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## Trade in Agriculture

Fiona Smith \*

The regulatory landscape governing international agricultural trade has become more complicated in recent times. Over three hundred regional trade agreements exist alongside the WTO's rules.<sup>1</sup> These regional agreements apply to the States that sign and ratify them, and comprise trade obligations that entrench or extend their WTO obligations. States have agreed to: further reduce or eliminate import and export restrictions that slow the flow of agricultural products across borders;<sup>2</sup> additional reciprocal non-discrimination commitments;<sup>3</sup> and, to modernize WTO rules to accommodate contemporary challenges, like climate change.<sup>4</sup>

Scholars respond to this proliferation of regional trade agreements in two ways. First, some argue that regional trade agreements accelerate the WTO's neoliberal mission by unshackling international agricultural trade from States' 'protectionism'.<sup>5</sup> They claim States are opening their agricultural markets beyond their obligations in multilateral rules<sup>6</sup> and agreeing experimental solutions to interminable problems, like how to balance the relationship between trade and development to protect developing and least-developed countries' food security.<sup>7</sup> These experimental solutions form the basis for WTO regulatory reform too.<sup>8</sup>

Second, others argue that regulating international agricultural trade through WTO rules and regional trade agreements is risky. As regional trade agreements proliferate, specialised regimes are created with their own rules, procedures, institutions, law-making practices and particular vision about the way that the law should work.<sup>9</sup> The risks of this 'fragmentation' mirror those highlighted by the International Law Commission in the broader field of public international law. Namely, the 'emergence of conflicting jurisprudence, forum-shopping and loss of legal security', together with potential 'conflicts between rules, or rules-based systems, deviating institutional practices and ... the loss of an overall perspective on the law'.<sup>10</sup> The central issue for scholars taking this perspective is, how to make

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<sup>1</sup> WTO, Regional Trade Agreements Database, <http://rtais.wto.org/UI/PublicMaintainRTAHome.aspx>.

<sup>2</sup> E.g. South Korea went beyond WTO commitments and eliminated all tariffs on wine from the EU: EU-Korea Free Trade Agreement 2011, Tariff Schedule of Korea OJ 2011 L 127, p. 6, at p. 86.

<sup>3</sup> E.g. In CETA, Canada agreed tariff free access to 90.9+% for all EU agricultural tariff lines; c/f the EU reduced 92.2% for all its agricultural tariff lines: OJ 2017 L11, p. 23; European Commission, *CETA-Summary of the final negotiating results*, (2016), 3: [https://trade.ec.europa.eu/doclib/docs/2014/december/tradoc\\_152982.pdf](https://trade.ec.europa.eu/doclib/docs/2014/december/tradoc_152982.pdf); see also the US-Japan Trade Agreement 2019: Japan agreed duty free access to 90+% on American agrifood exports, c/f the US concessions on 42 tariff lines: Office of the USTR, *Fact Sheet on Agriculture-Related Provisions of the US-Japan Trade Agreement*, <https://ustr.gov/about-us/policy-offices/press-office/fact-sheets/2019/september/fact-sheet-agriculture%E2%80%90related>

<sup>4</sup> The EU-Mercosur FTA contains a chapter governing trade and sustainable development. On 3 June 2020, the Dutch government rejected the agreement due to concerns that the agreement failed to protect the Amazon from deforestation: "EU mulls Dutch rejection of Mercosur deal", 4 June 2020: <https://www.argusmedia.com/en/news/2111447-eu-mulls-dutch-rejection-of-mercoshur-deal>.

<sup>5</sup> i.e. using trade measures to protect domestic farmers from the pressures of international trade. T. Josling, 'Agriculture' in S. Lester, B. Mercurio and L. Bartels (eds), *Bilateral and Regional Trade Agreements: Commentary and Analysis*, (Cambridge: Cambridge University Press, 2015), 171.

<sup>6</sup> K. Anderson, *Finishing Global Farm Trade Reform: Implications for Developing Countries* (Adelaide: University of Adelaide Press, 2017), Chapter 6. Note Japan's longstanding reluctance to open its agricultural sector changed following a refocus within Japan on agricultural trade liberalization and competitiveness. President Abe agreed an EU demand that Japan reduce its cheese tariff by 100% in return for concessions on EU tariffs on Japanese cars: H. Suzuki, 'The New Politics of Trade: EU-Japan' 39(7) *Journal of European Integration* (2017) 875, 882-883.

<sup>7</sup> K. Kuhlmann and A. Agutu, 'The African Continental Free Trade Area: Towards a New Legal Model for Trade and Development' 51(4) *Georgetown Journal of International Law* (2020) forthcoming, available on SSRN, [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3599438](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3599438) 1, 53 and 63.

<sup>8</sup> For an experiment in trade remedies see: T. Voon, 'Eliminating Trade Remedies from the WTO: Lessons from Regional Trade Agreements' 59(3) *ICLQ* (2010) 625.

<sup>9</sup> A. Mitchell, T. Voon and E. Sheargold, 'PTAs and Public International Law' in Lester, Mercurio and Bartels (eds), above n 5, Chapter 6.

<sup>10</sup> M. Koskenniemi, *Report of the Study Group of the International Law Commission: Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, United Nations, 13 April 2006, A/CN.4/L.682, paras 8-9.

these rules, procedures, institutions, and institutional practices coherent. Coherence comes through identifying the conflicts between all these legal regimes and carefully interpreting their rules in accordance with customary rules of treaty interpretation laid down in the Vienna Convention on the Law of Treaties (Vienna Convention).<sup>11</sup>

Both responses to regional trade agreement proliferation provide important insights, but they focus on a particular issue: how to maintain a coherent global legal order for regulating international agricultural trade.<sup>12</sup> The central problem is said to come from the failure to recognise the continued significance of WTO rules when regional trade agreements regulate agricultural trade in different ways. The fear being that States charged with legal reform, and traders and lawyers interpreting the rules, will not understand that WTO rules and regional trade agreements comprise a single unified system. And, what appears to be regional trade agreements' flaws, eccentricities, and deviations away from WTO rules, is a distinct level of global governance within that unified system.<sup>13</sup> The role of law in this unified system, and by extension, of the institutions charged with administering that law, is to constrain excessive displays of political power by the State and guarantee the well-being of global society.<sup>14</sup>

This way of understanding the new regulatory landscape is problematic. Questions about the *stability* of WTO rules and regional trade agreements are not asked. Instead, scholarly reflection focuses on the nature and function of law as 'articulated through the vocabularies of public law and the constitution'.<sup>15</sup> In this constitutionalist discourse, international agricultural trade law is understood as a form of higher law, which has an innate ability to constrain State power. The only useful avenues for scholarly investigation from this perspective revolve around: determining the normative hierarchy, establishing the legitimacy of institutions like the WTO, and strengthening legal rules and institutions to separate international law from regional and domestic law, and to show how law can constrain politics.<sup>16</sup>

This is not to say that such approaches are unworthy endeavours because it is difficult to discern what obligations WTO rules and regional trade agreements impose, or whether those rules facilitate efficient trade at all. But these accounts mask a more fundamental issue: namely that political disagreement over the correct way to govern international agricultural trade is incapable of final resolution by legal rules, so the rules are more fragile than they appear.

Political disagreement is complex and not a single idea: States might believe they have found common ground for a (legal) agreement, but this common ground is an illusion. In reality, each State's viewpoint cuts across all the others, with each heading towards a different conclusion, instead of to a point where agreement on everything has truly been reached.<sup>17</sup> As a consequence, issues that appear settled from the States' perspective can re-emerge and must be resolved once again through another (legal) agreement.

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<sup>11</sup> Vienna Convention on the Law of Treaties, 1969, 1155 UNTS 331, (1969) 8 ILM 679.

<sup>12</sup> See Simmonds' analysis of rationality in English Tort and Contract Law: Simmonds, 'The Changing Face of Private Law: Doctrinal Categories and the Regulatory State' 2 *Legal Studies* (1982) 257, 257.

<sup>13</sup> The unified system includes global, regional and national governance, with regional agreements constituting regional governance. E.g. J. Habermas, 'The Constitutionalization of International Law' 26 *Ratio Juris* (2013) 302; cited in A. Bianchi, *International Law Theories: An Inquiry into Different Ways of Thinking* (Oxford: Oxford University Press, 2016), 45. On the influence of German Constitutionalism in international law, see Bianchi, *ibid.*, Chapter 3.

<sup>14</sup> I draw on Slobodian's intellectual history of neoliberalism, rather than the constructivist tradition starting with Polanyi: K. Polanyi, *The Great Transformation*, (1944) Beacon Books (first imprint 1957) See Q. Slobodian, *Globalists: The End of Empire and the Birth of Neoliberalism* (Boston: Harvard University Press, 2018), 2 & 'Encasement not Liberation' 5-7 Slobodian, *ibid.*

<sup>15</sup> M. Koskenniemi, 'Between Coordination and Constitution: International Law as a German Discipline' 15 *Redescriptions: Yearbook of Political Thought, Conceptual History and Feminist Theory* (2011), 45-46. c/f M. Fakhri, 'A History of Food Security and Agriculture in International Trade Law, 1945-2017' in J.D. Haskell and A. Rasulov (eds.), *New Voices and New Perspectives in International Economic Law*, special edition, (2020) *European Yearbook of International Economic Law* 55.

<sup>16</sup> A. Peters, 'Compensatory Constitutionalism: The Function and Potential Fundamental International Norms and Structures' 19 *Leiden Journal of International Law* (2006), 579, 606-7 & 609.

<sup>17</sup> L. Wittgenstein, *Philosophical Investigations* (London: Blackwell, 1953) §20.

It is true that multilateral rules and regional trade agreements are amended, so old quarrels seem resolved and new challenges emerge only when the social, economic and political situation changes. But this is an argument about legal form, rather than a resolution to the disagreement. Instead, multilateral or regional rules take a particular form because different views and options of the best way to regulate international agricultural trade do not remain open. New rules render old ideas irrelevant, meaning new rules and ways of thinking about the problem are always needed.<sup>18</sup> Indeed, as Howse shows in the context of WTO dispute settlement, innovative interpretations of the rules during disputes set agreements onto new and unexpected trajectories. This trajectory moves from free trade values towards a ‘hybrid approach’ perhaps ‘inspired by or anchored in the “post-war embedded liberalism”’ of earlier rules, like the GATT 1947.<sup>19</sup> While Howse does not make the point, his argument implies that solving similar disagreements between States in future dispute settlement proceedings using legal arguments submitted in the extant dispute is no longer an option if the dispute settlement bodies have shifted the regulatory trajectory in this way. The form of the disagreement about the rules’ meaning has simply moved on.

In this chapter I argue that multilateral rules and regional trade agreements governing international agricultural trade should be thought of as multiple attempts to resolve a single disagreement between States: namely, how three competing objectives should be balanced within legal rules. These three competing objectives are (i) how to facilitate the flow of agricultural products between states (trade liberalization) (ii) while allowing States flexibility to use trade measures, like subsidies, to protect non-trade values, like human rights (non-trade values), and (iii) pursue other domestic policy goals (domestic policy autonomy).

At its heart, this disagreement is not about how (or whether) to give priority to ‘the market’ over the State in the context of agricultural trade. It is a fundamental disagreement about how best to structure ongoing political and moral disagreements between States about what rules are needed to allow for a just and fair global distribution of food, without damaging our social and cultural heritage and the Earth’s ability to continue to sustain life.<sup>20</sup> Multilateral rules and regional trade agreements remain fragile because disparate political and moral views of how to balance these competing objectives persist despite the conclusion of legal agreements, and are never resolved. Instead, the disagreement continues, moulded and shaped by the previous rules.

To exemplify this argument, I start with the WTO rules in the Agreement on Agriculture. I then peel back the layers of agreement and disagreement first to the WTO’s predecessor, the GATT 1947, and back further to the stillborn International Trade Organization (ITO). I do this to show that the disagreement remains despite multiple attempts to resolve it, and that each set of rules leaves a legacy that shapes how subsequent multilateral rules and regional trade agreements are created.<sup>21</sup>

## 1. The WTO’s legacy

Cross-border trade in agriculture is regulated predominantly by the Agreement on Agriculture.<sup>22</sup> This Agreement is one of three listed in Annex 1A to the WTO Agreement expressly designed to govern different dimensions of agriculture and food trade, notably market access and domestic agricultural policies, animal, plant life and human health and safety, and the quality of imported food.<sup>23</sup> I focus on

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<sup>18</sup> This argument draws on Simmonds, above n 12, 258.

<sup>19</sup> R. Howse, ‘The World Trade Organization 20 Years On: Global Governance by Judiciary’ 27 *European Journal of International Law* (2016) 9, 76.

<sup>20</sup> On the politician as problem solver, see R. Geuss, *Philosophy and Real Politics* (New Jersey: Princeton University Press, 2008), 13-15; H. Brabazon (ed), *Neoliberal Legality: Understanding the Role of Law in the Neoliberal Project* - (London: Routledge, 2017), 3.

<sup>21</sup> I use the word ‘created’ because markets are created by rules. See generally A.A. Chaufen, *Faith and Liberty: The Economic Thought of the Late Scholastics* (Oxford: Lexington Books, 2003).

<sup>22</sup> Article 21.1 Agreement on Agriculture states ‘[T]he provisions of GATT 1994 and of other Multilateral Trade Agreements in Annex 1A to the WTO Agreement shall apply subject to the provisions of this Agreement’. On Article 21.1, see Appellate Body Report, *EC – Sugar*, adopted 19 May 2005, para. 221; and on ‘conflict’ in Article 21.1, see Appellate Body Report, *Indonesia – Horticultural Products*, adopted 22 November 2017, paras. 5.15 and 5.17.

<sup>23</sup> The SPS Agreement on food safety, animal, plant life health; and TBT Agreement on technical regulations and voluntary standards going to food quality, non-trade concerns, like environmental footprint of food.

market access and domestic farm policy regulation as covered by the Agreement on Agriculture, leaving food safety and food quality to other contributors.<sup>24</sup>

The Agreement on Agriculture's ambition is to 'establish a fair and market-oriented agricultural trading system'. To facilitate this the Agreement requires 'substantial and progressive reductions in agricultural support and protection sustained over an agreed period', to correct and prevent 'restrictions and distortions in world agricultural markets'.<sup>25</sup> Its rules solve three problems. First, they stop States placing absolute quantitative limits (quotas) on crops or livestock imports to protect domestic farmers' livelihoods from cheaper imported goods. Second, they limit financial support given by States that encourage farmers to grow crops and rear livestock in particular ways. Third, they limit State support to farmers that compensates for downturns in global food prices.<sup>26</sup>

To resolve these problems, the Agreement on Agriculture's rules centre around three 'pillars': market access,<sup>27</sup> domestic support<sup>28</sup> and export competition.<sup>29</sup> Each pillar attempts to settle one aspect of the disagreement between States on how best to open their agricultural markets to trade (trade liberalization), while tailoring their agricultural policies to suit domestic challenges (domestic policy autonomy), and protect non-trade values. Tracing the Agreement on Agriculture's general legacy forward into regional trade agreements, we can see that the Agreement on Agriculture did not settle this disagreement, but only shaped its contours.

For example, during the EU-Mercosur FTA negotiations, European farmers feared lowering EU tariffs on poultry exported from Mercosur countries would lead to an increase in cheap chicken, overwhelming the East European poultry sectors. European environmentalists raised concerns that non-trade values, like environmental protection, would be undermined if Brazilian farmers boosted soy and beef production by clearing large areas of rainforest to meet new demand from Europe.<sup>30</sup> Whilst within Mercosur countries, Argentinian wine producers objected to the European Union's insistence that European Geographical Indications (GIs) on wine remain protected under the proposed trade agreement.<sup>31</sup>

In response to these suspicions, the EU and Mercosur trade negotiators discussed how to open their domestic markets to agricultural trade beyond WTO requirements, without harming the EU poultry sector. They considered how the relationship between non-trade values and agricultural production should be managed to protect the Amazon rainforest, and whether the European Union could respond to its farmers' concerns by offering further financial support to offset any adverse impact from the deal.<sup>32</sup> This is a disagreement about how trade liberalization, non-trade values and domestic policy autonomy should be balanced in the future, shaped by the way it was resolved by the Agreement on Agriculture's rules in the past.

### *Market Access*

The Agreement on Agriculture's market access rules reduce restrictions on imported agricultural products.<sup>33</sup> Members retain some policy autonomy because they can insulate their domestic agricultural sectors using a specific trade measure – a tariff.<sup>34</sup> Members had to discard other forms of non-tariff import restrictions on agricultural products, like quantitative restrictions, minimum import prices and

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<sup>24</sup> (cross reference to chapters on SPS and TBT Agreements...).

<sup>25</sup> Recitals 2 and 3 of the preamble to the Agreement on Agriculture.

<sup>26</sup> GATT, *Ministerial Declaration on the Uruguay Round* MIN.DEC (20 September 1986), Section D (i)-(ii). A. Swinbank and C. Tanner, *Farm Policy and Trade Conflict: the Uruguay Round and CAP Reform* (Ann Arbor: University of Michigan Press, 1996) Ch 4.

<sup>27</sup> Part III (Articles 4-5) of the Agreement on Agriculture.

<sup>28</sup> Part IV (Articles 6-7, Annexes 2 and 3) of the Agreement on Agriculture.

<sup>29</sup> Part V (Articles 8-10) of the Agreement on Agriculture.

<sup>30</sup> D. Pundy, 'EU farm chief struggles to dispel concerns over Mercosur trade deal' *Euroactiv* (16 July 2019) <https://www.euractiv.com/section/agriculture-food/news/eu-farm-chief-struggles-to-dispel-concerns-over-mercoshur-trade-deal/>

<sup>31</sup> P.P. Córtes, 'EU-Mercosur deal divides both sides of the Atlantic' *Euroactiv* (11 July 2019), <https://www.euractiv.com/section/economy-jobs/news/eu-mercoshur-deal-divides-both-sides-of-the-atlantic/>

<sup>32</sup> Pundy, above n 30.

<sup>33</sup> Part III (Articles 4-5) of the Agreement on Agriculture.

<sup>34</sup> Article 4.1 of the Agreement on Agriculture.

variable import levies that were so problematic in the then European Economic Community's Common Agricultural Policy (CAP).<sup>35</sup> All non-tariff barriers were converted into tariffs through a process of 'tariffication'.<sup>36</sup> How to convert non-tariff barriers into tariffs is not set out in the Agreement on Agriculture, but Annex 3 of the GATT Modalities Agreement contains the agreed methodology by which Members achieve their commitments in the Agreement on Agriculture.<sup>37</sup>

The tariffication process rebalanced the relationship between trade liberalization, non-trade values and domestic policy autonomy in agriculture in favour of trade liberalization.<sup>38</sup> In practice, Members disagreed how far the rules should affect their domestic agricultural sectors. Some artificially inflated their non-tariff barriers' value, and thus the resultant tariff, to limit the required tariff reductions' impact. This 'dirty tariffication' practice protected farmers because it created a higher tariff 'wall'.<sup>39</sup> These Members disagreed with the carefully crafted balance between the three competing objectives embedded into the rules, and tried to undermine the 'agreement' by pursuing more domestic policy autonomy.<sup>40</sup>

Notwithstanding this domestic policy autonomy 'grab', the rules required Members reduce existing and newly converted tariffs by specific amounts according to a formula set out in the Modalities Agreement. This insistence that *all* Members' policies were covered was reiterated by the Appellate Body in *Chile – Price Band System*, much to Chile's consternation as it believed it had secured agreement among Members that its price band system was exempt from the conversion.<sup>41</sup> For developed countries, the average tariff reduction was 36% over six years (1995-2001), with a minimum cut of 15% per tariff line; for developing countries, the average reduction was 24% over ten years, with a minimum cut of 10% per tariff line, while least-developed countries did not need to make tariff reductions to take account of their different economic situation. This exception gave greater protection for development, an important non-trade value.<sup>42</sup>

Despite the Agreement on Agriculture market access rules rebalancing agricultural trade in favour of trade liberalization, Members still disagree about whether to reduce high agricultural tariffs.<sup>43</sup> For example, a European negotiating objective for the EU-Japan EPA was to gain access to 'closed' Japanese markets by securing a reduction to Japanese tariffs on agricultural products and processed foods.<sup>44</sup>

The Agreement on Agriculture also introduced minimum market access requirements in the form of tariff quotas to embed trade liberalization into the rules. These tariff quotas are recorded, where relevant, together with agricultural tariffs, in each Member's legally binding Schedule of Commitments.<sup>45</sup> Tariff quotas ensured historic market access levels were not reduced in cases where

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<sup>35</sup> D. Harvey, 'What does the history of the Common Agricultural Policy tell us?' in J.A. McMahon and M.A. Cardwell (eds), *Research Handbook on EU Agricultural Law* (2015) (London: Edward Elgar, 2015) 3.

<sup>36</sup> Article 4.2 of the Agreement on Agriculture. The measures to be converted are listed in fn 1 to Article 4.2: this is an illustrative list, see Appellate Body Report, *Chile – Price Band System*, adopted 23 October 2002, paras. 209-210; 216; Appellate Body Report, *Peru – Additional Duty on Imports of Certain Agricultural Products*, adopted 31 July 2015, para. 5.51. On defining variable import levy and minimum import price, see Appellate Body Report, *Chile – Price Band System*, paras 236-238. But note Article XX GATT protects some import restrictions: see Appellate Body Report, *Indonesia – Import Licensing Regimes*, adopted 22 November 2017, para. 5.46.

<sup>37</sup> *Modalities for the Establishment of Specific Binding Commitments under the Reform Programme* MTN.GNG/MA/W/24 (20 December 1993) (GATT Modalities). Elements of Annex 3 are incorporated into Annex 5 AoA, but these cover when special treatment comes to an end. The GATT Modalities document is not a covered agreement for WTO dispute settlement: Appellate Body Report, *EC – Sugar*, adopted 19 May 2005, para. 199.

<sup>38</sup> Panel Report, *Canada – Dairy*, adopted 27 October 1999, paras. 7.25-7.26.

<sup>39</sup> M.D. Ingco, 'Tariffication in the Uruguay Round: How Much Liberalization?' 19(4) *World Economy* (1996) 425.

<sup>40</sup> Other attempts to carve out exceptions to non-tariff barrier conversion: Panel Report, *India – Quantitative Restrictions*, adopted 6 April 1999, paras. 5.240-5.241; Appellate Body Report, *EC – Bananas*, adopted 25 September 1997, paras. 156-7.

<sup>41</sup> Article 4.1 of the Agreement on Agriculture; Appellate Body Report, *Indonesia – Import Licensing Regimes*, adopted 22 November 2017, paras. 216 and 212.

<sup>42</sup> GATT Modalities, above n 37, para 5.

<sup>43</sup> The 2008 Draft Modalities contain a tiered reduction formula: see WTO, *Revised Draft Modalities for Agriculture*, (2008 Draft Modalities)TN/AG/W/4/Rev.4 (December 2008), paras. 59-65.

<sup>44</sup> EPRS, *Bilateral trade deal with Japan-largest to date for EU* (February 2019), 2-3.

<sup>45</sup> Appellate Body Report, *EC – Computer Equipment*, adopted 22 June 1998, para. 84.

converted non-tariff barriers created prohibitively high tariffs.<sup>46</sup> Despite the 2013 Bali Ministerial Decision, which improves transparency in tariff quota administration, access to Members' markets through tariff quotas remains an area of disagreement.<sup>47</sup> In response to pressure from European beef farmers, the European Union protected its beef sector in the EU-Mercosur FTA by resorting to tariff quotas, in part because it is one of the only market access restrictions permitted by the Agreement on Agriculture.<sup>48</sup>

The Agreement on Agriculture's rules on market access address non-trade values too. This protection takes the form of a quantitative (rather than qualitative) carve-out from tariff reduction commitments. For example, the rules protect development concerns, with Annex 5B guaranteeing special treatment for agricultural products that are 'a predominant staple in the traditional diet of a developing country Member'.<sup>49</sup> Annex 5A also excludes any agricultural products from tariff reduction commitments on the grounds of food security and environmental protection.<sup>50</sup> Whilst Annex 5A appears to give greater domestic policy autonomy to protect non-trade values, its impact was limited. Four countries (Japan, Korea, the Philippines, and Israel) chose to meet the requirements and made the necessary reservations in their Schedules, but only Japan used the exception.<sup>51</sup> Annex 5A lapsed in 2000.<sup>52</sup> Further repatriation of the protection of non-trade values back to Members was pushed into the domestic support (subsidies) rules of the Agreement on Agriculture. Despite this 'agreement', developing country Members still press for the power to restrict market access on food security, livelihood security, and development grounds.<sup>53</sup>

In practice, Members' control over the volume (and kind) of agricultural goods flowing into their markets after the Agreement on Agriculture came into force is limited. Following an unexpected decline in the price of agricultural goods or a sudden import surge, Article 5 Agreement on Agriculture allows Members to increase import duties on 'tariffied' products under specific circumstances. Members resort to this special safeguard measure to protect their farmers and to avoid additional regulatory hurdles under the WTO's general rules on safeguards in Article XIX of the GATT 1994 and the Agreement on Safeguards.<sup>54</sup> Due to limitations on Article 5's use, this exercise in autonomy is predominantly used by developed countries.<sup>55</sup>

Developing countries' inability to use Article 5's 'special agricultural safeguard' is a source of ongoing disagreement between WTO Members. In 2008, a group of developing countries, led by India, proposed a new special safeguard for the Agreement on Agriculture to allow developing countries' greater policy autonomy over their agricultural sectors and enable them to protect development as a non-trade value. These demands to rebalance market access rules were unsuccessful but calls for changes to the rules continued throughout the subsequent 12 years. These calls were shaped in part too by shifts in the panel and Appellate Body's jurisprudence towards favouring greater domestic policy autonomy for States over their agricultural policies and the protection of non-trade values.<sup>56</sup>

In *Indonesia – Horticultural Products*, the Appellate Body held that the GATT general exceptions, which protect non-trade values beyond those set out in the Agreement on Agriculture (such as public morals and public health), constitute relevant exceptions to the requirement to convert non-

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<sup>46</sup> GATT Modalities above n37, para 6; see J.A. McMahon, *The WTO Agreement on Agriculture: A Commentary* (Oxford: Oxford University Press, 2006) 50-54.

<sup>47</sup> WTO, *Understanding on Tariff Quota Administration of Agricultural Products as defined in Article 2 of the Agreement on Agriculture*, Ministerial Decision, WT/MIN(13)/39 (11 December 2013). see Pundy, above n 30.

<sup>48</sup> 'EU-Mercosur trade deal 'invitation' to other agreements: Brazil beef group' *Reuters* (5 July 2019), <https://www.reuters.com/article/us-brazil-beef/eu-mercotur-trade-deal-invitation-to-other-agreements-brazil-beef-group-idUSKCN1U028L>

<sup>49</sup> GATT Modalities above n 37, para. 6; on the staple diet carve-out see, Annex 5, Section B 7(a)-(b), to the Agreement on Agriculture.

<sup>50</sup> Annex 5, Section A 1(a)-(e), to the Agreement on Agriculture.

<sup>51</sup> McMahon, above n 46, 54.

<sup>52</sup> Annex 5, Section A 3, to the Agreement on Agriculture.

<sup>53</sup> See McMahon, above n 46, 53-4. On further domestic policy autonomy and protection of non-trade values in market access, see 2008 Draft Modalities, above n 43, paras. 129-131.

<sup>54</sup> Article 5. See McMahon, above n 46, 54-60

<sup>55</sup> McMahon, above n 48, 55.

<sup>56</sup> J.A. McMahon, *The Negotiations for a New Agreement on Agriculture* (The Hague: Martinus Nijhoff, 2011) Chapter 7.

tariff barriers into tariffs set out in Article 4.2, footnote 1, of the Agreement on Agriculture.<sup>57</sup> Furthermore, the Panel in *Indonesia – Chicken* recognized that a domestic policy favouring food self-sufficiency (food sovereignty) over trade in food, was a legitimate policy objective and not per se, a violation of WTO rules.<sup>58</sup>

It is not surprising, following these decisions, that Members made renewed calls to reconfigure the Agreement on Agriculture's special safeguard to balance trade liberalization, non-trade values, and domestic policy autonomy in a different way. For example, in January 2020, the G33 group of developing countries recommended to the WTO Committee on Agriculture that their proposal for an updated special agricultural safeguard to protect development and food security as critical non-trade values go back on the negotiating agenda.<sup>59</sup>

However, the Russian Federation's submission to the WTO Committee on Agriculture in 2018 reveals that agreement between Members on the precise form of this special safeguard is far from settled, with Russia pressing rebalancing in favour of *more* trade liberalization, not less.<sup>60</sup> In its submission, Russia showed that only eight out of the 33 Members eligible to use the existing special agricultural safeguard provision in Article 5 did so, and that such usage could damage the export trade from 78 Members, including ten least-developed nations. The Russian Federation argued that the way the agricultural safeguard allowed some countries to protect their domestic agricultural markets at the expense of other Members required further investigation.<sup>61</sup>

This disagreement over how best to craft a special safeguard to balance trade liberalisation with non-trade values and domestic policy autonomy, tips over into regional agreements. In 2019, the OECD reported that practice in regional agreements differs widely: some agreements contain 'sunset clauses' specifying a date when resort to a special safeguard will end as between the parties, whereas others completely exclude regional partners from any global safeguard action brought by a WTO Member.<sup>62</sup>

### *Domestic Support*

The trade negotiations leading up to the creation of Agreement on Agriculture's domestic support 'pillar' focused on improving "the competitive environment by increasing discipline on the use of all direct and indirect subsidies and other measures affecting directly or indirectly agricultural trade." The aim was to prevent and reduce distortions to trade caused by "structural surpluses" of agricultural products.<sup>63</sup>

Despite plummeting global commodity prices and land values during the 1980s, global stocks of agricultural products did not respond to these market signals. Instead, stocks ballooned in response to financial incentives given to farmers as part of developed countries' agricultural policies. These policies displaced developing countries exports to Japanese, European and American markets.<sup>64</sup> Global wheat stocks rose by approximately 70% between 1980-1981, with cereal stocks in the then European Economic Community (EEC) rising by over 50%.<sup>65</sup>

Calls from developing, least-developed countries, and the United States for new rules to govern domestic support and remove these trade-distortions were counterbalanced by European arguments that

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<sup>57</sup> Appellate Body Report, *Indonesia – Horticultural Products*, adopted 22 November 2017, para. 5.41.

<sup>58</sup> Panel Report, *Indonesia – Chicken Meat and Chicken Products*, adopted 22 November 2017, para. 7.679.

<sup>59</sup> WTO, *Ministerial Decision on Special Safeguard Mechanism for Developing Country Members*, WT/MIN(15)/43 (19 December 2015) and market access commitments for cotton from least-developed countries, WTO, *Ministerial Decision on Cotton*, WT/MIN(13)/41 (11 December 2013); G33 submission to the Committee on Agriculture on the special safeguard still highlights this problems, JOB/AG/178 (30 January 2020), [https://www.wto.org/english/news\\_e/news20\\_e/agri\\_31jan20\\_e.htm](https://www.wto.org/english/news_e/news20_e/agri_31jan20_e.htm).

<sup>60</sup> WTO, *Usage of Special Agricultural Safeguards: Submission by the Russian Federation*, JOB/AB/145 (19 October 2018), 1.

<sup>61</sup> *ibid.*

<sup>62</sup> OECD, *Joint Working Party on Agriculture and Trade: The evolution of the treatment of agriculture in preferential and regional trade agreements*, TAD/TC/CA/WP(2108)/5/FINAL (7 February 2019), para. 212.

<sup>63</sup> Uruguay Round Ministerial Declaration, above n 26, Section D, paras. 2(ii) and 1.

<sup>64</sup> D.G. Johnson, 'World Agriculture in Disarray: Revisited' 31(2) *Australian Journal of Agricultural Economics* (1987) 142, 152.

<sup>65</sup> Also EEC cereal, butter and beef stocks: Swinbank and Tanner, above n 26, 23-4.

farm support in the CAP achieved domestic policy objectives. The European trade negotiators claimed that domestic support stabilised farm gate prices and guaranteed food security through a continuous supply of cereals, vegetables, fruits, and livestock grown and reared in EEC Member States.<sup>66</sup> As the draft 1990 Uruguay Round negotiating text stated, only a ‘substantial and progressive’ reduction in domestic support for agricultural products could realign the rules in favour of trade liberalization. Unlike the negotiations around market access, the calibration towards trade liberalization in domestic support would have to give due regard to ‘maintaining the possibility for ...[states] to pursue national policy goals affecting agriculture through policies with minimal trade effects’.<sup>67</sup>

It is no surprise that, given the orientation of this disagreement between States during the negotiations, the Agreement on Agriculture’s domestic support rules strike a different balance between trade liberalization, non-trade values, and domestic autonomy from its market access rules. The focus is on non-trade values and domestic policy autonomy rather than on trade liberalization. However, this balance was tilted slightly back again in favour of trade liberalization by the Panel and the Appellate Body’s decisions in the *US – Cotton* dispute. Much to the United States’ surprise, since it believed paying farmers *not* to produce certain crops was a legitimate exercise of their domestic policy autonomy,<sup>68</sup> the Appellate Body upheld the Panel’s finding that such measures are prohibited. From then on, it was clear that when domestic support falls outside Agreement on Agriculture’s rules, it is considered under the much more stringent rules in the WTO SCM Agreement.<sup>69</sup>

The Agreement on Agriculture balances trade liberalization, non-trade values, and domestic policy autonomy by distinguishing between domestic support that distorts trade and undermines trade liberalization and domestic support that has only minimal effects on trade.<sup>70</sup> From a 1986-88 baseline period, developed countries had to reduce their domestic support by 20% between 1995 and 2000.<sup>71</sup> Developing countries were subject to less stringent reduction commitments, the rules requiring a 13.3% reduction over ten years starting from 1995, while least-developed countries were exempt.<sup>72</sup> General exemptions from these reduction commitments were permitted for *de minimis* domestic support and ‘direct payments for production-limiting’ programmes’, the so-called ‘Blue Box’ support. These exemptions were introduced to resolve a disagreement between the United States and the then EEC as to how certain payments made under their farm policies could be accommodated in the Agreement on Agriculture.<sup>73</sup>

Although trade-distorting domestic support levels remain high despite these reductions, Members still disagree whether to change the rules. For example, in January 2020, the Cairns Group of major agricultural exporting countries proposed a cap on, and further reductions to, trade-distorting domestic support entitlements in order to rebalance the domestic support rules back in favour of trade liberalization.<sup>74</sup>

Non-trade distorting domestic support, known as the ‘Green Box’, was excluded from the reduction commitments and could be retained.<sup>75</sup> Thus the rules permitted Members to incentivise

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<sup>66</sup> Swinbank and Tanner, above n 26, 73. European Community Preference remains a key pillar of the CAP: see C. Häberli, ‘The Story of Community Preference for Food Security’ in McMahon and Cardwell, above n 37, 437. GATT, *Framework Agreement on Agriculture Reform Programme, Draft Text by the Chairman*, MTN.GNG/NG5/W/170 (11 July 1990), para. 8(a)-(e).

<sup>67</sup> *Framework Agreement on Agriculture Reform Programme, Draft Text by the Chairman*, above n 66, para 2.

<sup>68</sup> See United States’ arguments in Appellate Body Report, *US – Cotton Products*, adopted 21 March 2005, paras. 15 -18.

<sup>69</sup> Appellate Body Report, *US – Cotton Products*, adopted 21 March 2005, paras. 394, 544-545.

<sup>70</sup> Annex 2, Section 1(a)-(b), to the Agreement on Agriculture requires that domestic support directed towards permitted domestic policy objectives must have ‘no, or at most minimal effects on production’ and be ‘provided through a publicly-funded government programme, (including government revenue forgone) not involving a transfer from consumers; and the support must have ‘shall not have the effect of providing support to producers’. McMahon, above n 46, 66-67.

<sup>71</sup> GATT Modalities, above n 37 paras. VIII, XV and XVI.

<sup>72</sup> *Ibid.*

<sup>73</sup> *De Minimis* support: Article 6.4(a)-(b) of the Agreement on Agriculture; Blue Box support: Article 6.5 of the Agreement on Agriculture.

<sup>74</sup> WTO, *Framework for Negotiations on Domestic Support*, JOB/AG/177 (23 January 2020).

<sup>75</sup> Annex 2 to the Agreement on Agriculture.

farmers to change their production practices to favour environmental protection,<sup>76</sup> to pay their farmers to retire,<sup>77</sup> to provide payments to build infrastructure services and provide pest control advice.<sup>78</sup> Accommodating such support in the rules was thought to be a useful way to resolve disagreements prevalent in the 1990s between the then EEC and the United States over how the EEC could still pursue domestic policy objectives without unduly undermining trade liberalization.<sup>79</sup> However it should be noted that the twenty-first century iteration of the European Union's CAP continues to rely on domestic support measures to deliver these 'public goods' in ways which remain controversial among other WTO Members.<sup>80</sup> Moreover, the European Union continues to emphasize the need to retain this exact balance between non-trade values and trade liberalization in its regional trade agreements, much to the consternation of some of its negotiating partners.<sup>81</sup>

Domestic support measures directed at other non-trade values, like food security and development, are also permitted under the Agreement on Agriculture. Members could purchase food to amass a public food stockpile or for distribution as part of targeted food security and food aid programmes.<sup>82</sup> To be eligible, States must purchase food at prevailing market prices.<sup>83</sup> This requirement excludes countries that are unable to afford the volumes of food required for their food security programmes.<sup>84</sup> This issue remains a point of contention for developing countries, like India, with large public food stockpiling programmes.<sup>85</sup>

Members do not universally accept India's position. For example, in 2013, Pakistan, Canada and the United States raised concerns in the WTO Committee on Agriculture that India's public food stockholding programme resulted in large-scale food waste and excess food being dumped on neighbouring countries' agricultural markets.<sup>86</sup> The 2014 Bali Ministerial Decision on Public Stockholding for Food Security Purposes introduced a moratorium on dispute settlement against developing countries that make use of the provision to support their food security as a critical non-trade value. However, this moratorium has done little to settle this disagreement.<sup>87</sup> The arguments over the compatibility of India's public stockholding programme with the Agreement on Agriculture continue to be unresolved.<sup>88</sup> The debate over domestic support as a mechanism to protect non-trade values remains an important issue for discussion at the 12<sup>th</sup> Ministerial Meeting scheduled to be held in the aftermath of the 2020 corona-virus outbreak.

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<sup>76</sup> Decoupled support, specifically payments made under environmental programmes, Annex 2:12 to the Agreement on Agriculture.

<sup>77</sup> Decoupled support, specifically structural support provided through producer retirement programmes, Annex 2:9 to the Agreement on Agriculture.

<sup>78</sup> Support for general services, Annex 2:2 to the Agreement on Agriculture.

<sup>79</sup> Australia supported further trade liberalization and acted as honest broker in discussions between the United States and the European Union: Swinbank and Tanner, above n 26, 67

<sup>80</sup> C. Potter, 'Agricultural Multifunctionality, working lands and public goods: Contested models of agri-environmental governance under the Common Agricultural Policy,' in McMahon and Cardwell, above n 35, 113.

<sup>81</sup> J. Brunson, A. Beattie & A. Williams, 'EU trade chief seeks revised talks to close transatlantic rift' *Financial Times* (11 May 2020) <https://www.ft.com/content/e4eb5ed9-97ed-4c78-a139-84c4d7dcd87>

<sup>82</sup> Annex 2:3 (public stockholding) and 2.4 (domestic food aid) to the Agreement on Agriculture.

<sup>83</sup> National Food Security Act 2013; 'Food Bill gets Presidential Assent' *The Hindu* (12 September 2013) <http://www.thehindu.com/news/national/food-bill-gets-presidential-assent/article5120677.ece?ref=relatedNews>.

<sup>84</sup> OECD, *Feeding India: Prospects and Challenges in the Next Decade* (2014), 71 and 87.

<sup>85</sup> A. R. Mishra, 'India wants workable solution on public stockholding for food security' *Mint*, (9 December 2017), <https://www.livemint.com/Politics/0a7mr1hq1GL9bYPHH4oPHJ/India-wants-workable-solution-on-public-stockholding-for-foo.html>.

<sup>86</sup> WTO, 'Farm produce stockholding worries members who fear impact on trade and incomes' (26 September 2013), [https://www.wto.org/english/news\\_e/news13\\_e/agcom\\_26sep13\\_e.htm](https://www.wto.org/english/news_e/news13_e/agcom_26sep13_e.htm).

<sup>87</sup> WTO, *Ministerial Decision: Public Stockholding for Food Security Purposes*, WT/L/939 (28 November 2014). WTO, 'Eyeing MC12 for an outcome, agriculture negotiators focus on doable elements and processes' (24 February 2020), [https://www.wto.org/english/news\\_e/news20\\_e/agri\\_24feb20\\_e.htm](https://www.wto.org/english/news_e/news20_e/agri_24feb20_e.htm)

<sup>88</sup> WTO, 'WTO members submit new proposals to move farm negotiations to 'solution-finding phase' (15 July 2019), [https://www.wto.org/english/news\\_e/news19\\_e/agng\\_16jul19\\_e.htm](https://www.wto.org/english/news_e/news19_e/agng_16jul19_e.htm); WTO, *WTO members discuss Kazakhstan's offer to host 12<sup>th</sup> Ministerial Conference in June 2021* (29 May 2020), [https://www.wto.org/english/news\\_e/news20\\_e/gc\\_29may20\\_e.htm](https://www.wto.org/english/news_e/news20_e/gc_29may20_e.htm); J.W. Glauber, J. Hepburn, D. Laborde and S. Murphy, *What National Farm Policy Trends Could Mean for Efforts to Update WTO Rules on Domestic Support*, April 2020, IISD, 9 <https://www.iisd.org/sites/default/files/publications/farm-policy-trends-en.pdf>.

This ongoing disagreement has not influenced the trade negotiations in contemporary regional trade agreements however. Since 2000, domestic support provisions in regional trade agreements either mirror WTO rules, or in addition to adopting the WTO rules, they require further multilateral trade talks to bridge the divide.<sup>89</sup> For example, Article 7.4(1)(a) CETA states that the Parties will work jointly to reach an agreement to “further enhance multilateral disciplines and rules on agricultural trade in the WTO”, while, in Article 7.8, reaffirming their rights and obligations under the WTO subsidy rules in the Agreement on Agriculture and the SCM Agreement.

### *Export Competition*

The structural surpluses and volatile commodity prices of the 1980s were caused in part by the domestic agricultural policies of the then EEC, and the United States.<sup>90</sup> Payments made to farmers to incentivise production fall within the Agreement on Agriculture’s rules on domestic support. Whereas its rules on export competition (export subsidies) govern export refunds, export insurance, export credits and export credit guarantees that enabled farmers to export without paying attention to market demand or the world price. Unlike the domestic support rules, which tilt towards the protection of non-trade values and domestic policy autonomy, the export subsidy rules focus on trade liberalization, with only limited concessions to non-trade values and domestic policy autonomy in the areas of development and food security.<sup>91</sup>

An export subsidy is defined in the Agreement on Agriculture as ‘a subsidy contingent upon export performance’, with specific export subsidies listed in Article 9.<sup>92</sup> In addition to direct payments, and payments in kind, Article 9 includes payments to reduce marketing and processing costs of exported agricultural products, and internal transport and freight charges.<sup>93</sup> Article 8 prohibits export subsidies paid ‘otherwise than in conformity’ with the Agreement, including the commitments in each Member’s schedule. Any export subsidy that fails to comply with the Agreement on Agriculture’s rules will be challenged under the SCM Agreement.<sup>94</sup>

Like domestic support, export subsidies were to be reduced over a specific time, calculated from a 1986-1990 base period.<sup>95</sup> The few concessions to non-trade values comprised least-developed countries exemption from reduction commitments, and a longer implementation period for developing countries. Starting from 1995, expenditure by developing countries on export subsidies was to be reduced by 24% over ten years and the volume of agricultural products receiving such subsidies by 14%. Developed countries were required to make reductions of 36% and 21% respectively, over five years (1995-2000).<sup>96</sup> Some concessions were given for food security in the context of food aid, which the 2008 Draft Modalities significantly expanded.<sup>97</sup>

The export subsidy rules weighting in favour of trade liberalization were consistently upheld by Members, to the point that non-trade values, like development, became synonymous with trade liberalization. In the Nairobi Ministerial Decision on Export Competition, Members declared their commitment to exercise ‘utmost restraint’ in using export subsidies: all developed Members to ‘immediately eliminate’ their remaining export subsidies, and developing countries to follow within three years for most of their agricultural products.<sup>98</sup>

This agreement between Members as to how best to balance trade liberalization with non-trade values and domestic policy autonomy in the context of export subsidies remains consistent across

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<sup>89</sup> OECD report, above n62, 4, 40.

<sup>90</sup> Swinbank and Tanner, above n 26, 20-21.

<sup>91</sup> The Appellate Body’s interpretation of Article 10.2 of the Agreement on Agriculture includes the United States’ export credit programme, even though it appeared that Article 10 was an exhortation only to continue negotiations on specific disciplines covering export credits: Appellate Body Report, *US – Cotton Products*, adopted 21 March 2005, para. 763(e)(i).

<sup>92</sup> Article 1(e) of the Agreement on Agriculture

<sup>93</sup> Article 9(a), (d) and (e) of the Agreement on Agriculture.

<sup>94</sup> Article 3.1(a) SCM Agreement: see Panel Report, *Canada – Dairy (Article 21.5DSU by New Zealand and the United States-I)*, adopted 18 December 2001, para. 6.92.

<sup>95</sup> GATT Modalities, above n 37, paras. XI, XV and XVI.

<sup>96</sup> *Ibid.*

<sup>97</sup> Article 10.4 of the Agreement on Agriculture; 2008 Draft Modalities, above n 45, Annex L, para. 3.

<sup>98</sup> WTO, *Ministerial Decision on Export Competition WT/MIN(15)/45* (21 December 2015), paras. 6-7.

regional trade agreements. The OECD found that 26% of the 54 regional trade agreements it evaluated in 2019 banned or phased out export subsidies, with only 7% allowing their signatories to use export subsidies at all.<sup>99</sup> The report went on to note that the rate at which export subsidies were being eliminated had accelerated from 2005 onwards as a direct consequence of the 2005 Hong Kong Ministerial Meeting, where the elimination of all export subsidies was first raised.<sup>100</sup>

This discussion shows that the Agreement on Agriculture balances trade liberalization, non-trade values and domestic policy autonomy in a particular way. And, that despite the Agreement on Agriculture's comprehensive nature, States still disagree on the correct balance these three competing objectives in multilateral trade talks and in contemporary regional trade agreements. It is clear that when States start to negotiate regional trade agreements, they do not come to the negotiating table with an entirely novel negotiating strategy. Instead, their starting positions are shaped by their perceptions of the Agreement on Agriculture's deficiencies. The disagreement about how to balance trade liberalization, non-trade values and domestic policy autonomy is not resolved by the multilateral rules, therefore, but just shifted onto a new axis.

Yet, the Agreement on Agriculture's 'take' on where the balance between these three competing objectives became out of line and how it must be corrected is not accidental. It was shaped by previous 'agreements' between States, the GATT 1947 and its predecessor, the ITO.<sup>101</sup>

## 2. GATT 1947's Legacy

GATT 1947 governed trade in goods from 1947 until the WTO came into force in January 1995.<sup>102</sup> Its rules applied to agriculture, but only sporadically and ineffectively.<sup>103</sup>

GATT 1947's express coverage of agriculture was limited to an exemption allowing countries to use import and export restrictions (quotas) to fulfil domestic agricultural policy objectives, specifically to alleviate shortages and excess production, and to control crop and livestock production.<sup>104</sup> Inserted at the United States' insistence, this provision protected the quotas used in its domestic agricultural programme.<sup>105</sup> Despite careful crafting of this exception, the policy was found to violate the GATT 1947 in a dispute brought by the Netherlands and Denmark.<sup>106</sup> Rather than withdrawing the policy, the United States asked for a temporary waiver from the rules that remained in place until 1995.<sup>107</sup> The only other reference to agriculture in the GATT 1947 was in Article XVI:3, which exhorted States to '*avoid the use of subsidies on the export of primary products*' though this did not forbid their use.<sup>108</sup> Domestic subsidies for agriculture were not prohibited.

GATT 1947's dearth of regulation over international agricultural trade enabled the United States and the then EEC to use elaborate import restrictions to limit the volume of cheaper agricultural products allowed to enter their markets and to provide financial support to their farmers (in various forms).<sup>109</sup> This interconnection of market access restrictions and domestic support meant that their farmers continued to grow crops and raise livestock even when the production costs and the demand for those crops and livestock did not justify such production. Any excess agricultural production was dumped on to international markets, undercutting whatever price other countries could get for their

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<sup>99</sup> OECD report, above n 62, 36.

<sup>100</sup> WTO, *Negotiations on Agriculture: Special Report by the Chairman*, TN/AG/21 (28 November 2005), para. 11.

<sup>101</sup> The WTO rules' stated purpose is to augment rules governing trade in goods in the GATT: see the fourth recital in the preamble to the WTO Agreement.

<sup>102</sup> The GATT of 1947 was subsumed into the WTO rules (with some amendments) and is referred to as GATT 1994. See G. Marceau, 'Transition from GATT to WTO: A Most Pragmatic Operation' 29 *Journal of World Trade* (1995) 147.

<sup>103</sup> M. Margulis, 'The Forgotten History of Food Security in Multilateral Trade Negotiations' 16(1) *World Trade Review* (2017) 25.

<sup>104</sup> Article XI:2(c)(i)-(iii) of the GATT 1994.

<sup>105</sup> McMahon, above n 46, 2.

<sup>106</sup> *ibid.*

<sup>107</sup> GATT, *Waiver Granted to the United States in Connection with Import Restrictions Imposed under Section 22 Agricultural Adjustment Act (of 1933) as amended BISD3S/32* (5 March 1955).

<sup>108</sup> See the ban on export subsidies on manufactured goods: Article XVI:4 of the GATT 1994.

<sup>109</sup> E.g. the European CAP's compliance with the GATT was questionable: see Häberli, above n 66, 437.

agricultural goods.<sup>110</sup> United States' and European farm support schemes also paid export subsidies to farmers to offset the difference between the market price for the goods and the production costs. Such subsidies were a cause of considerable consternation to other GATT Contracting Parties, especially developing and least-developed countries.<sup>111</sup> The size and scale of European and United States domestic agricultural policies and the fact they operated mostly outside the GATT 1947's rules meant other States believed its rules only exceptionally applied to agriculture, if at all.<sup>112</sup>

During this GATT 1947 period, there is little focus on agricultural trade liberalization, a significant rise in domestic policy autonomy and the emergence of diverging ideas of how best to protect non-trade values.<sup>113</sup> The GATT 1947's inability to constrain United States and European 'protectionism', while enabling all States to protect non-trade values and pursue important domestic policy objectives in their agricultural sectors, was a constant source of disagreement among the Contracting Parties. This disagreement became the impetus for the negotiation of new multilateral rules designed to address this problem.<sup>114</sup>

Given this disagreement's scope, it is not surprising to see that the Uruguay Round Ministerial Declaration resulting in the WTO's creation and the Agreement on Agriculture cited the 'urgent need to bring more discipline and predictability to world agricultural trade'.<sup>115</sup> While, European and United States' domestic agricultural policies were not named in the Ministerial Declaration, it contained strong allusions to the adverse effects caused by both those policies: singling out 'restrictions and distortions ... related to structural surpluses'. These are direct references to the CAP's product-specific subsidies that incentivised farmers to grow crops and rear livestock even when there was no international market for these goods;<sup>116</sup> and the need to 'bring all measures affecting import access...under strengthened and more operationally effective GATT rules', which was, in turn, a direct reference to the United States' GATT agricultural waiver protecting US farm payments.<sup>117</sup>

While the Uruguay Round may have started by focusing on how the GATT 1947's rules had failed to balance trade liberalization, non-trade values, and domestic policy autonomy in European and United States' agricultural policies correctly, the negotiations later expanded to include similar disquiet about Japanese agricultural protectionism and Canada's dairy sector.<sup>118</sup>

### 3. The ITO's Legacy

The contours of this disagreement between states about why the GATT 1947 rules failed, is not unexpected. This is because this disagreement was shaped by the earlier rules contained in the ITO.

The GATT 1947's negotiators only intended that the agreement addresses trade-related challenges of commercial policy. Other challenges to international trade in employment, economic development, business practices and commodities, were to be controlled by other rules set out in distinct Chapters.<sup>119</sup> These Chapters were grouped together under an institutional structure, the ITO. The idea was to create 'multitiered governance' from the global level down to, and including, the state.

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<sup>110</sup> This strategy devastated developing and least developed countries: GATT, *Trends in International Trade* (1958) (Chair, Gottfried Häberler), paras. 245-246 (on the levels of protection in the USA and the EEC) and paras 254-256 (the impact on 'unindustrialized countries').

<sup>111</sup> On the European CAP, see Harvey, above n 35, 3. On US farm policy see, Glauber and Effland, 'US Agricultural Policy' in W.H. Meyers & T. Johnson (eds), *Handbook of International Food and Agricultural Policies: Volume 1: Policies for Agricultural Markets and Rural Activity* (Singapore: World Scientific, 2018).

<sup>112</sup> The GATT was not an international organization, so signatory governments were referred to as Contracting Parties: Article XXXII & XXXIII of the GATT 1947. See also (add cross-reference to McRae chapter).

<sup>113</sup> McMahon, above n 46, chapter 1.

<sup>114</sup> Uruguay Round Ministerial Declaration, above n 26.

<sup>115</sup> *Ibid.* para. 2.

<sup>116</sup> M.N. Cardwell, 'The Direct Payments Regime: Delivering a 'fair standard of living for the agricultural community'?' in McMahon and Cardwell, above n 35, 41, 49.

<sup>117</sup> Swinbank and Tanner, above n 26, 67.

<sup>118</sup> *Ibid.*, 64 (Japan) and 68 (Canada).

<sup>119</sup> Article 1.6 Havana Charter for an International Trade Organization (ITO Charter), April 1948. [www.wto.org/english/docs\\_e/legal\\_e/havana\\_e/pdf](http://www.wto.org/english/docs_e/legal_e/havana_e/pdf)

The ITO Charter and its chapters would operate at the global level to ‘encase’ (not insulate) the economy from the short term political interests of States that would otherwise undermine the many positive (albeit unknowable) benefits that flowed from a well-functioning global market.<sup>120</sup> State control would not be removed entirely as rules were required to create and stabilize the market.<sup>121</sup> Instead, the ITO Charter would redesign ‘states, laws, and other institutions to protect the market’ from domestic politics and, as a corollary, from the inherent tendency of democracy to destroy itself.<sup>122</sup> In this reimagined world of global market protection, the balance between trade liberalization, non-trade values, and domestic policy autonomy in agriculture was incorporated into the ITO’s rules in a particular way.

The ITO Charter’s Intergovernmental Commodities Agreements Chapter (Chapter VI) set agriculture within a broader concern about primary commodities. Article 56(1) noted that primary commodities, loosely defined as ‘any product of *farm, forest or fishery* or any mineral’, raised ‘special difficulties’.<sup>123</sup> Chapter VI identified three such ‘difficulties’, or areas of disagreement among states, that were to be resolved by the rules. First, how to balance production and consumption when farmers could not react to rapid changes in consumers’ preference due to the natural lifecycles of crops and livestock. Second, how could any overabundance be reduced. And, third, how could price volatility be eliminated to stabilise commodity prices and keep trade flowing.<sup>124</sup>

In keeping with the ITO’s function to shrink the role of the State (domestic policy autonomy) in order to protect global agricultural markets (trade liberalization), Article 57 permitted limited State intervention in commodities markets only to restore the appropriate balance between supply, demand and price; that intervention taking the form of intergovernmental commodity agreements that stabilised commodity markets and boosted consumption.<sup>125</sup> The decision on how best to manage the global market in each commodity was taken away from the State and given to impassive experts, who would determine which measures were needed within those agreements. The State’s role was to acquiesce to the experts’ opinions and implement the agreements’ terms. Any disagreements about how best to protect non-trade values would be taken up by the experts in determining the terms of the Commodity Agreements.<sup>126</sup> These non-trade values were adverse effects on agricultural markets of price fluctuations, rather than general concerns about food security or climate change.<sup>127</sup>

When the United States’ Congress failed to ratify the ITO Charter in 1950, despite repeated attempts by President Truman to submit it to Congress, other countries followed this lead, leading to the collapse of the ITO.<sup>128</sup> The GATT 1947’s historical purpose within the ITO Charter meant its rules were designed to cover manufactured goods, rather than address the ‘special difficulties’ associated with international agricultural trade. These ‘special difficulties’ identified in Article 56(1) of the ITO Charter, acknowledged the need to balance trade liberalization with non-trade values and domestic policy autonomy. Yet, the ITO failed, and the GATT 1947 limped on, devoid of any institutional coherence, effective dispute settlement, and without any operative rules in agriculture.<sup>129</sup>

Disagreements among States about how to balance trade liberalization, non-trade values and domestic policy autonomy once thought settled in the ITO rules, resurfaced during the period covered by the GATT rules and took on a new form. Rather than coalescing around what form the ITO’s Commodity Agreements should take, or how (or whether) food security could be addressed by the

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<sup>120</sup> Slobodian, above n 14, 2 and ‘Encasement not Liberation,’ Slobodian, *ibid.* 5-7.

<sup>121</sup> This interpretation of the function of international agricultural trade rules is inspired by Chafuen, above n 23.

<sup>122</sup> The ITO’s neoliberal vision was driven by the United States and the United Kingdom: see D. Gale Johnson, *World Agriculture in Disarray* (New York: Macmillan, 1973), 12 to 13.

<sup>123</sup> Emphasis added. Article 56(1) ITO Charter.

<sup>124</sup> Article 55 ITO Charter.

<sup>125</sup> On the general relationship between the ITO and agriculture, see C.H. Alexandrowicz, *International Economic Organizations* (New York: FA Praeger, 1953) 162-168.

<sup>126</sup> *ibid.*

<sup>127</sup> Fakhri, above n 15, 63.

<sup>128</sup> For another perspective, see I.D. Trofimov, ‘The Failure of the International Trade Organization: A Policy Entrepreneurship Perspective’ 5(1) *Journal of Politics and Law* (2012) 56.

<sup>129</sup> Ruggie describes this as a period of ‘embedded liberalism’: see J.G. Ruggie, ‘International Regimes, Transactions and Change: Embedded Liberalism in the Postwar Economic Order’ 36(2) *International Organization* (1982) 379.

Commodity Chapter of the ITO, disagreements raged instead about how market access rules could be better crafted to constrain American protectionism, and what forms of domestic and export subsidy controls might offset the pernicious effects of the CAP. The GATT 1947's deficiencies were instrumental to the creation of the Agreement on Agriculture's three pillars: market access, domestic support, and export competition. The disagreement was not resolved, but moved onto another trajectory.

## Conclusion

This chapter presents a new way to understand the relationship between regional trade agreements and multilateral rules governing international agricultural trade. I argue that there is an ongoing disagreement between States that runs throughout all attempts to regulate international agricultural trade, whether in regional trade agreements or in the multilateral rules. This disagreement centres on how to balance three competing objectives in legal rules: namely, how to open each State's market to agricultural trade, while protecting crucial non-trade values, and allowing each State to retain sufficient autonomy over their domestic agriculture sectors.

Each new regional or multilateral trade agreement captures the balance between these three competing objectives in a certain way, but they lock in *disagreement* between States about how best to proceed too.<sup>130</sup> This is because once a new trade agreement has been concluded by States, previous proposals on what 'works' become irrelevant and different suggestions are needed that take into account that agreement's solution. So, while each trade agreement is successful on its own terms in so far as the trade negotiators concluded an agreement, these newly agreed rules do not settle the ongoing disagreement between States. Instead, the disagreement continues on a new axis shaped by the latest rules. By peeling back the layers of agreement and disagreement, starting from contemporary regional trade agreements, back to the WTO Agreement on Agriculture, to the GATT 1947 and then back to the ITO, I expose this pattern of agreement and disagreement and reveal the fragility of international agricultural trade regulation.

Agricultural trade is important. It affects access to food, our values as a society, and its production is linked to anthropogenic climate change. As we consider how the WTO and trade regulation should move forward, we have an opportunity to re-evaluate how we think trade regulation worked in the past. In reality, trade rules are fragile. At best, they manage, not resolve, the problem of international agricultural trade.

## Recommended Reading:

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<sup>130</sup> I am grateful to Sean Coyle for this point.

