



All EU agricultural subsidies to exported products can be sued for dumping

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GATT Article 6 states that there is no dumping if a product is exported at its “normal value”, i.e. at its domestic price when, according to Article 2 of the Regulation (EU) 2016/1036 of the European Parliament and of the Council of 8 June 2016 on protection against dumped imports from countries not members of the European Union, "*decisions of firms regarding prices, costs and inputs, including for instance raw materials, cost of technology and labour, output, sales and investment, are made in response to market signals reflecting supply and demand, and without significant State interference in that regard, and costs of major inputs substantially reflect market values*"¹.

Clearly the EU and US agricultural prices are not "*made in response to market signals reflecting supply and demand, and without significant State interference*" as the reforms of the CAP (Common Agricultural Policy) and Farm Bill from the early 1990s have sharply reduced minimum guaranteed (administered) prices below their normal value by offsetting them with direct aids to farmers, first coupled (including export subsidies), then mostly domestic decoupled subsidies.

And the Appellate Body (AB) has departed four times from the GATT definition of dumping, stating that dumping occurs when products are exported at a price lower than the average total national production cost without subsidies (Dairy products of Canada case of December 2001² and December 2002³, US Cotton case of 3 March 2005⁴ and EU Sugar case of 28 April 2005⁵), which is to be considered their "normal value".

The WTO DG, Roberto Azevedo, stated on 15/12/2015, at the end of the Xth Ministerial Conference in Nairobi: "*The decision you have taken today on export competition is truly historic... The elimination of agricultural export subsidies is particularly significant... Today's decision tackles the issue once for all*"⁶. Which shows that he ignores the WTO rules – of the AoA (Agreement on Agriculture) and ASCM (Agreement on Subsidies and Countervailing Measures) – as well as the AB rulings.

Indeed WTO rules show that all agricultural domestic subsidies can be sued for dumping.

¹ According to the Regulation (EU) 2016/1036 of the European Parliament and of the Council of 8 June 2016 on protection against dumped imports from countries not members of the European Union, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:L:2016:176:FULL&from=EN>

² [https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S006.aspx?Query=\(@Symbol=%20wt/ds103/ab/rw*%20not%20rw2*\)&Language=ENGLISH&Context=FomerScriptedSearch&languageUIChanged=true#](https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S006.aspx?Query=(@Symbol=%20wt/ds103/ab/rw*%20not%20rw2*)&Language=ENGLISH&Context=FomerScriptedSearch&languageUIChanged=true#)

³ [https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S006.aspx?Query=\(@Symbol=%20wt/ds103/ab/rw2*\)&Language=ENGLISH&Context=FomerScriptedSearch&languageUIChanged=true#](https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S006.aspx?Query=(@Symbol=%20wt/ds103/ab/rw2*)&Language=ENGLISH&Context=FomerScriptedSearch&languageUIChanged=true#)

⁴ https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds267_e.htm

⁵ https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds265_e.htm

⁶ https://www.wto.org/english/news_e/spra_e/spra108_e.htm

The ASCM Article 3.1 states that "*Except as provided in the Agreement on Agriculture, the following subsidies... shall be prohibited: (a) subsidies contingent, in law or in fact... upon export performance...; (b) subsidies contingent... upon the use of domestic over imported goods*"⁷.

If the AoA restricts export subsidies it has no provision on domestic subsidies, i.e. on all those which are not export subsidies⁸. A first remark is that import substitution agricultural subsidies (i.e. "*subsidies contingent... upon the use of domestic over imported goods*"), being domestic subsidies, are prohibited. Clearly, by reducing the farm prices below their normal value, the successive CAP reforms since 1992 have had the double objective of importing less and exporting more, while offsetting the loss of farmers' income through subsidies.

Which was attested, among others, by Pascal Lamy (then the EU Trade Commissioner)'s famous speech of 19 June 2003, addressing the General assembly of the Confederation of the EU Food and Drink Industries (CIAA) in Brussels. After having presented three solutions to foster the competitiveness of EU agro-industries, he added: "*But of course there is a fourth solution, which is simply to obtain supplies on the internal market at competitive prices. This raises the issue of internal prices and the reforms needed to bring them down. Which brings us to internal support, which is also an issue for the WTO. Thanks to a series of CAP reforms, internal prices have become highly competitive, especially for primary products such as wheat. And the performance of the processing industry bears witness to this. We must therefore persevere and also not lose sight of the need to overhaul our system of support so that it has a minimal impact on trade. That is why we have proposed the new CAP reforms and why they are so important in the WTO negotiations on internal support*"⁹. On 8 September 2003, on the eve of the WTO Cancun Ministerial (10-14 September), Pascal Lamy co-signed with Franz Fischler, the EU Commissioner on agriculture, an article in Le Figaro stating: "*Maintaining border protections, for those who want it, is not only legitimate but also necessary... Together with the low income countries, we share the concern of not opening agriculture to the large winds of liberalism... If the 146 WTO Members... abandon the illusion that we will sacrifice the European agriculture for the success of the remainder of the Doha programme, we are convinced that we will make Cancun a success*"¹⁰. However the same article defends the idea that the so-called decoupled direct payments decided in June 2003 have no dumping effect: "*From now to 2013, Europe will support its agriculture through means which would be neutral for international trade and, through a better regulation of its production, it will be able to export products for which it is really competitive*".

Two weeks later, the two Commissioners presented the results of the WTO Ministerial in a long debate at the EU Parliament, sticking to their stance that the new allegedly fully decoupled direct payments will benefit greatly developing countries as their would replace the cut in trade-distorting subsidies¹¹. For Pascal Lamy, "*We duly paid quite a price: ... after reform of the CAP, by agreeing to additional multilateral measures on agricultural support to help developing*

⁷ https://www.wto.org/english/docs_e/legal_e/24-scm_01_e.htm

⁸ Melaku Geboye Desta, *The law of international trade in agricultural products. From GATT 1947 to the WTO Agreement on Agriculture*, Kluwer Law International, 2002.

⁹ *From Doha to Cancun – Challenges and opportunities of the WTO negotiations for the food sector*, General assembly of the Confederation of the EU Food and Drink Industries (CIAA) - Brussels, 19 June 2003, http://trade.ec.europa.eu/doclib/docs/2004/july/tradoc_113875.pdf

¹⁰ Pascal Lamy, *Cancun: agriculture and liberalism*", http://ec.europa.eu/archives/commission_1999_2004/lamy/speeches_articles/spla186_fr.htm

¹¹ <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+CRE+20030924+ITEM-006+DOC+XML+V0//EN>

countries and further opening up our agriculture market... There is farm support and farm support, and not all of it is disruptive of trade. This is an essential dividing line for the future common agricultural policy... It is essential for developing countries to open up their markets and accept a number of rules. Everyone knows that this is a sine qua non and that the opening of the markets and the acceptance of rules by the North is not enough". Franz Fischler echoed: "At first we were told that we had to reform our common agricultural policy if the negotiations were to stand a chance of success. That is what we did, and the world even applauded us for doing so... The package on offer at Cancún would have resulted in a rational reform of the system of agricultural trade; it would, in particular, have led to drastic cuts in the subsidies that distort competition, especially in the industrialised countries – which was one of the developing countries' main objectives in the agricultural negotiations – and, among other things, the USA would have had to reform its agricultural policy. What, exactly, was on offer? In the area of domestic support the measures that most distort competition, the so-called 'Amber Box' and the 'de minimis' payments, have been drastically cut back".

Unfortunately Pascal Lamy and Franz Fischler ignored the AoA Article 13 ("Due Restraint" or so-called "Peace Clause") providing: "*During the implementation period, notwithstanding the provisions of GATT 1994 and the Agreement on Subsidies and Countervailing Measures (referred to in this Article as the "Subsidies Agreement"):* (a) domestic support measures that conform fully to the provisions of Annex 2 to this Agreement shall be: (i) non-actionable subsidies for purposes of countervailing duties¹²", the implementation period being defined by the AoA Article 1.f as "*the nine-year period commencing in 1995*". Which implies that, since 2004, all Annex 2 subsidies – generally considered non-trade distorting and notified in the green box, among which those of paragraph 6 on "Decoupled Income Support", which accounts presently for about 90% of all EU agricultural subsidies – could have been sued for dumping and taxed by countervailing duties when one shows they have adverse effects on other countries.

In their in-depth analysis of the Peace Clause of 12 June 2003, Richard H. Steinberg and Timothy E. Josling confirmed that "*When the Peace Clause expires, many EC and U.S. agricultural subsidies will be vulnerable to legal challenge under Articles 5(c) and 6.3(b) of the WTO Agreement on Subsidies and Countervailing Measures. The remedy would require that such subsidies be withdrawn or that appropriate steps be taken to remove their adverse effects... Three substantive WTO agreements are relevant to analysis of the legal vulnerability of EC and U.S. agricultural subsidies upon expiry of the Peace Clause: GATT 1994, the Agriculture Agreement, and the SCM Agreement*"¹³. The authors add that "*Only those agricultural subsidies that meet the definition of a "subsidy" in SCM Agreement Article 1, that are "specific" within the meaning of SCM Agreement Article 2, and that are not identified as non-actionable in SCM Agreement Article 8 would be actionable. Subject to those requirements, SCM Agreement Articles 5 and 6 may be potentially applied to all types of agricultural subsidies addressed in the Agriculture Agreement - export subsidies, Amber Box, Blue Box, and Green Box measures*". Furthermore, "*Importantly, in applying the tests under SCM Agreement Article 6.3(a)-(c), the complainant may aggregate specific, actionable subsidies from the subsidizing country, which would make it easier than otherwise for the complainant to establish a prima facie case that the aggregate subsidy caused serious*

¹² "Countervailing duties" where referred to in this Article are those covered by Article VI of GATT 1994 and Part V of the Agreement on Subsidies and Countervailing Measures.

¹³ Richard H. Steinberg and Timothy E. Josling, *When the Peace Ends: The Vulnerability of EC and US Agricultural Subsidies to WTO Legal Challenge*, 11 June 2003, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=413883

prejudice. SCM Agreement Articles 5 and 6 use the term “subsidy” in the singular and the term is used in the singular throughout the SCM Agreement. Nonetheless, it is well-established that aggregation of various forms of subsidies for a group of like products is permitted in a case challenging subsidization”. Besides “From the perspective of countries interested in challenging subsidies, one of the improvements offered by Article 6.3 (compared to the GATT rules) is the possibility of sustaining a challenge by showing adverse effects in trade in one market instead of showing adverse effects on world market shares, which (as shown above) had proven nearly impossible in GATT Article XVI.3 cases. At the same time, the effective use of this standard demands that the complainant(s) select appropriate markets upon which to base their claims... Three alternatives tests can be used to establish serious prejudice, in the case of agriculture: displacement of imports in the market of the subsidizing member; displacement in third country markets; or price undercutting, suppression, depression or lost sales. The first task is to establish a prima facie case, after which the burden of proof shifts to the respondent for a rebuttal”.

Which means that Pascal Lamy and Franz Fischler share an overwhelming responsibility in the radical change of the EU Council regulation 1782/2003 of 29 September 2003 having created the decoupled Single Payment Scheme which, contradicting the AoA Article 13, could be sued for dumping.

This is precisely what the US has just done by imposing antidumping and anti-subsidies ("countervailing") duties on 25 July 2018 on imports of table olives from Spain¹⁴, where the growers of raw olives receive subsidies, all allegedly decoupled, of 468 €/ha¹⁵ (excluding irrigation subsidies), around 40% of the market price, while the average subsidy per hectare for the whole Spanish agriculture is € 258. This has alarmed the EU Commission and Parliament that all agricultural exports could be subject to the same proceeding. For Joao Pacheco, former Deputy Director General of DG Agriculture at the European Commission, *"The argument that the US is using to punish Spanish olives can be used systematically as the recipe for all the other sectors where farmers receive direct payments"*¹⁶. The European Parliament had already stressed in March 2018 that *"There is the risk that other similar investigations might be undertaken by the US administration, thereby jeopardising bilateral agricultural trade relations and calling into question the whole European agricultural model"*¹⁷.

However some statements of the EU Parliament are worth considering: *"E. whereas subsidies allocated from the CAP to primary producers of table olives in Spain would qualify as ‘green box’ support according to Annex II of the WTO Agreement on Agriculture, since they are decoupled from production and are non-trade-distorting; F. whereas those agricultural subsidies would not qualify as product-specific under Article 2 of the WTO Agreement on Subsidies and Countervailing Measures"*. The main issue here is to what extent decoupled subsidies are non-product specific subsidies. In the case of Spanish table olives, the US Department of Commerce has shown that the full decoupling of direct aids to table olives since 2010 was the same as their level of coupled aids obtained from 2000 to 2002 and therefore it

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https://www.wto.org/english/forums_e/ngo_e/01_1_analysis_and_impacts_of_the_us_complaint_on_the_dumping_of_spanish_ripe_table_olives_and_on_the_future_of_the_cap_sol4_august_2018.pdf

¹⁵ <https://www.oliveoiltimes.com/olive-oil-business/europe/olive-regions-joint-strategy-eu-subsidies/25672>

¹⁶ Sarantis Michalopoulos, *US questions CAP's raison d'être with Spanish olives investigation*, 10 July 2018, <https://www.euractiv.com/section/agriculture-food/news/us-questions-caps-raison-detre-with-spanish-olives-investigation/>

¹⁷ <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+MOTION+B8-2018-0145+0+DOC+XML+V0//EN>

did not change the specific nature of these aids, especially as there is no alternative production possible in the areas with olive groves, except to make olives for oil instead of table olives, but the level of aid per hectare is identical.

But what about potential investigations against other EU alleged decoupled subsidies to other agricultural products? Even if there might be alternative productions possible in many EU agricultural areas, the main fact is that all alleged decoupled subsidies did not comply with the six criteria of Annex 2 paragraph 6:

- The SBS (Single Base Scheme) contradicts conditions a) as it is based on the amount of blue box subsidies of the 2000-02 years, a criterion not allowed in article 6.a.

- The SBS coexists with blue box payments for the same products. Indeed, according to the AoA article 6.5, blue box direct payments are granted "*under production-limiting programmes*" whilst the SBS allows to produce any product – otherwise it will not enjoy a full production flexibility. Now that the production quotas have been deleted for milk, sugar, and plantation rights of vines, they still concern in 2018 the crop-specific payment for cotton (1/3 of the total cotton subsidies, 2/3 being decoupled), the voluntary coupled support scheme, the small farmers scheme, and the POSEI payments.

- The SBS contradicts condition e) stating that "*No production shall be required in order to receive such payments*". But the EU Council regulation n° 1782/2003 of 29 September 2003 states that farmers getting SPS must "*ensure that all agricultural land, especially land which is no longer used for production purposes, is maintained in good agricultural and environmental condition*". Annex 4 of the regulation specifies that this implies not only "*Avoiding the encroachment of unwanted vegetation on agricultural land*" but also "*Protection of permanent pasture*" and "*Minimum livestock stocking rates*", which is clearly a production.

- The SBS contradicts the condition d) as it remains coupled to agricultural area as farmers must show they have eligible hectares (ha) to get their payments – indeed each single base payment right corresponds to one ha.

- A large part of the SBS is granted to feed (EU cereals, oilseeds meals and pulses), and also to feedstocks used for agrofuels (vegetable oil, cereals and sugarbeet), which are both input subsidies in the amber box for developed countries (AoA article 6.2). Even if biodiesel is not an agricultural product for the WTO, contrary to bioethanol, the AoA Annex IV paragraph 4 on the AMS calculation states that "*Measures directed at agricultural processors shall be included to the extent that such measures benefit the producers of the basic agricultural products*"¹⁸, which is all the more obvious as the agrofuels boom has increased much the prices of vegetable oils and cereals from 2007 to 2014.

- Last, but not least, as the SBS cannot be assigned to a particular product, it can be attributable to any product of which it lowers the sale price below its EU average total production cost. Therefore all EU agricultural exports can be sued for dumping, even products which had never received direct payment, as long as their producers get also SBS or SAPS payments for other productions, which applies practically to all EU28 farms to-day.

A fortiori non-Annex 2 subsidies – those considered trade-distorting and "coupled", i.e. linked to the level of prices or quantities, and notified in the Amber box or AMS (Aggregate Measurement of Support) – causing adverse effects to another WTO Member are actionable under the ASCM.

¹⁸ Toni Harmer, *Biofuels subsidies and the law of the WTO*, ICTSD, June 2009, <http://ictsd.net/i/publications/50724/>.

In the EU Sugar case the AB held on 28 April 2005 that economic effects of WTO-consistent domestic support may "spill over" to benefit export production: "*Such effects may arise... in circumstances where agricultural products result from a single line of production that does not distinguish between production destined for the domestic market and production destined for the export market*"⁵. As, in the US cotton case of March 2005, the AB ruled that cotton payments could not be notified in the green box for lack of full production flexibility (interdiction to grow fruits & vegetables and wild rice) the US has deleted its decoupled payments in the 2014 Farm Bill. Clearly the same ruling would occur if the EU BPS were sued at the WTO.

SOL has shown that the 59.3 million tonnes (Mt) of cereals (including those incorporated in processed cereal products) exported by the EU28 in 2016 have received subsidies of €3.585 bn (60.4 €/tonne), at a dumping rate of 34.4 % on raw cereals¹⁹. On this 3.375 Mt were exported to West Africa at a FOB value of €587 million (M) owing to €203.7 M of subsidies.

But this is not the end of the cheatings of the EU and other developed countries on the WTO rules. The AoA Article 6.2 states that "*Investment subsidies which are generally available to agriculture in developing country Members and agricultural input subsidies generally available to low-income or resource-poor producers in developing country Members shall be exempt from domestic support reduction commitments that would otherwise be applicable to such measures*", which is generally presented as the "Development Box" of developing countries. Forgetting that, to the contrary, investment and input subsidies to developed countries' farmers must be notified in their AMS, which they are not, being either notified in the green box or not notified at all. Which is the case of by far the largest type of input subsidies, particularly in the EU: those to feedstuffs of EU origin or COPs (cereals, oilseed meals and pulses). Who knows that, on average from 2013-14 to 2017-18, 55.3% of the EU cereals production, or 171.3 Mt over a total of 309.7 Mt²⁰, have been allocated to feed and have received an average subsidy of €60 per tonne, or a total of €10.3 bn!

SOL has estimated that, on extra-EU28 exports of 5.494 Mt of dairy products in 2016 – or 30.2 Mt in milk equivalent – total subsidies reached € 2.030 bn²¹, of which € 513 M in feed subsidies (€ 17 per t). And the feed subsidies included in the EU28 dairy exports to the four regions of West Africa, SADC, CEMAC and EAC were € 54.7 M in 2016 for € 216.3 M in total subsidies to dairy products²². EU28 feed subsidies on meat and poultry and egg exports to the six SADC countries reached € 41.443 M in 2016 (€ 120 per ton of carcass equivalent or egg equivalent) for an average dumping rate of 19% (ratio of total subsidies to FOB export value).

The EU, as the other developed countries, have refused to deal with agricultural domestic subsidies in all their Free Trade Agreements (FTAs), of which the EU Economic Partnership Agreements (EPAs), claiming that this issue can only be debated at the WTO where the EU has refused to change the rules, claiming that, besides, its subsidies being decoupled from production and notified in the WTO green box, they have no dumping impact.

¹⁹ SOL, *The subsidies to the EU exports of cereal products to Africa in 2016*, March 17, 2017, <https://www.sol-asso.fr/analyses-politiques-agricoles-jacques-b-2/>

²⁰ https://ec.europa.eu/agriculture/market-observatory/crops/cereals/balance-sheets_en

²¹ <https://www.sol-asso.fr/wp-content/uploads/2017/01/The-huge-dumping-of-extra-EU-exports-of-dairy-products-and-to-the-4-African-EPAS.pdf>

²² <https://www.sol-asso.fr/wp-content/uploads/2017/01/The-EU28-dumping-of-its-dairy-products-to-SADC-in-2016-27-March-2017.pdf>

On decoupling, Michel Jacquot, former Director of EAGGF (European Agricultural Guidance and Guarantee Fund or the EU agricultural budget) wrote: *"This scheme was not based on anything just: how can one imagine that a subsidy (SPS, BPS) does not affect exports (or imports). Commission negotiators – Guy Legras in the lead – but also New Zealand, Australia, the other members of the Cairns Group, naively believed the speech of Americans who claimed that decoupled aid had only one limited effect on exports (and imports)... Bullshit! Total Blindness!...Up to when will we continue to lie?...When is the hour of truth?"*²³. With the US imposition of antidumping and countervailing duties on imports of table olives from Spain, the hour of truth has rung!

Unfortunately, for Sub-Saharan Africa (SSA) countries, the worst is to come with the implementation of several EPAs (Economic Partnership Agreements) which will reduce considerably their customs revenues – import duties and VAT (value added taxes) on imports – by around 80%. This is particularly the case of the interim EPAs of Côte d'Ivoire and Ghana, already entered into force since the end of 2016, which will furthermore destroy the West Africa's integration process, given that Nigeria is determined of not signing the regional West Africa EPA²⁴. And the implementation of the African Continental Free Trade Area (AfCFTA) would worsen even more the situation²⁵. The proposal of Jean-Claude Juncker, President of the European Commission, in its State of the Union speech of 12 September 2018, to build the post-Cotonou Agreement from 2021, neither with the Regional Economic Communities (RECs) of the ACP (Africa-Caribbean-Pacific) countries, nor with SSA as a whole but with the entire Africa would put even more the cart before the horse, given the huge disparities between the 55 African States on all levels: political regimes, level of total and per capita GDP, of actual population and its expected growth, food deficit, etc.

²³ <http://blogs.mediapart.fr/blog/j-berthelot/260514/les-subventions-de-lue-lexportation-suite>

²⁴ Read Jacques Berthelot, *"Did you say FREE trade? The Economic 'Partnership' Agreement European Union-West Africa"*, Editions L'Harmattan, Paris, September 2018. The French version *"Vous avez dit LIBRE échange ? L'Accord de 'Partenariat' Economique Union européenne-Afrique de l'Ouest"* was published in June 2018.

²⁵ <https://www.sol-asso.fr/wp-content/uploads/2017/10/The-folly-of-the-Africas-Continental-Free-Trade-Area-September-4-2017.pdf>