile-Price Band System and Safeguard Measures Relating to Certain Agricultural Products, WT/DS207/R, 3 May 2002.

The panel also found that neither Article II:1(b) of GATT 1994 nor Article 4.2 of the AOA gave an explicit definition to "ordinary" customs duties. However, both provisions did give some clues as to what measures could not be counted as "ordinary" customs duties. Article 4.2 of the AOA prohibits Members from maintaining, resorting to, or reverting to any measures of the kind which have been required to be converted into ordinary customs duties. Footnote 1 of the AOA further specifies what non "ordinary" customs duties are, and it does provide that variable import levies and minimum import prices are non "ordinary" customs duties.[212] Therefore, the Panel concluded Chile's price band system was inconsistent with Article 4.2.[213]

In June 2002, Chile appealed to the Appellate Body with respect to certain issues of law covered in the panel report and certain legal interpretations developed by the panel. However, the Appellate Body upheld the panel's finding on the nature of the Chile's PBS and its inconsistency with Article 4.2 of AOA. However, the Appellate Body reversed the panel's finding about the definition of "ordinary customs duty".

3.3 Legal Border Protection Instruments and Members' Derivative Policy Space

There is a broad literature examining the issue of trade protection from the perspective of political economy. And normally they define and approach the issue from two aspects: the actual determinants of which industries receive protection (the level of industry protection) and of the structure of protection across industries.[214] However, the lens of economists and political scientists in analyzing the issue are quite different: the economics literature focuses mainly on the determinants of the structure of protection within countries, especially in developed countries. While the political science literature put greater emphasis on the evolution of the level of protection in Member states.[215] These two elements emanating from the political economy of trade protection cast great lights on a legal analysis of the issue as well.

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[212] 'WTO | Legal Texts - Marrakesh Agreement' <https://www.wto.org/english/docs_e/legal_e/14-ag_01_e.htm> accessed 5 July 2018.

[213] 'WTO | Dispute Settlement - the Disputes - DS207' <https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds207_e.htm> accessed 25 June 2018.

[214] Anne O Krueger, *The Political Economy of Trade Protection* (University of Chicago Press 2007).

[215] Daniel Lederman, *The Political Economy of Protection: Theory and the Chilean Experience* (Stanford University Press 2005) 6.

As mentioned earlier, there are three legally acknowledged border protection instruments or safety valves under the framework of the AOA: tariff protection, the TRQ administration and the SSG provisions. Based on these legal instruments for border protection, Members have created various border protection mechanisms that suit their own national interests. Two categories of policy space have derived from the said tariffication process: final bound tariffs and the entitlement to the TRQ administration and the SSG provisions. The purpose of this Chapter is to explore Members' border protection regimes and their derivative policy space in this regard.

3.3.1 Tariff as the Only Legitimate Instrument of Border Protection[216]

The tariffication process in the Uruguay Round resulted in a tariff-based system of border protection that allowed for an initial set of tariff cuts in the AOA.[217] The legal identity of tariff as a legitimate instrument and permissible instrument of border protection has been uphold in the rulings of a few WTO dispute cases. For instance, the WTO panel in Chile-PBS and Safeguards Measures Relating to Certain Agricultural Products ruled that it envisioned that ordinary customs duties would, in principle, become the only form of border protection.[218] The Report of Appellate Body in India-Additional and Extra Additional Duties on Imports from the United States speaks clearly that "tariffs are legitimate instruments to accomplish certain trade policy or other objectives such as to generate fiscal revenue. Indeed, under the GATT 1994, they

[216] "In discussing optimal tariffs for protection, the operational concept that will be employed is that of effective protection. Nominal protection measures the extent to which tariffs (or indeed other trade restrictions) increase the price of a good in the domestic market. But this does not give an accurate picture of the extent to which domestic resources are drawn towards the activity that is protected because it ignores, for example, the degree of government assistance (or tax) to that activity arising from subsidies and tariffs on inputs used in that activity. The effective rate of protection measures the protection accorded to domestic value added and is represented as the difference between valued at domestic prices and value added at world prices expressed as a percentage of the latter." Ali Ibrahim, Arvind Subramanian and Luis A Torres-Castro, *Optimal Tariffs: Theory and Practice* (International Monetary Fund 1993).

[217] Paul Gibson and others, 'Profiles of Tariffs in Global Agricultural Markets' 1 <https://www.ers.usda.gov/webdocs/publications/41241/32220_aer796.pdf?v=41932> accessed 8 December 2017.

[218] World Trade Organization, 'Appellate Body Report on Chile-Price Band and Safeguard Measures Relating to Certain Agricultural Products' (n 170).

are the preferred trade policy instrument, whereas quantitative restrictions are in principle prohibited. Irrespective of the underlying objective, tariffs are permissible under Article II:1(b) so long as they do not exceed a Member's bound rates." [219] In this sense, tariff protection becomes Members' primary policy space for import protection, while the final bound rates for agricultural products represent the highest level of tariff protection from imports.

In order to better understand Members' policy space for border protection, it would be practical to take stock of how Members have utilized customs duties as a lawful instrument of protection [220] and where Members have gone so far towards the agricultural trade liberation and how much room is left for them to play in the future tariff reduction. Two key elements as officially recognized in the tariff profile of a relevant Member[221] have been adopted as a basis to compare the level of playing fields of WTO Members in terms of tariff protection:

(i) The final bound duty and the MFN applied duty, which indicate the level of protection an individual Member has now. As explained previously, Members' final bound duties represent their maximum policy space in terms of tariff protection, while their MFN applied duties represent their actual level of tariff protection or used policy space. The difference between Members' final bound duty and MFN applied duty constitutes their unused policy space in tariff protection. In WTO-speak, the difference between the final bound tariff and the applied duty is referred to as tariff water or tariff binding overhang.[222] The presence of tariff water reflects a unilateral lowering of tariff

[219] World Trade Organization, 'Appellate Body Report on India-Additional and Extra-Additional Duties on Imports from the United States' (n 173) 59. para.159.

[220] Peter Van den Bossche and Werner Zdouc, *The Law and Policy of the World Trade Organization: Text, Cases and Materials* (Cambridge University Press 2017) 426.

[221] 'World Trade Organization, Trade Profiles' <http://stat.wto.org/CountryProfile/WSDBCountryPFHome.aspx?Language=E> accessed 8 December 2017.

[222] There are some disagreements on the terms "waters in the tariff" or "binding overhangs". As there are some economist arguing "water in tariff gap between the applied rate and the actual rate of protection, while the latter defines the difference between the bound tariff rates and the MFN rates. In this paper, there is no intention to differentiate the two terms, they all mean the difference between Members' final bound tariffs and their applied tariffs. Martina Brockmeier, Marianne Kurzweil and Janine Pelikan, 'Agricultural Market Access: Striking the Balance between Formulas and Water in the Tariffs',

barriers and allows for better market access, as the WTO rules grant Members the discretion to apply tariffs within their final bound rates to protect import, and agreeing to lowering bindings means giving up economic and fiscal policy space.[223] The tariff overhang is strategically important to WTO Members, as it will not only offer them more flexibility in using tariff measures to adjust their border protection in accordance with the food supply situation at home and abroad, but also provide them with bigger headroom for tariff protection[224] in terms of future tariff reduction in the ongoing Doha Round and beyond.

(ii) Frequency of the distribution and the tariff bands,[225] which illustrates the structure of protection across agricultural sectors within a Member. As Table 2-5 indicates the agricultural tariff lines of WTO Members are divided into 8 bands: free tariff (0), 0 ≤ 5, 5 ≤ 10, 10≤15, 15 ≤25, 25 ≤ 50, 50 ≤100 and> 100, and the frequency of distribution means what percentage of agricultural tariff lines are allocated to each tariff band. For instance, Lesotho (see Table 2) puts more than 99 percent of its agricultural tariff lines into the highest tariff band of > 100. The two ends of the frequency are quite useful to capture the picture of the tariff regime. The low tariff bands suggest to what extent the Member have achieved in partial and full liberalization. While the higher tariff bands indicate tariff peaks (tariff higher than 15 per cent for industrialized country) and tariff escalation (the import duties rise along processing chains)[226] in the individual Member in question. It is interesting to find out that the tariff structure of a WTO Member does not only indicate how it has designed its protection mechanism, but also the bargaining value in terms of reciprocal concessions of different products to the relevant trading

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ENARPRI Working Paper No.18 (2006) 2 <https://econpapers.repec.org/paper/enaenawpp/018.htm> accessed 8 December 2017.

[223] Van den Bossche and Zdouc (n 220) 448–449.

[224] United Nations, 'World Economic Situation and Prospects 2010' 70 <http://www.un.org/en/development/desa/policy/wesp/wesp_archive/2010wesp.pdf> accessed 8 December 2017.

[225] The WTO divides the frequency of tariff distribution of each WTO member into 8 bands: duty free, 0 ≤ 5, 5 ≤ 10, 10≤15, 15 ≤25, 50 ≤100 and > 100. Part A.1 of each individual WTO member's tariff profile.

[226] FAO Economic and Social Development Department, 'Commodity Market Review 2003-2004' <http://www.fao.org/docrep/006/y5117e/y5117e0f.htm#TopOfPage> accessed 8 December 2017.

partners.[227]

The question is how the border protection system functions under the framework of the AOA which aims at achieving agricultural trade liberalization. To do that, this study has made a thorough survey of the individual tariff profile of 131 WTO Members[228] that are available from the WTO public source to collect information about their bound tariffs, applied tariffs, frequency of the distribution and the tariff bands. As since the AOA was concluded in 1994 and the implementation period for developed Members and developing Members terminated in 2000 and 2004 respectively, no new agreement has been concluded and Members' bound tariffs and tariff structures remain unchanged. This survey shows that tariffs still constitute the primary means of border protection for WTO Members.[229] "Membership in the WTO commits a government to use only approved instruments of trade control, principally tariffs, to apply them in a generally non-discriminatory manner and to subject them to a long-term process of binding and reduction through negotiations".[230] However, the tariffication process in the Uruguay Round has resulted in a worrisome polarization or serious heterogeneity in tariff protection among WTO members.

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[227] "The move to a negotiated approach has probably had substantial implications not only for the degree to which tariffs have been reduced, but also for the structure of tariffs. It has been argued above that the major benefit of tariff negotiations will be probably seen as being the concessions that can be obtained from others. Since such negotiations tend to be governed by the principle of bilateral or multilateral reciprocity, the value of the concessions that the United States obtains will depend upon the value of the concessions offered to the other side. Like pawns in a chess game, however, not all tariff cuts will be of equal bargaining value; their value depends on their strategic position. The choice of which tariffs to reduce and by how much may come to depend less on local political or economic conditions than on their relative bargaining value in obtaining reciprocal concessions from other countries. The relative bargaining value of concessions will depend principally upon desire or ability of different countries to negotiate." R Lavergne, *The Political Economy of US Tariffs: An Empirical Investigation* (New York 1983) 25.

[228] Though the WTO says it has 162 Members as of 30 November 2015, only 131 members' tariff profiles are available from the WTO source, as all the 28 Member countries of the EU have one common tariff profile.

[229] Joseph McMahon, 'The WTO Agreement on Agriculture: A Commentary' (Oxford University Press 2006) 33.

[230] J Michael Finger, 'A Special Safeguard Mechanism for Agricultural Imports: What Experience with Other GATT/WTO Safeguards Tells Us about What Might Work' (2010) 9 World Trade Review 289, 291.

As developing Members are not required to undertake tariffication but instead could opt for ceiling bindings in the Uruguay Round, [231] most developing Members have chosen to protect their borders only through tariff, and by doing so they have set their final bound tariff rates for their sensitive agricultural products at a prohibitively high or a quite high level. As a result, those developing Members have not been entitled to the other two legal import protection instruments deriving from the tariffication: the TRQ administration and the SSG provisions.

If looking deep into the tariff scenarios of WTO Members, the frequency of tariff distribution in particular, we will have a better understanding of how each individual WTO Member protects its sensitive agricultural products, as normally WTO members tend to put their sensitive products in the highest tariff band (>100) or the second highest tariff band (50 ≤100). Besides this division of tariff bands, the correlation between a member's average final bound tariff rate and the frequency of its tariff distribution also suggests that the higher a WTO Member's average final bound rate for agricultural products remains, the higher proportion of agricultural products appears in the highest band or the second highest band of that Member's tariff profile. Based on this observation, three critical points are identified to make a distinction among WTO Members' tariff protection: the average final bound tariff rates of 60 per cent, 120 per cent and 30 per cent, which are nearly equal to, double or only half of the 62 per cent world average final bound tariff for agricultural products.[232]

Another factor for consideration is that if a WTO Member's final average bound tariff is more than 120 per cent, then more than 90 per cent or nearly 100 per cent of its tariff lines for agricultural products will fall only within the highest band (> 100) (see table 2); while if the final average bound tariff of a WTO Member is between 60 per cent and 120 per cent, more than 90 per cent of its tariff lines for agricultural products will go to the highest and second highest band, but the second highest band will be more dominant (see table 8); and vice versa, if the final average bound tariff of a WTO Member is between 30 per cent and 60 per cent or even lower than 30 per cent, its tariff lines for

[231] Merlinda D Ingco and John D Nash, *Agriculture and the WTO: Creating a Trading System for Development* (World Bank Publications 2004) 64.

[232] Basudeb Guha-Khasnobis, *The WTO, Developing Countries and the Doha Development Agenda: Prospects and Challenges for Trade-Led Growth* (Palgrave Macmillan 2004) 161.

agricultural products will be highly concentrated on the lower bands, namely, $25 \leq 50$ and $15 \leq 25$ (see table 9 and 10). This clustering approach is instrumental to differentiate and locate the sensitive products of in a WTO member's tariff profile, as it a normal practice that Members tend to assign their most sensitive products to the highest tariff band. Besides that, the distribution of the tariff lines among various tariff bands also impacts the overall level of import protection, the higher proportion of tariff lines flow to the lower tariff bands, the lower level of overall import protection a WTO Member has, and vice versa. The level of protection (final bound tariff rates) and the structure of protection (distribution of tariffs in various tariff bands) are two key elements in defining the sensitivity of an agricultural product in a Member's political economy.

Following this line of argument, four clusters of WTO members are developed in order to generalize or visualize their policy space in tariff protection:

The first cluster has only a small group of nine Member countries, including Lesotho, Bangladesh, Nigeria, Zimbabwe, Norway, Zambia, Malawi, Tanzania and Mauritius. Geographically, this group is dominated by Sub-Sahara African countries or 5 Least Developed Countries (LDCs).[233] Members in this cluster enjoy the highest level of tariff protection, which means their policy space in tariff protection remains the biggest among the WTO membership. As Table 2 illustrates that more than 90 per cent or nearly 100 per cent tariff lines fall in the highest band (> 100), leaving very limited proportion of tariff lines in other lower tariff bands. For instance, Lesotho and Nigeria set 199 per cent and 150 per cent respectively across each of their tariff lines and there is no distinction at all among them, regardless what product groups they are, animal products, dairy products, fruits and vegetables, cereals, oilseeds, fats &oils, sugars, beverage &tobacco, cotton or whatever, [234] making all their agricultural products equally "sensitive". This "one-size-fits-all" approach or solution is actually the most extraordinary common feature of the tariff profiles of a few Members in this cluster, except Norway. Another salient similarity in terms of the tariff structure of the WTO

[233] United Nations Committee for Development Policy, 'List of Least Developed Countries' <https://www.un.org/development/desa/dpad/wp-content/uploads/sites/45/publication/ldc_list.pdf> accessed 7 December 2017.

[234] Part A.2 of each individual WTO member's tariff profile defines these product groups and their tariffs and imports.

Members in this cluster is that the variations or tariff overhangs between the Members' final bound rates and their MFN applied rates are more than 100 percent. For Lesotho, the tariff overhang is as high as 190 per cent.

Table 2 WTO Members with the Highest Tariff Protection (Tier 1)

Country	Final bound	MFN applied	Frequency of Distribution							
			Free	0 ≤ 5	5 ≤ 10	10≤15	15 ≤25	25 ≤ 50	50 ≤100	> 100
Lesotho	199	8.5	0	0	0	0	0	0	0.7	99.3
Bangladesh	192.4	16.8	0	0	0	0.7	0.2	3.8	0	95.2
Nigeria	150	15.6	0	0	0	0	0	0	0	99.8
Zimbabwe	141.1	23.7	1.3	2.8	0.1	0	2.2	0	0	93.5
Norway	134.8	51.2	28	21.3	0.8	1.5	1	1.5	3.1	42.7
Zambia	123.3	18.9	0	0	0	0	0	2.1	0.2	97.6
Malawi	121.2	18.8	0	0	0	0	0	3.2	1.5	95.2
Tanzania	120	20.3	0	0	0	0	0	0	0	99.8
Mauritius	119.6	0.9	0	0	0	0	0	2.3	1.1	96.5
Source of data: the WTO Tariff Profile 2015.[235]										

The second cluster encompasses 39 WTO Members, about 30 per cent of the WTO Membership. Except Iceland, all the other members in this group are the developing countries, including 12 Members in Latin America and Caribbean, 18 Members in Africa and 4 Members in South and Southeast Asia. There are 14 LDCs in this cluster. The most distinctive feature of this cluster is that most Members have shifted their highest tariff protection to the second highest band. As highlighted in Table 3, there are 18 Members whose tariff lines for agricultural products falling within the 50 ≤100 band account for more than 90 per cent or nearly 100 per cent. Another 12 Members have substantial proportion of tariff lines in the highest band, but the proportions of the second highest band outnumber the highest band. If summing up the two bands, the proportion for the two bands in the total tariff lines for agricultural products of the relevant Member will be around 90-100 percent. All the other Members in this cluster are quite split, either the tariff lines are highly concentrated on the highest band, such as the Zambia, Tunisia or well distributed to other relatively lower bands, like Niger,

[235] 'WTO | Publications World Tariff Profiles 2015' <https://www.wto.org/english/res_e/publications_e/world_tariff_profiles15_e.htm> accessed 6 July 2018.

Egypt, Turkey. Like the first cluster, most Members in this cluster have huge tariff water in their border protection, and their tariff overhangs vary from 20 per cent to nearly 100 per cent.

Table 3 WTO Members with the Second Highest Tariff Protection (Tier 2)

Country	Final bound	MFN applied	Frequency of Distribution							
			Free	0 ≤ 5	5 ≤ 10	10≤15	15 ≤25	25 ≤ 50	50 ≤100	> 100
Tunisia	116	24.6	0	0	0	0	1.7	2.9	44.0	51.4
Saint Vincent &Grenadines	114.8	17.1	0	0	0	0	0	0.6	63.0	36.3
Saint Lucia	114.7	16.4	0	0	0	0	0	0.7	63.1	36.2
Iceland	113.6	23	25.6	2.1	6.9	1.4	7.9	12.8	3.2	40.2
India	113.5	33.4	0	0	1.3	0.3	2.2	7.2	53.2	35.8
Dominica	112.5	21.4	0	0	0	0	0	0.7	73.3	25.8
Barbados	111.1	18.1	0	0	0	0	0	0	81.1	18.7
Saint Kitts and Nevis	108.6	13.9	0	0	0.5	0	0	1.8	78.7	18.8
Myanmar	106.2	8.6	0.6	0.6	9.1	3.7	13.0	6.3	17.2	49.5
Antigua and Barbuda	104.8	16.3	0	0	0	0	0	0.6	85.2	14.1
Gambia	104.6	16.9	0	0	0	0	2.6	3.7	1.2	92.3
Belize	101.2	21.7	0	0	0	0	0	0.6	84.3	15
Grenada	100.3	18.2	1.9	0	0	0	1.1	2.5	90	4.6
Kenya	100	20.3	0	0	0	0	0	0	99.8	0
Kuwait	100	5.1	0	0	0	0	0	0	100.0	0
Mozambique	100	13.8	0	0	0	0	0	0	99.8	0
Guyana	99.6	21.4	0	0	0	0	0	0.7	99.3	0
Egypt	98.3	60.6	0	10.6	18.1	2.2	17.4	23.8	25.2	2.3
Burkina Faso	98.1	14.6	0	0.4	1.4	0	0.2	0	98	0
Congo, DR	98.1	10.9	0	0	0	0.3	2	0	97.7	0
Ghana	97.1	17.2	0	0	0	0	0	3.3	96.5	0
Jamaica	97	19.3	1.7	0.3	0.8	0	0	0.7	96.6	0
Pakistan	95.5	14.6	0	3.3	0	0.3	0.2	0.5	90.0	1.9
Burundi	94.4	20.2	3.1	0.6	0	0.3	0	2.3	93.5	0
Colombia	91.6	14.9	0	0	0	0.2	0.2	0.6	74.2	24.9
Trinidad and Tobago	90.2	19.4	5.3	1.9	0.3	2.6	0	1.0	87.1	1.8

Niger	85.7	14.6	0	0.4	1.4	0	0.2	73.2	0.8	24.1
Cameroon	80	22.5	0	0	0	0	0	0	99.8	0
Chad	80	21.8	0	0	0	0	0	0	99.8	0
Togo	80	14.6	0	0	0	0	0	0	99.8	0
Uganda	77.5	20.2	0	0	0	0	0	4.4	95.5	0
Israel	76.7	12.3	3.6	9.4	2.9	2.5	17.6	11.1	18.5	33.5
Rwanda	74	20	3.2	0.8	0.8	0.3	1.8	2.4	90.7	0
Solomon Islands	71.4	12.2	0	3.5	8.3	2.0	0.5	1.7	79.0	5.1
Benin	61.8	14.6	0	0.5	1.4	0	0.2	0	97.9	0
Malaysia	61.8	9.3	12.9	31.6	16.4	12.1	8.6	3.4	3.3	11.4
Turkey	61	42.2	0.0	3.2	3.7	5.8	21.3	24.8	22.8	18.4
Gabon	59.7	21.5	0	0	0	0.7	0	0	99.3	0
Mali	59.2	14.6	0	0.4	1.4	0	0.2	0	98.0	0
Source of data: the WTO Tariff profile 2015										

The third cluster is made up of 42 WTO Members, including 15 Members in Latin America and Caribbean, 15 Members in Africa and 11 Members in Asia and the Pacific. There are 11 LDCs in this group. With the average final bound rates of agricultural products going further down, more tariff lines also move down to lower tariff bands, concentrating in the band of 25 ≤ 50. As Table 4 suggests, 17 Members in this cluster have more than 90 per cent of their tariff lines for agricultural products in the particular band of 25 ≤ 50. Another 10 Members have more than 80 per cent of their tariff lines in this band as well, leaving a smaller proportion of tariff lines in the highest and the second highest tariff band. Therefore, as an enormous proportion of tariff lines is moving down to the lower bands, the sensitivity of some tariff lines in a relevant WTO member's tariff profile becomes quite obvious, normally it refers to those limited tariff lines which remain in the highest and the second highest band. For instance, Sri Lanka has only 0.1 per cent of tariff lines in the highest band, and with that reference it will be very easy to locate that the sensitive or special products for Sri Lanka are beverage and tobacco, whose final bound rate looks extraordinary in its tariff profile. This is probably the most distinctive feature of this cluster as compared to the first and second cluster. The tariff overhangs or unused policy space for tariff protection of Members in this group vary from 10 to 50 percent.

Table 4 Members with Relatively Lower Tariff Protection (Tier 3)

Country	Final bound	MFN applied	Frequency of Distribution							
			free	0 ≤ 5	5 ≤ 10	10≤15	15 ≤25	25 ≤ 50	50 ≤100	>100
Korea, Rep	56	52.7	2.2	5.7	9.1	8.7	23.1	31.8	10.2	8.1
Venezuela	55.3	11.9	0	0	0.3	0.4	7.8	63.6	13.0	14.8
Morocco	54.4	27.4	0	0	0.1	0	4.0	79.7	4.1	12.1
Angola	52.8	23.2	0	0	1.5	3.9	0	0	94.6	0
Guatemala	51.4	9.6	0	0	1.4	0.8	2.1	82.8	4.2	8.7
Djibouti	50.4	14.3	0	0.3	0	0	0	94	1	4.7
Sri Lanka	50.1	23.3	0	0.2	0	0.1	0.3	96.0	3.2	0.1
Maldives	48.8		0	0	0	0	0	93.0	0	6.9
Indonesia	47.1	7.5	0	0	0.6	0	0	87.5	8.6	3.2
Switzerland	46.1	36.1	22.7	22.8	9.5	4.4	5.4	10	11.7	12.5
Mexico	44.5	17.6	0.4	0.2	3.9	0	12.4	75.4	1.9	5.8
Papua New Guinea	44.2	12.7	0	0.8	0.3	19.1	5.6	37.4	35.9	0.9
Vanuatu	43.6		0.1	0	0	0.6	0.2	81.1	17.9	0.2
Nicaragua	43.5	10.6	0	0	0	0	0	89.9	9.5	0.6
Costa Rica	43.2	11.3	0	6.1	2	1.2	4.2	82.5	3	1
El Salvador	42.8	11.8	0	0	0	0	12.9	73.7	11.9	1.4
Fiji	42.5	18.5	0	0	0.2	0	0.1	97.3	1.4	0.9
Nepal	41.5	14.1	0	0.8	2.5	0.5	4.8	82.8	7.8	0.9
Namibia	40.4	8.5	21.4	2.3	1.8	1.7	9.5	36.4	23.6	3.2
Sierra Leone	40.4		0	0	0	0	0	98.8	1.2	0
South Africa	40.4	8.4	21.4	2.3	1.8	1.7	9.5	36.4	23.6	3.2
Swaziland	40.4	8.5	21.4	2.3	1.8	1.7	9.5	36.4	23.6	3.2
Guinea-Bissau	40.1	14.6	0	0	0	0	0	100.0	0	0
Bolivia	40	12.3	0	0	0	0	0	100	0	0
Guinea	39.7		0	0.4	1.4	0	0.2	97.1	0.8	0
Dominican Republic	39.3	12.7	0	0.1	0.9	0.1	2.3	93.8	2.8	0
Bahrain	39	5.3	0	0	0	0	0	97.1	0.5	2.3
Thailand	38.7	31.3	2.0	1.2	3.9	1.7	1.9	75.0	10.5	3.6
Mauritania	38.1	11.1	0	0.4	1.4	0	30.6	56.2	11.5	0
Botswana	37.9	8.5	20.8	2.3	1.8	1.7	14.1	36.1	19.9	3.2
Cuba	37.3	10.6	3.8	2.3	0.6	0	0.2	93.2	0	0
Brazil	35.4	10.2	2.7	0	0.4	1.1	7.1	74.9	13.7	0
Philippines	35.1	9.9	0	2.9	5.4	0.7	9.5	80.2	0.7	0

Uruguay	34	9.9	0	0	0.8	3.1	7.3	84.3	4.5	0
Paraguay	33.1	10	0	0	3.4	3.3	2.0	91.3	0	0
Argentina	32.3	10.4	0.1	3.9	0.4	0.4	6.8	88.3	0	0
Honduras	32.3	10.2	0	0.0	2.9	2.9	14.8	78.6	0.6	0.2
Peru	30.9	4.1	0	0	0	0	0	97.7	2.3	0
Central African	30	21.8	0	0	0	0	0	99.8	0	0
Congo	30	22.2	0	0	0	0	0	99.8	0	0
Madagascar	30	14.6	0	0	0	0	0	99.8	0	0
Senegal	29.8	14.6	0	0	0	1.1	0	98.9	0	0
Source of data: the WTO Tariff Profile 2015										

The fourth cluster is composed by 41 Members, including all of the 21 RAMs and those major players in the WTO multilateral talks, the United States, the European Union (EU), Canada, Japan, etc. There are also 4 LDCs in this group. The salient feature of this cluster is that it is the lowest one in terms of tariff protection level, which means Members in this cluster enjoys the smallest policy space for tariff protection if compared to the other three clusters. The average bound rates for agricultural products of all the Members in this group are less than 30 per cent. Most Members have a very limited number of tariff lines in the highest and second highest band, and the tariff distribution is quite split, but an overwhelming majority of tariff lines for agricultural products of these Members concentrate in three bands: 10≤15, 15 ≤25 and 25 ≤ 50. Another distinction of the cluster is that most Members' tariff overhangs or unused policy space for tariff protection are less than 10 per cent, which means water in these members' tariff protection is insignificant.

Table 5 Members with the Lowest Tariff Protection (Tier 4)

Country	Final bound	MFN applied	Frequency of Distribution							
			Free	0 ≤ 5	5 ≤ 10	10≤15	15 ≤25	25 ≤ 50	50 ≤100	> 100
Oman	28.1	5.2	0	9.0	6.6	73.0	0.0	1.7	2.6	7.1
Panama	27.7	12.1	0.4	7.3	6.5	6.2	8.3	66.7	3.7	0.6
Samoa	26.6	14.7	0	0.6	4.0	18.1	32.1	44.2	0.7	0.3
Qatar	26.2	5.3	0	0	0.8	75.3	18.3	0.1	0	5.6
Chile	26.1	6	0	0	0	0	89.9	9.5	0.6	0
Ecuador	25.7	18.3	0	2.4	0.9	9.8	51.2	33.2	2.4	0
UAE	25.6	5.4	0	0	0	94.3	0	0	0	5.7
Yemen	25	10.4	0	0	4.0	8.4	51.7	23.5	4.5	0

Jordan	23.8	17.4	1.2	15.7	15.4	10.9	27.5	25.6	0.2	3.4
Singapore	23.5	1.1	4.1	0	92.2	0.1	0.2	0.1	0.4	3.0
Haiti	21.4	8.2	16.9	2.1	10.7	3.3	28.7	37.1	0.3	0
Suriname	19.8	18.4	0.3	0	0.1	0.3	99.2	0	0	0
Cabo Verde	19.3	12.2	0	18.7	17.6	1.8	46.6	12.6	2.7	0
Lao	19.2	20.1	6.2	10.8	38.2	5.4	11.6	24.0	3.9	0
Tonga	19.1	11	0	0	0	17.6	82.4	0	0	0
Viet Nam	19.1	16.3	8.7	15.9	18.9	8.8	20.8	24.4	2.3	0.3
Mongolia	18.8	5.1	0.7	0.7	0.8	24.8	71.2	1.5	0.3	0
Cambodia	18.2	14.9	0	3.3	7.4	16.9	15.2	56.3	0.9	0
Japan	18.2	14.3	34.1	18.6	16.1	7.8	10.9	6.2	2.2	4
Chinese Taipei	17.3	16.7	24.6	14.5	12.7	10.7	25.9	7.8	1.2	2.6
Seychelles	16.9		30.1	0	19.0	0	47.5	2.2	0.0	1.2
Canada	16.8	15.9	46	15.7	21	7.5	2	1.8	1.3	4.6
China	15.7	15.2	6	7	25.8	25.6	26.2	7	2.3	0
Saudi Arabia	15.7	5.9	0.1	4.8	33.4	49.7	3.7	0.2	0	1.4
Côte d'Ivoire	14.9	14.6	0.2	2.9	2	93.7	0.2	0	0.9	0
Armenia	14.7	6.8	1.4	0.5	1.1	97.1	0	0	0	0
Moldova	14.1	10.4	3.2	9.8	30.9	36.5	16.0	0.9	2.1	0
EU28	13.5	13.2	32.3	9.6	15.6	13	10.5	11.6	4.6	0.8
FYROM	13.4	13	33.1	16.0	9.1	9.3	11.2	19.7	1.7	0
Georgia	13	6.4	8	1.5	7.1	69.6	11.1	2.3	0.2	0.3
Kyrgyz	12.6	7.6	1.2	9.4	54.6	11.9	22.0	0.5	0	0.3
Tajikistan	11.4	10.7	0.5	35.6	23.4	32.6	6.2	1.2	0.2	0.3
Russia	11.2	11.6	3	43.7	21.3	24.2	3.9	1.1	2.4	0.3
Ukraine	10.9	9.2	12.7	19.5	28.2	14.4	24.1	1.0	0.2	0
Montenegro	10.8	10.1	23	16.6	24.3	12.0	15.1	9.0	0	0
Albania	9.7	7.7	10.6	18.1	53.9	0.1	17.4	0	0	0
New Zealand	6.1	1.4	53.6	2.9	12.7	17.2	11.2	2.4	0	0
USA	4.8	5.1	30.2	44.4	12.7	4.9	2.9	1.4	0.2	0.5
Australia	3.5	1.2	31.3	43.6	17.5	3.9	3.4	0.4	0	0
Hong Kong	0	0	0	0	0	0	0	0	0	0
Macao	0	0	0	0	0	0	0	0	0	0
Source of data: the WTO Trade Profile 2015										

3.3.2 Invisible Tariff Protection of Non-Ad-Valorem (NAV) Duties

Besides the visible tariff protection which can be easily measured or compared on the basis of WTO Members' average final bound duties for agricultural products, there are

some sorts of intangible tariff protection as well that are hidden in the complicated tariff regime of some WTO members.[236] The proportion of NAV or specific duties in the total tariff line of a relevant WTO Member is a good indicator to test the transparency or simplicity of this Member's tariff protection. It is easy to make comparisons between the rates in each market in the case of ad valorem duties because they can be directly compared. The tax impact of an ad valorem rate of 6 per cent is greater than that of an ad valorem rate of 5 per cent in any market(s) and for any goods. Problems of comparison arise in case of NAV duties.[237] It is widely recognized that ad valorem duties are by far the most common type of customs duties. They are preferable to NAV duties for several reasons, such as more transparent, more stable and more efficient.[238] Let's take Canada as an example. Canada's average final bound tariff rate for agricultural products is the closest to China among developed Members, 16.8 per cent as indicated in Table 5. A majority of final bound tariff rates for some agricultural products in Canada's Scheduled HS Code are expressed in a combination of ad valorem duty and specific duty, which makes Canada's tariff regime work like the two-tiered TRQ system, offering huge leeway for Canada in using the import border measures to control the import. For example, the customs duty for cuts and offal, frozen (Scheduled

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[236] "Agricultural protection is the result of a combination of different tariff or para-tariff measures that can be particularly efficient for restraining trade. Among themselves, we can quote: ad valorem tariffs (percentage of the value of the imports), specific tariffs (duty by physical unit of imports), compound and mixed tariffs (a linear or non-linear combination of ad valorem or specific tariffs), tariff rate quotas (a system of two tariffs based on imported quantities), and entry prices (imports entering below the entry price will trigger additional duties). To be able to compare the level of protection across sectors and countries, we computed an aggregated measure of tariff protection: the Ad Valorem Equivalent (AVE) at the HS6 level." David Laborde, 'Implications of the Draft Market Access Modalities on Bound and Applied Tariffs', in Meléndez-Ortiz, R. et al. (ed.)*, Tackling Agriculture in the Post-Bali Context* (2014) 92.

[237] World Trade Organization, *A Handbook on Reading WTO Goods and Services Schedules* (n 151) 49.

[238] "First, ad valorem duties are more transparent than non-ad valorem duties. The protectionist impact and the negative effect on prices for customers are easier to access for ad valorem duties than for non-ad valorem duties. The lack of transparency of non-ad valorem duties make it easier for special interest groups to obtain government support for high levels of protection. Secondly, by definition, the ad valorem customs duties are index-linked. In time of inflation, the government's tariff revenue will keep up with price increases and the level of protection will remain the same. By contrast, non-ad valorem duties will constantly have to be changed to maintain the same real tariff revenue or maintain the same level of protection. Thirdly, non-ad valorem duties 'punish' efficiency because the cheaper like products are subject to a higher duty in ad-valorem terms" Van den Bossche and Zdouc (n 220) 422.

HS Code 02071422) is set as 238.3 per cent but not < 644.7¢/kg, but if converted into the ad valorem equivalent (AVE), it will be 597.8 per cent,[239] more than double than it appears to be at the first sight. The scheduled final bound tariffs for garlic (07032010) and mushrooms (07123030), China's two major exported agricultural products, in Chinese Taipei are NT$27.00/KGM and NT$369.00/KGM, and it will be 293 per cent and 328 per cent respectively in terms of their AVE.

As Table 6 indicates that 40 WTO Members or nearly one third of the WTO membership have maintained NAV duties for agricultural products. They are made up of Members from various clusters as identified previously, with 2 Members (Zimbabwe and Norway) from cluster 1, 9 Members from cluster 2 and 8 Members from cluster 3, and all the rest 21 Members from cluster 4. Generally speaking, developing Members tend to maintain high final bound duties with very limited proportion of NAV duties, while developed Members are behaving the other way around, with apparently low final bound duties but maintaining a substantial proportion of NAV duties, especially over their sensitive products. For instance, NAV duties for agricultural products in the United States, the EU, Canada and Japan, the so-called "Quadrilaterals" or "Quad", account for 41.3 per cent, 32 per cent, 19.6 per cent and 15.1 per cent of their total tariff lines for agricultural products respectively, which makes it almost impossible to estimate their real levels of tariff protection, even though the average final bound duties of developed Members look apparently much lower than those of most developing countries. The estimated AVEs of NTMs in the sector of agriculture and food for the EU are ranging from 48.2 per cent to 56.8 per cent, while its simple average MFN applied tariff is 13.2 per cent. It is also the case for the United States, as its AVE varies from 51.3 per cent to 73.3 per cent in accordance with different source of calculation, while its simple average MFN applied tariff is 4.7 per cent.[240] In this sense, the transparency of tariffs in agriculture in developing Members is significantly higher than those in industrial countries.[241] A number of RAMs Russia and Saudi Arabia in particular, have also maintained NAV duties. In case of China, it has only ad valorem

[239] Note by the Secretariat, Ad Valorem Equivalents (AVEs) of Scheduled Final Bound Agricultural Tariffs, WTO Committee on Agriculture, Special Session, Job (07) 192, 30 November 2007, p. 5.

[240] Tim Josling and Stefan Tangermann, 'Agriculture, Food and the TTIP: Possibilities and Pitfalls' 9 <https://www.ceps.eu/publications/agriculture-food-and-ttip-possibilities-and-pitfalls>.

[241] Ingco and Nash (n 231) 70.

duties.

Table 6 Members with NAV Duties for Agricultural Products

	Country	Final bound duty	MFN applied duty	NAV
1	Zimbabwe	141.1	23.7	2.3
2	Norway	134.8	51.2	66.7
3	Iceland	113.6	23	24.5
4	India	113.5	33.4	0.3
5	Myanmar	106.2	8.6	0.6
6	Egypt	98.3	60.6	1.6
7	Jamaica	97	19.3	0.3
8	Pakistan	95.5	14.6	0.2
9	Israel	76.7	12.3	0.4
10	Solomon Islands	71.4	12.2	3.5
11	Malaysia	61.8	9.3	21.1
12	Korea	56	52.7	5.2
13	Sri Lanka	50.1	23.3	2.6
14	Switzerland	46.1	36.1	77.3
15	Mexico	44.5	17.6	7.0
16	Papua New Guinea	44.2	12.7	6.0
17	Fiji	42.5	18.5	2.3
18	Thailand	38.7	31.3	44.2
19	Brunei Darussalam	32	0.1	2.3
20	Panama	27.7	12.1	0.2
21	Samoa	26.6	14.7	3.4
22	Yemen	25	10.4	7.9
23	Jordan	23.8	17.4	0.8
24	Singapore	23.5	1.1	3.8
25	Haiti	21.4	8.2	9.4
26	Japan	18.2	14.3	15.1
27	Chinese Taipei	17.3	16.7	6.8
28	Canada	16.8	15.9	19.6
29	Saudi Arabia	15.7	5.9	9.0
30	Moldova	14.1	10.4	9.0
31	EU	13.5	13.2	32
32	FYROM	13.4	13	9.6
33	Georgia	13	6.4	2.6
34	Kyrgyz Republic	12.6	7.6	2.3
35	Tajikistan	11.4	10.7	3.1
36	Russian Federation	11.2	11.6	22.9
37	Ukraine	10.9	9.2	1.1
38	New Zealand	6.1	1.4	0.2
39	USA	4.8	5.1	41.3
40	Australia	3.5	1.2	1.7
Source of data: the WTO Tariff Profile 2015.				

3.3.3 TRQ Administration as a Legal Instrument of Protection

As mentioned earlier, the TRQ system has two facets: it has been designed as a market access instrument to achieve minimum market access opportunities, but in practice it has been used as an instrument of protection for sensitive products. A research by the OECD finds out that the tariffication of agricultural non-tariff barriers following the AOA has led to the introduction of high out-of-quota tariff rates; in many instances, the same is true of in-quota tariff rates that were introduced to provide minimum market access.[242] In nature, TRQ is regarded as one of non-technical NTMs. [243]

3.3.3.1 TRQ Administration Protection for What Products

As Table 7 indicates, 39 Members[244] have maintained 1094 TRQs over agricultural products in their scheduled commitments.[245] These TRQs originate from different sources, including the tariffication process (current or minimum access) in Uruguay Round, commitments in place prior to the conclusion of the Uruguay Round, and accession negotiations.[246]

TRQs account for one-fifth of the total number of agricultural tariff lines in developed Members or 6 per cent of tariff lines for WTO Members[247] or apply to an estimated 43 per cent of agricultural trade and 51 per cent of domestic production in the OECD

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[242] OECD, *Post Uruguay Round Tariff Regimes: Achievements and Outlook* (OECD 1999) 9.

[243] UNCTAD, 'Non-Tariff Measures to Trade–Economic and Policy Issues for Developing Countries.' (n 185) 38–39.

[244] This number is calculated in accordance with the notification of the WTO dated 28 March 2013, a number of countries who joined the European Community, including Bulgaria, Czech Republic, Hungary, Latvia, Lithuania, Poland, Romania, Slovak Republic and Slovenia are not included in this number, but their numbers of TRQ have not been added into the TRQ number of EU, therefore the number of EU as listed in table 7 refers to the one for EU15 only. Meanwhile according to another WTO document, as of 8 March 2002, 43 Members have tariff quota commitments shown in their Schedules with a total of 1425 individual tariff quota commitment, TN/AG/S/5, dated 21 March 2002.

[245] World Trade Organization, 'Tariff Quota Administration Methods and Fill Rates 2002-2011, Background Paper by the WTO Secretariat, TN/AG/S/26/Rev.1' (n 204).

[246] Tariff and Other Quotas—Background Paper by the Secretariat, World Trade Organization, TN/AG/S/5, 21 March 2002. Para.6.

[247] Tim Josling, 'An Overview of the WTO Agricultural Negotiations', *Reforming Agricultural Trade for Developing Countries: Key issues for a pro-development outcome of the Doha Round negotiations* (World Bank 2007) 26.

countries.[248] TRQ administration has provided eligible Members with considerable flexibility in terms of border protection and import management. The EU has maintained 91 TRQs, but this statistic does not include the TRQ number of those countries who joined the EU after 2004,[249] if their numbers were included, the TRQ number of the EU would go up to 427, accounting for 30 per cent of WTO Members' total amount of TRQ for agricultural products. The other leading TRQ user is Norway who has 232 TRQs.[250] The United States has 54 TRQs. While in the developing Members camp, 13 out of 23 G20 members, including Brazil, India, China, South Africa, and Indonesia, have also maintained TRQ administration over agricultural products. Normally, developing Members have quite a limited number of agricultural products that are subject to TRQ administration. For instance, the numbers of TRQ agricultural products in Brazil, India and China are all less than 10, but South Africa and Thailand are exceptions, maintaining TRQ over 53 and 25 agricultural products respectively. There are also some RAMs, including Chinese Taipei, Ecuador, Ukraine and Viet Nam, who have maintained TRQ protection over a few number of tariff lines for agricultural products.

Table 7 TRQs and Their Principal Administration Methods

Country	Number	Principal TRQ Administration Methods							
		AT	FC	LD	HI	ST	MX	AU	Other
Norway	232	×		×	×			×	
EU-15	91		×	×	×				
Iceland[251]	90	×						×	

[248] Song Soo Lim and David Blandford, 'Korea's Tariff Rate Quota System: Impact of the Doha Development Agenda Proposals' (2009) 13 Journal of Korea Trade 1, 2.

[249] "In the case of the EU, the certified Schedule for the EC-15 is used as the point of reference". World Trade Organization, 'Tariff Quota Administration Methods and Fill Rates 2002-2011, Background Paper by the WTO Secretariat, TN/AG/S/26/Rev.1' (n 204) 2.

[250] According to the clarification from Norway, it has only notified both minimum access quotas and current access quotas for cheese, sheep meat, meat to promotional fairs, meat of game, apples, pears, hay and turkey roll. For other current access quotas included in Norway's Schedule, as of 2000 the bound MFN tariff has been at the level of the in-quota tariff. A tariff-only regime applies to these TRQ from 2000 and onwards. Since Norway has fulfilled its commitments, for the current access quotas with a tariff-only regime, these will not be a part of the notification. Therefore, the number of TRQ products as appeared in Norway's relevant notifications is much less than in its Schedules.

[251] According to the notification from Ireland, the current market access of a number of TRQ products as listed in Section I-B of Part I of Iceland's Schedule LXI is presently not subject to any quota restrictions

Colombia	67	×			×		×	×	×
Korea, Rep	63	×		×	×	×	×	×	×
Venezuela	62						×		
United States	54		×				×		×
South Africa	53	×		×	×				
Barbados	36								
Switzerland	28	×		×	×		×	×	
Costa Rica	27						×		
Thailand	23			×		×			×
Guatemala	22			×					
Canada	21		×	×	×	×	×		×
Japan	20			×		×			
Malaysia	19								
Morocco	19		×						
Panama	19	×						×	
Chinese Taipei	17			×			×	×	
Ecuador	14				×				
Philippines	14	×			×	×			
Tunisia	13				×				
Israel	12	×		×	×		×		×
El Salvador	11							×	
Mexico	11				×				
Croatia	9			×					
Nicaragua	9	×							
Dominican Republic	8			×					
China	7			×			×		
India	4					×			
Moldova	3								
New Zealand	3	×							
Viet Nam	3		×						
Australia[252]	2	×			×				
Brazil	2	×							
Indonesia	2								
Chile	1			×					
FYROM	1								
Ukraine	1			×					
Total Number of Scheduled TRQ	1094	476	81	226	89	27	84	94	17
Source of data: WTO, 'Tariff Quota Administration Methods and Fill Rates 2002-2011, Background Paper by the WTO Secretariat, TN/AG/S/26/Rev.1'.									

There are also some differences in the structure of WTO Members' agricultural products under TRQ administration. For developed Members, the TRQ administration

upon import, only applied rates of duty that are equal to or lower than the corresponding in-quota tariff rates. G/AG/N/ISL/1.

[252] According to the Notification from Australia, the unmanufactured tobacco tariff quota in Section 1-B of Australia's Schedules has not been implemented since 1 January 1995. G/AG/N/Aus/107.

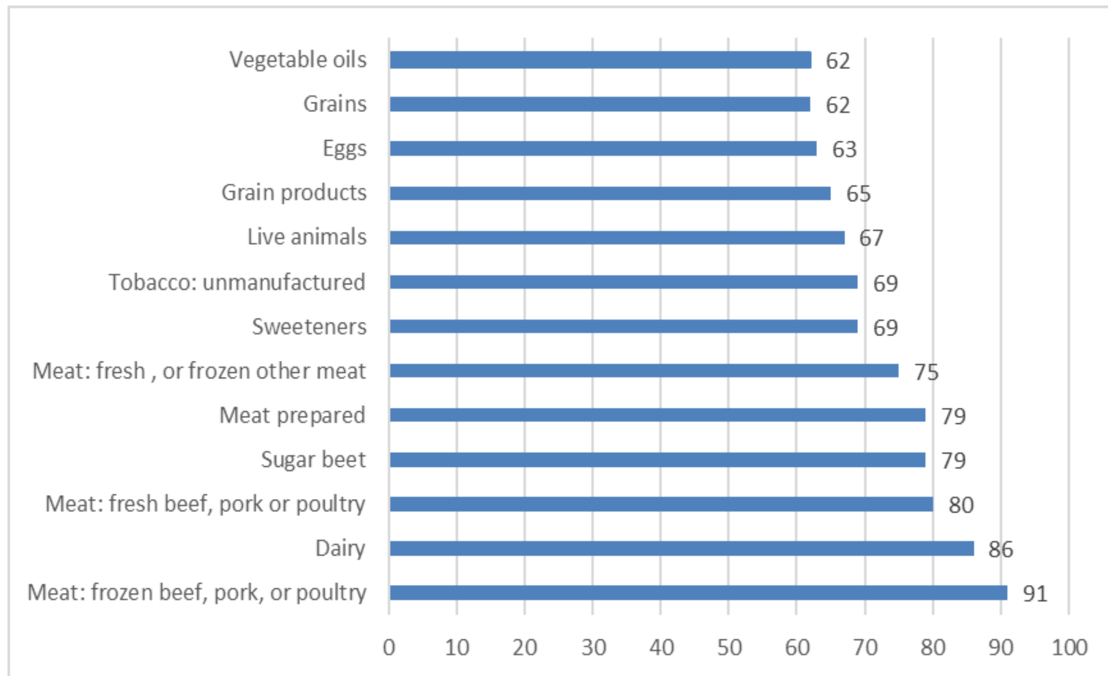
protects mostly the agricultural products in the following HS Code Chapters: dairy produce (milk and milk powder, whey, butter, cheese) in Chapter 4; meat and edible meat offal (pork and beef) in Chapter 2; cereals (wheat, barley, rice and maize) in Chapter 10 and the preparations of cereals, flour, starch in Chapter 19; vegetables (potatoes, tomatoes, dried leguminous vegetables) and fruits and nuts (apples, pears, peanuts) in Chapter 7 and Chapter 8 respectively and the preparations of vegetables and fruits (fruit juice) in Chapter 20. For developing Members, the most favored agricultural products for TRQ protection are cane and beet sugar in Chapter 17. A number of developing Members, such as Ukraine, Chile and Moldova, have maintained TRQ administration only for sugar. Besides sugar, cereals (maize, rice, wheat and sorghum) in Chapter 10, dairy produce (milk and milk in powder, cream, eggs) in Chapter 4, animal and vegetable fats and oils (soybean oil, palm oil) in Chapter 15 and meats (chicken or poultry, pork and beef) in Chapter 2 have also been widely protected by TRQ administration. [253]

Table 8 TRQ by Product Categories

Code	Product category	Number of tariff quotas
FV	Fruit and vegetables	370
ME	Meat products	258
CE	Cereals	226
DA	Dairy products	183
OI	Oilseeds products	129
SG	Sugar and sugar products	59
CO	Coffee, tea, spices and processed agricultural products	58
OA	Other agricultural products	53
BV	Beverages	35
EG	Eggs and egg products	21
FI	Agricultural fibres	20
TB	Tobacco	13
ALL	Total all products	1425
Source of data: WTO, Tariff and Other Quotas: Background Paper by the Secretariat, TN/AG/S/5, dated 21 March 2002, p.4, Table 1.		

[253] OECD, *Post Uruguay Round Tariff Regimes: Achievements and Outlook* (n 242) 20–21.

Figure 1 Average Bound Tariffs by Commodity, 2001[254]



Source of data: Merlinda D Ingco and John D Nash, Agriculture and the WTO: Creating a Trading System for Development (World Bank Publications 2004), p.69.

It is not difficult to find out the correlations between the tariff protection and TRQ administration protection. Normally, the most sensitive agricultural products enjoy dual protection of both the highest tariff protection and the TRQ administration protection (quantitative restriction in this case). For instance, the maximum agricultural duties in India is 300 per cent for oilseeds, fats and oils,[255] and India has also maintained TRQ protection for sunflower-seed oil or safflower oil (tariff line 1512.11),[256] whose bound rate is among the maximum duties for agricultural products. It is also the case for the United States, whose tariff profile indicates that the maximum duties for agricultural products are 350 per cent for tobacco, [257]and meanwhile those tariff lines for tobacco (4-digit HS Code 2401 and 2403) enjoy the TRQ production.[258] Even for the other TRQ products that are not subject to the maximum tariff protection, strong links between the

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[254] Ingco and Nash (n 231) 69.

[255] World Trade Organization, 'World Tariff Profiles 2016' 96 <https://www.wto.org/english/res_e/booksp_e/tariff_profiles16_e.pdf> accessed 8 December 2017.

[256] G/AG/N/IND/5, p.2, dated 7 March 2011, accessed 19 May 2017.

[257] World Trade Organization, 'World Tariff Profiles 2016' (n 255) 175.

[258] G/AG/N/USA/115, p.6, dated 31 March 2017, accessed 19 May 2017.

tariff protection and the TRQ administration protection exist. As Figure 1 shows that meats (Chapter 2), dairy produce (Chapter 4), sugar (Chapter 17), tobacco (Chapter 24) and cereals (Chapter 10) enjoy the higher average tariff protection, [259] meanwhile those products or sectors are also heavily protected by the TRQ administration.

3.3.3.2 The Design and Functioning of TRQ

The effectiveness of the TRQ system as a border protection instrument depends on the following two factors: the design of the TRQ system and the TRQ administration method.

As far as the design of the TRQ system is concerned, the interactions between the in-quota tariff and out-of-quota tariff are key to the effectiveness of the system. The in-quota tariff rates should be kept quite low or zero so as to ensure the minimum market access, and the gaps between the in-quota and the out-of-quota tariff rates shall be very wide, the manner of in-quota tariff rates allocation is of crucial importance.[260] In this sense, the in-quota tariff rates work as the first safety valve of the TRQ system as a protection instrument. Given the TRQ system has to meet the minimum access commitment requirement, under which the imports will enjoy the privileges of lower in-quota tariff. This has made the TRQ system behave like an allocation mechanism to distribute rights to the low in-quota tariff and the rents that accrue.[261]While the out-of-quota tariff rates service as the second or last safety valve, therefore Members normally set the out-of-quota tariff rates at very high level with a complicated combination of an ad valorem rate and a specific rate. For instance, the in-quota tariff rate of Australia for cheese is $A 96/t, while the out-of-quota tariff rate is $A 1,220/t, which is 18 times of the in-quota tariff rate. Due to the huge gap between the in-quota and out-of-quota tariff rate, the fill rate of in-quota import of cheese in Australia has been reported nearly 100 percent over the years. [262]However, in practice, there are also cases where the in-quota tariff itself was set at a relatively high level or with specific conditions, making it

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[259] Ingco and Nash (n 231) 68.

[260] Melaku Desta, *The Law of International Trade in Agricultural Products: From GATT 1947 to the WTO Agreement on Agriculture* (Kluwer Law International 2002) 79.

[261] Abbott and Morse (n 198).

[262] A/AG/N/AUS/107, A/AG/N/AUS/102, A/AG/N/AUS/94.

difficult even for in-quota imports to compete with domestic production.[263] For instance, the 10 per cent in-quota tariff rate for orange (HS code 080510) in the EU is only for import during a specific period, namely 1 February to 30 April, otherwise the out-of-quota tariff will apply to orange imports, which is 10.4 per cent plus 71 ECU/T. The mean out-of-quota tariff rates in Korea, Japan, Norway, Iceland and Canada are all more than 200 per cent, while in the EU, the United States remain at relatively moderate levels, for instance, 45 per cent for the former.[264] Although the TRQ system was designed to increase market access for agricultural products that previously faced quantitative barriers, high in-quota and out-of-quota tariffs imply that the TRQ system can still be an impediment to trade. Across WTO Members the simple average in-quota tariff is as high as 63 per cent, which has led to low quota fill rates. The TRQ regime may provide less market access than what the architects of the AOA expected.[265]

Besides the interaction between the in-quota tariff and out-of-quota tariff, the in-quota quantity of a TRQ product is also quite important as it decides directly how much a Member has agreed to give its trading partners more favorable market access to import. The AOA requires Members to ensure current and minimum access opportunities of 3 or 5 percent of base-period consumption (1986-1988 average), however the in-quota quantities in most developing Members, particularly some RAMs have exceeded the minimum and current access requirement. For instance, the in-quota quantity of China for sugar represents nearly 30 per cent of its domestic consumption in 1986-88, which seems to use these commitments as maximum rather than minimum trade levels.[266]

Table 9 China's Final TRQ Quantity

as a Percentage of UR Base Domestic Consumption

TRQ product	Domestic Consumption (1986-88 average) (Million MT)	final quota quantity (Million MT)	Percent (%)
Wheat	99.377	9.636	9.7
Corn	66.8	7.2	10.8
Rice	115.743	5.32	4.6

[263] Jean-Christophe Bureau and Stefan Tangermann, 'Tariff Rate Quotas in the EU' (2000) 29 Agricultural and Resource Economics Review 70, 74.

[264] OECD, *Post Uruguay Round Tariff Regimes: Achievements and Outlook* (n 242) 19–31.

[265] Josling, 'An Overview of the WTO Agricultural Negotiations' (n 247) 27.

[266] Abbott and Morse (n 198) 116.

Cotton	4.39	0.894	20.4
Sugar	7.0	1.945	27.8

Source of data: China’s domestic consumption of TRQ products in the base period of 1986-88 comes from the Production, Supply and Distribution (PSD) database of the United States Department of Agriculture (USDA). http://apps.fas.usda.gov/psdonline/psdQuery.aspx, accessed 22 May 2017.

Apart from the design of TRQ system, the administration methods also have a direct bearing on the functioning of the TRQ system.[267] Article XIII of the GATT 1994 entitled “Non-discriminatory Administration of Quantitative Restrictions” as well as the ILP Agreement constitutes the legal jurisprudence that can also apply to the allocation and administration of agricultural TRQs.[268] Article XIII of the GATT 1994 will be discussed shortly. The ILP Agreement provides that import licensing should be simple, transparent and predictable so as not to become an obstacle to trade. To do that, Members are required to publish rules and all information concerning procedures for the submission of applications, including the eligibility criteria for applicants, the administrative bodies to be approached and lists of products that are subject to import licensing, whenever practicable, 21 days prior to the effective date of the requirement

[267] “Tariff quota administration is fundamentally a rationing problem. There are many ways to ration. How to determine the way most consistent with WTO principles is the issue. Tariff quota administration concerns how the rights to import at the in-quota tariff are distributed. How these rights are distributed can determine the volume and distribution of trade, as well as the distribution of quota rents. When considering tariff quotas, one must distinguish between the volume and distribution of trade and the volume and distribution of rents. The WTO is concerned only with how quota administration influences the volume and distribution of trade; it has no direct interest in the distribution of rents. However, the distribution of rents is important. First, how quota rents are distributed influences the distribution of trade. Administrative methods that separate the distribution of quota rents from the distribution of trade remove the trade-distorting risk posed by quota rents. Administrative methods that award quota rents to in-quota imports encourage a biased distribution of trade. Second, it is the distribution of rents that motivates the politics of TRQ administration. The choice of the method of tariff quota administration is a political decision; many competing interests claim entitlement to quota rents”. David W Skully, ‘Economics of Tariff-Rate Quota Administration’ 3 <https://www.ers.usda.gov/webdocs/publications/47379/31998_tb1893_002.pdf?v=42487> accessed 8 December 2017.

[268] “The allocation of the TRQ should follow the disciplines in GATT Article XIII (Non-discriminatory Administration of Quantitative Restrictions) which provides that TRQ should be applied similarly to products from all origins, but that allocations also should correspond as closely as possible to the expected import shares that would have existed in the absence of TRQ. Agreements with principal suppliers also are possible.” World Trade Organization, ‘WTO E-Learning: Trade Remedies and the WTO’ (n 178).

but in all events not later than the effective date. Members need to make sure that application and renewal forms are simple. It requires Members to apply import licensing procedures neutrally and administer them in a fair and equitable manner. Minor documentation errors or variation should be tolerated, and applications are not to be refused for minor documentation errors or be penalized heavily for any omissions or mistakes in documentation or procedures obviously made without fraudulent intent or gross negligence. The ILP Agreement further provides for the specific requirements for automatic licensing and non-automatic licensing.[269]

Two normative criteria are set forth to judge the proper administration of a TRQ: quota fill and distribution of trade.[270]

TRQ administration is fundamentally a rationing problem. There are many ways to ration. The issue is how to determine the way most consistent with WTO principles.[271] The WTO has identified ten principal TRQ administration methods, which can be divided into three general types: market-based or auction allocation, rule-based allocation (license on demand, first-come-first served and historical allocation) and discretionary allocation.[272] Each method has its pros and cons. On the selection of TRQ administration methods by a Member, there are many political factors involving in the decision-making process. It is widely said that the more politically sensitive imports of a commodity are, the greater probability that its TRQ administration will be by discretionary methods.[273] And even in cases where discriminatory administration of TRQs is not at issue, importing Members often try to set all sorts of hurdles against in-quota imports.[274] Therefore, the matter of substance surrounding the operation and administration of the TRQ system is that WTO Members have no intention to give up

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269 'WTO | Import Licensing - Technical Information' <https://www.wto.org/english/tratop_e/implic_e/implic_info_e.htm> accessed 7 July 2018.

270 Skully (n 267) 4.

271 Skully (n 267) 6.

272 Kerr and Gaisford (n 194) 267–275.

273 "There is a political economy of administrative choice. Governments choose an administrative method for each commodity. Thus, fill rates reflect factors determining a government's choice of method as well as the intrinsic properties of administrative method used and the commodity market conditions during the period of observations—factors difficult to identify and separate." Skully (n 267) 5.

274 Desta (n 260) 84.

their protection of sensitive products through TRQ administration, even though they are committed to offer minimum and current market access. In practice, Members tend to choose the most credible administration method to influence or control the import of sensitive TRQ products.

Two controversial legal issues arise from WTO Members' unilateral decisions on their own TRQ allocation methods: one is whether those methods based on country-specific allocation or traditional commercial arrangements, such as Historical Importers (HI), have violated the non-discrimination principle? The other one is how to make sure non-market or political factors that have been involved in the method of Imports Undertaken by State Trading Entities (ST) will not impact the fill rate or the fair allocation and distribution of a TRQ? [275]

As Table 7 indicates, the HI method has been adopted by many developed Members. For instance, many TRQ products in the United States, such as beef, milk and cream, cheese, butterfat, have been administrated through the HI method. [276] To give a brief example, Edam and Gouda cheeses (HS 0406) have been reserved by the United States for a small group of Members, including the EU, Norway, Argentina, Costa Rica and Uruguay. As a matter of fact, HI is also the preferred method of the EU for its allocation of TRQ products, like beef, lamb, butter, cheese, sweet potatoes, let alone the most famous banana arrangement for its global quota allocation among few South American Countries. The HI method has been widely adopted by developed Members to strike a balance between maintaining its old preferential trade arrangements and fulfilling its new market access expansion commitments. [277] Does it constitute a discrimination

[275] "Quota administration can have a direct influence on both trade flows and the distribution of rents originating under the quotas, and is, therefore, a highly political issue. In the debate about implementation of the URAA, much dissatisfaction has been voiced regarding TRQ administration in many specific cases, and in some cases formal disputes have been brought before the WTO. There is an urgent need to provide more information on how TRQ are currently administered, what the economic implications are, how trade flows have developed under TRQ." Harry De Gorter and Ian M Sheldon, 'Issues in the Administration of Tariff-Rate Import Quotas in the Agreement on Agriculture in the WTO: An Introduction' (2000) 29 Agricultural and Resource Economics Review 54, 54–57.

[276] David Skully, 'US TRQs for Peanuts, Sugar, and Tobacco: Historical Allocation and Nondiscrimination' (2000) 29 Agricultural and Resource Economics Review 81, 82.

[277] "The EU used current access quotas to maintain previously-existing preferential access arrangements. Of the 44 current access TRQs, 14 are allocated to a particular list of countries. Several of

against other developing Members, particularly the RAMs? The legal answers seem to be explicit and irrefutable. Firstly, the Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries (the Enabling Clause) introduced in 1979 allows derogation to the MFN treatment (non-discrimination) in favour of developing Members, which means it allows developed Members to grant favourable treatment to their developing counterparts on a non-reciprocal basis. In particular, Paragraph 2(c) permits preferential arrangements among developing Members in goods trade. It has continued to apply as part of the GATT 1994 under the WTO. Secondly, Article XIII of the GATT 1994 on non-discriminatory administration of quantitative restrictions has recognized the legality of the country-specific allocation of TRQ if the following specific conditions are met: (1) the import restrictions shall be based on a distribution of trade approaching as closely as possible the shares which the various Contracting Parties might be expected to obtain in the absence of such restrictions; (2) quotas representing the total amount of permitted imports shall be fixed and a public notice shall be given concerning the total quantity or value of the product or products which will be permitted to be imported during a specified future period and of any change in such quantity or value; (3) in cases in which a quota is allocated among supplying countries, the Contracting Party applying the restrictions may seek an agreement with respect to the allocation of shares in the quota with all other Contracting Parties having a substantial interest in supplying the product concerned. [278]

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these quotas list developing countries as beneficiaries. Some of these quotas are allocated to African, Caribbean and Pacific (ACP) countries as a result of the Lomé Convention (now the Cotonou Agreement). This includes four quotas for sheep, goats and mushrooms as well as the 1.2 million tonne quota of sugar. Others are allocated to Central and Eastern European countries. The EU Schedules mention that, for 18 out of the 36 minimum access quotas, the EU may count against these quotas preferential imports from Central and Eastern European countries under the Europe Agreements. This is the case for pigmeat (5 quotas), poultry (3 quotas), dairy products (7 quotas) and processed eggs (3 quotas). However, neither the quantities admitted under quota nor the eligible countries are specified in the Schedule itself." Matthews and Dupraz (n 197) 89–106.

[278] World Trade Organization, 'Article XIII Non-Discriminatory Administration of Quantitative Restrictions' <https://www.wto.org/english/res_e/booksp_e/gatt_ai_e/art13_e.pdf> accessed 2 January 2018.

The State Trading method is also quite controversial due to the ambiguities of WTO rules. There is one point that deserves clarification. STEs have been endorsed by the WTO as legitimate partners in international trade, both imports and exports. However, the activities of STEs have the potential to distort international trade or the political factors involving in the commercial consideration of STEs might violate the WTO's core value of market economy,[279] in which firms make decisions based on economic principles and not upon government instruction. [280]A key factor here is to define the legality of activities of STEs. For example, there are concerns that STEs might distort trade relative to the competitive market solution or use their powers to circumvent their AOA commitments on market access.[281] There are no provisions under the AOA to regulate the state trading as well as the TRQ allocation through STEs. But in practice this method has been widely adopted by many WTO Members, including Canada, India, Japan, the Philippines, Korea and Thailand, and China.[282] The core provision dealing with this special issue is Article XVII of the GATT 1994, which prescribes that Members shall notify STEs in accordance with the following working definition: governmental and non-governmental enterprises, including marketing boards, which have been granted exclusive or special rights or privileges, including statutory or constitutional powers, in the exercise of which they influence through their purchases or sales the level or direction of imports or exports. Particularly important in this definition is the phrase "in the exercise of which they influence … the level or direction

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[279] Chiedu Osakwe, 'Future of the Multilateral Trading System: Why the WTO Remains Indispensable' (2015) 10 Asian J. WTO & Int'l Health L & Pol'y 1, 5.

[280] "If the government wishes to produce specific trade results, it must have discretionary powers to influence specific trading operations of enterprises. There are essentially three ways in which a government can gain such power over enterprises in a market economy. First, the government can acquire control with ownership. Secondly, it can grant a privilege to the enterprise on the condition that it accepts certain government instruments. The privilege may be in the form of fiscal advantages, direct financial aid……Finally, it might confer on the enterprise an exclusive right, that is, a monopoly in the production, consumption or trade of certain goods, and make the exercise of this subject to government instructions…..The scope of government intervention depends on whether the control is based on ownership, grant of privilege or grant of monopoly rights." Michel M Kostecki, *State Trading in International Markets: Theory and Practice of Industrialized and Developing Countries* (The Macmillan Press 1982) 264.

[281] OECD, *State Trading Enterprises in Agriculture - Books - OECD ILibrary* (OECD 2001) 11–16.

[282] World Trade Organization, 'Tariff Quota Administration Methods and Fill Rates 2002-2011, Background Paper by the WTO Secretariat, TN/AG/S/26/Rev.1' (n 204) 10–19.

of imports or exports", as this goes to the heart of what the regulation of state trading in the WTO is aimed at – that is, the potentially distorting effects on trade of the operations of STEs. Conversely, the WTO does not seek to prohibit or even discourage the establishment or maintenance of STEs, but merely to ensure that they are not operated in a manner inconsistent with WTO principles and rules. The WTO has summarized the substantive obligations of Members under the rules governing state trading into four aspects: (1) non-discrimination, commonly referred to as the MFN treatment; (2) no quantitative restrictions; (3) preservation of the value of tariff concessions; and (4) transparency.[283] There is no further legal disciplines under the current framework of the AOA to guide Members to ensure these substantive obligations have been reflected into their TRQ administration methods. Besides all the criticisms surrounding the discriminatory or quantitative restrictive nature of the involvement of STEs in the TRQ allocation, the transparency issue seems to be the most outstanding one. Many efforts have been made to reduce Members' interventions into the business activities of STEs so as to increase the transparency of TRQ allocation.[284] A major move in this regard is the designation of the specific share of STEs in the allocation of some Members' TRQ final quota quantity and reallocate unused portions of the TRQ by state trading enterprises to private trading enterprises in a bid to increase market access.

Table 10 China's TRQ Commitments at a Glance

	Wheat	Corn	Rice[285]	Cotton	Vegetable Oils[286]	Sugar	Wool

[283] World Trade Organization, State Trading, 'WTO | Trade Topics - THE REGULATION OF STATE TRADING UNDER THE WTO SYSTEM' <https://www.wto.org/english/tratop_e/statra_e/statrad.htm> accessed 8 December 2017.

[284] Protocol on the Accession of the People's Republic of China, Article 6.1 reads that "China shall ensure that import purchasing procedures of state trading enterprises are fully transparent, and in compliance with the WTO Agreement, and shall refrain from taking any measure to influence or direct state trading enterprises as to the quantity, value, or country of origin of goods purchased or sold, except in accordance with the WTO Agreement".

[285] Rice includes short and medium grain rice and long grain rice, the TRQ level refers the total TRQ quantity of China's commitments under each of the relevant tariff lines.

[286] Vegetable oils include Soybean Oil, Palm Oil and Rapeseed Oil. China has made respective TRQ commitments on each of the three individual vegetable oils, the TRQ level refer to the total TRQ quantity

TRQ Level				(Million Metric Tons)			
2002	8.5	5.9	4.0	0.82	5.8`	1.8	0.27
2003	9.1	6.5	4.6	0.86	6.44	1.9	0.28
2004	9.6	7.2	5.4	0.89	6.94	1.9	0.28
2005	*	*	*	*	8.0	*	*
State Share				(Percent)			
2002	90	68	50	33	34	70	
2003	90	64	50	33	26	70	
2004	90	60	50	33	18	70	
2005	*	*	*	*	10	*	
In-quota Tariff				(Percent)			
2002	1-10	1-10	1-9	1	9	20	1
2003	1-10	1-10	1-9	1	9	20	1
2004	1-10	1-10	1-9	1	9	15	1
2005	*	*	*	*	9	*	*
Out-of-quota tariff				(Percent)			
2002	71	70	60	54	48	50	42
2003	68	60	50	47	35	50	40
2004	65	50	40	40	22	50	38
2005	*	*	*		9	*	*

Source of data: Schedule CLII-Peoples' Republic of China, Part I-MFN Tariff, Section I-B Tariff Quotas

3.3.4 The Special Safeguard (SSG) Provisions

Safeguards are contingency restrictions on imports taken temporarily to deal with special circumstances such as a sudden surge in imports. They normally come under the Safeguards Agreement, but the AOA has special provisions (Article 5) on safeguards.[287] Unlike with normal safeguards, the SSGs can automatically trigger higher safeguards duties when import volumes rise above a certain level (volume trigger SSG), or if prices fall below a certain level (price trigger SSG). And there is no need to demonstrate the causal relationship between the import surge and the serious injury to the domestic industry, which is normally hard to prove. As explained earlier, the SSG can only be used on products that were tariffied — which amount to less than 20% of all agricultural products (as defined by "tariff lines") and the SSG provisions

of these vegetable oils. And China has also committed to remove vegetable oils TRQ administration and granted the right to trade such vegetable oils to all individuals and enterprises since the 1 January 2006.

[287] "In the WTO system, there are two sector-specific safeguard mechanisms, in the Agreement on Agriculture (Article 5 of the URAA) and in the General Agreement for Trade in Services (Article X of the GATS). These mechanisms allow for particular kinds of derogations where the effects of the trade liberalizing measures forming the basis of these Agreements cause particular kinds of economic problems to the Member undertaking the liberalization."

can only be used if the Member governments have reserved the right to do so in their schedules of commitments on agriculture. The SSG cannot be used on imports within the tariff rate quotas. However, the volume trigger SSG may function as a second stage TRQ. The volume trigger allows a Member to screen the annual imports against the average of imports over the previous three years. Once the trigger level is reached, it can impose an additional duty--above the bound duty rate. The stages of tariff application are thus the following: the low in-quota tariff rate will apply for the import up to in-quota quantity, and above that the ordinary out-of-quota will apply; once the volume trigger is reached, the ordinary out-of-quota duty plus the SSG additional duty may be applied.[288]

The legal identity of the SSG provisions is very similar to the TRQ system, as they are all products of the tariffication intending to expand market access, meanwhile granting Members necessary means to prevent or control ensuing potential import risks. However, these tools have been turned into devices for sensitive products protection.[289] For the SSG provisions, it is believed that they appear to have been used to balance internal markets by some Members, or overall speaking they have not been used as a haven for Members seeking to avoid their liberalization commitments.[290] And these lawful instruments of protection take different forms and serve different purposes. For the SSGs provisions in question, they appear in the form of trade remedies against import surges.[291]

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[288] Finger (n 230) 2.

[289] Jean-Jacques Hallaert, *Special Agricultural Safeguards: Virtual Benefits and Real Costs-Lessons for the Doha Round* (International Monetary Fund 2005) 4.

[290] Josling, 'An Overview of the WTO Agricultural Negotiations' (n 247) 28.

[291] "The term 'import surge' has been used to highlight two types of potential shocks to domestic agriculture sectors that may arise from increased openness to trade: (a) significant increases in volumes of imports from one year to the next; and (b) depressions to domestic market prices that may result from increased connectivity to global market prices…Import surges can be the result of factors internal to the domestic economy, such as domestic production shortfalls due to climatic events – that do not necessarily imply negative impacts – or they can be the result of external, global market factors that can be potentially disruptive to domestic agriculture.…There is no agreed definition of an import surge or of a methodology for assessing and measuring import surges. The definitions tend to be based inter alia on differing thresholds, with an import surge said to have occurred when the actual imports surpass that threshold. The selection of the threshold can have a significant effect on the determination of the existence of an

39 WTO members have reserved the right to use a combined total of 6156 SSGs on agricultural products. Most developing Members tariffied their NTMs by adopting ceiling bindings and are thus not eligible to the SSG mechanism, even those who are eligible complain that the complexity of the formulas and the data requirements make it difficult to use. For whatever reason, few developing Members are available to this legal mechanism.[292] The availability of SSGs in world trade is perhaps greater than people realize as in practice they have been used in relatively few cases. The major developed Members have a variety of highly protected products with SSG status and account for about two thirds of the total number of SSG designated products in world trade.[293] As Table 11 indicates, Switzerland, Norway and the EU are the biggest holders, and the numbers of SSG that they have are 961, 581 and 539, accounting for 45%, 40% and 26% of their numbers of MFN applied tariff lines for agricultural products respectively. The United States, Canada and Japan have also reserved the SSG for a great number of tariff lines for agricultural products. Some RAMs, such as Chinese Taipei, Ecuador and Panama have designated SSG for a number of tariff lines for agricultural products.

Table 11 Special Safeguards Provisions: Who Has Reserved the Right?

Members	No. of SSGs	No. of MFN Applied Tariff lines	Percentage
Switzerland-Liechtenstein	961	2,134	45.0
Norway	581	1,444	40.2
EU-15(EU-28)	539(1346)[294]	2,074	26.0
Iceland	462	1,926	24.0
Morocco	374	2,466	15.2
Mexico	293	1,274	23.0
United States	189	1,684	11.2
South Africa	166	1,092	15.2
Namibia	166	1,097	15.1
Swaziland	166	1,097	15.1

import surge." Jamie Morrison and George Mermigkas, 'Import Surges and the Special Safeguard Mechanism in a Changing Global Market Context', *Tackling Agriculture in the Post-Bali Context* (2014).

292 J Michael Finger, 'A Special Safeguard Mechanism for Agricultural Imports and the Management of Reform' 21 <http://documents.worldbank.org/curated/en/650881468329067113/pdf/WPS4927.pdf> accessed 31 December 2017.

293 David Harris, 'Special Safeguards and Agricultural Trade Liberalisation' <http://www.apec.org.au/docs/08_SSG_DH.pdf> accessed 8 December 2017.

294 The number in the bracket includes the number of SSGs of these WTO members who joined the EU in or after 2004.

Botswana	161	1,097	14.7
Canada	150	1,302	11.5
Japan	121	1,996	6.1
Philippines	118	1,331	8.9
Korea, Rep	111	1,726	6.4
Guatemala	107	1,163	9.2
Costa Rica	87	1,898	4.6
Chinese Taipei	84	1,501	5.6
El Salvador	84	1,041	8.1
Venezuela	76	1,230	6.2
Malaysia	72	1,255	5.7
Colombia	56	1,039	5.4
Thailand	52	1,303	4.0
Israel	41	1,200	3.4
Barbados	37	1,028	3.6
Tunisia	32	3,407	0.9
Nicaragua	21	1,166	1.8
Indonesia	13	1,320	1.0
Australia	10	838	1.2
Ecuador	7	1,038	0.7
Panama	6	1,420	0.4
New Zealand	4	1,073	0.4
Uruguay	2	1,482	0.1

Source of data:
1. the number of a Member's SSGs come from WTO Secretariat background paper, Special Agricultural Safeguard, G/AG/NG/S/9/Rev.1;
2.the number of Members' MFN applied tariff lines comes from Tariff Profiles 2015, https://www.wto.org/english/res_e/booksp_e/tariff_profiles15_e.pdf;

3.4 Multi Layers of Protection for Sensitive Products

It is more interesting to find out the fact that Members have laid down multi-layers of protection for their sensitive agricultural products on the basis of the legal instruments of protection as approved by the AOA.

Firstly, though the SSG provisions cannot be used on imports below the in-quota quantity of a TRQ product, there is considerable overlap between Members who have maintained TRQ administration and who have reserved the right to use SSG provisions. Vis-à-vis Table 7 and Table 11, we will find a list of 35 WTO members who have maintained both two instruments, including many key WTO players, Australia, Canada, the EU, Japan, the United States, etc. It is worth noting that those Members present a strong geographical picture. Europe appears to be the region who is most likely to favour this TRQ administration and SSG provisions dual protection mechanism. Next to Europe, Latin America and Caribbean, and ASEAN and East Asia follow suit.

Secondly, there is no need to repeat the high tariff protection enjoyed by the TRQ products. The agricultural products which have been designated with SSG status also enjoy high tariff protection. For instance, both the EU and the United States have reserved SSG for a substantial number of tariff lines in Chapter 4 for dairy produce, which account for 21 percent and 39 per cent of their total number of SSGs respectively. Meanwhile, dairy produce also enjoys the highest average final bound duty among the agricultural product groups in their tariff profiles, which is 35.5 per cent for the EU and 16.8 per cent for the United States.[295] Another product group where a great number of SSGs have been designated in the schedules of both the EU and the United States is meat and edible meat offal (chapter 2), accounting for about 30 percent and 6 percent of their total number of SSGs respectively. The EU and the United States have reserved SSGs for sugar and sugar confectionary (chapter 17). Both Chapter 2 and Chapter 17 enjoy relatively high tariff protection in the EU and the United States. The similarity of the SSG distribution in the tariff lines of the EU and the United States suggests that WTO members normally tend to reserve the SSG provisions to protect those sensitive products which are fundamentally important to their diet (nutrition security). If looking deep into the SSG distribution in the schedules of members from other regions, Asia and Africa in particular, we will find that the SSG designated products are key to their food security, and thus enjoy the highest tariff protection. For instance, Japan, Korea and Philippines have maintained TRQ administration for rice, and they also have reserved SSG for a substantial number of tariff lines in chapter 10 (cereals) and Chapter 11("products of the milling industry; malt; starches; inulin; wheat gluten"), which account for 20 percent, 37 per cent and 12 percent of their total number of SSGs respectively. [296] Meanwhile, Cereals & Preparations enjoy quite high average final bound tariff protection, 54.1 percent for Japan, 161.2 per cent for Korea and 37.6 per cent for the Philippines. In the case of South Africa, the situation is even clearer, as the number of SSGs in these two Chapters top the product groups, around one fourth of the

[295] World Trade Organization, 'World Tariff Profiles 2016' (n 255) 81.

[296] "SSGs are especially common for meat, dairy and sugar products: the EU has SSG status on the major meat, dairy, cereal and sugar products; Japan has SSG status on a range of meat, dairy and cereal products; the US has SSG status on the major dairy and sugar products and various cereal and meat products; and Canada has SSG status on the major dairy products and some cereal and meat products" 'Special Safeguards and Agricultural Trade Liberalisation' (n 293) viii.

total number of SSGs. The tariff protection of South Africa for Cereals & Preparations is 47 per cent.

Table 12 Products with SSG status in WTO Members

		Developed Members	Developing Members	Total
Meat products	number	885	471	1 356
	% of category	65.3	34.7	
Dairy products	number	464	365	829
	% of category	56.0	44.0	
Cereal products	number	690	399	1 089
	% of category	63.4	36.6	
Oilseed products	number	407	304	711
	% of category	57.2	42.8	
Sugar products	number	148	150	298
	% of category	49.7	50.3	
Fruit & vegetables	number	644	187	831
	% of category	77.5	22.5	
Other products	number	793	249	1 042
	% of category	76.1	23.9	
	Total number	4 031	2 125	6 156
	% of category	65.5	34.5	

Source of data: David Harris, 'Special Safeguards and Agricultural Trade Liberalisation' <http://www.apec.org.au/docs/08_SSG_DH.pdf> accessed 8 December 2017.

Moreover, the SSG coverage across product categories reflects the degree of sensitivity to liberalization or defensive interests to protect in each Member.[297] For instance, the EU has designated 77 SSGs in Chapter 10 and Chapter 11, while the United States has not made any SSG reservation in this regard. On the contrary, the EU has reserved only 1 SSG in Chapter 19 (preparations of cereals, flour, starch or milk, pasta, bread), while the United States has made 15 designations in this Chapter.

Table 13 Distribution of SSGs in Selected Members' Scheduled Tariff Lines

HS Digit 2	EU-15	USA	Japan	Kore a	Chinese Taipei	South Africa	Philippines

[297] Josling, 'An Overview of the WTO Agricultural Negotiations' (n 247) 28.

02	161	12	24		22	23	52
04	114	73	29		13	8	
07	16	-	6	12	7	22	7
08					4	7	
10+11	77	-	24	41	1	40	14
12	3	2	3	21	4	5	
15	10	1	-		2	10	
16	13	-	6		7	15	16
17	28	16	-		7	4	
19	1	15	16		2		
20					10	20	
Source of data: author's own calculation based on Members' Schedules Commitments							

Despite the broad coverage across products, few actions in the name of special agricultural safeguards have been taken. For instance, Japan has taken SSG actions for 12 tariff lines in fiscal year 2016, mainly against dairy produce and cereals & preparations, which is only 10 per cent of its total SSGs number.[298] It is the same situation for the EU and the United States. In this sense, the SSG mechanism under the AOA is more like a symbolic gesture. It works with other instruments of protection, tariffs and the TRQ system, to provide those eligible WTO Members with extra assurance that their sensitive products will not meet any challenge from competitive import or allow it to happen at least in a way that they can still control.

3.5 Conclusions

The AOA has offered Members with two categories of legitimate policy space to enable them to provide border protection to their sensitive products: protection through the final bound tariffs and the entitlements to the TRQ system and the SSG provisions. Based on the legal policy space, Members have built up their own mechanisms for border protection.

3.5.1 Tariff Protection as Members' Primary Policy Space in Border Protection

The word "tariff" is used in various contexts. The WTO application of this term

[298] G/AG/N/JPN/216, dated May 11, 2017.

exclusively relates to taxes triggered by, and imposed upon, cross-border movement of goods. They do not extend to domestic commerce. Import and export tariffs are normally classified under three major categories based on the principle of application: ad-valorem, specific and mixed or compound tariffs. Tariffs need to be distinguished from customs-controlled, but essentially distinct levies such as quotas, other duties, indirect taxes (e.g. VAT) and service fees. In the course of economic history, the functions of tariffs have evolved from being an exclusive source of governmental revenue to an important multifaceted international trade tool, such as providing a degree of protection over infant industries, working as punitive measures in international trade disputes. [299]

The tariff-only regime adopted in the Uruguay Round has long been blamed for the "dirty tariffication" process, which has resulted in the fact that the AOA has had a limited concrete impact on the market access. As Members chose data that would allow the highest possible tariffs when they converted their NTMs into tariffs, the resulting high tariffs were either not always applied in practice [300]or contained "dirt" or "water" in the sense that they were much higher than what would have been exact equivalents of the non-tariff barriers existing in the base period. [301] Thanks to the dirty tariffication, the level of effective tariff protection against the flow of agricultural trade has been rising instead of falling in the Uruguay Round.[302]

However, a bad agreement is probably better than no agreement at all. Despite the imperfectness, the AOA proves to be a critical first step towards the formation of a legitimate global trade regime capable of removing barriers to trade.[303] It has put an end to the long-protected status or "exceptionalism" from international disciplines[304]that agriculture has enjoyed over the decades and has initiated the reform process to integrate it into the multilateral trading system. At this important juncture, the AOA is

[299] Cottier, Nartova and Shingal (n 181).

[300] McMahon and Desta (n 159) 6.

[301] Stefan Tangermann, 'Implementation of the Uruguay Round Agreement on Agriculture by Major Developed Countries' (United Nations Conference on Trade and Development 1995) 5.

[302] Desta (n 260) 79.

[303] Thacker (n 66) 731.

[304] Green (n 67) 819–820.

reshaping agriculture towards order, fair competition and a less distorted sector[305] by laying down the basis for a legal framework aiming at progressively reducing distortions and protections in agricultural markets. Positive progress has been made in this regard, for instance, improvements in market access and transparency from tariffication, classification and reduction measures for the domestic supports that mostly distort trade.

More importantly, the tariff-only regime has recognized the legal status of tariffs as the primary lawful instrument of border protection. The tariff binding requirements have turned Members' final bound tariffs into their legal policy space in border protection.[306] However, as bound or consolidated tariffs are reversible in WTO law, Members might opt to change their policy space in border protection through deconsolidating their bound tariffs on the basis of offering compensation on different tariff lines to the members primarily affected. The legal jurisprudence for tariff deconsolidation rests on Article XXVIII of the GATT 1994 by corresponding notes, the Understanding on the Interpretation of Article XXVIII of the GATT 1994 and the Procedures for Negotiations under Article XXVIII adopted 10 November 1980. With this legal authorization, a WTO member can increase its bound protection on a given item provided that the multilateral process included in Article XXVIII has been followed. Typically, a member wishing to raise its duties will have to negotiate and agree compensation with those Members holding initial negotiating rights (INR), qualifying as the Principal Supplying Interest (PSI) Member and having a substantial interest. In case no agreement is reached, the requesting WTO member is free to increase its tariff protection and the main affected members would then have the right to withdraw substantially equivalent tariff concessions. In practice, tariff deconsolidation is not frequent, as governments tend to negotiate tariff bindings beyond the tariff levels

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[305] World Trade Organization, 'WTO | Understanding the WTO - Agriculture: Fairer Markets for Farmers' <https://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm3_e.htm> accessed 8 December 2017.

[306] "Bound tariffs represent the policy space available to a country with respect to import protection", Alan Mathew, Technical Note for The State of Agricultural Commodity Markets 2015-16, Alan Matthews, 'Policy Space to Pursue Food Security in the WTO Agreement on Agriculture' 2 <http://www.fao.org/3/a-i5224e.pdf> accessed 8 December 2017.

actually in existence.[307] The huge tariff overhangs in many Members' tariff profiles give them sufficient maneuvering space in tariff protection.[308]

However, Members have not been fully prepared to treat agriculture in the same way as non-agricultural products in terms of trade liberalization and they have had to make comprises or granted necessary flexibility in the AOA rules to accommodate the common interests of Members for the protection of their sensitive products. This partly explains why WTO Members normally adopt two approaches to select their sensitive products: rule of thumb approach for selecting products with the highest bound or applied tariffs or the political-economy approach.[309]

The landscape of Members' policy space in tariff protection is quite diverse and complex at global, regional and individual Member level.

As regards the tariff protection at the global and regional level, developing Members are enjoying more policy space in tariff protection. The tariff overhang between the world average bound tariff for agricultural products (62%) and the world average applied tariff for agricultural products (19%) stands as high as 43%. The contribution comes mostly from developing Members. As Figure 2 illustrates, there are 5 regions whose average bound tariffs are higher than the world average level, and 4 of them are from the developing Members camp, including South Asia, Caribbean Islands, Sub-Saharan and North Africa (or Asia-Pacific[310]). Even for those regions whose average bound tariffs are lower than the world average level, there are still some considerable water in the level of their tariff protection.

As regards the tariff protection at the individual Member level, it varies with each Member's final average bound rate and the relevant applied rates. Given the diversity of Members' tariff profiles, they can be divided into 4 tiers or clusters in accordance with their final bound tariff rates and the world average bound tariff rate for agricultural

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[307] Cottier, Nartova and Shingal (n 181).

[308] Munisamy Gopinath and David Laborde, 'Implications for India of the May 2008 Draft Agricultural Modalities' 5 <https://www.ictsd.org/downloads/2008/07/126.pdf> accessed 8 December 2017.

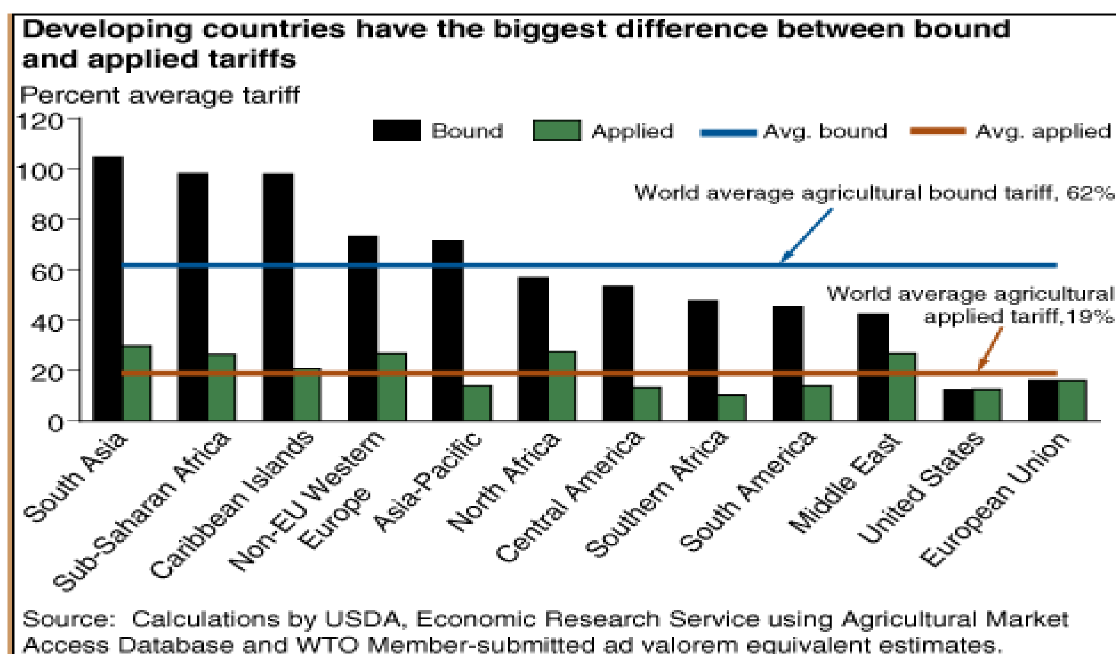
[309] Jean, Laborde and Martin (n 125) 511–514.

[310] Figure 1 and Figure 2 are from different sources, and there are some variations in the order of the average bound rates at regional level, it is worth to keep both of them here.

products:

--Tier 1 (average final bound tariff is more than 120 percent, nearly twice of the 62 per cent of world average tariff rate) enjoys the highest level of tariff protection. More than 90 per cent or nearly 100 per cent of Members' tariff lines fall in the highest band (> 100), leaving very limited tariff lines in other lower tariff bands.

Figure 2 Tariff Overhang of WTO Members at the Regional Level



Source of data: US Department of Agriculture, 'Developing Countries Have the Biggest Difference between Bound and Applied Tariffs' <https://www.ers.usda.gov/data-products/chart-gallery/gallery/chart-detail/?chartId=60954> accessed 8 December 2017.

--Tier 2 (average bound tariff is between 60 percent and 120 percent, between once and twice of the world average rate) enjoys quite high tariff protection as 90-100 percent of the total tariff lines are in the highest band (>100) and the second highest band (50 ≤100).

--Tier 3 (average bound tariff is between 30 percent and 60 percent, between half and once of the world average rate) enjoys relative high tariff protection and a majority of tariff lines are in the 25 ≤ 50 band.

--Tier 4 (average bound tariff is less than 30 percent, below half of world average) is the most trade liberalized cluster in terms of tariff protection. Most Members in this tier have very limited number of tariff lines in the highest and second highest bands, and

the tariff protection distribution is quite split. An overwhelming majority of tariff lines concentrate on three bands: 10≤15, 15 ≤25 and 25 ≤ 50. This cluster is made up of mainly by the RAMs and developed Members, such as the United States, the EU, Canada, Japan, etc.

Members' space in further tariff cuts rests mostly on their tariff overhangs or unused policy space. The tariff overhang is strategically important to WTO members, as it will not only offer them more flexibilities in using tariff measures to adjust their border protection in accordance with the food supply situation at home and abroad, but also provide them with more maneuvering space in terms of future tariff reduction in the ongoing Doha Round and beyond. The landscape of WTO Members' tariff overhangs is quite polarized. For instance, there are **37** Members whose tariff overhangs are even higher than the 62 per cent of world average tariff for agricultural products, ranging from 64 per cent for Israel and 190 per cent for Lesotho. Among them, except Norway and Iceland, all the other Members are developing countries. There are **26** Members with tariff overhangs ranging from 30 to 60 per cent, and they are all developing countries. All the rest **68** Members have their tariff overhangs less than 30 per cent, and half of them have their tariff overhangs even less than 10 per cent. They are made up of developed Members and the RAMs.

Table 14 Members' policy space in Tariff Protection[311]

	Average bound tariffs	Average applied tariffs	Average unused policy space
LDCs	74.5	15.1	59.3
DCs	52.9	14.8	38.1
DDs	35.7	16.7	19.0

3.5.2 The Entitlements to the TRQ Administration and the SSG Provisions as an Additional Policy Space

Members who have maintained relatively low tariff protection have built up multi-layers of protection mechanisms on the basis of other legal instruments of protection as endorsed by the AOA. These extra layers of border protection come from the NAV

[311] It deserves notice that developed country Members in Table 1 include Australia; Canada; China, Hong Kong SAR; China, Macao SAR, Taiwan Province of China, EU-28, Iceland, Israel, Japan, Republic of Korea, New Zealand, Norway, Singapore, Switzerland, United States of America. Matthews, 'Policy Space to Pursue Food Security in the WTO Agreement on Agriculture' (n 306) 3.

duties, the TRQ administration and the SSG provisions. The entitlements to these instruments of protection become their additional policy space for import protection.

As Table 15 indicates, besides tariff protection, 42 Members have adopted multi-layer protection regimes. If broken down, these 42 Members include 1 Member from Tier 1 (Norway), 6 Members from Tier 2 (Barbados, Iceland, Tunisia, Colombia, India and Malaysia), 20 Members from Tier 3 and 15 Members from Tier 4. There are some strong connections between Members' tariff protection and other entitlements to the TRQ administration and SSG provisions as most Members who have maintained other means of protection come from Tier 3 and Tier 4 where Members' average bound rates for agricultural products are lower than the world average bound tariff. This special arrangement reveals the differences of WTO Members in border protection. For Members in Tier 1 and Tier 2, they rely more on high tariffs (ad valorem tariffs) to protect their borders; while for Members in Tier 3 and Tier 4, they tend to protect their import by other means that are less transparent and more complicated than ad valorem tariffs.

Table 15 Multi-Layers Import Protection Scheme[312]

	Tier	Final Bound	Overhang	NAV Percentage	TRQ	SSG
Norway	1	134.8	83.6	66.7	232	581
Barbados	2	111.1	103	-	36	37
Iceland	2	113.6	90.6	24.5	90	462
Tunisia	2	116	91.4	-	13	32
Colombia	2	91.6	76.7	-	67	56
India	2	113.5	80	0.3	4	-
Malaysia	2	61.8	52.5	21.1	19	72
Israel	3	76.7	64.4	0.4	12	41
Guatemala	3	51.4	41.8	-	22	107
Venezuela	3	55.3	43.4	-	62	76
Indonesia	3	47.5	40.5	-	2	13
Namibia	3	40.4	31.9	-	-	166
Swaziland	3	40.4	31.9	-	-	166
Costa Rica	3	43.2	31.9	-	27	87
Nicaragua	3	43.5	32.7	-	9	21
Dominican Republic	3	39.4	26.7	-	8	-

[312] Table 14 does not include some RAMs, as the data concerning the numbers of TRQ and SSGs that Members have maintained comes from early documentation from the WTO. For instance, Russia Federation has also maintained TRQ administration over a number of agricultural tariff lines, but it is not included in Table 14.

Mexico	3	44.5	26.6	7.0	11	293
South Africa	3	40.4	32	-	53	166
Botswana	3	37.9	29.3	-	-	161
El Salvador	3	42.8	31	-	11	84
Morocco	3	54.4	27	-	19	374
Philippines	3	35.1	25.2	-	14	118
Brazil	3	35.4	25.2	-	2	-
Uruguay	3	34.0	24.1	-	-	2
Thailand	3	38.7	7.4	44.2	23	52
Switzerland	3	46.1	10	77.3	28	961
Korea, Rep	3	56	3.3	5.2	63	111
Chile	4	26.1	20.1	-	1	-
Panama	4	27.7	15.4	0.2	19	6
Japan	4	18.2	3.9	15.1	20	121
Ecuador	4	25.7	7.4	-	14	7
New Zealand	4	6.1	4.7	0.2	3	4
Viet Nam	4	19.1	2.9	-	3	-
Canada	4	16.8	0.9	19.6	21	150
Ukraine	4	10.9	0.7	1.1	1	-
Moldova	4	14.0	3.4	9.0	3	-
Chinese Taipei	4	17.3	0.6	6.8	17	84
Australia	4	3.5	2.3	1.7	2	10
FYROM	4	13.4	0.5	9.6	1	-
EU-15	4	13.5	0.3	32	91	539
China	4	15.8	0.2	-	7	-
United States	4	4.8	0	43.1	54	189
Source of data: made in accordance with data from previous Tables.						

For the Members in Tier 4 as listed in Table 15, their average bound tariffs are the lowest among WTO Members, however most Members in this Tier have widely adopted NAV duties, which have made their actual level of tariff protection much higher than what it appears to be.[313] An UNCTAD informal paper further concludes that the AVE of NAV tariffs are generally higher than those given in ad valorem rates. And NAV tariffs are more commonly used to protect products that are considered as "sensitive", such as meat, dairy, cereal, and sugar.[314] Openness of agricultural markets in some developed Members, such as the United States, the EU, Japan and Canada has been dampened by the existence of a great number of NAV agricultural duties. In this sense, the 4 developing Members in this group, namely Chile, Ecuador, Viet Nam and China, who have not used any NAV duties for their agricultural products, seem to be

[313] Gibson and others (n 217) v.

[314] Miho Shirotori, 'WTO Negotiations on Agriculture: Assessment of Non-Ad-Valorem Tariffs as A Tariff Barrier' <http://unctad.org/Sections/comdip/docs/webcdpbkgd8_en.pdf> accessed 8 December 2017.

the most transparent and the most open agricultural market around the world in terms of tariff protection. Besides NAV duties, Members in this particular small group have maintained 257 TRQs and 1110 SSGs, which account for nearly 25 per cent and 20 per cent of the total number of TRQs and SSGs that WTO Members have had. All the developed Members (the United States, the EU, Canada, Japan, Australia and New Zealand) and some developing Members (Panama, Ecuador, Chinese Taipei) in this group have maintained both the TRQ administration and the SSGs provisions. The rest developing Members (Chile, Viet Nam, Ukraine, Moldova, FYROM and China) have only maintained either of them. The tariff overhangs of the Members in this group are marginal. For instance, the differences between the bound tariff and the applied tariff in the United States, China, the EU, Canada, Chinese Taipei and Ukraine are all less than 1 per cent. Therefore, the policy space in border protection enjoyed by Members in this small group comes mostly from the intangible tariff protection provided by NAV duties and their entitlements to the TRQ administration and the SSG provisions.

In this regard, the arrangement of the EU for orange import could be taken as an example to illustrate the complexity of multi-layer border protection scheme. As Table 16 indicates, the bound tariff rate of the EU for imported orange is a 10.4 per cent ad valorem duty plus a 71 ECU/T specific duty, which is hardly to tell the real tariff protection in terms of ad valorem duty. And for the import within the TRQ quantity, the in-quota tariff rate is 10 per cent, while the out-of quota tariff rate is varying at different period of time with an ad valorem duty ranging from 3.2% to 16%, plus an additional 71 ECU/T specific duty if the shipment price is lower than the entry price. Given the multi-layer scheme, the protection of the EU against orange import is much higher than what the tariff shows. The EU has adopted seasonal duty for orange, which means that the customs duty for orange import into the EU will vary in different period of time throughout the year. This gives the EU more flexibility to adjust its tariff protection according to its domestic market situation. Besides that, the tariff rates for orange take the form of both ad valorem duty and specific duty, which offers the EU with additional flexibility to control the import according to its impacts on domestic products. Thirdly, the EU has maintained TRQ administration and has reserved the SSG status for orange. Orange in the EU enjoys at least four layers of border protection against imports.

Table 16 the EU Import Protection regime for Orange

Final Quota		MFN Tariff Rates		
Quantity	bound duties			
20.000	10%	---From 1 to 30 April ---From 1 to 15 May ---From 16 to 31 May ---From 1 June to 15 October ---From 16 October to 30 November ---From 1 December to 31 March --Other: ---From 1 April to 15 October ---From 16 October to 31 March	10.4 4.8 3.2 3.2 16.0 16.0 12.0 16.0	+ 71 ECU/T + 71 ECU/T + 71 ECU/T + 71 ECU/T

Source of data: EU-15 goods schedules, Schedule LXXX for both MFN rate and TRQ.

For the Members in Tier 3 as indicated in Table 15, though their average final bound tariffs are relatively higher than those Members in Tier 4, their real levels of tariff protection are much more transparent as only few Members (Thailand, Switzerland, Korea, Mexico and Israel) have adopted NAV duties. Members in this group have maintained 366 TRQs and 3000 SSGs, which account for about 35 per cent and 50 per cent of the total number of TRQs and SSGs that WTO Members have made. Unlike Members in Tier 4 as listed in Table 15, all the Members in this group are developing Members, except Switzerland. Their policy space in border protection rests not only on the tariff protection, but also on their entitlements to the TRQ administration and the SSG provisions.

For the 6 Members in Tier 2 and 1 Member in Tier 1 as appear in Table 15, their levels of import protection are the heaviest among the whole WTO membership as they have not only provided their agricultural sectors high tariff protection, but also widely covered them by the other two instruments of protection: the TRQ administration and the SSG provisions. These 7 Members have maintained 461 TRQs and 1240 SSGs, which account for more than 40 per cent and 20 per cent of the total number of TRQs and SSGs that WTO Members have made. Even that, the policy space of these Members in border protection comes primarily from the huge tariff overhangs, which range from 50 to 100 per cent.

3.5.3 Protection of sensitive products remains to be top at Members' political agenda

Though the AOA provides that its long-term objective is to provide for substantial progressive reduction in agricultural protection, with a view to correcting and preventing restrictions and distortions in world agricultural markets, the protection of sensitive agricultural products remains to be front and center in Members' political agenda for further derogating their regulatory autonomy in border protection to the WTO. To allay Members' concerns over the negative impacts of opening markets on their domestic sectors, effective precautionary rules need to be developed on the basis of current framework of the AOA. Before that, we need to find out what the most sensitive products are for WTO Members and what mechanisms that Members have entitled to protect them.

Members have a great deal of discretion in choosing their sensitive products. However, from the legal point of view, the criteria for identifying the sensitive products from a Member's trade profile and justifying the need for more import protection is to show how sensitive an agricultural product is to the achievement of the Member's legitimate policy objectives as articulated previously, such as food security, the right to adequate food, sustainable development and concerns over smallholder farmers. For instance, it will be more acceptable if a Member claims grains instead of wine as its sensitive product. However, given the importance or contribution of wine industry to certain Members' economy, they might do consider wine as their sensitive product.

From the technical point of view, there are two tricks to identify Members' sensitive products:

1) **The most sensitive products are normally subject to the highest tariff protection.** The design and structure of a Member's tariff profile can give a hint about the importance or priority of a certain agricultural product in that Member's list of tariff protection as normally the more sensitive an agricultural product is, the higher tariff protection it is subject to. It would be easier to locate the most sensitive products of a Member with relatively low average final bound tariff as there are only few tariff lines appearing in the highest tariff band (>100 per cent, megatariffs). For instance, the average final bound tariff of the United States for agricultural products is only 4.8 per

cent, but if we look into its tariff profile and we will find out that its highest tariff is 350 per cent for beverages &Tobacco. If we make further investigations in its goods schedules, we will find out that the corresponding tariff lines are 240110, 240120 and 240130 for tobacco. Data further reinforce that tariff protection in both OECD countries and non-OECD countries is concentrated in a few sectors: grains, dairy, livestock, sugar, and sweeteners, the only difference between them is that the latter has overall high tariff rates of protection with less variation across commodity groupings and in their tariff profiles tobacco stands out with the highest average tariff.[315]

2) **For Members with relatively low levels of tariff protection, their sensitive products are normally located in those tariff lines that are entitled to the TRQ administration and the SSG provisions.** Though tariffs are still used by these Members as their first safety valve of protection against import, the TRQ administration that they have successfully been maintained over politically and economically sensitive agricultural commodities is the real card in their hands. As explained, the TRQ administration is an instrument of protection more than a market access tool. And its functioning in this regard depends on the delicate design of the subtle interactions between the in-quota and out-of-quota tariff. WTO Members' average out-of-quota tariff and the estimated average in-quota tariff for TRQ products stands as high as 128 per cent and 63 per cent, which is double or equal to the world average tariff for agricultural products of 62 per cent.[316] Besides that, the functioning of a TRQ is also impacted by its method of administration. The more politically sensitive imports of a commodity are, the greater the probability that its TRQ administration will be by discretionary methods. Therefore, for Member governments the TRQ administration is an issue of political economy more than a legal one, and they will choose the methods that they can easily intervene so as to keep the import of sensitive TRQ products under their control. The SSG provisions are designed for the same purpose as the TRQ system to facilitate tariffication and market opening. Unlike the regular safeguards, the SSGs are easier and cheaper to invoke. Easier because no proof of injury is required. Cheaper, because the administrative costs of the procedure are limited, and no compensation is required. For those reasons, the SSG provisions have been used by qualified Members

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[315] Gibson and others (n 217) 18.

[316] Gibson and others (n 217) v. 16.

as an almost continuous protection device sheltering a few sensitive commodities and become their additional policy space in border protection. Initially, the SSG provisions were mostly used by developed Members, the EU, Japan and the United States in particular, but in recent years more and more transition economies and developing Members, such as Korea, Costa Rica, have started to invoke them frequently.[317] More importantly, unlike the ex-ante TRQ administration, the contingent status of the SSG provisions provides eligible Members with an ex post instrument of protection against import surges. Given their different advantages, developed Members normally put their sensitive products under the custody of both TRQ administration and the SSG provisions to improve the effectiveness of their protection mechanisms. [318]

[317] Hallaert (n 289) 4,5,11,14.

[318] "The SSGs magnify the protectionist impact of tariff rate quotas (TRQ). Most countries that have reserved the right to invoke the special safeguards also maintain TRQs. Since the additional duty can only be imposed on the over-quota imports, the SSGs further increase the protectionist impact of TRQs". Hallaert (n 289) 10.

Chapter 4

WTO Members' Legal Policy Space in Domestic Support

The multilateral disciplines on domestic support in the AOA are much more controversial than the rules in the market access pillar. The international community has different views on the new law-making developments of the multilateral trading system in an area characterized by agricultural protection and trade distortion. For some commentators, the introduction into the AOA of a multilateral architecture of rules and commitments disciplining domestic support in agriculture is considered as one of the more innovative achievements associated with the conclusion of the Uruguay Round.[319] For other commentators, the innovation of the domestic support disciplines was partly watered down by a number of last-minute compromises in the Uruguay Round negotiation process, which has left the domestic support disciplines of the AOA often described by apparently contradictory terms or as the "least binding" part of the agreement.[320]

With these contradictory observations in mind, this portion of the research starts with a brief introduction of the AOA rules in domestic support, particularly the differentiation and categorization of various domestic support measures. Then it moves on to examine the two categories of Members' legal policy space in domestic support deriving from the AOA rules: the exemption space and the limited space. After that, it examines two essential legal issues about the effectiveness and practicality of the multilateral rules on domestic support measures. Then it draws conclusions on Members' policy space in domestic support.

4.1 A Brief Introduction of the AOA Rules on Domestic Support

The term of "domestic support" has been put to use for the first time by the AOA without giving a proper legal definition.[321] The WTO itself defines "domestic support" as: "(sometimes 'internal support') in agriculture, any domestic subsidy or other measure which acts to maintain producer prices at levels above those prevailing in

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[319] Orden, Blandford and Josling (n 129) 3.

[320] Desta (n 260) 393–394.

[321] Desta (n 260) 384.

international trade; direct payments to producers, including deficiency payments, and input and marketing cost reduction measures available only for agricultural production".[322] Although domestic support as a legal concept is used only in the AOA, it means essentially the same as the more familiar concept of domestic subsidies or agricultural subsidies.[323] However, due to lack of a strict legal definition on domestic support, confusions may arise when some key distinctions between domestic support and a few other relevant terminologies are neglected, which include those between domestic support measures and the measurement of support, the clarification or categorization of these domestic support measures, between commitment and applied support, etc..[324]

WTO Members have provided various kinds of domestic support to their agricultural producers for the same or different purposes, which have brought about different consequences for international agricultural trade. Therefore, the first mission of the AOA is to allow Members to differentiate and categorize their various domestic support measures. Four distinct kinds of domestic support measures, namely Green Box measures, Blue Box measures, Article 6.2 measures and Amber Box measures are often mentioned (see Table 1). Although the AOA does not identify any boxes or colors, it identifies specific legal criteria for three of these categories. A domestic support measure qualifies for inclusion in a particular category by meeting that category's criteria. It is universally understood that Annex 2 defines Green Box measures and Article 6.5 defines Blue Box measures, which are payments tied to production-limiting programs. Article 6.2 of the AOA defines certain measures in developing countries, which is sometimes called an "S&D box" or Development Box, without any given color.[325] Amber Box measures are thus the residual subset of measures that do not meet

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[322] 'WTO | Glossary - a Guide to "WTO Speak"' <https://www.wto.org/english/thewto_e/glossary_e/glossary_e.htm> accessed 7 December 2017.

[323] "The Agreement uses 'subsidies' and 'support' in clearly interchangeable ways. It thus appears that this is only a choice of one word over another. As such these two terms—domestic subsidies and domestic support—are used in this text to mean one and the same thing". Desta (n 260) 387.

[324] Lars Brink, 'Classifying, Measuring and Analyzing WTO Domestic Support in Agriculture: Some Conceptual Distinctions' (Canadian Agricultural Trade Policy Research Network 2007) 3 <http://ageconsearch.umn.edu/bitstream/7337/2/wp070002.pdf> accessed 27 November 2017.

[325] World Trade Organization, Domesitc Support in Agriculture: the Boxes, available at https://www.wto.org/english/tratop_e/agric_e/agboxes_e.htm, last accessed 6 December 2017.

the criteria for any of the Green Box, Blue Box or Development Box measures.[326] The failure of a policy measure to meet the criteria means that the support provided under the measure is subject to limits or a limit.

The Table 1 summary of the domestic support categories demonstrates that the traffic light analogy sometimes used in the early days after the Uruguay Round was both incomplete and misleading.[327] For example, it does not account for Article 6.2 measures. All domestic support measures are allowed, and no measure is prohibited under the domestic support rules of the AOA. Limits apply on support provided under some measures, but that does not make the measures prohibited. Agricultural subsidies were incorporated into the multilateral rules in a privileged way.[328]

Table 1 Categories of Domestic Support Policies

Green Box: policies that have no or at most minimal trade-distorting effects and which meet given criteria (can include domestic food aid and environmental programs); support not subject to limit
Blue Box, certain payments made under production-limiting programs; support not subject to limit
Article 6.2, subsidies that meet certain criteria; support not subject to limit
Amber Box, policies not qualifying for above categories (includes market price support, payments related to current production or prices, and input subsidies); support subject to limit

While the above categories, whether described by colors or by criteria in the AOA, are helpful to understanding the provisions of the AOA, this categorization is based on a more fundamental distinction: policy measures under which support is exempt from limit and policy measures under which support is not exempt. An appreciation of this

[326] Lars Brink, 'The WTO Disciplines on Domestic Support', *WTO Disciplines on Agricultural Support: Seeking a Fair Basis for Trade* (Cambridge University Press 2011) 27–30.

[327] "Since 1994, the terms 'amber', 'blue' and 'green' have been used to describe the different kinds of support. The original idea was to repeat the colors of traffic light—red for prohibited subsidies, yellow for limited subsidies and green for permitted subsidies—but a softer treatment prevailed." Meléndez-Ortiz, Bellmann and Hepburn, *Agricultural Subsidies in the WTO Green Box: Ensuring Coherence with Sustainable Development Goals* (n 156) (239).

[328] Meléndez-Ortiz, Bellmann and Hepburn, *Agricultural Subsidies in the WTO Green Box: Ensuring Coherence with Sustainable Development Goals* (n 156) 239.

binary classification of exempt and non-exempt domestic support measures remains critical for a proper understanding of the AOA discipline on domestic support in agriculture.[329] This line of categorization of domestic support and domestic support measures is based on two types of rules: quantitative and qualitative. The quantitative rule establishes limits or a limit on support, while the qualitative rules define domestic support policies that are exempt from the limit or limits.[330]

Table 2 Domestic Support Measures and Domestic Support

Domestic Support Measures	Domestic Support
Green Box Measures	No limit on support
Blue Box Measures	No limit on support
Article 6.2 Measures	No limit on support
Non-exempt Measures	Support under these measures is subject to: (a) for some Members, a limit on the Member's CTAMS (b) for other Members: a number of limits on Member's individual Aggregate Measurements of Support

4.1.1 Non-exempt Domestic Support Measures

Domestic support measures that are not exempted from limit(s) on support are often referred to as Amber Box measures, without any such phrase being used in the AOA. The legal basis for these measures rests on Article 6.1 of the AOA, which states that the domestic support reduction commitments of each Member contained in Part IV of its Schedule shall apply to all of its domestic support measures in favour of agricultural producers with the exception of domestic measures which are not subject to reduction in terms of the criteria set out in Article 6 and in Annex 2 of the AOA. The criteria in Article 6 are the Blue Box criteria in Article 6.5, and the Article 6.2 criteria for development box.

"Aggregate Measurement of Support" (AMS) is the legal terminology provided in the AOA to quantify Members' support under non-exempt domestic support measures,

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[329] McMahon and Desta (n 159) 7.

[330] Bishnu D Awasthi and Shrawan K Adhikary, 'Agreement on Agriculture: Domestic Support Measures', *The Implications of WTO Membership on the Nepalese Agriculture. FAO, UNDP, and Ministry of Agriculture and Cooperatives* (2004) 19 <http://www.fao.org/docrep/008/ae896e/ae896e00.htm> accessed 6 December 2017.

which is the centerpiece of Members' commitments in the domestic support pillar. [331]Article 1 (a) of the AOA defines the AMS as "the annual level of support, expressed in monetary terms, provided for an agricultural product in favour of the producers of the basic agricultural products or non-product-specific support (NPS support) provided in favour of agricultural producers in general, other than support provided under programs that qualify as exempt from reduction under Annex 2 of this Agreement". An interesting aspect of this definition is that only support provided through Annex 2 or Green Box measures is excluded from AMS, which means that, technically, support provided through Article 6.2 measures and Blue Box measures is also regarded as AMS support.[332]

The AMS is to be calculated on a product specific basis for each product receiving any type of non-exempt support, while NPS support is to be aggregated into one number, which is to be included in the Total AMS. Therefore, the Total AMS is a sum of a number of components: all the AMSs. The definition of Total AMS refers to aggregate measurements of support in the plural. This is often overlooked in analysis that treats "the Product Specific AMS (PS AMS) as the single sum of all PS AMSs. Annex 3 of the AOA specifies how to calculate an AMS. Annex 4 specifies how to calculate an Equivalent Measurement of Support (EMS) as an alternative, if it is not practical to calculate an AMS.

Support under non-exempt domestic support measures is subject to reduction commitments, i.e., a limit applies, or limits apply. As a result of the Uruguay Round negotiations, Members entered in their Schedules (Part IV, Section I, headed Domestic Support: Total AMS Commitments) their "Annual and Final Bound Commitment Levels". For most Members this entry is nil (or blank or zero), for other Members each yearly level is a specified amount. Corresponding entries are made by Members that have acceded to the WTO since 1995 under Article XII of the WTO Agreement. The Member's entry, whether nil or otherwise, constitutes the maximum amount of certain AMS support the Member may provide. A nil entry results from the Member having provided no or little non-exempt support in the 1986-88 base period (different base

[331] McMahon (n 229) 67.

[332] Brink, 'Classifying, Measuring and Analyzing WTO Domestic Support in Agriculture: Some Conceptual Distinctions' (n 324) 4.

period for Members having acceded to the WTO). An entry that is not nil results from the Member having calculated a Base Total AMS for the base period, as per Article 1(h)(i) of the AOA. The Annual and Final Bound Commitment Levels derive from reductions, with some adjustments, from the Base Total AMS. The Final Bound Commitment Level results from reducing the Base Total AMS while also accommodating adjustments associated with support reductions from the year 1986. The reduction of developed Members with a Base Total AMS was 20 percent, carried out over six years from 1995, while the reduction of developing Members with a Base Total AMS was 13.3 percent over ten years. A Member's Current Total AMS (CTAMS) must not exceed the scheduled annual and final Bound Total AMS (BTAMS) (Article 6.3).[333] Current Total AMS is the level of support actually provided during any year, measured in a particular way. It is the sum of all AMSs, except any AMS that does not exceed a threshold amount.

Under Article 7.2(b) a Member without a BTAMS (or with BTAMS of nil, zero or blank) is subject to limits on its individual AMSs. Those limits are at the same levels as the threshold amounts on AMSs for Members with a BTAMS. This means that having a BTAMS in its Schedule makes a difference in terms of a Member's policy space for AMS support, i.e., support under non-exempt measures. This has been and remains a key issue in negotiating the accession of some new Members to the WTO. It has also been mentioned as a possible issue in the context of the United Kingdom's departure from the EU.[334] Moreover, the balance between having a BTAMS and not having one is a consideration in the ongoing negotiations on tightening the rules for trade-distorting domestic support. This complicated issue will be examined in detail at a later stage.

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[333] McMahon (n 229) 69.

[334] "Where no Total AMS commitment exists in Part IV of a Member's Schedule, a WTO Member is not allowed to provide support to agricultural producers in excess of the relevant de minimis levels. Thus, a key issue in determining the degree of flexibility that the UK may have in future in determining its agricultural policy is whether it will have an Amber Box ceiling or whether it will be limited to de minimis support". Alan Matthews, 'Establishing the UK's Non-Exempt Limit on Agricultural Support after Brexit | CAP Reform' (*capreform.eu*, 2017) <http://capreform.eu/establishing-the-uks-non-exempt-limit-on-agricultural-support-after-brexit/> accessed 6 December 2017.

4.1.2 Exempt Domestic Support Measures

Exempt domestic support measures refer to policies under which domestic support in favour of agricultural producers is not subject to limit, i.e., exempt from reduction commitments. They cover a range of support instruments, including Green Box measures, Blue Box measures, and Article 6.2 measures. The so-called *de minimis* exemption is sometimes mentioned along with the exemption of measures.[335] This can be very misleading since the *de minimis* exemption applies to certain AMSs when calculating the CTAMS (i.e., support), not to a measure (Article 6.4). [336]

4.1.2.1 Green Box Measures

The legal basis of the Green Box measures is Annex 2 of the AOA, which stipulates that "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". The key element in distinguishing Green Box measures from any other domestic support measure is that they have no or minimal trade-distorting effects on trade and production. Beside this fundamental requirement, Green Box measures shall conform to two basic criteria: 1) they must be provided through publicly-funded government programs (including government revenue foregone) not involving transfers from consumers; 2) they must not have the effect of providing price support to producers. Moreover, Green Box measures must meet policy-specific criteria that can be of many kinds. These specific criteria for relevant measures leave open the interpretation that among these measures are a number that could have more than a minimal effect on production.

Annex 2 gives the policy-specific Green Box criteria under twelve headings. The measures under these headings can be classified into two groups: the first one is programs involving expenditures on public services, such as research, training,

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[335] For instance, McMahon puts the *de minimis* as one of the exemption measures from the reduction commitment, which also include the S&D box, Blue Box and Green Box measures. McMahon (n 229) 70–72.

[336] "The URAA also creates a special category of Amber Box measures excluded from the reduction commitments because of their low level: *de miminis* payments." Meléndez-Ortiz, Bellmann and Hepburn, *Agricultural Subsidies in the WTO Green Box: Ensuring Coherence with Sustainable Development Goals* (n 156) 239.

marketing, promotion, infrastructure, domestic food aid or public stockholding for food security purposes; the second one is programs involving direct payments to producers. The latter can be further broken down into two sub-groups: income guarantee and security programs (natural disasters, government financial contributions to crop insurance, etc.) and programs to adjust structures and environmental programs.[337] The common shorthand for the measures exempted as Green Box compliant is that they are not trade distorting. However, Annex 2 does not define "trade-distorting effects or effects on production" nor is there jurisprudence within the WTO on its legal meaning".[338] A major concern surrounding Green Box subsidies is that payments may not respect the fundamental requirement described in paragraph 1 of Annex 2 of the AOA. Besides that, some Green Box measures, such as the decoupled payments programs, may have trade- and production-distorting effects. [339] In this case, economic analysis is needed to establish the extent to which any particular measure that meets the criteria is trade-distorting, though as a legal structure, the AOA is not meant to be an economic and analytical framework and cannot be interpreted as a tool for the analysis of support.[340] From the legal point of view, the distortionary effects of agricultural support are examined from the prism of their "degree" of coupling/decoupling from production and input use decisions so as to have a lesser impact on production and trade.[341]

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[337] European Parliament, 'WTO Agreement on Agriculture | EU Fact Sheets | European Parliament' (*European Parliament,*) <http://www.europarl.europa.eu/atyourservice/en/displayFtu.html?ftuId=FTU_3.2.7.html> accessed 6 December 2017.

[338] Brink, 'The WTO Disciplines on Domestic Support' (n 326) 29.

[339] Ricardo Meléndez-Ortiz, Christophe Bellmann and Jonathan Hepburn, *Agricultural Subsidies in the WTO Green Box: Ensuring Coherence with Sustainable Development Goals* (Cambridge University Press 2009) 4–5.

[340] Ricardo Meléndez-Ortiz, Christophe Bellmann and Jonathan Hepburn, *Agricultural Subsidies in the WTO Green Box: Ensuring Coherence with Sustainable Development Goals* (Cambridge University Press 2009) 137.

[341] Aziz Elbehri and Alexander Sarris, *Non-Distorting Farm Support to Enhance Global Food Production* (FAO, Roma (Italia) 2009) 13.

4.1.2.2 Blue Box Measures

The Blue Box exemption results from one of the important compromises, the so-called Blair House Accord, [342] brokered between the United States and the EU in order to save the Uruguay Round. It was originally designed to accommodate subsidies provided by the EU under the 1992 MacSharry reform of the CAP and by the United States under the deficiency payments programs in its 1990 Farm Bill.[343] The Blue Box payments were not subject to reductions, but support was not to exceed the 1992 levels. Thus, the Blue Box became the way in which the reformed CAP became consistent with the Uruguay Round constraints. The notifications by the EU to the WTO reflect this compromise.[344]

The legal basis of Blue Box is Article 6.5 of the AOA, namely "direct payments under production-limiting programs". Support under Blue Box measures shall not be subject to reduction commitments, i.e., there are no limits on Blue Box subsidies. However, Blue Box measures include some constraints on implementation rules, which require the Blue Box payments have to be a part of "production limiting programs". These constraints in Blue Box measures are, in general, weaker than the constraints specified for Green Box measures, as there is no definition of what these programs have to be.[345] To qualify as Blue Box payments, (i) payments must be based on fixed area or yields; or (ii) payments must be made on 85% or less of the base level of production; or (iii) livestock payments must be made on a fixed number of head.

4.1.2.3 Development Programs

The legal basis of development programs is Article 6.2 of the AOA. It identifies three types of government measures of assistance under which support shall not be required to be included in a Member's calculation of its CTAMS. As part of the special and

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[342] Stephen Healy, Richard Pearce and Michael Stockbridge, *The Implications of the Uruguay Round Agreement on Agriculture for Developing Countries: A Training Manual*, vol 41 (Food & Agriculture Org 1998) 11.

[343] McMahon (n 229) 86.

[344] Tim Josling and Alan Swinbank, 'EU', *WTO Disciplines on agricultural support: seeking a fair basis for trade* (Cambridge University Press 2011) 64.

[345] Meléndez-Ortiz, Bellmann and Hepburn, *Agricultural Subsidies in the WTO Green Box: Ensuring Coherence with Sustainable Development Goals* (n 340) 146–147.

differential treatment in the AOA, this exemption is available only to developing Members. The measures are (1) investment subsidies generally available to agriculture; (2) agricultural input subsidies generally available to low-income or resource-poor producers; and (3) domestic support to producers to encourage diversification from growing illicit narcotic crops. The AOA bases the exemption of support under these measures from commitment on an earlier agreement that the type of support that fits into the development category is measures of assistance, whether direct or indirect, designed to encourage agricultural and rural development and that is an integral part of development programs of developing Members.[346]

4.1.3 The *De Minimis* Level

The legal basis of the "*de minimis*" level domestic support is laid down in Article 6.4 of the AOA. However, the AOA does not provide a legal definition. Brink observes that *de minimis* literally means "lacking significance or importance: so minor as to merit disregard" or it parallels the idea of tolerance in engineering, which is defined as "the allowable deviation from a standard".[347] In the current context, the *de minimis level* concerns the exemption of relatively small AMSs from a Member's CTAMS. An AMS, whether for a basic agricultural product or the non-product-specific AMS, that is no larger than its *de minimis* level can be exempted from the calculation of CTAMS. The *de minimis* exemption means that the *de minimis* AMSs are Amber Box support in nature, though there are some different arguments on that. [348] However, their levels that are small enough are tolerated, presumably because the trade-distorting effects of such AMSs are expected to be relatively small.

The *de minimis* level is a given percentage times the value of production of the individual basic agricultural product (the given percentage times the value of total agricultural production in the case of the non-product-specific AMS). The percentage

[346] 'WTO | Agriculture - Explanation of the Agreement - Domestic Support' (*World Trade Organization, Domestic Support*) <https://www.wto.org/english/tratop_e/agric_e/ag_intro03_domestic_e.htm> accessed 6 December 2017.

[347] Brink, 'Classifying, Measuring and Analyzing WTO Domestic Support in Agriculture: Some Conceptual Distinctions' (n 324) 9.

[348] Brink, 'Classifying, Measuring and Analyzing WTO Domestic Support in Agriculture: Some Conceptual Distinctions' (n 324) 10.

is 5 per cent for developed Members and 10 per cent for developing Members. When China and Kazakhstan acceded to the WTO, they committed to a *de minimis* percentage of 8.5 per cent. The exemption of *de minimis* AMSs from the calculation of CTAMS means that, for a Member with a BTAMS, the *de minimis* level is effectively a *de minimis* threshold. An AMS is allowed to be larger than its *de minimis* level but then it must be included in its entirety in the CTAMS. The *de minimis* level operates differently for a Member with a nil BTAMS: no AMS is allowed to exceed its *de minimis* level, which is thus effectively a *de minimis* limit on each individual AMS (Article 7.2(b)).

4.1.4 Case Study: The United States-Subsidies on Upland Cotton

Brazil filed a challenge in March 2003 against the upland cotton subsidies programs of the United States for their inconsistencies with the provisions of the AOA, SCM Agreement and the GATT 1994. Brazil's requests covered a range of substantive legal issues. The thesis will focus only on the one most relevant to the current debate, and that is concerning whether agricultural subsidies that are protected by Article 13 of the AOA should also be exempted from any legal action from the SCM Agreement. The dispute in this case revolves around two issues: the validity of Article 13 of the AOA or the applicability of SCM Agreement to agricultural subsidies, defining the nature of various domestic support measures of the United States for upland cotton. Given the legal, economic, and political significance of the case, thirteen WTO members, eventually representing over thirty countries, intervened as third parties.

Validity of Article 13

Article 13 of the AOA, normally referred to as the peace clause, regulates the application of other WTO agreements to subsidies in respect of agricultural products. It provides that Green Box domestic support measures cannot be the subject of countervailing duty action or other subsidy action under the SCM Agreement, nor can they be subject to actions based on non-violation nullification or impairment of tariff concessions under the GATT. Other domestic support measures, such as Blue Box domestic support (Article 6.5), *de minimis* level domestic support (Article 6.4), Development Box domestic support (Article 6.2), which are in conformity with the provisions of the AOA may be the subject of countervailing duty actions, but due

restraint is to be exercised by Members in initiating such investigations.[349] Further, in so far as the support provided to individual products does not exceed that decided in the 1992 marketing year, these measures are exempt from other subsidy action or nullification or impairment action.[350] Nevertheless, the peace clause is only valid during the implementation period, which has expired by the end of 2003.[351] The expiration of the Peace Clause means that the immunity for all agricultural subsidies from legal challenges comes to an end and now agricultural subsidies, regardless of whether they are categorized as Amber, Blue, Green Box, Development Box or *de minimis* level domestic support are subject to legal challenges under the provisions of the SCM Agreement.[352]

In this context, Brazil believed that Article 13(b)(ii) of the AOA did not exempt the domestic support measures of the United States for upland cotton, including marketing loan/loan deficiency payments (LDP), crop insurance payments, production flexibility contract (PFC) payments, direct payments (DP), market loss assistance payments (MLA), counter-cyclical payments (CCP), cottonseed payments, from actions based on Articles 5 and 6 of the SCM Agreement and Article XVI:1 of the GATT 1994. And they constituted actionable subsidies within the meaning of SCM Agreement.

The Panel concluded that Article 13 (peace clause) of the AOA was not in the nature of an affirmative defense, and that the domestic support measures of the United States for upland cotton, including PFC payments, DP payments, did not satisfy the conditions set out in Article 13 of the AOA. Therefore, they were not exempt from actions based on relevant rules in Article XVI of the GATT 1994 and the SCM Agreement.

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349 "Under URAA Article 13 (known as the "Peace Clause"), however, the more stringent rules of the SCM Agreement were not to be imposed on agricultural subsidies until 2004, as long as the subsidies did not exceed the specified levels embodied in a WTO member's URAA schedule of reduction commitment." Richard H Steinberg, 'United States: Subsidies on Upland Cotton. WTO Doc. WT/DS267/AB/R' (2005) 99 American Journal of International Law 852, 852.

350 'WTO | Agriculture - Explanation of the Agreement - Other Issues' <https://www.wto.org/english/tratop_e/agric_e/ag_intro05_other_e.htm> accessed 25 June 2018.

351 'WTO | Glossary - Peace Clause' <https://www.wto.org/english/thewto_e/glossary_e/peace_clause_e.htm> accessed 25 June 2018.

352 Richard H Steinberg and Timothy E Josling, 'When the Peace Ends: The Vulnerability of EC and US Agricultural Subsidies to WTO Legal Challenge' (2003) 6 Journal of International Economic Law 369, 388.

Defining the Nature of Various Domestic Support Measures

In this case, Brazil challenged the legality of a range of domestic support measures of the United States for upland cotton. These measures at issue include marketing loan payments, user marketing (Step 2) payments paid to domestic users, PFC payments, MLA payments, DP payments, CCP payments, crop insurance payments, cottonseed payments, and current legislative and regulatory provisions providing for the payment of measures.

Article 13 of the AOA does distinguish different types of domestic support measures from each other. Paragraph (a) of Article 13 applies to domestic support measures that conform fully to the provisions of Annex 2 of the AOA, that is, so-called Green Box measures, which are not subject to reduction commitments according to the AOA; while paragraph (b) of Article 13 covers domestic support measures that conform fully to the provisions of Article 6, that is, so called Amber Box, Blue Box, *de minimis*, and Development Box domestic support measures. All those non-Green Box measures are subject to reduction commitments, unless they are exempt on the criteria set forth in Article 6.[353]

Brazil challenged that PFC and DP payments did not conform to the provisions of Annex 2 of the AOA, and thus could not be considered as Green Box measure and should not be exempted from reduction commitments. In the same vein, these measures did not satisfy the conditions in paragraph (a) of Article 13, and instead paragraph (b) should apply in this case. Brazil's challenge was supported by the Panel. After examining the conditions of two domestic support measures, the Panel did conclude that PFC payments, DP payments, and the legislative and regulatory provisions which establish and maintain the DP program, do not fully conform with paragraph 6(b) of Annex 2 of the Agreement on Agriculture. They are not green box measures. Consequently, the Panel concluded that these measures do not comply with the

[353] Paragraph VII. 346-350, 354, Report of Panel, United States-Subsidies on Upland Cotton, WT/DS267/AB/R, 3 March 2005.

condition in paragraph (a) of Article 13 of the AOA and are therefore non-Green Box measures covered by paragraph (b) of Article 13.[354]

The case also examined this issue: were the agricultural subsidies provided by the United States to upland cotton producers through all the other domestic support programs, such as marketing loan program payments, user marketing (Step 2) payments, MLA payments, CCP payments and export credit guarantee programs, prohibited or actionable subsidies pursuant to the SCM Agreement? [355]Any arrangement which ties the availability of a subsidy to a particular level of import substitution or export performance falls in the "prohibited" category. For this reason, export subsidies and import substitution subsidies are explicitly prohibited under the SCM Agreement. "Actionable" subsidies are those arrangements which are not prohibited but create serious prejudice to the interests of other member states.[356] In this regard, the Panel concluded that the export subsidies provided through export credit guarantee programs were prohibited subsidies and should either be withdrawn or be brought into conformity with the AOA by the United States. With respect to the 'mandatory price-contingent subsidy measures", such as marketing loan program payments, user marketing (Step 2) payments, MLA payments and CCP payments, they were actionable "Amber Box" subsidies because it contributed serious prejudice to the interests of Brazil, therefore the United States was under an obligation to take appropriate steps to remove the adverse effects or withdraw the subsidy upon adoption of the Panel Report.

In October 2014, the United States appealed certain issues of law covered by the Panel Report. However, the Appellate Body upheld the panel's finding that the two challenged domestic support measures of the United States, (production flexibility contract and direct payments) could not be counted as Green Box measures and

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[354] Paragraph VII. 413, 414, Report of Panel, United States-Subsidies on Upland Cotton, WT/DS267/AB/R, 3 March 2005.

[355] Article 3 of SCM Agreement prohibits import-substitution subsidies (subsidies that are contingent on the use of domestic over imported goods), as well as export subsidies (subsidies that are contingent upon export). While Article 5 of SCM Agreement states that no Member should cause, through the use of any subsidy adverse effects to the interests of other Members, i.e.: ...serious prejudice to the interests of another Member. If so, these subsidies are actionable. Steinberg (n 349) 853–854.

[356] David Hanson, *Limits to Free Trade: Non-Tariff Barriers in the European Union, Japan and United States* (Edward Elgar Publishing 2010) 31.

therefore should not be exempted from actions under the SCM Agreement.[357]This case represents an important victory for the developing world and all those seeking to limit farm subsidies. The case places new limits on the use of Amber Box subsidies, which will deeply affect treatment of "Amber Box" domestic support programs in the developed Members.[358] In it, the Appellate Body interpreted WTO provisions to significantly expand the restriction on agricultural support programs generally. Moreover, if future panels continue to read disciplines broadly and exemptions narrowly, agricultural support programs may be headed for zero tolerance regardless of the outcomes of the Doha Round negotiations.[359]

4.2 The Landscape of Members' Limited Policy Space

A main contribution of the AOA to the multilateral trading system is that it has defined the legal policy space within which Members have been given rules for domestic support measures and distinct international commitments on certain support, which they can take into account in pursuing their agricultural policy objectives.[360] The AOA's rules establish which domestic support policies are exempt from the reduction commitments. A scheduled commitment level, whether nil or larger, establishes the limit that applies to certain support in favour of agricultural producers. The interaction between the rules-based exemptions and the scheduled commitment level is key to defining the distortive nature of domestic support. The WTO is not too concerned about the amount of support that a government provides to its farmers; this support matters only to the extent that it affects, directly or indirectly, international trade in the sector**.** The rules of the AOA on domestic support reflect the delicate balance that has to be struck between the desire to leave governments free to support their agricultural sectors

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[357] 'WTO | Dispute Settlement - the Disputes - DS267' <https://www.wto.org/english/tratop_E/dispu_e/cases_e/ds267_e.htm> accessed 25 June 2018.

[358] Michael J Shumaker, 'Tearing the Fabric of the World Trade Organization: United States-Subsidies on Upland Cotton' (2006) 32 NCJ Int'l L. & Com. Reg. 547, 598.

[359] 'The WTO Decision on U.S. Cotton Subsidies | ASIL' <https://www.asil.org/insights/volume/9/issue/11/wto-decision-us-cotton-subsidies> accessed 25 June 2018.

[360] Ramesh Sharma, 'Developing Country Experience with the Key Policy Issues of the Uruguay Round Agreement on Agriculture', *Reforming Agricultural Trade For Developing Countries* (The World Bank 2007) 75–76.

as they see fit and the need to reduce the trade-distortive effects of those otherwise domestic measures.[361]

Along the line of legal differentiation of domestic support measures, the AOA has created two kinds of policy space in domestic support pillar: exemption space and limited space. Exemption space derives from the entitlement of Members to separate policies that meet given criteria from those policies under which support counts against the Member's limit(s), i.e., exemption space allows limitless support. The criteria are those of Annex 2, Article 6.2 and Article 6.5 of the AOA (Green, Development and Blue Boxes). Limited space derives from the entitlement to provide support under non-exempt policies up to the Member's limit(s). Some Members (a minority) have only one limit, the BTAMS, and other Members (the majority) have limits on individual AMSs, defined by the Member's *de minimis* percentage and values of production.[362]

There is a need to clarify the method used to collect and calculate the exact figures of a specific domestic support measure before we start to explore the landscape of Members' limited policy space. All the data or figures come from Members' own notifications to the WTO in a given year, therefore the research has made tremendous efforts to collect each Members' domestic support on a yearly basis and then put them together in order to get a comprehensive picture of how a specific domestic support measure has been used by Members and what their overall expenditure on that specific domestic support measure in that year. For that purpose, the research continues to convert the domestic support of all WTO Members, where it is available, into one common currency, the US dollar by adopting the exchange rates from the IFS database of the IMF. For instance, Table 3 of this Chapter starts with the BTAMS of the EU as indicated in its Schedule (72,244 Million Euros), and then gets the exchange rate of the Euro with the US dollar from the IFS database of the IMF, which is 0.68 in 2008. With that, the BTAMS of the EU becomes 106,241.2 Million Dollars). The same approach is adopted to deal with the figures of all the other Members if they are expressed in their own currencies. With all those conversions and calculations, a sum of WTO Members' BTAMS and CTAMS

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[361] McMahon and Desta (n 159) 7.

[362] Lars Brink, 'Policy Space in Agriculture under the WTO Rules on Domestic Support' (2015) <http://ageconsearch.umn.edu/bitstream/207090/2/WP15-01 per cent20Brink.pdf> accessed 6 December 2017.

is provided. Besides Table 3, most other tables in this chapter follow the same method to calculate the figures of Members in order to present a broad picture of the use of a specific domestic support measure by Members.

4.2.1 Total Aggregate Measurement of Support (Total AMS)

The Total AMS has two forms: the bound level in the Member's Schedule and the applied level, which must not exceed the bound level. This parallels the bound tariff and the MFN applied tariff in the market access pillar. The BTAMS is specified in the Schedule's column headed Annual and Final Bound Total AMS, but since all reductions from the Uruguay Round were completed by 2004, the level that matters today is simply the Final BTAMS. Members with a BTAMS calculate a CTAMS, which measures the applied AMS support in the current year. Certain rules apply to the calculation of CTAMS, specifically the *de minimis* exemption. The Member's CTAMS must not exceed the BTAMS (Article 6.3).[363]

For an original WTO Member with a BTAMS this level has remained unchanged since the end of the period of carrying out their Uruguay Round reduction commitments: 2000 for developed Members and 2004 for developing Members. The CTAMS, an indicator of certain applied support, can of course vary from year to year but must never exceed the BTAMS. Some of the new Members who have acceded to the WTO after 1995 have established a BTAMS by negotiation and in some of these cases also a period of reduction of the BTAMS to the Final BTAMS (most RAMs have a nil commitment in Part IV, Section of their Schedule). For instance, the Russian Federation, which became a Member of the WTO in August 2012, committed to gradually reduce its BTAMS from $ 9 billion in 2012 and 2013 to $ 4.4 billion in 2017 and 2018, the level of its Final BTAMS.[364]

As of September 2017, 32 Members (counting the EU as one) have a BTAMS greater

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[363] Article 6.3 of the URAA provides that "A Member shall be considered to be in compliance with its domestic support reduction commitments in any year in which its domestic support in favour of agricultural producers expressed in terms of Current Total AMS does not exceed the corresponding annual or final bound commitment level specified in Part IV of the Member's Schedule."

[364] World Trade Organization, Russian Federation and the WTO, Russian Federation's Goods Schedules, available at <https://www.wto.org/english/thewto_e/countries_e/russia_e.htm>, last accessed 6 December 2017.

than nil in their schedules, either the Final BTAMS from reductions or simply the BTAMS negotiated in accession. The 32 Members form a diverse group. Nine Members, or nearly half of the Cairns Group membership, who favour ambitious agricultural trade liberalization, seven Members of G10 who champion the concept of non-trade concerns for diverse and special treatment for agriculture in the multilateral talks, and six G20 Members who are pressing for ambitious reforms of agriculture in developed Members with flexibility for developing Members.

As Antón rightly observes that aggregating expenditure of all WTO members can be quite misleading as it requires conversion of Members' various national currencies in which they notified their domestic support into a common currency. The result of adding up support is very much subject to the variations of both the exchange rate and the number of Members notifying their domestic support in a given year.[365] To do with that, three points deserve special clarification. First, the US dollar has been adopted as the common currency. Second, the exchange rates of Members' national currencies against the US dollar in a given year are from the International Financial Statistics (IFS) of the IMF.[366] All the Tables throughout this Chapter have followed the same methodology in terms of exchange rate data processing. However, few exceptions, such as Chinese Taipei, Cuba, have to be made as the data concerning their exchange rates are not available from the common source. In this case, the relevant sources of data are specified. Third, the paper has chosen the year of 2008 is as the starting point to examine and compare Members' domestic support. Due to poor data availability, resulting from many Members not having notified for recent years, it is impossible to get up-to-date information for all WTO Members, including the major players, which is kept in mind when drawing conclusions drawn from the data.

The sum of these 32 Members' BTAMS commitments equaled $ 195.9 billion in 2008 (Table 3). The level of BTAMS in USD can vary with the applicable exchange rate against the USD. For instance, the total of BTAMS of these Members shrank to $ 174.8 billion in 2014, more than $ 20 billion less than 2008 due to the fluctuations of exchange

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[365] Meléndez-Ortiz, Bellmann and Hepburn, *Agricultural Subsidies in the WTO Green Box: Ensuring Coherence with Sustainable Development Goals* (n 340) 162–163.

[366] International Monetary Fund, International Financial Statistics, Exchange Rates incl. Effective Ex. Rates, available at <://data.imf.org/regular.aspx?key=60998108>, last accessed 6 December 2017.

rates. With the inclusion of the respective BTAMS of Montenegro,[367] Russian Federation[368] and Tajikistan,[369] who acceded to the WTO after the preparation of Table 3, the sum of BTAMS levels of the 32 Members amounted to $ 182.5 billion in 2014. OECD Members have almost all of this amount. The total level of BTAMS of the 12 OECD Members was $ 190 billion in 2008, accounting for 97 per cent of the sum. In this sense, the BTAMS is a legal privilege mostly for developed Members, and very few developing Members can benefit from it. On the other hand, all developing Members are able to exempt a larger set of policies from limits on support and they also enjoy larger *de minimis* percentages, so some equivocation about the balance of entitlements is in order.

Table 3 Levels of BTAMS and CTAMS in 2008[370]

	BTAMS in Schedule	Exchange Rate 2008	USD million	CTAMS 2008	USD million
EU (Euro Million)	72,244.0	0.68	106,241.2	11,795.5	17,346.3
USA (USD Million)	19,103.3	1	19,103.3	9,183.5	9,183.5
Japan (Yen billion)	3,972.9	90.75	43,778.5	520.4	5,734.4
Mexico (Pesos 1991 million)	25,161.2	3.02	8,331.5	577.4	191.2
Canada (Can$ million)	4,301.0	1.07	4,019.6	1,683.9	1573.7
Switzerland Liechtenstein (CHF million)	4,257.0	1.08	3,941.7	2,954.6	2,735.7
Norway (Nkr million)	11,449.0	5.64	2,030.0	11,555.0	2,048.8
Korea, Rep (Won Billion)	1,490.0	1,102.05	1,352.0	33.1	30.0
Venezuela (USD million)	1,130.7	1.0	1,130.7	n.a	n.a
Brazil (USD million)	912.1	1.0	912.1	520.4	520.4
Saudi Arabia (SR million)	3,563.9	3.75	950.4	3,327.3	887.3

[367] Montenegro's Level of Total AMS Commitments is bound at 333,278 Euros, available at <https://www.wto.org/english/thewto_e/countries_e/montenegro_e.htm>, (Table CGR-Other 2-#5, Supporting Tables: WT/ACC/SPEC/CGR/1/Rev.2), last accessed 6 December 2017.

[368] Russian Federation's Level of Total AMS commitments is bound to be reduced from $ 9 billion in 2012 to $ 4.4 billion by 2018. Available at <https://www.wto.org/english/thewto_e/countries_e/russia_e.htm>, (Table RUS4-101, Relevant Supporting Tables and Document Reference JOB/ACC/5/Rev.3), last accessed 6 December 2017.

[369] Tajikistan's level of Total AMS commitments is bound at 182,667 thousand US dollars. Available at <https://www.wto.org/english/thewto_e/countries_e/tajikistan_e.htm>, (Table CGR-Other 2-#5, Supporting Tables: WT/ACC/SPEC/TJK/3/Rev.5 for Tajikistan), last accessed 6 December 2017.

[370] Most figures in Table 3 come from two sources: the WTO Members' Transparency Toolkit--Agriculture Information Management System (AGIMS), available at: http://agims.wto.org/, and a document from the WTO Committee on Agriculture titled the Secretariat's Note on "Total Aggregate Measurement of Support" (TN/AG/S/13/Add.3/Rev.1) dated 23 Nov. 2009, available at the WTO website (documents online), last accessed 6 December 2017.

Ukraine (Hrv million)	3,043.4	5.27	577.5	1,113.4	211.3
Thailand (B million)	19,028.5	33.31	571.3	169.2	5.1
Israel (USD million)	569.0	1	569.0	582.7	582.7
Chinese Taipei[371] (NT$ million)	14,165.2	31.49	449.8	4,014.6	127.5
Australia ($A million)	471.9	1.19	396.5	0	0.0
Colombia (USD million)	344.7	1	344.7	17.8	17.8
South Africa (R million)	2,015.4	8.26	244.0	0	0.0
Viet Nam (VND billion)	3,961.6	16,302.25	243.0	0	0.0
Iceland (SDR million)	130.1	0.63	205.6	87.5	138.9
New Zealand ($NZ million)	288.3	1.42	203.0	0	0.0
Morocco (DH million)	685.0	7.75	88.4	38	4.9
Argentina (Arg$ million)	75.0	1	75.0	74.2	74.2
Tunisia (D million)	59.3	1.23	48.2	0	0.0
Papua New Guinea (US$ million)	34.2	1	34.2	n.a	n.a
FYROM (Euro million)	16.3	0.68	24.0	15.8	23.2
Moldova (SDR million)	12.78	0.63	20.3	0	0.0
Costa Rica (US$ million)	15.9	1	15.9	62.5	62.5
Jordan (JD)	1,333,973	0.71	1.9	0	0.0
Total			**195,903.2**		**41,499.4**
Montenegro (Euro million)	0.3				
Russian Federation (USD million)	9000-4400				
Tajikistan (USD million)	182.7				
Sources of data: 1. Members' self-notifications to the WTO; 2. Exchange rates between Members' local currencies and US dollar are from the IFS database of the IMF.					

The corresponding sum of CTAMS levels of Members with BTAMS commitments was $ 41.5 billion in 2008, more than 20 per cent of their total BTAMS in the same year. It indicates that the level of CTAMS of these 32 WTO Members has generally been well below their legally bound limits (BTAMS). There is thus large room for these Members to raise their non-exempt domestic support, as measured by the CTAMS, within their BTAMS. But a closer look indicates that this gap between CTAMS and BTAMS varies from one Member to the other, and five trends can be easily identified from their notifications.

First, for the United States, the EU, Japan, Canada, Mexico, Korea, Colombia and Chinese Taipei, the levels of CTAMS have remained quite stable over the years and the gap between CTAMS and BTAMS has been much larger than CTAMS itself. For example, the CTAMS of the EU has been kept at less than 10% of its BTAMS since

371 Data concerning the exchange rate of Chinese Taipei comes from the Federal Reserve Bank of New York, <https://www.federalreserve.gov/releases/h10/hist/dat00_ta.htm>, last accessed 6 December 2017.

2010, while the CTAMS of the United States has remained at nearly 40% of BTAMS in most years.

Second, for Australia, New Zealand, South Africa, Viet Nam, Tunisia and Moldova, the levels of BTAMS have remained unused over the years, which indicates that the BTAMS is an entitlement that can be used in case they wish to raise AMS support in future years above the respective *de minimis* thresholds.

Third, Switzerland, Norway, Iceland, Argentina, and the FYROM have maintained very high level of CTAMS in relation to BTAMS over the years. These Members have used a substantial part or nearly all of their BTAMS. Switzerland and Iceland are quite similar in terms of their levels of CTAMS, which has remained around 50-70% of their BTAMS in 2008-2013. Norway has maintained an even higher relative level of CTAMS, around 80-90% of its BTAMS, and in one year its CTAMS even exceeded its BTAMS. The CTAMS of Argentina has nearly reached the BTAMS, and its unused gap within BTAMS has been kept to only 1 or 2 per cent of BTAMS in 2008-2013.

Fourth, the case of Israel and Costa Rica is exceptional as their respective CTAMS have exceeded BTAMS levels. For Israel, its BTAMS is $ 569 million, but data from its notification shows that its CTAMS has exceeded its BTAMS. For instance, its CTAMS in 2013 and 2014 was $ 689.9 million and $ 661.4 million, which was $ 120 million or nearly $ 100 million more than its BTAMS.[372] The BTAMS for Costa Rica is $ 15.9 million, but its CTAMS has remained 4 to 7 times its BTAMS in 2008-2013.

Fifth, the levels of CTAMS of Brazil, Saudi Arabia, Ukraine, Jordan and the Russian Federation have remained quite unpredictable, and gap between their respective CTAMS and their BTAMS has varied from year to year. For instance, the CTAMS of Brazil accounted for 57 per cent of its BTAMS in 2008, but it turned to zero in 2013 and 2014.[373] Accordingly, Brazil's gap between CTAMS and BTAMS changed from 43 per cent of BTAMS in 2008 to 100 percent in 2013 and 2014.

Table 4 Evolution of the CTAMS/BTAMS Percentage for Members with Total AMS Commitments in 2008-2013

[372] Notification from Israel dated 28 April 2016, G/AG/N/ISR/55, p.19 and p.27.

[373] Notification from Brazil dated 27 October 2016, G/AG/N/BRA/41, p.2.

Unit: %

	2008	2009	2010	2011	2012	2013
EU-27	16.3	12.1	9.0	9.5	8.2	8.3
Japan	13.1	14.2	14.5	14.1	15.3	n.a
United States	48.1	34.3	27.0	37.0	35.9	36.1
Mexico	2.3	2.7	2.7	2.7	1.3	2.3
Canada	39.2	32.4	11.4	12.1	19.5	11.6
Switzerland	69.4	60.6	57.3	55.8	52.0	60.0
Norway	100.9	89.4	84.3	84.3	91.5	86.2
Korea, Rep	2.2	1.9	0.9	0.0	n.a	n.a
Venezuela	n.a	n.a	n.a	n.a	n.a	n.a
Brazil	57.1	32.1	29.5	23.4	0.8	0.0
Saudi Arabia	93.4	64.2	44.4	10.9	n.a	n.a
Ukraine	36.6	36.6	71.6	73.5	n.a	n.a
Thailand	0.9	n.a	n.a	n.a	n.a	n.a
Israel	102.4	90.3	93.3	110.4	102.0	121.2
Chinese Taipei	28.3	27.2	27.4	n.a	n.a	n.a
Australia	0.0	0.0	0.0	0.0	0.0	0.0
Colombia	5.0	7.3	7.4	0.0	9.2	5.9
South Africa	0.0	0.0	0.0	0.0	0.0	0.0
Viet Nam	0.0	0.0	0.0	0.0	0.0	0.0
Iceland[374]	67.3	52.6	55.4	62.0	63.0	n.a
New Zealand	0.0	0.0	0.0	0.0	0.0	0.0
Morocco	5.5	n.a	n.a	n.a	n.a	n.a
Argentina	98.9	99.0	98.7	99.1	96.6	98.9
Tunisia	0.0	0.0	0.0	0.0	0.0	0.0
Papua New Guinea	34.2	n.a	n.a	n.a	n.a	n.a
FYROM	96.9	n.a	n.a	n.a	n.a	n.a
Moldova	0.0	0.0	0.0	0.0	0.0	0.0
Costa Rica	391.8	575.4	687.8	655.3	513.3	540.2
Jordan[375]	0	38.5	64.1	0.0	0.0	0.0
Montenegro	n.a	n.a	n.a	n.a	n.a	n.a
Russia	n.a	n.a	n.a	n.a	64.4	0.7
Tajikistan	n.a	n.a	n.a	n.a	n.a	n.a
Source of data: author's own calculations based on Members' notifications						

[374] Iceland has presented two forms of CTAMS calculation, one without inflation adjustment and the other with inflation adjustment in its notifications. Table 4 has adopted the latter. Notification of Iceland dated 16 December 2005, G/AG/N/ISL/26, at p.59.

[375] Jordan has presented two forms of calculation for its level of CTAMS in 2009 and 2010 in its notification to the WTO, one without inflation adjustment and the other with inflation adjustment. There are substantial differences in the results of the two forms of calculation. If without inflation adjustment, the percentage between its level of CTAMS and its level of BTAMS in 2009 and 2010 was 148.4% and 268.8% respectively, which had exceeded its limits for the non-exempt domestic support. Notification of Jordan dated 1 Oct. 2013, G/AG/N/JOR/16, at p.2 and p.13.

4.2.2 The *De Minimis* Level

The limits on AMS support are of a substantially different nature for Members with a non-zero Total AMS commitment (BTAMS) and Members with a blank, zero or nil in Part IV, Section I, of their Schedules. For the former ones, the legal limit is their BTAMS, but the rules for calculating CTAMS enable them to exempt some AMSs from CTAMS. For Members without a BTAMS the *de minimis* level of each AMS is its limit.[376] The two components of the AMS, product-specific and non-product-specific are disciplined separately.[377] For the former, the *de minimis* percentage applied to each basic agricultural product's value of production (VoP) in a given year determines the *de minimis* limit for the AMS of the product. The result is a number of *de minimis* limits, one for each product. For the latter, the *de minimis* percentage applied to the total value of agricultural production (VAP) determines the *de minimis* limit in a given year on the NPS AMS.

4.2.2.1 The *De Minimis* Level of Non-Product Specific AMS

The term of "Non-Product-Specific domestic support" appears four times in the text of the AOA without having a clear definition and coverage.[378] However, the ruling of the WTO Appellate Body in the US-Upland Cotton case about the definition of "support to a specific commodity" as appeared in Article 13 or the "Peace Clause" of the AOA has shed some light on this issue.[379]

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[376] Article 7.2 (b) of the URAA provides that "where no Total AMS commitment exists in Part IV of a Member's Schedule, the Member shall not provide support to agricultural producers in excess of the relevant de minimis level set out in paragraph 4 of Article 6."

[377] Sharma (n 360).

[378] Namely, Article 1 (a), 1(h), Article 6.4 (a)(ii) and Para. 1 of Annex 3.

[379] "The term 'such measures…grant support to a specific commodity' comprises two elements: first, a non-Green Box measure actually confers support on the specific commodity in question; second, there is a discernible link between the measure and the commodity, such that the measure is directed at supporting that commodity. Such a discernible link may be evident where a measure explicitly defines a specific commodity as one to which it bestows support. Such a link might also be ascertained, as a matter of fact, from the characteristics, structure or design of the measure under examination. Conversely, support that does not actually flow to a commodity or support that flows to a commodity by coincidence rather than by the inherent design of the measure cannot be regarded as falling within the ambit of the term 'support to a specific commodity'". World Trade Organization, 'Appellate Body Report on U.S

Many WTO Members have classified support policies in line with their own interpretations of what constitutes NPS domestic support in relation to Article 6.4. This is also the phrase used in the Committee on Agriculture's formats for notifications, decided in 1995. Article 6.4 introduces the concept of Current AMS, which is in line with the article's exemption of some support from the CTAMS. Accordingly, this analysis refers to NPS AMS, a narrower measurement than NPS support.

As of March 2017, 21 Members had notified the WTO Committee on Agriculture of what they classified as NPS AMS in 2008, summing to $ 22.7 billion.[380] This was about 1.1 per cent of the sum of their total VAP ($ 2,077.7 billion) in the same year. The difference between a Member's NPS AMS and either the *de minimis* threshold (for Members with a non-zero BTAMS) or the *de minimis* limit (for Members without a BTAMS) can be called unused support space for NPS AMS. This unused support space for NPS AMS of these Members totaled $ 123.4 billion, more than five times their used support space for such support in 2008. In 2009 and 2010, the sum of the NPS AMSs of these Members increased to $ 27.7 billion and $ 27.6 billion, which was about 1.3 per cent of the sum of their total VAP ($ 2,103.8 billion and $ 2,173.2 billion) in the same year. The unused support space for NPS AMS in 2009 and 2010 was $ 127.2 billion, less than five times the used space for such support.

Table 5 NPS AMS of WTO Members in 2008[381]

Members	NPS ($ million)	Total VAP ($ millions)	Used (%)	unused (%)	Unused ($ million)
China	11,347.3	759,694.5	1.5	7.0	53,178.6
United States	3,578.9	316,512.9	1.9	3.1	12,246.8
Brazil	2,126.8	96,165.5	2.2	7.8	7,500.9
Canada	1,562.2	43,782.1	3.6	1.4	612.9
Japan	1,332.2	84,077.0	1.6	3.4	2,858.6
EU	1,114.0	506,279.9	0.2	4.8	24,301.4

Subsidies on Upland Cotton' 138, Para.372 <https://www.wto.org/english/tratop_e/dispu_e/267abrw_e.pdf> accessed 2 January 2018.

380 Members may revise substantially their domestic support in updated notifications. Therefore, the sum of the non-PS AMSs is subject to change. Due to time constraints, it is not possible to trace all the changes concerning Members' subsequent revised and corrected notifications.

381 Sources of data in Table 4 are author's computation based on Members' notifications. Otherwise specified, sources of date in the following Tables and graphs in this Chapter are all author's computation. There is no need to clarify each time again.

Pakistan	577.3	38,200.0	1.5	8.5	3,247.0
Korea, Rep	264.1	35,989.8	0.7	9.3	3,347.1
Chinese Taipei	262.2	10,356.1	2.5	2.5	258.9
Saudi Arabia	155.9	10,946.7	1.5	8.5	930.5
Australia	135.9	37,657.1	0.4	4.6	1,732.2
Viet Nam	84.2	2,101.3	4.0	6.0	126.1
Uruguay	46.3	4,986.6	0.9	9.1	453.8
Chile	42.3	76,522.6	0.1	9.9	7575.7
Mexico	22.6	28,244.9	0.1	9.9	2,801.9
Norway	21.6	4,534.4	0.5	4.5	204.0
Moldova	20.2	1,595.2	1.3	3.7	59.0
Jordan	14.6	1,868.7	0.8	9.2	171.9
Tunisia	10.6	4,374.0	0.2	9.8	428.7
Albania	10.2	2,341.1	0.4	9.6	224.7
Peru	5.6	9,427.9	0.1	9.9	937.1
Armenia	5.5	2,052.5	0.3	9.7	199.1
Total	22,740.5	2,077,710.8	1.1		123,397.0
2009 (Total)	27,717.6	2,103,773.1	1.3		127,282.5
2010 (Total)	27,608.2	2,173,218.9	1.3		127,212.1
Source of data: author's own calculation based on Members' notifications					

China provided the largest amount of NPS AMS at $ 11.3 billion in 2008, or 50 per cent of the sum of the NPS AMSs of the other WTO Members. China's NPS AMS accounted for 1.5 per cent of its total VAP in 2008. Given the 8.5 per cent *de minimis* percentage to which China has committed, the unused room for NPS AMS support below the *de minimis* limit was 7 per cent of its total VAP in 2008, or $ 53.2 billion. In 2009 and 2010, China continued to top the WTO membership and its NPS AMS increased to $ 13 billion and $ 14.4 billion, around 1.6 per cent of its corresponding total VAP, and the unused room for NPS AMS support increased to $ 55.1 billion in 2009 and then $ 64.6 billion in 2010.

After China, the United States and Brazil occupied the second and the third place with a NPS AMS of $ 3.6 billion and $ 2.1 billion, respectively, which accounted for 1.1 per cent and 2.2 per cent of their respective total VAP in 2008 (Table 6). Due to their different *de minimis* percentages, the unused room below their respective limits on NPS AMS was around 4 per cent for the United States and 8 percent for Brazil of total VAP, or $ 12.2 billion and $ 7.5 billion, respectively. But since then both the United States and Brazil have witnessed radical changes. The NPS AMS of the United States hit an apex in 2009, $ 3 billion more than in 2008, making the NPS AMS 2.3 per cent of total

VAP. This meant the gap between the NPS AMS and its *de minimis* threshold reached its lowest at 2.7 per cent of total VoP or about $ 7.6 billion. But this gap has declined significantly since then, to $ 272.4 million in 2013 or only 0.1 per cent of the total VoP. It went back to $ 5.5 billion again or 1.4 per cent of the total VoP in 2014. By contrast, the story of Brazil is much more stable. Brazil's NPS AMS has remained around 2.5 per cent of its total VAP in 2008-2011, and it has dropped to 1.2 percent afterwards. The gap between the NPS AMS and its *de minimis* threshold has remained around 7.5-8.8 per cent throughout the period from 2008 to 2014.

Table 6 NPS AMS of the United States and Brazil

	USA				Brazil			
	NPS ($ Million)	Used (%)	Unused (%)	Unused ($ Million)	NPS ($ M)	Used (%)	Unused (%)	Unused ($ M)
2008	3,578.9	1.1	3.9	12,246.8	2,126.8	2.2	7.8	7,500.9
2009	6,667.2	2.3	2.7	7,565.4	1,907.7	2.3	7.7	6,303.2
2010	5,584.5	1.7	3.3	11,162.1	2,528.2	2.5	7.5	7,705.1
2011	1,782.2	0.5	4.5	17,135.1	2,846.5	2.5	7.5	7,373.9
2012	309.3	0.1	4.9	19,521.0	2,109.6	1.2	8.8	7,476.0
2013	272.4	0.1	4.9	19,306.5	2,269.9	1.2	8.8	7,578.1
2014	5,532.5	1.4	3.6	14,749.8	1,724.6	1.2	8.8	7,680.2
Source of data: author's own calculation based on Members' notifications								

Canada ranked No. 4 with a NPS AMS of $ 1.7 billion, but it ranked very high among WTO members by using 3.6 per cent of its room below its *de minimis* threshold (Table 7). Canada's unused room for NPS AMS in 2008 was only 1.4 per cent of total VAP, or $ 0.6 billion. Canada has maintained a relatively high percentage of NPS AMS over the years, which in most years is only 1 percentage point below its 5 per cent *de minimis* threshold. In 2010 Canada nearly reached the threshold as its NPS AMS accounted for 4.9 per cent of total VoP.

Table 7 Canada's NPS AMS in 2008-2013

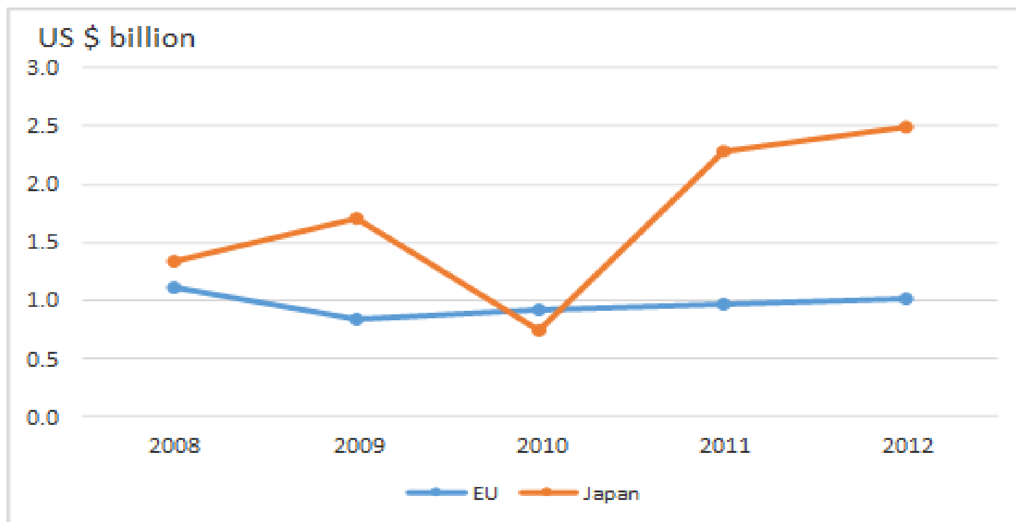
	NPS (Can$ million)	TVOP (Can$ million)	Used (%)	Unused (%)	Unused (Can$ million)	Unused (US$ million)
2008	1,671.6	46,846.9	3.6	1.4	670.7	626.9
2009	1,560.7	41,395.7	3.8	1.2	509.1	446.6
2010	2,241.3	45,573.1	4.9	0.1	37.4	36.3
2011	2,195.6	50,545.9	4.3	0.7	331.7	335.0

2012	2,019.3	54,815.8	3.7	1.3	721.5	721.5
2013	1,993.9	56,916.6	3.5	1.5	851.9	827.1
Source of data: author's own calculation based on the notifications from Canada						

For Japan and the EU, their NPS AMS in 2008 was very similar, $ 1.3 billion (¥ 137.7 billion) for Japan and $1.1 billion (€ 757.5 million) for the EU (Graph 1). This accounted for 1.6 per cent of Japan's total VAP, but only 0.2 per cent for the EU. Japan's unused room for NPS AMS below its *de minimis* threshold in 2008 was 3.4 per cent of total VoP, or $ 2.9 billion (¥ 296.8 billion). For the EU it was 4.8 per cent of total VoP, at $ 24.2 billion (€ 16.5 billion). But after 2008, their NPS AMS moved in different directions. For Japan, this AMS nearly doubled ($ 2.5 billion) by 2012, while for the EU it went down ($ 1.0 billion). Nevertheless, the NPS AMS remained at 0.2 per cent of the total VoP in the EU in 2008-2012, while it increased to 2.3 per cent by 2012 from 1.6 per cent in 2008 in Japan.

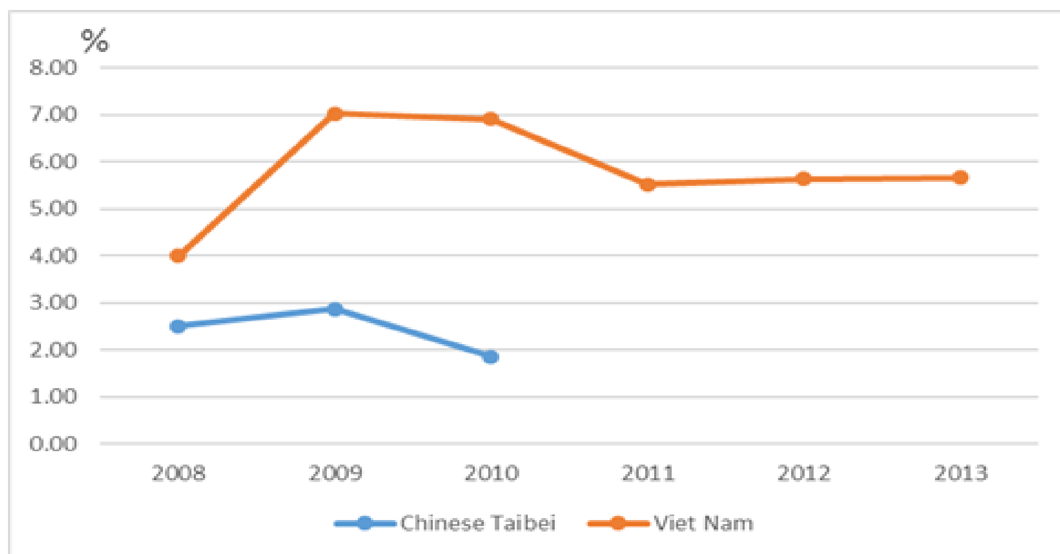
Most developing Members used less than 1 per cent of their room for NPS AMS in 2008. But given the small scale of their total VoP, the unused room below the *de minimis* limit or *de minimis* threshold appears relatively small. For instance, the NPS AMS of Tunisia accounted for only 0.2 per cent of its total VoP, corresponding to $ 0.4 billion in 2008. Uruguay, Albania, Armenia, and Jordan faced the same situation. The case of Chinese Taipei and Vietnam deserves special attention. For Chinese Taipei, its *de minimis* percentage is 5 per cent and its NPS AMS accounted for 2.5 percent and 2.9 per cent of its total VoP in 2008 and 2009, respectively, leaving its unused room at about 2 per cent, or less than $ 0.3 billion. For Viet Nam, NPS AMS was 4 per cent of its total VoP in 2008, climbed to 7 per cent in 2009 and 2010, and stayed around 6 percent in 2011-2013. In 2009 the unused room below the *de minimis* threshold was only $ 75 million.

Graph 1 NPS AMS of the EU and Japan in 2008-2012



Source of data: notifications from the EU and Japan

Graph 2 the Case of Chinese Taipei and Viet Nam



Source of data: Notifications from Chinese Taipei and Viet Nam

What these figures reflect are not only the financial resources that WTO Member governments have allocated to subsidize their agricultural production, but also the guiding role that the multilateral disciplines in domestic support have played in reshaping Members' agricultural policies so as to achieve greater policy coherence at the global level. A survey of the NPS budgetary outlays of WTO Members shows that such support has been channeled to the following areas:

Table 8 NPS AMS Measures as Reported in 2008

Members	NPS Measures
China[382]	input subsides, interest subsidy
United States[383]	irrigation (irrigation facilities interest rates), grazing livestock in federal land, crop and revenue insurance, countercyclical payment, farm storage facility, biomass crop assistance program
Brazil[384]	non-product specific production and marketing credit, debt-rescheduling programs, risk minimizing agribusiness
Canada	agricultural policy framework initiative, stabilization component of AgriStability, AgriStability enhancement, AgriInvest
Japan	agricultural insurance scheme, crop income stabilization payment
EU	insurance subsidies, interest concessions, harvest insurance
Korea	subsidy for farm facilities, input subsidies, loan program, loan interest subsidy, crop insurance
Pakistan	fertilizer subsidy, electricity subsidy
Saudi Arabia	general agricultural subsidies, opportunity cost for interest-free agricultural loans, bad debts for agricultural loans
Chinese Taipei	agricultural machinery price subsidy, fertilizer freight subsidy, agricultural fertilizer price difference subsidy, waiver or reduction of fees for electricity used for agricultural production, fuel subsidy for agricultural machinery, interest subsidy, livestock insurance subsidy
Australia	Murray Darling Basin irrigation management grants program, on-farm productivity improvement grants, small block irrigators exit grant package
Viet Nam	support to cover losses for electricity used in irrigation, support irrigation fee
Uruguay	exemption from payment of global tariff (CET) on imports of agricultural inputs from non-MERCOSUR countries
Chile	land reclamation
Norway	subsidy to insemination, feed transport subsidies
Jordan	water subsidy, credit subsidy
Tunisia	irrigation water subsidy
Albania	plant trees like grape, apple and olive at subsidized rates provided to producers
Armenia	supplying farmers with livestock on the condition of postponed payments, in the framework of the Cattle Husbandry Development Program

a) Agricultural production factors, including agricultural inputs (fertilizer, pesticides), irrigation water or facilities, land, farm (storage) facilities. Subsidies for agricultural inputs have been widely adopted by both developed and developing Members, either seeking to improve agricultural productivity, increase production,

[382] However, someone observes that some input subsidies, such as irrigation subsidies, are unreported in China's notifications in NPS support. It is estimated that an average of RMB32 billion is provided to irrigation annually in China for the period 1996-2005. Orden, Blandford and Josling (n 129).

[383] Orden, Blandford and Josling (n 129) 123.

[384] Orden, Blandford and Josling (n 129) 252–256.

raise farmers' income, or allowing output prices to be lower than otherwise might be the case. Developing Members, with two exceptions, may exempt such subsidies from their AMSs if the subsidy policies meet the criteria of Article 6.2 of the AOA. China and Kazakhstan have committed not to exempt input subsidies from their AMS calculations. Input subsidies have become the lion's share of China's NPS AMS. China's reported budgetary outlays on agricultural input subsidies have rocketed from only Y 148 million or $ 17.9 million in 2001[385] to Y 95,700.4 million or $ 14,100 million in 2010,[386] a very large increase. By 2010, input subsidies accounted for 98 per cent of China's NPS AMS. India's subsidies for agricultural inputs, like fertilizers, irrigation, electricity and seeds tripled from $ 10 billion in 2004-05 to $ 30 billion in 2008-09, as its ration of NPS AMS to the value of total agricultural production was as high as 7.5 per cent in 1995, but unlike China, India claimed them as exempt under Article 6.2.[387] The same situation is for Peru as its ratio reached 6.2 per cent in 1997, but dropped to 0.1 per cent in 2008.[388] Korea has also notified its input subsidies, with budgetary outlays increasing from 27.7 billion won ($ 35.9 million) in 1995 to 114 billion won ($ 102.9 million) in 2011. WTO Members also provide support for other production factors, such as irrigation water or irrigation facilities, land, and transport. For example, the United States, Australia, Chile, Norway, Jordan, Tunisia and Albania provide such support (Table 8).

b) Credit concessions. Members subsidize agricultural producers by granting many kinds of favorable financial conditions, including partial or full interest subsidies, loan guarantees, loan write-offs and other favorable financial conditions. For instance, interest concessions are part of the EU's NPS AMS, accounting for 18-28 per cent of its NPS AMS in 2008-2013 (Table 9). The United States reports subsidies to cover the interest on the outstanding unpaid balance of capital investment by the Government in irrigation facilities, which has been reduced gradually from $ 200 million in 2008 to $ 140 million in 2014.[389] China has granted interest subsidies to its poverty alleviation

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[385] Notification from the People's Republic of China dated 31 March 2006, G/AG/N/CHN/8, at p.13.
[386] Notification from People's Republic of China dated 5 May 2015, G/AG/N/CHN/28, at p.18.
[387] Notification from India dated 10 September 2014, G/AG/N/IND/10, at p.5.
[388] Sharma (n 360) 78.
[389] Notification from the United States of America dated 12 October 2010, G/AG/N/USA/77, at p.20.

loans or to its disaster-relief programs,[390] and has raised its interest subsidies dramatically, from Y 113.58 million ($16.3 million) in 2008 to Y 2037 million ($298.2) in 2009. Saudi Arabia has provided subsidies for farm machinery, poultry and dairy farm equipment and has granted commercial interest rates to agricultural loans.[391] Notifications show that Canada,[392] Korea,[393] Brazil,[394] Jordan[395] and Tunisia[396] have also carried out a similar agricultural policy.

Table 9 Interest Subsidy of EU and United States

	United States		EU	
	$ Million	% of NPS AMS	€ Million	% of NPS AMS
2008	203.8	5.7	176.5	23.2
2009	203.8	16.3	165	27.6
2010	188.7	21.4	122.9	17.5
2011	188.7	10.6	167	24.2
2012	167.3	54.1	217.9	27.4
2013	167.3	61.4	212.3	22.4
2014	140.1	2.5	--	--
Source of data: notifications from the United States and the EU				

c) Insurance. Under the AOA the legal status of agricultural insurance programs depends on whether or not they meet the criteria for exemption under Annex 2. Some Members have claimed that their agricultural insurance programs meet the criteria of Paragraph 7 of Annex 2 of the AOA (government financial participation in income insurance and income safety-net programs) or Paragraph 8 (payments for relief from natural disaster) and have exempted them from AMS.[397] Others have included the

[390] Notification from the People's Republic of China dated 31 March 2006, G/AG/N/CHN/8, at p.13.
[391] Notification from the Kingdom of Saudi Arabia dated 19 April 2011, G/AG/N/SAU/4, at p.20 and p.23.
[392] Notification from Canada dated 25 January 2008, G/AG/N/CAN/71, at p.21.
[393] Notification from the Republic of Korea dated 16 September 2011, G/AG/N/KOR/43, at p.45.
[394] Notification from Brazil dated 23 September 1996, G/AG/N/BRA/6, at p.12.
[395] Notification from Hashemite Kingdom of Jordan dated 17 September 2002, G/AG/N/JOR/1, at p.9.
[396] Notification from Tunisia dated 8 April 2011, G/AG/N/TUN/40, at p.13.
[397] Insurance subsidy is classified by Japan as Green Box measures, namely payments (made directly or by way of government financial participation in crop insurance schemes) for relief from natural disasters, while in the United States and the EU they are normally notified as NPS AMS and quantified for the *de minimis*. Meléndez-Ortiz, Bellmann and Hepburn, *Agricultural Subsidies in the WTO Green Box: Ensuring Coherence with Sustainable Development Goals* (n 156) 184.

support in their AMSs.[398]

Depending on the involvement of public resources, three broad types of government interventions in agricultural insurance have been identified: minimal involvement of public resources in regulation and information only; insurance and re-insurance against catastrophic events; subsidization of premiums through state-owned or private companies (subsidization of premiums). For developed Members, support to agricultural insurance normally takes the form of re-insurance and subsidization of premiums. While for developing Members, all these different types of agricultural insurance schemes have been adopted by different countries in accordance with their levels of economic development.[399]

Agricultural insurance subsidies have become a large part of the NPS AMS of some WTO Members. Data from the notifications of the EU suggests that its insurance subsidy has been raised from about € 400 million in 2009 to nearly € 700 million in 2013, with the share of insurance subsidy in its NPS AMS moving from 60 per cent up to more than 70 per cent. In the case of the United States, it is important to distinguish between its different types of insurance programs and the consequent classifications under the AOA in terms of crop insurance and income insurance and eligibility for exemption or not. Analysis is complicated by changes in how the United States reports some support under crop insurance programs.[400] The change in U.S. reporting practice does not affect the Supplemental Crop Revenue Assurance (SURE),[401] which

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[398] Joseph W Glauber, 'Agricultural Insurance and the World Trade Organization' (2015) <http://www.ifpri.org/publication/agricultural-insurance-and-world-trade-organization> accessed 6 December 2016.

[399] Piero Conforti., Review of Pulic Support to Agricultural Insurance, in Elbehri and Sarris (n 341) 293–304.

[400] For instance, in 2016 the United States revised its reporting of crop insurance premium subsidies for earlier years. In its first notification dated 12 October 2010 (G/AG/N/USA/77), the non-PS AMS in 2008 was $ 5,988.837 million (revised to 5,690.872 for 2008 in notification dated 29 August 2011; G/AG/N/USA/77/Rev.1). In a second revision (notification dated 23 December 2016 (G/AG/N/USA/77/Rev.2), the figure was revised to $ 3,578.888 million. The large drop was explained by crop insurance premium subsidies no longer being as part of the non-PS AMS but reported as part of the PS AMSs of 68 individual products in Supporting Table DS:7).

[401] The SURE payments are made to eligible producers on farms in disaster counties that incurred crop production or crop-quality losses or both during crop year. It provides payments at 60% of difference between disaster assistance program guarantee and total farm revenue, where revenue includes all crops

subsidizes the contracted-for insurance premiums whenever actual yield or revenue falls below the guarantee level. Moreover, certain income stabilizing payment programs were reported as NPS AMS in the Uruguay Round and subsequently exempted as Blue Box support in 1995.[402] The United States then provided a type of income insurance in several years through, e.g., counter-cyclical payments (CCP), which subsidized agricultural producers when prices of program commodity fell below a target price.[403] Insurance subsidies of different kinds reported by the United States as part of NPS AMS have varied dramatically (Table 10). They were as high as $ 2.1 billion in 2008, when SURE and Adjusted Gross Revenue Insurance together accounted for about 60 per cent of the NPS AMS. By 2014 the United States no longer reported SURE as part of the NPS AMS but continued the reporting of $ 10.606 million. The series of income stabilization programs reported as part of NPS AMS in 2014 includes Agriculture Risk Coverage, county-based (ARC-CO), Price Loss Coverage (PLC), and Agriculture Risk Coverage, individual farm (ARC-IC), as adopted in the 2014 Farm Bill.[404] Meanwhile,

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produced on farm plus government payments. Authorized by the 2008 Farm Act (PL 110-246). G/AG/N/USA/77/Rev.2, dated January 12, 2017.

[402] Joseph W Glauber and Patrick Westhoff, 'The 2014 Farm Bill and the WTO' (2015) 97 American Journal of Agricultural Economics 1287, 1289.

[403] "Provides payments when prices of program commodities fall below a target price. Payments are based on historical acres and yields and do not require current production of the historically produced commodity. Authorized by the 2002 Farm Act." G/AG/N/USA/77, dated October 12, 2010.

[404] "The 2014 Farm Act offered operators and owners of farms with historical base acres of covered commodities (wheat, feed grains, soybeans, peanuts, other oilseeds, rice, and pulses) the opportunity to elect one of three new programs, Price Loss Coverage (PLC), County Agriculture Risk Coverage (ARC-CO), or Individual Agriculture Risk Coverage (ARC-IC). ARC-CO and PLC could be elected separately for the base acres for each covered commodity on a farm. No production is required to receive an ARC-CO or PLC payment, if triggered. ARC-CO provides payments when county-level revenue is less than the guarantee, which is 86% of the benchmark revenue for the covered commodity. PLC provides payments when the national price as defined in legislation is less than the statutory reference price for that commodity. In both cases, payments, if triggered, are made on 85% of base acres of the covered commodity. If a producer elected ARC-IC, such election automatically covered all base acres on the farm. ARC-IC provides payments when a farm's total revenue for all covered commodities on the farm is less than that farm's revenue guarantee, which is 86% of the benchmark revenue. The ARC-IC benchmark is the weighted 5-year average of the revenues for all covered commodities planted on the farm. If a payment is triggered, it is made on 65% of the farm's total base acres. Any ARC or PLC payments shall

a report from the United States Government says that the cost of crop insurance averaged $3.4 billion per year from fiscal year 2003 through 2007, and it increased to $8.4 billion per year for fiscal years 2008-2012. Subsidies for crop insurance premiums accounted for $42.1 billion, or about 72 percent, of the $58.7 billion total program costs from 2003 through 2012.[405] While revenue policies accounted for $30.9 billion of the total premium subsidy costs for 2003 through 2012.[406]

Table 10 Insurance Subsidy of the EU and the United States

	EU		United States	
	€ Million	% of NPS AMS	$ Million	% of NPS AMS
2008	526	69.4	3,319.6	92.8
2009	394.2	65.9	953.1	14.3
2010	415.2	59.2	16.9	0.3
2011	419.3	60.7	1,442.4	80.9
2012	500.7	63	0	0
2013	683.8	72.3	0	0
2014	--	--	10.6	0.2
Source of data: author's own calculation based on the notifications from the EU and USA				

Japan operates an agricultural insurance scheme since 1995, under which government subsidies on premiums of agricultural insurance for production loss shall not exceed 30 per cent of the average of production. Japan's outlays for agricultural insurance have been quite stable, around 10 per cent of its NPS AMS. Korea has also offered crop insurance programs, for which the budgetary outlays accounted for nearly 70 per cent of its NPS AMS in 2010. The AgriInsurance program (formerly Production Insurance) is an essential part of Canada's domestic support, with government outlays increasing from nearly Can $ 800 million in 2008 and 2009 to Can$ 1.2 billion in 2013. Insurance subsidy accounted for nearly 60 per cent of Canada's NPS AMS in 2013.

d) Income stabilization. Besides the subsidized insurance against agricultural production or yield loss, some Members have operated domestic support programs

be made on no earlier than October 1, after the end of the applicable marketing year for the covered commodity." G/AG/N/USA/109, dated January19, 2017, p. 29.

[405] Glauber and Westhoff (n 402) 1292.

[406] U.S. GAO, 'Crop Insurance: Considerations in Reducing Federal Premium Subsidies' 8 <https://www.gao.gov/products/GAO-14-700> accessed 6 December 2017.

aimed at reducing the size of income losses of agricultural producers. The examples in this regard are Canada and Japan (Table 11).

Canada's Agricultural Income Stabilization (CAIS) or AgriStability Program was initiated in 2003 under the Canadian Farm Income Protection Act to compensate producers for dramatic income losses (i.e., greater than 30 per cent in comparison to their historic margin),[407] and it combines the earlier income stabilization assistance and disaster assistance into one comprehensive program. Built on the idea that government and producers share in the cost of replacing the lost income,[408] CAIS identified three tiers or levels of protection and producers deposited a certain amount based on their chosen level of protection and governments pay the remainder.[409] In Canada's notifications of NPS AMS, the government outlays for "Stabilization Component of AgriStability" in Supporting Table DS: 9 have increased from Can $ 56 million in 2008 to Can $ 66 million in 2013, and have remained at 3-4 per cent of Canada's NPS AMS over the years.[410]

Japan has adopted a similar program--Farm Income Stabilization Program--since 2007 to subsidize its core farmers for upland crops (wheat, barley, soybeans, sugar beet and starch potatoes).[411] These programs compensate farmers for part of the losses they incur

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[407] Notification from Canada dated 20 October 2006, G/AG/N/CAN/64, p.12.

[408] Agricorp, 'Canadian Agricultural Income Stabilization (CAIS) Program Handbook: A Canada-Ontario Initiative' <http://www.agricorp.com/SiteCollectionDocuments/AgriStability-Handbook-en.pdf> accessed 7 December 2017.

[409] "The CAIS program is a whole-farm program available to eligible farmers regardless of the commodities they produce. A program payment is generated when a producer's current year production margin falls below that producer's reference margin, which is based on an average of the previous five-year's program margins less the highest and lowest. A producer is required to open a CAIS account at a participating financial institution and deposit an amount based on the level of protection they have chosen. For a disaster level of coverage (0-70 percent of their reference margin) the producer must deposit an amount equal to 20 percent of their reference margin, and the other 80 percent is to be put by the Federal and Provincial Governments. For a second tier of protection (71 to 85 percent of the reference margin), the producer must deposit an amount equal to 30 percent (and the Governments 70 percent). Finally, if producers choose for their protection (86 to 100 per cent of their reference margin), they must deposit an amount equal to 50 per cent (and the Governments 50 per cent). Under the program, Governments pay increasing portions of the payment as the seriousness of the income decline increases. But Governments only provide their share of funding when producers withdraw funding from their accounts." European Commission, 'Agricultural Insurance Schemes' 53 <https://ec.europa.eu/agriculture/sites/agriculture/files/external-studies/2006/insurance/full-report-rev_en.pdf> accessed 2 January 2018.

[410] Notification from Canada dated 30 April 2012, G/AG/N/CAN/91, p.14.

[411] Notification from Japan dated 18 August 2011, G/AG/N/JPN/168, pp 4-5.

if current-year market prices are lower than a historical average price.[412] The government payment is not based on current production but on past production. The government outlays have increased from ¥ 121.9 billion ($ 1.2 billion) in 2008 to ¥ 178.7 billion ($ 2.2 billion) in 2012. Income stabilization has accounted for around 90 per cent of Japan's NPS AMS.

Table 11 Income Stabilization Programs in Japan and Canada

	Japan		Canada	
	¥ Billion	% of NPS AMS	Can $ Million	% of NPS AMS
2008	121.9	88.5	55.9	3.3
2009	143.1	89.7	47.5	3.0
2010	50.1	76.3	81.3	3.6
2011	164.0	89.8	89.1	4.1
2012	178.7	90.2	62.3	3.1
2013			65.9	3.3
Source of data: Author's calculation based on the notifications from Japan and Canada				

To conclude, NPS AMS support is a quite small legal category of support under the AOA in terms of both the number of Members who have adopted it and the sum of their budgetary outlays. As mentioned, only 21 Members or less than one sixth of the WTO membership (in terms of number of Schedules) reported NPS AMS in 2008. Most Members reported any domestic support as PS AMSs or as exempt from AMS calculations. The sum of NPS support was $ 22.7 billion in 2008, which was only 5 per cent of the total domestic support of the WTO Members or 1.5 per cent of the total value of agricultural production of these 21 Members in the same year. This left more than $ 120 billion of unused room for NPS AMS support below the sum of these Members' *de minimis* limits or thresholds. By 2010, the sum of NPS AMS increased to $ 27.6 billion, which was about 1.3 per cent of the sum of their total value of agricultural production in the same year. The unused room for NPS AMS was $ 127.2 billion, almost five times larger than the sum of NPS AMS support.

Nevertheless, this particular support classification has played a pivotal role in guiding and disciplining the various ways of WTO Members in using trade-distorting domestic support measures to achieve better policy coherence in a number of key areas:

[412] USDA, 'Japan's Commodities Policy' <https://www.ers.usda.gov/topics/international-markets-trade/countries-regions/japan/policy.aspx> accessed 7 December 2017.

agricultural production factors (fertilizer, pesticide, irrigation water, seed, land, electricity, storage, transportation, agricultural machinery), favorable financial conditions (interest rate concessions, loans, credits), insurance and income stabilization, which are all vital to agricultural production and food security, market price and farmers' income. For this reason, the rules and policy space in NPS AMS are more important for developing Members than rules and policy space in PS AMS.[413] Members have used this tool for different purposes: some Members may report support under only one policy measure as NPS AMS, while other Members report such support under several policy measures. For instance, China's fast-growing agricultural inputs subsidies can be legally accommodated only as NPS AMS (98 per cent of its NPS AMS), while the EU and the United States have also used it to harbor subsidies for insurance and interest concessions (80-95 percent for the EU and 20-99 per cent for the United States). Canada is known for its income stabilization programs, although they make up only 3-4 percent of Canada's NPS AMS: its AgriInsurance program actually accounts for 60 per cent of it. Income stabilization is favored by Japan, as it has remained at 80-90 per cent of Japan's NPS AMS over the years.

4.2.2.2 Product Specific AMSs and the *De Minimis* Level

Besides Non-Product-Specific AMS support, the AOA requires Members to cap their non-exempt domestic support that provided in favour of the producers of each of basic agricultural products. In the same way as for the cap on NPS AMS, the Member's *de minimis* percentage is part of the calculation of the *de minimis* level for each product-specific AMS (PS AMS). This level is calculated for each basic agricultural product and for each year by multiplying the *de minimis* percentage and the product's VoP in the year concerned (the percentage is 5 per cent for developed Members. 8.5 for China and Kazakhstan, and 10 for developing Members). For Members with non-zero BTAMS the *de minimis* level defines the threshold above which the product's AMS must be included in the CTAMS. For Members with a nil, zero or blank for the BTAMS in the Schedule the *de minimis* level defines the limit on the product's AMS.

As the ceiling or the legal limit of a PS AMS is tied to the VAP of the specific product, there is a need to check one by one the budgetary outlays of WTO Members for each

[413] Sharma (n 360) 78.

agricultural product, which is eligible for receiving subsidies, and its corresponding value of production to see whether the PS AMSs of these Members have stayed within their *de minimis* levels. By reference to the WTO Agriculture Information Management System (Ag-IMS), a list of 20 abnormal cases where Members' PS agricultural AMSs in 2008 exceeded the corresponding *de minimis* levels has been diagnosed. For instance, the AMSs of the EU for sugar and tobacco in 2008 accounted for 60 per cent or 75 per cent of the respective values of production. This was 12 or 15 times the EU's 5 per cent *de minimis* percentage. The AMSs of the United States for sugar and cotton were nearly 11 or 6 times their *de minimis* thresholds in 2008.

The 20 identified cases cannot be counted as violations of Members' commitments under the AOA since they all involve Members with non-zero BTAMS, including Brazil, Canada, the EU, Israel, Saudi Arabia and the United States (Table 12). These Members could easily accommodate within their BTAMS the CTAMS resulting from those AMSs that exceeded their *de minimis* thresholds. As negotiated in the Uruguay Round, the AOA offers Members with non-zero BTAMS more maneuvering space in calculating their AMSs: they may choose to control the AMS level for a specific product within its *de minimis* threshold and thus exclude it from the calculation of CTAMS.[414] For instance, the United States reported AMS support to a wide range of 84 agricultural products in 2008, but AMSs for only 14 products were included in its CTAMS. The AMSs for all the other 70 products were excluded as they were below the relevant *de minimis* thresholds. Therefore, Members with a non-zero BTAMS may allow the AMSs for several products to exceed their respective *de minimis* thresholds and be counted in the CTAMS, as long as the CTAMS stays below the BTAMS. This legal entitlement to exceed the *de minimis* thresholds applies to the NPS AMS as well.[415]

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[414] "The Agreement (on Agriculture) provides for the exemptions for the support that is counted in the CTAMS to assess compliance with the BTAMS limit. These exemptions are under PS and non-PS de minimis allowances. A PS AMS is excluded from the calculation of CTAMS if it is below a value corresponding to a specified percentage of the product's nominal value of production. Similarly, the non-PS AMS is excluded if it is less than a specified percentage of total agricultural production value." Orden, Blandford and Josling (n 129) 5–6.

[415] "A *de minimis* allowance can be defined as the amount within which an AMS is excludable from Current Total AMS. That same amount can also be seen as a de minimis threshold, where an AMS switches from being de minimis into having to be included in Current Total AMS. The de minimis threshold is different from a commitment. An AMS can increase from zero without any consequence

As indicated in Table 3 and Table 12, the AMSs of the EU and the United States for sugar were more than 10 times their *de minimis* thresholds. Even when included in the CTAMS, the CTAMS was just 20 or 30 per cent of their respective BTAMS. This left considerable room for larger amounts of AMS support.

For these reasons the *de minimis* thresholds for AMSs, whether for the PS AMSs or the NPS AMS, is essentially meaningless for Members with a large non-zero BTAMS. Although Members with such a BTAMS have a commitment not to exceed it, they enjoy flexibility in terms of being able to exceed their *de minimis* thresholds, in contrast to those Members for whom the *de minimis* levels are limits on individual AMSs. As Andrews rightly observed that the agreed reduction in AMS levels---gives Members flexibility to isolate individual commodities from reductions. The fact that the reductions are for agriculture as a whole is used effectively as a means of transferring support between commodities. If reductions for some items are greater than a Member's average for individual items, AMS for other items can be either maintained or increased. These factors, together with increased used of Blue Box, Green Box, and NPS *de minimis* exemptions, have enabled both the United States and the EU to maintain support prices for some commodities despite their commitments to reduce them. Examples are the United States and the EU sugar, dairy and sheep meat.[416] Every year billions of dollars of non-exempt agricultural AMS support are harbored within the BTAMS of many Members, including the United States and the EU. Moreover, Blandford and Orden observe that the NPS *de minimis* exemption from the U.S. notified total AMS has proved to be extremely important to the United States, otherwise in some years the United States would have exceeded its FBTAMS commitments.[417]

Table 12 Cases Where Members' PS AMSs Exceeded *the De Minimis* Threshold

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until it reaches the threshold level. When it exceeds that level, the consequence is immediate: the whole AMS (not just the part that exceeds the threshold) is included in Current Total AMS. There is no obligation to keep an AMS below the threshold, in contrast to the obligation not to exceed the Total AMS commitment." Lars Brink, 'WTO Constraints on Domestic Support in Agriculture: Past and Future' (2009) 57 Canadian Journal of Agricultural Economics/Revue canadienne d'agroeconomie 1, 6.

[416] Neil Andrews, David Beiley and Ivan Roberts, *Agriculture in the Doha Round | Commonwealth Bookshop* (The Commonwealth Secretariat 2004) 18.

[417] David Orden and David Blandford, 'Shadow WTO Agricultural Domestic Support Notifications' 122–125 <http://www.ifpri.org/publication/united-states> accessed 8 December 2018 Table 4.6.

in 2008

Members	Subsidized Agricultural Products	Value of Granted Subsidies	VoP of the Subsidized Product	Percent
Brazil[418] (US$ millions)	Wheat	195.3	1,473.5	13.3
	Cotton	325.1	2141.9	15.2
Canada[419] (Can$ millions)	Apple	15.8	177.2	8.9
	Beef	563.7	6,528.7	8.6
	Sheep	18.7	126.5	14.8
	Pork	402.5	3,189.9	12.6
	Milk	683.2	5,306.3	12.9
EU[420] (€ million)	Barley	2226.4	9,997.1	22.3
	Common Wheat	2,081.5	21,771.6	9.6
	Maize	596.2	9,637.5	6.2
	Sugar	1,813.1	3,008.9	60.3
	Tobacco	375.6	499.3	75.2
Israel[421] (US$ millions)	Eggs	107.9	199.0	54.2
	Milk	474.8	769.4	61.7
Saudi Arabia[422] (SRl millions)	Livestock	1,832.2	4,360.0	42.0
	Wheat	592.8	1,985.0	29.9
	Poultry	902.4	5,202.0	17.3
United States[423] (US$ millions)	Dairy	3,973.0	35,050.8	11.3
	Sugar	1,146.0	2,104.1	54.5
	Cotton	1,130.0	3,984.2	28.4
Source of data: Members' notifications				

The legal bases of this differentiation of WTO Members are laid down in Article 7.2(b) and Article 6.4(a). The former provides that Members who have no Total AMS commitment in Part IV of their Schedule (i.e., BTAMS) shall not provide non-exempt support to agricultural producers (i.e., AMSs) in excess of the relevant *de minimis* level. The latter says that a PS AMS need not be included into the calculation of the CTAMS if it does not exceed the *de minimis* level of that Member. Therefore, the legal treatment for Members with a non-zero BTAMS commitment and Members without is substantially different under the AOA. This separation of Members into two categories of course needs to be considered in the context of other ways in which the AOA separates Members into categories, such as those that have a *de minimis* percentage of

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418 Notification from Brazil dated 1 March 2012, G/AG/N/BRA/27, at p.20.

419 Notification from Canada dated 20 April 2012, G/AG/N/CAN/90, at pp.7-8.

420 Notification from EU dated 2 April 2012, G/AG/N/EU/7, at pp.9-10.

421 Notification from Israel dated 14 October 2010, G/AG/N/ISR/45, at p.16.

422 Notification from Saudi Arabia dated 19 April 2011, G/AG/N/SAU/4, Annex 3, at p.25.

423 Notification from the United States dated 12 October 2010, G/AG/N/USA/77, at p.10.

5, 8.5 or 10 per cent, and those that allow the exemption of Article 6.2 support from the calculation of AMSs.

As of September 2016, 30 WTO Members had notified the WTO of their PS domestic support in the year of 2008 with a total expenditure of $ 46 billion. Among that, $ 37.6 billion or more than 80 per cent came from the category of CTAMS, and the EU, the United States, Japan and some other developed Members dominated the reported sum of CTAMS amounts. The rest of $ 8.4 billion domestic support took the form of PS *de minimis* AMSs. China, India, and Thailand reported the largest amounts in this category. In 2008, the expenditures of these three Members in product specific *de minimis* AMSs accounted for 55 per cent of the sum of the WTO Members in this regard.

Table 13 WTO Members' PS AMSs in 2008

Unit: $ million

Members	Sum of *de minimis* PS AMSs	CTAMS	Total
China	2,412.2	Not Allowed	2,412.2
India	1,301.3	Not Allowed	1,301.3
Thailand	898.3	5.1	903.4
United States	708.3	6,254.9	6,963.2
Mexico	688.5	191.2	879.7
Pakistan	659.7	Not Allowed	659.7
Korea, Rep.	503.7	30.1	533.8
EU	483.5	17,346.3	17,829.8
Philippines	193.2	Not Allowed	193.2
Japan	148.0	5,034.8	5,182.8
Jordan	90.4	0	90.4
Brazil	90.3	520.4	610.7
Canada	86.4	1,573.7	1,660.1
Tunisia	40.8	0	40.8
Israel	17.4	582.7	600.1
Viet Nam	15.9	0	15.9
Saudi Arabia	12.6	887.3	899.9
Norway	11.0	2,048.8	2,059.8
Chinese Taipei	9.7	127.5	137.2
Peru	5.8	Not Allowed	5.8
Argentina	5.3	74.8	80.1
Moldova	5.1	0	5.1
Barbados	1.4	Not Allowed	1.4
Australia	0.6	0	0.6
Panama	0.4	Not Allowed	0.4
Switzerland	0	2,735.8	2,735.8
Colombia	0	17.8	17.8
Iceland	0	138.9	138.9
Costa Rica	0	62.5	62.5

Ukraine	--	--	--
Total (2008)	8,389.8	37,632.6	46,022.4
Total (2009)	13,122.0		
Total (2010)	15,257.7		
Source of data: author's own calculation based on Members' notifications			

As mentioned, the *de minimis* level is only meaningful and binding for those Members whose BTAMS in their Schedule is zero, nil or blank. Therefore, the limits on AMSs (the limited policy space) was relevant only for a few of the Members who reported any AMSs in 2008. They were the following seven Members (highlighted in Table 13): China, India, Pakistan, Philippines, Peru, Barbados and Panama. Table 14 further explores both the used and the unused room for AMS support of these Members in terms of their PS *de minimis* limits. It finds that generally speaking these seven Members kept their AMSs for certain products well within the *de minimis* limits, but two cases deserve special attention: One is Barbados, whose AMS for sugarcane has been set at its *de minimis* level over the years and thus there will be no more room for it to use.[424] The other one is Pakistan, whose AMS for wheat has remained at 8-9 per cent of its value of production for wheat, leaving only 1 or 2 per cent before reaching its *de minimis* limit. In some years, China and India also provided high level of AMS support for certain products. For instance, China's AMS for cotton in 2009 was 4.6 per cent and India's domestic support for rice in 2010 was 4.1 per cent.

Table 14 PS AMSs and the Unused Room within *De Minimis* Limits

Member	Product	2008		2009		2010	
		% Used	% Unused	% Used	% Unused	% Used	% Unused
China	Rice	1.5	7.0	0.4	8.1	1.7	6.8
	Wheat	--	--	2.0	6.5	2.5	6.0
	Corn	0.8	7.7	2.3	6.2	2.0	6.5
	Soybean	0.7	7.8	1.7	6.8	1.6	6.9
	Cotton	2.5	6.0	4.6	3.9	1.7	6.8
	Rapeseed	0.6	7.9	1.5	7.0	1.4	7.1
	Potato	--	--	0.4	8.1	0.5	8.0
	Pig	0.5	8.0	0.1	8.4	0.0	8.5
India[425]	Rice	1.9	8.1	3.4	6.6	4.1	5.9
	Cotton	4.1	5.9	0.1	9.9	--	--

[424] G/AG/N/BRB/20, G/AG/N/BRB/23.

[425] There is no way to find India's values of production for its subsidized products from India's notification to the WTO. The values used here are from FAOSTAT. http://www.fao.org/faostat/en/#data, last accessed 6 December 2017.

Pakistan	Wheat	9.0	1.0	8.1	1.9	8.0	2.0
Philipphines	Rice	3.7	6.3	2.8	7.2	3.0	7.0
	Corn	0	10.0	0.9	9.1	0.2	9.8
Peru	Cotton	3.8	6.2	--	--	--	--
Barbados	Sugarcane	10	0	10	0	10	0
Panama	Industrial Tomatoes	3.7	6.3	5.2	4.8	--	--
Source of data: Members'notifications							

The AOA (Annex 3) identifies three types of support included in an AMS: market price support, non-exempt direct payments, and any other subsidy not exempted from the commitment. Market price support is calculated for a product by multiplying the difference between the fixed external reference price and the applied administered price of the program by the quantity of production eligible to receive the applied administered price (paragraph 8, Annex 3). Non-exempt direct payments and support under other non-exempt measures are calculated from price gaps, budgetary outlays or forgone revenue to the government (paragraphs 2, 10, 12, and 13, Annex 3). Some Members have provided two or three of these types of AMS support for one product at the same time.

4.2.2.2.1 Market Price Support

Market Price Support (MPS) is an example of a trade-distorting domestic support device that cannot be exempted under the rules of the AOA.[426] Because it is not exemptible and it was prevalent among some of the major agricultural producers at the time of negotiating the AOA, there is guidance on the calculation of MPS in Annex 3 and 4. One of the key elements in defining MPS is the gap between a fixed external reference price and the applied administered price, which multiplied by the quantity of production eligible to receive the applied administered price.[427] Supporting Table DS: 5 in a Member's notification deals specifically with MPS. Besides that, the ruling of the WTO Appellate Body on the US-Upland Cotton dispute, particularly the two elements in defining "support to a specific commodity", is extremely useful. Governmental intervention[428] of a Member in the workings of the market by setting a

[426] McMahon and Desta (n 159) 8.

[427] Paragraph 8 of Annex 3 of the URAA, World Trade Organization, *The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations* (n 7) 53.

[428] "Price support, referred to **as intervention**, was based on institutional prices set for agricultural products which guaranteed a fixed price to farmers for products." European Commission on Agriculture

minimum or guaranteed price for a product is usually a key element in defining "MPS". The legal interpretation of what constitutes MPS has not been further elaborated in any WTO dispute. However, the dispute launched by the United States against China regarding domestic support has the potential to lead at least to a Panel report on how some of the rules of Annex 3 of the AOA should be interpreted in that particular situation.[429]

Since it was introduced into the AOA, the concept of "MPS" has encountered numerous criticisms due to a number of deficiencies surrounding both its legal definition[430] and its calculation. This can be attributed to four aspects: the arbitrary fixity of external reference prices at the 1986-88 levels; the use of the administered price instead of the prevailing domestic market price to calculate the level of support per unit of output;[431] the ambiguity about the eligible quantity of output from which the MPS is computed and, the calculation of MPS only in cases of an announced applied administered price under weak rules about what constitutes such a policy instrument.[432]

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and Rural Development, 'The Future of CAP Market Measures' 3 <https://ec.europa.eu/agriculture/sites/agriculture/files/policy-perspectives/policy-briefs/03_en.pdf> accessed 6 December 2017.

[429] 'WTO | Dispute Settlement - the Disputes - DS511' <https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds511_e.htm> accessed 6 December 2017.

[430] "The MPS in the WTO notifications often does not accurately reflect the effects of government policies on the price signals that determine market outcomes. This creates a significant problem with respect to the economic interpretation of WTO notifications of MPS and, hence, the PS AMS and the CTAMS……the MPS component of the AMS calculated according to the Agreement does not provide a time series of the actual price support provided to farmers. The market price support component of the PSE as calculated by the OECD is a better indicator of this support than the WTO's MPS, but it is available for fewer countries and is not the measurement to which the WTO commitments apply." Orden, Blandford and Josling (n 129) 15–16.

[431] "Important consideration when using administered support price as a critical determinant of price support levels is that administered prices are used for a variety of purposes. Some are used as targets for market management, where the aim is to manage the market prices around the administratively set targets. Some administered prices are used as floor prices to provide a safety net level below which internal prices will not be allowed to fall. Such a floor price has been long incorporated into the US farm bills for milk. For more than a decade, the floor price has been far below the actually supported internal market prices. The administered price is virtually meaningless as a basis for measuring the actual price support element of distorting US support for milk—but it is still used in determining the price support component for milk as part of US AMS." Andrews, Beiley and Roberts (n 416) 17.

[432] Orden, Blandford and Josling (n 129) 15.

In practice, each Member has its own discretion to decide which specific agricultural products are eligible for MPS. Therefore, the product coverage of MPS programs varies among Members or even from one year to the other due to the market price changes of eligible products in one Member. However, there is a trend in national agricultural policies toward removing market price support, so that PS AMS is relevant for fewer commodities that are strategically important in both the political and the economic sense.[433]

As of September 2016, 18 Members had reported MPS support in the year of 2008, amounting to $ 29.7 billion. This was 64 per cent of the sum of WTO Members' PS AMSs in that year. As illustrated earlier, essential differences exist in the nature of the calculated support under MPS programs between Members with a non-zero BTAMS and Members without. The MPS support of the former mainly went into CTAMS, as was the case for some for some developed Members. For instance, the MPS support of the EU in 2008 was more than € 10 billion, while the AMSs falling within the *de minimis* thresholds summed to only 16 million. All the other PS AMS were included in the CTAMS. The MPS support of Members with zero, nil or blank BTAMS (mostly developing Members) generally qualified for the *de minimis* exemption. For example, the MPS of India for rice climbed up to $ 2.3 billion in 2010-11, or about 3.3 per cent of its rice gross value of production.[434]

The EU alone, at more than € 10 billion ($ 15.2 billion), accounted for 50 per cent of all MPS support in 2008. The United States,[435] Japan and Switzerland together accounted for another 35 per cent with a total amount of MPS of $ 10 billion. Adding Canada and Iceland brought the share of developed Members to around 90 per cent. India and Pakistan reported the largest MPS amounts in the developing world at 1.3 billion for India and $ 0.7 billion for Pakistan, summing to $ 2 billion, or 7 per cent of the total. China did not report any MPS in 2008. With the EU ending its MPS for sugar

[433] Sharma (n 360) 76.

[434] India's rice value of production for 2010-11 is not available in its relevant notification to the WTO (G/AG/N/IND/10). The data comes from FAOSTAT. http://www.fao.org/faostat/en/#data/QV, last accessed 6 December 2017.

[435] The MPS of the United States has remained around $ 4 billion in 2008-2012 (Table 13), but it has been going down if compared to the level in 1995-2005, amounting to nearly $ 6 billion in most years at that time. Orden and Blandford (n 417) 13 Table 4.

and barley, its MPS support dropped to € 5.6 billion ($ 7.4 billion) in 2010. Meanwhile, the sum of MPS support of these 18 Members shrank to $ 23 billion, and the share of the developed Members was about 80 per cent (32 per cent for the EU, 20 per cent for Japan, 18 per cent for the United States and 10 per cent for Switzerland). In contrast, India witnessed a sharp increase with its MPS amounting to $ 2.3 billion or a share of 10 per cent in 2010, while China's MPS grew to $ 0.2 billion.

Table 15 WTO Members' MPS Support in 2008 and 2010

Members	Currency of notification	2008	2010	2008 US$ Million	2010 US$ Million
EU	€ Million	10,322.3	5,592.2	15,179.9	7,358.2
United States	US$ Million	4,059.6	4,102.9	4,059.6	4,102.9
Japan	¥ billion	390.8	394.0	3,781.0	4,488.5
Switzerland	CHF Million	2,884.7	2,369.5	2,671.0	2,278.4
India	US$ million	1,301.3	2,282.2	1,301.3	2,282.2
Pakistan	US$ million	659.7	609.1	659.7	609.1
Canada	Can $ million	681.2	461.0	636.6	447.6
Israel	US$ Million	578.0	515.6	578.0	515.6
Philippines	₱ Million	8,564.6	7,177	193.2	159.1
Saudi Arabia	SR Million	592.8	437.0	158.1	116.5
Chinese Taipei	NT$ Million	3,088.9	2,961.2	98.1	93.9
Iceland	ISK million	5,915.1	6,777.8	67.3	55.4
Costa Rica	US$ Million	62.5	109.7	62.5	109.7
Tunisia	DT Million	50.2	61.4	40.8	42.9
Korea, Rep	₩ Billion	41.0	13.7	37.2	11.9
Argentina	1992 pesos Million	74.8	74	74.8	74
Brazil	US$ Million	22.5	107.6	22.5	107.6
China	¥ Million	0	1433	0	211.7
Total				29,703.5	23,065.1
Source of data: author's own calculation based on Members' notifications and exchange rates from the IFS database of the IMF, see Table 3 in this Chapter.					

If broken down by specific products, nearly all of the MPS has gone to the following seven products (2010 MPS in brackets): meat (bovine and swine, $ 5.8 billion), butter ($ 4.8 billion), wheat ($ 3.6 billion), rice ($ 2.7 billion), milk ($ 2.6 billion), cheese ($ 1.7 billion) and sugar ($ 1.3 billion). All domestic support for these specific products has been dominated by one or two Members, even though some other Members have adopted similar policy instruments. For instance, a number of Members have provided support for wheat, but they do not match the MPS level of the EU, whose MPS accounted for 70 per cent of the total in 2010.

Table 16 Specific Products That Have Received MPS

Unit: US $ Million

		2008	2010
	Sub-total	5,299.8	5,765.5
Meat (Swine+Bovine)	Japan	3,781.0	4,488.5
	Switzerland	1,518.8	1,277.0
Butter	Sub-total	5,267.5	4,781.1
	EU	4,118.7	3,591.3
	United States	754.1	826.6
	Canada	394.7	363.2
Wheat	Sub-total	4,037.3	3,591.4
	EU	3,061.0	2,481.6
	Pakistan	659.7	609.1
	China	0.0	211.7
	Saudi Arabia	158.1	116.5
	Switzerland	126.7	102.8
	Brazil	29.5	68.7
	Tunisia	2.3	1.0
Rice	Sub-total	1,401.7	2,658.9
	India	1,058.1	2,282.2
	Philipphines	193.2	156.2
	Costa Rica	62.5	109.7
	Chinese Taipei	87.9	83.6
	Brazil	0.0	27.2
Milk	Sub-total	2,696.7	2,637.6
	EU	1,244.3	1,285.3
	Switzerland	552.0	531.6
	Israel	470.0	433.8
	United States	325.0	289.7
	Iceland	67.3	55.4
	Tunisia	38.1	41.8
Cheese	Sub-total	1,846.4	1,729.0
	United States	1846.4	1729.0
Sugar	Sub-total	3,707.6	1,260.8
	EU	2569.4	0.0
	United States	1134.2	1257.6
	Chinese Taipei	4.0	3.2
Barley	Sub-total	3,304.2	11.9
	EU	3274.1	0.0
	Korea, Rep	30.1	11.9

Source of data: author’s own calculation based on Members’ notifications and exchange rates from the IFS database of the IMF, see Table 3 in this Chapter.

The EU

The EU made the provision of MPS the historical backbone of its Common Agricultural Policy (CAP) at its inception, aiming at market stability and a reasonable income to farmers. The EU has gradually moved away from MPS to direct payments or compensation payments[436] through successive reforms over the past two decades. This has also shifted the role of market intervention instruments in the EU from essentially determining the market price for its major crops received by producers to providing a market safety net.[437] The CAP is still undergoing debate at various levels for possible changes in its market price intervention mechanisms.

The current legal basis of the EU's MPS mechanism is laid down in Regulation (EU) No 1308/2013 of the European Parliament and of the Council of 17 December 2013 Establishing a Common Organization of the Markets in Agricultural Products, which basically comprises two parts: public intervention or the payment of aid for private storage.[438] For public intervention or intervention purchasing, the European Commission, or Commission, has set out relevant parameters for intervening on agricultural markets and providing sector-specific support through the so-called Common Market Organization (CMO). But there is no single model of public intervention for all the eligible products[439] and intervention prices are derived in different ways from reference prices that are fixed for products subject to intervention measures in the single CMO regulation. The EU has maintained MPS for three agricultural products: common wheat, skimmed milk powder and butter (Table 15), and

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[436] "Direct aids......payments were initially introduced as 'compensation payments' to farms as the EU has lowered import tariffs and price support, and have been reformed since - in the process of which the word 'compensation' was dropped". Johan Swinnen, 'Compensation Payments in EU Agriculture' (LICOS Centre for Institutions and Economic Performance & Department of Economics University of Leuven (KUL) & Centre for European Policy Studies Brussels, September 2009) 2 <https://lirias.kuleuven.be/bitstream/123456789/285432/2/Swinnen2.pdf> accessed 6 December 2017.

[437] Alan Matthews, 'Intervention Arrangements in the New CAP | CAP Reform' <http://capreform.eu/intervention-arrangements-in-the-new-cap/> accessed 6 December 2017.

[438] European Commission, 'Official Journal of the EU' (2013) 692 <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:347:0671:0854:EN:PDF> accessed 6 December 2017 Article 10.

[439] "In order to stabilize the markets and to ensure a fair standard of living for the agricultural community, a differentiated system of market support for the different sectors has been developed and direct support schemes have been introduced, taking into account the different needs in each of these sectors on the one hand and the interdependence between different sectors on the other. Those measures take the form of public intervention or the payment of aid for private storage. There continues to be a need to maintain market support measures whilst streamlining and simplifying them." European Commission (n 438) 672.

their latest reference thresholds have been fixed at € 101.31/tonne for common wheat, € 169.80/100 kg for skimmed milk powder and € 246.39/100 kg for butter.[440] In addition to purchases into public intervention, the Commission can also open private storage aids (PSA) for certain agricultural products. Under the PSA schemes, the products remain in private ownership and the owner receives aid to cover the cost of storage for periods specified in the contracts before they can be released onto the market.[441] Over the years, the EU has worked to diminish reliance on intervention arrangements in a number of ways, including reducing the reference prices, increasing the volume limits and extending the public intervention period. The total annual MPS has been stabilized about € 6 billion since 2010.

Table 17 The MPS of the EU in 2008-2013

Unit: € million

	2008	2009	2010	2011	2012	2013
Common wheat	2,081.5	1917.5	1886.0	1929.7	1864.6	2016.4
Durum wheat	0.0	0.0	0.0	0.0	0.0	0.0
Barley	2,226.4	2109.7	0.0	0.0	0.0	0.0
Maize	596.2	0	0.0	0.0	0.0	0.0
Sorghum	8.1	9.5	0.0	0.0	0.0	0.0
Rice	16.1	0	0.0	0.0	0.0	0.0
Sugar	1,747.2	1722.2	--	--	--	--
Skimmed milk powder	846.1	953.5	976.8	1110.6	1145	1134.9
Butter	2,800.7	2723	2729.4	2799.4	2743.4	2709
Beef	0.0	0.0	0.0	0.0	0.0	0.0
Total	10,322.3	9,435.4	5,592.2	5,839.7	5,753.0	5,860.3

Source of data: Notifications from the EU.

The United States

The market price intervention mechanisms of the United States are even more complicated as they have evolved over many years and have varied substantially from one agricultural product to the other. According to the WTO notifications, the United States has maintained MPS for dairy products (butter, non-fat dry milk and cheddar cheese) and sugar. Dairy products have long been subject to price support in the United

[440] European Commission (n 438) 692 Article 7.

[441] Matthews, 'Intervention Arrangements in the New CAP | CAP Reform' (n 437).

States since the Milk Price Support Program (MPSP) was created by the 1949 Farm Bill. This legislation was designed to set a price floor for all milk and dairy products. Should the market price for milk fall below the farm-level support price, MPSP directed the Department of Agriculture (USDA) to purchase from vendors butter, cheese, and nonfat dry milk at levels that would raise the milk market price to a level no less than the support price.[442] MPSP was reauthorized by the 2008 Farm Bill as the Dairy Product Price Support Program (DPPSP), which has represented the single largest domestic support outlay of any single program commodity in the United States, accounting for $ 5.5 billion annually in 1995-2011 or 39 per cent of all Amber Box support notifications of the United States to the WTO.[443] The 2008 Farm Bill fundamentally changed the milk support purchase program by specifying support prices of purchased manufactured products instead of the price of milk. The program indirectly supports the farm milk price by standing ready to purchase bulk quantities of butter, cheddar cheese and nonfat dry milk at specified purchase prices (administered prices) through the Commodity Credit Corporation (CCC).[444] The DPPSP was repealed by the 2014 Farm Bill and two new programs have been established: Margin Protection Program for Dairy (MPP-Dairy) and Dairy Product Donation Program (DPDP). The two new programs are not based on the price gap between the administered price and the external reference price as required by the WTO MPS, but on the difference between an average national milk price and a representative cost of dairy feed. What the new programs intend to protect is producer margins rather than support prices. Participating dairy producers will pay premiums for the margin insurance, thereby cost-sharing with the federal government. Due to these features of the new programs, it would be quite challenging from a legal point of view to count the MPP-Dairy as a typical MPS

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[442] Kim Dillivan, 'Dairy Policy Changes in the 2014 Farm Bill' (*AgWeb - The Home Page of Agriculture*) <https://www.agweb.com/article/dairy_policy_changes_in_the_2014_farm_bill_NAA_University_News_Release/> accessed 6 December 2017.

[443] Carla Edie, *U.S. Dairy Support Programs: Farm Bill Provisions and Gross Margin-Dairy Insurance* (Novinka Science Publishers 2014) 27.

[444] The specified purchase prices for the dairy products are: $1.05 per pound for butter, $1.13 per pound for cheese in blocks, $1.10 per pound for cheese in barrels, and $0.80 per pound for nonfat dry milk. USDA, 'Dairy Policy' <https://www.ers.usda.gov/topics/animal-products/dairy/policy.aspx> accessed 6 December 2017.

measure.[445]

The United States operates a completely different MPS program for sugar, the Sugar Loan program or the Sugar Program.[446] The framework for the U.S. sugar program has its roots in the 1990 Farm Bill,[447] and a few minor adjustments of the loan rates have been made in subsequent agricultural legislations, including the 1996, 2008 and 2014 Farm Bills. The 2014 Farm Bill reauthorized the Sugar Program without changes. The operation of the Sugar Program is quite similar to the Marketing Assistance Loans (MAL) Program, which covers most of the important crops, such as wheat, corn, soybeans, and cotton. The MAL intends to provide interim financing at harvest time

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[445] The MPP is a voluntary program that makes a payment to participating farmers when a formula based national margin—referred to as the Actual Dairy Production Margin (ADPM) and calculated as the national average farm price for all milk minus a national-average feed cost ration—falls below a producer-selected insured margin that can range from $4.00 per hundredweight (cwt.) to $8.00/cwt. in $0.50/cwt. increments. Producers must pay an annual administrative fee of $100 for each participating dairy operation. In addition, producers must pay a premium that rises steadily for higher margin protection levels starting at the $4.50/cwt. margin level. The minimum $4.00/cwt. margin is fully subsidized and has no farmer-paid premium. The premium structure is further divided based on the size of operations—lower premiums are charged for the first 4 million pounds (lbs.) of annual milk marketings, higher premiums are charged on marketings above 4 million lbs. As an added incentive to encourage participation by smaller dairy operations (with annual milk marketings under 4 million lbs.), premiums will be reduced by 25% across the board for all coverage levels except the $8.00/cwt. Level during calendar 2014 and 2015. The DPDP requires USDA to procure and distribute certain dairy products when the ADPM falls below $4.00/cwt. for each of the immediate proceeding two months. DPDP dairy product distribution is required to target individuals from low-income groups and not be allowed for resale into commercial markets. Purchases and distribution under the DPDP end after three months or if the certain other triggers related to the ADPM and U.S. to international dairy price are met. Edie (n 443) 2.

[446] USDA, 'Sugar Loan Program USA' (2014) <https://www.fsa.usda.gov/Internet/FSA_File/sugar_loan_2014.pdf> accessed 2 January 2018.

[447] "The farm bill is the primary vehicle for setting U.S. sugar policy and that policy is currently based on three main pillars: price support through preferential loan agreements, domestic market controls and tariff-rate quotas. For price support, the U.S. Department of Agriculture (USDA) provides loans to sugarcane and sugar beet producers and processors that guarantee a minimum price regardless of the true market conditions. At the end of the loan term (generally 9 months), sugar producers and processors make one of two choices: turn over to the government the sugar they produced as payment for the loan, or sell their sugar on the market if the going price is higher than the USDA loan amount." Sugarcane.org, 'U.S. Sugar Policy' (*SugarCane. org*) <http://sugarcane.org/global-policies/policies-in-the-united-states/sugar-in-the-united-states> accessed 6 December 2017.

when the market prices are typically low, allowing the producers to delay the sale of commodity until more favorable market conditions emerge, and then the loan may be redeemed by repaying the capital plus interest. Marketing assistance loans are available through the Commodity Credit Corporation (CCC) for eligible producers. When market prices are below the loan rate, the ownership of the crop can be transferred to the CCC or the loan can be repaid based on local market prices, with interest waived. When the loan rates are below market prices, loan deficiency payments provide an alternate benefit for producers who forgo taking loans. These producers receive payments equivalent to the value gained by producers allowed to repay loans at local market prices.[448] Currently, the loan rate is US$ 18.75 cents per pound for raw cane sugar and US$ 24.09 cents per pound for refined beet sugar. The U.S. MPS for sugar uses the loan rates for raw cane sugar or refined beet sugar as the applied administered price. The terminology involved could make it questionable whether the American Sugar Loan Program is a MPS measure. Anyway, the reported MPS of the United States for MPS programs have remained quite stable, around $ 4 billion since 2008 up through 2012 (Table 18).

Table 18 The MPS of the United States in 2008-2012

Unit: $ Million

	2008	2009	2010	2011	2012
Butter	754.1	721.0	826.6	838.0	874.0
Non-fat dry milk	325.0	299.5	289.7	289.7	341.2
Cheddar cheese	1,846.4	1,806.4	1,729.0	1,707.2	1,707.5
Sugar	1,134.2	1,240.9	1,257.6	1,405.6	1,405.8
Total	4,059.6	4,067.8	4,102.9	4,240.5	4,328.5
Source of data: notifications from the United States					

Japan

Japan has maintained MPS for pork and beef, but its MPS policies have also undergone reforms and changes over the years.[449] MPS is undertaken through the deficiency

[448] USDA, 'Nonrecourse Marketing Assistance Loans and Loan Deficiency Payments' <https://www.fsa.usda.gov/Assets/USDA-FSA-Public/usdafiles/FactSheets/2016/mal_ldp_2016.pdf> accessed 2 January 2018.

[449] Yoshihisa Godo and Daisuke Takahashi, 'Evaluation of Japanese Agricultural Policy Reforms under the WTO Agreement on Agriculture' (International Association of Agricultural Economists (IAAE)

payments program in Japan, which pays farmers all or part of the difference between a fixed target price and the actual market price in the current year.[450] For pork, Japan takes the standard stabilization price (400 yen/kg in Japanese fiscal year 2012) as the applied administered price, and sluicegate price in the EU in 1986-88 (152 yen/kg)[451] as the fixed the external reference price. This price difference is multiplied total Japanese pork production to arrive at a measurement of MPS.[452] The MPS for has been maintained around ¥300 billion since 2008. For beef, the Japanese Government has various price support measures for feeder calves and beef cattle fattening operations. But as far as the WTO MPS is concerned, Japan reports only its Beef Price Stabilization Program, which is authorized by the Law Concerning the Stabilization of Livestock Prices. The Ministry of Agriculture, Forestry and Fisheries (MAFF) determines a price band for domestic beef according to its grading and charges the Agriculture and Livestock Industries Corporation (ALIC) with taking market actions when beef prices fall below or rise above this band. When beef prices are below the lower bound (the applied administered price), ALIC can purchase beef and put it into stocks or ask the industry to stockpile beef with storage borne by ALIC. When beef prices are above the upper bound, ALIC can release stocks or purchase beef in foreign markets.[453] According to the notifications of Japan, the lower bound of the beef price band or the applied administered price has been set at 815 yen/kilo, while the external reference price has adopted the CIF price of Australian beef and has remained 626 yen/kilo. The MPS for beef in Japan has remained quite stable since 2008, around ¥ 90 billion.

Table 19 The MPS of Japan in 2008-2012

Unit: ¥ billion

	2008	2009	2010	2011	2012

Triennial Conference, Foz do Iguaçu, Brazil, 18 August 2012) 20 <https://ageconsearch.umn.edu/bitstream/125102/2/20120609GodoIAAE_AESPoster.pdf>.

450 USDA, 'Japan's Commodities Policy' (n 412).

451 Notification of Japan dated 31 March 2014, G/AG/N/JPN/191, at p.31.

452 Kakuyu Obara, John Dyck and Jim Stout, 'Pork Policies in Japan' <https://www.ers.usda.gov/mediaImport/1136581/ldpm10501.pdf> accessed 7 December 2017.

453 Kakuyu Obara, Michael McConnell and John Dyck, 'Japan's Beef Market' <http://usda.mannlib.cornell.edu/usda/ers/LDP-M/2010s/2010/LDP-M-08-30-2010_Special_Report.pdf> accessed 7 December 2017.

beef and veal	93.2	93	92.1	91	92.5
meat of swine	297.6	311.3	301.9	301.6	305.9
Total	390.8	404.3	394	392.6	398.4
Source of data: notifications from Japan					

India

India's central government has determined Minimum Support Price (MSP) for many crops for many years. MSP allows market intervention by the Indian government to insure its agricultural producers against any sharp fall in farm prices. Normally, the Indian government announces the minimum support prices at the beginning of the sowing season for certain crops, which constitute a guarantee price for their produce from the government. In case the market price for the commodity falls below the announced minimum price, government agencies can purchase the entire quantity offered by the farmers at the announced minimum price.[454] In 2008, India calculated $ 1.3 billion MPS to two major crops, rice and cotton, and the amount rose to $ 2.3 billion in 2010.

Table 20 MPS of India 2008-2010

Unit: US$ Million

Products	2008	2009	2010
rice	1,058.1	1,723.5	2,282.2
Cotton	243.1	7.0	0.0
Total	1,301.3	1,730.5	2,282.2
Source of data: notifications from India			

China

China initiated the minimum price support for rice and wheat in 2006, and then started the so-called "temporary reserve" price support program for corn, rapeseed and soybeans in 2008. Though the MPS was reported at only $ 0.2 billion in 2010, it was estimated that China would be likely to break its *de minimis* limits for a number of products. For instance, the MPS for rapeseed and soybeans already exceeded the relevant *de minimis* limit and the room for MPS for other products, such as corn, wheat

[454] Vikaspedia, 'Minimum Support Price' <http://vikaspedia.in/agriculture/market-information/minimum-support-price> accessed 7 December 2017.

and rice was also quite limited.[455] In this context, the Chinese government announced in March 2016 that the "temporary reserve policy" would be replaced by a new mechanism of "marketized purchases", which means that the Chinese government has abandoned price support policies for all commodities except wheat and rice.[456]

4.2.2.2.2 Non-exempt Direct Payments

Paragraph 10 of Annex 3 of the AOA provides that non-exempt direct payments which are dependent on a price gap shall be calculated either using the gap between the fixed reference price and the applied administered price multiplied by the quantity of production eligible to receive the administered price, or using budgetary outlays, if the direct payments are not dependent on a price gap. As for other non-exempt measures, such as input subsidies and market-cost reduction measures, these are to be valued on the basis on budgetary outlays. Where budgetary outlays do not reflect the full extent of the subsidy, provision is made for calculating the difference between the price of the product benefiting the measure and a representative market price for a similar product, which is then multiplied by the quantity of the product benefiting from the measure.[457] The AOA indirectly recognizes two forms of non-exempt direct payments: those that are price-related and those based on other factors. This is indicated in the Supporting Table DS: 6 of WTO Members' notifications.

As of September 2016, 21 Members notified the WTO of their non-exempt direct payments with a total of $ 6.8 billion for their budgetary outlays in 2008. Only Canada and Japan identified their assurance-stabilization or deficiency payment program, respectively, as price-related non-exempt direct payment. As some major players were undertaking agricultural policy reforms and a few countries joined the WTO later, the total support of WTO Members in non-exempt direct payments have been maintained in the range of $ 6-8 billion. The United States, the EU, Japan and the Russian Federation are the major users of this classification of support measures (Table 21).

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[455] Guoqiang Cheng, *Mechanism and Policy Options for Stabilizing Chinese Grain Market* (Beijing: China Development Press 2012) 139–144.

[456] A Anderson-Sprecher and J Ji, 'China's Decision to End Corn Floor Price Shakes Grain and Feed Market' [2016] Washington, DC: US Department of Agriculture, Foreign Agricultural Service, GAIN Report CH16027.

[457] McMahon and Desta (n 159) 9.

Table 21 WTO Members' Reported Non-exempt Direct Payments

Unit: US$ Million

Members	2008	2009	2010	2011	2012	2013
United States	2,084.8	1,221.3	183.6	789.0	3,016.0	2,292.3
EU	2,081.6	2,710.7	1,864.2	1,738.9	1,264.2	1,170.0
Japan	1,401.9	1,861.7	2,379.8	2,285.4	2,913.9	n.a
Canada	655.2	701.0	387.1	365.3	354.6	243.9
Korea, Rep	271.8	36.6	524.0	n.a	n.a	n.a
Iceland	70.2	52.1	54.3	62.8	61.2	n.a
Norway	53.2	45.1	49.9	49.7	64.2	60.5
Chinese Taipei	37.6	38.1	38.1	n.a	n.a	n.a
Brazil	33.3	331.1	70.0	42.3	304.8	263.0
Israel	22.1	16.6	24.7	25.4	31.7	26.1
Colombia	17.8	25.3	25.6	5.4	31.7	20.2
Mexico	14.3	34.0	0.0	0.8	0.6	n.a
Saudi Arabia	12.6	12.4	12.4	12.6	n.a	n.a
Peru	5.8	0.0	0.0	5.9	6.9	5.3
Barbados	1.4	1.4	1.2	1.3	1.0	n.a
Australia	0.6	0.2	0.0	13.4	0.7	0.5
Panama	0.4	0.7	0.0	0.2	0.1	0.0
Ukraine	0.0	88.7	41.7	44.7	24.9	n.a
Vietnam	0.0	0.0	0.0	0.0	98.4	97.4
Albania	0.0	10.1	8.0	0.0	0.0	6.6
Russia	n.a	n.a	n.a	1,183.7	1,183.7	1,437.7
Total	6,764.8	7,187.2	5,664.8	6,626.8	8,175.0	5,623.5

Source of data: author's own calculation based on Members' notifications and exchange rates from the IFS database of the IMF, see Table 3 in this Chapter.

Like the MPS, the non-exempt direct payments are an integral part of some developed Members' farm safety net programs, which are designed mainly to accommodate their desire to support farmers' income through various risk management or market loss payment programs.

The United States

The non-exempt direct payment mechanism of the United States is structured on the basis of its domestic support for three major groups of commodities:

--- **The Direct and Counter-cyclical Payment (DCP) Program** dated back to the 2002 Farm Bill and were the primary policy instruments for the United States to provide income support to its producers of major crops: corn, wheat, feed grains, upland cotton,

soybean and rice. Direct Payments were unrelated to or decoupled from the current production or current market prices as they were based on a fixed rate established by the Farm Bill, and it were also tied to acreage bases and yields. The Direct Payments Program guaranteed a payment with an annual limit of $40,000 per person.[458] The United States notifications classified the Direct Payments as exempt payments under paragraph 6 of Annex 2 (decoupled income support; see below). The Counter-cyclical Payments (CCP) compensated for the difference between a crop's target price and a lower effective market price. The target price was a statutory benchmark defined in the Farm Bill. The effective price was the direct payment rate plus the higher of the national season-average market price or the national loan rate. When effective market prices exceeded the target price, no payment was made. As with direct payments, counter-cyclical payments were tied to a farm's base acres and "counter-cyclical payment yield" and did not depend on current production. Thus, even though the counter-cyclical program payment rate formula depended on market prices, it did not require the farmer to produce any of the commodity. The CCP applied an annual limit of $65,000 per person. The 2008 Farm Bill introduced the Average Crop Revenue Election (ACRE) Program as an alternative to the CCP to provide eligible producers a state-level revenue guarantee, based on the 5-year Olympic average yield and the 2-year national average price.[459] Besides the DCP and ACRE, the United States also has various marketing loan programs[460] to provide interim financing and additional income support for major crops

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[458] USDA, 'Direct and Counter –Cyclical Program (DCP)' <https://www.fsa.usda.gov/Internet/FSA_File/26037201201.pdf> accessed 7 December 2017.

[459] "Producers who elect the ACRE program for a farm agree to: forgo counter-cyclical payments; accept a 20% reduction in the guaranteed direct payment; accept a 30% reduction in loan rates for all commodities produced on the farm; ACRE payments are revenue based and are tied to crop production and the National Average Market price for planted covered commodity crops on the farm." USDA, 'Fact Sheet: Direct and Counter-Cyclical Program' <https://www.fsa.usda.gov/Internet/FSA_File/dcp_fact_sheet.pdf> accessed 7 December 2017.

[460] "The marketing loan program has four mechanisms to provide benefits when market prices are below loan rates: 1) loan deficiency payment (LDP)--direct payment of loan benefits, instead of taking out a loan and repaying the loan; 2) marketing loan gain (MLG)--repaying a loan at a lower price than the original loan, and keeping the difference as a loan benefit; 3) certificate gain — similar to a MLG but without payment limits; repay a loan with commodity certificates instead of cash; 4) forfeiting the collateral (commodity) and keeping the principal (cash from the loan)." Jim Monke, 'Farm Commodity Programs: Direct Payments, Counter-Cyclical Payments, and Marketing Loans' 10

if market prices fall below statutorily-determined loan prices. The Loan Deficiency Payments (LDPs) has been the most used of these programs. In nature, LDPs are direct payments made in lieu of a marketing assistance loan when the CCC determined value, which is based on the current local price in a county, is below the applicable county loan rate. The payment is the difference between the two rates times the eligible quantity.[461] Both the DCP and the ACRE were repealed by the 2014 Farm Bill, but the LDPs were re-authorized. Meanwhile, two new programs have been created: （1） Price Loss Coverage (PLC), which is a counter-cyclical price program and makes a payment when the farm price for a covered crop declines below its “reference price” set in the Farm Bill; (2) Agriculture Risk Coverage (ARC) which is a revenue-based program designed to cover a portion of a farmer’s out-of-pocket loss (referred to as “shallow loss”) when crop revenues decline. In both cases, payments are made based on historical acreage and are independent of current production. The payment rate is the difference between the reference price and the annual national-average market price (or marketing assistance loan rate, if higher). For each covered commodity enrolled on the farm, the payment amount is the payment rate, times 85 percent of base acres of the commodity, times payment yield.[462] Due to the radical changes in the policy concerning non-exempt direct payments, the budgetary outlays for ACRE and LDPs have been quite turbulent, dropping from $ 950 million in 2008 to $ 3 million in 2012. The budgetary outlays for the PLC and the ARC were notified as $165.8 million in the first year, plus $ 371.7 million for LDPs. The non-exempt direct payments for major crops thus bounced back to about $ 540 million in 2014.

---the Milk Income Loss Contract (MILC) Program for dairy. The MILC was created by the 2002 Farm Bill to compensate dairy producers when domestic milk prices (the Boston Class I milk) fell below a specified level ($16.94 per hundredweight, cwt). The MILC budgetary outlays in 2008 made up one third of the total budgetary outlays of

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<http://nationalaglawcenter.org/wp-content/uploads/assets/crs/RL33271.pdf> accessed 7 December 2017.

[461] USDA, ‘Loan Deficiency Payments’ <https://www.fsa.usda.gov/programs-and-services/price-support/loan-deficiency/index> accessed 7 December 2017.

[462] USDA, ‘Crop Commodity Program Provisions-Title I’ <https://www.ers.usda.gov/topics/farm-economy/farm-commodity-policy/crop-commodity-program-provisions-title-i/> accessed 7 December 2017.

the United States for non-exempt direct payments. As Table 20 indicates, MILC, along with Dairy Disaster Payments (DELAP) used to be the biggest direct payment program, accounting for more than 50 per cent of the total budgetary outlays on non-exempt direct payments of the United States in 2008, and it had been reduced over the years before it was eventually repealed by the 2014 Farm Bill.

---the Livestock Forage Payment (LFP) and Livestock Indemnity Program (LIP) for livestock. The LFP was created by the 2008 Farm Bill and originally named the Livestock Forage Disaster Program.[463] The program provided compensation to eligible livestock producers who had suffered grazing losses for covered livestock on land due to drought or fire. The LIP provides disaster assistance to livestock owners and contract growers that had losses due to livestock deaths in excess of normal mortality due to adverse weather during the calendar year or due to attacks by animals reintroduced into the wild by the Federal Government or protected by Federal law.[464] The LFP has a fixed payment rate for losses due to drought and fire. The LFP and LIF for livestock have been authorized by the 2014 Farm Bill. The LFP has grown to be the largest program for non-exempt direct payments over the years, and the budgetary outlays culminated at US $ 2.6 billion, nearly 90 per cent of the total in 2012, but dropped to less than $ 1 billion or about 60 percent of the total in 2014.

Table 22 Structural Changes of the U.S Non-exempt DP Programs

Unit: US$ Million

	2008	2009	2010	2011	2012	2013	2014
Total	2084.8	1221.3	183.6	789.0	3016.0	2292.3	1503.3
MILC +DELAP（Dairy）	1049.6	184.9	--	403.2	404.3	276.6	9.2
ACRE/PLC/ARC+ LDP (Crop)	953.1	815.3	118.5	53	3.0	298.2	537.5
LFP+ LIP (Livestock)	45.3	196.8	58.2	321.4	2605.3	1714.2	944.3
Source of data: notifications from the United States							

463 USDA, 'Livestock Forage Disaster Program (LFP)' <https://www.fsa.usda.gov/Internet/FSA_File/lfp08.pdf> accessed 7 December 2017.

464 National Archives and Records Administration, 'Federal Register / Vol. 79, No. 71 / April 14, 2014 / Rules and Regulations' <https://www.fsa.usda.gov/Internet/FSA_Federal_Notices/agriculturaldisaster.pdf> accessed 7 December 2017.

Japan

Japan launched a new farm subsidy scheme in April 2007 that departed from the past commodity-specific support given to practically all farmers and instead targeted direct payments to larger scale farmers. The scheme comprises two different programs. One program is a payment to rectify the cost of production and market price, which includes two components: payment based on the acreage during the base period (2004-06); and payment based on production volume and quality of the current years. The other program is direct payment to relieve the impact of price fluctuations. According to Japan's notifications, its non-exempt direct payments to sugar, starch and eggs producers are related to the volume of production, while direct payments to milk, vegetables and fruits are related to price. Japan has also ascribed its deficiency payments programs for beef and pork to non-exempt direct payments. As Table 23 shows that Japan's total budgetary outlays for non-exempt direct payments have picked up from ¥ 145 billion in 2008 to ¥ 232 billion in 2012, and during this short time span the share of beef has increased from one third to three fifths.

Table 23 Structure of Japan's Non-exempt DP programs 2008-2012

Unit: ¥ billion

Products	Name of the Programs	2008	2009	2010	2011	2012
Sugar	Payments related to production	26.4	24.2	22.9	15.2	16.9
Starch	Payments related to production	3.9	4.3	3.8	3.9	3.3
Eggs	Payments related to production	1.2	1.2	5	5.2	5.2
Milk	Payments related to price	46.8	26.3	22.8	22.9	27
Vegetables	Payments related to price	14.1	12.4	12.1	3.2	9.9
Fruits	Payments related to price	---	---	8.8	7.5	6.7
Beef	Deficiency payments	49.2	101.1	123.6	114.5	137.8
Pork	Deficiency payments	3.3	4.7	9.9	10	25.7
Total		144.9	174.2	208.9	182.4	232.5
Source of data: notifications from Japan						

The EU

Data from the EU's notifications indicates that it has used non-exempt direct payments as a legal policy instrument to pursue market reforms in some key sectors: wine restructuring and milk national aid, tobacco premium and potato starch premium and production refunds for certain period under examination. Direct payments reported

under headings such as restructuring in the wine sector and national aid in the milk sector encompass a variety of payments that apply differently in different member states of the EU and differently for different segments of the respective commodity sectors. The EU also classifies support for the market withdrawal by producer organizations as non-exempt direct payments, applying to a large number of fruits and vegetables.

For instance, in order to improve the competitiveness of European wine producers, particularly to streamline market mechanisms for European vineyards, the EU has launched a series of reforms of its wine common market organization (CMO) regulations, which are the legal and regulatory basis of the European wine market. Under the wine CMO regulation 479/2008, national support programs are one of the key aspects of the revolution in European wine policy, and for which a percentage system is adopted to distribute support program funds to the member states of the EU: 50 per cent linked to the historic share of the wine budget received by each partner; 25 per cent related to the national surface area under vine; and 25 per cent for the member country's share of total production of the EU. Moreover, 8 definitive measures (2009-2013), including restructuring &vineyard reconversion, which has been notified by the EU as one of its main programs of non-exempt direct payments in 2008-2013 (Table 24), have been identified and the national support program must activate at least one of them. However, a new single CMO (Reg. 1308/2013) was approved and there were some changes with the measures support programs in the wine sector under the heading of market intervention. Restructuring & reconversion is still one of the 8 eligible measures programmed for 2014-2020, but support has been extended to replanting following compulsory grubbing-up for phytosanitary reasons. The most noticeable change in the new EU's wine regulation is the planting right scheme, which has been seen as a fundamental building block of the EU's policies for controlling wine production, are replaced by a scheme of authorizations for vine plantings. Together with grubbing-up, restructuring and reconversion of vineyards in the EU are the two most costly measures, and € 4200 million was allocated for restructuring and reconversion in its ten-year application period 2001-2010. The support has been mostly distributed

to Italy, Spain and France.[465]

Table 24 Non-exempt DP Programs of the EU

Unit: € million

		2008	2009	2010	2011	2012	2013
Total		1,415.5	1,951.7	1,416.8	1,252.0	986.1	877.5
Wine	Restructuring	322.5	395.4	415.5	591.4	599.1	553.4
Milk	National aid	175.3	177.7	175.8	176.7	192.3	181.9
Potato Starch	Premium and production refunds	152.3	150.8	123.4	144.7		
Tobacco	Premium	375.6	295.8				
Source of data: Notifications from the EU							

4.3 Exemption Policy Space

Exemption policy space refers to the maneuvering room that WTO Members enjoy under the current framework of the AOA to exempt support under certain types of measures from reduction commitments, i.e., the support is not included in the Member's AMSs. In accordance with the provisions of the AOA, domestic support under the Green Box (Annex 2), the Blue Box (Article 6.5) and the development programs (Article 6.2) are exempted from the reduction commitments. Therefore, WTO Members' exemption policy space derives from these three categories of agricultural subsidies, based on the compliance of policies with the criteria given in the AOA. AMS support not exceeding the *de minimis* level is exempt from being counted in Current Total AMS. This latter exemption is thus based not on policies and criteria but on the amount of support accounted for in an AMS and the corresponding *de minimis* level (examined in an earlier section).

4.3.1 Green Box

As of November 2016, 62 Members had notified the WTO Committee on Agriculture of their Green Box measures in 2008. Four additional Members, namely the Russian Federation, Ukraine, Samoa and Seychelles, notified Green Box measures after their more recent accession to the WTO. The sum of support notified under Green Box

[465] Davide Gaeta and Paola Corsinovi, *Economics, Governance, and Politics in the Wine Market: EU Developments* (Palgrave Macmillan 2014) 33–76.

measures stood at $ 330 billion in 2008 and climbed to $ 365 billion in 2010.

Though the United States, the EU and Japan have remained the biggest users of the Green Box instruments, the landscape has been evolving. China, India and some other developing Members have raised their Green Box support quickly in recent years. The share of the top five developed Members (the United States, the EU, Japan, Switzerland and Canada) and the top five developing Members (China, India, Cuba, Korea and Brazil) remained around 60 per cent and 30 per cent, respectively, in 2008-2010. Besides these very large spenders, a handful of Members, including Vietnam, Mexico, Australia, Thailand, Indonesia, Norway, South Africa, Chinese Taipei and Peru, had a sizable expenditure of more than $ 1 billion in Green Box support.

Table 25 Members' Green Box Support in 2008-2012

Unit: US$ Milllion

	2008	2009	2010	2011	2012
EU	92,390.3	88,608.5	89,541.4	98,578.9	91,205.1
China	85,325.9	69,906.3	78,970.8	n.a	n.a
United States	81,585.0	100,779.0	118,958.0	125,117.0	127,441.0
Japan	17,775.7	19,754.2	17,349.1	24,743.8	23,523.0
India	16,927.5	17,381.2	19,479.1	n.a	n.a
Cuba	5,321.3	4,860.2	4,473.2	4,049.6	4,758.9
Korea, Rep	4,240.5	3,806.6	5,854.1	6,969.7	n.a
Brazil	3,296.6	3,579.8	4,906.9	4,500.1	4,945.2
Switzerland	3,294.2	3,453.9	3,680.9	4,244.5	4,078.3
Canada	2,429.3	2,357.7	2,771.2	2,754.2	2,654.3
Viet Nam	2,101.3	1,474.6	1,500.9	2,005.6	1,889.5
Mexico	1,955.2	2,259.0	2,212.1	2,862.8	2,801.1
Australia	1,942.9	1,744.8	1,703.7	1,864.7	1,526.7
Thailand	1,921.9	n.a	n.a	n.a	n.a
Indonesia	1,488.8	1,624.8	2,321.0	3,562.8	n.a
Norway	1,216.8	1,127.4	1,198.2	1,311.1	1,323.2
South Africa	1,185.1	1,335.9	1,766.4	2,112.5	2,069.2
Chinese Taipei	1,021.3	1,333.3	1,313.1	n.a	n.a
Peru	1,018.4	1,022.8	1,123.1	1,034.9	1,333.7
Argentina	557.3	830.7	997.7	953.1	1,005.4
Philippines	401.3	606.7	798.3	n.a	n.a
Israel	369.1	287.8	206.9	267.9	287.1
Colombia	262.2	252.8	291.3	419.1	403.9
Jordan	262.2	220.1	170.1	201.8	270.9
Chile	228.3	269.2	243.8	270.6	271.7

Saudi Arabia	219.8	283.2	356.8	184.1	n.a
Malaysia	215.7	342.7	246.2	279.7	n.a
New Zealand	206.3	196.0	234.7	351.6	394.8
Mali	188.0	123.3	173.6	138.4	94.8
Pakistan	170.9	233.0	766.9	264.9	n.a
Panama	101.4	82.4	102.9	117.4	135.0
Dominican Republic	62.5	56.0	63.3	55.3	63.4
Costa Rica	61.6	100.9	121.6	119.2	134.6
Iceland	61.2	41.7	43.7	37.1	35.8
Tunisia	51.5	48.5	52.4	60.0	73.4
Barbados	47.1	47.1	23.4	57.9	29.9
Uruguay	43.4	0.4	51.8	60.9	40.9
Jamaica	42.4	32.0	29.4	33.1	33.2
Trinidad and Tobago	41.5	10.9	10.6	19.8	20.0
Madagascar	38.5	50.9	50.0	56.8	59.1
Botswana	36.0	14.5	16.4	21.3	15.1
Georgia	33.7	30.5	10.2	37.3	131.1
Honduras	29.9	21.3	18.7	7.4	9.6
Namibia	26.6	37.6	n.a	n.a	n.a
United Arab Emirates	23.7	10.5	4.1	17.4	26.1
Zambia	23.7				
Guatemala	22.2	11.1	38.3	28.4	26.6
Moldova	18.9	53.1	32.5	39.1	57.9
Fiji	13.2	14.3	14.2	7.1	10.9
Paraguay	12.5	45.5	52.4	90.8	92.1
Oman	11.9	21.8	10.4	25.8	35.0
Armenia	11.9	13.0	9.6	6.1	5.7
Nicaragua	10.8	4.4	3.7	0.9	n.a
Hong Kong	10.6	11.1	10.9	11.5	12.4
Albania	10.2	10.8	8.8	n.a	n.a
Senegal	5.8	0.0	9.9	0.0	14.5
Sri Lanka	5.3	4.6	4.5	6.3	6.1
Cambodia	2.5	0.0	1.8	1.9	2.3
St Vincent and the Grenadines	1.7	2.2	1.9	1.9	n.a
Qatar	1.3	0.7	1.2	2.0	1.6
Bahrain	0.9	1.0	1.1	1.1	0.0
Tonga	0.8	0.5	0.0	0.0	0.0
Ukraine	--	383.9	444.2	691.1	657.2
Russia	--	--	--	--	1,730.4
Samoa	--	--	--	--	0.3
Seychelles	--	--	--	--	--
Total	**330,384.3**	**331,218.8**	**364,853.2**	**290,658.2**	**275,737.7**

Source of data: author's own calculation based on Members' notifications and exchange rates from the IFS database of the IMF, see Table 3 in this Chapter.

Examining Members' classification of support under the various policy-specific Green Box categories identified in Annex 2 of the AOA shows great variation across Members in what kind of Green Box support they choose to provide.

The Green Box comprises of two major kinds of measures: the first involves public services programs under paragraph 2 through paragraph 4 of Annex 2; the second involves direct payments to producers covered by paragraph 5 through paragraph 13. The second kind mainly involves support in the form of decoupled income support, farmers' income guarantee and security programs (natural disasters and environment, government financial contributions to crop insurance, etc.), as well as programs for structural adjustment assistance.

4.3.1.1 Public Services Programs

4.3.1.1.1 General Services

Paragraph 2 of Annex 2 proves to be the most practical policy tool as general services programs are found in the notifications of nearly all of 62 WTO Members who have notified of their domestic support in 2008. The total expenditure of the Members on general services was $ 102.7 billion in 2008, which was about one third of the sum of their Green Box support in that year.

Among the 7 specific categories of general services identified in Article 2 of Annex 2, infrastructural services accounted for the largest amount of support. Members' total expenditure in infrastructural services was $ 33.4 billion in 2008, which was about 10 per cent of their overall Green Box support. Members from Asia tend to subsidize **infrastructural services** relatively more than other Members. For instance, China and Japan dedicated more than 20 per cent or even nearly 40 per cent of their Green Box support, respectively, to infrastructural services in 2008.[466] But they were not the only

[466] Godo and Takahashi observe that the most noticeable characteristics of Japan's Green Box is that infrastructural services for the agricultural sector and rural areas under General Services makes up the largest portion of the Green Box. Though the percentage of infrastructural services in the Green Box has been going down from 60 per cent in 1995 to 44 per cent in 2005, the average percentage has remained more than 50 per cent in the period. Yoshihisa Godo and Daisuke Takahashi, 'Japan: Shadow WTO Agricultural Domestic Support Notifications', *IFPRI Discussion Paper 00822* (Intl Food Policy Res Inst

ones: India (18.4 per cent), Thailand (66.6 per cent), Korea (32 per cent), Viet Nam (14.6 per cent), Chinese Taipei (28.4 per cent), the Philippines (49.6 per cent), Malaysia (31.1 per cent) and Pakistan (40.2 per cent) showed similar shares. Members from South America or the Caribbean preferred to subsidize training, extension and advisory services. Brazil and Argentina assigned 22 per cent or 31.7 per cent of their Green Box support, respectively, in 2008 to training, extension and advisory services. Some other Members in the region, like Cuba (26.1 per cent), Jamaica (44.1 per cent), Costa Rica (42.1 per cent) and Honduras (81.5 per cent) adopted a similar policy.

Many Members assigned a huge amount of Green Box support to an undefined category of "other general services". This practice is in line with the fact that paragraph 2 of Annex 2 is open-ended in its identification of general service categories: general services programs "include but are not restricted to" an identified list of program categories. As indicated in Table 26, 10 per cent of the Green Box subsidies were classified as other general services. For instance, more than $ 8 billion of Green Box support by the United States were assigned by the WTO Ag-IMS system to the "other general services", which accounted for 72.5 per cent of its total expenditure for general services in 2008.[467] China also reported Y 166 billion ($ 2.4 billion) as support for other general services in 2008, which was about 50 per cent of its general service expenditure in the same year. But China defined it as "outlay on governmental services not included above (services explicitly identified in Article 2 of Annex 2 of the AOA), such as operating expenditures related to buildings, facilities, salaries and expenses of agricultural administrative and service agencies as well as pensions to retired employees of these government agencies".[468] Japan, the EU and Brazil had also considerable amounts of subsidies covered by the "other general services" heading.

Table 26 Break-down of Members' Expenditures in General Services in 2008

	Outlays in US $ million	% of Green Box Subsidies
Infrastructural Services	33,358.5	10.1

2008) 14–15 <http://www.ifpri.org/sites/default/files/publications/ifpridp00822.pdf> accessed 7 December 2017.

[467] The data comes from the WTO Members' transparency toolkit—Agriculture Information Management System (Ag-IMS), as the USA notification (G/AG/N/USA/77) was not based on the specific items of general services, but on its government agencies and their programs.

[468] Notification from China dated 13 October 2011, G/AG/N/CHN/21, p.3.

Other General services	32,855.0	10.0
Extension and Advisory Services	11,853.7	3.6
Research	9,449.1	2.9
Pest and Disease Control	4,723.9	1.4
Inspection	4,645.8	1.4
Training Services	3025.5	0.9
Marketing and Extension	2697.0	0.8
Total	102,653.7	31.1
Source of data: author's own calculation based on Members' notifications		

4.3.1.1.2 Public Stockholding for Food Security Purposes

Paragraph 3 of Annex 2 lays down the legal criteria for exempting expenditures on public stockholding programs for food security purposes. They are Members' expenditures (or revenue foregone) in relation to the accumulation and holding of stocks of products which form an integral part of a food security program identified in national legislation. They may include government aid to private storage of products as part of such a program. The volume and accumulation of such stocks shall correspond to predetermined targets related solely to food security. The process of stock accumulation and disposal shall be financially transparent. Food purchases by the government shall be made at current market prices and sales from food security stocks shall be made at no less than the current domestic market price for the product and quality in question.

Public stockholding for food security purposes might be expected to be a policy instrument of interest to many WTO Members, but the real data does not support this judgement. Only 18 Members reported expenditure on public stockholding for food security purposes in 2008.[469] Their total expenditure amounted to as small a share as 5.6 per cent ($ 18.6 billion) of total Green Box subsidies. India and China are the two dominant users of this policy tool and their corresponding expenditure was $ 9.5 billion and $ 8.3 billion respectively, accounting for 50.9 per cent or 44.7 per cent of the sum of WTO Members' expenditure on public stockholding. The major users have raised

[469] The 18 Members include India, China, Brazil, Japan, Korea, Viet Nam, Indonesia, Philippines, Zambia, Israel, the EU, Saudi Arabia, Iceland, Moldova, Switzerland, Norway, Namibia and Albania. Switzerland and Albania stopped their public stockholding programs one or two years after 2008. Ukraine, and the Russian Federation adopted programs on public stockholding for food security purposes later on.

their expenditure on public stockholding in recent years: the budgetary outlays of each of India and China for public stockholding grew to more than $ 11 billion in 2010.

Table 27 Major Users of Public Stockholding for Food Security Purposes

Unit: US$ Million

	2008	2009	2010	2011	2012
India	9,495.13	12,282.25	13,812.46	n.a	n.a
China	8,335.6	10,181.26	11,380.35	n.a	n.a
Brazil	234.2	236.8	653.1	749.1	204.6
Japan	238.0	253.3	258.6	291.9	294.5
Korea, Rep	124.4	133.3	167.3	166.9	n.a
Viet Nam	103.2	72.0	74.0	51.1	69.7

Source of data: author's own calculation based on Members' notifications and exchange rates from the IFS database of the IMF, see Table 3 in this Chapter.

Although major developing Members raised their expenditure on public stockholding, a controversy surrounding footnote 5 to Paragraph 3 of Annex 2, which featured front and center at the 2013 Bali Ministerial Conference, does not center on the amount of expenditures as such. The footnote stipulates that, if the programs in which food stocks for food security purposes are acquired and released at "administered prices" (i.e., not market prices), the expenditures can be exempted only if the difference between the acquisition price and the external reference price is accounted for in the country's computation of AMS. The accounting for the price gap involving the administered acquisition price effectively means calculating market price support. As illustrated earlier, market price support is accounted for as part of a product's AMS. The MPS calculated under the rules of Annex 3 is conceptually different from the expenditure that can be exempted under paragraph 3 of Annex 2. As part of the Bali Package,[470] the Ministerial Decision on Public Stockholding for Food Security Purposes (WT/MIN (13)/38) mandates WTO Members to arrive at a "permanent" solution to the public stockholding issue. Until then, pre-existing public stockholding programs of developing Members which employ administered prices will not be subject to disputes

[470] World Trade Organization, 'Bali Package and November 2014 Decisions' <https://www.wto.org/english/thewto_e/minist_e/mc9_e/balipackage_e.htm> accessed 7 December 2017.

provided they comply with certain conditions and rules.[471] While this advantage is sometimes referred to as a "peace clause" similar to the "Due Restraint" clause of Article 13 of the AOA, the nature of the flexibility they grant is materially different. The Bali package concerns the provision of AMS support in excess of a Member's commitment, while Article 13, which applied during the defined implementation period of the AOA, concerned the interface of the AOA with the Agreement on Subsidies and Countervailing Duties.

4.3.1.1.3 Domestic Food Aid

Paragraph 4 of Annex 2 prescribes the criteria for exempting the expenditures on providing domestic food aid to the sections of population in need. They require the form of the food aid to be direct provision of food to targeted population or the provision of means to allow eligible recipients to buy food either at market prices or at subsidized prices. Food purchases by the government shall be made at current market prices and the financing and administration of the aid shall be transparent.

A range of 17 Members reported domestic food aid programs in 2008,[472] with the United States reporting exceptionally large amounts under this heading. The total expenditure of these Members on domestic food aid programs was $ 66 billion in 2008, which was about 20 per cent of the Green Box support at that time. The United States alone contributed $ 60.5 billion, or more than 90 per cent of the total expenditure in domestic food aid programs by WTO Members. Domestic food aid accounted for 70 per cent of the total Green Box support of the United States in 2008.[473] By 2014, the budgetary outlays of the United States for domestic food aid had grown to $ 102.8 billion, accounting for more than 80 per cent of its total Green Box domestic support.

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[471] R Montemayor, 'Public Stockholding for Food Security Purposes: Scenarios and Options for a Permanent Solution', *ICTSD Issue Paper No. 51* (ICTSD 2014) <http://www.ictsd.org/sites/default/files/research/Public%20Stockholding%20for%20Food%20Security%20Purposes%20Scenarios%20and%20Options.pdf> accessed 7 December 2017.

[472] The 17 Members are: United States, Cuba, Indonesia, EU, Brazil, South Africa, Jordan, Pakistan, Georgia, Viet Nam, Republic of Korea, Japan, China, Madagascar, Guatemala, Mali and Nicaragua. The Russian Federation also reported domestic food aid in 2013.

[473] Domestic food aid has been the most rapidly growing category of Green Box expenditure since 1995. Orden and Blandford (n 417) 107 Table 3.

Table 28 Major Users of Domestic Food Aid

Unit: US $ Million

	2008	2009	2010	2011	2012	2013	2014
United States	60,519	78,7960	94,915	103,151	106,781	109,591	102,841
Cuba	1,952.8	2,124.5	1,971.8	2,125.7	1,830.3	2,197.7	n.a
Brazil	812.8	1,013.2	1,721.3	1,826.7	1,595.1	1,644.9	1,574.3
EU	867.1	867.8	960.4	1,348.8	1,206.2	992.5	n.a
South Africa	198.7	297.9	481.1	625.8	603.9	539.1	502.4
Jordan	198.6	178.9	132.4	145.1	215.5	260.0	249.8
Source of data: author's own calculation based on Members' notifications and exchange rates from the IFS database of the IMF, see Table 3 in this Chapter.							

4.3.1.2 Direct Payments

The AOA does not provide a strict definition and coverage of the legal term--"direct payments". It may refer to direct payments to producers as defined in paragraph 5 of Annex 2 of the AOA in the narrow sense. It may also refer to direct payment programs as covered by paragraph 6 through paragraph 13 of Annex 2. The broad definition of the concept is more appropriate as paragraph 5 of Annex 2 (direct payments to producers) spells out explicitly that programs as set out in paragraph 6 through 13 of Annex 2 are individual types of direct payments. There are two types of direct payments: direct payments to support farm incomes, which are covered in paragraph 5 through 8 of Annex 2; and direct payments under structural adjustment assistance and certain other headings, referring to programs in paragraph 9 to 13 of Annex 2.

4.3.1.2.1 Direct Payments to Support Farm Incomes

As of November 2016, nearly 40 Members or about one third of the WTO Membership notified various types of direct payment programs in 2008 with a total expenditure of $ **136.2 billion.** This was more than 40 per cent of the total monetary values of the Green Box subsidies at that time. In 2009 and 2010, Members' expenditure on direct payments programs remained more or less at that level. More than 40 per cent of Members' direct payments, or around $ 60 billion in 2008-2010, took the form of **decoupled income support (paragraph 6 of Annex 2).** The criteria require that the amount of direct payment shall have nothing to do with the type or volume of production undertaken by the producers, prices applying to the production or the factors

of production, and that no production shall be required in order to receive payments.[474] Decoupling has been the key word or essential element for the successive agricultural policy reforms undertaken by the major players over the past decades, although some Members' use of the term "decoupled" does not necessarily mean decoupled in the sense of paragraph 6 of Annex 2 of the AOA.[475] Among the 14 users as identified in Table 28,[476] the EU has always been the leading and dominant one.

Payments for relief from natural disasters (Paragraph 8 of Annex 2), can be exempted if the production has declined by at least 30 per cent compared to the average for the previous three years and the payment must be related to loss of income or of factors of production such as land and livestock. The value of the payments shall cover only the loss suffered and, when made along with income insurance payments, must not exceed 100 per cent of the lost income. Relief from natural disasters has attracted less funds than decoupled income support, and Members' expenditure on relief from natural disasters was only about one fifth of their budgetary outlays on decoupled income support, or less than 10 per cent of their total direct payments in 2008. Nevertheless, it is the most frequently reported Green Box policy instrument in terms of the number of reporting Members. There were 25 users in 2008 and most of them were developing Members. For some developing Members, such as Indonesia, Chile,

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[474] Paragraph 6 of Annex 2 spells out the criteria for decoupled income support: (a) Eligibility for such payments shall be determined by clearly-defined criteria such as income, status as a producer or landowner, factor use or production level in a defined and fixed base period. (b) 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. (c) The amount of such payments in any given year shall not be related to, or based on, the prices, domestic or international, applying to any production undertaken in any year after the base period. (d) The amount of such payments in any given year shall not be related to, or based on, the factors of production employed in any year after the base period.

[475] Mary E Burfisher and Jeffery Hopkins, 'Decoupled Payments: Household Income Transfers in Contemporary U.S. Agriculture.' <https://www.ers.usda.gov/webdocs/publications/41549/15434_aer822_1_.pdf?v=41063> accessed 7 December 2017.

Nick Beard and Alan Swinbank, 'Decoupled Payments to Facilitate CAP Reform' (2001) 26 Food Policy 121, 121–145.

[476] These Members include the EU, China, the United States, Japan, Switzerland, Republic of Korea, Mexico, Australia, Argentina, Israel, Iceland, Georgia. Ukraine and the Russian Federation report such support after their accession to the WTO.

Tonga, and the Philippines, payments for relief from natural disasters were their only direct payment program. For some other developing Members, like China and Argentina, the expenditure on payments for relief from natural disasters was higher than on decoupled income support.

For the other two forms of direct payments to support farm income, both government financial participation in income insurance and income safety-net programs (paragraph 7 of Annex 2)[477]and direct payments to producers (paragraph 5 of Annex 2) are rarely used. Table 32 indicates that only 4 Members, namely Australia, Brazil, Canada and the EU reported insurance and income safety net programs, while only 4 Members, Australia, Argentina, Uruguay and Chile reported paragraph 5 direct payments to producers.

EU Policy on Direct Payments to Support Farm Incomes

The EU defines direct payments as "payments granted directly to farmers to ensure them a **safety net**. They are mainly granted in the form of a basic income support, **decoupled from production**, stabilizing their income stemming from sales on the markets, which are subject to volatility.…...Direct payments also contribute, through greening, and in combination with cross-compliance to providing basic public goods."

Direct payments in the EU can be dated back to the 1992 MacSharry Reform of the CAP with a view to reducing the level of price support and preventing a corresponding fall in the incomes of farmers.[478] Direct payments have now become the most important

[477] Paragraph 7 of Annex 2 provides that "eligibility for such payments shall arise only following a formal recognition by government authorities that a natural or like disaster (including disease outbreaks, pest infestations, nuclear accidents, and war on the territory of the Member concerned) has occurred or is occurring; and shall be determined by a production loss which exceeds 30 per cent of the average of production in the preceding three-year period or a three-year average based on the preceding five-year period, excluding the highest and the lowest entry; payments made following a disaster shall be applied only in respect of losses of income, livestock (including payments in connection with the veterinary treatment of animals), land or other production factors due to the natural disaster in question; payments shall compensate for not more than the total cost of replacing such losses and shall not require or specify the type or quantity of future production."

[478] The 1992 MacSharry Reform is the turning point of the CAP reform from the "old" CAP, which did not rely heavily on domestic subsidies and support was mainly through high internal support prices maintained by import levies and export subsidies to the "new" CAP, which relies on direct payments to farmers based on past production patterns and is broadly unrelated to current prices and output decisions.

source in WTO terms for the EU to support its farmers' incomes. The EU has gone far in transforming direct payments from coupled support (production-related aid) to decoupled, and a series of reforms have been undertaken in order to move its CAP in the direction of more market orientation in line with WTO principles. In the Agenda 2000 reform, the CAP was divided into two pillars as a way to enhance the concept of multifunctionality of European agriculture in line with a subsidiarity-based approach. The first pillar was dedicated to market support, to which direct aid payments were assigned, and rural development became the second pillar.[479] In the 2003 Fischler reform (the legal base is Council Regulation 1782/2003), specific direct payment schemes were incorporated into a Single Payment Scheme (SPS Scheme). The principle of cross-compliance was also introduced, which established a link between the receipt of CAP support by farmers and respect of a set of basic rules that are related to public, animal and plant health, animal welfare and environmental protection.[480] In order to provide funding for direct payment to farmers, the European Agricultural Guarantee Fund (EAGF) was created in September 2005 and came into operation at the beginning of 2007. Another important measure called "modulation" was set up to allow to transfer funds from the first CAP pillar (market support) to the second (rural development), as 80 percent of the CAP budget was allocated to the first pillar and 20 percent for the second. Direct aids accounted for 70 per cent of the CAP budget. As a general rule, the single payment is paid as a single annual payment based on the value of the payment entitlements. These are allocated by the national authorities to a farmer who has activated his payment entitlements and declared an equivalent number of eligible hectares in a yearly application in order to claim the payment entitlements. Otherwise,

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Tim Josling and Alan Swinbank, 'EU: Shadow WTO Agricultural Domestic Support Notifications', *IFPRI Discussion Paper 00809* (Intl Food Policy Res Inst 2008) 4 <http://www.ifpri.org/publication/european-union> accessed 7 December 2017.

[479] Michelle Cini and NIEVES NIEVES PEREZSOLORZANO BORRAGAN, *EU Politics* (Oxford University Press 2013) 314–316.

[480] Swinbank observes that there have been two changes in the EU's use of the WTO's Green Box. First, there has been a significant decoupling of the support designed to sustain farm incomes and, second, there has been an attempt to switch support from agriculture to the wider rural economy and to protection and enhancement of the environment (from the so-called Pillar 1 to Pillar 2). Meléndez-Ortiz, Bellmann and Hepburn, *Agricultural Subsidies in the WTO Green Box: Ensuring Coherence with Sustainable Development Goals* (n 340) 70–71.

the payment entitlements will be reverted into the "national reserve" and allocated to other farmers in specific situations (e.g., newcomers, force majeure cases, investments), if they are not used within 2 years. Entitlements can be transferred under certain conditions to another farmer (sale, lease). So basically, there are three ways for farmers to obtain SPS payment entitlements: allocation of entitlements based on application and activation; national reserve; and transfer. When introducing the SPS, the Member States of the EU had three main options for calculating the value of payment entitlements: 1) on the basis of the payments received by the individual farmer during a reference period ("historical model") resulting in different aid levels per hectare; 2) taking all payments received in a region and divide them by the number of eligible hectares ("regional model") resulting in a flat rate; 3) a mixture between these two models ("hybrid model") that can be "static" or "dynamic (with the latter approximating both elements towards a flatter rate). Besides that, the EU regulations have set up national ceilings for each Member State and each year and require the Member States to maintain the total value of all allocated payment entitlements within their respective national ceilings. In 2009, the so-called CAP Health Check (the legal base is Council Regulation 73/2009, which repealed Council Regulation 1782/2003) simplified the functioning of the single payment scheme and extended the decoupled direct payments. [481] In 2013 CAP reform (the legal base is Regulation (EU) No 1307/2013 of the European Parliament and of the Council), the Single Payment Scheme was replaced with the Basic Payment Scheme (BPS Scheme), which came into effect as from 2015. Similar to SPS, the BPS is based on payment entitlements, activated on eligible land and decoupled from production. The reform has designed compulsory and voluntary schemes, which has offered considerable flexibility to Member States in how they implement the direct support system while requiring them to notify the European Commission of the main policy choices. The BPS Scheme is a compulsory scheme for all Member States. However, the new Member States having applied the single area payment scheme (SAPS) have been granted a transitional period and are allowed to continue applying the SAPS until 2020. All Member States previously applying SAPS have decided to maintain this

[481] Paragraph 40 of the Preamble to the Council Regulation (EC) No 73/2009 recognizes that "the decoupling of direct support and the introduction of the single payment scheme were essential elements in the process of reforming the CAP".

scheme. The 2013 CAP reform was adjusted to make the direct payments both environmentally greener (direct payments to farmers were subjected to greater environmental conditionality) and fairer (level of direct payments to farmers were made more equal within and between Member states). To do that, the Member States of the EU were given three options to achieve internal convergence: 1) a uniform unit value for all payment entitlements as from 2015; 2) full convergence by 2019: gradual adaptation of the unit value of the payment entitlements during the period 2015-2019 in order to reach a uniform unit value of all payment entitlements at the latest in 2019; 3) partial convergence: payment entitlements with a value lower than 90% (or a figure between 90 and 100%) of the national/regional unit value in 2019 will have their value increased during the period 2015-2019 in order to close at least 1/3 of the gap between their initial unit value and this value in 2019. Also, in 2019, no payment entitlement shall have a unit value below 60% of the average unit value of the payment entitlements in 2019. Besides that, the part of the annual BPS payments granted to a farmer exceeding EUR 150 000 shall be subject to a reduction of at least 5% for the purpose of ensuring a better distribution of funds between small and large beneficiaries.

Table 29 Expenditure of the EU on Decoupled Income Support

Unit: € million

	Decoupled Income Support	Natural Disaster Relief	Income and Insurance Safety Net	Direct Payments	Total	Green Box	%
2008	31,893.7	1,165.3	17.1	--	33,076.1	62,825.4	52.6
2009	31,481.6	1297.6	16.9	--	32,796.1	63,798.1	51.4
2010	32,913.1	802.7	21.9	--	33,737.7	68,051.5	49.6
2011	32,756.0	840.8	31.4	--	33,628.2	70,976.8	47.4
2012	32,780.2	775.3	37.8	--	33,593.3	71,140	47.2
2013	31,845.4	638.2	39	--	32,522.6	68,697.8	47.3

Source of data: notifications from the EU

U.S Policy on Direct Payments to Support Farm Incomes

Reforms of the farm policy in the United States have been driven by both domestic and international factors. For domestic factors, the reforms have been undertaken as the production and income of farmers have undergone change. The basic direction of policy reform has been a shift away from acreage-idling supply controls combined with price

supports above market-clearing levels to less supply intervention and more direct income support, at least for crops that are exported. For international factors, moving towards greater market orientation and keeping domestic farm support policy in compliance with WTO rules for agriculture have been the driving force for the evolution of the U.S. farm support policy changes over the years.[482] The provision of direct payments was a major element of various farm policy reforms. The 1996 Farm Bill or FAIR Act (Federal Agriculture Reform and Improvement Act) instituted transition payments to replace a set of farm programs that supported a number of crop commodity prices at above market levels.[483] This would break the links between the amounts of direct payments paid to farmers, their level of production, and market prices. The new support mechanism, called Production Flexibility Contract (PFC), was a lump-sum cash payment to farmers based on their historical participation in commodity support programs. They were fixed payments announced in advance for the duration of the 1996 Farm Bill (1996-2002). No decision by the farmer nor change in market prices could have altered the size of the lump-sum payment. PFCs transferred nearly $36 billion to eligible producers over the 1996-2002 period, with an average annual

[482] Keeney R., 'The End of the Direct Payment Era in U.S. Farm Policy' <https://www.extension.purdue.edu/extmedia/ec/ec-774-w.pdf> accessed 7 December 2017.

[483] "The 1996 Farm Bill initiated four changes in the U.S farm support programs. First, farmers who received government support were given the flexibility to plant whatever crops they chose on base acreage. Second, the authority of the USDA to require annual idling of acreage to limit crop supplies was ended. Third, farmers received fixed income transfers, known as production flexibility contract (PFC) payments, that were based on past production and were independent of current market prices and farmers' planting decisions. These fixed income transfers replaced earlier 'deficiency payments' that had required production of the crop for which payments were received. Fourth, the price guarantees made to crop producers for any amount of current output through 'loan rates' were capped at nominal levels well below market prices prevailing at that time. The changes to farm policy in 1996 were partial reforms in the direction of providing direct income transfer instead of using land idling or government stockholding to keep prices above free-market-clearing levels. Farmers responded to the increased flexibility, or 'freedom to farm', that the 1996 FAIR Act allowed through substantial movements away from the crops to which deficiency payments previously had been tied, particularly by reducing wheat acreage and expanding planting of soyabeans." David Orden, David Blandford, United States: Shadow WTO Agricultural Domestic Support Notifications, IFPRI Discussion Paper 821 (Intl Food Policy Res Inst 2008) 2–3, <http://www.ifpri.org/publication/united-states> accessed 6 December 2017.

payment per recipient household of about $9,000.[484] The PFC was replaced by decoupled Direct Payments in the 2002 Farm Bill or FSRI Act (Farm Security and Rural Investment Act and extended in the 2008 Farm Bill or FCE Act (Food, Conservation, and Energy Act).[485] But the 2014 Farm Bill replaced Direct Payments with a new risk management approach that transited subsidization from Direct Payments to crop insurance. As regards the funding of the domestic support programs, the Farm Bill authorizes two kinds of program funding. 1) Mandatory funding is provided to authorized programs to a level as needed (or to a statutory level) through the Commodity Credit Corporation (CCC) and is not subject to annual appropriations decisions by Congress. Congress can alter mandatory funding levels at any time through new legislation, but there is no automatic reconsideration during the life of the Farm Bill. Examples of Farm Bill programs provided with mandatory funding include the Supplemental Nutrition Assistance Program (SNAP) and most commodity and conservation programs. 2) Discretionary funding is provided to authorized programs up to the level provided for by legislation, but Congress may decide each year what level of funds is appropriated for these programs, if any. Once program expenditures reach the level appropriated for that year, no additional funds can be spent unless Congress provides new appropriations. Many research and rural development programs, for example, are funded in this way. The farm policy changes in the 2014 Farm Bill have profound implications for payment programs and budgets. With direct payments being shifted to crop insurance, the outlays on crop insurance are projected to account for 8 percent of the total 5-year outlays of 2014 Farm Bill spending of $ 489 billion.[486] This is close to $ 40 billion for the 5-year spending or almost $ 8 billion per year. The landscape of Members' programs in direct payments to support farm incomes is being restructured as currently the United States has included its direct payments for revenue

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[484] Mary E Burfisher and Jeffery Hopkins, 'Farm Payments: Decoupled Payments Increase Households' Well-Being, Not Production' <https://www.ers.usda.gov/amber-waves/2003/february/farm-payments/#box> accessed 2 January 2018.

[485] Jeremy G Weber and Nigel Key, 'Expansion in Direct Payments Did Not Lead to More Crop Production' (*US. Department of Agriculture*) <https://www.ers.usda.gov/amber-waves/2012/september/expansion-in-direct-payments/> accessed 7 December 2017.

[486] USDA, 'Projected Spending Under the 2014 Farm Bill' <https://www.ers.usda.gov/topics/farm-economy/farm-commodity-policy/projected-spending-under-the-2014-farm-bill/> accessed 7 December 2017.

and income insurance program in the umbrella of crop insurance program and classified them as AMS support (PS or non-product specific). The United States claims that its outlays on delivering crop insurance are exemptible as general services.[487] However, the expenditures of the United States in decoupled income support have remained quite stable, around 5-6 billion in 2008-2014.

Table 30 Expenditure of the United States in Decoupled Income Support

Unit: $ million

	Decoupled Income Support	Environmental Payments	Disaster Relief	Total[488]
2008	5,776	3,983	65	9,824
2009	6,176	4,044	93	10,313
2010	5,852	4,828	63	10,743
2011	5,698	4,914	264	10,876
2012	4,790	5,139	344	10,273
2013	5,795	4,988	174	10,957
2014	6,134	4,756	126	11,016
Source of data: notifications from the United States				

4.3.1.2.2 Direct Payments for Structural Adjustment Assistance

The AOA identifies three forms of structural adjustment assistance programs: producer retirement programs under paragraph 9 of Annex 2 (conditional on the total and permanent retirement of the recipients from marketable agricultural production), resource retirement programs under paragraph 10 of Annex 2 (conditional on the retirement of land from marketable agricultural production for a minimum of three years, and on slaughter or definitive permanent disposal in the case of livestock), and investment aids programs under paragraph 11 of Annex 2 that aim at overcoming structural disadvantages or land re-privatization. Although targeted at countries in transition from centrally planned economies to market-oriented economies, this policy

[487] The US notification indicates, regarding income insurance and safety-net programs in Supporting Table DS:1, that "all revenue and income insurance program support to producers is included in Supporting Tables DS: 7 and DS:9 under the entry for USDA Crop Insurance programs". G/AG/N/USA/109, dated 19 January 2017, p.6.

[488] Blandford and Orden observe that three categories of Green Box support in the United States, namely decoupled income support, disaster relief and environmental payments, have totaled roughly $ 10 billion annually in the notifications of 1995-2005. Table 27 shows that this trend has remained in 2008-2014. Orden and Blandford (n 483) 12 Table 3.

instrument has also been used by other Members with structural problems in agriculture.[489] There are 15 Members who notified programs on structural adjustment assistance provided through investment aids in 2008, and most of them are from Latin America and Asia. However, No one matches the EU in terms of program expenditure. Table 32 indicates that the total of Members' expenditure in investment aids was $ 20 billion in 2008 and the EU accounted for more than $ 11 billion or nearly 60 per cent.[490] For both the resource retirement and the producer retirement programs, very few Members have used them.

Support for environmental programs under paragraph 12 of Annex 2 is provided to farmers to encourage their compliance with environmental regulations or enrollment in environmental programs, and the amount of payment shall be limited to the **extra costs or loss of income** involved in complying with the government programs. Besides programs for relief from natural disasters, environmental programs are used by many WTO Members. The budgetary outlays of the major users on environmental programs have risen over the years. Table 32 shows that the total expenditures of China, the EU,[491] the United States and Japan on environmental programs increased from $ 24.4 billion in 2008 to $ 30.1 billion in 2010.

Table 31 Budgetary Outlays of Major Users for Environmental Programs

Unit: USD $ Million

	China	EU	USA	Japan	Total
2008	9,908.5	8,372.9	3,983	2,178.8	24,443.2
2009	13,357.0	9,101.5	4,044	3,115.3	29,617.8

[489] Ingco and Nash (n 231) 32.

[490] The EU has used the Green Box provisions to shelter a large (€ 20 billion per annum) spend on farm support, but only a small proportion of this has been spent on overtly agri-environmental measures (paragraph 12) and regional assistance programmes (paragraph 13). Over one-half of the money has been devoted to general services (paragraph 2) and investment aids (paragraph 11). Meléndez-Ortiz, Bellmann and Hepburn, *Agricultural Subsidies in the WTO Green Box: Ensuring Coherence with Sustainable Development Goals* (n 340) 83.

[491] "For the moment, the EU has scope to include its limited expenditure on agri-environmental measures under either heading; but in aggregate the overall level and structure of domestic support looks vulnerable if the Doha Round is concluded and further WTO disciplines are even triggered." Meléndez-Ortiz, Bellmann and Hepburn, *Agricultural Subsidies in the WTO Green Box: Ensuring Coherence with Sustainable Development Goals* (n 340) 83–84.

2010	13,355.2	9,523.6	4,828	2,923.2	30,630.0
2011	n.a	11,530.6	4,914	3,227.7	n.a
2012	n.a	11,370.6	5,139	3,268.6	n.a
2013	n.a	10,509.7	4,988	n.a	n.a
Source of data: author's own calculation based on Members' notifications and exchange rates from the IFS database of the IMF, see Table 3 in this Chapter.					

Regional assistance support under paragraph 13 is designed to help producers in disadvantaged regions to overcome the difficulties of producing in such regions. Like decoupled income support, the regional assistance support shall not be related to, or based on, the type or volume of production (including livestock units) undertaken by the producer, or the prices, domestic or international, applying to any production. The payments shall be limited to the extra cost or loss of income involved in undertaking agricultural production. 16 WTO Members[492] notified regional assistance support programs in 2008 with a total expenditure of $ 12.6 billion, among which the EU and China accounted for more than $ 10 billion or 80 per cent.

[492] These Members include: the EU, China, Japan, Switzerland, Republic of Korea, Cuba, Mexico, Viet Nam, Chinese Taipei, South Africa, Israel, Iceland, Colombia, Costa Rica, Madagascar, Albania.

Table 32 Direct Payments by Members in 2008

Unit: US$ Million

	Decoupled Income Support	Investment Aids	Environmental Programs	Regional Assistance	Natural Disaster Relief	Producer Retirement Programs	Resource Retirement Programs	Income and Insurance Safety Net	Direct Payments to producers	Total
EU	46,902.5	11,429.0	8,372.9	5,470.9	1,713.7	1,302.4	445.1	25.1	--	75,661.5
China	3,396.6	--	9,908.5	4,609.3	7,969.4	--	--	--	--	25,883.8
USA	5,776.0	123.0	3,983.0	--	65.0	--	--	--	--	9,947.0
India	--	6,020.2	365.9	--	174.1	--	--	--	--	6,560.2
Japan	989.7	127.7	2,178.8	210.9	473.1	1,251.9	--	--	--	5,232.2
Switzerland	1,498.1	81.4	508.1	624.1		--	--	--	--	2,711.7
Korea, Rep	823.7	735.6	278.0	40.3	290.5	11.9	--	--	--	2,180.0
Cuba	--	942.1	--	574.1	364.3	--	--	--	--	1,880.5
Mexico	743.4	349.0	54.6	208.1	33.5	--	--	--	--	1,388.7
Australia	0.9	--	286.3		735.3	15.0	--	84.0	3.9	1,125.5
Norway	--	78.7	737.0		16.9	19.7	--	--	--	852.3
Viet Nam	--	18.2	32.7	437.2	241.6	--	--	--	--	729.7
Canada	--	--	70.7	--	--	--	20.7	559.0	--	650.4
Chinese Taipei	--	--	318.6	5.3	120.4	--	9.7	--	--	454.0
South Africa	--	--	--	380.9	44.7	--	--	--	--	425.6
Peru	--	--	--	--	--	--	--	--	--	255.7
Argentina	32.1	70.4	--	--	78.0	--	--	--	11.2	191.6
Israel	27.8		10.5	52.0	64.2	--	--	--	--	154.5
Brazil	--	--	--	--	--	--	--	48.6	--	48.6
Iceland	23.2		0.3	0.8	0.4	6.3	--	--	--	31.0

Costa Rica	--	3.5	0.9	21.6	--	--	--	--	--	25.9
New Zealand	--	--	19.6	--	0.7	--	--	--	--	20.3
Mali	--	--	16.0	--	--	--	--	--	--	16.0
Panama	--	10.4	--	--	1.1	--	--	--	--	11.5
Uruguay	--	--	6.9	--	--	--	--	--	1.7	8.6
Tunisia	--	8.1	--	--	--	--	--	--	--	8.1
Indonesia	--	--	--	--	8.2	--	--	--	--	7.7
Chile	--	--	--	--	3.7	--	--	--	1.9	5.6
Colombia	--	--	--	3.3	2.2	--	--	--	--	5.5
Georgia	4.3	--	--	--	--	--	--	--	--	4.3
Guatemala	--	4.3	--	--	--	--	--	--	--	4.3
Philippines	--	--	--	--	3.3	--	--	--	--	3.3
Tonga	--	--	--	--	2.8	--	--	--	--	2.8
Moldova	--	--	--	--	1.1	--	--	--	--	1.4
Albania	--	--	--	0.9	--	--	--	--	--	0.9
Madagascar	--	--	--	0.8	--	--	--	--	--	0.8
Hong Kong	--	--	--	--	0.5	--	--	--	--	0.5
Total (2008)	60,218.4	20,001.6	27,149.3	12,640.6	12,405.9	2,607.1	475.5	716.7	18.7	136,233.8
Total (2009)	56,855.6	13,761.7	32,184.2	14,361.9	8,718.9	2,770.8	478.7	718.8	29.7	129,880.3
Total (2010)	56,057.1	14,266.2	33,722.1	14,844.1	12,495.4	2,589.0	543.3	908.6	7.0	135,420.9

Source of data: author's own calculation based on Members' notifications and exchange rates from the IFS database of the IMF, see Table 3 in this Chapter.

4.3.2 Blue Box

As of November 2016, only 4 Members, namely the EU, Japan, Norway and Iceland, notified Blue Box measures in 2008, with a total expenditure of $ 8.9 billion. These 4 users of the Blue Box exemption are known for their strong positions in claiming agricultural protection. The spending of WTO Members on Blue Box payments has been reduced over the years and it dropped to $ 6.3 billion by 2012, nearly 20 percent less than in 2008.

Table 33 Members' Blue Box Spending 2008-2012

	2008	2009	2010	2011	2012
EU (Million Euro)	5,347.8	5,323.6	3,141.8	2,981.1	2,754.2
Japan (Billion Yen)	32.4	21.8	306.8	153.3	155.2
Norway (Million NOK)	3,981.5	4,137.6	4,394.9	4,469.3	4,744.0
Iceland (Million ISK)	537.5	542.0	553.0	581.0	610.0
Total (Million Dollar)	8,889.9	8,289.1	8,361.2	6,864.3	6,296.1
Source of data: Members' notifications					

4.3.2.1 The EU Policy on Blue Box

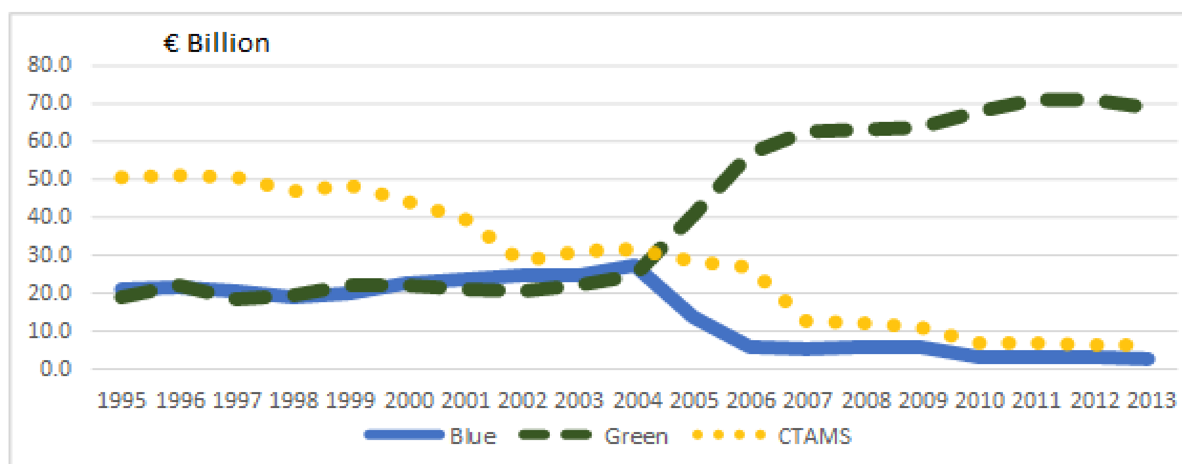
The EU was the designer and beneficiary of the WTO Blue Box policy,[493] which was created to accommodate its compensatory payments and set-aside programs approved by the 1992 MacSharry CAP reform. Under these programs, the concept of compulsory set-aside was introduced as farmers were required to leave a minimum percentage of' their land idle as a condition to receive the direct payments or "compensatory aid". A limit on total payments was imposed at regional levels. These direct payments were called "compensatory" in the 1992 reform in compensation for significantly decreased intervention support prices.[494] The Blue Box exemption has been functioning as a transitional instrument for the EU in reducing price support and replacing it with payment support. It first replaced much non-exemptible price support with exempted Blue Box payments, which were then largely replaced with exempted Green Box payments. The EU's CTAMS fell from around €48 billion in 1995/96 to €30 billion in 2004/05, while Blue Box and Green Box payments rose from €20 billion and €18 billion to €27 billion and

[493] Actionaid UK, 'The Agreement on Agriculture---Domestic Support' <https://www.actionaid.org.uk/sites/default/files/content_document/URAA_domestic.pdf>, last accessed 7 December 2017.

[494]

€24 billion, respectively, over the same period. Blue Box payments then dropped radically to €13 billion in 2005/06 from the peak of the previous year, while Green Box payments climbed to €40 billion. By 2013, Blue Box payments and CTAMS had been further cut down to about €3 billion and €6 billion respectively, while Green Box payments went up to nearly €70 billion.

Graph 3 Evolution of the EU's CTAMS and Blue and Green Box Payments

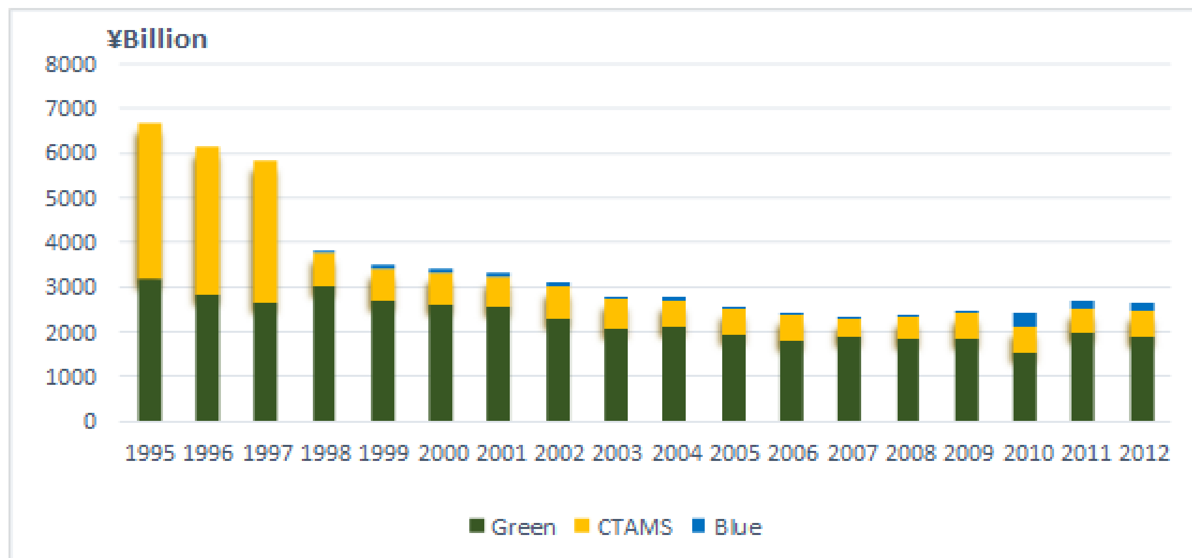


Source of data: notifications from the EU

4.3.2.2 Japan's Blue Box Policy

Japan introduced Blue Box payments in 1998 with a view to implementing the rice diversion program as part of replacing market price support for rice with exempted payments. Market price support for rice was reported as high as ¥ 2,397.5 billion in 1997, while it was eliminated in Japan's market price support notification the following year. With that the level of CTAMS dropped dramatically from ¥ 3,170.8 billion to ¥ 766.5 billion and at the same time a new ¥ 50 billion program was claimed as exempt. Japan's spending on Blue Box support has been unstable and volatile over the years. It was only ¥ 20 billion in 2009, jumped to more than ¥ 300 billion in 2010, and then dropped to ¥ 150 billion in 2012.

Graph 4 Evolution of Japan's CTAMS and Green and Blue Box Payments



Source of data: notifications from Japan

4.3.3 Development Programs

As of November 2016, 32 developing Members notified development programs in 2008 with a total expenditure of $ 37.2 billion. Spending stayed at more or less that level in 2009 and 2010.

India was the dominant user of the development program exemption. Its budgetary outlays were reported at $ 31.5 billion in 2008, accounting for 84.5 per cent of the total expenditure of WTO Members in development programs in that year. Indonesia and Brazil also exempted a substantial amount of agricultural subsidies as development programs. There are some structural differences in Members' development programs. India's input subsidies for fertilizers, irrigation, electricity and seeds that are generally available to low-income or resource-poor producers account for 95 per cent of its development programs. This makes India an outlier in terms both of the amount of support exempted under Article 6.2 and the amount of input subsidies so exempted. Brazil and Colombia channeled their development program expenditure mainly as investment subsidies generally available to agriculture. For example, funds for agricultural investments or investment credits that were directed to improve rural structure, acquisition of machine, equipment, vehicles

and animal services accounted for 80 per cent of Brazil's expenditure on development programs.[495]

Table 34 Members' Expenditure on Development Programs 2008-2010

Unit: US$ Million

	2008	2009	2010
India	31,458.7	29,857.3	31,610.3
Indonesia	1,960.3	1,917.8	2,264.7
Brazil	900.1	870.7	1,651.0
Mexico	659.2	622.5	738.8
Viet Nam	496.8	170.3	205.1
Sri Lanka	408.8	290.7	228.0
Colombia	365.6	317.9	339.3
Malawi	279.0	159.8	148.6
Honduras	244.2	5.6	5.6
Cuba	121.7	194.4	176.8
Philippines	107.0	308.2	162.3
Zambia	83.7	--	--
Malaysia	83.0	77.9	123.4
Tunisia	75.6	70.4	41.4
Ecuador	51.0	52.0	0
Chile	45.0	37.6	40.5
Peru	43.2	69.9	39.1
Botswana	31.0	1.4	34.3
Senegal	27.4	0.0	17.3
Paraguay	16.1	42.1	28.0
Panama	14.9	17.5	20.6
Namibia	6.8	5.9	--
Jordan	4.5	1.3	1.2
Korea, Rep	4.2	0.9	1.2
Uruguay	3.7	3.3	3.9
Oman	3.6	5.2	5.9
Bahrain	2.8	3.1	3.1
Barbados	0.8	1.1	0.9
Qatar	0.9	1.4	2.5
Chad	0.9	0.8	0.6
Burundi	0.2	0	0

[495] Nassar and Ores observe that "Brazil makes plentiful use of its developing status, and this is clear when one observes the use of Article 6.2 of the Agreement. The so-called development box is offered as a special and differential treatment to countries in need of such action. Brazil uses Article 6.2 to notify debt rescheduling and production credit (family farming only), as well as investment credit (for both family and commercial farming)". Andre M Nassar and Diego Ures, *Brazil: Shadow WTO Agricultural Domestic Support Notifications* (Intl Food Policy Res Inst 2009) 17 <http://www.ifpri.org/sites/default/files/publications/ifpridp00865.pdf,> accessed 6 December 2017.

Madagascar	0.0	0.1	4.6
Total	37,416.9	35,107.2	37,899.1
Source of data: author's own calculation based on Members' notifications and exchange rates from the IFS database of the IMF, see Table 3 in this Chapter.			

4.4 Two Essential Legal Issues Remain Unsolved

The AOA rules and disciplines on domestic support were created on the basis of negotiations and compromises among the major players, the EU and the United States in particular.[496] Two essential legal issues arising from this special feature of the WTO law-making process at the time remain unsolved. One issue relates to the effectiveness of these rules and disciplines and focuses more on the functioning and the effectiveness of the multilateral agricultural trading system in disciplining agricultural subsidies of the major players. The other issue concerns the flexibility that is available to or is practicable for developing Members.

4.4.1 The Effectiveness of the AOA Rules on Domestic Support

The status of WTO Members' practices in using any particular single instrument of domestic support cannot offer a complete and comprehensive landscape view of the effectiveness of the AOA rules in binding certain domestic support of Members.[497] This requires examining all types of domestic support policies and associated support, including Green Box, Blue Box, and Development Programs as well as the limits on certain support (*de minimis* limits, *de minimis* thresholds, BTAMS) and the measurement of support that counts towards the limits (AMSs, CTAMS). The differential availability of exemptions among Members and the differential nature and size of limits on certain support define Members' different policy space. A few conclusions can nonetheless be drawn from the previous analyses:

4.4.1.1 Agricultural Support Is Becoming "Greener"

The Green Box exemption has become the lion's share of WTO Members' agricultural subsidies.

[496] "If the gap between the different positions on the permitted policies (Green Box) had not been bridged, it would have been impossible to build the pillar of domestic support and hence to finish the agriculture negotiations and the Uruguay Round. Reaching agreement on the Green Box was one of the necessary conditions for the OECD countries to overcome the strong domestic resistance against reform arising in the farming sector and related interests thereto." Meléndez-Ortiz, Bellmann and Hepburn, *Agricultural Subsidies in the WTO Green Box: Ensuring Coherence with Sustainable Development Goals* (n 156) 33.

[497] "To a great extent, the discussions around Green Box criteria have to be seen in the broader context of the negotiations on levels of overall trade distorting support (OTDS)." Meléndez-Ortiz, Bellmann and Hepburn, *Agricultural Subsidies in the WTO Green Box: Ensuring Coherence with Sustainable Development Goals* (n 156) 69.

Table 35 indicates that the total domestic support of WTO Members increased from $ 449 billion in 2008 to $ 482 billion in 2010, while Green Box support rose from $ 330 billion to $ 365 billion. This means Green Box support was the main contributor to the increase of the total domestic support. In 2010, Green Box domestic support accounted for 75 per cent of the total value of agricultural support as reported to the WTO. AMS support counted in CTAMS declined from $ 41 billion in 2008 to $ 27 billion, while its share in total domestic support dropped from 9 per cent to nearly 6 per cent. Blue Box support was relatively stable and remained above $ 8 billion or around 2 per cent of total domestic support, although it has been declining slowly. Members' expenditures on Development Programs stabilized at around $ 37 billion or 8 per cent of total domestic support in 2008-2010. Members' AMS support within *de minimis* levels saw a slight or mild increase. The sum of PS AMSs within their respective *de minimis* levels (whether *de minimis* limits or *de minimis* thresholds) went up considerably from $ 8.4 billion in 2008 to $ 14.9 billion in 2010. The NPS AMS within the *de minimis* level increased from $ 22.7 billion to $ 28.6 billion. Altogether the sum of all AMSs within their *de minimis* levels grew from 7 percent to 9 percent.

4.4.1.2 The Political Landscape of Agricultural Subsidies is Changing

Agricultural subsidies have long been a subject of contention among developed Members in the multilateral negotiations, and between the EU and the United States in particular. With some developing Members emerging as key stakeholders, the political landscape and the rules of the game are being challenged and will have to be reshaped. For instance, China and India, the two biggest developing Members, have been among the top 5 providers of agricultural support, in amounts of $ 100 billion and $ 50 billion or a share of 20 per cent and 10 per cent, respectively, in global agricultural support by 2010. The amounts of support of a number of developing Members, such as Brazil, Cuba, Indonesia, Viet Nam, Thailand, Pakistan, Saudi Arabia and South Africa, exceeded $ 1 billion in 2008. If pooled together, the share of developing Members in total domestic support might reach 40 per cent.

Table 35 Structure of the Total Domestic Support of the WTO Members in 2008

Unit: $ Million

	Green	Blue	CTAMS	PS *de minimis*	NPS *de minimis*	DB	Total 2008
EU	92,390.3	7864.4	17,346.3	483.5	1,114.0	--	119,198.5
China	85,325.9	--	--	2,412.2	11,347.3	--	99,085.4

USA	81,585.0	--	9,183.5	708.3	3,578.9	--	95,055.7
India	16,927.5	--	--	1,301.3	--	31,458.7	49,687.5
Japan	17,775.7	313.5	5,734.8	148.0	1,332.2	--	25,303.8
Brazil	3,296.6	--	520.4	90.3	2,126.8	900.1	6,934.2
Switzerland	3,294.2	--	2,735.7	--	--	--	6,029.9
Canada	2,429.3	--	1,573.7	86.4	1,562.2	--	5,651.6
Cuba	5,321.3	--	--	--	--	121.7	5,443.0
Korea, Rep	4,240.5	--	30.1	503.7	264.1	4.2	5,042.6
Norway	1,216.8	705.9	2,048.8	11.0	21.6	--	4,004.1
Mexico	1,955.2	--	191.2	688.5	22.6	659.2	3,516.7
Indonesia	1,488.8	--	--	--	--	1,960.3	3,449.1
Thailand	1,921.9		5.1	898.3	--	--	2,825.3
Viet Nam	2,101.3	--	--	15.9	84.2	496.8	2,698.2
Australia	1,942.9	--	--	0.6	135.9	--	2,079.4
Chinese Taipei	1,021.3	--	127.5	9.7	262.2	--	1,420.7
Pakistan	170.9	--	--	659.7	577.3	--	1,407.9
Saudi Arabia	219.8	--	887.3	12.6	155.9	--	1,275.6
South Africa	1,185.1	--	--	--	--	--	1,185.1
Peru	1,018.4	--	--	5.8	5.6	43.2	1,073.0
Israel	369.1	--	582.7	17.4	--	--	969.2
Philippines	401.3	--	--	193.2	--	107	701.5
Colombia	262.2	--	17.8	--	--	365.6	645.6
Argentina	557.3	--	74.2	5.3	--	--	636.8
Sri Lanka	5.3	--	--	--	--	408.8	414.1
Jordan	262.2	--	--	90.4	14.6	4.5	371.7
Chile	228.3	--	--	--	42.3	45	315.6
Malaysia	215.7	--	--	--	--	83	298.7
Malawi	--	--	--	--	--	279	279.0
Honduras	29.9	--	--	--	--	244.2	274.1
New Zealand	206.3	--	--	--	--	--	206.3
Iceland	61.2	6.2	137.5	--	--	--	204.8
Mali	188.0	--	--	--	--	--	188.0
Tunisia	51.5	--	--	40.8	10.6	75.6	178.5
Costa Rica	61.6	--	62.5	--	--	--	124.1
Panama	101.4		--	0.4	--	14.9	116.7
Zambia	23.7	--	--	--	--	83.7	107.4
Uruguay	43.4	--	--	--	46.3	3.7	93.4
Botswana	36.0	--	--	--	--	31	67.0
Dominican RE	62.5	--	--	--	--	--	62.5
Barbados	47.1	--	--	1.4	--	0.8	49.3
Moldova	18.9	--	--	5.1	20.2	--	44.2
Jamaica	42.4	--	--	--	--	--	42.4
Trinidad and Tobago	41.5	--	--	--	--	--	41.5
Madagascar	38.5	--	--	--	--	0	38.5
Georgia	33.7	--	--	--	--	--	33.7
Namibia	26.6	--	--	--	--	6.8	33.4
Senegal	5.8	--	--	--	--	27.4	33.2

Paraguay	12.5	--	--	--	--	16.1	28.6
UAE	23.7	--	--	--	--	--	23.7
Guatemala	22.2	--	--	--	--	--	22.2
Albania	10.2	--	--		10.2	--	20.4
Armenia	11.9	--	--	--	5.5	--	17.4
Oman	11.9	--	--	--	--	3.6	15.5
Fiji	13.2	--	--	--	--	--	13.2
Nicaragua	10.8	--	--	--	--	--	10.8
Hong Kong	10.6	--	--	--	--	--	10.6
Bahrain	0.9	--	--	--	--	2.8	3.7
Togo	--	--	--	--	--	3.3	3.3
Cambodia	2.5	--	--	--	--	--	2.5
Qatar	1.3	--	--	--	--	0.9	2.2
St. Vincent	1.7	--	--	--	--	--	1.7
Chad	--	--	--	--	--	0.9	0.9
Tonga	0.8	--	--	--	--	--	0.8
Burundi	--	--	--	--	--	0.2	0.2
Total (2008)	330,384.3	8,890	41,258.6	8,389.8	22,740.5	37,420.2	449,083.3
Percentage	73.6	2.0	9.2	1.9	5.1	8.3	100
Total (2009)	336,831.0	8,289	32,284.1	13,053.8	27,673.5	35,107.2	453,238.7
Percentage	74.3	1.8	7.1	2.9	6.1	7.7	100
Total (2010)	364,853.2	8,361	27,386.5	14,873.3	28,646.5	37,899.1	482,019.9
Percentage	75.7	1.7	5.7	3.1	5.9	7.9	100
Source of data: author's own calculation based on Members' notifications and exchange rates from the IFS database of the IMF, see Table 3 in this Chapter.							

4.4.1.3 The Effectiveness of the AOA Rules Is Dampened by Exemptions

It is recalled in the AOA preamble that the long-term objective is to provide for "substantial progressive reductions in agricultural support and protection sustained over an agreed period of time, resulting in correcting and preventing restrictions and distortions in world agricultural markets". To do that, a reform process should be initiated through "the negotiation of commitments on support and protection and through the establishment of strengthened and more operationally effective GATT rules and disciplines". It seems to imply that the effectiveness of the WTO rules and disciplines need to take into account both the strictness (strengthened) and the flexibility or practicality (operational) of the rules.

The structural changes of Members' total domestic support as well as the evolving political landscape of agricultural support require further strengthening of the effectiveness of the AOA disciplines on the one hand and making the rules more operationally effective on the other hand. Therefore, as a matter of legal issue the effectiveness of the AOA rules on domestic support will

continue to depend on the subtle balance between these two elements.

Some conspicuously embedded mismatches between the two elements under the current legal framework of the AOA have hurt the effectiveness of the rules. What is called box shifting is one example to illustrate that. At the same time, the operational effectiveness of the rules is being tested by the large increases in support that is exempted from limits, regardless of the extent to which the support is distorting or not.

Four forms of box shifting can be discerned. Some forms are simply the effect of policy change in the sense of terminating policies under which support cannot be exempted from commitment and introducing new policies that meet the criteria for exempting the associated support from commitment. To the extent that the new policies also provide support that is less distorting, the rules of the AOA are actually effective: distortions have been reduced. Other forms are in the nature of AMS support being reclassified from PS AMSs to NPS AMS or vice versa. This is in some cases as a result of policy change and in other cases simply as a result of a change in reporting practice support under an unchanged policy.

The first form of box-shifting is replacing AMS support with Green Box support as a result of policy change. AMS support is usually coupled with production and prices, while many direct payments under Green Box are decoupled from both of them. The AOA obliges Members to reduce Amber Box support, but it leaves the door open for them to shift support from the Amber Box to the Green Box to the extent that new programs comply with corresponding Green Box criteria.[498] As the first provider of agricultural support, the EU is an example of shifting support from one category to the other as a result of major policy change. [499] Table 36 indicates that the EU's total domestic support changed only little over the 2001-2008 period. The average level in this period remained near €83 billion, about €2 billion less than its level in 2001. However, while the EU CTAMS dropped from roughly €40 billion to €12 billion, Green Box increased from €20 billion to more than € 60 billion. The share of the CTAMS in the EU's total domestic support went down from 46 per cent in 2001 to 15 per cent in 2008, while the proportion of Green Box increased from

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[498] Meléndez-Ortiz, Bellmann and Hepburn, *Agricultural Subsidies in the WTO Green Box: Ensuring Coherence with Sustainable Development Goals* (n 156) 139.

[499] Josling and Swinbank provided a very detailed summary of the policy changes of the EU due to the CAP reforms and the implications for the box shifting of the EU's domestic support. Josling and Swinbank (n 478) 27.

24 per cent to 78 per cent. This trend of policy-induced box shifting[500] between the two categories of agricultural support has continued afterwards, as the share of the CTAMS dropped to only 7 per cent, while Green Box climbed to 87 per cent in 2012.

Table 36 Total Domestic Support of the EU in 2001-2012

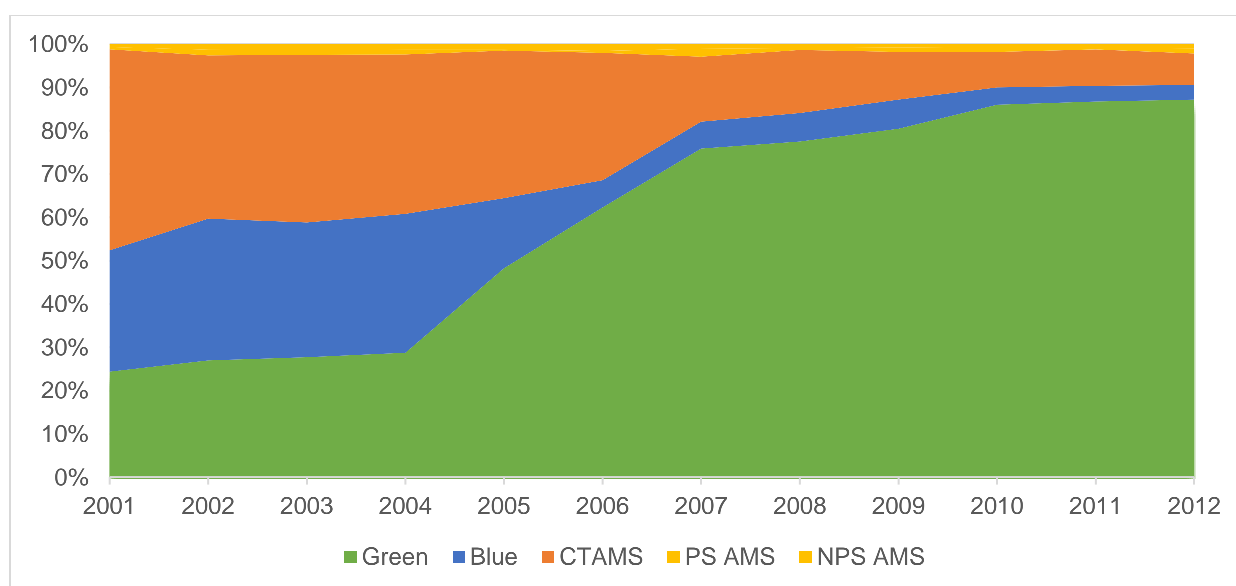
Unit: Million Euro

	Green	Blue	CTAMS	PS AMS	NPS AMS	DB	Total
2001	20,661.2	23,725.9	39,281.3	468.1	573.5	0.0	84,710.0
2002	20,404.3	24,726.5	28,490.4	1,003.7	938.1	0.0	75,563.0
2003	22,074.1	24,781.7	30,880.2	901.4	1,052.1	0.0	79,689.5
2004	24,390.6	27,236.6	31,214.3	955.3	1,086.5	0.0	84,883.3
2005	40,280.2	13,445.2	28,427.1	191.7	1,059.3	0.0	83,403.5
2006	56,529.8	5,696.7	26,632.1	445.4	1,407.0	0.0	90,711.0
2007	62,610.2	5,166.1	12,354.2	1,536.9	852.0	0.0	82,519.4
2008	62,825.4	5,347.8	11,795.5	328.8	757.5	0.0	81,055.0
2009	63,798.1	5,323.6	8,764.0	803.7	598.1	0.0	79,287.5
2010	68,051.5	3,141.8	6,501.8	692.3	700.8	0.0	79,088.2
2011	70,976.8	2,981.1	6,858.9	311.8	690.9	0.0	81,819.5
2012	71,140.0	2,754.2	5,899.1	986.1	794.5	0.0	81,573.9

Source of data: notifications from the EU

500 "It is often possible to make a direct link between policy change and subsequent support notifications. The EU provides the best example of notifications that track gradual replacement of MPS by direct payments over an extended period of time. After the US introduced new farm assistance payments in 1999 in response to falling market prices, after Brazil enacted debt rescheduling in 1995 and 1999, and after China introduced national payments to grain producers in 2004, subsequent notifications reflected the changes in policy and indicate the amount of support provided. In short, the requirement to list and categorize measures has led countries to report new policies in their notifications. Although the categorization of policy measures and notified support levels can sometimes be questioned, shifts in policy measures are clearly visible and a basis is provided for assessing compliance with commitments." Orden, Blandford and Josling (n 129) 17.

Graph 5 Structural Changes of the EU's Domestic Support in 2001-2012



Source of data: notifications from the EU

The structural changes of total domestic support in the United States and Japan tell a similar story, although less drastic. The CTAMS of the United States dropped from $ 14 billion or 20 per cent of its total domestic support in 2001 to $ 6 billion or 7 per cent in 2008, while Green Box support increased from $ 51 billion or 70 per cent of total domestic support to $ 81 billion or 86 per cent. By 2013, the share of Green Box support amounted to 90 per cent, while CTAMS was less than 5 per cent. As for Japan, it introduced decoupled income support programs in 2007 of Yen 100 billion, while non-exempt direct payments and CTAMS were reduced by a similar amount. To do that, Japan adopted the strategy of "playing the avoidance card", through which the AMS support was lowered by abolishing or redefining the purpose of the administered price on a specific product to remove the market price support from the AMS. As the product in question were excluded from the MPS computation, and consequently, the AMS support had been reduced automatically.[501]

Table 37 Total Domestic Support of the United States in 2001-2012

Unit: $ Million

	Green	Blue	CTAMS	PS AMS	NPS AMS	DB	Total

[501] Ivar Gaasland, Robert Garcia and Erling Vårdal, 'Norway: Shadow WTO Agricultural Domestic Support Notifications', *IFPRI Discussion Paper 00812* (Intl Food Policy Res Inst 2008) 10 <http://www.ifpri.org/sites/default/files/publications/ifpridp00812.pdf> accessed 7 December 2017.

2001	50,672.0	0.0	14,413.1	214.6	6,828.2	0.0	72,127.8
2002	58,321.0	0.0	9,637.3	1,589.9	5,100.5	0.0	74,648.7
2003	64,062.0	0.0	6,950.0	436.2	2,800.7	0.0	74,248.9
2004	67,425.0	0.0	11,628.9	679.8	5,777.8	0.0	85,511.6
2005	71,829.0	0.0	12,937.6	117.8	5,862.3	0.0	90,746.7
2006	76,035.0	0.0	7,742.0	171.1	3,430.1	0.0	87,378.2
2007	76,162.0	0.0	6,259.9	236.9	2,022.8	0.0	84,681.6
2008	81,585.0	0.0	6,254.9	708.3	5,988.8	0.0	94,537.0
2009	103,214.0	0.0	4,267.0	1,183.9	6,074.2	0.0	114,739.2
2010	120,531.0	0.0	4,119.5	278.0	5,386.7	0.0	130,315.2
2011	125,117.0	0.0	4,654.0	481.4	9,233.0	0.0	139,485.4
2012	127,441.0	0.0	6,863.3	4,962.5	309.3	0.0	139,576.1
2013	132,511.0	0.0	6,891.8	7,103.4	272.4	0.0	146,778.7

Source of data: notifications from the United States

The second form of box shifting is from Blue Box to Green Box. The underlying reason behind the creation the Blue Box was to facilitate reform of trade distorting subsidies towards the Green Box.[502] Both categories of support are exempt from commitment, so there is no change in AMSs or in CTAMS. Therefore, the Blue Box exemption was initially designed as an interim instrument to accommodate Members who through policy change moved out market price support into payment support. This was seen as a desirable accommodation in view of larger market distorting effects of price support than of certain types of payments. However, no mechanism has been foreseen to reduce support under the Blue Box as an incentive towards reforming policies to conform to Green Box criteria. The further replacement of Blue Box payments with Green Box payments would continue the shift towards less distorting policy instruments, to the extent that the new policies meet the Green Box criteria. Graph 5 shows that the share of Blue Box in the EU's total agricultural support decreased from 28 per cent in 2001 to 7 per cent in 2008, and further declined to 3 per cent in 2012. The increase in EU Green Box support derives from a combination of policy changes that replace AMS support and Blue Box support with Green Box support.

It is worth noting that these two forms of box shifting are a common practice among the EU, the United States and Japan (the so-called Trio) and the changes of their domestic support structure can explain to a great extent the trends of Members' total support. As Antón points out that the

[502] Meléndez-Ortiz, Bellmann and Hepburn, *Agricultural Subsidies in the WTO Green Box: Ensuring Coherence with Sustainable Development Goals* (n 156) 137.

main shifts observed in all of their notifications are from Amber and Blue Box to Green Box.[503]

The third form of box shifting takes place between the CTAMS and the PS *de minimis* AMSs. As explained earlier, there is a distinction between Members with a BTAMS of nil and Members with a non-zero BTAMS. Most Members have a nil BTAMS and their non-exempt support is limited to *de minimis* levels. Members with a non-zero BTAMS can keep non-exempt support for basic agricultural products within the *de minimis* thresholds or, if an AMS amounts exceeds its *de minimis* threshold, must include it in the calculation of CTAMS. However, they enjoy the extra privilege of shifting total AMS across commodities. The structural changes of Brazil's total domestic support over the years could serve as an example for explaining that. [504] Table 38 shows that the CTAMS of Brazil in 2001-2004 had been consistently reported as zero, and the sum of its PS AMSs had been maintained around $ 250 million. While in 2005 the sum of AMSs was still around the same level, it was split into two categories: the Brazilian government increased market price support for wheat in 2004/05, and the wheat AMS reached 20 per cent of its value of production. This exceeded the 10 per cent *de minimis* threshold and the wheat AMS had to be included in CTAMS. With Brazil reducing its subsidies for wheat in 2005/06, wheat AMS dropped to 4.9 per cent of its value of production, which was within its *de minimis* threshold[505] and the AMS did not enter CTAMS, which became zero once again. This form of policy-induced box shifting happens in the United States and the EU as well: it is simply a consequence of applying the rules for calculating CTAMS as AMSs change size.

Table 38 Structural Changes of Brazil's Total Domestic Support in 2001-2015

Unit: $ Million

	Green	Blue	CTAMS	PS AMS	NPS AMS	DB	Total
2001	1,462.0	0.0	0.0	235.8	739.9	331.5	2,769.2
2002	892.6	0.0	0.0	211.8	803.5	392.8	2,300.7
2003	820.1	0.0	0.0	249.5	1,069.1	494.5	2,633.3
2004	895.7	0.0	0.0	278.7	850.7	394.3	2,419.3
2005	1,929.4	0.0	117.0	68.8	1,193.4	626.3	3,934.9
2006	2,421.9	0.0	0.0	307.5	1,343.0	764.7	4,837.1

[503] Meléndez-Ortiz, Bellmann and Hepburn, *Agricultural Subsidies in the WTO Green Box: Ensuring Coherence with Sustainable Development Goals* (n 156) 152, 156-157,160.
[504] Sharma (n 360) 77–78.
[505] Notification from Brazil dated 10 May 2010, ORGANIZATION, G/AG/N/BRA/26, p.12, p.25.

2007	2,345.6	0.0	341.8	436.3	1,470.0	642.9	5,236.6
2008	3,296.6	0.0	520.4	90.3	2,126.8	900.1	6,934.2
2009	3,579.8	0.0	292.9	170.1	1,907.7	870.7	6,821.2
2010	4,906.9	0.0	269.0	682.4	2,528.2	1,651.0	10,037.6
2011	4,500.1	0.0	213.7	581.8	2,846.5	1,739.3	9,881.4
2012	4,771.5	0.0	7.7	236.7	2,364.2	1,039.7	8,419.8
2013	6,199.4	0.0	0.0	320.6	2,109.6	1,070.0	9,699.6
2014	4,295.3	0.0	0.0	399.5	2,269.9	1,875.3	8,840.0
2015	1,634.4	0.0	0.0	177.9	1,724.6	1,312.5	4,849.4

Source of data: notifications from Brazil

The fourth form of box shifting is between the non-product specific AMS and the development programs. As the development programs are part of the special and differential treatment granted to developing country Members, this form of box shifting takes places in developing Members. The difference in the domestic support profiles of India and China gives a hint. Both India and China have provided considerable agricultural input subsidies and investment subsidies, but they are dealt with in a different manner under the legal framework of the AOA. China has committed not to exempt such subsidies under Article 6.2 and thus must include them in the calculation of AMSs. China accounts for agricultural input subsidies as part of its non-product specific AMS. India exempts input subsidies and investment subsidies under Article 6.2. India thus has more maneuvering room than China, as it can choose to exempt agricultural input subsidies from AMSs or include them in one or more AMSs, such as the NPS AMS. Table 39 shows that India's investment and input subsidies exempted under Article 6.2 accounted for more than 60 per cent of its total domestic support, nearly two times its Green Box support in 2008. India changed its reporting of much of its investment and input subsidies from being part of NPS AMS in 1995-96 to exempting them as Article 6.2 support in subsequent years, without justifying this reporting change as a result of policy change.[506] From 1998-99 onwards India shifted all such subsidies from NPS AMS to the Article 6.2 exempt category, without linking the shift to policy change. This is thus an example of box shifting through reporting practice.

[506] Gopinath observes several key changes of India's notifications after the 1996. The first was the transfer of 80 percent of fertilizer, irrigation, and electricity subsidies from non-PS AMS, which already accounted for 7 per cent of India's value of agricultural production in 1995, to special and differential treatment of low-income and resource-poor farmers. Munisamy Gopinath, 'India: Shadow WTO Agricultural Domestic Support Notifications', *IFPRI Discussion Paper 00792* (Intl Food Policy Res Inst 2008) 26 <http://www.ifpri.org/publication/india-shadow-wto-agricultural-domestic-support-notifications> accessed 7 December 2017.

Table 39 Domestic Support Profile of China and India in 2001-2010

Unit: %

	India			China		
	Green	PS AMS	DB	Green	PS AMS	NPS AMS
2001	32.7	0.0	67.3	99.0	0.7	0.3
2002	41.6	0.0	58.4	99.4	0.5	0.1
2003	39.5	0.0	60.5	99.0	0.5	0.5
2004	36.6	0.0	63.3	98.0	1.3	0.6
2005	32.4	0.0	67.6	98.5	0.8	0.7
2006	29.5	0.0	70.5	95.6	0.4	4.0
2007	29.6	1.3	69.1	91.6	2.3	6.1
2008	34.1	2.6	63.3	86.1	2.4	11.5
2009	35.5	3.5	61.0	81.5	3.3	15.2
2010	36.5	4.3	59.2	81.3	3.9	14.9

Source of data: notifications from China and India

From the legal perspective, the consequences of box shifting are mixed. This follows from differences among Members in how they have carried out box shifting. On the one hand, it has facilitated the political efforts by some major players to undertake domestic reforms of their agricultural subsidies policies in order to fulfil their international commitments under the multilateral trading system in reducing trade-distorting domestic support. This can be seen as the legitimate reasons for allowing box shifting.[507] The shift from AMS support, especially MPS, resulting from the numerous reforms of CAP in the EU[508] or the Farm Bills in the United States, has resulted in support taking less distorting forms, although the amount of support has not necessarily been reduced.[509] From the positive point of view, policy-induced box shifting has

507 Meléndez-Ortiz, Bellmann and Hepburn, *Agricultural Subsidies in the WTO Green Box: Ensuring Coherence with Sustainable Development Goals* (n 340) 571.

508 "Domestically in developed countries, the building up of support for the round was sustained on adjustment and compensatory policies that covered the losses incurred by farmers, entrepreneurs and workers employed in agriculture and other traditional sectors. The purpose was to neutralize their opposition to the change in policies by guaranteeing their historical amount of receipts. The MacSharry Reform in the EU, approved late in the round, was a clear demonstration of this. The action by the offensive domestic interests to convince parliaments and the public opinion of the advantages of opening up high-tech and service markets around the world supplemented the former defensive action. In developing countries, the traditional sectors played the offensive role, while the representatives of the new sectors did not form constituencies strong enough to deter authorities from joining the upcoming negotiations." Meléndez-Ortiz, Bellmann and Hepburn, *Agricultural Subsidies in the WTO Green Box: Ensuring Coherence with Sustainable Development Goals* (n 156) 26.

509 "In general, countries have stayed within their (domestic support) commitments. However, many issues of interpretation are identified concerning the ways in which policies have been reported by countries. There is evidence

elucidated the element of "practicality" or "operational" as emanating from the effectiveness of the AOA rules and disciplines on domestic support. It is also conducive to the achievement of policy coherence among WTO Members in defining and categorizing agricultural subsidies under relevant umbrellas in accordance with the criteria for exemption under the AOA.[510] On the other hand, achievements have been made at the cost of the strictness of the AOA rules and disciplines. "The function of the Agreement (on Agriculture) is to impose legal requirements on WTO Members, its fundamental purpose is to discipline policies that are most likely to lead to distortions in agricultural production and trade and to contribute to a reform process in which the use of trade-distorting policies is reduced."[511] Under the current framework of the AOA, there are two basic legal requirements that are fundamental to the effectiveness of the rules and disciplines. One is the *de minimis* level for AMSs, which decides the size of most Members' limited policy space. The other one is the "have no, or at most minimal trade-distorting effects or effects on production" requirement for Green Box measures, which defines a part of Members' exemption space. The other parts are the Blue Box exemption and the Article 6.2 exemption for developing countries.

Notably, nearly all types of box shifting involve a policy change that shifts support from the limited AMS space to the exemption space or a change in reporting practice that shifts support from AMS space to exemption space or taking advantage of the rules for calculating CTAMS. Therefore, from the legal point of view the big concern is that increased Green Box support in the EU and other Members may necessitate a fundamental revision of Annex 2 to ensure that Members do not use the box as a way to evade their reduction commitments.[512] The existence of various types of box shifting, whether based on policy reform or on change in reporting practice, may justify efforts to

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of strategic behavior. This is manifest in changes in the way that support relating to some policy measures has been notified or the shifting of measures across categories in order to remain within the commitments imposed by the Agreement without making real changes in the underlying types of measures or levels of support provided." Orden, Blandford and Josling (n 129) 10.

[510] "The agricultural package also addresses many other issues of vital economic and political importance to many Members. These include provisions that encourage the use of less trade-distorting domestic support policies to maintain the rural economy, that allow actions to be taken to ease any adjustment burden, and also the introduction of tightly prescribed provisions that allow some flexibility in the implementation of commitments." World Trade Organization, Legal Text: the WTO Agreements—A Summary of the Final Act of the Uruguay Round, <https://www.wto.org/english/docs_e/legal_e/ursum_e.htm#aAgreement>, last accessed December 6, 2017.

[511] Orden, Blandford and Josling (n 129) 14.

[512] McMahon and Desta (n 159) 13.

close any loopholes embedded in the rules and disciplines.[513] For instance, there may be a lack of precision in the criteria that differentiate Green Box compatible direct payments to producers from non-exempt direct payments accounted for in AMSs.[514] It may be also due to poor compliance with the existing criteria or lack of adequate means to prevent this.[515] In this sense, from the negative point of view, some forms of box shifting have reinforced the difference among Members in terms of the size of their limited AMS space. This is the case when policy change reduces a product's AMS enough to bring it within its *de minimis* threshold. For most Members, the rules and disciplines are strict in the sense that no AMS may exceed its *de minimis* limit, while a sub-set of Members have the flexibility of letting their AMSs to some extent exceed their thresholds. The strictness of the AMS *de minimis* limits is of course offset by the fact that these limits increase as values of production increase in nominal terms, whereas the BTAMS remains constant in nominal terms. Moreover, almost all of the Members with *de minimis* AMS limits calculate these limits using 10 per cent of values production, not 5 per cent. Members with *de minimis* limits at 10 per cent of values of production are also able to exempt investment subsidies and input subsidies in unlimited amounts from their AMSs. Taking these various factors into account helps to nuance and enrich the context within which arguments about some kinds of box shifting are made.

Adopting total domestic support as an indicator would help to evaluate a Member's level of agricultural support and to monitor the extent to which agricultural support and protection are

[513] "The challenge remains to be faced whether a set of multilateral rules will eventually reflect a global consensus about a common end point to which agricultural policies should converge across countries." Orden, Blandford and Josling (n 129) 19.

[514] "The goal of the domestic support commitments is to allow Member states to direct support to the agricultural sector while limiting the trade effects from such support. The ability of the commitments to do this is strictly dependent on the precision of the domestic support guidelines in categorizing programs in their trade impacts. Judging from recent trade disputes, precision is somewhat lacking. The lack of precision was recognized in the URAA, as Blue and Amber Box programs were not completely restricted. If only non-trade-distorting programs had been allowed, the ability of Member states to reach consensus on the guidelines for such programs would have been severely tested. The Uruguay Round lasted eight years and the current agricultural negotiations are already in their sixth year. If the negotiations include strict guidelines on non-trade-distorting domestic support, we can imagine that the negotiations might take considerably longer and be even more contentious. One potential way to avoid this situation is to provide a temporarily generous definition of the Green Box, which would allow buyout or phase out of Amber and Blue Box forms of support. Then a progressive phase down of the Green Box would discipline remaining farm support over time. It took eight GATT round to get rid of industrial protection. It is foolish to hope that vested agricultural interests in some of the high- and middle-income countries would give up huge and concentrated rents without virulent and long fights." Chad E Hart and John C Beghin, 'Rethinking Agricultural Domestic Support under the World Trade Organization', in Anderson K.and Martin W. (ed.), *Agricultural Trade Reform and the Doha Development Agenda* (Copublication of Palgrave Macmillan and the World Bank, 2006) 236–237.

[515] Meléndez-Ortiz, Bellmann and Hepburn, *Agricultural Subsidies in the WTO Green Box: Ensuring Coherence with Sustainable Development Goals* (n 340) 572.

being progressively reduced. Such an indicator would measure support over time regardless of how a Member classifies its support as a result of policy change or as a result of changing reporting practice without underlying policy change. The total domestic support of some key players has not been reduced and has instead either undergone a radical increase or remained quite stable. For instance, the total domestic support of the United States doubled from $ 72.1 billion in 2001 to $ 146.8 billion in 2013 (much of the increase is in the form of domestic food aid). The total domestic support of the EU has been maintained around €80 billion since 2007. After a brief decline, Japan's CTAMS has rebounded since 2007 and the share of AMS support (CTAMS, PS AMSs and NPS AMS) in the total domestic support increased from 21 per cent in 2001 to 29 per cent in 2012. Likewise, the total domestic support of China increased from Y 245 billion in 2001 to Y 658 billion in 2010, and the total domestic support of India grew from $ 12 billion in 2001-02 to 44 billion in 2013-14. In total, therefore, the actions of many major agricultural producers do not reveal reductions in agricultural support.

4.4.2 The Practicability of the AOA Rules and Disciplines

The practicality issue deals with two aspects of the application of the AOA domestic support rules: one concerns the functioning of the rules, which has been discussed earlier. The other aspect concerns to what extent the rules and disciplines can be used by Members, particularly developing ones.

As of April 2017, a total of **66** Members (counting the EU as one) had notified their domestic support in 2008, which was about 50 percent of the WTO Members by that time. This means that half of the WTO Membership had not notified or had not provided domestic support**.** This is particularly the case for Sub-Saharan African countries and the Least Developed Countries (LDCs). Among the 40 WTO Members from the Sub-Saharan African group as identified by the World Bank,[516] only 4 Members, including South Africa, Botswana, Namibia and Burundi, had notified agricultural support. Among the 34 Members from the LDCs group as identified by the United Nations,[517] only 2 Members, Burundi and Cambodia, had notified agricultural support. It can

[516] The World Bank, Sub-Saharan Africa, <http://data.worldbank.org/region/sub-saharan-africa>, last accessed 7 December 2017.

[517] United Nations Committee for Development Policy, Department of Economic and Social Affairs, the United Nations, 'List of Least Developed Countries' <https://www.un.org/development/desa/dpad/wp-content/uploads/sites/45/publication/ldc_list.pdf>, last accessed 7 December 2017.

probably be assumed that those Members who had not notified domestic support for 2008 did not provide significant amounts of domestic support, if any. The reasons why many Members notified no or very little domestic support could be partly attributed to three factors: One is that the provision of any domestic support is based on Members' financial strength, and many developing Members, particularly the LDCs could not afford to do that.[518] The second factor is the limitations imposed by the Green Box measures. [519] The third factor is that most developing Members choose to protect their agriculture by border measures, rather than by domestic support measures.[520]

4.4.2.1 Green Box

Among the various Green Box measures identified in Annex 2 of the AOA, direct payments have overtaken general services as the type of measure under which the most support is exempted. The expenditure of WTO Members on direct payments and on general services in 2008 was $ 136.6 billion and $ 102.7 billion, respectively, accounting for 45 per cent and 33.8 per cent of total Green Box support. Table 32 indicates that among the various direct payment headings of Paragraph 5 through 13 of Annex 2, the largest amount of support is claimed under the decoupled income support heading. However, this does not mean it is used by a large number of Members. Only 12 Members exempted support under the decoupled income support heading in 2008, with a total expenditure of $60 billion. The EU alone contributed $ 45 billion or nearly 40 per cent. In contrast, 23 Members notified payments under natural disaster relief programs with a total expenditure of $ 12 billon. The headings of environmental programs (19 Members), investment aids (15 Members) and regional assistance (16 Members) were also used by numerous Members. The headings of resource retirement programs (3 Members), producer retirement programs (6 Members), income insurance and income safety-net programs (4 Members) and direct payments to producers (4 Members) were rarely used by Members. The limited number of Members who claimed exemption

[518] Ralf Peters and David Vanzetti, 'Shifting Sands: Searching for a Compromise in the WTO Negotiations on Agriculture' (Social Science Research Network 2008) SSRN Scholarly Paper ID 1281522 10 <https://papers.ssrn.com/abstract=1281522> accessed 7 December 2017.

[519] Meléndez-Ortiz, Bellmann and Hepburn, *Agricultural Subsidies in the WTO Green Box: Ensuring Coherence with Sustainable Development Goals* (n 340) 387.

[520] "The rules and commitments on domestic support are particularly important in this context because of the market-distorting effects of many of the policy measures countries have enacted. In addition, without constraints on domestic support it is hard to envision success in multilateral negotiations to reduce agricultural tariffs, as some countries provide support for their farmers primarily through domestic measures while others rely more heavily on border protection." Orden, Blandford and Josling (n 129) 3.

for expenditure under direct payments programs also suggests that direct payments programs may not be particularly practical to implement or that Members' commitments are not tight enough to require policies to be designed to meet the criteria of Annex 2 for direct payments.

For general services the situation is different. The infrastructural services heading was used by as many as 41 Members in 2008. Among them only 6 Members were developed Members, meaning that many developing Members found this exemption heading applicable to their support. Infrastructural services accounted for nearly one fifth of China's total domestic support in 2008, while it was about 45 per cent for Thailand. Developed Members have used general services for different policy objectives. In the case of Japan, infrastructural services form the greater part of general service expenditure. For the EU, the general service categories with largest spending are pest and disease control and research; in the United States, the categories are sub-national state programs that are not singled out and research. [521]

Table 40 Decoupled Income Support and Infrastructural Services in 2008

Unit: $ million

Infrastructural services			Decoupled Income Support		
Members	Expenditure	% of total domestic support	Members	Expenditure	% of total domestic support
China	18,038.9	18.2	EU	46,902.5	39.3
Japan	6,920.7	28.1	USA	5,776.0	6.1
EU	2,638.4	2.2	China	3,396.6	3.4
Korea, Rep	1358.7	26.9	Switzerland	1,498.1	24.8
Thailand	1280.8	45	Japan	980.1	4.0
Brazil	632.4	9.1	Korea, Rep	823.7	16.3
Viet Nam	305.9	11.3	Mexico	743.4	21.1
Chinese Taipei	289.6	20.4	Israel	27.8	2.9
India	273.8	0.6	Iceland	23.2	11.2
Peru	213.3	19.9	Argentina	18.9	3.7
Philippines	199.1	28.4	Georgia	4.3	12.8
Mexico	179.4	5.1	Australia	0.9	0.0
Colombia	158.5	24.6	Total	60,195.7	13.5
Saudi Arabia	145.9	11.4			
Canada	105.6	1.9			
Australia	102.3	4.9			

[521] Meléndez-Ortiz, Bellmann and Hepburn, *Agricultural Subsidies in the WTO Green Box: Ensuring Coherence with Sustainable Development Goals* (n 340) 183.

Switzerland	81.9	1.4
Pakistan	68.7	4.9
Malaysia	67	22.4
Chile	63.9	20.2
New Zealand	42	20.4
Tunisia	36.6	20.5
Georgia	27.4	81.3
Jordan	26.4	7.1
Mali	23.6	33.7
Panama	17.4	14.9
Barbados	16.8	33.9
Argentina	15.2	3.0
Trinidad and Tobago	7.6	18.3
Oman	4	25.8
Albania	3.9	19.1
Costa Rica	2.7	2.7
Zambia	2	1.9
South Africa	1.4	0.1
Armenia	1.4	8.0
Cambodia	1.4	56.0
Dominican Republic	1.4	2.2
Guatemala	1.3	5.9
Hong Kong, China	0.7	6.6
Indonesia	0.5	0.0
Tonga	0.2	25.0
Total	33,358.50	7.5

Source of data: author's own calculation based on Members' notifications and exchange rates from the IFS database of the IMF, see Table 3 in this Chapter.

While the headings of domestic food aid and public stockholding for food security purposes were used by a numerous Members, large amounts of support were exempted only by one or two of them. Table 41 shows that these two Green Box headings were used by about 20 Members in 2008. Exemptions under the domestic food aid heading were dominated by the United States, whose expenditure was about three fourths of its Green Box expenditure or two thirds of its total domestic support in 2008. The expenditures exempted under public stockholding for food security purposes were dominated to an extreme extent by the expenditures of India and China.[522]

[522] "The pattern of use of the Green Box by developing country Members suggests that the limiting provisions accompanying green box measures have imposed restrictions on these members. For instance, only a few members have used programmes for public stockholding for food security purposes and regional assistance, both of which are

Table 41 Domestic Food Aid and Public Stockholding 2008

Unit: $ Million

Domestic Food Aid		Public Stockholding for Food Security Purposes	
USA	60,519.0	India	9,495.1
Cuba	1,952.8	China	8,335.6
Indonesia	1,246.5	Brazil	234.2
EU	867.1	Japan	202.2
Brazil	812.8	Korea, Rep	124.4
South Africa	198.7	Viet Nam	103.2
Jordan	198.6	Indonesia	71.9
Pakistan	69.3	Philippines	20.3
Georgia	35.7	Zambia	14.3
Viet Nam	25.3	Israel	12.0
Korea, Rep	22.9	EU	7.3
Japan	21.3	Saudi Arabia	6.5
Madagascar	14.6	Iceland	4.4
China	9.2	Moldova	4.3
Guatemala	6.0	Barbados	2.1
Mali	2.2	Switzerland	1.6
Nicaragua	0.6	Norway	1.1
		Namibia	0.6
		Albania	0.1
Total	66,002.6	Total	18,641.2

Source of data: author's own calculation based on Members' notifications and exchange rates from the IFS database of the IMF, see Table 3 in this Chapter.

Under the current framework of the AOA, the role of the Green Box and Blue Box criteria in defining exemptible legal instruments of domestic support is far from perfect as it fails to strike a balance between the strictness and the practicality of the rules and disciplines. The criteria for defining and distinguishing various types of domestic support measures have accommodated policy changes where some Members reduced MPS and replaced it with direct payments of particular types. Until now only certain developed Members have been able to take advantage of such provisions, such as the heavy use of paragraph 6 (decoupled income support) by the EU. Direct payments to producers as described in paragraph 5 of Annex 2 were provided by Australia,

of critical importance to most developing countries." Meléndez-Ortiz, Bellmann and Hepburn, *Agricultural Subsidies in the WTO Green Box: Ensuring Coherence with Sustainable Development Goals* (n 340) 390.

Argentina, Uruguay and Chile in 2008. The income insurance and safety net programs is barely used, either by developed or developing Members,[523] however, some developed Members are intended to shift their insurance and safety net programmes from the *de minimis* to the Green Box. Designing farm income support programs to meet the criteria under paragraphs 5 or 6 provides some legal assurance that the support does not need to be counted as AMS support. While such legal assurance is available for any Member, whether a developed Member or a developing Member, the fact is that most developing Members have not been in a position to take advantage of this exemption. The same holds for the exemption of direct payments under other Green Box headings, such as farmers' income safety nets. Many developing Members have not had the means to offer large payments to farmers and instead concentrate their government expenditures in agriculture on general services (such as infrastructural services, pest and disease control, and training services) or public stockholding for food security purposes. These expenditures boost these Members' agricultural productivity and contribute to satisfying the supply dimension of food security. However, many developing Members also provide investment subsidies and input subsidies, which they exempt from AMSs by virtue of Article 6.2 (not available to China and Kazakhstan). India exempts an unusually large amount of support from AMSs under that article. The effects of input subsidies on productivity can be very different from the effects of direct payments.

It thus remains a challenge for WTO Members to balance the conflicting priorities of Members at different development stages in terms of ensuring that there is legal policy space to exempt some domestic support from limits, achieving Members' policy objectives through particular instruments, and substantially reducing support and protection, while also accommodating special and differential treatment for developing Members.

4.4.2.2 Amber Box

Though support through non-exempt measures is subject to limits under the AOA, such measures have remained the most immediate policy choice for market intervention by Member governments. The total amount provided by WTO Members as non-exempt support, i.e., AMSs (CTAMS and *de minimis* AMSs) was $ 71.2 billion in 2008. This corresponded to about 16 per cent or roughly

[523] Meléndez-Ortiz, Bellmann and Hepburn, *Agricultural Subsidies in the WTO Green Box: Ensuring Coherence with Sustainable Development Goals* (n 340) 184.

one fifth of their total domestic support. Non-exempt support thus remains an essential part of Members' agricultural support. The motivation for making some support subject to limit was to rein in trade-distortions. However, many types of support that are exempted from limits, such as Blue Box support, Article 6.2 support and even some Green Box support, can be trade-distorting. This erodes to some extent the effectiveness of the limits in terms of reducing trade distortions.

One issue concerning non-exempt support is how to strike a balance between Members with scheduled BTAMS commitments and Members without. There are substantial differences in terms of their rights and obligations in using non-exempt domestic support. A Member without a BTAMS has legal support space within each of the *de minimis* limits applying to individual AMSs. These limits vary with changes in the Member's values of production for agriculture and for individual products. A Member with a non-zero BTAMS commitment has discretion to choose the basic agricultural products entitled to support and the level of support for each product. This makes it possible to raise or reduce support according to, e.g., the market situation of each product or the income of producers. A Member with a nil BTAMS does not have this flexibility and is constrained to maintaining each AMS within its *de minimis* limit at all times. However, it should be recognized that there is also a contrast between Members with only a small BTAMS and Members with a large BTAMS. A Member with only a small BTAMS is obviously more limited in how much it can let one or more AMSs exceed their *de minimis* thresholds than is a Member with a large BTAMS. Among the whole WTO membership, 32 Members have a non-zero BTAMS (15 developed Members and 17 developing Members). While phasing out these BTAMS commitments would help to bring Members closer to an equal footing as far as the limited policy space for AMS support is concerned, an unequal footing might still remain in terms of the exemption space, where some Members enjoy the flexibility of being able to exempt certain investment subsidies and input subsidies while other Members do not.

4.5 Linkage between Domestic Support and Export Subsidies

Agricultural subsidies, either domestic support or export subsidies, are closely linked in terms of their effects at international and domestic markets. Some heavily supported agricultural products are also those that are heavily traded, then this would suggest that levels of domestic support for those agricultural products may have a significant impact on world trade or the export of other

trading partners.[524] Although domestic support and export subsidies are different in terms of their price-setting mechanisms, they cannot be evaluated in isolation, as there are spillover consequences of domestic support measures on export support.[525]

4.5 Case Studies

1) Canada—Measures Affecting the Importation of Dairy Products and the Exportation of Milk (Canada-Dairy)

The United States and New Zealand filed a challenge in March 1998 against the special milk class system of Canada for its inconsistencies with the provisions of the AOA, SCM Agreement and the GATT 1994. This case covered Canadian government domestic milk-production and export supports that were provided through Canada's Special Milk Classes Scheme as well as the Canadian government's application of its TRQ for imports of fluid milk, which cut across the three pillars of the AOA. In this sense, the Canada-Dairy has always been cited as the best example to show the complex linkages within the three pillars of the AOA. Nevertheless, the real legal issue in dispute in this particular case is the relationship between domestic and export subsidies.

Canada has established a very complicated regime for the regulatory control over trade in dairy products. Under the Special Milk Classes Scheme at issue, milk was divided into five different classes, and four of which were designed for the domestic market, while the fifth was comprised of a cluster of five sub-classes for "Special Milk." Class 5(d) was for milk used in products exported, notably for the US and UK markets under a negotiated quota system, and 5(e) was for removal of surplus milk from the domestic market, which could be in or over quota. The Canadian government had a different invention mechanism for the milk prices and pricing differed by class due to the government intervention. Prices in the first four classes were developed by the Canadian provincial marketing boards, while Special Class 5 required processors and exporters to apply for a permit from the Canadian federal government agency and the permit would be used as the basis for gaining provincial access to the milk. The complainants, the United States and New Zealand,

[524] Jared Greenville, 'Domestic Support to Agriculture and Trade: Implications for Multilateral Reform' [2017] Geneva: ICTSD. www. ictsd. org/node/99232 20 <https://www.ictsd.org/sites/default/files/research/domestic_support_to_agriculture_and_trade_ictsd_issue_paper_0.pdf> accessed 23 January 2019.

[525] H Horn and PC Mavroidis, The WTO Case Law of 2001: The American Law Institute Reporters' Studies (Cambridge University Press 2004) 237.

challenged Special Classes 5(d) and 5(e) of the Special Milk Classes Scheme under Articles 9.1(a), 9.1(c), 3.3 and 10.1 of the AOA and argued that Canada's scheme violated their commitments in export subsidies reduction.[526]

The Panel found that the Canadian dairy scheme represented a violation of Articles 9.1(a), 9.1(c), 3.3 and 10.1 of the Agriculture Agreement. Further, it held that some of the restrictions imposed by Canada under its TRQ administration violated GATT Article II.1 (b). These findings were appealed by Canada, but the AB upheld the Panel's main finding that Canada was in violation of its export subsidy reduction commitments under the AOA, though the AB also reversed a number of elements of the Panel report.

Nevertheless, the Complaints again challenged Canada for failing to comply with the recommendations of the DSB after the reasonable implementation period expired in January 2001. The matter at issue this time was the "commercial export milk" (CEM). According to this new policy, domestic producers can sell any quantity of CEM, without any requirement a quota or permission from the government, to processors for export on terms that are freely negotiated between them. However, if a processed dairy product using CEM is sold on the domestic market, there are penalties applied to the processor for diverting such product to the domestic market. The United States and New Zealand challenged that the CEM market system and the continued operation of Special Milk Class 5(d) was inconsistent with relevant provisions of the AOA and constituted an export subsidy. The compliance panel ruled that Canadian new practices were inconsistent with its obligations under the AOA. Accordingly, it requested Canada to bring its dairy products marketing regime into conformity with its obligations in respect of export subsidies under the AOA. The AB upheld the compliance Panel's finding that the measure at issue--the supply of CEM by Canadian milk producers to Canadian dairy processors-involves export subsidies in the form of "payments" on the export of milk that are "financed by virtue of governmental action" within the meaning of the AOA. The AB noted that there could be some "spillover" effects between WTO-consistent domestic supports to exports. The distinction between domestic support and export-subsidy disciplines would be ended, however, if two consistent supports were automatically characterized as export subsidies because they produced spillover

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[526] 'WTO | Dispute Settlement - the Disputes - DS103' <https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds103_e.htm> accessed 24 January 2019.

economic benefits for export production.[527] The systemic tension as illustrated by this case between the permitted domestic supports and prohibited export subsidies under the scenario where the domestic subsidy fosters the export subsidy remains unsolved under the current framework of the AOA and will have some profound implications on Members' policy space.

2) European Communities—Export Subsidies on Sugar (EU-Sugar)

In September 2004, a WTO panel was established to consider complaints by Brazil, Australia and Thailand regarding export subsidies of the European Communities for sugar and sugar-containing products. The measures at issue in this case are Common Organization for Sugar (CMO) (Council Regulation (EC) No. 1260/2001) and related instruments (together, the EC sugar regime). The EC sugar regime established two categories of production quotas "A sugar" and "B sugar" and set the minimum prices for A and B sugar and beet. These quotas constituted the maximum quantities eligible for domestic price support and direct export subsidies. Further, sugar produced in excess of A and B quota levels was called C sugar, which was not eligible for domestic price support or direct export subsidies and should be exported. There was no difference in physical characteristics between A, B, and C sugar and beet. However, unlike for A and B beet, there was no minimum guaranteed price for C beet. The Complaints claimed that the EC provided export subsidies for sugar in excess of its reduction commitment levels specified in its Schedule and in violation of certain provisions of the AOA, the SCM Agreement and other WTO agreements.

The Panel Report concluded that the EC's domestic subsidies for C sugar constituted export subsidies within the meaning of Article 9.1(a) of the Agreement on Agriculture and its total exports of sugar exceed its quantity commitment level. Therefore, the EC sugar regime violated the relevant provisions of the AOA and the SCM.

The EU appealed the Panel's findings. However, the Appellate Body upheld the Panel's finding [528] that the EC violated Article 3.3 and 8 of the AOA by exporting C sugar because export subsidies in the form of payments on the export financed by virtue of government action within the meaning of Article 9.1(c) were provided in excess of the EC's commitment level. In this regard, the EC

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[527] H Horn and PC Mavroidis, *The WTO Case Law of 2001: The American Law Institute Reporters' Studies* (Cambridge University Press 2004) 261.

[528] Report of the Appellate Body, European Communities-Export Subsidies on Sugar, WT/DS265/AB/R, Para.346.

provided two types of "payments" within the meaning of Article 9.1(c) for C sugar producers, i.e. (i) sales of C beet sugar below the total costs of production to C sugar producers; and (ii) transfers of financial resources, through cross-subsidization resulting from the operation of the EC sugar regime.[529]

These two interesting case studies shed light on the complexity of Members' policy space. Due to the fact that Members' policy space in domestic support can be converted into their policy space in export subsidies, it will have some profound legal implications as Members have agreed to eliminate export subsidies.

4.6 Conclusions on Members' Policy Space in Domestic Support

Based on the categorization of domestic support measures,[530] the AOA has created two types of policy space in domestic support: exemption space and limited space. For this reason, Brink defines Members' policy space in domestic support as a "two-fold metric of policy space".[531] This distinction has allowed the AOA to focus on trade-distorting policies, negotiate cuts, and provide an incentive for Member governments to re-instrument their agricultural policies toward the "Green Box".[532] Exemption space is available for those domestic support measures or instruments that have been exempted from any reduction commitments, including Green Box, Blue Box, and development box; while limited space allows the provision of support under non-exempt measures, i.e., AMS support, up to a Member's limit(s), either its *de minimis* limits if the Member has no Final Bound Total AMS (FBTAMS) or its FBTAMS if the Member does have one.[533]

4.6.1 Members' Exemption Space in Domestic Support

1) Members' use of exemption space is growing with agricultural subsidies becoming greener.

Green Box support is considered to increasingly represent the future direction of WTO Members'

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[529] WTO Legal Affairs Division, WTO Dispute Settlement: One-Page Cases Summaries, 1995-September 2006, p.97. https://www.wto.org/english/res_e/booksp_e/dispu_summary06_e.pdf, accessed 6 February 2019.

[530] "The Agreement on Agriculture (URAA) categorized domestic support according to its presumed effect on trade. Subsidies that were deemed to be "trade distorting" were subject to limits specified in member schedules. Those that were regarded as having no (or minimal) impacts on trade were sheltered from reduction obligations." Timothy Josling, 'Rethinking the Rules for Agricultural Subsidies' (ICTSD 2015) 1 <http://www20.iadb.org/intal/catalogo/PE/2015/15251.pdf> accessed 7 December 2017.

[531] Brink, 'Policy Space in Agriculture under the WTO Rules on Domestic Support' (n 362).

[532] Meléndez-Ortiz, Bellmann and Hepburn, *Agricultural Subsidies in the WTO Green Box: Ensuring Coherence with Sustainable Development Goals* (n 340) 70–71.

[533] Brink, 'Policy Space in Agriculture under the WTO Rules on Domestic Support' (n 362).

agricultural policy.[534] It has become quite dominant not only in Members' exempt domestic support, but also in their overall agricultural subsidies. Data shows that Green Box support has accounted for 80 per cent of WTO Members' exempt domestic support or 75 per cent of their total value of agricultural subsidies by 2010. As Members' total agricultural subsidies have been growing in recent years, WTO Members' use of exemption space is also growing bigger with the trend of agricultural subsidies becoming greener. This process has been accompanied by a controversial trend of "box shifting" as the substantial increases in Green Box subsidies have more than compensated the decline in AMS support and Blue Box subsidies.[535]

The changing landscape of agricultural subsidies has brought about a myriad of legal issues. First, box shifting has not been outlawed by the AOA, if these measures have complied with the fundamental principle or criteria of Green Box.[536] However, box shifting has undermined the confidence of Members towards the effectiveness of the AOA rules and developing Members in particular are quite critical in this regard.[537] In fact, when box shifting happens from AMS support to Green Box support, a legal concern arises about whether trade-distorting AMS support has been turned into less trade distorting Green Box support without breaking the AOA rules? For instance, some Members have clearly attempted to design new policies to meet the criteria of Annex 2 (Green Box) at the same time as they have eliminated non-exempt policies or reduced support provided under non-exempt measures. Their policy measures claimed as Green Box compliant are completely different in nature from the non-exempt measures they replace. The EU and the United States have done this through a series of agricultural policy reforms that aim at effectively cutting the link between payments, production, and prices to make the payments a direct transfer of income

[534] ICTSD, 'Information on Agricultural Subsidies in the WTO Green Box: Ensuring Coherence with Sustainable Development Goals' <https://www.files.ethz.ch/isn/110428/green-box-web-1.pdf> accessed 7 December 2017.

[535] Jonathan Hepburn and Christophe Bellmann, The Future of Green Box Measures, in Meléndez-Ortiz R. et al., (ed.), 'Tackling Agriculture in the Post-Bali Context'.

[536] Rashmi Banga, 'Impact of Green Box Subsidies on Agricultural Productivity, Production and International Trade', *UNCTAD Background Paper NO. RVC-11* (2014) 2 <http://unctad.org/en/PublicationsLibrary/ecidc2014misc1_bp10.pdf> accessed 7 December 2017.

[537] "Developing countries, in particular, have been critical of the possibility of 'box shifting', arguing that giving farmers money, even if unrelated to production, will influence the amount produced." Keith Walsh, Martina Brockmeier and Alan Matthews, 'Implications of Domestic Support Disciplines for Further Agricultural Trade Liberalization', *IIIS Discussion Paper No. 99* (2005) 19 <https://www.tcd.ie/iiis/documents/discussion/pdfs/iiisdp99.pdf> accessed 7 December 2017.

to the farm household, [538]or shifting market intervention of Member governments from essentially determining the market price for their major crops to providing their farmers a market safety net.[539]

This process has been interpreted from different perspectives. From the economic and trade point of view, the process undertaken in the agricultural trade policy reforms by major players is an issue more about the results or impacts of these domestic support programs, which looks at the trade spill-overs of a Member's domestic support policy across its border.[540] Therefore, the focal point is the issue of categorization and precision of domestic support programs and guidelines.[541] However, from a legal perspective, it is an issue of redefining the role of Member governments' intervention in domestic support programs. Though both two aspects relate very closely to the market orientation that multilateral trading system is aiming for, they play different roles in defining the policy space of Member governments in using Green Box to pursue sustainable agricultural policies. As the Green Box provides Members with limitless policy space in domestic support, it is important to be vigilant against any abuse of it by Member governments.[542] Differentiating Member governments' interventions into the two types of Green Box programs of public services and direct payments, allows putting different legal restrictions on them. As the former is more to do with persistent market failure, while the latter is more about income support and social protection, the legal limits on the latter shall be stricter as it is more closely connected to the decoupling process.[543]

Second, though the exemption policy space provided by the Green Box is limitless, and Members' expenditure in Green Box grew from 330 billion in 2008 to 365 billion in 2010, there is an issue of disparity in how feasible it is to implement measures under the 12 Green Box headings in Annex 2 of the AOA. The most popular Green Box measure is general services (paragraph 2 of the Annex 2), which has been adopted by half of the WTO Membership. Public stockholding for food security

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[538] Burfisher and Hopkins (n 475).

[539] European Commission on Agriculture and Rural Development, 'Direct Payments | Agriculture and Rural Development' <https://ec.europa.eu/agriculture/direct-support/direct-payments_en> accessed 7 December 2017.

[540] OECD, *Decoupling: A Conceptual Overview* (2001) <https://www.oecd.org/tad/agricultural-policies/25481500.pdf> accessed 7 December 2017.

[541] "The goal of the domestic support commitments is to allow Member states to direct support to the agricultural sector while limiting the trade effects from such support. The ability of the commitments to do this is strictly dependent on the precision of domestic support guidelines in categorizing programs in their trade impacts. Juding from recent trade disputes, precision is somewhat lacking." Hart and Beghin (n 514) 236.

[542] Aerni, Haberli and Karapinar (n 42) 204.

[543] 'Tackling Agriculture in the Post-Bali Context' (n 535) 174–175.

purposes (paragraph 3) and domestic food aid programs (paragraph 4) are used by around 20 Members. For decoupled income support (paragraph 6), the most popular direct payment program, there are fewer users, only 12 Members. But there are one or two dominant users of these programs, for example, India and China in public stockholding for food security, the United States in domestic food aid, and the EU in decoupled income support. Most direct payment programs, like producer retirement (paragraph 9), resource retirement (paragraph 10), income insurance and income safety-nets (paragraph 7) and direct payments to producers (paragraph 5), have very few users with very limited expenditures. For this reason, these measures have been criticized for reflecting the interests of developed Members and not being well tailored to the specific circumstances of developing Members.[544] The lack of practicality of the Green Box provisions is evidenced by how they have been used. On the one hand, they have been used by a few major players as part of their policy reforms away from AMS support, although their shift to policies claimed as Green Box compliant may not even have been necessary, given their unused room for AMS support within their FBTAMS commitments. On the other hand, the exemption policy space is meaningless for many developing Members as they have very limited fiscal capacity to use all Green Box programs.[545]

2) Blue Box remains marginalized in the landscape of Members' exemption policy space. Blue Box is widely seen as an anomaly within the AOA as it is just a temporary arrangement to allow Members with a high level of MPS to set the support apart from reduction commitments as they reform their agricultural policies away from AMS support.[546] It has been used by a few developed Members, namely the EU, Japan, Norway and Iceland, as a way to accommodate trade distorting domestic support shifted from the non-exempt AMS category. Given its nature as "Amber Box with conditions",[547] the Blue Box will be subject to more restrictions, though at present there are no limits on spending on Blue Box subsidies. Members' expenditure in Blue Box has declined over the years and it dropped to $ 6.3 billion by 2012, nearly 20 percent less than in

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[544] Matthews, 'Food Security and WTO Domestic Support Disciplines Post-Bali' (n 63).

[545] "For many developing countries, the primary constraint in making use of Green Box measures is their limited fiscal capacity. However, there is also a view that the list of measures eligible for the Green Box mainly" Matthews, 'Food Security and WTO Domestic Support Disciplines Post-Bali' (n 63).

[546] UNCTAD Secretariat, 'An Analysis of the Agricultural Domestic Support under the Uruguay Round Agreement on Agriculture' 39 <http://unctad.org/en/Docs/ditccom20036_en.pdf> accessed 7 December 2017.

[547] 'WTO | Agriculture - Backgrounder - Domestic Support Boxes' <https://www.wto.org/english/tratop_e/agric_e/agboxes_e.htm> accessed 7 December 2017.

2008. The Revised Draft Modalities for Agriculture (TN/AG/W/4/Rev.4) even proposes a tiered reduction formula on the basis of the Overall Trade-Distorting Domestic Support (OTDS), and some Blue Box support would be included into the base level of OTDS. This means if the proposed modalities were adopted, Blue Box would not be exempted from reduction commitments.

3) Development box (Article 6.2) is emerging as a category of policy space for developing Members to exempt a growing amount of input and investment subsidies from WTO limits.[548] Members' interest in input subsidies, particularly those on fertiliser, has revived, notably in Africa.[549] There are 32 WTO Members who notified their development programs in 2008 with a total expenditure of $ 37.2 billion and their spending remained at more or less that level in 2009 and 2010. Among them, India is an outlier in size of Art. 6.2 claims, accounting for more than 80 per cent of those Members' total expenditure in Development Box. In 2008-10, India's average expenditure in Development Box stood at $ 31 billion, accounting for 14.2 per cent of value of production. This means India's exempted expenditure in Development Box was larger than the limit of 10 per cent of value of production for non-exempt NPS AMS. Another interesting element in India's overall domestic support structure is that support exempted in the Development Box is even larger than support exempted in the Green Box. Given that the Development Box is an instrument of special and differential treatment granted to developing Members to exempt their trade-distorting domestic support from AMS calculations, the Development Box is of major importance to India. Without it India would have exceeded its *de minimis* level limits, about which there has been a heated debate.[550] In contrast to Members that have shifted support from non-exempt AMS to exempt Green Box or Blue Box support by means of policy reform, India has simply shifted from reporting support as non-exempt AMS to reporting it as exempt Development Box support without underlying policy reform. Besides India, Sri Lanka and Zambia also exempt

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[548] Lars Brink, 'Investment and Input Subsidies: A Growing Category of Farm Support Exempted from WTO Limits' (International Agricultural Trade Research Consortium 2015) <http://ageconsearch.umn.edu/bitstream/229234/2/Session%203%20-%20Brink.pdf> accessed 7 December 2017.

[549] Steve Wiggins and Jonathan Brooks, 'The Use of Input Subsidies in Developing Countries', *Global Forum on Agriculture* (OECD 2010) <https://www.oecd.org/tad/agricultural-policies/46340359.pdf> accessed 7 December 2017.

[550] "The US and other developed countries have alleged that India is not notifying its agri subsidies because it has breached the 10 per cent cap. But now we have filed the notification to the WTO for seven years (2004-2005 to 2010-2011)." the Economic Times, 'India's Farm Subsidy Well below WTO Cap of 10%: Official - The Economic Times' <https://economictimes.indiatimes.com/news/economy/finance/indias-farm-subsidy-well-below-wto-cap-of-10-official/articleshow/42288827.cms> accessed 7 December 2017.

a great share of expenditure in input and investment subsidies if compared to their relevant value of production. However, as a legal instrument of providing additional policy space to developing Members for subsidizing agriculture, some of the key terms in Article 6.2, such as what are "low-income", resource-poor" farmers or "generally available" subsidies, need a greater clarity. And the use of this provision will receive much scrutiny by other WTO Members as more and more developing Members adopt it.[551]

4.6.2 Members' Limited Policy Space in Domestic Support

Unlike the exemption space, the limited policy space derives from two different types of quantitative limits set by the AOA on non-exempt trade-distorting domestic support. Each type applies to a particular category of Members. One type is the *de minimis* limits on individual AMSs, which applies to Members without a Final Bound Total AMS (FBTAMS). The other type is the FBTAMS limit on the Current Total AMS of Members with a FBTAMS in their schedule.[552]

1) The existence of a scheduled FBTAMS matters in deciding a Member's limited policy space. The *de minimis* levels are laid down in Article 6.4. It provides that if a Member's Current AMS is no larger than a given percentage of the value of production, it shall not be required to be included in the calculation of Current Total AMS and shall not be required to be reduced. For each PS AMS the value of production is that of the basic agricultural product, and for the NPS AMS it is the value of total agricultural production. The *de minimis* percentage is 10 per cent for developing Members and 5 percent for developed Members. Two other provisions in the AOA render different legal consequences for Members with and without a FBTAMS, i.e., a Total AMS commitment in Part IV of their schedule. Article 7. 2 (b) provides that if a Member does not have a Total AMS commitment in Part IV of its Schedule, the Member shall keep its support to agricultural producers within the relevant *de minimis* level. This is the case for most developing

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[551] Sharma (n 360) 80.

[552] "A second feature of the rules concerns support under measures that do not conform with any of the boxes (green, development or blue): such support is allowed but it faces quantitative limits. For many countries – those without a Bound Total AMS - the limits are simply the year's *de minimis* level of each of the AMSs. For countries with a Bound Total AMS, the amount of support that otherwise would count towards that limit is reduced by the *de minimis* exemption of some AMSs from Current Total AMS. The space available within a country's AMS limits or its Bound Total AMS limit, accounting for *de minimis* thresholds, is a second part of its policy space. While it might be called AMS space, this is easily misunderstood." Brink, 'Policy Space in Agriculture under the WTO Rules on Domestic Support' (n 362) 17.

Members, including India and China.[553] Meanwhile, Article 6.3 stipulates that if a Member has kept its Current Total AMS (CTAMS) for a given year within the corresponding annual or final bound commitment level specified in Part IV of the Member's Schedule (FBTAMS), it shall be considered to be in compliance with its domestic support reduction commitments. This means that for a Member with a FBTAMS, its AMS support to agricultural producers can exceed the relevant *de minimis* levels, and the support will be counted in the CTAMS. The *de minimis* levels in this case are thus only thresholds, not limits. The upper limit for the CTAMS is the scheduled FBTAMS. This is the case for 32 Members, including 15 developed Members and 17 developing Members, such as Brazil, Mexico, Saudi Arabia and Thailand (see Table 3).[554]

The situation with regard to the *de minimis* limits on individual AMSs and the FBTAMS as the limit on CTAMS is like Members' final bound tariffs and their relevant applied tariffs in the market access pillar. Like the tariff overhang, there can be a huge gap between the amount of applied AMS support and the bound limit. The gap can be observed between an individual AMS and its *de minimis* limit (for Members without a FBTAMS), and a huge gap between the CTAMS and the FBTAMS (for Members with a FBTAMS).

These provisions have fundamental impacts on Members' policy space in domestic support. Brink has well-articulated the critical role of *de minimis* in this regard.

"A *de minimis* allowance can be defined as the amount within which an AMS is excludable from CTAMS. That same amount can also be seen as a *de minimis* threshold, where an AMS switches from *de minimis* status to having to be including in CTAMS. The *de minimis* threshold is different from a commitment. An AMS can increase from zero without any consequence until it reaches the threshold level. When it exceeds that level, the consequence is immediate: the whole AMS (not just the part that exceeds the threshold) is included in the CTAMS. There is no obligation to keep an AMS below the threshold if a country has a FBTAMS in its schedule of commitments, in contrast to the legal obligation that CTAMS must not exceed the FBTAMS."[555]

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[553] "There are *de minimis* thresholds below which PS and non-PS AMS support can be exempted from counting in the CTAMS." Lars Brink, David Orden and Giselle Datz, 'BRIC Agricultural Policies through a WTO Lens' (2013) 64 Journal of Agricultural Economics 197, 202.

[554] Brink, 'Policy Space in Agriculture under the WTO Rules on Domestic Support' (n 362).

[555] Brink, 'The WTO Disciplines on Domestic Support' (n 326) 31.

2) The limited policy space diverges between developing and developed country Members. Based on Members' FBTAMS commitments, two categories of policy space in using non-exempt trade-distorting support have been created: 1) As most developing Members have a nil Final Bound Total AMS, each of their PS AMSs and their NPS AMS have to be maintained within their *de minimis* limits, namely, 10 per cent of the relevant value of production. This means for most developing Members the *de minimis* levels are the upper limits of their limited policy space for AMS support. 2) Members with a scheduled FBTAMS have two kinds of limited policy space for AMS support. Like most developing Members who do not have a scheduled FBTAMS, they have limits on some AMSs equal to the *de minimis* levels of those AMSs. In addition, their other AMSs can exceed their relevant *de minimis* thresholds, and in this case the upper limits of their limited policy space for the sum of those AMS will be their scheduled FBTAMS. They have the option for each AMS to keep it within its *de minimis* level, which is then the limit, or to let the AMS exceed its *de minimis* level and be counted in CTAMS, which is limited by the FBTAMS. As the FBTAMS can be far bigger than the *de minimis* level of an individual AMS, this option grants these Members the flexibility to scale up the AMS support for sensitive products, to the extent that the CTAMS is within the FBTAMS. For instance, as indicated by Table 12, the PS AMSs of the EU for sugar and tobacco account for 60 per cent and 75 per cent of their values of production, respectively, which is 12 or 15 times the relevant *de minimis* thresholds. In assessing the amount of space available for AMS support it is of course crucial to realize that an AMS cannot at the same time be subject to its *de minimis* limit and to the FBTAMS. It is either part of CTAMS or it is not part of CTAMS: it cannot at the same time be small enough to fit within its *de minimis* limit and large enough to exceed its *de minimis* limit.

Members have used NPS AMS support for various purposes. Developing Members have used it to provide farmers with favourable agricultural production factors or free interest, interest rates concessions, while developed Members have adopted it to accommodate agricultural insurance or income stabilization.

Article 6.4 can be tricky in terms of its legal consequences. It requires a Member with a FBTAMS to categorize its AMS support between those AMSs that are counted in CTAMS, which is limited by FBTAMS, and those AMSs that are small enough not to be counted, i.e., they are no larger than their *de minimis* thresholds. Such a Member has the flexibility to change from one year to the next

the amount of each individual AMS in relation to its *de minimis* threshold, as long as the CTAMS stays within the FBTAMS. In an extreme case a single AMS can even equal the CTAMS, in which case of course all the other AMSs have to be within their respective *de minimis* thresholds. This flexibility to concentrate AMS support above *de minimis* limits to only few products is not available to Members without a FBTAMS, i.e., most developing Members. In this context, the 32 Members with scheduled FBTAMS enjoy both the limited space for some AMSs deriving from their *de minimis* thresholds, and the limited space for the other AMSs deriving from the CTAMS. Brink observes that the landscape or pattern of the non-green support to producers is evolving. On the one hand, the "traditional" high-support countries of the EU, the United States and Japan still provide large amounts of non-Green Box support but much less so than in earlier years and their non-green support is or has been on a downward trend.[556] But that has been achieved through the flexibility embedded in the AOA rules which allow box shifting on condition that the policies providing support are changed. For instance, as Table 13 illustrates that Members' total expenditure in PS AMS stood at $ 46 billion in 2008, and CTAMS accounted for 80 per cent. In other words, a very large share of PS AMS support escaped the limits on individual AMSs and found a safe harbour in CTAMS, in line with Article 6.4. This results from the distinction between those Members with a FBTAMS and those Members without, mainly developing Members. On the other hand, non-Green Box support in some emerging developing country Members, such as Brazil, China, India and Indonesia, has seen an increasing trend and their levels of non-Green Box support are approaching or matching those of the EU, the United States and Japan. As Table 5 indicates, China already overtook the United States as the largest provider of NPS AMS support. An immediate question is whether the limited policy space for AMS support provided by the *de minimis* limits is enough for China?

3) The large Total AMS "overhang" allows developed Members large policy space even after a reduction of FBTAMS. Like tariff overhang in market access, a large Total AMS overhang also exists between Members' FBTAMS and CTAMS.[557] Table 4 in this Chapter shows that in 2010-2012 the average percentage of the CTAMS in major developed Members' FBTAMS was 33 per cent for the United States, 15 per cent for Japan, 14 per cent for Canada and 9 per cent for the EU.

[556] Lars Brink, 'The Evolution of Trade-Distorting Domestic Support', *Tackling Agriculture in the Post-Bali Context* (ICTSD 2014).
[557] Brink, 'The Evolution of Trade-Distorting Domestic Support' (n 556) 143.

This means their Total AMS overhang in relative terms is nearly 70 per cent for the United States, more than 80 per cent for Japan and Canada and 90 per cent for the EU. If expressed in absolute terms, their Total AMS overhang stood in 2008: $ 89 billion for the EU, $ 38 billion for Japan, $ 10 billion for the United States and $ 2 billion for Canada. Even the tiered reduction formula as suggested by the Revised Draft Modalities for Agriculture (TN/AG/W/4/Rev.4) was adopted, there would be still quite considerable policy space for these Members, and for other Members with a FBTAMS, to continue to provide AMS support. It is recalled that a larger number of developing than developed Members have a FBTAMS in their schedules, although the amounts of FBTAMS are often smaller for developing Members. It takes time to phase out the limited policy space enjoyed mostly by developed Members in using non-exempt domestic support. For instance, Brazil will have more policy space in domestic support even in the Doha Round.[558]

4) Though disfavoured by the AOA due to its trade distorting nature, MPS remains the most immediate policy options for market intervention by Member governments to deal with price fluctuations, provide income support and pursue other policy goals. Data suggests that Members' total support in MPS programs stood at $ 30 billion in 2008, and it accounted for 64 per cent of their PS AMS support outlays in the same year. With further trade liberalization, Members' limited policy space will be further reduced. The importance of MPS in preventing market and price from risks and fluctuations will become more prominent and Members' reliance on such support will be increased. [559] This will call into question the sufficiency of limited policy space provided within the *de minimis* limits. A recent dispute filed by the United States against Chinese agricultural subsidies for cereals in 2016 brought this issue to the fore. The United States

[558] "Brazil is presenting itself as being in a comfortable position with respect to domestic support in the Doha Round negotiations, and our analysis confirms this position. Doha Round outcomes in terms of creating or strengthening domestic support disciplines will not be a constraint for the execution of the Brazilian agricultural policy. Even in the most restrictive scenario, assuming Brazil as a developed country, Brazil would still have enough room for maneuver by using NPS and PS de minimis to notify its programs. In the case of Brazil, de minimis policies are binding compared to the OTDS of a possible Doha agreement. Due to the high level of overhang, even in the PS de minimis, a 40 percent reduction will not oblige Brazil to make deep changes in its programs." Andre M Nassar and Diego Ures, 'Brazil: Shadow WTO Agricultural Domestic Support Notifications', *IFPRI Discussion Paper 00865* (Intl Food Policy Res Inst 2009) 37 <http://www.ifpri.org/sites/default/files/publications/ifpridp00865.pdf,> accessed 6 December 2017.

[559] "In some cases, administered prices rather than border measures are the key policy instrument on which governments focus. In such cases, it is the administered price that determines how tariffs and TRQs are applied, rather than border measures determining the levels at which administered prices are set. Moreover, administered prices can be effective in providing price stability to producers in circumstances where tariffs cannot. Administered prices for crops are often aimed at insulating farmers from low market prices when harvests are bountiful." Orden, Blandford and Josling (n 129) 14.

complained that China's MPS for cereals producers appeared to exceed its PS *de minimis* level of 8.5 per cent.[560] This case also highlights the disparity of Members' entitlements deriving from the AOA rules and limits on non-exempt domestic support. In addition, the measurement of MPS, which uses fixed external reference prices at 1986-88 base-period levels instead of the actual world prices in particular, creates a significant problem with respect to the economic interpretation of WTO Members' MPS notifications[561]as the MPS calculated under the AOA legal rules may not represent the actual support provided to agricultural producers. This will undermine the credibility of the MPS that Members report in notifications, even if calculated correctly.

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[560] 'WTO | Dispute Settlement - the Disputes - DS511' (n 429).
[561] Brink, 'The WTO Disciplines on Domestic Support' (n 326) 27.

Chapter 5

The Legal Policy Space of RAMs for Import Protection

After examining the landscape of WTO Members' legal policy space for import protection and domestic support protection, we will find out that the RAMs have made some unique and substantial concessions or commitments upon their accession to the WTO. The accession protocols of the RAMs have brought about a lot of controversies and debates among both academia and international lawyers around the world, [562] among which the most relevant one to the current research is the so-called "WTO plus obligations and WTO minus rights" proposition. On the basis of this claim, commentators challenge the fairness of the WTO rules and the legitimacy of the WTO rule-making process from both the legal perspective of procedure and substance. For instance, some commentators criticize that the WTO has created a "second class" citizenship within the multilateral trading system and violated the non-discrimination principle, [563]while others question the WTO accession procedure is unfair and discriminatory to new Members and has possibly undermined the legitimacy of the WTO as a law-making body. [564] China Protocol has been exemplified in all these debates. Jackson observes that the China Protocol in some ways departs from the normal rules of the WTO by applying a somewhat more stringent set of rules to the China case.[565] Qin claims that China's accession highlights the tension between a generally rule-based WTO system and its power-based accession regime. While the world trading system has moved into a new era of international trade law, its accession remains in the GATT age, still

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562 "The rationale of WTO accession, and the potential impact of accession on entrant and incumbent members, has given birth to a substantial literature. To the simple underlying questions-(1) Why join the WTO? and (2) What are the effects of WTO Membership? A number of answers have been provided, sometimes generating a stream of passionate academic exchanges. The need was even felt to summarize the discussion and a 'literature on the literature' has emerged. Accession of China to the WTO alone generated more than 20000 scholarly contributions". Carlos A Primo Braga and Oliver Cattaneo, *The WTO and Accession Countries*, vol 1 (Edward Elgar Publishing 2009) xxii.

563 "Far-reaching commitments by the acceding government (or separate customs territory), as well as the acceptance of disciplines and binding commitments which in several instances go beyond those applied to existing members, and occasionally even acquiescence to lesser rights-at least temporarily. This procedure has sometimes been characterized in the development and legal literature as 'unfair' to new members, as discriminatory, arbitrary and as possibly undermining the legitimacy of the WTO as a body of law." Uri Dadush and Chiedu Osakwe, *WTO Accessions and Trade Multilateralism: Case Studies and Lessons from the WTO at Twenty* (Cambridge University Press 2015) 5.

564 "Has the price to pay for acceding to the WTO become too high---in particular with regard to the role of the WTO in the management of a global public good? Have accession protocols created a 'second class' of citizens in the WTO and contradicted to the core WTO principles of non-discrimination and single undertakings? Has the WTO accession process ignored the specific needs of developing countries?" Braga and Cattaneo (n 562) xxii.

565 Jackson (n 12) 110.

indulging in the ad hoc country-specific rule-making unguided by clear principles and unchecked by duly established procedures. The systemic implications of the issues raised by the China Protocol need to be considered carefully.[566]

The "WTO plus obligations and WTO minus rights" claim essentially touch on the fact that the RAMs enjoy less legal policy space for import protection if compared with the original Members. The purposes of this Chapter will embark on reviewing the legal policy space of the RAMs for import protection under the framework of the AOA, then move on to examine the legality of the "WTO plus obligations and WTO minus rights" allegation.

5.1 The Legal Policy Space of the RAMs for Import Protection

Though the RAMs or new Members normally refer to those Members who acceded the WTO in accordance with Article XII of the WTO Agreement after the WTO was founded in 1995, the scope of the RAMs is quite controversial. The first reference to the concept of "new members" came from Paragraph 9 of the Doha Declaration, which welcomes the accession of Albania (September 2000), Croatia (November 2000), Georgia (June 2000), Jordan (April 2000), Lithuania (May 2001), Moldova (July 2001), Oman (November 2000), China (December 2001) and Chinese Taipei (January 2002) as new members and notes their extensive market-access commitments made upon accession.[567] Paragraph 47 of Annex A (Framework for Establishing Modalities for Agriculture) to the Doha Work Program: Decision Adopted by the General Council on 1 August 2004 (WT/L/579) (the August 2004 Framework)[568] further states that the particular concerns of the RAMs will be effectively addressed through specific flexibility provisions.[569]

There are two points that deserve clarifications. Firstly, as indicated, all those new Members that are recognized by the Doha Declaration joined the WTO in or after 2000, it will be more precise to say that the RAMs might refer to Members who gained their WTO membership thereafter the new Members or after 2000. That means not all those Members who joined the WTO between

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566 Julia Ya Qin, 'WTO-Plus Obligations and Their Implications for the World Trade Organization Legal System' (2003) 37 J. World Trade 483, 521–522.

567 'Doha Declaration' <https://www.wto.org/english/res_e/booksp_e/ddec_e.pdf>, last accessed 15 December 2017.

568 'WTO | Agriculture - Negotiations Backgrounder - The July 2004 Package and August Decision' <https://www.wto.org/english/tratop_e/agric_e/negs_bkgrnd23_julypack_e.htm>, last accessed 16 December 2017.

569 'WTO | Doha Development Agenda - Text of the "July Package" — the General Council's Post-Cancún Decision' <https://www.wto.org/english/tratop_e/dda_e/draft_text_gc_dg_31july04_e.htm> accessed 15 December 2017.

1995 and 2000 can be counted as the RAMs. Secondly, the RAMs are those new members who have made extensive market-access commitments during their accession process, and therefore are entitled to enjoy the specific flexibility provisions. In this sense, there are 31 RAMs by far (excluding those Members who joined the EU later on, such as Lithuania, Croatia, Bulgaria, Estonia, and Latvia).[570] In the revised draft modalities for agriculture (TN/AG/W/4/Rev.4) or July 2008 Package,[571] the RAMs have been further differentiated into three sub-groups: very recently-acceded Members, which refer to Saudi Arabia, the FYROM, Viet Nam and Ukraine, small low-income RAMs with economies in transition, which include Albania, Armenia, Georgia, Kyrgyz Republic, Moldova and Mongolia, and other RAMs. All these sub-groups of RAMs enjoy different flexibility in terms of domestic support and market access.

5.1.1 The RAMs' Legal Policy Space in Border Protection

1) Most RAMs enjoy the lowest tariff protection. As highlighted in Table 5 in Chapter 3, all the RAMs are in Tier 4 with the lowest tariff protection (less than 30 per cent). Among the 41 Members in Tier 4, 26 are RAMs, accounting for 60 per cent. It is worthy of noting that in the band of 10-20 per cent of Members' final bound tariff, besides the EU, Japan and Canada, all the other Members are RAMs. This means these RAMs share the similar levels of tariff protection with their developed Member counterparts. As far as the tariff overhang is concerned, there are 30 Members whose tariff overhangs are less than 10 per cent, and most of them are the RAMs. A few RAMs, such as Tajikistan, Montenegro, Chinese Taipei, China and the FYROM, even have tariff overhangs less than 1 per cent. It is also interesting to find out that among the 40 Members with non-ad valorem duties for agricultural products in Table 6 of Chapter 3, one third are RAMs (13). Therefore, there is an issue about the transparency of tariff protection for some RAMs as well.

2) Some RAMs are entitled to protect their sensitive products either through the TRQ administration or the SSG provisions, and only one RAM is also entitled to both mechanisms.

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[570] These RAMs include: Afghanistan, Albania, Armenia, Cambodia, Cabo Verde, China, Ecuador, Georgia, Jordan, Kazakhstan, Kyrgyz Republic, Lao People's Democratic Republic, Liberia, Moldova, Mongolia, Montenegro, Nepal, Oman, Panama, Russian Federation, Samoa, Saudi Arabia, Seychelles, Chinese Taipei, Tajikistan, the FYROM, Tonga, Ukraine, Yemen, Vanuatu and Viet Nam. 'WTO | Accession: Protocols of Accession for New Members since 1995, Including Commitments in Goods and Services' <https://www.wto.org/english/thewto_e/acc_e/completeacc_e.htm#mda> accessed 21 December 2017.

[571] 'WTO | Agriculture - Chairperson's Texts 2008' <https://www.wto.org/english/tratop_e/agric_e/chair_texts08_e.htm> accessed 16 December 2017.

As indicated in Table 7 in Chapter 3, 8 RAMs, including Chinese Taipei, China, Ecuador, Moldova, Panama, Viet Nam, the FYROM, Ukraine, have maintained TRQ administration over their sensitive products. The TRQ number is ranging from 19 of Panama to 1 of Ukraine, but most of them are less than 10. Three RAMs, namely Chinese Taipei, Ecuador and Panama, are also entitled to the SSG provisions. As Table 15 in Chapter 3 shows, like the developed Members, these 8 RAMs have established the multi-layer border protection mechanism for their sensitive products. However, unlike their developed Member counterparts, quite few RAMs have managed to keep both the TRQ administration and the SSG provisions as integral part of their border protection mechanisms. Even though Chinese Taipei who has done so, the coverage of its protection mechanisms in terms of the number of sensitive products is smaller than developed Members. For the RAMs, their levels of tariff protection are relatively low and the TRQ administration becomes their primary instrument to protect their sensitive products against import. Therefore, TRQ administration is essential in their policy space in border protection. For instance, Viet Nam has maintained TRQ administration over 3 agricultural products: eggs, sugar and unmanufactured tobacco, and the in-quota rates are 40 per cent for eggs, 25-60 per cent for sugar and 30 per cent for tobacco, while the out-quota rates are 80 or 85 per cent. The in-quota volumes are 30,000 dozen for eggs, 55,000 tons for sugar and 31,000 tons for unmanufactured tobacco. All the in-quota volumes of the TRQ products are subject to a 5 per cent annual growth rate. Viet Nam is not entitled to the SSG provisions for any agricultural products, TRQ administration is the only mechanism available to it under the AOA to protect against the import of the TRQ products. China has been facing the same situation as Viet Nam for its TRQ administration over cereals. However, the USA filed a WTO complaint against China for the inconsistencies of its TRQ administration over cereals with the WTO rules. This case will certainly have some positive impacts on China's TRQ administration practices and its policy space for import protection.

5.1.2 The RAMs' policy space in Domestic Support

1) Green box is emerging as an important tool for the RAMs to provide necessary domestic support to their agricultural producers. As Table 25 in Chapter 4 illustrates, 17 out of 62 Members, or nearly one fourth of Members who notified of green box support in 2008-2010 are RAMs. China emerged as the third largest user of green box support with an average expenditure of $ 78 billion in 2008-10, just next to the United States ($ 100 billion) and the EU ($ 90 billion).

Unlike its developed Member counterparts, who prefers either the domestic food aids or decoupled payments to producers, China contributes its green box support primarily to general services, infrastructural services in particular. China's expenditures in direct payments programs are also increasing, but most go to the payments under environmental programs (Paragraph 12 of Annex II) and payments for natural disaster relief programs (Paragraph 8 of Annex II). Chinese Taipei and Viet Nam have the similar picture in terms of their expenditures in green box support. Besides China, Chinese Taipei and Viet Nam, Russian Federation and Ukraine are also increasing their green box support. For the RAMs, the increases of their agricultural subsidies are partly in response to their great concessions in market access made upon their accessions to the WTO.

2) Amber box support remains to be essential to RAMs' policy space in domestic support. The situation of the RAMs' policy space in Amber Box support is bifurcated: 10 RAMs, namely Saudi Arabia, Ukraine, Chinese Taipei, Viet Nam, the FYROM, Moldova, Jordan, Montenegro, Tajikistan and Russian Federation, have maintained the FBTAMS (Table 3 in Chapter 4) in their schedules, which means that the upper limits for their amber box support are their FBTAMs, rather than their *de minimis* thresholds. Table 4 in Chapter 4 further illustrates the differences of the RAMs in the use of FBTAMS space. For example, the evolution of CTAMS/FBTAMS percentage of Saudi Arabia and Ukraine in 2008-2011 shows a different trend. The CTAMS/FBTAMS in Saudi Arabia was reduced from 93 per cent in 2008 to 11 per cent, meanwhile it was doubled in Ukraine from 37 per cent to 74 per cent. As Table 13 in Chapter 4 shows that the policy space provided by the FBTAMS commitments accommodated the substantial part of amber box support in Saudi Arabia and Chinese Taipei, while only very limited amount came from their *de minimis* level. Meanwhile, all the other 20 RAMs without scheduled FBTAMS must maintain their amber box support, either product-specific or non-product-specific within their *de minimis* thresholds. In this regard, 7 RAMs have obtained a *de minimis* level of 10 per cent, including Ecuador, Mongolia, Panama, Oman, Nepal, Cambodia, and Tonga, which means that they are treated as developing Members. Meanwhile, Kyrgyz Republic, Georgia, Albania, Moldova and Armenia have got a 5 per cent *de minimis* level. The *de minimis* level for China and Kazakhstan is 8.5 per cent.[572] Table 5 in Chapter 4 gives insights about RAMs' unused space in non-product-specific AMS. For

[572] 'WTO | Handbook on Accession to the WTO - CBT - Substance of Accession Negotiations - Negotiation of Market Access Concessions and Commitments - Page 2' <https://www.wto.org/english/thewto_e/acc_e/cbt_course_e/c5s3p2_e.htm> accessed 7 December 2017.

instance, China used 1.5 per cent of its 8.5 per cent *de minimis* threshold in 2008, and the unused space was 7 percent of its value of production or $ 53 billion in monetary terms. For product-specific *de minimis* threshold, it remains to be the only policy space left for many RAMs to provide market price support to their sensitive products. Albania and Armenia used their *de minimis* level, but only a little. Table 14 in Chapter 4 shows that China uses to provide market price support to an increasing number of agricultural products, such as grains, soya bean, potato, rapeseed and pig. And it seems that China's unused space in this regard is still ample, but it is shrinking as China has scaled up its domestic support over the years. For instance, the unused space for cotton dropped to less than 4 per cent in 2009.

3) RAMs' policy space in the Development Box (Article 6.2) is quite divergent. As part of the S&DT, the entitlement of a RAM to the Development Box depends on whether it is recognized by other Members as a developing Member. Given the diversity of the RAMs composition, their legal policy space in using Development Box varies from each other. Among the 31 RAMs, 9 Members are LDCs, namely Afghanistan, Cabo Verde,[573] Cambodia, Lao, Liberia, Nepal, Samoa, Vanuatu and Yemen,[574] which are undoubtedly entitled to the Development Box. Besides these LDC Members, no one will challenge that a few other Members, such as Jordan, Saudi Arabia, Viet Nam, Ecuador, Mongolia, Oman, Panama, Seychelles, and Tonga are developing Members. For instance, the status of Jordan[575] and Oman[576] as a developing Member and their entitlement to Development Box have been recognized in the Report of the Working Party on the Accession to the WTO. The difficulty lies at defining and recognizing the status of economies in transition as

[573] Cabo Verde made an application to accede the WTO as a LDC Member in 1999, but it graduated from LDC status on 20 December 2007.

[574] 'Accession Commitments Database (ACDB)' <http://acdb.wto.org/tabs.aspx> accessed 22 December 2017.

[575] Paragraph 189 of the Report of the Working Party on the Accession of the Hashemite Kingdom of Jordan (WT/ACC/JOR/33) provides that those Members also considered that for the purposes of Article 6.4 of the WTO Agriculture Agreement, Jordan was a developing country.

[576] Paragraph 124 of the Report of the Working Party on the Accession of Oman to the World Trade Organization (WT/ACC/OMN/26) provides that as regards domestic support reduction commitments, the Working Party agreed that Oman could have recourse to Article 6.2 and Article 6.4(b) of the Agreement on Agriculture upon accession.

developing Members. Both China[577] and Kazakhstan [578] have committed a 8.5 per cent *de minimis* level and inclusion of their Development Box support into their *de minimis* level. Armenia committed not to seek recourse to subsidies provided for under Article 6.2 of the Agreement on Agriculture.[579] Meanwhile, Chinese Taipei, Montenegro,[580] and Russian Federation committed a 5 per cent *de minimis* level, which means that they are recognized as a developed Member and will not be entitled to Article 6.2.

4) No RAMs have ever used "Blue Box" domestic support measures. As illustrated in Chapter 4.3.2, the Blue Box measures are adopted only by a quite limited developed Members, no RAMs have ever used them.

5.2 The Legality of the "WTO Plus Obligations and WTO Minus Rights" Allegation

There is no legal definition about the "WTO plus obligations and WTO minus rights" allegation. Commentators tend to argue that "WTO plus implies additional obligations that go beyond the ones applying to the incumbent members (WTO+ commitments) and WTO minus denotes latitude

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[577] "In implementing Article 6.2 and 6.4 of the Agreement on Agriculture, the representative of China confirmed that while China could provide support through government measures of the types described in Article 6.2, the amount of such support would be included in China's calculation of its Aggregate Measurement of Support ("AMS"). He noted that China's Total AMS Commitment Level was set forth in Part IV, Section I of China's Schedule. The representative of China further confirmed that China would have recourse to a *de minimis* exemption for product-specific support equivalent to 8.5 per cent of the total value of production of a basic agricultural product during the relevant year. The representative of China confirmed that China would have recourse to a *de minimis* exemption for non-product-specific support of 8.5 per cent of the value of China's total agricultural production during the relevant year. Accordingly, these percentages would constitute China's *de minimis* exemption under Article 6.4 of the Agreement on Agriculture. The Working Party took note of these commitments." Paragraph 235 of the Report of the Working Party on the Accession of China (WT/ACC/CHN/49).

[578] "In implementing Article 6.2 of the WTO Agreement on Agriculture, the representative of Kazakhstan confirmed that while Kazakhstan could provide support through government measures of the types described in Article 6.2, the amount of such support would be included as non-exempt in Kazakhstan's calculation of its Current Total Aggregate Measurement of Support. The representative of Kazakhstan further confirmed that Kazakhstan would have recourse to a *de minimis* exemption for product-specific support equivalent to 8.5 per cent of the total value of production of a basic agricultural product during the relevant year. The representative of Kazakhstan confirmed that Kazakhstan would have recourse to a *de minimis* exemption for non-product-specific support of 8.5 per cent of the value of Kazakhstan's total agricultural production during the relevant year. Accordingly, these percentages would constitute Kazakhstan's *de minimis* exemption under Article 6.4 of the WTO Agreement on Agriculture. She also noted that Kazakhstan's Total AMS Commitment Level was set forth in Part IV Section I of Kazakhstan's Schedule of Concessions and Commitments on Goods (CLXXII). The Working Party took note of this commitment." Paragraph 988 of the Report of the Working Party on the Accession of the Republic of Kazakhstan (WT/ACC/KAZ/93).

[579] Paragraph 160 of the Report of the Working Party on the Accession of the Republic of Armenia (WT/ACC/ARM/23).

[580] Paragraph 191 of the Report of the Working Party on the Accession of Montenegro to the WTO (WT/ACC/CGR/38) says that the support exceeded the de minimis level of 5 per cent for two types of commodities only (tobacco and cereals - rye, barley, etc.).

regarding obligations applying to other WTO members (WTO- rights)."[581] Thanks to a number of unique commitments that China made upon its accession, the "WTO plus obligations and WTO minus right" claim hold sway in Chinese academia. For instance, Henry Gao shares the same vision and argues that "obligations China has accepted during the accession process are beyond those normally required of WTO Members; while the rights that China has gained are less than those usually enjoyed by WTO Members".[582]

From these arguments, we can see that the criteria used by those advocates for defining the "plus" and "minus" concept are normally based on a comparison between the protocol commitments made by an applicant (China or other RAMs) and the commitments of original WTO Members, but they do not say explicitly what "original WTO Members" they are referring to in this context as the rights and obligations vary substantially even among original WTO Members. Only one WTO document alludes to "original WTO Members at similar levels of economic development", [583] which has made this concept even more problematic as we need to find out which original WTO members have the similar level of economic development as the applicant. In this particular case, the surrogate or analogous country approach that the EU has adopted to calculate the normal values for non-market economy residual rates in its anti-dumping investigations against Chinese imports could be a good example. However, even the most frequently chosen countries in these circumstances, such as the United States, Turkey, India and the EU, are hardly to say that they are at the similar level of economic development as China.[584]

However, it deserves to look deep into the legality of the "WTO plus obligations and WTO minus rights" allegation to appreciate what has made a difference between the rights and obligations of RAMs and the original Members. As a matter of law, both the procedural and the substantive

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[581] Orden, Blandford and Josling (n 129) 323.

[582] Henry Gao, 'Elephant in the Room: Challenges of Integrating China into the WTO System' (2011) 6 Asian J. WTO & Int'l Health L & Pol'y 137, 147.

[583] "Some Members have argued in the General Council/Ministerial Conference that new entrants should not be required to undertake Protocol commitments that are more stringent than those of original WTO Members at similar levels of economic development (sometimes referred to as WTO-plus commitments)." 'WTO | Handbook on Accession to the WTO - CBT - Substance of Accession Negotiations - Negotiation of Market Access Concessions and Commitments - Page 2' (n 572).

[584] European Parliament, 'Calculation of Dumping Margins' <http://www.europarl.europa.eu/RegData/etudes/IDAN/2016/583794/EPRS_IDA(2016)583794_EN.pdf> accessed 9 December 2017.

aspect of the claim need to be examined.

5.2.1 Procedural Aspect of the "WTO Plus Obligations and WTO Minus Rights" Claim

From a legal point of view, what makes China and any other RAMs distinguish from the original WTO Members in terms of the rights and obligations under the multilateral trading system is not the levels of their economic development, but the legal procedures that they have gone through for making concessions.

The task of procedure is to facilitate the implementation of substantive law: whatever else procedure might do, its primary goal is to generate quality outcomes measured by the substantive law.[585] In the current debate, Article XI and Article XII [586]of Marrakesh Agreement Establishing the World Trade Organization (the WTO Agreement) are the relevant provisions that govern the rules of procedure for original membership and accession, which suggests that the substantive rights and obligations of original WTO Members and the RAMs clearly have been transmitted from different procedures. The rights and obligations of the former are automatically inherited from the GATT 1994, while the rights and obligations of the latter depend on the terms to be agreed between the applicant and the WTO. In this sense, the RAMs have also been called Article XII Members by the WTO.[587] Therefore, it is the legal procedures that have made a difference in terms of the rights and obligations of the original WTO Members and the RAMs.[588] As the

585 André Nollkaemper, 'International Adjudication of Global Public Goods: The Intersection of Substance and Procedure' (2012) 23 European Journal of International Law 769, 779.

586 Article XII of the WTO Agreement provides that "any State or separate customs territory possessing full autonomy in the conduct of its external commercial relations and of the other matters provided for in this Agreement and the Multilateral Trade Agreements may accede to this Agreement, on terms to be agreed between it and the WTO. Such accession shall apply to this Agreement and the Multilateral Trade Agreements annexed thereto".

587 "Article XII Members or Recently acceded members (RAMs), ie, countries that negotiated and joined the WTO after 1995, seeking lesser commitments in the negotiations because of the liberalization they have undertaken as part of their membership agreements. Excludes least-developed countries because they will make no new commitments, and EU members". World Trade Organization, 'Negotiating Groups in the WTO' <https://www.wto.org/english/tratop_e/dda_e/negotiating_groups_e.pdf> accessed 9 December 2017.

588 "The WTO has two types of Members: the original Members who were Members of the General Agreement on Tariffs and Trade (GATT) by virtue of which they are founding Members of the WTO; and the new Members who joined the WTO through accession negotiations. Among the 153 Members of the WTO, 123 are original Members, while 29 countries joined through the accession process. Most of the recent members in the WTO belong to Least-Developed Countries (LDCs) category. Among the 50 LDCs on the United Nations list, 33 are already WTO Members by dint of their earlier membership with the GATT. However, only three—Nepal, Cambodia and Cape Verde— joined the WTO through the accession process. These countries along with developing countries like China, Vietnam etc. are referred to be Recently Acceded Member (RAM) countries." Anil Kumar Kanungo, 'Experience of Recently Acceded Member Countries to the WTO' [2012] Browser Download This Paper.

accession negotiations have not gone through the same process as the original Membership, the outcomes of accession negotiations are that the acceding government typically takes on more demanding obligations than original Members.[589] The "WTO plus obligations or WTO minus rights" proposition has ignored the instrumental role of procedures as transmission, and improperly put two categories of substantive rights and obligations under the same umbrella, namely ones that the original Members have inherited from the old system (GATT 1944) and the other ones that the RAMs have been granted through accession negotiations under the new system (the WTO). As a matter of fact, it happens that China has gone through both procedures of the old GATT and the new WTO. It firstly made an application to resume its status as a contracting party of the GATT in 1987, and after the application was turned down, China changed to apply for acceding to the WTO pursuant to Article XII of the WTO Agreement in 1995.[590] No one knows better than China itself that it is the different procedures of the GATT/WTO system that have transmitted it different substantive rights and obligations. In this context, it would be more appropriate to compare whether and, if so, how far the RAM's rights and obligations have deviated from each other. The general observation from the previous part is that although there are some variations among the RAMs in their terms of accession, the disparities in their substantive rights and obligations are not as extraordinary as those among original WTO Members.

Besides Article XII, there is no any other useful provisions regulating the WTO accession process.[591] Even the WTO itself recognizes that perhaps the most striking thing about Article XII is its brevity. It gives no guidance on the "terms to be agreed", these being left to negotiations between the WTO Members and the applicant. Nor does it lay down any procedures to be used for negotiating these terms, also leaving it to individual Working Parties to agree.[592] Therefore, the WTO will have to develop relevant procedures before it starts to negotiate the terms of accession with the applicant. Although Article XII itself does not prescribe procedural rules to be followed in the course of the accession process, a fairly well-defined set of procedures based on those used

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589 Dadush and Osakwe (n 563) 9.

590 Report of the Working Group on the Accession of China, WT/MIN (01)/3, Introduction, para.1.

591 Marc Bacchetta and Zdenek Drabek, 'Effects of WTO Accession on Policy-Making in Sovereign States: Preliminary Lessons from the Recent Experience of Transition Countries' (WTO Staff Working Paper 2002) 4 <https://www.wto.org/english/res_e/reser_e/derd200202_e.htm> accessed 9 December 2017.

592 'WTO | Acession | Relevant WTO Provisions' <https://www.wto.org/english/thewto_e/acc_e/acc7_3_e.htm> accessed 9 December 2017.

in GATT 1947 has been developed by the WTO Secretariat in consultation with Members and through customary practices over the years.[593] Generally speaking, the WTO accession process is made up of two stages: fact-finding, which is aimed at examining the trade and legal regime of the applicant and identifying any inconsistencies with the WTO Agreements, and negotiating the applicant's terms of accession, which is the most essential part of the whole accession process. [594] Accession negotiations on the applicant's terms of accession fall into two main categories:[595]negotiations on multilateral WTO rules and bilateral market access negotiations,[596] which have rendered two sets of obligations for the applicant: WTO rule obligations that are set out in the WTO Agreement and its annexes, which are uniform and binding for all WTO Members, and the market access obligations of the Members, which are contained in the Members' goods and services schedules annexed to GATT 1994 and GATS respectively. On the contrary, the market access obligations are country-specific, and might vary from one Member to another. However, they are required to apply to all other Members on the basis of the MFN treatment.[597] These two sets of distinctive obligations have been absorbed into two clauses in WTO Agreements: the conformity clause and the "integral clause". The former one refers to Article XVI:4 of the WTO Agreement and prescribes that "each Member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements", while the latter one normally refers to Article II in the Protocol of an acceding

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593 'WTO | Handbook on Accession to the WTO - CBT - The Basic Rules - Basic WTO Provision - Page 1' <https://www.wto.org/english/thewto_e/acc_e/cbt_course_e/c2s1p1_e.htm> accessed 9 December 2017.

594 'WTO Technical Note on the Accession Process, WT/ACC/10/Rev.4' 1, last accessed 9 December 2017.

595 "Accession negotiations deal with two broad types of issues. First, current members seek assurances that the acceding country will fully apply all binding WTO rules. Typically, this involves checking existing legislation for consistency with the various WTO agreements and identifying required challenges that the applicant country then commits itself to implementing. Second, negotiations deal with market access in the applicant countries for WTO members. New members are required to bind policy instruments (for example, tariffs on merchandise imports, agricultural production subsidies, regulations on market access in services) to levels agreed with current members." Rolf J Langhammer and Matthias Lucke, 'WTO Accession Issues', *The WTO and Accession Countries* (Edward Elgar Publishing 2009) 12.

596 "Multilateral negotiations on WTO rules relate to goods (including systemic agricultural issues), TRIPS and systemic issues in services. Acceding governments must be prepared to accept all the rules set out in the WTO Agreement. Their obligations on rules are contained in the relevant "commitment paragraphs" of their Working Party Reports, which are incorporated by reference in the Protocols of Accession. Sometimes commitments may be recorded in the text of the Protocol itself. Bilateral market access negotiations begin following the Applicant's submission of offers on tariff concessions and specific commitments on services. As the negotiations advance, these initial market access offers are revised to take account of the requests of interested Members. The results of the negotiations on goods are consolidated by the Secretariat in a draft Goods Schedule". World Trade Organization, 'WTO Technical Note on the Accession Process' (n 594).

597 Qin (n 566) 485.

Member by saying that the Protocol shall be an integral part of the WTO Agreement.[598] For instance, as regards the conformity clause, Paragraph 22 of the Report of the Working Party on the Accession of China says that "the representative of China declared that, by accession, China would repeal and cease to apply all such existing laws, regulations and other measures whose effect was inconsistent with WTO rules on national treatment. This commitment was made in relation to final or interim laws, administrative measures, rules and notices, or any other form of stipulation or guideline. The Working Party took note of these commitments." And this statement has been translated into Annex 1A of the Protocol on the Accession of the People's Republic of China by requiring China to notify the WTO Council for Trade in Goods of the repeal and cessation of all WTO inconsistent laws, regulations and other measures on national treatment. Meanwhile, on the integral clause, the Paragraph 1.2 of the China accession protocol provides that "this Protocol, which shall include the commitments referred to in paragraph 342 of the Working Party Report,[599] shall be an integral part of the WTO Agreement." To do with that, there are some important steps that have been set up to guide the WTO accession process, including the creation of a Working Party to consider the application for WTO membership, the drafting of a Memorandum on the applicant's foreign trade regime, the applicant successfully concluding bilateral negotiations with each of the Working Party members, and the adoption of the Protocol of Accession by the Working Party and then by the WTO's General Council or Ministerial Conference.[600] While the terms of accession are decided on a case-by-case basis and might be different for each applicant, accessions are similar enough for patterns to emerge.[601] These emerging patterns are crystallized in the so-

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[598] The main aim of the discussions on WTO rules is to establish if the Applicant's regime conforms to WTO rules and, in particular, how it is to be brought into conformity where necessary. "Each of the Protocols of Accessions, which follow a common format binds new Members to observe the rules contained in the Agreement establishing the WTO, as rectified, amended or otherwise modified as of the date that the relevant Protocol entered into force. Each of these Protocols also binds the new Member to observe specific commitments. These specific commitments are generally set out in the commitment paragraphs of the relevant Working Party Report (which are incorporated by reference in the Protocols). Sometimes, they are also contained in the text of the Protocol itself. Both sets of commitments are integral parts of the Protocol and have the same status and legal effect. They are enforceable through the Dispute Settlement Mechanism of the WTO. The entire package of Report, Protocol of Accession and Goods and Services Schedules constitutes the conditions under which the acceding government is permitted to join the WTO Agreement". World Trade Organization, 'WTO Technical Note on the Accession Process' (n 594) 15.

[599] Paragraph 342 of the Working Party Report refers to the commitments given by China in relation to certain specific matters, which have been incorporated in paragraph 1.2 of the Protocol.

[600] Simon J Evenett and Carlos A Primo Braga, 'WTO Accession: Lessons from Experience' <http://documents.worldbank.org/curated/en/831891468330043210/WTO-accession-lessons-from-experience> accessed 9 December 2017.

[601] World Trade Organization, 'WTO Technical Note on the Accession Process' (n 594) 1.

called “Standard Protocol”[602]as formulated by the WTO Secretariat, which typically has only 3 pages, and is made up of 3 parts (General Provisions, Schedules and Final Provisions) or includes 9 or 10 paragraphs. Nowadays, the “Standard Protocol” has been adopted by the accession negotiations of more than 30 RAMs. In a sense, the formatted accession protocols of the RAMs are probably the most positive law development in the procedural aspects of WTO accession negotiations.

As the WTO explains that the primary reason why the drafters did not attempt to prescribe universally applicable terms of accession was that the terms are to a large extent decided in negotiations on a case-by-case basis, in relation to each applicant’s national measures. In this case, it is correct to say that each accession to the WTO is a unique event.[603] In each negotiation, the challenge is to arrive at an appropriate balance between preserving and applying the rules and disciplines of the organization and accommodating them, to the extent possible, to the individual circumstances of the acceding government”.[604] Let’s take China’s accession as an example. When China sought to join the WTO, it was making all endeavors to push the economic reform at home aiming at transiting smoothly from a “planned economy” to a “market economy”,[605] the ultimate goal of China’s accession process in terms of agriculture is to find out what related laws, regulations or policies are inconsistent with the AOA, and then help China to fine-tune them with the long-term objective as called upon by the AOA for a fair and market-oriented agricultural trading system, and based on that purpose to develop necessary rules to guide or bind China to faithfully fulfill its obligations in market orientation and trade liberalization. Since the functioning of WTO rules depends on Members being market economies, while very few applicant countries have in place the full set of institutions and policies required for the functioning of a market economy, [606] and it is understandable that the applicant countries will face greater scrutiny from

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[602] ‘WTO Technical Note on the Accession Process’ (n 510), Annex 10.2 Accession Protocols.

[603] Alan S Alexandroff, Sylvia Ostry and Rafael Gomez, *China and the Long March to Global Trade: The Accession of China to the World Trade Organization*, vol 74 (Routledge 2003) 22.

[604] ‘WTO | Handbook on Accession to the WTO - CBT - The Basic Rules - Basic WTO Provision - Page 1’ (n 593).

[605] “In statements to the GATT 1947 Working Party and subsequently to the Working Party on the Accession of China, the representative of China stated that China's consistent efforts to resume its status as a contracting party to GATT and accession to the WTO Agreement were in line with its objective of economic reform to establish a socialist market economy as well as its basic national policy of opening to the outside world.” Report of the Working Party on the Accession of China, WT/MIN(01)/3, 10 November 2001, para. 4.

[606] Rolf J Langhammer and Matthias Lücke, ‘WTO Accession Issues’ 3 <https://www.ifw-members.ifw-kiel.de/publications/wto-accession-issues/kap905.pdf> accessed 9 December 2017.

the WTO and will be required to do more in agricultural trade liberalization.[607] For China, its state-owned and state-invested enterprises, pricing policies, quantitative import restrictions were the biggest concerns of WTO Members over its government interventions into market, which became the main areas of strict scrutiny when the Working Party reviewed China's foreign trade regimes, accordingly China made relevant commitments in all these regards. In this way, these accession procedures are also important to law development as all these commitments made by China have been incorporated into the WTO Agreements, which have been turned into an important driving force to China's domestic reform.[608] It is no doubt that the WTO accession procedure is also some sort of law development process. More than 30 XII members have accepted approximately 1,361 specific obligations. Pursuant to the WTO Accession Protocol, they are integral to the WTO Agreement. The RAMs have also enacted approximately 7,356 WTO-consistent laws and associated implementing regulations across the principal areas of the foreign trade regime. [609]

If compared to the legal procedures for the original WTO Members, the intrinsic values of WTO accession procedures rest on the various bilateral negotiations held under the WTO multilateral platform between the applicant and the relevant incumbent Members who have an interest in getting into the applicant's market at more favorable conditions.[610] This has made the bilateral accession negotiations on the substantive rights and obligations of the applicant more "specific"

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607 "Accession is a crucial period when International Organizations hold considerable influence over states, often requiring applicants to change various domestic policies to conform to the organizations' mission. In the trade context, states face greater scrutiny from the WTO and thus engage in greater trade liberalization as part of the WTO accession process should experience greater trade on joining compared to those who face little scrutiny and engage in little if any liberalization". Todd L Allee and Jamie E Scalera, 'The Divergent Effects of Joining International Organizations: Trade Gains and the Rigors of WTO Accession' (2012) 66 International Organization 243, 244.

608 "In essence, there is nothing in the WTO Agreement does not support the Chinese leadership's stated desire to move toward a market economy and especially on the State-owned Enterprises and the financial system there will be pressure for more fundamental reform… Without some strong external disciplining mechanism, economic reform (at home) might grind to a halt as vested interests resisted further forward momentum…. Entry into the WTO will provide a line in the sand of reform that it will be almost impossible to retreat behind. It will bind subsequent leadership to continue economic reforms and increased internationalization of China's economy". Tony Saich, 'China as a Member of the WTO: Some Political and Social Questions' [2002] http//www. hks. harvard. edu/fs/asaich/China% 20and% 20the% 20WTO. pdf 5.

609 Dadush and Osakwe (n 563) 10.

610 "An even more important characteristic of the accession process not evident from the text of Article XII is the high degree of decentralization in accession negotiations. Instead of one negotiation between the WTO and the applicant, there are multiple, simultaneous negotiations between the applicant and each incumbent Member hoping to demand 'terms'. Only after each incumbent member is satisfied to do all of these individual negotiating results get folded together into the overall accession package. At that point, all the bilateral commitments are multi-lateralized". Steve Charnovitz, 'Mapping the Law of WTO Accession', *The WTO and Accession Countries* (Edward Elgar Publishing 2009) 280.

or "tailor-made". If the specific demands of a relevant incumbent Member could not be met, the accession negotiations could not move forward at all. Behind that, incumbent Members have more leverage in the bilateral negotiations and they can use the lure of the membership to induce economic policy changes in the applicant [611] or wring commercial advantages out of weaker economic partners.[612] In view of the asymmetric bargaining position of the applicant versus the incumbent Members, the terms agreed during the accession process have typically centered on commitments by the applicant, no "reciprocal and mutually advantages" from the incumbent Members have eventuated in WTO practice.[613] For instance, Article XIII of the WTO Agreement permits incumbent Members to resort to the possibility of non-application of WTO Agreements to the applicant,[614] otherwise the applicant's benefits of joining the WTO could be eroded if its protocol of accession was approved by a majority vote over resistance by some important incumbent members.[615] In the case of China, among the 140 WTO Members at that time, there were 37 Members who requested bilateral talks with China. The critical bilateral market access negotiations occurred primarily with the United States and the EU.[616] The United States turned to the renewal of China's MFN status by the Congress as the bargaining chip in the bilateral negotiations.[617]

The "WTO plus obligations or WTO minus rights" allegation has failed to factor in the important role that accession procedure has played in the creation of the RAMs' rights and obligations.

5.2.2 Substantive Aspect of the "WTO Plus Obligations and WTO Minus Rights" Claim

As a matter of substance, what the plus or minus connotation purports to convey is that whether the commitments that RAMs have undertaken are in conformity with the fundamental principles

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[611] Charnovitz (n 610).
[612] Evenett and Braga (n 600).
[613] Charnovitz (n 610) 281.
[614] 'WTO Accession and Development Policies' xii <http://unctad.org/en/Docs/ditctncd11_en.pdf> accessed 9 December 2017.
[615] Langhammer and Lücke (n 606) 7.
[616] Alexandroff, Ostry and Gomez (n 603) 1.
[617] "The U.S. Congress turned to the annual renewal of China's MFN status as the key to influencing the general direction of U.S.-China policy. Each year between 1990 and 1994, the U.S. Congress attempted dozens of pieces of legislation that would have made the continuation of China's MFN status contingent upon presidential certification in the areas of human rights, trade, and arms proliferation." Ka Zeng, *Trade Threats, Trade Wars: Bargaining, Retaliation, and American Coercive Diplomacy* (University of Michigan Press 2004) 94.

of international law, such as non-discrimination or legal equality of states? [618]A selective approach has been adopted as it will be too demanding to examine all the commitments of such a kind. The most referred example in this regard is China's commitments under Article 6.4 and Article 6.2 of the AOA, namely the 8.5 percent *de minimis* level and the inclusion of these developmental measures into its *de minimis* level. Kazakhstan made similar commitments upon its accession to the WTO. "China has given up the right as a developing country to exempt support described in Article 6.2 of the Agreement (certain development programs) from counting towards the Bound Total AMS. In its accession documents, China agreed to include the amounts of such support in the calculation of AMS. This was among the compromises China accepted in return for its WTO membership, which reflect elements of both WTO plus and WTO minus provisions."[619] Rights and obligations are merely two sides of one coin, therefore it won't be difficult to justify that the *de minimis* level or the developmental measures means both rights and obligations to WTO Members, the issue is how to determine the plus or minus things? And this question has been partly answered from the perspective of rules of procedure, let's examine the substantive aspect of the claim.

Trade without discrimination or non-discrimination is a founding principle of the multilateral trading system, which normally refers to the most-favored-nation (MFN) and national treatment. But discrimination has not been completely outlawed by the multilateral trading system[620]and some exceptions are allowed.[621] The Permanent Court of International Justice (PCIJ) ruled in its Advisory Opinion over on the Minority Schools in Albania case that equality in law precludes

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[618] "Discrimination is a word with bad connotations. It suggests unfairness, prejudice and favoritism. It seems to point to a departure from the ideal of equal opportunities, equal rewards and even-handed legal protection of all human beings without regard to differences of race, religion, ethnic origin or sex. Similarly, in public international law discrimination suggests violation of the principle of equality of states…. The principle of equality of states merely means that the many rules constituting what is often called general (or universal) international law apply equally to all independent states. Hence, by definition, such states have equal rights and duties under general international law. But the latter leaves vast areas of transnational activity to be regulated by states at their discretion either unilaterally which it may withhold from third states. Discrimination in this sense is not contrary to international law and is an or by special agreement with other states. No state has, in fact, exactly the same totality of rights and duties as other states, since no two states are parties to exactly the same treaties. By treaty, a state often grants to another state a right easily observed fact of international life." Khurshid Hyder and Oliver James Lissitzyn, *Equality of Treatment and Trade Discrimination in International Law* (Springer 1968) VII.

[619] Orden, Blandford and Josling (n 129) 323.

[620] "Since the principle of equality of treatment in GATT is far from absolute, discrimination has not been completely outlawed. Distinction is made between 'permissible' or 'legal' discrimination and 'forbidden' or 'illegal' discrimination. Notwithstanding this, discrimination in general is discouraged and has been legalized only in the form of exceptions to the most-favoured-nation clause either as a temporary measure to meet certain contingencies, or to bring about a lowering of tariffs and expansion of international trade." Hyder and Lissitzyn (n 618) XI.

[621]'WTO | Understanding the WTO - Principles of the Trading System' (n 69).

discrimination of any kind; whereas equality in fact may involve the necessity of different treatment in order to attain a result which establishes an equilibrium between different situations. The equality must be an effective genuine equality.[622] However, there are no absolute criteria for judging discrimination. What constitutes discrimination, in fact, depends on the schemes of values, or norms and standards, used as the basis for making judgments. Three basic elements emanating from the concept of discrimination includes: unequal treatment, the notion that such treatment is bad and the fact that is relative to the set of norms, or standards.[623] We can adopt the three criteria to revisit the substantive aspect of the claim.

I) Unequal treatment. The principle of state equality does not imply equal or identical rights but equal capacity or opportunity for the acquisition of rights. In connection with that, it is necessary to make distinctions between rights directly derived from the general principles of international law and rights acquired by contracts on the basis of law, [624] which are quite corresponding to the two sets of obligations for WTO Members as mentioned earlier: WTO rule obligations that are set out in the WTO Agreement and its annexes, and the market access obligations of a Member, which are contained in that Member' s goods and services schedules annexed to GATT 1994 and GATS respectively. As the first set of rights and obligations is uniform and equal for all WTO Members, including the RAMs, the plus or minus of rights and obligations comes from the second set, which will vary with each applicant's bargaining power in the accession negotiations. In this sense, what the unique commitments of China or Kazakhstan in Article 6.4 and Article 6.2 reflect are not the fact that China and Kazakhstan have been treated unequally, but the stern reality is that they do

[622] Permanent Court of International Justice, 'Summaries of Judgments, Advisory Opinions and Orders of the Permanent Court of International Justice' 351 <http://legal.un.org/PCIJsummaries/documents/english/PCIJ_FinalText.pdf> accessed 9 December 2017.

[623] Hyder and Lissitzyn (n 618) 14–15.

[624] "All states cannot have similar or equal rights in view of the great disparity in their geographical location, size, strength and the level of development. As Dickinson has pointed out, 'innumerable internal and external limitations render complete equality of rights impossible in practical terms'. What it means is that under similar conditions states have the same rights and same duties. In this connection, it is necessary to distinguish between rights directly derived from the general principles of international law and those acquired by contracts on the basis of law. While the former is equal, unless modified by contracts, the latter cannot be equal in view of differences between various states, though, theoretically, each state has equal freedom to undertake obligations or exchange rights……Nor can it be inferred from the principle of equality of states that it imposes a legal obligation on states to treat all states alike in matters where rights and obligations are regulated on the basis of contractual agreement. By virtue of the discretion which vests in a state as a sovereign entity, it can grant special privileges to some states and discriminate against others, provided in doing so it does not violate a principle of international law or a treaty obligation. Therefore, all examples of discriminatory treatment are not 'illegal under international law; states have wide latitude to accord or withhold special privileges, and this latitude may be used for bargaining purposes." Hyder and Lissitzyn (n 618) 17–18.

not have the equal capacity or opportunity to strike a contractual agreement with the key WTO players on the sensitive issue of their status as developing Members. To the extent that the schedules (of WTO Members) do not meet appropriate levels of market access and remain sub-optimal, they merely reflect the outcome of the political bargaining processes.[625]

Since only developing Members are entitled to the special and deferential treatments (S&DT) granted by the AOA, the WTO and China or Kazakhstan need to reach a consensus first on their status as developing Members. The problem is that except the least-developed countries,[626] the WTO has never made any efforts to define the issue of differentiation of developing Members.[627] There are no legal criteria to define which Members can be counted as "developed" or "developing" Members. However, Members can announce for themselves as developed or developing ones according to the so-called self-classification principle.[628] Other Members can challenge the decision of a Member to make use of provisions available to developing Members. Developing Member status in the WTO can bring certain rights. That a WTO member announces itself as a developing one does not automatically mean that it will benefit from the unilateral preference schemes of some of the developed Members such as the Generalized System of Preferences (GSP).[629] The self-classification principle inevitably creates tensions among Members as to which ones would be counted as developing ones.[630] Moreover, the principle is becoming more arbitrary as the economic status of a Member is not static, particularly for those emerging and transiting economies. Different levels of development among different sectors exist even within a particular Member.[631] Based on these thoughtful and sharp observations, Cottier appeals for replacing

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625 Thomas Cottier, 'From Progressive Liberalization to Progressive Regulation in WTO Law' (2006) 9 Journal of International Economic Law 779, 781.

626 Article XI of the WTO Agreement provides that "the least-developed countries recognized as such by the United Nations will only be required to undertake commitments and concessions to the extent consistent with their individual development, financial and trade needs or their administrative and institutional capabilities". World Trade Organization, *The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations* (n 7) 11.

627 The issue of differentiation between the developing countries in the WTO is closely related to the discussion on S&DT and the ongoing multilateral trade negotiations on agriculture in the Doha Development Round. Jonas Kasteng, Arne Karlsson and Carina Lindberg, 'Differentiation between Developing Countries in the WTO'.

628 Amin M Alavi, *Legalization of Development in the WTO* (Kluwer Law International 2009) 7.

629 'WTO | Development - Who Are the Developing Countries in the WTO?' <https://www.wto.org/english/tratop_e/devel_e/d1who_e.htm> accessed 10 December 2017.

630 Bernard Hoekman, 'Operationalizing the Concept of Policy Space in the WTO: Beyond Special and Differential Treatment' (2005) 8 Journal of International Economic Law 405, 413.

631 "The basic distinction underlying S&D treatment of industrialized countries, DCs and LDCs is increasingly arbitrary in an age of emerging economies. Except for LDCs, these are not legally defined categories, and yet, the law

traditional perceptions of S&DT by a new concept of graduation that are based on two avenues: recourse to economic factors within substantive rules and scheduling of additional commitments.[632]As the typical representative of emerging or transforming economies, China could be the best case to look at the uncertainty and ambiguity surrounding the legal categorization of developing Member and the accorded S&D treatment. Therefore, it would be not astonishing that China's self-claim as a developing Member should be conferred to the S&D treatment under the AOA [633] has been challenged at the outset of its accession negotiations. "China's claim to receive the special and differential treatment accorded to developing countries was not agreed in full. For instance, a compromise was reached regarding its *de minimis* level of domestic support and its entitlement to special and differential treatment under the SCM Agreement".[634] In the end, there is no agreement between the WTO and China on its developing Member status.[635]

II) The notion that such treatment is bad. The unique commitments of China and Kazakhstan under Article 6.4 and Article 6.2 of the AOA should also be interpreted in accordance with the principle of good faith, which has been recognized by the Article 31 (1) of the Vienna Convention on the Law of Treaties (VCLT) as a source and method of treaty interpretation. Meanwhile, the principle of good faith also entails certain responsibilities to both parties to the accession protocol, [636] such as to deal honestly and fairly with each other, to represent their motives and purposes

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is built upon such distinctions. The new group of transforming economies (e.g., the former Soviet Union) fails to meet these categories: treating them as developed countries ignores the realities on the ground. More profoundly, it can be observed that different sectors of the economy show different levels of development within a particular country". Cottier (n 625) 789.

[632] Cottier (n 625) 779–821.

[633] Paragraph 8 of the Report of Working Party on the Accession of China says that "the representative of China stated that although important achievements have been made in its economic development, China was still a developing country and therefore should have the right to enjoy all the differential and more favourable treatment accorded to developing country Members pursuant to the WTO Agreement.

[634] 'WTO | Handbook on Accession to the WTO - CBT - Substance of Accession Negotiations - General Points - Page 1' <https://www.wto.org/english/thewto_e/acc_e/cbt_course_e/c5s1p1_e.htm> accessed 10 December 2017.

[635] Paragraph 9 of the Report of Working Party on the Accession of China reads that "some members of the Working Party indicated that because of the significant size, rapid growth and transitional nature of the Chinese economy, a pragmatic approach should be taken in determining China's need for recourse to transitional periods and other special provisions in the WTO Agreement available to developing country WTO Members. Each agreement and China's situation should be carefully considered and specifically addressed. In this regard it was stressed that this pragmatic approach would be tailored to fit the specific cases of China's accession in a few areas, which were reflected in the relevant provisions set forth in China's Protocol and Working Party Report."

[636] "Within treaty law, good faith most prominently figures in two places: (1) it is a source and method of treaty interpretation pursuant to Article 31 (1) of VCLT. The content of the interpretative principle of good faith is to ensure that the interpretation of the treaty terms remains a balanced and fair one. It limits the extent of literal interpretation if there is the risk that such an interpretation may result in one party 'gaining an unfair or unjust advantage over another

truthfully, and to refrain from taking unfair advantages that might result from a literal and unintended interpretation of the agreement between them.[637] The whole purpose is to make sure that the WTO has made every good faith effort to obtain the consent of the sovereign Government of China or Kazakhstan for making bigger contributions in terms of trade liberalization.

Agricultural trade distortion and protection is an issue of common concern for international community. The motives and purposes of Article 6.2 and Article 6.4 are very clear, that is to build up effective disciples or rules to bind Members' expenditure on trade distorting domestic support measures in order to achieve the long-term objective for a fair and market-oriented multilateral agricultural trading system. Given the economic size and great potential of China or Kazakhstan in subsidizing its agriculture, either of them has a stake in addressing trade distortion. Therefore, the issue in question is not about whether China or Kazakhstan has been treated unequally, but about whether the treatment for assigning them more responsibilities in addressing trade distortion has been done in an "honest and fair" manner. Given extensive negotiations on it between the WTO and China or Kazakhstan during the accession process, both sides had exchanged their motives and purposes truthfully, and they had dealt this sensitive matter with an honest and fair attitude in order to provide China or Kazakhstan with adequate information to fully understand the legal consequences of accepting these commitments before they reached consensus. This has been clearly confirmed in relevant part of their protocol in accession to the WTO. For instance, Paragraph 9 of the Working Party Report on the Accession of China, which says that "Members reiterated that all commitments taken by China in her accession process were solely those of China and would prejudice neither existing rights and obligations of Members under the WTO Agreement nor on-going and future WTO negotiations and any other process of accession. While noting the pragmatic approach taken in China's case in a few areas, Members also recognized the importance of differential and more favorable treatment for developing countries embodied in the WTO Agreement". All proves that the WTO has made every good faith effort to persuade China

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party'. (2) It imposes certain duties to the signatories to a treaty prior ratification, namely to make every good faith effort to 'obtain the consent of the sovereign'. Given that good faith expresses 'complex', 'polar' values, good faith is associated with concepts of equity, such as acquiescence and estoppel. In addition, good faith has close ties to the customary rule of pacta sunt servanda, the general principles of the PLE (Protection of Legitimate Expectations) and the prohibition of abus de droit." Marion Panizzon, *Good Faith in the Jurisprudence of the WTO: The Protection of Legitimate Expectations, Good Faith Interpretation and Fair Dispute Settlement* (Bloomsbury Publishing 2006) 20–21.

[637] Anthony D'Amato, 'Good Faith' (1995) 2 Encyclopedia of Public International Law 599.

or Kazakhstan to accept these legal commitments, though they are discriminatory in nature.

III) The fact that is relative to the set of norms, or standards, which constitutes the criteria for judgment. As there is no general rule of international law which forbids discrimination in trade matters, a state is free to follow a policy which it deems best calculated to promote its interests, as long as in doing so it does not violate a principle of international law or a treaty obligation.[638] So does the situation of regulation of domestic support. Though the AOA has established multilateral rules to guide all WTO Members' domestic support policy, each individual WTO Member still has full discretion to decide how to use these legitimate policy space. But the point is even China could get the same 10 per cent of *de minimis* threshold as for developing Members, there is still an issue of de facto disparity among WTO Members' *de minimis* level. As WTO Members' *de minimis* levels are also based on their values of agricultural production (VAP), which vary substantially among the WTO membership.[639]

Another criterion for judgment is the AOA in nature is an "incompletely theorized agreement", [640] as championed by Cass R. Sunstein,[641] which basically argues that though Members could reach

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638 "In the first place, it is sufficiently clear that regulation of tariffs is a matter essentially within the domestic jurisdiction of a state and is not regulated by general international law. It cannot, therefore, be deduced from the principle of equality of states in international law that it imposes a legal obligation on a state to grant similar rights to all third states, or entitles a third state to demand equality of treatment as a legal right under international law." Hyder and Lissitzyn (n 618) 182.

639 "VOP and hence the *de minimis* allowances are expected to continue to grow over time for most members. This would increase the contrast between the sums of the *de minimis* allowances of developed and developing countries. Faster growth of agricultural VOP in developing countries would further increase this contrast. To illustrate, suppose the annual growth rate of nominal value of agricultural production is one percentage point among developed countries but two percentage points among developing countries. From 2002 to 2023 the VOP in developed countries would grow by 23 percent and in developing countries by 52 percent, and the *de minimis* allowances in developed and developing countries would increase correspondingly." Brink, 'The WTO Disciplines on Domestic Support' (n 326) 51–52.

640 "Constitution-makers can agree on abstractions without agreeing on the particular meaning of those abstractions…. In the day-to-day operations of constitutional practice, incompletely theorized agreements on certain rules and doctrines help to ensure a sense what the law is, even amid large-scale disagreements about what, particularly, accounts for those rules and doctrines. The phenomenon suggests a general strategy for handling some of the most difficult decisions….and this phenomenon has an especially notable feature: it enlists silence, on certain basic questions, as a device for producing convergence despite disagreement, uncertainty, limits of time and capacity, and heterogeneity. In short, silence can be a constructive force. Incompletely theorized agreements are an important source of successful constitutionalism and social stability; they also provide a way for people to demonstrate mutual respect". Cass R Sunstein, 'Incompletely Theorized Agreements in Constitutional Law' [2007] Social research 1, 1–24.

641 "Sunstein distinguishes between three types of incompletely theorized agreements: i) incompletely specified agreements (e.g., "constitutional provisions and regulatory standards in administrative law"); ii) mid-tier incompletely theorized agreements where there is "agreement on a mid-level principle" but disagreement "about the more general theory that accounts for it and about outcomes in a particular case"; and iii) "incompletely theorized agreements on

consensus on abstractions of an agreement without agreeing on the particular meaning of those abstractions, so the agreement is incomplete in the sense that it keeps silent on some controversial issues. For instance, as explained earlier the WTO and China reached agreement on China's treatments under Article 6.2 and 6.4, while remained no consensus on such sensitive issue as China's status as a developing Member. A great advantage of an incompletely theorized agreement is that it allows Members of diverse views to live together on mutually advantageous terms or to show one another a high degree of both humility and mutual respect [642] so that they can make decisions more readily without the need to engage in protracted disagreement over principles and concepts that lie at the heart of the legal system. Complete theorization is unnecessary, particularly at the early stages of system building, and rife with the potential for needless conflict.[643] This is exactly the situation that the AOA is facing now. First, the AOA says in its preamble that it aims primarily to "establish a basis for initiating a process of reform of trade in agriculture", while the long-term objective of that process is to "establish a fair and market-oriented agricultural trading system".[644] That means agricultural trade reform process did not end with the birth of the AOA, while on the contrary the AOA is just to lay the foundation for starting to do that.[645] As WTO Members only agreed on the general principles to bring agriculture under the multilateral trading system, huge disagreements remain on how to approach agricultural trade liberalization. Secondly, the AOA has given a very broad "built-in agenda" in Article 20 to mandate Members to continue to work upon issues that have been set aside early in the Uruguay Round negotiations or issues that might pop up at some future points.[646] A series of milestones have been achieved since the Doha Development Round was initiated in 2001 in narrowing down the differences in Members' positions so as to enable them to reach a number of historic decisions on some less controversial

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particular outcomes, accompanied by agreements on the low-level principles that account for them". John Hoben, 'In from the Cold: Canada's WTO Obligations & Incompletely Theorized Agreements in Contemporary International Law' (2014) 65 UNBLJ 157, 161.

642 Cass R Sunstein, 'From Consumer Sovereignty to Cost-Benefit Analysis: An Incompletely Theorized Agreement' (1999) 23 Harv. JL & Pub. Pol'y 203, 205.

643 Hoben (n 641) 179.

644 McMahon and Desta (n 159) 1.

645 'WTO | Agriculture - Gateway' <https://www.wto.org/english/tratop_e/agric_e/agric_e.htm> accessed 16 December 2017.

646 Meléndez-Ortiz, Bellmann and Hepburn, *Agricultural Subsidies in the WTO Green Box: Ensuring Coherence with Sustainable Development Goals* (n 156) 37.

issues or to harvest "some low hanging fruit",[647] such as the 2013 Bali Package and 2015 Nairobi Package, [648] but deep divisions still remain among members on the two other important pillars of the agricultural trade reform--domestic support and market opening. Therefore, at current stage the nature of the AOA as an incompletely theorized agreement remains unchanged. Though agreements on certain issues are reached, the solutions to the long-term objective for a fair and market-oriented trading system seem still quite elusive.[649]

In short, the legality of "WTO plus obligations and WTO minus rights" allegation cannot be subscribed to due to considerations based on both procedural and substantive rules. However, the fact that the RAMs enjoy legal less policy space for import protection than the original Members under the current framework of the AOA cannot be denied.

5.3 Is Policy Space for Import Protection Offered by the AOA Sufficient for RAMs?

Another immediate question will be whether the legal policy space for import protection embedded in the AOA is sufficient for the RAMs to fight against the competition from imported products?

General speaking, the AOA has provided the original Members with legal policy space for import protection more than what they need. This point has been articulated in detail in previous Chapters.

As regards the sufficiency of RAM's legal policy space for import protection, there are two contradictory developments that deserve a close attention.

1) RAMs still have policy space for import protection to give in bilateral and regional free trade agreements (FTA). With the stagnation of the WTO multilateralism and the resurrecting

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[647] 'WTO | Ministerial Conferences - Ninth WTO Ministerial Conference - Briefing Notes' <https://www.wto.org/english/thewto_e/minist_e/mc9_e/brief_agneg_e.htm> accessed 14 December 2017.

[648] 'WTO | Agriculture - Negotiations' <https://www.wto.org/english/tratop_e/agric_e/negoti_e.htm> accessed 16 December 2017.

[649] "Even when agreement is reached between members, this only ever represents one possible way in which the pathways through the web can be mapped; the other pathways remain open so that disagreement is inevitable as different understandings of how the various strands fit together come to the fore, seemingly identifying new difficulties requiring different solutions. All this means that when agreement is reached in multilateral negotiations, we only fix one review of problem at the point of agreement; the problem itself is not eliminated, it merely shifts around the axis and the same difficulties merely come to prominence in a slightly modified form…. Rather than looking for an ultimate resolution of the problem, we should be more concerned about its management. That is, we should certainly regard the task of international agricultural trade regulation as imposing some form of vertical control on worst protectionist excesses witnessed in pre-WTO agricultural policies; but we should also see the multilateral agreement as a protocol of balancing members' competing versions of problem of international agricultural trade and the interests of the WTO members." Fiona Smith, *Agriculture and the WTO: Towards a New Theory of International Agricultural Trade Regulation* (Edward Elgar Publishing 2009) 143–144.

bilateralism and a new form of loose regionalism, the landscape of international trade agreements has changed dramatically.[650] By far there are about 300 FTAs in force and a number of important FTAs are under negotiations.[651] The EU and the North America Free Trade Agreement (NAFTA) continue to dominate trade among regional trade agreements, with inter-trade representing 63% or 50% of their total export in 2015 respectively.[652] The legal basis of FTAs is Article XXIV of the GATT 1994, which "recognize the desirability of increasing freedom of trade by the development, through voluntary agreements, of closer integration between the economies of the countries parties to such agreements. The purpose of a customs union or of a free-trade area should be to facilitate trade between the constituent territories and not to raise barriers to the trade of other contracting parties with such territories". The "enabling clause" for developing Members further allows the derogations to the MFN treatment (non-discrimination) in favor of developing Members and permits preferential arrangements among them in goods trade. However, in practice the birth of more FTAs will have profound implications on the multilateral trading system. In the case of agricultural trade, this interaction between the FTAs and the WTO is more than usually pertinent. Though there is a strong degree of complementarity between the multilateral trade negotiations and the bilateral and regional free trade talks, bilateral and regional FTAs that include agricultural products may erode market access barriers but set up trade flows encouraged by discrimination among suppliers.[653] This means that WTO Members can first lower down or even give up their policy space in agricultural import protection to some trading partners on the basis of bilateral and regional FTAs. For instance, according to China-Australia Free Trade Agreement (ChAFTA), which entered into force in December 2015, China has committed to eliminate its tariff protection over a number of agricultural products that are key to Australian export, including beef, dairy, pork, wine and spirits mostly by 2019. China has also committed to give preferential market access to Australian wool in terms of its TRQ administration protection.[654] China has made the similar

[650] Simon Lester, Bryan Mercurio and Lorand Bartels, *Bilateral and Regional Trade Agreements: Commentary and Analysis*, vol 1 (Cambridge University Press 2016).

[651] 'WTO | Regional Trade Agreements Gateway' <https://www.wto.org/english/tratop_e/region_e/region_e.htm#facts> accessed 30 May 2018.

[652] 'WTO | Trade Statistics - World Trade Statistical Review 2017' <https://www.wto.org/english/res_e/statis_e/wts2017_e/wts17_toc_e.htm> accessed 30 May 2018.

[653] Lester, Mercurio and Bartels (n 650) 181.

[654] 'Quick Guide: Agriculture & Processed Foods Outcomes - Department of Foreign Affairs and Trade' <http://dfat.gov.au/trade/agreements/in-force/chafta/fact-sheets/Pages/quick-guide-agriculture-and-processed-foods-outcomes.aspx> accessed 30 May 2018.

FTAs arrangements with many other WTO Members, including New Zealand and ASEAN.[655] In this context, it would not make sense if we argue that China, as a RAM, does not have enough policy space to protect its agricultural products from imports. Other RAMs, such as Viet Nam, Kazakhstan and Russian Federation, have done the same as China by providing each other with better market access conditions and giving up their policy space in tariff protection through the FTAs arrangement.[656]

2) Meanwhile the RAMs are facing an embarrassing situation where certain highly trade-liberalized agricultural products fall short of effective protection instruments against import surges. This is the case for those agricultural products with low bound tariff rates, and without any entitlement to other means of border protection, such as the TRQ administration and the SSG provisions. For instance, soybean only enjoys 3 per cent final bound tariff protection in China and is not subject to the TRQ administration and the SSG provisions. After acceding to the WTO in 2001, China's soybean import witnessed a dramatic increase, and it surged from 13 million metric tons in 2001/02 to 84 million metric tons in 2015/16, increasing more than 6 times just within a short period of 14 years. While China's own soybean production has been shrinking on a yearly basis due to the strong competition from imported soybeans. An assumption has been made. If China was allowed to revoke the SSG provisions against soybean import surges, china could reduce its soybean import by up to 7.5 million metric tons (Table 1). That's why the Special Safeguard Mechanism (SSM) as negotiated in the Doha Round [657]will be extremely critical to China as well as the other RAMs.

Table 1 A Scenario if China had reserved the SSG for Soybean

Unit: Million MT

	Import Quantity	Production	Percent (%)	Average Domestic Consumption over the past 3 years	Trigger Level (105%)	Less Import if SSG Reserved
2004/05	28.24	17.40	162.3	34.14	21.06	-7.18
2005/06	30.8	16.35	188.4	39.02	29.65	-1.15
2006/07	30.86	15.97	193.2	42.97	32.34	1.48

[655] 'China FTA Network' <http://fta.mofcom.gov.cn/topic/ennewzealand.shtml> accessed 30 May 2018.

[656] 'WTO | Regional Trade Agreements , Eurasian Economic Union (EAEU) - Viet Nam' <http://rtais.wto.org/UI/PublicShowRTAIDCard.aspx?rtaid=973&lang=1&redirect=1> accessed 31 May 2018.

[657] Special Safeguard Mechanism for Developing Country Members, Submission by the G-33, WT/MIN (15)/W/19, JOB/AG/49, 18 December 2015.

2007/08	39.82	12.73	312.8	46.25	32.40	-7.42
2008/09	43.35	15.55	278.8	47.66	41.81	-1.54
2009/10	52.84	14.98	352.7	49.77	45.52	-7.32
2010/11	54.85	15.08	363.7	55.06	55.48	0.64
2011/12	61.53	14.49	424.6	62.25	57.59	-3.94
2012/13	62.17	13.05	476.4	69.5	64.61	-2.44
2013/14	72.75	11.95	608.8	74.56	65.28	-7.47
2014/15	80.52	12.15	662.7	79.06	76.39	-4.13
2015/16	81.12	11.00	737.5	84.23	84.55	3.33
Table 1 is made on the basis of the author's calculation, however the data concerning China's soybean import quantity, production, average domestic consumption comes from the AMIS market database. http://statistics.amis-outlook.org/data/index.html#COMPARE						

To conclude, it is hard to say that the AOA provided the RAMs with sufficient policy space for import protection as each Member has the final discretion to decide which agricultural product need what level of import protection, given the sensitivity of each agricultural product to the Member's legitimate policy objectives. If the Member realizes that some products need more policy space for protection, it will develop corresponding mechanisms for compensation. For instance, China provided subsidies to its soybean producers as a way to fight against the competition from imported soybeans. It seems that this is not enough, China still has the chance to put up its protection for soybean producers through the new mechanisms under the ongoing negotiations in the Doha Round, such as the special products (SP) and the SSM.

Chapter 6
Conclusions

6.1 Defining the Concept of "Policy Space" for Import Protection under the AOA

Policy space is one of the most contentious issues in the WTO law or more specifically in the AOA. The controversy stems from the fact that the expansion of the jurisdiction of the multilateral trading system into agriculture that aims at trade liberalization will inevitably restrict Members' choices in agricultural trade protection policies. The controversy also derives from the fact that it lacks of a proper definition and clear references to the term of "policy space" in the WTO law and the AOA, though it has gone through heated debates over the years. This legal gap has profound percussions as in most cases those debates are undertaken without a common understanding about what policy space is. As a matter of fact, the concept of "policy space" has been accommodated and instrumentalized by the AOA into various legal mechanisms that allow Members to carry out necessary protection against import under certain conditions. The AOA does not outlaw protection; instead, it legalizes protection and integrates it into the multilateral trading system in a transparent manner. Policy space is the maneuvering room or flexibility that a WTO Member has to strike balances between fulfilling its commitments in agricultural trade liberalization and maintaining proper means of protection to shield its domestic sectors from imports. Policy space is not an abstract concept as what appears at first sight any more, and it has been translated into concrete legal instruments or mechanisms of protection. In order to prevent the abuse of these legal instruments or mechanisms, quantitative or qualitative conditions, criteria and thresholds are set up. These conditions, criteria and thresholds also serve as the concrete tools to measure a Member's policy space in import protection whether has been used lawfully. In this sense, A Member's legal policy space in import protection under the framework of AOA is embodied in two aspects: whether it is entitled to a specific instrument of protection that has been endorsed by the AOA? If so, under what conditions, criteria and thresholds can this Member use its special privilege? The sum of all these privileges constitutes this Member's overall policy for import protection under the AOA.

As Members joined the AOA with different conditions and commitments, and all those conditions and commitments become the legal benchmarks to measure their policy space in import protection.

Though policy space offers Members necessary means to protect their interests or products, it does not guarantee all the Members stand on the equal footing, as Members agreed in the Uruguay Round to bind their policy space for import protection, for example, tariff, domestic support, export subsidies, at different starting points with different conditions and reduce it on those bases. No one-size-fit-all policy space exists under the AOA.

As policy space involves not just legal instruments of protection that WTO Members have under the framework of the AOA, but also the overall interests of WTO Members in exchanging their market access with each other as Members have to work out their agreements on terms of concessions. In nature, policy space is about whether Members have been given the flexibility to strike balances between their defensive interests of protecting their domestic markets and offensive interests of opening the markets of their trading partners. They face two challenges. First, how to make balances among the interest of different sectors at home. In this context, each Member has to work out its key interests or sensitive products that may have direct implications to its legitimate concerns, such as food security, right to adequate food, sustainable agriculture and rural development, smallholder agriculture, etc., and on the basis of these legitimate concerns, each Member may claim that its key interests or sensitive products deserve more protection than any other sectors. Therefore, policy space means the internal balance of interests among a Member's own agricultural sectors, and it is an issue of prioritizing sensitive products and protective interests. Another challenge is the balance of interests among Members, which might involve power play when Members negotiate their terms of market opening.

Another interesting aspect of legal policy space for import protection under the AOA is that it will evolve with the development of the multilateral negotiations. However, except the achievement made in export subsidies, no new international agreement is concluded since the AOA was signed in 1994 and Members' legal policy space for import protection has nearly remained the same in the past more than two decades.

6.2 Members' Policy Space for Border Protection

For market access, Members' policy space rests on two aspects: tariff protection and the entitlements to the TRQ administration and the SSG provisions. The tariff-only regime has established the legal status of tariff protection as the primary legitimate instrument of protection, though the practices of WTO Members seeking to protect their legitimate objectives through the

use of NTMs are also on the rise, which might have a bearing on the expansion of Members' policy space. For that purpose, a number of WTO agreements are created to regulate various NTMs, including the SPS Agreement for SPS measures, TBT Agreement for TBT measures, ILP Agreement for import licensing procedures. In this context, Members' policy space for tariff protection under the AOA shall not be looked at only from the levels of their bound tariff rates and it shall be examined together with their policy space under other WTO agreements, the SPS Agreement in particular. However, this thesis is only looking at Members' policy space for tariff protection under the AOA, and it is not overstretching to examine all the other WTO agreements together.

There are quantitative and qualitative criteria in the AOA to measure Members' policy space for tariff protection. Once a Member has bound a tariff at a certain level in the Uruguay Round, it has made a legal commitment not to charge more than that level of duty on the imported agricultural products in question. The final bound tariff constitutes the quantitative criterion for its policy space in tariff protection, while its MFN applied duties represent its actual level of tariff protection or used policy space. The difference between that Member's final bound duty and MFN applied duty constitutes its unused policy space in tariff protection, which is referred to as tariff water or tariff binding overhang. The tariff overhang is strategic in terms of future tariff reduction.

To capture a broad picture of the status quo of Members' policy space for tariff protection, a band approach is adopted and Members are allocated into four clusters based on their levels of final bound tariffs. Members' policy space for tariff protection varies dramatically from one Cluster to the other. For Members in Cluster 1, their policy space for tariff protection measured by the final bound tariff ranges from 120 per cent to 199 per cent, and even the tariff overhangs remain more than 100 per cent. While for those Members in Cluster 4, their average final bound tariff rates for agricultural products are less than 30 per cent, which means their policy space for tariff protection is less than 30 per cent. For most Members in this Cluster, their tariff overhangs are even less than 10 per cent. However, Members in Cluster 2 (average final bound tariffs are in the range of 30 per cent to 60 per cent) and Cluster 3 (average final bound tariffs are in the range of 60 per cent to 120 per cent) account for more than 60 per cent of the WTO Membership, which means a large number of Members' policy space for tariff protection falls within these two clusters. As Table 14 in page 107, the average policy space for tariff protection, if measured by bound tariff rates, is 52.9 per

cent and 35.7 per cent for developing Members and developed Members respectively, while 74.5 per cent for LDCs. Generally speaking, WTO Members' policy space for tariff protection remains quite sufficient as the average unused space for tariff protection stands as high as 38 per cent for developing Members and 19 per cent for developed Members.

For Member's policy space for the entitlement to the TRQ administration and the SSG provisions, the qualification for the entitlements to these mechanisms can be considered as the qualitative criterion for Members' policy space in this regard due to the fact that these mechanisms are only available to a limited number of Members. As far as each mechanism is concerned, there are also some quantitative criteria to measure Members' policy space, for instance, the in-quota tariff rate, the out-quota tariff rate and the in-quota quantity for the TRQ system and the price-based or the volume-based trigger criteria for the SSG provisions. While the primary qualitative criterion for the entitlement of policy space to these two mechanisms is whether Members have agreed with the terms for tariffication. This means that the entitlement to these mechanisms is a compensation for the exchange of tariffication. The purpose of these two mechanisms is to provide necessary remedies against the risks of market opening. For those Members who have smaller policy space in terms of tariff protection have maintained additional policy space by the privileges to the TRQ administration and the SSG provisions. Based on the policy space for tariff protection and for the entitlement to the TRQ administration and the SSG provision, 42 Members, which are primarily comprised of developed Members and RAMs, have established a multi-layer protection mechanism for their sensitive products (see Table 15, Page 108). Therefore, there is a dichotomy on the use of these two types of policy space for border protection. Most developing Members are relying more on their policy space for tariff protection, while developed Members are structured their protection on the basis of their policy space for the entitlement to the TRQ administration and the SSG provisions.

6.3 Members' Policy Space for Domestic Support

For domestic support, Members' policy space comes from the rights to use different categories of domestic support measures, including the Green Box, Amber Box, Blue Box, Development Programs and the *de minimis* support, to achieve expected policy objectives. As these domestic support measures are classified into exempt and non-exempt ones, Members' policy space is made up of two types: limited policy space and exemption policy space.

1) For limited policy space, derives from two different types of quantitative limits set by the AOA on non-exempt trade-distorting domestic support (Amber Box support). Each type applies to a particular category of Members. One type is the *de minimis* limits on individual AMSs, which applies to Members without a Final Bound Total AMS (FBTAMS). The other type is the FBTAMS limit on the Current Total AMS of Members with a FBTAMS in their schedule. The existence of a scheduled FBTAMS matters in deciding a Member's limited policy space. If a Member has a FBTAMS commitment in its Schedules in Goods, then its CTAMS in a given year shall not exceed its FBTAMS. If the FBTAMS is nil or zero, then its AMS shall not exceed its *de minimis* level. Therefore, the FBTAMS or the *de minimis* level becomes the quantitative criterion of that Member's policy space in Amber Box support. The situation with regard to the *de minimis* limits on individual AMSs and the FBTAMS as the limit on CTAMS is like Members' final bound tariffs and their relevant applied tariffs in the market access pillar. Like the tariff overhang, there can be a huge gap between the amount of applied AMS support and the bound limit. The gap can be observed between an individual AMS and its *de minimis* limit (for Members without a FBTAMS), and a huge gap between the CTAMS and the FBTAMS (for Members with a FBTAMS). There is no obligation to keep an AMS below the threshold if a country has a FBTAMS in its schedule of commitments, in contrast to the legal obligation that CTAMS must not exceed the FBTAMS. The upper limit for the CTAMS is the scheduled FBTAMS. A large Total AMS overhang also exists between Members' FBTAMS and CTAMS. As Table 4 in page 135-136 shows that Total AMS overhang in relative terms is nearly 70 per cent for the United States, more than 80 per cent for Japan and Canada and 90 per cent for the EU. If expressed in absolute terms, their Total AMS overhang stood in 2008: $ 89 billion for the EU, $ 38 billion for Japan, $ 10 billion for the United States and $ 2 billion for Canada. This is the case for 32 Members, including 15 developed Members and 17 developing Members, such as Brazil, Mexico, Saudi Arabia and Thailand (see Table 3 in page 133). The flexibility in limited policy space and the huge Total AMS overhang allows the "traditional" high-support Members, such as the EU, the United States and Japan to play the game of box shifting. For those Members without FBTAMS, their trade-distorting domestic support are required to be restricted within their *de minimis* levels, which are 10 per cent for developing Members and 5 percent for developed Members of the value of production for NPS AMS or of the value of production of a basic agricultural product for PS AMS. This is the case for most developing Members. Members have used NPS AMS support for various purposes.

Developing Members have used it to provide farmers with favourable agricultural production factors or free interest, interest rates concessions, while developed Members have adopted it to accommodate agricultural insurance or income stabilization. Members only used a very limited part of their policy space in NPS AMS and their unused support space for NPS AMS are about five times of their used space for such support in 2009-2010. For most of the WTO Members, limited policy space for Amber Box support is not an issue. However, for some emerging economies, China in particular, the limited policy space is taking effects on their policymaking. Market price support is disfavoured by the AOA due to its trade distorting nature, however, it remains the most immediate policy options for market intervention by Member governments to deal with price fluctuations, provide income support and pursue other policy goals. With further agricultural trade liberalization, Members' limited policy space for domestic support will be further reduced on the one hand. The importance of MPS in preventing market and price from risks and fluctuations will become more prominent and Members' reliance on such support will be increased on the other hand. This will call the sufficiency of limited policy space provided within the *de minimis* limits into question. The very recent WTO panel report on the Chinese Agricultural Subsidies is the most relevant ruling in this regard and it concludes the market price support of China to its wheat, Indica rice and Japonica rice producers exceeded the *de minimis* level and therefore, China acted inconsistently with its obligations under Articles 3.2 and 6.3 of the Agreement on Agriculture.[658] As the first WTO case on Members' policy space on domestic support, the ruling of the WTO panel will have significant implications on the WTO negotiations.

2) For exemption policy space, Green Box support has become the lion's share of Members' exempt domestic support or even their overall agricultural subsidies. Members' expenditure in Green Box grew from US$ 330 billion in 2008 to US$ 365 billion in 2010. With the expansion of Members' Green Box support, their exemption space in domestic support is also growing bigger. However, this process is achieved through the so-called "box shifting", which has been undertaken under various forms. Box-shifting is not outlawed by the AOA. However, Box shifting happens normally from the domestic support box with limited policy space to other boxes with exemption policy space, such as from Amber Box to Green Box or Blue Box or from *the de minimis* level to Development Box. A big loophole that allows some Members to circumvent their commitments

[658] https://www.wto.org/english/news_e/news19_e/511r_e.htm.

in reducing trade-distorting domestic support is embedded in the current framework of the AOA. The way to fix this systematic defect is to strengthen the legal criteria of Green Box, particularly the decoupled income support and other direct payment programs in Annex II of the AOA. Otherwise, Members will not be placed at the same footing in terms of the use of legal instruments of protection as well as the derivative policy space.

Blue Box remains marginalized in the landscape of Members' exemption policy space, as it is adopted as a temporary arrangement to allow Members with a high level of MPS to set the support apart from reduction commitments. Only few developed Members, namely the EU, Japan, Norway and Iceland, have used it. In nature, Blue Box is "Amber Box with conditions", and will and shall be subject to more restrictions, though no limits are placed on the spending in the name of Blue Box. Members' expenditure in Blue Box has declined over the years and it dropped to $ 6.3 billion by 2012, nearly 20 percent less than in 2008. The Revised Draft Modalities for Agriculture (TN/AG/W/4/Rev.4) even proposes a tiered reduction formula on the basis of the Overall Trade-Distorting Domestic Support (OTDS), and some Blue Box support would be included into the base level of OTDS. This means if the proposed modalities were adopted, Blue Box would not be exempted from reduction commitments.

Development Box (Article 6.2) is emerging as an important category of policy space for developing Members to exempt a growing amount of input and investment subsidies from WTO limits. Members' interest in input subsidies, particularly those on fertiliser, has revived, notably in Africa. India can be counted as the best example in making full use of the AOA rules to protect its interests. The study finds that India's exempted expenditure in Development Box exceeds its *de mininis* level for NPS domestic support or its Green Box domestic support without breaking its international commitments. In sharp contrast, China is caught for acting inconsistently with its international obligations as different rules apply to China and India in terms of Development Box. For China, it committed to include its domestic support under Development Box into its *de minimis* level, which has further squeezed its exemption policy space.

6.4 Members' Divergent and Common Interests in Policy Space for Import Protection

WTO Members have divergent interests in terms of policy space for import protection. For developing Members, their policy space rests more on border protection as most of them have set quite high bound tariffs and maintained huge tariff overhangs; while developed Members have

more bargaining chips in domestic support as many of them have set high FBTAMS and kept large Total AMS overhangs. Therefore, to advance agricultural trade liberalization, the multilateral trade talks must first strike an internal balance between the market access pillar and the domestic support pillar.[659] A number of scenarios about how to move the multilateral trade negotiations forward suggest that the major gains from further agricultural liberalisation would likely come from reductions in agricultural tariffs and other measures to improve market access. The effect of domestic support reductions is likely to be even smaller than previous research suggests.[660] For instance, Rae and Strutt argue that substantial trade expansion and welfare gains can be achieved even when domestic support is excluded from the multilateral agreement, and that improved market access makes a far greater contribution to welfare gains than reforms to domestic policies. Once substantive reforms to border policies have been achieved, attention can be turned to the lower-priority task of reforming domestic support.[661] Based on similar lines of arguments, Dimaranan and Roman Keeney advise developing Members to focus on improving their market access to developed Members, meanwhile allowing developed Members to continue or even increase domestic support payments.[662] As examined in previous Chapters, serious imbalances are embedded in the current framework of the AOA, which have resulted in disparities among WTO Members in terms of entitlements and constraints. Continuing to ignore these disparities and focusing only on the market access pillar will exacerbate these imbalances, and some developing Members may have less policy space for import protection than their developed counterparts. Firstly, import tariffs remain the most convenient and widely adopted policy instrument for developing Members to deal with import surges in a much more open market. Most developing Members do not have the policy space in TRQ administration or SSG provisions and the policy

[659] Gonzalez (n 54) 438.

[660] Walsh, Brockmeier and Matthews (n 537).

[661] Allan N Rae and Anna Strutt, 'The Current Round of Agricultural Trade Negotiations: Should We Bother About Domestic Support?' (New Zealand Trade Consortium Working Paper 2002).

[662] "We conclude that developing countries will be well advised to focus their efforts on improved market access to the OECD economies, while permitting these wealthy economies to continue – indeed even increase – domestic support payments. Provided these increased domestic support payments are not linked to output or variable inputs, the trade-distorting effects are likely to be small, and they can be a rather effective way of offsetting the potential losses that would otherwise be sustained by OECD farmers. This type of policy re-instrumentation will increase the probability that such reforms will be deemed politically acceptable in the OECD member economies, while simultaneously increasing the likelihood that such reforms will also be beneficial to the developing economies." Betina Dimaranan, Thomas Hertel and Roman Keeney, 'OECD Domestic Support and the Developing Countries' [2003] GTAP Working Papers 19.

space in tariff protection remains the only one that they have under the current framework of the AOA, but developed Members have more choices in this regard. Therefore, developing Members need other mechanisms in exchange for any further reduction of their policy space in tariff production. The July 2008 package stresses that the final balance will be found only at the conclusion of these subsequent negotiations and within the Single Undertaking. To achieve this balance, operationally effective and meaningful S&DT provisions for developing Members shall be incorporated into the modalities to be developed.[663] Special products, TRQ administration and the special safeguard mechanism (SSM) as suggested in the July Package 2008 will be a right move in that direction. The issue again is how to make sure that these provisions work in the interests of developing Members, while preventing the provisions from being abused of.[664] Secondly, there are strong connections between the market access and domestic support pillar.[665] The lowering the level of tariff protection in the absence of a real change in domestic support policies in developed Members will render very limited economic implications for the expansion of market access opportunities for developing Members.[666] Third, the AOA rules on domestic support focus on protecting the interests of developed Members. For instance, as the policy space in Amber Box support that most developing country Members enjoy is restricted to the *de minimis* limits only, the central issue shall be eliminating the large policy space that allows some developed Members to scale up their AMS support to levels much beyond the *de minimis* thresholds. Moreover, the effectiveness of the AOA rules rests on whether Members can set out effective disciplines to prevent box shifting of trade-distorting support without underlying policy change. Last but not the least, a number of cases as examined previously, US-Cotton, Canada-Dairy, EU-Sugar and Chile-PBS show the close linkage among the legal instruments of protection in different pillars, which may have significant implications in terms of the expansion of Members' policy

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663 Annex A, Framework for Establishing Modalities in Agriculture, the General Council's Decision on the Doha Agenda Work Program on 1 August 2004 (the "July package 2004"), 'WTO | Doha Development Agenda - Text of the "July Package" — the General Council's Post-Cancún Decision' (n 569).

664 "Unfortunately, from a systemic point of view, it appears that 'Doha' may leave the door wide open for certain abuses of policy space, especially by advanced developing countries (e.g. Special Products, Special Safeguard Mechanism and export restrictions) but also, albeit in less obvious ways, for the developed countries (e.g. Sensitive Products, various Green Box discretions, food aid and export credits)." Aerni, Haberli and Karapinar (n 42) 189.

665 "The reforms in all three pillars form an interconnected whole and must be approached in a balanced and equitable manner." 'WTO | Doha Development Agenda - Text of the "July Package" — the General Council's Post-Cancún Decision' (n 569).

666 Orden, Blandford and Josling (n 129) 14.

space for import protection. Therefore, Members' policy space in different pillars shall not be examined in isolation. With the expiration of the peace clause of the AoA, the special privileges enjoyed by developed countries for the immunity of their agricultural subsidies policies from the SCM litigation also terminates, these landmark WTO cases shed great lights on the significance of WTO dispute settlement mechanism in reshaping Members' policy space for import protection.

Besides the differences, WTO Members also share common interests in terms of policy space for the protection of their sensitive products. Policy space is not the S&DT that is tailored made for developing Members. Developed Members also need policy space to protect their sensitive products. Each Member might have its own list of sensitive products due to economic and political considerations, such as food security, poverty alleviation, right to adequate food, farmers' income or employment, sustainable development, concerns over smallholder agriculture, non-trade concerns, etc.. However, protection of sensitive products has always been put to the forefront of Members' profiles for agricultural trade liberalization and has been legitimized by the AOA through various instruments of protection. To a great extent, Members' qualification or eligibility to these legal instruments of protection has become their policy space. The multilateral agricultural trade negotiations hinge very much on whether Members will work out new mechanisms for the protection of sensitive products on the basis of qualifications acceptable to all Members.

6.5 RAMs Deserve More Flexibility in Policy Space for Import Protection

Members' police space is framed by the AOA rules and their respective commitments. Given the diversity of Members' commitments, Members are approaching the ultimate common goal for full agricultural trade liberalization at different paces. In this sense, Members' policy space is quite dynamic. For some Members, the policy space that they got is more than what they need; for other Members, they feel uncomfortable or constrained by certain aspects of their commitments. But generally speaking, the AOA provides Members with ample policy space.

Some RAMs are exceptions. For instance, the large and substantive contributions that China made upon its accession to the WTO in agricultural trade liberalization provide some good reasons for the academia to debate the "WTO plus obligations and WTO minus rights" allegation. However, a deep look at both the procedural and substantive aspect of claim concludes that this allegation is not legally grounded. Different procedures apply to the original WTO Members and the RAMs for negotiating their terms of concessions or accession. For China or other RAMs, the procedure is

more based on bilateral negotiations between the applicant and relevant trading partners who have an interest in the applicant's market, therefore the terms of accession for RAMs are tailor-made and their policy space for import protection is smaller if compared to the original WTO Members. However the contributions of the RAMs in agricultural trade liberalization have been broadly recognized. and they deserve more flexibility in policy space for import protection. For instance, the Doha Declaration first recognizes the extensive market access commitments made by RAMs, such as China, Chinese Taipei, Albania, Georgia, Jordan, Moldova and Oman.[667] Paragraph 58 of the Hong Kong Ministerial Declaration further acknowledges the special situation of RAMs who have undertaken extensive market access commitments at the time of accession and promises to take this situation into account in the negotiations.[668] Paragraph 47 of Annex A to the Doha Work Programme on Framework for Establishing Modalities for Agriculture provides explicitly that the particular concerns of RAMs will be effectively addressed through specific flexibility provisions.[669] Based on that, the July 2008 package on the revised draft modalities for agriculture has proposed specific flexibility provisions for RAMs in border protection and domestic support.[670] However, the real effects of these provisions in leveling the playing field for RAMs with the original WTO Members in terms of import protection still need further examination.

6.6 Recommendations for Future Negotiations

The very recent development concerning Members' policy space for import protection is that the United States submitted a WTO reform proposal (WT/GC/W/757/Rev.1) [671] in January 2019, which challenges the principle of self-declaration of developing Member status and claims to withhold the S&DT from Members classified as "high income" by the World Bank, OECD members or acceding Members, G20 nations and any state accounting for 0.5 percent or more of world trade.[672] In response to that, China, India, South Africa and Venezuela, joined later by

[667] 'WTO | Doha 4th Ministerial - Ministerial Declaration' <https://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm> accessed 31 December 2017.

[668] 'WTO | Ministerial Conferences - Hong Kong 6th Ministerial - Ministerial Declaration' <https://www.wto.org/english/thewto_e/minist_e/min05_e/final_text_e.htm> accessed 31 December 2017.

[669] 'WTO | Doha Development Agenda - Text of the "July Package" — the General Council's Post-Cancún Decision' (n 569).

[670] 'WTO | Agriculture - Chairperson's Texts 2008' (n 127).

[671] Item 6 and 7, https://www.wto.org/english/thewto_e/gcounc_e/meet_mar19_e.htm.

[672] https://www.reuters.com/article/us-usa-trade-wto/u-s-drafts-wto-reform-to-halt-handouts-for-big-and-rich-states-idUSKCN1Q426T.

Bolivia, Kenya and Cuba, presented a communication entitled "the Continued Relevance of Special and Differential Treatment in Favour of Developing Members to Promote Development and Ensure Inclusiveness" (WT/GC/W/765/Rev.1), claiming that S&DT is an integral part and one of the cornerstone principles of the multilateral trading system to ensure that negotiated outcomes would accommodate differences in levels of economic development as well as the capacity constraint of developing Members. S&DT would allow developing Members **the space** to calibrate trade integration in ways that help them support sustainable growth, employment expansion and poverty reduction. The communication also claims that self-declaration of developing Member status, a fundamental rule in the WTO, has proven to be the most appropriate classification approach to the WTO. As a fundamental right granted to all developing Members, each developing Member shall, based upon its own particular situation, make the decision by itself on whether, when, where and how to use S&DT, and to what extent as well. No other Members are entitled to interfere with such a self-declared decision. Any attempt to dilute S&DT would be in conflict with the fundamental premise of equity and fairness that underpins an international treaty framework in a context of a Membership as diverse as that of the WTO. It concludes that the real threats to the relevance, legitimacy and efficacy of the WTO are the proliferation of WTO-inconsistent protectionism and unilateralism and the impasse of the Doha Development Round, not the self-declared development status of developing Members.

The heated debate between the United States and China, India as well as other developing Members on the S&DT reflects the fact that policy space for import protection involves the vital interests of developing Members and remains an essential element to achieve balanced outcomes between developed and developing Members. The claims from both sides have their pros and cons. From the point of view of developed Members, it is true that the self-declaration principle for determining a Member's status as a developing one to claim the entitlement to the S&DT needs further clarification as a number of Members, such as Republic of Korea, Israel and Mexico, who are also members of the OECD do self-declare and are accepted as developing Members in the WTO. However, this is just one side of the coin. The other side that is missing from the arguments of the United States is that a Member might self-declare itself as a developing Member, it still needs to be scrutinized and recognized by other Members. This means the self-declaration principle does not automatically entail the entitlement to the S&DT. For instance, China has been consistently claiming its status as a developing Members, but its status as a developing Member

remains an outstanding issue as the accession protocol was signed without giving a clear answer. However, to a great extent the concessions made by China upon its accession to the WTO are far beyond developing Members. From the perspective of developing Members, the S&DT is only very limited part of developing Members' policy space for import protection. Though the S&DT grants developing Members more favourable treatment in terms of longer implementation period and lower tariff/domestic support cuts, it does not help to rule out the systemic imbalances embedded in the AOA rules. Moreover, the S&DT does not offer developing Members the privileges to except them from making further commitments in terms of market opening or agricultural trade liberalization. For instance, India's policy space for import protection is built on its high tariff protection and Development Box, while China's policy space for import protection is based on the TRQ system and import through STEs, which is challenged by the United States to the WTO. What to do if tariffs are going to be reduced substantially? How to deal with the situation if the rules concerning Development Box or the TRQ system and import through STEs are going to be strengthened. To find out proper solutions and necessary arrangements to protect their policy space for import protection seems to be more in the interests of developing Members. Based on these arguments, developing Members need to do two things: on the one hand they need to examine these proposed mechanisms that are under negotiations, such as the SP, the SSM to make sure these instruments serve the interests of developing Members and offer them sufficient policy space to prevent the potential risks of opening market. On the other hand, they need to work closely with their developed counterparts to better frame the criteria or conditions of certain legal instruments that allow developed Members to circumvent their relevant commitments in reducing trade distorting domestic support and opening market.

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