

VII. TRADE DISTORTIONS DUE TO CROSS-SUBSIDIZATION DURING THE PANDEMIC: A CRITICAL ANALYSIS

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ABSTRACT

The modalities of the WTO Agreement on Agriculture (“AoA”) oversee the liberalization of global agricultural trade through the regulation and reduction of agricultural subsidies, which are categorized under two heads, domestic support and export subsidies. While export subsidies have been successfully phased out, the AoA reduction commitments provide ample policy space for nations to implement trade distorting domestic support programs without contravening said commitments. The concept of cross-subsidization contemplates the use of domestic support measures to subsidize the export of agricultural products. The use of domestic support measures has increased exponentially during the COVID-19 pandemic as WTO members continue to deal with the exigencies of the pandemic, and support their domestic agricultural sectors to maintain stability and prevent critical shortages, and such heavy domestic subsidization has an adverse impact on the global market prices of agricultural products, especially during the pandemic. In the present paper, the authors seek to critically analyse the provisions of the AoA, and highlight the inability of the statute to effectively curb cross-subsidization. To that end, Part I of the paper provides a brief overview of the regulation of agricultural subsidies. Part II deals with the concept of cross-subsidization, and the ways in which developed nations use their substantial financial resources to engage in trade distorting activities that adversely affect the markets of developing and least developed nations that cannot afford to subsidize their agricultural sector. Furthermore, Part II underscores the exacerbated effect of trade distortions due to the pandemic, and the inadequacy of the current AoA regime to reduce the impact of such distortions. In light of the fact that the AoA does not envisage an explicit scheme for the regulation of cross-subsidization, Part III proposes enlargement of the scope of Articles 9 and 10 of the

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AoA, and the Agreement on Subsidies and Countervailing Measures to directly prohibit cross-subsidization. An explicit regime is necessary due to the nebulous nature of cross-subsidies as they blur the lines between export subsidies and domestic support. Lastly, Part IV concludes while noting that although the effect of cross-subsidization has been aggravated due to the pandemic, the vast policy space available to developed nations to provide trade distorting domestic support has misused before the pandemic, and will be misused after the pandemic. Therefore, there is a stark need for reform in the AoA regime.

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I. INTRODUCTION

The COVID-19 pandemic has presented an unprecedented challenge for international trade and global food security as large portions of the world economy have been forced to cease operations. While the agriculture sector was exempted from the lockdowns, and has been resilient to the externalities of the pandemic, it was still impacted by the overall stagnancy of trade.¹

The pandemic has also emphasized the fragility of global food supply chains as countries strive to ensure that their populations do not suffer from critical food shortages. In doing so, countries are disrupting supply chains to meet domestic demands for food products and medical supplies, and contravening their obligations under the World Trade Organisation (“WTO”),

¹ *COVID-19 and agriculture: a story of resilience*, WTO (August 2020), https://www.wto.org/english/news_e/news20_e/agri_27aug20_e.htm.

specifically the Agreement on Agriculture (“AoA”). Trade negotiations to prevent trade distortions due to such measures are primarily focusing on the disruption of international trade due to the export prohibitions and restrictions.

However, the impact of agricultural subsidies and their trade distorting effects on global food security, and the exacerbation of such effects due to the exigencies created by the pandemic have been discussed in a very limited manner in the meetings on the Committee on Agriculture.² As countries scurry to recover from the economic slowdown, they have been providing significant amounts of agricultural subsidies, specifically domestic subsidies, to their agricultural sector to bolster production and food security.³

Export subsidies are subject to strict reduction commitments under Articles 9 and 10 of the AoA.⁴ However, such subsidies may have long-lasting trade distorting impacts as member states are utilising the ample policy space available under the Agreement to domestically subsidize their agricultural production.⁵

The present paper highlights the issue of cross-subsidization of agricultural products during the pandemic. While cross-subsidization is not a novel concept, its trade distorting effects are exacerbated by the exigencies of the pandemic. As heavily subsidized agricultural products flood the markets and the world price of the product is depressed, it is the developing and least

² J. Hepburn, *Coronavirus, resilience, and food security: how can trade policy help?*, THOMSON REUTERS FOUNDATION (Apr. 30, 2020), <https://news.trust.org/item/20200430103801-dijoh/>.

³ Sparsha Janardhan, *‘Treatment’ of Subsidies in Times of Crisis: Reviving the Economy through Trade Agreements*, C110 UNESCAP 1, 3 (2020).

⁴ WTO Agreement on Agriculture, art. 8.

⁵ Koo and Kennedy, *Impact of Agricultural Subsidies on Global Welfare*, 88 AMERICAN JOURNAL OF AGRICULTURAL ECONOMICS, 1219, 1223 (2006).

developed countries (“LDCs”), which do not possess the financial resources and Aggregate Measure of Support (“AMS”) entitlements available to developed nations to provide domestic support to their agricultural sectors, who bear the brunt of the trade distorting effects of such practices.⁶

A. Agricultural Subsidies and the Agreement on Agriculture

The AoA was a significant step in the liberalization of international agricultural trade by eliminating trade barriers and reforming the trade-distorting policies of states through commitments under the Agreement. In this regard, member states agreed to reform their policies in three areas, namely: market access, domestic support, and export subsidies; and they have endeavoured to institute reductions in these areas.

Domestic support programs, in the form of direct subsidies or payments-in-kind, are considered to be a viable method for minimizing the costs of production of agricultural products, and stimulating growth in the agriculture industry. Initially, such subsidies were envisioned as supplementary income for farmers and agribusinesses to boost the production of agricultural products, and consequently, stabilise global food security.⁷ On the other hand, export subsidies are granted to exporters of agricultural products to incentivise the sale of surplus on the international market through payments contingent upon export, exemptions from domestic sale, and excise

⁶ *Id.*

⁷ Satya Ranjan Swain, *Trade Externalities of Agricultural Subsidies and World Trade Organization*, 1 AMERICAN JOURNAL OF ECONOMICS AND BUSINESS ADMINISTRATION 225, 229 (2009).

taxes or credit facilities to lower the cost of export.⁸ The grant of such subsidies is legally or factually contingent upon their exportation.⁹

The AoA was enacted to create a more egalitarian international market for agricultural trade, and to recognize the severe effects of agricultural subsidies. Consequently, it imposes reduction commitments on the WTO members to reduce, and eventually abolish subsidies. In that regard, the 10th WTO Ministerial Conference in Nairobi was a significant achievement of the WTO as members recognized the highly distorting and detrimental effects of export subsidies on international trade. To that end, where developed country members resolved to “immediately eliminate their remaining schedules of export subsidy entitlements,” developing countries would do the same by 2018.¹⁰ Presently, export subsidies no longer pose a significant threat to international trade, and their regulation is largely limited to ensuring that member states do not circumvent their commitments through the modalities of the Committee on Agriculture and the Agreement on Subsidies and Countervailing Measures (“**SCM Agreement**”).¹¹

B. Domestic Support Policy Space

Per Contra, member States have ample policy space under the AoA to implement domestic subsidies that have trade-distorting impacts. Since they constitute a variety of governmental measures, they are very challenging from

⁸ WTO Agreement on Agriculture, art. 1(e).

⁹ WTO Agreement on Subsidies and Countervailing Measures, art. 3.1 (a).

¹⁰ Heinz Strubenhoff, *The WTO's decision to end agricultural export subsidies is good news for farmers and consumers*, BROOKINGS (Feb. 8, 2016), <https://www.brookings.edu/blog/future-development/2016/02/08/the-wtos-decision-to-end-agricultural-export-subsidies-is-good-news-for-farmers-and-consumers/>.

¹¹ S. EVENETT & R BALDWIN, *COVID-19 AND TRADE POLICY: WHY TURNING INWARD WON'T WORK* 36 (CEPR Press 2020).

a regulatory perspective. Furthermore, domestic subsidization is often done in furtherance of legitimate sovereign actions, such as securing food security for the people. Consequently, a complete ban like that in the case of export subsidies is not feasible.

Domestic support programs under the AoA may be implemented under four categories or boxes, namely, Green, Blue, Development and Amber. Under the Green¹² and Blue¹³ Boxes, member states are entitled to provide unlimited support to their agricultural sectors. The Development box was implemented as a Special and Differential Treatment mechanism (“**S&DT**”), wherein developing members may provide unlimited investment and input subsidies to their agricultural sectors and struggling farmers.¹⁴

Domestic measures outside the three boxes are measured in terms of the AMS, and are covered under the Amber Box. Such measures are subject to stringent financial limitations. Under the Amber Box, member states may provide for price support which can be product-specific support (“**PSS**”) or non-product specific support (“**NPS**”). PSS and NPS is permissible up to the de minimis limit,¹⁵ which is 5% of the value of production for developed nations, and 10% for developing nations.

Under the AoA, there is a stark disparity between the AMS entitlements available to developed members as opposed to developing members. For developing and least developed nations, the de minimis limit is the maximum limit for providing AMS. However, developed nations are

¹² WTO Agreement on Agriculture, Annex 2.

¹³ *Id.*, art. 6.5.

¹⁴ *Id.*, art. 6.2.

¹⁵ *Id.*, art. 6.4.

entitled to provide Amber box support beyond the de minimis levels, subject to a maximum AMS entitlement.¹⁶ This is due to the fact that developed members had the financial resources to provide for AMS support beyond the de minimis levels during the base period, i.e. 1986 to 1990. The AMS support provided during the base period was used as a benchmark for AMS support reduction for member states after the implementation of the WTO guidelines. 17 developed members may provide for unlimited PSS or NPS beyond the de minimis limit, provided that it does not exceed their maximum AMS entitlements. Developing members, on the other hand, did not provide for Amber box support beyond the de minimis levels during the base period and therefore, their AMS entitlements beyond de minimis are zero.¹⁸

The wide policy space due to high AMS entitlements available to developed members allows them to implement highly distorting support measures without actually breaching their commitments. For example, the European Union (“EU”) provided for PSS to sugar and cotton up to 177% and 139% of their value of production respectively, and did not breach its commitments.¹⁹ The wide policy space available to developed members puts

¹⁶ WTO Agreement on Agriculture, art. 6.3.

¹⁷ *Understanding the WTO: The Agreements*, WTO, [https://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm3_e.htm#:~:text=It%20was%20a%20significant%20first,\)%2C%20that%20began%20in%201995](https://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm3_e.htm#:~:text=It%20was%20a%20significant%20first,)%2C%20that%20began%20in%201995).

¹⁸ Sachin Kumar Sharma, *A Quantitative Analysis of Proposals on Domestic Support in WTO Agriculture Negotiations: Need for Reaffirming the Development Agenda 1-7*, CENTRE FOR WTO STUDIES, INDIAN INSTITUTE OF FOREIGN TRADE, Working Paper No. CWS/WP/200/63, 2021.

¹⁹ *Elimination of AMS to Reduce Distortions in Global Agricultural Trade, Submission by India and China*, WTO (July 17, 2017), https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=237728&CurrentCatalogueIdIndex=0&FullTextHash=371857150&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True.

them in a very advantageous position from an international agricultural trade perspective, and forces the agricultural sectors in developing states to compete from an extremely weaker position in comparison.²⁰

II. CROSS-SUBSIDIZATION OF AGRICULTURAL PRODUCTS

Domestic subsidies and export subsidies are fundamentally different in nature, and are regulated in distinct spheres. However, the trade distorting effects of the two pillars of the AoA are intricately linked. Domestic subsidies incentivise production, and consequently, the market is flooded with the subsidized product. Subsequently, as the supply increases, the price of the product on the global market is depressed.²¹ This allows the subsidizing state, which is generally a developed nation and possesses the financial resources to domestically support its producers and can utilise the vast policy space available to it under the AoA, to export and sell its product on the global market at a lower price.²²

However, developing and LDCs, which are largely agrarian economies that rely on their agricultural surplus for revenue through export, cannot afford to subsidize their agricultural products and have to compete with the subsidized prices. Furthermore, they have to adhere to the de minimis levels of AMS support to ensure that they are not breaching their commitments under the AoA.²³

When these subsidized products are exported, they are available at cheaper prices in the importing countries. For example, American wheat

²⁰ *Id.*, at 17.

²¹ *Supra* note 7, at 4, p. 227.

²² *Id.*

²³ *Supra* note 18, at 6.

available in Chennai is much cheaper than the domestically grown grain. Consequently, food processors in South India find it more economical to use the imported wheat than to transport it from North India. As a result, while there is a surplus of wheat in North India, processors in the South continue to import cheaper wheat from the United States of America (“US”).²⁴ Similarly, farmers in Brazil have had to sell their cotton produce for artificially lower prices due to the high extent of subsidization of cotton done by the US.²⁵ This concept of ‘cross-subsidization’ has been discussed in a number of instances, most notably in the *EC – Export Subsidies on Sugar*²⁶ and the *Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products* (“**Canada – Dairy**”)²⁷ cases.

A. Cross-Subsidization of Agricultural Products:

Article 9 of the AoA contemplates an elaborate list of export subsidies that are subject to reduction commitments. For the purposes of the present discussion, Article 9.1(c) assumes significance and has been reproduced below:

payments on the export of an agricultural product that are financed by virtue of governmental action, whether or not a charge on the public account is involved, including payments that are financed from the proceeds of a levy imposed on the agricultural product concerned or on an

²⁴ *Supra* note 7 at 4, p. 229.

²⁵ Appellate Body Report, *US – Upland Cotton*, WTO Doc. WT/DS267/AB/R (adopted 2014).

²⁶ Appellate Body Report, *EC – Export Subsidies on Sugar*, WTO Doc. WT/DS265/AB/R (adopted 2005).

²⁷ Appellate Body Report, *Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products*, WTO Doc. WT/DS103/AB/R (adopted 2003).

agricultural product from which the exported product is derived.²⁸

Therefore, to fall within the jurisdiction of Article 9.1(c), an agricultural subsidy would have to be a payment that subsidizes the export of an agricultural product that was financed by virtue of governmental intervention. The concept of cross-subsidization involves the subsidization of exports through domestic support programs.

The concept of cross-subsidization is best explained through the factual matrix of the EC–Export Subsidies on Sugar case, wherein domestic prices of two categories of sugar, termed as ‘A sugar’ and ‘B sugar’ were supplemented by combinations of minimum support prices, import restrictions, and other forms of governmental intervention. Sugar produced in excess of the quantities covered under A and B sugar was termed as ‘C sugar’, and was eligible to be exported, unlike A and B categories. The contention brought by Australia, Brazil and Thailand was that the EC was providing for export subsidies for sugar in excess of its reduction commitments under the AoA.²⁹

The Panel and the Appellate Body noted that there was no differentiation between the production or the manufacturing process of the three categories of sugar, and held that the domestic subsidies and protectionist trade restrictions that were provided for the domestic sale of A and B sugar, were also benefiting the production of C sugar. Consequently, the export price of C sugar was much lower than the average cost of production due to the fact

²⁸ WTO Agreement on Agriculture, art. 9.1 (c).

²⁹ *Supra* note 26, at 7.

that the subsidization of A and B sugar was also subsidizing the export of the C sugar through the process of cross-subsidization.³⁰

In the Canada–Dairy case, the Appellate Body stressed the importance of a benchmark for assessing whether a measure constituted a ‘payment’ within the meaning of Article 9.1(c). The AoA does not identify a specific benchmark, and that the term ‘payments’ must not be restricted to a rigid definition. The meaning of the term would depend on the facts and circumstances of each case, and the regulatory framework that surrounded the domestic support measure.³¹ The Appellate Body determined that the comparison between the average cost of production and the price at which the product was being exported would be a suitable industry-wide benchmark in that case.³²

The Appellate Body in EC–Export Subsidies on Sugar relied on the report in Canada–Dairy to hold that the term ‘payments on export’ directly or indirectly³³ ‘financed by virtue of governmental action’ under Article 9.1(c) did not mean that the subsidies were contingent upon export, but rather that they had the effect of subsidizing exports, or were connected to export performance. The Appellate Body held that the term should be interpreted widely to further the object of Article 9, so that all agricultural subsidies that distort export performance can be regulated under the AoA.

Therefore, through the process of cross-subsidization, the export price of domestically produced agricultural products is subsidized through domestic

³⁰ *Supra* note 26, at 7.

³¹ *Supra* note 27, at 7, ¶ 74-76.

³² *Supra* note 27, at 7, ¶ 110, 116.

³³ *Supra* note 26, at 7, ¶ 237.

support and market access measures. A domestic support measure that subsidizes the export of a particular agricultural product in this manner would come within the ambit of Article 9. However, due to the fact that the AoA does not specifically deal with cross-subsidization, it is easy for nations to utilise their domestic support policy space to circumvent their export subsidy reduction commitments under the AoA and the SCM Agreement.

B. Excessive Domestic Support during the Pandemic

Unlike the food crisis in 2008, where market disruptions were exacerbated by export prohibitions and stockpiling of agricultural products to combat the critical food shortages faced by many countries, the Global Trade Alert³⁴ paints a starkly different picture during the COVID-19 pandemic. While export prohibitions and restrictions in the healthcare sector saw the usage of highly distorting state policies, the agricultural sector was untouched by such measures. Measures restricting the export of food and other ancillary products were less in number than half the measures on surgical gloves alone.³⁵

However, domestic support programs for the agricultural sector were used by member states to relieve the pressure of the economic slowdown. For example, the US financial relief to agricultural producers in the form of direct transfers and domestic subsidies amounted to \$19 billion.³⁶ Similarly, the EU has been providing for domestic support measures to mitigate the effects of

³⁴ *COVID-19 and world trade*, WTO (November 2020), https://www.wto.org/english/tratop_e/covid19_e/covid19_e.htm.

³⁵ *Id.*

³⁶ *USDA Announces Coronavirus Food Assistance Program*, USDA Release No. 0222.20 (Apr. 17, 2020), <https://www.usda.gov/media/press-releases/2020/04/17/usda-announces-coronavirus-food-assistance-program>.

the pandemic by offering loans and crisis support for farmers.³⁷ Even developing countries like India are offering domestic support to their farmers in the form of working capital to the tune of INR 30,000 crores, and direct transfers under the PM KISAN fund amounting to INR 18,700 crores, among other measures.³⁸

While domestic measures are inevitable in times of crisis, their distorting effects on international agricultural trade may have drastic impacts. Even though such measures may not be in contravention of the AoA, and cannot be classified under the Amber Box, it is the duty of WTO members to ensure that such measures are proportionate, targeted, temporary, and transparent, so that they do not adversely affect trade during this sensitive period.³⁹

C. Impact of Cross-Subsidization in the wake of the Pandemic

As the world economy was shut down due to the pandemic, the reactionary response of nations was an inevitability due to the unprecedented nature of the crisis. Broadly, this response can be characterized under two heads: firstly, implementing prohibitions and restrictions on the export of essential commodities, healthcare supplies and food products to prevent

³⁷ *Supporting the Agriculture and Food Sectors amid Coronavirus*, EUROPEAN COMMISSION (2020), https://ec.europa.eu/info/foodfarming-fisheries/farming/coronavirus-response_en#measures.

³⁸ *COVID-19 in India – GOI's Economic Package for Self-Reliant India – Food and Agriculture Items*, USDA (May 29, 2020), <https://www.fas.usda.gov/data/india-covid-19-india-gois-economic-package-self-reliant-india-food-and-agriculture-items>.

³⁹ *DG Azevedo welcomes G20 ministers' commitment to notify WTO of COVID-19 related trade measures*, WTO (Mar. 30, 2020), [wto.org/english/news_e/news20_e/dgra_30mar20_e.htm](https://www.wto.org/english/news_e/news20_e/dgra_30mar20_e.htm).

critical shortages,⁴⁰ and secondly, providing domestic support to the producers of such products.⁴¹

However, as the pandemic progressed and countries acclimated to the new reality, the concerns of the WTO members shifted from self-preservation to honouring their commitments under the WTO rules and ensuring that global supply chains are not terminally affected. The preservation of global food security is an important aspect of the Sustainable Development Goals of the WTO.⁴² However, it is important to note that the WTO rules do not prescribe best practices to ensure that trade distorting measures are avoided. Instead, they provide space for members to legislate their own policies and prescribe the boundaries within which such policies must necessarily lie. The utilisation of that policy space is left entirely up to the members.⁴³

Therefore, it is no surprise that members continue to heavily subsidize domestic production to relieve the pressure felt by the agricultural industries in the respective nations. Under Section 1 Part IV of the Member's Schedules under the AoA, domestic support commitments provide ample policy space for providing potentially trade distorting subsidies. While the support provided by developing countries is limited due to the de minimis limitations and the lack of financial resources, developed countries can utilise the policy space to destabilise the global market.⁴⁴

⁴⁰ *COVID-19: Why export restrictions are the wrong response*, AMIS (May 14, 2020), <http://www.amis-outlook.org/news/detail/en/c/1152643/>.

⁴¹ *Supra* note 11, at 5, p. 45.

⁴² Peter Ungphakorn, *Lessons from the pandemic for WTO work on agriculture trade and support*, WTO SECRETARIAT 257, 260 (2020).

⁴³ *Id.*, p. 263.

⁴⁴ *Id.*, p. 267.

The level of domestic support leeway available to developed nations is a threat to the preservation of global food prices. The threat is further exacerbated by the pandemic as members strive to apply the maximum level of domestic support that is within their commitment limits. An example of the unease caused due to such subsidies can be seen in the meetings of the Committee on Agriculture, as members raise questions against the support packages of major economies like the US' Coronavirus Food Assistance Program and Canada's Food Purchase Program.⁴⁵ While these policies may not contravene the commitments under the AoA, their trade-distorting impacts will adversely affect the food security and livelihood of developing countries and LDCs.

In light of the above, the cross-subsidization of agricultural products has been elevated to as a major threat against global food security and the ability of developing countries to deal with the realities of the pandemic. While the beginning of the pandemic saw hastily implemented export prohibitions,⁴⁶ restrictive trade measures were lifted as the economy stabilized and as WTO members were urged not to disrupt food supply chains. At the end of 2019, trade restrictions were at historically high levels in anticipation of the pandemic.⁴⁷ However, the Trade Monitoring Report of the WTO dated 11 December, 2020 shows a marked decline in such restrictions.⁴⁸ *Prima facie*,

⁴⁵ Committee on Agriculture, *Compilation of Questions for the Special Meeting of 18 June 2020*, WTO Doc. No. G/AG/W/206 (Jun. 8, 2020).

⁴⁶ *Export Prohibitions and Restrictions*, WTO (Apr. 23, 2020), https://www.wto.org/english/tratop_e/covid19_e/export_prohibitions_report_e.pdf.

⁴⁷ *Report shows trade restrictions by WTO members at historically high levels*, WTO (Dec. 12, 2019), https://www.wto.org/english/news_e/news19_e/dgra_12dec19_e.htm.

⁴⁸ *Report shows marked decline in trade restrictions by WTO members amidst COVID-19 pandemic*, WTO (Dec. 11, 2020), https://www.wto.org/english/news_e/news20_e/trdev_11dec20_e.htm.

these developments may seem positive as healthy trade in agricultural products will result in an increasingly stable market. However, it may have long lasting distorting impacts due to the cross-subsidization of such productions.

Similar to the highly distorting nature of C sugar⁴⁹, agricultural products exported by developed economies have been significantly cross-subsidized.⁵⁰ As domestic support measures are followed by an up-tick in production, such nations will have surplus goods that can be exported to foreign markets. Therefore, due to the domestic support, the price of such products would be lower than the average cost of production, and this will also be reflected in the price of the product in markets where the product is exported. As a result, the global market for the cross-subsidized product would be destabilized because the market would be flooded with the product due to increased production, and the global price of the product would be depressed.

As a consequence, despite the AoA and the developments made through WTO negotiations with regard to the subsidization of exports, such subsidies have been repackaged and legitimized through the domestic support policy space. Developing countries and LDCs that have especially fragile economies due to the pandemic and need to benefit from the protectionist measures of the WTO regime in these trying times would suffer the most due to cross-subsidization. The ability of such nations to support their agricultural sectors due to suffocating and inequitable reduction commitments causes their

⁴⁹ *Supra* note 26, at 7.

⁵⁰ *Supra* note 5, at 3.

domestic producers to feel the negative effects in both the domestic and the international market.

III. FRAMEWORK FOR REGULATING CROSS-SUBSIDISATION

The regulation of agricultural subsidies and ensuring adherence to the commitments under the AoA in order to achieve holistic liberalization in international agricultural trade involves striking a balance between the ability of members to implement programs and support in the pursuance of legitimate policy goals, and ensuring that these programs do not distort trade. However, during times of crisis such as the pandemic, ensuring open and transparent trade practices that do not have long term effects on the market is a tall order.

This is especially true in the case of cross-subsidization due to the fact that the lines between export subsidies and domestic support are blurred, and the regulatory framework does not specifically address the issue. However, if domestic support measures are used to provide support for exports without any limits by developed countries, specifically Green Box and Blue Box support, then the benefits and protections that accrue to developing nations and LDCs under the AoA export subsidy commitments would be undermined.⁵¹

Developing countries have been advocating that the flexibilities and vast policy space that is available to developed nations for providing domestic support should be curtailed through the implementation of an overall trade-distorting support limit (“**OTDS**”). For example, India and China put forth a Joint Proposal at the 11th WTO Ministerial Conference, 2017 calling for

⁵¹ *Supra* note 27, at 7.

reduction in the domestic support policy space. It was contended that developed nations utilise 90% of the global AMS entitlements to subsidize their agricultural products from 50% to 100% of the cost of production.⁵²

However, it has been very difficult for developed and developing states to resolve conflicting views on the subject, and formulate a solidified mechanism for reducing the AMS entitlements and policy space. Developing states argue that the policy space that is available to them according to the de minimis Amber Box support maximums is constantly shrinking and it is paralysing them from providing domestic support without breaching their commitments, whereas developed nations are utilising their AMS entitlements to implement trade-distorting support programs.⁵³

In contrast, developed states argue that the 10% de minimis limit under the Amber Box along with the relaxations provided to developing members under the Development Box, the domestic support policy space for developing states is expanding much faster in monetary terms as the value of production of agricultural products increases with time.⁵⁴

Debates between WTO members with regard to the domestic support policy space under the AoA have been an ever-present element in WTO negotiations since the Doha Round in 2001. However, the trade distorting practices of developed member states have an adverse impact on the interests

⁵² *Supra* note 19, at 6.

⁵³ A. M. Thow et al., *An Analysis of Indonesia's Shrinking Food Security Policy Space under the WTO*, 11(6) INTERNATIONAL SOCIETY FOR PLANT PATHOLOGY 1275, 1281-1283 (2016).

⁵⁴ *Higher and Higher – Growth in the Domestic Support Entitlements since 2001*, Submission by Australia and New Zealand, WTO (Nov. 22, 2019), <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/Jobs/AG/171.pdf&Open=True>.

of developing members. While domestic support under the AoA is a multi-faceted issue, the authors posit that the issue of cross-subsidization can be addressed independent of the domestic support regulations by widening the scope of the AoA, specifically Article 9 and 10, and the enforcement mechanism under the SCM Agreement, and explicitly incorporating cross-subsidization within their scheme.

A. Widening the Scope of Article 9 and 10 of the AoA

The language of Article 9.1(c) has played a crucial role in bringing cross-subsidies into the ambit of the AoA. By widening the ambit of the terms ‘payment’ and ‘export’ under the provision, the Panel and the Appellate Body have brought the economic impacts of excessive domestic support within the ambit of the export subsidy regulations.⁵⁵ However, suitable modifications can be made to the provisions regulating export subsidies, and the substantive modalities of the SCM Agreement can ensure that the distorting effects of such subsidies are efficiently regulated.⁵⁶

While the concept of cross-subsidization can be absorbed into the language of Article 9.1(c), amendments are needed in the AoA to ensure that all circumstances where countries are utilising their domestic support policy space to subsidize exports are covered.⁵⁷ In *Canada–Dairy* and *EC–Export Subsidies on Sugar*, the level of governmental intervention with respect to

⁵⁵ *Supra* note 27, at 7.

⁵⁶ Puyana et. al., *The Cumulative Application of the Agreement on Agriculture and the Subsidies and Countervailing Measures Agreement: An Approach to Agricultural Subsidies Based on its Effects*, REV. COLOMB. DERECHO INT. BOGOTÁ 209, 212 (2007).

⁵⁷ *Id.*

domestic support and market access tariffs was very high, and consequently, proving the nexus between financing and governmental action was easy.⁵⁸

However, member states may utilise their policy space to implement domestic support programs that have more subtle effects on the export performance of the agricultural products, and are effectuated through indirect governmental action. For example, programs that indirectly incentivise productions through mechanisms that do not necessarily involve direct payments or rebates and do not have an effect on the price of the product should also come within the ambit of Article 9.⁵⁹

To that end, Article 10 of the AoA is of paramount importance for widening the scope of the AoA to incorporate the concept of cross-subsidization. Export subsidies that do not fall within the ambit of Article 9.1 but are applied in a manner that threatens to, or results in the circumvention of reduction commitments under Article 9 are also prohibited under Article 10.⁶⁰

In the US-FSC case, the Appellate Body held that the term “export subsidy commitments” under Article 10 has a wider reach than the term “reduction commitments” used in Article 9.⁶¹ The provision must be widely interpreted to hold that circumvention of export subsidy commitments could be effectuated in a myriad of ways, and that “it is not necessary to demonstrate actual ‘circumvention’ of ‘export subsidy commitments’”. It suffices that

⁵⁸ *Supra* note 3, at 3, p. 11.

⁵⁹ D. A. Sumner, *Farm Programs and Related Policy in the United States*, SEMANTIC SCHOLAR (1995), <https://pdfs.semanticscholar.org/603a/4033fb0f924a8485e9f7e1e8648b2f3a563d.pdf>.

⁶⁰ WTO Agreement on Agriculture, art. 10.

⁶¹ Appellate Body Report, *US – Tax Treatment for “Foreign Sales Corporations”*, WTO Doc. WT/DS108/AB/R, ¶¶ 144, 147 (2006).

‘export subsidies’ as ‘applied in a manner which threatens to lead to circumvention’ of export subsidy commitments.”⁶² Therefore, the provisions of Article 10 would also apply to situations wherein an export subsidy measure did not create an explicit ‘legal entitlement’ in favour of the exporter of agricultural products. The term ‘threat’ must be interpreted holistically to include export subsidy programs that implicitly or indirectly circumvent export subsidy reduction commitments.⁶³

Additionally, Article 10 makes it obligatory for the subsidizing state to prevent circumvention through precautionary measures.⁶⁴ If domestic support measures that result in cross-subsidization are included explicitly under Article 10, then the policy space available to developed members would shrink automatically as the onus would be on the subsidizing state to ensure that domestic support measures are not cross-subsidizing exported products.

Furthermore, the burden of proof requirements under Article 10.3 which are different from the onus under Article 3.3 would also prove to be a useful tool for the determination of cross subsidization.⁶⁵ Article 3.3 merely imposes a restriction on member states for the provision of export subsidies in terms of Article 9 and the specific requirements in the member’s Schedule.⁶⁶ However, under Article 10.3, it is for the complaining member state to prove that the exporting member has exported agricultural products in excess of the quantities of their commitments. After that is proven, the burden of proof lies

⁶² *Id.*, ¶ 148.

⁶³ *Id.*, at 57.

⁶⁴ *Supra* note 25, at 7.

⁶⁵ *Supra* note 27, at 7, ¶ 68- 69.

⁶⁶ WTO Agreement on Agriculture, art. 3.

on the exporting nations to prove that the excess quantity was not subsidized.⁶⁷ Member states that are domestically subsidizing their agricultural product and are exporting that product at subsidized prices must be held accountable for their trade distorting practices, and must show that the export product has not been indirectly subsidized through domestic support programs.

Developed nations use cross-subsidization to implicitly circumvent their export subsidy reduction commitments under the AoA. Therefore, it is contended that if the ambit of Article 10.1 is expanded to include the circumvention or threat against circumvention of export subsidy reduction commitments through the domestic subsidization of agricultural products, the concept of cross-subsidization would be easily and effortlessly incorporated into the AoA scheme.

B. SCM Agreement

Similar changes to the SCM Agreement would ensure that members can enforce subsidy reduction commitments through the invocation of the WTO dispute settlement mechanism, and the levy of countervailing duties. The term ‘subsidy’ is defined under Article 1, as a “financial contribution” made by a “government or a public body within the territory of a Member” including the agencies of that government,⁶⁸ or at the direction of such authority which confers a “benefit”.⁶⁹ In order to qualify as a subsidy, the actions of the Member must meet all three of the above-mentioned criteria.

⁶⁷ *Supra* note 27, at 7, ¶ 70-73.

⁶⁸ *Supra* note 27, at 7, ¶ 75.

⁶⁹ WTO Agreement on Subsidies and Countervailing Measures, art. 1.

However, as seen earlier, governmental intervention in cases of cross-subsidization may not necessarily be in the form of ‘financial contributions.’ Member states engage in a plethora of practices are not financial contributions but result in cross-subsidization. Therefore, the term ‘payment’ as interpreted in the EC-Export Subsidies on Sugar and the Canada-Dairy cases is broader, and includes domestic support beyond mere financial contributions. Similarly, the term ‘benefit’ was held to not be a prerequisite of ‘payment’ by the Panel and the Appellate Body in the above-mentioned cases.

Furthermore, Article 5 of the SCM Agreement contemplates an intensive investigation mechanism for the determination of ‘adverse effects’ of the subsidization on the aggrieved member state, which involves collection of data, and an elaborate study. Under Article 9.1(c) of the AoA, the determination of cross-subsidization is limited to a comparison of the average cost of production and the actual price of the exported product.⁷⁰ While the latter is more convenient, the mechanism under Article 5 may prove to be useful for the determination of cross-subsidization in cases where governmental intervention is subtle.

Domestic support regulations allow for member states to implement creative mechanisms to circumvent their reduction commitments. Changes in the export subsidy regulatory framework are necessary to ensure that the effects of such domestic support does not spill over into the domain of export. Therefore, the effects of all types of domestic support on the export market

⁷⁰ *Supra* note 27, at 7.

should be taken into consideration when determining whether a member has satisfied their reduction commitments.⁷¹

Such measures would be a significant step towards achieving the goal of agricultural trade liberalization. Firstly, this will further reduce the detrimental effects of export subsidies on global agricultural trade. Secondly, the implementation of these measures would result in the narrowing of the policy space available to member states vis-a-vis domestic support. While implementing domestic support programs, members would also have to consider the effects of such programs on export, and this will prevent over-zealous trade-distorting subsidies.⁷²

IV. CONCLUSION

The COVID-19 pandemic has been an unprecedented challenge for the global community, and has revealed the fragility of international trade mechanisms, and the importance of global supply chains. While the circumstances necessitate that nations use their policy space under the AoA to provide the maximum amount of domestic support possible to prop up their agricultural industry, the pandemic has also highlighted the inadequacy of the current AoA regime to deal with misuse of the said policy space, the inequality between developed and developing states with regard to AMS entitlements, and the inability of the regime to prevent the resultant deleterious effects on agricultural trade.

⁷¹ R. H. Steinber & T. E. Josling, *When the Peace ends: The Vulnerability of EC and US Agricultural Subsidies to WTO Legal Challenges*, 6 J. INT'L ECO L. 374, 375 (2003).

⁷² *Supra* note 3 at 3, p. 10.

The AoA contemplates mechanisms for the regulation of trade distortions in agriculture due to the combined effects of a plethora of governmental policies and subsidies. However, there is a need for reforming the AoA and the SCM Agreement to address the concerns of cross-subsidization, and the vast policy space for domestic support, and to widen the ambit of the export subsidy commitments to encompass cross-subsidization and the scenarios in which such spill occurs.

This is doubly true in the wake of the pandemic, and the consequent economic downturn, as the fragile economies of developing and least developed nations try to reverse the damage caused by the chaotic and uncertain circumstances. The trade distorting effects of export subsidization by developed nations will destabilise the markets of such nations, in both the short and the long term. The recognition of cross-subsidization as a substantial contributor to the instability in international agricultural trade would ensure better food security, and protect the interests of agricultural producers and farms in poorer agrarian economies that depend heavily on domestic sales as well as the exportation of agricultural products.

Recognition is a precursor to regulation. Therefore, it is paramount that the principle of cross-subsidization is incorporated into Articles 9 and 10 of the AoA and the regulatory procedure under the SCM Agreement in a more comprehensive manner to include all the circumstances in which domestic support programs have an impact on the export of a product, including the support packages that do not directly affect export, but do so subtly and indirectly.