



AGREEMENT ON AGRICULTURE AND FOOD
Preliminary proposal by Jacques Berthelot, SOL, January 22, 2019

Summary

The document proposes a rewriting of the provisions of the 1995 WTO Agreement on Agriculture (AoA) into an Agreement on Agriculture and Food (AoAF) that includes fish and preparations and will be subject to a hierarchy of norms that must respect international human, social and environmental rights agreements. The objective of the AoAF is to contribute to the food sovereignty of WTO Members, unlike the objective of the AoA to prioritize access to other Members' market in order to "*provide for substantial progressive reductions in agricultural support and protection*". This implies that Members shall refrain from any export dumping and from importing agricultural and food products that have the effect of violating human, social and environmental rights in exporting countries.

The distinction in the AoA and the Agreement on Subsidies and Countervailing Measures (ASCM) between non-specific subsidies when calculable and specific subsidies, and between export subsidies and domestic subsidies in the Amber, Blue or Green Boxes, has no scientific basis and should be abolished: all subsidies have the effect of reducing the export price below the national average total cost of production and increasing the competitiveness of the products benefiting from them. They have both a dumping effect when exported and an import substitution effect identical to that of customs duties. As a result, Annexes 2 to 5 of the AoA are obsolete. On the other hand, Members must notify the types and levels of their import protection, the average total national average cost of production of each exported product, their subsidies to exported products, and undertake to tax exports at a price below the average national cost of production.

To implement the hierarchy of norms that subject WTO agricultural trade rules to international human, social and environmental rights rules, it is necessary to modify the composition of the Panels and Appellate Body so that one of the three persons appointed for a dispute is an expert in international conventions on human and social rights and environment. This implies that the number of persons composing the Appellate Body will increase from 7 to 9, in line with the proposal made on 13 December 2018 in the joint communication of the European Union (EU), China and India to the WTO General Council.

As this document is a preliminary draft of what would become a binding legal text, some justifications are added on a provisional basis, in particular in Article 6 on subsidies, which would no longer be relevant in the final text.

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Members,

Noting that the Preamble of the Agreement on Agriculture (AoA) already stipulated that "Commitments under the reform programme should be made in an equitable way among all

Members, having regard to non-trade concerns, including food security and the need to protect the environment".

Having decided to reform the trade rules of the Agreement on Agriculture (AoA) to make them consistent with the objectives of the International Agreements on Human and Social Rights and the Environment, including the Charter of the United Nations of 26 June 1945, the Universal Declaration of Human Rights of 10 December 1948, the Sustainable Development Programme to 2030 of 25 September 2015 and the Paris Agreement on Climate Change of 12 December 2015.

Stressing the need to extend the AoA to fishery products in an Agreement on Agriculture and Food (AoAF) in view of their importance in the diet of the population.

Stressing that this reform implies redefining the rules of trade in agricultural and food products in a hierarchy of norms, making them subject to respect for fundamental human and social rights and the environment.

Stressing that this hierarchy of norms defined here to reform the AoA does not prejudice its equally desirable application to all WTO Agreements. To the extent that there is a conflict between the rules of the reformed AoAF and other WTO Agreements that have not yet incorporated this hierarchy of norms, the provisions of the AoAF will prevail. These provisions will also apply to the rules on agricultural and food trade in plurilateral and bilateral agreements.

Stressing that this redefinition of the rules of the AoA requires the mobilization of all stakeholders: relevant multilateral institutions, Member States and representatives of civil society, including producer organisations, processors, traders, consumers, researchers and associations promoting fundamental human, social and environment rights and international solidarity.

Stressing that this hierarchy of norms implies considering that the reform of the AoA rules can be summarized in the primary objective of ensuring the food sovereignty of each Member. This does not imply food self-sufficiency, which many Members are unable to achieve, but the freedom for everyone to choose the degree of openness of its agricultural and food imports, including their free trade. On the other hand, this implies the duty of each Member to respect the opening choices of other Members. The AoA therefore differs from the AoA for which *"the... long-term objective is to provide for substantial progressive reductions in agricultural support and protection resulting in correcting and preventing restrictions and distortions in world agricultural markets"*.

Emphasizing that the food sovereignty of each Member implies prohibiting dumping and amending accordingly the definition of dumping in Article 6 of the GATT and in the Anti-dumping Agreement as well as the definition of subsidies allowed in the AoA and the Agreement on Subsidies and Countervailing Measures (ASMC).

Stressing that the integration of the essential objectives of the International Agreements on Human, Social and Environmental Rights into the AoAF should be carried out in a progressive and seamless process, so as not to unduly disrupt necessary agricultural and food trade while at the same time strengthening respect for Members' food sovereignty.

Agreeing that, in order to achieve this objective of the hierarchy of norms, it is necessary to modify the composition of the persons in the Panels and the Appellate Body as provided for in Articles 8 and 17 of the Understanding on Rules and Procedures Governing the Settlement of Disputes.

Hereby *agree* as follows:

Part I
Article 1
Definition of Terms

Since this Agreement on Agriculture and Food (AoAF) removes distinctions according to the types of subsidies provided for in the AoA, the definitions in Article 1 of the AoA are obsolete and no new definitions are required.

Article 2
Products covered

This Agreement shall apply to the agricultural and food products listed, for agricultural products, in Annex 1 of the AoA – which does not include fishery products and preparations of the Harmonised System of Trade (HS) codes 03 and 16.4 and 16.5 – and, for specific food products, in codes 0, 11, 22 and 4 of the SITC (Standard International Trade Classification).

Part II
Article 3
Incorporation of concessions and commitments

The commitments on domestic support and export subsidies in Part IV of each Member's Schedule notified to GATT in 1994 are now obsolete.

Part III
Article 4
Market Access

1. The market access concessions contained in the Schedules of commitments notified to the GATT in 1994 related to bindings and tariff reductions, and the other market access commitments specified therein, are now obsolete.
2. WTO Members have the right to efficiently protect their agricultural and food products at the import level in order to obtain remunerative prices for farmers and fishermen, guarantee livelihoods to producers and processors, ensure food security and rural development, contribute to environmentally sound production patterns, and animal welfare and maintaining agriculture in disadvantaged areas and other social objectives.
3. This right to efficient import protection is recognized for all countries but is particularly necessary for poor countries that cannot significantly subsidize their farmers and fishermen, while domestic subsidies in rich countries have an import substitution effect.
4. Members shall refrain, including in their Plurilateral and Bilateral Agreements, from requiring access for their food products to the domestic market of other Members, especially

developing and least-developed Members, in return for concessions they may grant them on their exports of non-food products and services.

5. Members shall refrain from importing agricultural and food products that have the effect of violating human, social and environmental rights in exporting countries.

6. Given the high volatility of world agricultural prices, accentuated by that of exchange rates, and the inefficiency of fixed tariffs in this context, Members are encouraged to introduce variable import levies in order to stabilize domestic agricultural prices in national currencies and thus entry prices into their domestic markets, or price band systems that will mitigate the transmission of world prices fluctuations to domestic prices. The entry prices or price bands are calculated according to the production and marketing costs of the vast majority of peasant farms and fishermen. Members may also introduce quantitative import restrictions.

7. To maintain transparency of trading conditions for traders, Members must notify to the WTO in advance each year of changes in the forms and levels of protection of their agricultural and food products.

Article 5
Special safeguard clause

The provisions of the AoA's Special Safeguard Clause (SSC) will be reformulated to incorporate the Special Safeguard Mechanism (SSM) proposed by developing countries in the revised Draft Agricultural Modalities of 6 December 2008 (TN/AG/W/4/Rev.4), updated by the G33 in December 2015 (JOB/AG/49).

Part IV
Article 6
Subsidies

1. The distinction in the AoA and the Agreement on Subsidies and Countervailing Measures (ASCM) between non-specific subsidies when calculable and specific subsidies, and between export subsidies and domestic subsidies in the Amber, Blue or Green Boxes, has no scientific basis and should be abolished: all types of subsidies have the effect of reducing the export price below the total national average cost of production, as defined by the WTO Appellate Body in the Canadian Dairy Products Case of December 2001 and December 2002, and increasing the competitiveness of the products benefiting from them. They have both a dumping effect when exported and an import substitution effect identical to that of customs duties. The distinction between subsidies according to the type of "box" in which they are notified to the WTO is all the less justified as developed countries have constantly shifted the type of box in which they were notified: from export subsidies to domestic subsidies and, among these, from the amber box to the blue box and to the green box.

2. As long as agricultural products are not exported, Members have the right to use the types of subsidies they consider appropriate, taking into account their level of development. In particular, subsidies coupled to price or production are preferable in deficit developing countries, as highlighted by FAO, as they provide a direct incentive to increase production of deficit products. However, the distinction between product-specific subsidies and non-product-

specific subsidies remains relevant, in particular for allocating non-product-specific subsidies among products.

3. Members shall notify to the WTO the total average national cost of production without subsidies of each exported product and undertake to tax exports at a lower price than the cost of production.

4. Members shall notify to the WTO all their export subsidies, in US dollars, in order to prove that they no longer use them at the end of a transitional period of 3 years for developed countries and 5 years for developing countries.

5. The provisions of Annex 2 of the AoA on the criteria to be met for domestic agricultural subsidies to be considered non-trade-distorting and to be notifiable in the "green box" are obsolete. Indeed, the two basic requirements of Article 1 of Annex 2 are mystifying: on the one hand, these Annex 2 subsidies involve transfers from consumers since, from a macroeconomic point of view, the distinction between consumer-financed and taxpayer-financed "market price support" is not convincing since the vast majority of taxes are passed on to consumers; on the other hand, these subsidies provide clear price support to producers since they allow them to be satisfied with a price below the average total national production cost without subsidy. In addition, the so-called "decoupled income support" subsidies, which are by far the main subsidies of the EU's Common Agricultural Policy (CAP), do not meet the six necessary conditions.

6. In particular, the AoA rules on subsidies to public food security stocks for domestic food aid as defined in paragraphs 3 and 4 of Annex 2 of the AoA should be amended. Because all Members have the right, and even the moral duty, to build up stocks of basic food products redistributed to disadvantaged populations at highly subsidized prices, even when these stocks have also been purchased from producers at subsidized prices (known as administered prices), as long as this does not result in the export of stocks at a dumped price, i.e. below the average total national production cost without subsidy. Indeed, footnote 5 of paragraph 3 considers the difference between the administered price and the world price at the country's border in 1986-88 to be a trade-distorting subsidy. In addition, it should be pointed out that there are misunderstandings about the concepts used in paragraphs 3 and 4 of Annex 2 of the AoA, which deals with "food products" and not with "agricultural products" and confront "administered prices" with "current market prices", as if the latter were not heavily subsidized in developed countries. A thorough interpretation makes it possible to apply the same absurd rules to the huge US domestic food aid, which it notifies in the green box, as to those imposed by developed countries on developing countries, in particular India. And it has been shown that a permanent solution to this debate would be to delete from Annex 3 of the AoA the underlined words that are not in italics in the following paragraphs: "fixed" in paragraphs 8 to 11, "for the base period" in paragraph 5, "on the basis of the years 1986 to 1988 and" in paragraphs 9 and 11, and "during the base period" in paragraph 9. These minor changes in the wording of paragraphs 5 and 8 to 11 of Annex 3 would be of great benefit to the developed countries themselves, including the EU, as it would virtually eliminate their AMS – Aggregate Measurement of Support or the amber box of coupled domestic support subject to reduction – notified to the WTO.

7. The provisions of Annex 3 of the AoA on "Domestic Support: Calculation of Aggregate Measurement of Support" are obsolete. This is the case in particular with paragraphs 8 and 9

on "market price support" (MPS): "*market price support shall be calculated using the gap between a fixed external reference price and the applied administered price multiplied by the quantity of production eligible to receive the applied administered price*" (paragraph 8), bearing in mind that this fixed external reference price is that of the years 1986-88 (paragraph 9). Because this definition of the MPS is absurd for three reasons: 1) it is calculated as the difference between the current administered price (minimum price such as the intervention price in the EU) and the border price for the period 1986-1988, multiplied by the eligible production; 2) it does not involve any actual subsidies; 3) it does not provide any additional support to that resulting from other measures such as customs duties, export subsidies and restrictions, land set aside, production quotas, storage aid, external and internal food aid. In fact, this MPS, which does not involve actual public expenditure, represented 98.1% of the AMS notified by the EU for 2013/14, that of Canada 97.2% of its AMS notifications for 2013, that of Switzerland also represented 97.2% of its AMS notified for 2013.

8. It is worth noting the truncated interpretation given by developed countries of Article 6.2 of the AoA allowing most developing countries not to notify in their AMS their investment and input subsidies, a provision considered as their "development box": "*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*". Indeed, developed countries, led by the EU and the US, have pretended not to read "*that would otherwise be applicable to such measures*" since they do not report any investment subsidies in their AMS and virtually no input subsidies, particularly those to feed, which are by far their largest input subsidies.

Part V

Article 8 replacing Articles 8 and 9 of the AoA Export competition commitments

1. Members undertake not to grant subsidies to exported products, in accordance with the Decision of the WTO Ministerial Conference in Nairobi in December 2015.
2. Members are free to protect themselves at the import level against subsidies included in export credits, export credit guarantees, external food aid and state trading enterprises from exporting countries.

New Article 9

Supply management and minimum regulation of world prices

1. Exporting Members shall establish supply-control mechanisms to avoid exporting surpluses of non-competitive agricultural and food products requiring subsidies to exported products.
2. Exporting Members undertake to coordinate their exports of agricultural and food products in order to mitigate fluctuations in world prices.
3. Members shall refrain from using domestic or imported food products for the production of agrofuels or biogas.

4. Mere coordination among exporting Members would not be sufficient for exports of tropical products. Members shall establish a global minimum price mechanism for exported tropical products (by variety and quality), to be managed by FAO and/or UNCTAD, in which traders undertake to reimburse, at the end of each marketing year, the difference between the fair value of their purchases – multiplied by the minimum prices set before the marketing year – and their actual purchase costs at current prices throughout the marketing year. Only traders undertaking to respect this contract would be authorized by the governments of exporting Members. They will make every effort to ensure that most of the minimum prices received by exporters are passed on to producers.

5. Since, beyond interannual fluctuations, the main cause of the long-term fall in world prices of tropical products lies in their structural overproduction, which these guaranteed minimum prices would further encourage, exporting Members entrust FAO and/or UNCTAD with the administration of the distribution of production quotas among them and their enforcement through appropriate sanctions.

Article 10
Food aid

1. Members undertake that all types of food aid shall not be directly or indirectly, explicitly or implicitly, linked to commercial food exports to beneficiary countries.

2. In the case of emergency assistance or for critical food needs arising from natural disasters, climatic disasters or humanitarian crises or in post-crisis situations, such assistance shall be provided exclusively on the basis of requests and commitments, or in response to appeals from specialized United Nations food aid agencies, other regional or intergovernmental agencies, or in response to an urgent government-to-government appeal immediately after a natural disaster. This emergency assistance will be provided exclusively in the form of grants. All means must be explored to provide food aid through the purchase of local staple foods in the neighbouring country or countries, with donors agreeing to provide cash and logistics instead of exporting food surpluses.

3. Food aid for other purposes, including programmes and projects aimed at raising the nutritional standards of the most vulnerable groups in least-developed and net food-importing developing countries, is provided exclusively in the form of untied financial grants for use in the purchase of local food products for and by the recipient country. This food aid must be sold on urban markets and the proceeds used to improve the production and marketing conditions of national food products or to purchase national agricultural surpluses for food security programmes.

4. Members shall adopt legislation on the purchase of national food products for food security stocks and nutritional programmes, guaranteeing purchase prices to farmers covering their production costs.

Article 11
Incorporated products

This article is obsolete.

Part VI
Article 12
Disciplines concerning export prohibitions and restrictions

WTO members are free to restrict their exports of agricultural and food products to prioritize their food security as well as to favour exports of processed agricultural and food products over raw products in order to promote domestic value added before export.

Part VII
Article 13
Due restraint

This article is obsolete.

Part VIII
Article 14
Sanitary and phytosanitary measures

Members agree to give effect to the Agreement on the Application of Sanitary and Phytosanitary Measures.

Part IX
Article 15
Special and Differential Treatment

In keeping with the recognition that differential and more favourable treatment for developing country Members is an integral part of the negotiation, special and differential treatment in respect of commitments shall be provided as set out in the relevant provisions of this Agreement and embodied in the Schedules of concessions and commitments.

Part X
Article 16
Least developed and developing countries
net food importers

This article has been incorporated into Article 15.

Part XI
Article 17
Committee on Agriculture and Food

1. A Committee on Agriculture and Food is hereby established to replace the Committee on Agriculture, both in its regular and special configuration on agricultural trade negotiations.
2. While several international organizations are observers in the AoA Agricultural Committee (IMF, World Bank, OECD, UNCTAD, FAO, WFP, Inter-American Institute for Agricultural Cooperation, International Grains Council), representatives of the Office of the United Nations High Commissioner for Human Rights, FAO, the International Labour Organization (ILO) and

the United Nations Environment Programme (UNEP) are full members of the Committee on Agriculture and Food, on a par with the WTO Secretariat.

Article 18

Review of the implementation of commitments

1. Progress in implementing the commitments negotiated under the AoA reform programme to make it compatible with the objectives of the AoAF, in particular on subsidies and dumping, will be reviewed by the Committee on Agriculture and Food.
2. This review process shall be based on notifications by Members at fixed intervals on specific issues – in particular on the form and level of import protection, the average total domestic total cost of production without subsidies, and export subsidies – as well as on documentation that the Secretariat may be requested to prepare to facilitate this process.
4. In the review process, Members shall give due consideration to the influence of excessive inflation rates on the ability of any Member to comply with its commitments.
5. Any Member may bring to the attention of the Committee on Agriculture and Food any measure which it considers should have been notified by another Member.

Article 19

Dispute Resolution

1. In order to implement the hierarchy of norms subjecting WTO agricultural trade rules to international human, social and environmental rights rules, it is necessary to modify the composition of the persons of the Panels and Appellate Body as provided for in Articles 8 and 17 of the Understanding on Rules and Procedures Governing the Settlement of Disputes so that one of the three persons appointed for a dispute is an expert in human and social rights, and on environment. This implies that the number of persons composing the Appellate Body will increase from 7 to 9, in line with the proposal made on 13 December 2018 in the joint communication of the European Union (EU), China and India to the WTO General Council.
2. The provisions of Articles XXII and XXIII of GATT 1994, as specified and implemented by the Dispute Settlement Understanding, shall apply to consultations and dispute settlement under this Agreement.

Part XII

Article 20 integrating Article 21 Continuation of the reform process

1. Recognizing that the long-term objective is the implementation of a hierarchy of norms that subjects agricultural and food trade rules to international human, social and environmental rights rules, Members agree that this can only be adjusted gradually and that negotiations for the continuation of the process will be necessary.
2. The provisions of GATT 1994 and the other Multilateral Trade Agreements in Annex 1A of the WTO Agreement will themselves have to be amended to fit into the hierarchy of norms.

3. Annex 1 of this Agreement is an integral part of the AoAF, but Annexes 2 to 5 of the AoA are now obsolete. For the implementation of the AoAF, the Committee on Agriculture and Food may propose specific annexes.

APPENDIX 1

PRODUCT COVERAGE

This agreement shall cover the following products:

1. For specific food products only, Chapters 0, 11, 22 and 4 of the SITC (Standard International Trade Classification)

2. For agricultural products, Chapters 1 to 24 of the Harmonized System (HS), minus fish (3) and fish products (16.4 and 16.5), plus* and **

HS Code	2905.43	(mannitol)
HS Code	2905.44	(sorbitol)
HS Heading	33.01	(essential oils)
HS Headings	35.01 to 35.05	(albuminoidal substances, modified starches, glues)
HS Code	3809.10	(finishing agents)
HS Code	3823.60	(sorbitol n.e.p.)
HS Headings	41.01 to 41.03	(hides and skins)
HS Heading	43.01	(raw furskins)
HS Headings	50.01 to 50.03	(raw silk and silk waste)
HS Headings	51.01 to 51.03	(wool and animal hair)
HS Headings	52.01 to 52.03	(raw cotton, waste and cotton carded or combed)
HS Heading	53.01	(raw flax)
HS Heading	53.02	(raw hemp)

3. The foregoing shall not limit the product coverage of the Agreement on the Application of Sanitary and Phytosanitary Measures.

* The HS codes 4001 to 4004 on natural rubber could be added, as the US does, to be decided by the Committee on Agriculture and Food.

** The product descriptions in round brackets are not necessarily exhaustive.

ANNEXES 2 to 5 are obsolete.