Unifying the developing countries' stances on the Green and Blue Boxes

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Contents

Summary

As the 12th WTO ministerial conference in Kazakhstan in June 2020 approaches, there is an urgent need to unify the developing countries (DCs)' views on the trade-distorting impact of the developed countries' agricultural subsidies. The joint communications of China and India to the WTO Committee on agriculture in July 2017 and that of the African Group in November 2019 focus their main criticism on the developed countries AMS – Aggregate Measurement of Support or so-called *amber box* of trade-distorting domestic support – and challenge much less the trade-distorting impact of their so-called *green box* (GB) and *blue box* (BB) subsidies despite they are 4.5 times larger than those of the AMS, contradicting the views of most Northern and Southern NGOs and small farmers' organizations.

By focusing their criticism on the AMS the DCs are not aware that most of it is a fake market price support (MPS), for two reasons : 1) It is calculated as the gap between the current guaranteed minimal administered price – such as the *intervention price* in the EU and the *loan rate* in the US – and the border price of the 1986-88 period. 2) It does not imply any actual subsidy because it does not bring additional support to that of other policy measures: import duties, export subsidies and restrictions, land set aside, production quotas, foreign and domestic food aid. If the MPS is notified in the supporting table DS:5, when the products receive also actual subsidies they are reported under other supporting tables. The last notifications to the WTO made by the Western developed countries show that the MPS

accounted for 72.8% of their total AMS against only 27.2% for actual subsidies. And the share of the fake MPS in the AMS of developed countries was even larger in the past. Notifying these fake MPS has blurred the negotiations and misled WTO Members. Therefore the AMSs linked to administered prices should be eliminated altogether since they have allowed developed countries to look like reducing much their trade-distorting subsidies when they have actually increased their allegedly non trade-distorting subsidies of the GB and BB.

The reasons why the subsidies of the GB and BB are really trade-distorting require a long in-depth analysis. The original sin lies in the scandalous definition of dumping in the GATT Article VI: there is no dumping as long as the products are exported at their domestic price. This definition was at the origin of the radical reforms of the EU's Common Agricultural Policy (CAP) and the US Farm Bill in the early 1990s, during the Uruguay Round negotiations. As their huge export subsidies were no longer tolerated by the other GATT contracting parties, they decided to avail of the GATT definition of dumping by making a large reduction of their minimal guaranteed agricultural prices which would come closer to world prices, with the double effect of boosting exports without dumping and reducing imports without requiring higher tariffs, while offsetting the lower farm prices with subsidies. As the two parties were devising at the same time the AoA's rules in almost face-to-face, they could fine-tune the distinction between alleged trade-distorting and non-trade-distorting subsidies: red box for export subsidies, amber box (AMS) for trade-distorting domestic support, BB for subsidies subject to production caps and GB for the alleged non-trade distorting subsidies which could be raised without limits.

We should be aware that, when we say that the WTO is a "rules-based trading system", the rules are defined by its Members, not by the Secretariat and its Director General. The Secretariat does not investigate and cannot denounce the violation of the rules by Members, which are not obliged to take into account the decisions of previous panels and Appellate Body (AB) rulings to which they don't recognize a value of legal precedent (*stare decisis*), which has led to more prosecutions and slowed down the decision-making of the Dispute Settlement Body (DSB). It is why the existence of the AB is essential, not only to monitor the legal conformity of the panels decisions but also to interpret more broadly the rules, even if some Members, beginning by the US President Trump, refuse the possibility of *obiter dicta*. A good example is the fact that the AB has refused four times to take into account the highly critical definition of dumping in the GATT agreement, making clear that dumping occurs when domestic subsidies are granted to exported products, even when the subsidies are allegedly decoupled as in the US Cotton case of March 2005.

Before going to the core issue of the allegedly *decoupled income support* of paragraph 6 of the AoA Annex 2, the report shows that all the other 12 paragraphs are trade-distorting.

The study shows that the EU allegedly decoupled subsidies do not comply with the six conditions of paragraph 6. But they do not comply either with the provisions of the Agreement on Subsidies and Countervailing Measures (ASCM), when they are product-specific and cause injury to other WTO Members.

Then the study focuses on the other crucial issue of subsidies to animal feed, that most DCs WTO Members are not aware of. The developed countries stance on this issue has been much helped by the OECD tortuous concept of "excess feed cost": OECD considers that the livestock producers are penalized as they have to pay their feedstuffs at domestic prices higher than world prices received by the growers of cereals, oilseeds and pulses (the "COPs"). This provision could have been at best debated when the world prices of COPs were low so that the gap between domestic prices and world prices was large, but after the world prices of cereals have skyrocketed from 2008 to 2014 the "excess feed cost" has disappeared but the feed subsidies are still there, hidden in the EU alleged fully decoupled subsidies. If there is no discussion that the direct payments to COPs are fully received by the COPs' producers, nevertheless the producers of animal products get the implicit but actual subsidies corresponding to the lower prices they pay for the COPs of EU origin, prices that would be much higher in the absence of the subsidies granted to COPs' producers in compensation for the reduction in their intervention prices. Here is at play the "cross-subsidization", central in the WTO panels and Appellate Body's rulings in the cases of Dairy products of Canada and EU sugar.

The CAP has always linked the CMOs (common market organisations) for poultry and pigmeat to the CMO for cereals. Before the May 1992 CAP reform, for the CMOs for poultry and pigmeat, considered as processed cereals, the variable import levies and export refunds on poultry and pigmeat were calculated on the basis of their theoretical cereal content. Which shows that BB and GB payments to the COPs are as much coupled subsidies as the customs duties and export refunds they have replaced.

So that the part of the COPs devoted to animal feed has conferred PS AMSs to the animal products having consumed this subsidized feed, with the end result that the EU allowed Overall Trade-distorting Domestic Support (OTDS) for 1995-00 becomes €90.496 bn instead of €110.305 bn in Canada's simulations, and also the allowed US OTDS in the base period falls from $48.224 bn to $42.875 bn.

Finally the report shows that the BB subsidies are themselves trade-distorting, and their exemption from reduction result from the political dictate imposed by the two superpowers EU-US as a result of their Blair House agreement of November 18, 1992. The EU and US AMS of the base period (1986-88) included supports placed during the implementation period in the BB (EU) or the GB (US) so that the current total AMS for 1995-96 was already less than the 20% reduction commitment required for the all 6 years period: $64.4 bn for the EU (-20.2%) and $6.2 bn for the US (-75%), nullifying all actual reduction commitments of EU and US coupled subsidies. This sleight of hand between boxes shows clearly the actual coupled nature of the transferred subsidies.

Let us add the theoretical inconsistency that BB subsidies are considered decoupled to the extent they limit production, but this limit increases prices, a coupled measure contradicting paragraph 1 of Annex 2.

Finally the report stresses that fighting against the GB and BB subsidies is all the more justified as the WTO does count the subsidies of the 'gold box'. This concept, invented during the WTO Hong Kong ministerial conference of 2005, acknowledges that WTO rules take only into account the subsidies *specific* to agriculture, and only for the current year or at best for the most recent years. In fact the current greater competitiveness of agri-food products of developed countries, particularly the EU, compared to that of DCs, particularly ACP countries, is much less due to the difference in their level of tariffs and/or current subsidies than to current and past non-agricultural support and past agricultural support, for decades and even centuries, including through strong import protection and large domestic and export subsidies, as well as export taxes. This is why, even if the WTO were to decide stricter criteria for the GB, the developed countries could still increase their gold box subsidies to maintain the competitiveness of their farmers and agri-food industries and ensure their food sovereignty. In particular, instead of maintaining specific agricultural institutions, they could integrate them into broader institutions so that, the specific nature of subsidies disappearing, they could not be sued at the WTO. Another way to escape the WTO product-specific constraint would be to finance transport infrastructure not specific to agricultural products but very beneficial to them, as the US subsidies to improve the Mississippi's navigability.

We hope that this report would help to unify the DCs views on how to fight the most trade-distorting agricultural subsidies of the developed countries, to achieve their food sovereignty, given the commitments of all the WTO members to comply with the SDGs and the Paris Agreement on climate change.

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As the 12th WTO ministerial conference in Nur-Sultan, Kazakhstan, will occur on 8-11 June 2020 there is an urgent need to unify the views of the developing countries (DCs) on the necessity to impose the right to food sovereignty and, for this, to denounce the trade-distorting impact of the developed countries' subsidies of the Green Box (GB) and Blue Box (BB).

Unfortunately the joint communications of China and India to the WTO Committee on agriculture special session[1] on 12 July 2017 as well as that of the African Group[2] on 25 November 2019 focus their main criticism on the developed countries AMS – Aggregate Measurement of Support or amber box of trade-distorting domestic support, above *de minimis* levels – and challenge much less the trade-distorting impact of their GB and BB, contradicting the views of most Northern and Southern NGOs and small farmers' organizations, particularly of those fighting within the Our World Is Not For Sale (OWINFS) network[3].

Before presenting briefly extracts of these two communications and preliminary comments, followed by a long in-depth analysis of the reasons why the main struggle should be concentrated on the GB and BB, let us just present the evolution of the distribution of the EU agricultural budget outturn among the different "boxes".

I – The distribution of the EU budget outturn among boxes from 1995 to 2018

Table 1 and Figure 1 show the evolution of the distribution of the EU agricultural budget outturn among boxes:
- Red box of export refunds which have almost disappeared since 2013;
- Amber box of market interventions of the domestic trade-distorting subsidies (here the fake market price support does not appear), which have been halved in 2007 with the massive rise of the decoupled direct aids, followed by a new strong decline from 2011 to 2015 and a new rise since 2015 with the Voluntary coupled payments (VCPs);
- Blue box (BB) of direct aids subject to caps, which were the dominant for of subsidies from 1995 to 2005, after what their decline was replaced by the rise of the decoupled direct payments;
- Green box (GB) of decoupled direct aids, increasing with the enlargement to new Member States before declining from 2015 to 2018, offset by the rise of VCPs;

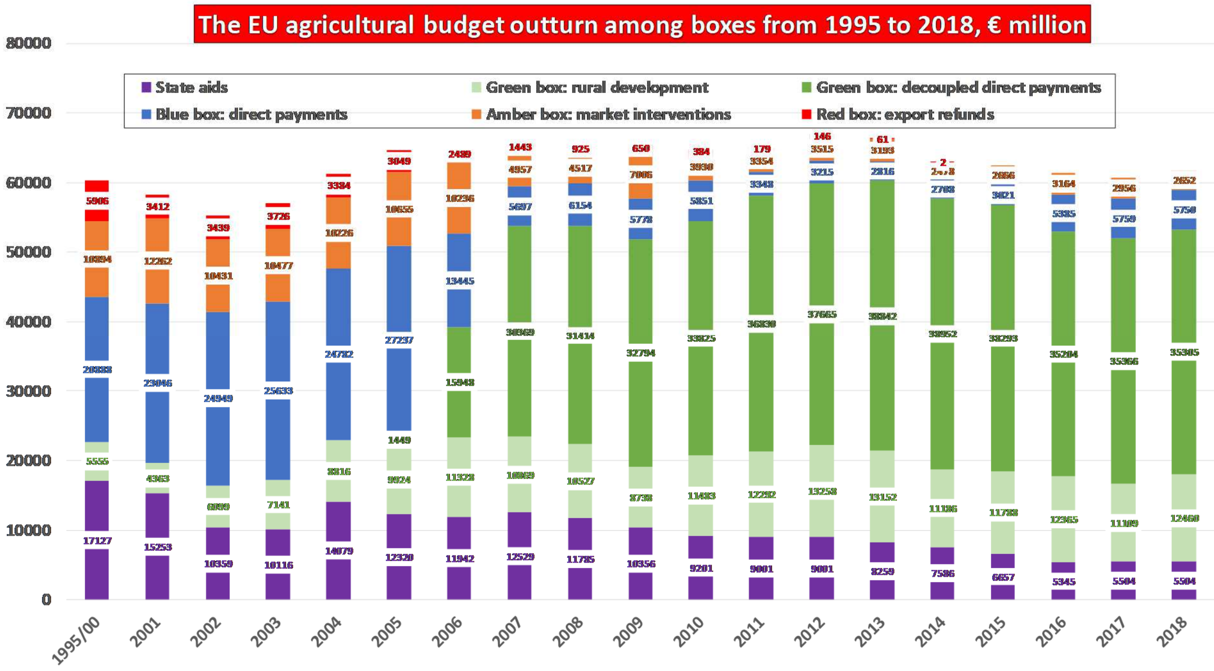
[1] *Elimination of AMS to Reduce Distortions in Global Agricultural Trade*, Submission by China and India, WTO Committee on Agriculture Special Session, JOB/AG/102, 18 July 2017
[2] *African Group elements on agriculture for meaningful development outcomes at the twelfth ministerial conference*, Communication of Benin on behalf of the African Group, WTO Committee on agriculture Special Session, JOB/AG/173, 25 November 2019: https://www.wto.org/english/news_e/news19_e/agri_03dec19_e.htm
[3] Our World Is Not For Sale (OWINFS): http://notforsale.mayfirst.org/fr

- GB of rural development, doubling from 1995/2000 to 2006 after which its level stabilized more or less till 2018;
- State aids, which have shrunk continuously from 1995/2000 to 2018, in part due to legislation on "de minimis" aid not included in State aids, which allows up to €15,000 per farm or up to €200,000 per agri-food or agricultural service company per three-year period, provided that the total does not exceed 1% of the value of national production.

Table 1 – Distribution of the EU agricultural budget outturn among boxes: 1995 to 2018, € million

€million	1995/00	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018
State aids	17127	15253	10359	10116	14079	12320	11942	12529	11785	10356	9201	9001	9001	8259	7586	6657	5345	5504	5504
Rural develt	5555	4363	6099	7141	8816	9924	11328	10869	10527	8738	11483	12292	13258	13152	11186	11788	12365	11109	12460
Decoupl aids						1449	15948	30369	31414	32794	33825	36830	37665	38842	38952	38293	35204	35366	35305
BB aids	20888	23046	24949	25633	24782	27237	13445	5697	6154	5778	5851	3348	3215	2816	2708	3021	5385	5759	5750
Markt inter°	10894	12262	10431	10477	10226	10655	10236	4957	4517	7006	3930	3354	3369	3193	2478	2666	3164	2956	2652
Refunds	5906	3412	3439	3726	3384	3049	2489	1443	925	650	384	179	146	61	2	0	0	0	0
Total budget	60370	58336	55277	57093	61287	64634	65388	65864	65322	65322	64674	65004	66654	66323	62912	62425	61463	60694	61671

Source: EU Budget: https://eur-lex.europa.eu/budget/www/index-en.htm The budget outturn of year x appears in the budget of year x+2



II – The main arguments of the China-India and African Group communications

2.1 – China-India communication

"*Aggregate Measurement of Support (AMS) is the most trade distorting element in global trade in agriculture. In the Uruguay Round AMS entitlements were made available in the Agreement on Agriculture to developed Members and some developing Members. Developed Members have more than 90% of global AMS entitlements amounting to nearly US$ 160 bn. As a result developed Members have access to huge amount of AMS beyond their de minimis. In contrast most developing Members have access only to de minimis resulting in a major asymmetry in the rules on agricultural trade… From the analysis it is clear that the imbalance in the existing AoA where only some Members have access to bound AMS allows them much more policy space. On the other hand, most developing Members are strictly limited by their de minimis... Therefore, in order to achieve the long outstanding reforms in agriculture subsidies the AMS entitlements of developed Members must be eliminated as a pre-requisite for consideration of other reforms in domestic support negotiations*".

Preliminary comments: The Third World Network (TWN) electronic daily paper SUNS (South-North development monitor) made the following comments on this meeting of 12 July 2017:

"*Major developing countries… called for the elimination of Aggregate Measurement of Support (AMS) as well as significant reduction commitments of minimally trade-distorting green box programs in the developed countries… China said the biggest item of trade-distorting domestic support is AMS that requires it to be eliminated altogether… Without the elimination of AMS the AoA will continue to perpetuate the historical inequities in global farm trade… India also called for elimination of AMS. It said the time has come for reforming the green box support programs that are provided by the US and the EU… Egypt said that the major trade-distorting programs are AMS and green box support programs*". On the other hand, "*Major farm producing countries such as Australia, New Zealand, and Argentina among others also called for sharp reduction commitments in blue box and green box measures as provided by the US, the EU, and several other industrialized countries because of their continued trade-distorting effects*" and, as usual, "*The EU opposed any changes in the blue box and green box support programs as suggested by Australia, New Zealand, and Argentina among others*".

Ranja Sengupta of the Third World Network (TWN) has also written an interesting paper on the eve of the WTO XIth Ministerial at Buenos Aires, criticising the China-India focus on the AMS[4].

2.2 – African Group communication

"*1.2. On product-specific support, Members with scheduled AMS entitlements shall apply a cap on their product-specific support beyond de minimis based on the average of the last three years figures notified to the Committee on Agriculture. A commitment will be made to further reduce the amount of product-specific support beyond de minimis as a percentage of the product's value of production (VoP)… 1.4. On Blue Box support, Members commit to set a specific end date for the existing programs classified as Blue Box support under Article 6.5 of the AoA… 1.5. On Green Box support, stricter disciplines – as stipulated in paragraph 5.3 below – are to be applied on the usage of support provided for in paragraphs 5-13 of Annex 2 to ensure that it meets the criteria of being no or minimally trade distorting. A cap is to be applied on the usage of the Green Box support with respect to measures within the scope of paragraphs 5-13 of Annex 2 of the AoA*".

Preliminary comments:
1) On the AMS there is no proposal to cap the non-product-specific (NPS) support beyond *de minimis* (dm) and there is no proposal either to reduce the two dm (PS and NPS), a regression vis-à-vis the Revised draft modalities on agriculture report of the Chair of the WTO Agricultural commission special session (so-called Rev.4) of 6 December 2008 on *de minimis* where the two dm "*shall be reduced by no less than 50 per cent effective on the first day of the implementation period*" whereas for DCs with AMS commitments they "*shall be reduced by at least two-thirds of the reduction rate of developed countries over three years*", the DCs with no AMS commitments being exempted from reduction[5].
2) On the BB, I am not aware of a formal commitment of the developed countries to put a date limit to its existence and at least such limit is not foreseen in the AoA Article 6 paragraph 5. At least the Rev.4 report proposed to halve the percentages of the two dm: from 5% to 2.5% "*on the first day of the implementation period*" for developed countries and from 10% to 5% for DCs.

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[4] Ranja Sengupta, *The road to Buenos-Aires: agriculture remains key*, TWN, November 2017, https://www.twn.my/briefings_MC11.htm

[5] The text of Rev.4 with in-depth comments of Jacques Berthelot can be viewed on SOL website: https://www.sol-asso.fr/wp-content/uploads/2008/12/Solidarit%C3%A9s-comments-on-the-December-08-agchairtext-11-12-08.pdf

3) On the GB, the African Group proposes only "stricter disciplines" and caps on "*paragraphs 5-13 of Annex 2 to ensure that it meets the criteria of being no or minimally trade distorting*", without specifying what these stricter disciplines and caps would be. And this implies that the African Group does not find any trade-distortion in the subsidies complying with paragraphs 1 to 4 of Annex 2.

Incidentally the African Group view on the GB reminds the analysis made in mid-November 2004 by the G20 of DCs on the necessity to revise the GB criteria, but only also of paragraphs 5-13 of the AoA Annex 2. According to the TWN[6], "*The G20 pointed out that programs of direct payments to producers (Annex 2: Paragraphs 5-13) "especially the way they are currently designed, have been found to influence trade and production and therefore could not be characterized as having "no, or at most minimal, trade-distorting effects or effects on production." They further argued, alluding to OECD and World Bank publications, that the so-called "de-coupled" programs amongst direct payments do distort trade and production because of (i) "wealth effects"; (ii) "farmers' expectations about future policies and (iii) "incomplete decoupling*".

2.3 – The AMS is mostly a fake market price support

Apparently the DCs are not aware that most of the AMS is a fake market price support (MPS), likely because they are confusing the fundamental concepts of *support* and *subsidy* as well as the difference between the MPS definitions of OECD and the AoA.

The concept of agricultural *support* is broader than that of agricultural *subsidy* as it encompasses "market price support" (MPS) through import protection and export subsidies, albeit in different ways for OECD and the AoA. For OECD the MPS represents the gap between the current domestic farm price and the current world price (CIF price for a net imported product and FOB price a net exported product) rendered at farm gate, encompassing import protection as well as export subsidies. However as explicit export subsidies have disappeared in the last years in the developed countries – as confirmed by the WTO Nairobi ministerial conference of December 2015 where Members committed to eliminate them – the MPS concerns only import protection, the gap between the current farm gate price and the current CIF price rendered at farm gate. This MPS is "financed" essentially by consumers, OECD considering that they are entitled to buy their food and other products at world prices and that import duties prevent them to do it. For all net food importing countries – mostly DCs grouped into the G33 but also small developed countries grouped into the G10 of net food importing countries such as Norway and Switzerland – and for NGOs and small farmers organisations promoting food sovereignty as long as the protecting countries do not harm others through dumping of the protected products, this MPS financed by consumers cannot be considered a "subsidy". Incidentally let us stress that the current world reference prices are themselves subsidised prices, as is the case for cereals and soybean where the US is price maker.

On the other hand the AoA definition of MPS is totally absurd for two reasons:
1) It is calculated as the gap between the present guaranted minimal administered price – such as the *intervention price* in the EU and the *loan rate* in the US – and the border price of the 1986-88 period (CIF price for a net imported product and FOB price for a net exported product), multiplied by the current eligible production. This definition is totally unfair for DCs as their inflation rate has been much higher than that of the developed countries: the average annual inflation rate over the 30 years from 1986 to 2015 has been of 7.95% in India against 2.68% in

[6] https://www.twn.my/title2/twninfo172.htm

the US and 1.78% in Germany[7]. This implied a cumulative inflation of 69.8% for Germany, 120.5% for the US[8], and 892.4% for India. And using the world prices of 1986-88 is also highly detrimental to DCs, as the very low world wheat prices of those years were the result of the US and EU massive dumping through several channels: explicit export subsidies, share of their domestic subsidies having benefited to wheat and flour exports, export credit guarantees and the high level of their foreign food aid. During that period the average cumulative US+EU dumping rate of wheat and flour was 78.4% (without taking into account foreign food aid), of which 71.2% for the US and 118.5% for the EU[9]. And, given that the average total US+EU quantity of wheat and flour exports accounted for 48% of global exports (a figure largely underestimated as we did not take into account the wheat and flour incorporated in other exported processed products), we can understand their huge responsibility in depressing the world prices of wheat and wheat flour in that base period.

2) It does not imply any actual subsidy because it does not bring additional support to that of other policy measures: import duties, export subsidies and restrictions, land set aside, production quotas, foreign and domestic food aid. If the MPS is notified in the supporting table DS:5, when the products received also actual specific subsidies they are reported under the supporting table DS:6 of "non-exempt direct payments" or the supporting table DS:7 of "other product-specific AMS".

Table 1 shows the last notifications of agricultural support made at the WTO by the Western developed countries (deleting Iceland and Israel), converted in US dollars by the OECD exchange rates. The last notified marketing years were 2015-16 for Japan, 2016 for the US and Canada, 2016-17 for the EU, 2017 for Australia and Switzerland, 2017-18 for Australia and New Zealand and 2018 for Norway.

Table 1 – Last notified AMS, BB and GB of most Western developed countries

US$ million	EU28	US	Japan	Canada	Switzerland	Norway	Australia	New Zealand	Total
AMS	7760	3830	5414	465	1385	1243	0	0	20097
MPS	7500	1485	3857	456	8	1328	0	0	14634
MPS/AMS	96.6%	38.8%	71.2%	98.1%	0.6%	106.8%	0	0	72.8%
AMS subsid.	260	2345	1557	9	1377	-85	0	0	5463
PSdm	1492	4804	157	167	7	12	1	0	6640
NPSdm	1178	7405	2306	1542	1014	22	70	0	13537
AMS+2dm	10430	16039	7877	2174	2406	1277	71	0	40274
AMS sub+2dm	2930	14554	4808	1718	2398	-51	71	0	26428
BB	5185	0	859	0	0	725	0	0	6769
OTDS	15615	14554	5667	0	0	674			36510
GB	68934	119492	15220	1641	2740	1065	1639	401	211132
GB-DFA	67561	17249	15219	1641	2740	1790	1639	401	108240
BB+(GB-DFA)	72746	17249	16078	1641	2740	1790	1639	401	114284
"/AMSsub+2dm	248.3%	176.9%	334.4%	95.5%	114.3%	infinite	2308.5%	infinite	432.4%

We see that for these 8 Western developed countries the MPS accounted for 72.8% of their total AMS, of which 98.1% for Canada, 96.6% for the EU28 and, strange enough, 106.8% for Norway, so that the actual subsidies in the AMS was of only 27.2%. If the MPS is of only 38.8% of the US AMS, it is because it has deleted the dairy MPS since the 2014 reform of the

[7] http://www.inflation.eu/inflation-rates/historic-hicp-inflation.aspx

[8] http://www.calculator.net/inflation-calculator.html?cstartingamount1=1&cinyear1=1986&coutyear1=2016&calctype=1&x=47&y=4

[9] *Analysis of the G-33's proposal to change the AoA provision on Public stockholding for food security*, Solidarité, January 25, 2014: https://www.sol-asso.fr/wp-content/uploads/2014/07/Analysis-of-the-G-33-proposal-on-Public-stockholding-for-food-security-25-01-2014.pdf

Farm Bill. However, from 2008 to 2013 the US has hugely under-notified its dairy MPS, which had a huge impact on its allowed final bound total AMS[10].

If the total GB of the 8 countries was of 211.1 bn, it is fair to delete from the GB the domestic food aid (DFA), particularly huge in the US, as subsidising poor citizens should be a right recognised to all countries, one reason why it is intolerable that the US does not recognise this right to DCs, particularly to India[11]. We see also that the sum of the GB (without DFA) plus the BB has been 4.3 times higher than the sum of the actual subsidies in the AMS plus the two de minimis: product specific (PS) de minimis (PSdm) and non-product-specific (NPS) de minimis (NPSdm). Which clearly explains why it is much more important to discipline the GB and BB than the AMS.

Incidentally we can calculate the OTDS (overall trade-distorting domestic support), a concept created by the so-called Framework Agreement of the WTO Council of 31 July 2004 which is the sum of the FBTA (Final Bound Total AMS), PSdm, NPSdm and BB although it is hugely under-notified as the FBTA does not include the subsidies to animal products due to those to animal feed.

The share of the fake MPS in the AMS of developed countries was even larger in the past. Thus in the 1995-00 period the EU subsidy component of its average annual AMS has represented only €4.822 bn or 10% of the €48.425 bn notified total AMS and the MPS component 90%. The suppression the 1st July 2002 of the intervention price of beef has allowed the EU to cut its total AMS by €11.9 bn from one day to the other, without any impact on the market price which has increased in the following years because of a high import protection. In the EU, the sugar AMS linked to its intervention price amounted to €5.9 bn in 2000-01 and comparable amounts the preceding years, although public purchases at the intervention price have only occurred once in 25 years, because high domestic prices have been maintained through a high import protection and production quotas. The AMS linked to the intervention prices of butter and skimmed milk powder amounted to €5.951 bn in 2000-01, but the EU expenses on dairy have only reached €1.907 bn.

[10] In the 2008 Farm Bill the US changed the way to notify its dairy MPS, from the administered price of the whole milk production made in the US schedule for 1986-88 to the sum of the administered prices of butter, cheddar cheese and non-fat dry milk, so that the notification for the dairy MPS fell from $5 bn in 2007 to $2.880 bn on average from 2008 to 2013, implying a total under-notification of $12.726 bn in these 6 years. Indeed Article 1 of the AoA states that "*Support provided during any year of the implementation period and thereafter*" must be "*calculated in accordance with the provisions of Annex 3 of this Agreement and taking into account the constituent data and methodology used in the tables of supporting material incorporated by reference in Part IV of the Member's Schedule*". Notifying only these three dairy products implies that about 50% of US milk production was no longer notified between 2008 and 2013. Not only the US was not allowed to change its methodology to compute its dairy AMS from 2008, but, to cap it all, it has continued to use in its notifications from 2008 to 2015 its allowed final bound total AMS (FBTA) of $19.103 bn for the Doha Round implementation period incorporating a dairy MPS calculated on the basis of another methodology, and even since 2014 when the MPS was deleted. Given the levels of support prices and production in the base period 1986-88, the total dairy AMS for the sum of butter, nonfat dry milk and Cheddar cheese was of $2.314 bn instead of the notified $5.409 bn for the whole milk in that period. It follows that, if the US does not rectify its notifications of dairy AMS from 2008 to 2013 based on the whole milk as it should, it must at least revised its total bound AMS for 1986-88 which was not of $23.879 bn but of $20.784 bn so that the FBTA, at the end of the Uruguay Round implementation period in 2000 which is also the base period for the Doha Round commitments, was not $19.103 bn (80% of 23.879) but only $16.627 bn (80% of 20.784).

[11] *Reconciling the views on a permanent solution to the issue of public stockholding for food security purposes*, SOL, September 10, 2017, https://www.sol-asso.fr/wp-content/uploads/2017/10/Reconciling-the-views-on-a-permanent-solution-to-the-isssue-of-public-stockholding-for-food-security-purposes-1.pdf

In Japan, the MPS of rice was eliminated in 1997, and Japan's AMS notified to the WTO dropped by $20 bn but, as there was no change in import protection, the actual support remained the same[12].

An interesting Canadian report of 2017 underscores that the AoA rule of article 6.5 fixing at 5% the PS *de minimis* and also at 5% the NPS *de minimis* for the developed countries ends up with the unexpected result, shown for the US case but which could be applied to any country, including the DCs in adding twice their 10% *de minimis* rate): "*If commodity specific support is at the five percent limit for all commodities, and at five percent for non-commodity specific support, then support is at 10 percent of the value of production… The clue to this is found in the fact that the sum of the individual commodity values of production is substantially greater than the reported total value of production for the US*"[13].

Notifying these fake MPS has blurred the negotiations and misled WTO Members. The more surprising is that these AMS supports continue to be presented by China, India and the African Group as the most trade-distorting ones. What they are clearly distorting is the understanding of the WTO Members. Therefore the AMSs linked to administered prices should be eliminated altogether since they have allowed developed countries to look like reducing much their coupled supports when they have actually increased their allegedly non trade-distorting subsidies of the GB and BB[14].

2.4 – <u>These conclusions are confirmed by the neo-liberal agricultural trade economists</u>

In the introduction of their common book on "*WTO disciplines on agricultural support*" (Cambridge University Press, 2011), David Orden, David Blandford and Tim Josling write: "*From an economic perspective the WTO's MPS (market price support) measure suffers from four deficiencies…and the notified MPS, despite its name, has not been a good indicator of economic market price support… The calculation of the MPS component of AMS (and EMS) from world prices of more than twenty years ago illustrates the weakness of these measures as a meaningful reflection of the actual level of support given by administered prices… Ambiguity in measurement of the MPS is going to be difficult to resolve*".

The analysis made in 2002 by Harry de Gorter and Merlinda Ingco was more explicit: "*The AMS was designated to be a measure for trade distorting domestic support policies. It was assigned the "amber box" in the Agreement on Agriculture. Reduction commitments agreed to were supposed to measure domestic support, independent of that due to import barriers and export subsidies. In reality, however, the AMS is double counted with support derived from trade policies… The Agreement on Agriculture requires each country to identify "market price supports" in the form of "administered prices" which are required to be included in the calculation of the AMS. On the other hand, if there are import barriers in place that keep*

[12] Hoshihisa Godo and Daisuke Takahashi, *Japan*, in D. Orden, D. Blanford and Tim Josling, *WTO disciples on agricultural support*, Cambridge Univ. press, 2011, p 153-188.

[13] Agri-food economic systems, *Trade study* prepared for Canadian AgriFood Policy Institute, 2 May 2017, https://capi-icpa.ca/wp-content/uploads/2019/09/2017-05-02-CAPI-Subsidies-Trade-Study-Full-Report.pdf

[14] *The truth about the European Union's food deficit and the dumping of its food exports linked to its domestic subsidies*, SOL, 26 June 2018: https://www.sol-asso.fr/wp-content/uploads/2017/01/The-truth-about-the-European-Union-food-defcit-and-the-dumping-impact-of-its-domestic-subsdies-June-26-2018.pdf; *Time is up for Developing countries to sue the US agricultural domestic subsidies*, SOL, 14 January 2016: https://www.sol-asso.fr/wp-content/uploads/2016/06/Time-is-up-for-Developing-countries-to-sue-the-US-domestic-subsidies-Solidarit%C3%A9-January-14-2016.pdf

domestic prices high, but there is no administered price, then no "market price support" is estimated for the AMS. For example, Canada has not been able to identify an administered price for chicken (or turkey or eggs), so there is no "market price support" for Canada's AMS for these products. This is ridiculous, of course, because it is arbitrary if an official price is reported or not. The United States reports an administered price support for dairy products. However, the US dairy price supports are mostly inoperative as market prices for these products are well above support in the implementation period because of export subsidies and import barriers"[15]. Their conclusion has also been more straightforward: "*Hence, a "flashing amber" box should be created that includes only domestic support that is trade distorting (with perhaps adjustments downwards for output reducing measures), and is not conflated with trade border measures*".

William R. Cline stated in the USDA 2007 Agriculture Outlook Forum: "*The bound AMS contained about $6 billion of pure fiction, a remarkable concept called 'Market Price Support' (MPS)... There is no actual taxpayer money paid out for the MPS, it is pure accounting... Getting rid of the phony subsidy will make it easier to get rid of phony subsidy cuts*"[16].

Tim Josling, the "father" of the OECD indicators of agricultural prices supports in the 1980's, confirmed in 2014: "*The reference prices bear little resemblance to current world market conditions (Orden et al. 2011). As a result, the AMS is now essentially meaningless as an indicator of trade distortion*"[17].

III – The reasons why the GB and the BB are really trade-distorting

The reasons why the subsidies of the GB and BB are really trade-distorting require a long in-depth analysis, following several steps.

3.1 – The original sin lies in the GATT scandalous definition of dumping

According to GATT Article VI and the Anti-dumping agreement "*A product is to be considered as being introduced into the commerce of an importing country at less than its normal value, if the price of the product exported from one country to another (a) is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country*" or, in simpler words, there is no dumping as long as the products are exported at their domestic price.

This definition was at the origin of the radical reforms of the EU's Common Agricultural Policy (CAP) and the US Farm Bill in the early 1990s, during the Uruguay Round negotiations. As their huge export subsidies were no longer tolerated by the other GATT contracting parties, they decided to avail of the GATT definition of dumping by making a large reduction of their minimal administered agricultural prices – *intervention prices* in the EU and *loan rates* in the

[15] Harry de Gorter and Merlinda Ingco, *The AMS and Domestic Support in the WTO Trade Negotiations on Agriculture: Issues and Suggestions for New Rules*, 25 September 2002, http://siteresources.worldbank.org/INTARD/825826-1111044795683/20424518/AMSandDomesticSupportintheWTOTradeNegotiations.pdf

[16] William Cline, *The Doha Round, Agriculture, and the Developing Countries*, March 1, 2007, file:///C:/Users/berth/Documents/OneDrive/Downloads/fo07cl01.pdf

[17] http://www.ictsd.org/themes/global-economic-governance/research/rethinking-the-rules-for-agricultural-subsidies

US – which would come closer to world prices, with the double effect of boosting exports without dumping and reducing imports without requiring higher tariffs.
As the two parties were devising at the same time the Agreement on Agriculture (AoA)'s rules in almost face-to-face, they could make a fine-tuning distinction between alleged trade-distorting and non-trade-distorting subsidies, to be notified in the so-called red box – for export subsidies –, amber box – or "Aggregate Measurement of Support (AMS) for trade-distorting domestic support, above *de minimis* levels –, blue box (BB) – for subsidies subject to production caps – and green box (GB) which could be raised without limits within the conditions defined in Annex 2 of the AoA. Then all Uruguay Rounds agreements were approved by consensus by all WTO Members on 15 December 1993, before being officially concluded in Marrakech on 15 April 1994 with the creation of the WTO. Incidentally, as all Members had to adopt all the agreements, the Ambassador of Mauritius, who signed on behalf of African countries, said that he signed the "*head on the block*" because he had to sign the AoA. And, contrary to the US which has been the world prices maker for most vegetable products already much before 1995, the EU had to continue the reduction of its intervention prices, which it did in the CAP reforms of 1999 for arable crops, in 2005 for milk and 2006 for sugar.

3.2 – The WTO as a "rules-based trading system"

A largely shared misunderstanding is that the EU CAP is complying with the WTO rules on its green and blue domestic subsidies so that they have no dumping impact.

We must begin by stressing that, when we say that the WTO is a "rules-based trading system" they are the rules decided and interpreted by its Members, not by its Secretariat, of which its Director General (DG). Many NGOs themselves have not understood that the WTO Secretariat has no power within the WTO, as repeated again and again by the DG. The Secretariat does not investigate and cannot denounce the violation of the rules by Members, usually the most developed, nor contest the veracity of the data provided to the Secretariat for its report on the Member's "*Trade Policy Review*". This is because the WTO is an organization "*managed by Members*", not by its Secretariat. The Members are not obliged to take into account the decisions of previous panels and Appellate Body (AB) rulings to which they don't recognize a value of legal precedent (*stare decisis*), which has led to more prosecutions and slowed down the decision-making of the Dispute Settlement Body (DSB). Otherwise the EU sugar case, where the EU was condemned on appeal on 9 April 2005 on complaint by Australia, Brazil and Thailand, would have not been necessary as the same arguments were used in the AB ruling of December 2001, reiterated in December 2002, in the "Dairy Products of Canada" case, only the product being different (see below).

3.3 – The Appellate Body's redefinition of dumping

It is why the existence of the AB is essential, not only to monitor the legal conformity of the panels decisions but also to interpret more broadly the rules, even if some Members, beginning by the US President Trump, refuse the possibility of *obiter dicta.* A good example is the fact that the AB has refused to take into account the highly critical definition of dumping in the GATT agreement. So that when the European Commission (EC) states that it is complying with the WTO rules it forgets to differentiate between the rules interpreted by the WTO Members (in that instance by the EU) and the actual WTO rules interpreted by the Appellate Body.
The AB report in the Dairy products of Canada case makes clear that dumping occurs when domestic subsidies are granted to exported products: *"89. It is possible that the economic effects of WTO-consistent domestic support in favour of producers may "spill over" to provide certain*

benefits to export production, especially as many agricultural products result from a single line of production that does not distinguish whether the production is destined for consumption in the domestic or export market… 91. We consider that the distinction between the domestic support and export subsidies disciplines in the Agreement on Agriculture would also be eroded if a WTO Member were entitled to use domestic support, without limit, to provide support for exports of agricultural products. Broadly stated, domestic support provisions of that Agreement, coupled with high levels of tariff protection, allow extensive support to producers, as compared with the limitations imposed through the export subsidies disciplines. Consequently, if domestic support could be used, without limit, to provide support for exports, it would undermine the benefits intended to accrue through a WTO Member's export subsidy commitments"[18].

And, in these ruling the AB has clearly defined when dumping occurs: "*96. The average total cost of production represents the appropriate standard for determining whether sales of CEM* [commercial export milk] *involve "payments" under Article 9.1(c) of the Agreement on Agriculture. The average total cost of production would be determined by dividing the fixed and variable costs of producing all milk, whether destined for domestic or export markets, by the total number of units of milk produced for both these markets… 97. Thus, on the basis of the standard of average total cost of production, there will be an export subsidy only if the below-cost portion of an export sale is "financed by virtue of governmental action*"[19].

And the AB report of December 2002 clarifies the words "*financed by virtue of governmental action*" as payments to exported products does not imply payments from the government but that governmental action has allowed milk producers themselves to "cross-subsidize" the share of milk (the CEM) exported at below the "average total cost of production": "*132… Article 9.1(c) expressly… states that "payments" need not involve "a charge on the public account". This is borne out by the fact that the text indicates that "financing" need only be "by virtue of governmental action", rather than "by government" itself. Article 9.1(c), therefore, contemplates that "payments may be financed by virtue of governmental action even though significant aspects of the financing might not involve government." Indeed, as we have said, payments may be made, and funded, by private parties… 137… The Panel found that governmental action regulating the domestic milk market "cross-subsidizes many sales that otherwise would not be made or would at least constitute sales at a loss*"[20].

The AB repeated these conclusions for the EU sugar case: "*346.d: upholds the Panel's finding, in paragraph 7.334 of the Panel Reports, that the production of C sugar receives a "payment on the export financed by virtue of governmental action", within the meaning of Article 9.1(c) of the Agreement on Agriculture, in the form of transfers of financial resources through cross-subsidization resulting from the operation of the European Communities' sugar regime*"[21].

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18 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#

19 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#

20 https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S006.aspx?Query=(@Symbol=%20wt/ds113/ab/rw2*)&Language=ENGLISH&Context=FomerScriptedSearch&languageUIChanged=true#

21 https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S006.aspx?Query=(@Symbol=%20wt/ds265/ab/r*%20not%20rw*)&Language=ENGLISH&Context=FomerScriptedSearch&languageUIChanged=true#

Above all the AB report on cotton of 3 March 2005 stressed that the US alleged decoupled *production flexibility contract payments*, market loss assistance payments and *direct payments* were product-specific, i.e. not fully decoupled: "*upholds the Panel's finding, in paragraphs 7.518 and 7.520 of the Panel Report, that Step 2 payments to domestic users, marketing loan program payments, production flexibility contract payments, market loss assistance payments, direct payments, counter-cyclical payments, crop insurance payments, and cottonseed payments (the "challenged domestic support measures") granted "support to a specific commodity", namely, upland cotton*"[22]. And paragraph 7388 of the panel "*concludes that PFC payments, DP payments, and the legislative and regulatory provisions that provide for the planting flexibility limitations in the DP programme, do not fully conform with paragraph 6(b) of Annex 2 of the Agreement on Agriculture*"[23], and in paragraph 7.413 "*The Panel concludes that PFC payments, DP payments, and the legislative and regulatory provisions which establish and maintain the DP programme, do not fully conform with paragraph 6(b) of Annex 2 of the Agreement on Agriculture. They are not green box measures*".

Let us take this opportunity to stress the EU unnoticed huge responsibility in the depression of the world cotton price: yes, from 2000 to 2018 the US exported 53 million tonnes (Mt) of cotton that received $35.3 bn in subsidies, an average subsidy of $657/t and an average dumping rate of 41%. But, during the same period, the EU – Greece and Spain – exported 4.5 Mt with an average subsidy of $2,789/t, 1.83 times the FOB export price. Although the EU produced ten times less cotton than the US and exported 12 times less, its export subsidies were only 2.8 times lower ($12.5 bn against $34.8 bn) due to an average subsidy per tonne 4.2 times higher[24]. Furthermore the EU exports have exceeded those of Burkina Faso or Mali since 2000, with the exception of 2017 and 2018.

3.4 – Even the Annex 2 paragraphs 1 to 4 and 7 to 13 are trade-distorting

Before going to the core issue of the allegedly *decoupled income support* of paragraph 6 of the AoA Annex 2, let us consider the extent to which paragraphs 1 to 5 and 7 to 13 are or not trade-distorting. As the G20, the China-India joint paper and the African group consider as non-trade distorting the paragraph 1 to 4, let us analyse them and after the paragraphs 7 to 13.

1) Paragraph 1
Already the two general conditions of paragraph 1 of Annex 2 for notifying subsidies in the WTO's green box must be criticized:

"*a) the support in question shall be provided through a publicly-funded government programme (including government revenue foregone) not involving transfers from consumers*": from a macroeconomic point of view, the distinction between *market price support* – financed by consumers – and *subsidy* – financed by taxpayers – is not convincing since the vast majority of

22 https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S006.aspx?Query=(@Symbol=%20wt/ds267/ab/r*%20not%20rw*)&Language=ENGLISH&Context=FomerScriptedSearch&languageUIChanged=true#

23 https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S006.aspx?Query=(@Symbol=%20wt/ds267/r*%20not%20rw*)&Language=ENGLISH&Context=FomerScriptedSearch&languageUIChanged=true#

24 *Would the WTO World Cotton Day solve the SSA farmers plight?* SOL, October 17, 2019, https://www.sol-asso.fr/wp-content/uploads/2019/01/Would-the-WTO-World-Cotton-Day-solve-the-SSA-farmers-plight-J.-Berthelot-October-17-2019.pdf

taxes are ultimately passed on to consumers, particularly in the EU given the weight of value added taxes. More than ¾ of the EU Budget's resources are eventually levied on consumers: (i) This is obvious for the VAT (value added tax), which accounts for about 40% of the EU Budget's resources. (ii) This is true also for most of another 42% of the EU Budget provided by the contribution of Member States levied on their GDP since: (a) the VAT accounts also for a large part of the Member States' Budgets (45% in France); (b) this is true also for many specific taxes like the tax on oil products (8% of the French Budget), on tobacco (1%) and registration fees (4,5%). (iii) This is also true for the income tax on the benefits of companies (16% in France) and even on the part of the income tax on households running also an individual business, since both pass this tax on to consumers.

"*b) the support in question shall not have the effect of providing price support to producers*": the SPS-SBS subsidies provide clear price support to producers as the prices would necessarily be higher in the absence of the SPS-SBS, as recognised for example by the EC when stating that "*the price of table olives is very low, making production without support uneconomic*"[25].

Since these two conditions of paragraph 1 apply to all specific green subsidies in paragraph 2 to 13, they cannot be put in the GB.

<u>2) Paragraph 2 on general services</u>
For the G-20 these measures "*have been generally found to be non- or minimally trade-distorting*" and "*can be assimilated to the provision of public goods*". Such assessment is too hasty. These "general services", although delivered in kind and collectively to farmers, have the effect to increase agricultural production and to reduce its costs. Their coupled nature is unquestionable. These subsidies, granted for decades or even centuries, explain to a very large extent the gap in yields and production costs between developed countries and DCs. Under the pretext that these subsidies are provided collectively to farmers, one tends to depreciate their efficiency, which mirrors well the individualistic behaviour of our time.

Thus, for Daryll Ray, former Head of the University of Tennessee Agricultural Policy Analysis Center, "*WTO has declared that such research and education related expenditures have a minimal effect on trade. Such a declaration is inconsistent with the notion that any public policy that causes changes in production shifts the supply curve. In practice, these activities have a direct impact on price and trade, whether that be a set-aside program or yield enhancing research*"[26].

In another fundamental report of September 2003, Daryll Ray and his colleagues underline that the public financing of research and extension have been the main source of productivity gains and of the competitiveness of the US agriculture: "*US taxpayers bankrolled a system of research stations and extension services to generate and disseminate new technologies. The system has been a tremendous success. It continues to ensure that each new generation of Americans will have access to ample quantities of safe food at reasonable prices. The other side of the coin is that publicly-sponsored research and extension services contribute to price and income problems. Clearly, neither the US nor the rest of the world would be facing today's low prices and failing small farms if the cumulative growth in agricultural productivity had not*

[25] http://ec.europa.eu/environment/life/publications/lifepublications/lifefocus/documents/oliveoil.pdf
[26] Daryll Ray, *Is food too important to be left to WTO?* Agricultural analysis policy center, University of Tennessee, November 29, 2002 (http://www.agpolicy.org).

taken place"[27]. That is why all countries, even the poorest, have allocated a minimum of financial resources to agricultural research and extension, but it is the tremendous gap between the resources of developed countries and DCs which explain also the huge gap between their productivity levels. IFPRI has underlined in 2005 that "*investments in R&D have the highest impact on agricultural growth per million rupees invested. The rates of return to public investment in research have been as high as over 60 percent, and in extension, over 50 percent. India currently invests only about 0.5 percent of its agricultural GDP in agricultural research, compared with 0.7 percent in the developing countries as a whole and as much as 2–3 percent in the developed countries. These figures suggest that government has been systematically underinvesting in a sector that offers a high social return and that there is considerable scope for diverting incremental outlays to priority areas in research*"[28].

Furthermore for the EU several items of paragraph 2 on general services are product-specific (PS): "*research programmes relating to particular products*"; "*product-specific pest and disease control measures*"; "*training services, including both general and specialist training facilities*"; "*inspection of particular products for health, safety, grading or standardization purposes*"; "*marketing and promotion services, but excluding expenditure for unspecified purposes that could be used by sellers to reduce their selling price or confer a direct economic benefit to purchasers*", without forgetting that paragraph 13 of Annex 3 provides that "*marketing-cost reduction measures*" are "*non-exempt measures*". Based on the last EU notifications of its agricultural domestic supports of 23 August 2018 for the marketing year 2016-17, for conservative reasons, let us assume that half of the subsidies of these items were PS, at € 2.624 bn.

3) Paragraphs 3 and 4 on public stockholding for food security purposes and domestic food aid

As we said already all countries should have the right to notify in the GB the subsidies to their poor consumers and to farmers to grow the corresponding food, provided that these subsidies to farmers do not spill over to subsidized exports. The issue here is that the US, followed by other developed countries, do not recognize the right of DCs, particularly India, to subsidize their poor farmers through remunerative prices to grow enough food (in Indian case wheat and rice) to build public stocks which are then distributed at very low prices to the majority of Indian consumers. The US is applying the absurd MPS of the AoA to India considering as a trade-distorting subsidy the gap between the current Indian minimum support price (MSP) and the border price of 1986-88. We will not enter here in the long debate at the WTO on this issue, all the more that SOL has shown that the same absurd rule could be applied to the US domestic food aid[29] (and see footnote 7 above).

4) Paragraph 5: Direct payments to producers

This paragraph is sonly an introduction to paragraphs 6-13 stating that, beyond the specific conditions foreseen in each of these paragraphs, they should comply with the two conditions of paragraph 1, already analysed.

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[27] Daryll Ray, Daniel de la Torre Ugarte, Kelly J. Tiller, *US Agricultural Policy: Changing course to secure farmers livelihoods worldwide*, Agricultural Policy Analysis Center, University of Tennessee, September 2003.

[28] J. von Braun et al., *Indian agriculture and rural development*, IFPRI, 2005.

[29] *Time is up for Developing countries to sue the US agricultural domestic subsidies*, SOL, January 14, 2016: https://www.sol-asso.fr/wp-content/uploads/2016/06/Time-is-up-for-Developing-countries-to-sue-the-US-domestic-subsidies-Solidarit%C3%A9-January-14-2016.pdf

5) <u>Paragraphs 7: Government financial participation in income insurance and income safety-net programmes, and 8: Payments (made either directly or by way of government financial participation in crop insurance schemes) for relief from natural disasters</u>

In 2006 Joe Glauber – who was then Chairman of the Board of Directors of the Federal Crop Insurance Corporation before becoming the chief economist of USDA from 2008 to 2014 and in charge of the Doha Round at the US Trade Representative from 2007 to 2009, and who has joined IFPRI since 2015 – stated the following: "*Subsidies for crop insurance have averaged more than $3 billion a year since 2002, and annual disaster payments have averaged more than $2 billion. Moreover, much of the disaster assistance goes to producers who also are receiving crop insurance indemnity payments. The result, as the title of this paper suggests, is "double indemnity". For many producers, disaster assistance allows them to collect twice on the same loss to "help fill the hole in the safety net"… Far from substituting for crop insurance, disaster assistance outlays have been highly correlated with insurance indemnities. This suggests that much of the disaster assistance goes to producers who also are receiving crop insurance indemnity payments*"[30]. And it took the case of 2001 where "*An insured producer with 85 percent yield coverage is effectively made whole (that is, crop revenue plus crop insurance indemnity plus disaster payment are equal to the expected value of the crop at planting) at a crop loss of 59 percent. At a 100 percent loss, a producer could receive 127 percent of the expected value of the crop*". It follows that this double-counting was clearly contradicting the AoA Annex 2 paragraph 7.b requirement that "*The amount of such payments shall compensate for less than 70 per cent of the producer's income loss in the year the producer becomes eligible to receive this assistance*" and particularly the paragraph 7.d, repeated in paragraph 8.e on payments for natural disasters stating that "*Where a producer receives in the same year payments under this paragraph and under paragraph 7 (income insurance and income safety-net programmes), the total of such payments shall be less than 100 per cent of the producer's total loss*".

Furthermore, for the first time the premium subsidies of crop insurances were no longer notified in 2012 in the non-product specific (NPS) AMS but in the product-specific (PS) AMS to benefit of the PS *de minimis* (PSdm) for many crops: on a total of $7.074 bn of premium subsidies $4.886 bn were notified in PSdm so that the net PS AMS of crop insurances subsidies was limited to $2.188 bn. But the boomerang effect of this change is that the US recognized that the premium subsidies were improperly notified in the past in the NPS AMS, implying that it should have rectified its past notifications made in the NPS AMS and transferred them to the PS AMS, which it did not. Besides disaster payments assessed by the Environment Working Group were 75% higher from 2001 to 2012 and 8.2 times higher from 2008 to 2012 than those notified at the WTO[31]. Besides, even if the US has notified the premium subsidies of the regular crop insurances in the product-specific (PS) AMS, it has notified the other costs of crop insurance (reimbursement of delivery costs and underwriting gains to insurers, and administrative costs of the FCIC) in the GB for $3.375 bn, which is highly questionable as these delivery costs are closely linked to the subsidies to farmers whose most insurances are crop-revenue insurance covering the decline in prices during the crop's growing season.

Besides $7.084 bn or 95.7% of the NPS AMS notified for 2016 concern the two main programmes created by the 2014 Farm Bill and which are close to insurance programs: the Agricultural risk coverage (ARC) which is an income support providing payments when actual

[30] Joe Glauber, *Double Indemnity: Crop Insurance and the Failure of U.S. Agricultural Disaster Policy*, in Bruce L. Gardner and Daniel A. Sumner, The 2007 Farm Bill and Beyond, 2007: http://aic.ucdavis.edu/research/farmbill07/aeibriefs/20070516_Summary.pdf.

[31] http://farm.ewg.org/progdetail.php?fips=00000&progcode=total_dis

crop revenue declines below a specified guarantee level, and the Price loss coverage (PLC) which provides payments when the price for a covered crop declines below its "effective reference price". To conclude, the DCs should be all the more vigilant on the US subsidies to agricultural insurance and disaster as they represent the bulk of its AMS subsidies.

For the EU these two items of income insurance and disaster payments have only accounted for €764 million or 1.3% of the GB in 2016-17 but there is nevertheless a problem because €817 million of insurance subsidies have been notified in the NPS AMS so that there is also here, as for the US, a problem of consistency to separate the subsidies between the GB and the NPS AMS, at least for crop insurance if not for disaster payments.

6) Paragraphs 9 ("Structural adjustment assistance provided through producer retirement programmes") and 10 (Structural adjustment assistance provided through resource retirement programmes) have only accounted for €386 million in the EU in 2016-17 or 0.6% of the GB so that it is not worthwhile taking care of it. And the US did not spend one dollar on them.

7) Paragraph 11: Structural adjustment assistance provided through investment aids
It is curious to see that the US did not notify anything in the GB on this item although OECD registered $1.671 bn in fixed capital formation. But we must stress the ridiculous notification of irrigation subsidies of only $130 million for 2016 as this huge under-notification has been stressed many times since several decades, including by the General Accounting Office (GAO) and the Congressional Budget Office (CBO). The most interesting reports are the CBO report of 2006 (*How Federal Policies Affect the Allocation of Water*)[32] and the Paul Stanton Kibel report of 2014[33] (*WTO Recourse for Reclamation Irrigation Subsidies: Undermarket Water Prices as Foregone Revenue*). And, in her chapter in the Oxford University Press book on "Fresh Water and International Economic Law", Bernasconi-Osterwalder, based on many previous studies, writes that "*The annual irrigation subsidies for the United States from such underpricing have been estimated at between $2 billion and $2.5 billion*"[34].

We could say the same for the EU which has never notify any irrigation subsidy in the NPS AMS, although they are quite huge on its 10 million ha of irrigated agricultural area, particularly in Spain (3 million ha), Italy (2.4 million ha), France (1.6 million ha) and Greece (1 million ha). For Spain alone "*subsidies to irrigated agriculture may be between €906 million per year (as this report has evaluated under conservative assumptions), and €1.120 million per year (a 55 per cent per cent subsidy rate—costs not recovered), which is the Ministry's own evaluation*"[35]. And these irrigation subsidies could be allocated to the benefitting products according to the amount of irrigated water per hectare of the different crops, as it is done in the US Farm and Ranch Irrigation Surveys, so that they may be considered PS, as it is in fact the case in Spain[36]. Although the subsidies of paragraph 11 are the main item notified in the EU GB after decoupled income support, they should be granted "*in response to objectively demonstrated structural disadvantages*" and "*to the amount required to compensate for the structural disadvantage*". The evaluation report of the EAFRD from 2007 to 2013 shows that €28.2 bn or 29.3% of all rural development funds of € 96.2 bn were devoted to "*productive investment support to private*

[32] http://www.cbo.gov/sites/default/files/08-07-waterallocation.pdf
[33] Paul Stanton Kibel, *Recourse for Reclamation Irrigation Subsidies: Undermarket Water Prices as Foregone Revenue*, 2014: http://digitalcommons.law.ggu.edu/cgi/viewcontent.cgi?article=1648&context=pubs
[34] http://www.gbv.de/dms/spk/sbb/toc/487559800.pdf
[35] http://www.iisd.org/gsi/sites/default/files/irrig_Spain.pdf
[36] https://www.mapa.gob.es/es/estadistica/temas/estadisticas-agrarias/agricultura/superficies-producciones-anuales-cultivos/

beneficiaries" where a good part was devoted to "*modernisation of agricultural holdings*" and "*setting up of young farmers*"[37]. And the CAP did not put any ceiling in the subsidies available per farm, except for State aids, so that, with the on-going concentration of farms the larger farms have received much more subsidies, implying that the EU did not comply with the condition that, to be in the GB, the investment subsidies must go to farmers in "structural disadvantages".

Furthermore the AoA article 6.2 provides that investment subsidies to farmers of developed countries must be notified in the AMS: "*… 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*". Because the provisions of Article 6.2 are often considered to correspond to the "development box" of DCs the developed countries have taken this at face value to exempt themselves of the last ten words "*reduction commitments that would otherwise be applicable to such measures*". So that the EU and US (not to speak of other developed countries) did not notify any agricultural investments subsidies in the AMS but, for the EU, in the CAP second pillar on rural development considered to be totally in the GB, without any consideration of farmers' "structural disadvantages".

Daryll Ray confirms that "*Little attention has been paid to legacy investments in the infrastructure of agricultural areas. These legacy investments… all influence production decisions in one way or another and that influence continues year after year while the influence of direct payments are limited to a given year*"[38]. A statement endorsed by IFPRI in the same article: "*Investment in rural roads has the most potent effect on poverty alleviation, per million rupees invested, followed by investment in R&D*".

<u>8) Paragraph 12</u>. "*Payments under environmental programmes: (a) Eligibility for such payments shall be determined as part of a clearly-defined government environmental or conservation programme and be dependent on the fulfilment of specific conditions under the government programme, including conditions related to production methods or inputs. (b) The amount of payment shall be limited to the extra costs or loss of income involved in complying with the government programme.*"

If such programmes appear fair at first sight, the problem is that they are most often implemented to try to offset other subsidies degrading the environment. For instance the uncapped subsidies of the EU decoupled direct payments are fostering the concentration of farms, particularly of animal products, which are increasing many types of pollution. Not to speak of the degradation of the environment in the DCs whose farmers, unable to compete with the EU subsidized exports, are forced to degrade their own environment, for example in reducing too much the fallow time.

<u>9) Paragraph 13</u>. "*Payments under regional assistance programmes. (a) Eligibility for such payments shall be limited to producers in disadvantaged regions… (f) The payments shall be limited to the extra costs or loss of income involved in undertaking agricultural production in the prescribed area.*"

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[37] http://ec.europa.eu/agriculture/evaluation/rural-development-reports/2014/investment-support-rdp/fulltext_en.pdf

[38] Daryll Ray, *What is an agricultural subsidy?*, Agricultural Policy Analysis Center, University of Tennessee, 26 mars 2004.

According to the European Court of Auditors report on "*The RDPs* [Rural Development Plans] *we reviewed… did not demonstrate clearly a link between the needs assessment and the measures selected. As a result, the intervention logic remained unclear… None of the RDPs we reviewed provided a quantified description of identified needs. This makes it difficult - or even impossible - to assess at the programming stage whether the planned financial support is proportionate to or relevant for the fulfilment of the identified needs… RDPs should also justify the funding allocated to measures. None of the RDPs we reviewed provided such justification or analysed whether funding was relevant and set at the right level for the targets concerned*"[39].

IV – Why the alleged agricultural decoupled payments are not decoupled

The analysis of agricultural subsidies refers not only to the AoA but also to the Agreement on Subsidies and Countervailing measures (ASCM).

4.1 – The alleged decoupled subsidies and the AoA

There are six reasons why the EU allegedly "decoupled income support" of Annex 2 paragraph 6 (which should be labelled "decoupled income subsidy" as there is no market price support there) – the "single payment scheme" (SPS) and the SAPS (single area payment scheme for 10 of the EU-12 new Member States) from 2005 to 2014, now the "base payment scheme" (BPS) and the additional redistributive payments, payments to young farmers, payments to environmentally friendly agricultural practices (green aids for simplicity) since the CAP reform of 2014 – are not decoupled as they do not comply with the AoA Annex 2, Paragraph 6 on "decoupled income support".

1) The SPS-BPS contradict the condition b) which states: "*The amount of such payments in any given year shall not be related to, or based on, the type or volume of production (including livestock units) undertaken by the producer in any year after the base period*". Perhaps but, given the high volatility of world prices, this is an economically absurd and socially unjustified condition when world prices are high while the SPS-SBS is insufficient to ensure a minimum income when prices are low.

According to the AoA article 6.5, blue box (BB) direct payments are granted "*under production-limiting programmes*" whilst the SPS-SBS allow to produce any product – otherwise there would not be a full production flexibility –, including products whose production is capped. This contradiction was already written in paragraph 28 of the preamble of the EU Council regulation n°1782/2003 of 29 September 2003: "*(28) In order to leave farmers free to choose what to produce on their land, including products which are still under coupled support, thus increasing market orientation, the single payment should not be conditional on production of any specific product. However, in order to avoid distortions of competition some products should be excluded from production on eligible land*". And the article 51 of the same Regulation specifies that this exclusion concerns permanent crops, fruits and vegetables and potatoes other than for starch. Indeed, after the precedent of the WTO Appellate Body ruling on cotton of 3 March 2005 that the US fixed direct payments were not in the green box because US farmers receiving them were prevented to grow fruits and vegetables and wild rice, the SPS-SBS will be much more easily ruled to be in the amber box. Because, even though the production quotas on milk, sugar and plantation rights of vines have

[39] European Court of Auditors, *Rural development programming: less complexity and more focus on results needed*, 2017, https://www.eca.europa.eu/en/Pages/DocItem.aspx?did=43179

disappeared, the EU maintains caps on the production of all products notified in the BB, among which cotton and bananas plus 19 products notified in the Voluntary coupled payments (VCP) since 2015 under specific conditions permitted by Regulation No 1307/2013 of 17 September 2013: Cereals, Flax and Hemp, Fruit and vegetables, Hops, Nuts, Oilseeds, Olive Oils, Protein crops, Rice, Seeds, Silkworms, Starch Potato, Sugar beet, Tobacco, suckler cows, ewes and goats, Beef, Sheep and goat meat, Dairy - milk and milk products (see notifications for 2015-16 ad 2016-17).

It is why Daugbjerg et A. Swinbank wonder: "*But can partially coupled SPS payments be split between the green and blue boxes; or does partial coupling imply that the whole of the partially coupled SPS payment should remain in the blue box (all the old arable payment in France for example)? And might concerns of this sort have prompted the Commission's quest for full decoupling in the Health Check*"[40].

2) The SPS-BPS contradict 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.

3) The SPS-BPS contradict the condition d): "*The amount of such payments in any given year shall not be related to, or based on, the factors of production employed in any year after the base period*". Indeed the SPS-BPS remain coupled to agricultural area as farmers must show they have eligible hectares (ha) to get their payments, each SPS-SBS entitlement corresponding to one ha.

4) The SPS-BPS are based on the amount of BB subsidies of the 2000-02 years, a criterion not allowed by the condition a): "*Eligibility for such payments shall be determined by clearly-defined criteria such as income, status as a producer or landowner, factor use or production level in a defined and fixed base period*".

5) A large part of the SPS-BPS payments are granted to animal feed (EU cereals, oilseeds meals and pulses or COPs), and 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*"[41], which is all the more obvious as the agrofuels boom has increased much the prices of vegetable oils and cereals.

6) Last, but not least, as the SPS-SBS payments cannot be assigned to a particular product, they are attributable to any product of which they lower the sale price below its EU average total production cost, the standard definition of dumping by the Appellate Body since the Dairy Products of Canada case in December 2001 an December 2002. Therefore all EU agricultural

[40] Carsten Daugbjerg and Alan Swinbank, *Explaining the health check: the budget, WTO, and multifunctional policy paradigm revisited*, http://*ageconsearch.umn.edu/bitstream/44818/2/3.2.1_Swinbank.pdf*
[41] Toni Harmer, *Biofuels subsidies and the law of the WTO*, ICTSD, June 2009, http://ictsd.net/i/publications/50724/.

exports can be sued for dumping, even products which had never received direct payments, as long as their producers get SPS-SBS for other products, which applies practically to all EU28 farms to-day.

4.2 – <u>The alleged decoupled subsidies and the ASCM</u>

Article 3 of the ASCM states: "*3.1 Except as provided in the Agreement on Agriculture, the following subsidies, within the meaning of Article 1, shall be prohibited: (a) subsidies contingent, in law or in fact, whether solely or as one of several other conditions, upon export performance, including those illustrated in Annex I; (b) subsidies contingent, whether solely or as one of several other conditions, upon the use of domestic over imported goods*". But the European Commission pretends to ignore that "*Import substitution subsidies remain prohibited under Article 3.1(b) of the SCM Agreement, and all subsidies causing adverse effects to the interests of WTO members are now actionable under the SCM Agreement, and all subsidies causing injury to the domestic industries of WTO members may be subject to the imposition of countervailing duties by those members*"[42]. This explicitly covers all domestic subsidies to import substitutes, but also exported products when they cause injury to other WTO Members since the AoA does not address the domestic subsidies to exported products but only explicit export subsidies.

This is confirmed by Melaku Geboye Desta, specialist of WTO agricultural law: "*The loopholes within the subsidies provisions of the Agreement on Agriculture are fulfilled primarily by resorting to the relevant provisions of the SCM Agreement... A study on the law of export subsidies in agricultural products under the multilateral trading system which does not cover at least the major features of the discipline governing the practice of export subsidies in general can only be incomplete... Subsidies for import substitution are strictly prohibited under the SCM Agreement and fall under the 'red light' category. They are part of domestic subsidies because their supply does not depend on export performance... The Agreement on Agriculture does not explicitly "provide" anything particularly concerning the use of import substitution subsidies*"[43].

Indeed Article 13 of the AoA, on Due Restraint (also known as "peace clause"), states that "*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 duties*". As the "implementation period" was the 9-year period from 1995 to 2003, all Annex 2 subsidies could have been prosecuted since 2004 under the ASCM, provided they are product-specific (PS).

Chambovey observes that "*once the Peace Clause is dropped, it should be noted that the URAA does not contain any provision dealing specifically with the imposition of countervailing duties… Therefore, as regards the imposition of countervailing duties, the only rules applicable to agricultural products are those of Article VI of the GATT 1994 and of the SCM Agreement that cover all products*"[11]. By the same token, "*There is nothing in the Agreement on Agriculture*

[42] Laurent Bartels, *The Relationship between the WTO Agreement on Agriculture and the Agreement on Subsidies and Countervailing Measures*, July 2015, https://www.oecd-ilibrary.org/commonwealth/trade/the-relationship-between-the-wto-agreement-on-agriculture-and-the-scm-agreement_5jm0qgkjsb41-en

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

which exempts agricultural products from the application of the GATT 1994 Article VI and the Anti-Dumping Agreement".

In the US cotton case the panel report stated that all types of subsidies should be considered as a whole when appraising their impact on prices: "*Thus, in our price suppression analysis under Article 6.3(c), we examine one effects-related variable – prices – and one subsidized product – upland cotton. To the extent a sufficient nexus with these exists among the subsidies at issue so that their effects manifest themselves collectively, we believe that we may legitimately treat them as a "subsidy" and group them and their effects together. We derive contextual support for this view from Article 6.1 and Annex IV* [of the SCM Agreement]*, which referred to the concept of total ad valorem subsidization and envisaged that, "[i]n determining the overall rate of subsidization in a given year, subsidies given under different programmes and by different authorities in the territory of a Member shall be aggregated*" (paragraph 7.1192)[44].

To conclude, the decoupled payments were a legal artifice to allow the developed countries to notify a maximum of subsidies in the green box. To the extent that green box subsidies can increase without limit and benefit to exports, their trade distorting effect, of which dumping, is larger than that of explicit export subsidies which were capped and had to be eliminated. As we have shown above, the most decisive reason for the radical change in the CAP and Farm Bill price policies in the 1990s was the scandalous definition of dumping in the GATT and the AoA.

4.3 – Why and how the EU producers of animal products get feed subsidies

4.3.1 – The EU and US know that feed subsidies are trade-distorting

The fact that the EU has notified in its AMS some secondary feed subsidies – to dried fodder and skimmed-milk fed to calves – attest clearly that it is perfectly aware that feed subsidies are coupled input subsidies but it has refused to notify its huge subsidies to feed cereals, oilseeds and pulses (COPs). We could say the same for the US: the US Congressional Research Service has acknowledged that "*program commodities such as corn are feed inputs for livestock*"[45] and OECD has stated that "*Input subsidies are typically explicit or implicit payments reducing the price paid by farmers for variable inputs (for example… feed)*"[46].

4.3.2 – The OECD tortuous concept of "excess feed cost"

The EU cheating in that area has been largely promoted by the OECD tortuous concept of "excess feed cost" (EFC). OECD considers that the livestock producers are penalized as they have to pay their feedstuffs at domestic prices higher than world prices received by the growers of COPs: "*The EFC adjustment reduces the value of MPS* [market price support] *for livestock commodities. Indeed this occurs because livestock producers pay higher prices for feed crops as a result of price support for these commodities*". In an e-mail of 2004 Catherine Moreddu of OECD replied to me: "*The excess feed cost due to the price support of cereals is deducted from the price support of animal products. Therefore it is not possible to take it into account a second*

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44 https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S006.aspx?Query=(@Symbol=%20wt/ds267/ab/r*%20not%20rw*)&Language=ENGLISH&Context=FomerScriptedSearch&languageUIChanged=true#

45 http://wikileaks.org/wiki/CRS:_Potential_Challenges_to_U.S._Farm_Subsidies_in_the_WTO:_A_Brief_Overview,_June_1,_2007

46 http://www.oecd.org/agriculture/agricultural-policies/1937457.pdf

time in input subsidies". This statement could have been at best debated when the world prices of COPs were low so that this alleged "excess feed cost" – represented by the gap between domestic prices and world prices at farm level – was large, for an average of €5.345 bn in the EU from 1986 to 1994 (table 2), but after that the world prices of cereals have skyrocketed from 2008 to 2014 so that the "excess feed cost" has almost disappeared in the EU PSE (producer support estimate) and the average from 2008 to 2018 was of only €322.9 million, with €71.4 million for 2018. For the US the gap between the farm price and the world price at farm gate has always been nil for maize, sorghum and soybean as the US makes the world reference prices for cereals and soybean even if it was not nil for wheat and barley from 1986 to 1994 after which the gap was also nil for them. Yet the feed subsidies are still there in the US and in the EU, hidden in its alleged fully decoupled SPS-SBS, which is the best refutation of this OECD concept of "excess feed cost".

Table 2 – The US and EU average annual "excess feed cost" from 1986 to 2018

	1986-94	1995-2007	2008-2018
USA, in $ million	294.5	2.4	0
EU, in € million	5344.6	1298	322.9

http://www.oecd.org/tad/agricultural-policies/producerandconsumersupportestimatesdatabase.htm#browsers

4.3.3 – <u>The cross-subsidisation of the feed subsidies received by the producers of COPs</u>

If there is no discussion that the direct payments to COPs are fully received by the COPs' producers, nevertheless the producers of animal products get the implicit but actual subsidies corresponding to the lower prices they pay for the COPs of EU origin, prices that would be much higher in the absence of the subsidies granted to COPs' producers in compensation for the reduction in their intervention prices.

Here enters into play the concept of "cross-subsidization", central in the WTO panels and Appellate Body's rulings in the cases of Dairy products of Canada and EU sugar. For animal feed the "*cross-subsidization… financed by virtue of governmental action*" can be invoked by the fact that the EU producers of animal products have been purchasing their feed at below its average total production cost in the absence of the feed subsidies received by the producers of feed crops (and very often the producers of animal products grow themselves part of their animal feed). The OCDE Manual on the Producers support estimate (PSE) states that "*Implicit support to agricultural producers may also be provided through <u>concessions on</u> taxes, interest rates, or <u>input prices. Such support usually involves no flow from government funds, but nevertheless represents real transfers</u>*"[47] (not underlined in the text).

A very interesting article by Carlos Gasperin and Ivana Doporto Miguez underscores the cumulative effect of coupled and decoupled subsidies and their cross-subsidisation, among which the case of livestock: "*The farmer may receive payments for the livestock – the direct subsidy – and buy feed from the producers, who have been the beneficiaries of subsidies for its production (therefore the price of the feed may be lower than in a situation without this support) – the indirect subsidy. An example of the third type also may be the case of livestock and feed, but from the feed's producer perspective: the feed producer benefits from the support to the feed production – the direct subsidy – and also from increased demand for the producer's product*

[47] https://www.oecd.org/agriculture/topics/agricultural-policy-monitoring-and-evaluation/documents/producer-support-estimates-manual.pdf

due to the subsidies given to users of this commodity as feed – the indirect subsidies"[48]. And they go on: "*This analysis may grow in complexity if a farmer produces different goods, where the type of subsidy for each product may differ in the category of box and the degree of the distorting effect. Here, the transference of subsidies is among products of the same farm; that is, part of payments for a product may be transferred for covering costs of another product. Another possible situation of transference is the case of the producer of two commodities – one with subsidies and another without – that shares some inputs, such as land and machinery: payments for the first commodity can be used for paying the cost of the joint inputs, thus reducing production costs of the commodity without subsidies*".

4.3.4 – Reducing feed costs was a main objective of the CAP reforms of 1992 and 1999

This objective is explicitly claimed by the European Commission (EC): "*Consumption of EU cereals in the animal feed sector and in the processing industry in EUR-12 has increased by some 20 million t. between 1992-93 and 1996/97. This increase is to be compared to the previous trend of a 2 million t. annual decrease, over the period 1985-1992. In compound feed, the rate of incorporation of cereals rose from 35% before the reform to 44% in 1996/97, representing an increase of 11 million t. On-farm use has also increased substantially, from 45 million t. in 1992/93 to 50 million t. in 1996/97*"[49], and "*The 1992 reform of the CAP aimed to render cereals grown in the Community more competitive both internally in the Community and on the world market. During the 1980s and early 1990s, home-grown cereals continuously lost market share on the internal market for animal feed to the benefit of imported cereals substitutes*"[50]. This strategy has succeeded since the increase in EU cereals production, practically entirely fed to animals, has reached 33.6 million tonnes between 1992 and 2002. Since direct payments to COP have had the treble effect of increasing production, lowering prices, and reducing the volume of imported feedstuffs, if they are not a "market price support", what else are they?

The contribution of Bonn University on the evaluation of Agenda 2000 for the EC specifies that: "*Further reduction of intervention prices for grains increases the chance to export without subsidies. Therefore, the EU can relinquish obligatory set-aside requirements without coming into conflict with the limits of WTO-obligations for export subsidies… the EU will have the chance to export some grain without subsidies most of the time and will be able to participate in the rapidly growing demand on the world market. Furthermore, the reduction of grain and other feed prices close to world market prices will be an important step to increase the competitiveness of the European pork and poultry production*"[51].

In 2002, the EC recognized again formally that "*The shift over to direct aid payments in the cereals sector has also created new cross sectoral distortions. The average 45% decline in the EU intervention price of cereals over the decade of the 1990s has seen a decline in the price of EU produced animal feed stuffs. In industries where animal feed constitutes a major cost component this decline in EU cereals prices has greatly improved the competitiveness of EU*

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[48] Carlos Gasperin and Ivana Doporto Miguez, *Green box subsidies and trade-distorting support: is there a cumulative impact?* In Ricardo Melendez Ortiz, Christophe Bellmann and Jonathan Hepburn, Agricultural subsidies in the WTO green box, Cambridge University Press, 2009, pp.239-57.

[49] European Commission, *Situation and outlook: cereals, oilseeds and protein crops*, Agenda 2000, July 1997.

[50] EU Official Journal C 192, 08/07/1999 p. 0001 – 0034.

[51] *Wilhelm* Henrichsmeyer and Heinz Peter Witzke, *Overall evaluation of the Agenda 2000 CAP reform,* Institute for Agricultural Policy (IAP), University of Bonn, in European Commission, *Evaluation report of the Agenda 2000*, February 2000 (see Commission's website).

producers[52]*. Thus in the poultry sector, where animal feed costs account for up to 70% of production costs*[53]*, declining cereal prices have led to significant cost savings. This in turn has contributed to the expansion of both EU poultry meat production and exports. Indeed, the cost savings have been such that despite the expansion in EU poultry meat exports, the level of export refund payments in the poultry meat sector have declined dramatically over the 1990s*"[54]. This quotation is wonderful since the EC recognizes explicitly three things: (1) first that direct payments have created distortions; (2) that the increased competitiveness they have conferred to poultry have fostered poultry exports; (3) that direct payments have replaced export refunds.

Indeed the CAP has always linked the CMOs (common market organisations) for poultry and pigmeat to the CMO for cereals. Before the May 1992 CAP reform, for the CMOs for poultry and pigmeat "*the legislation currently governing them – Council Regulation 2759/75 on poultry meat, 2771/75 on eggs, and 2777/75 on pigmeat – was always enacted in parallel with the legislation governing the common organisation of the market in cereals*"[55], being considered as processed cereals, which implies that the variable import levies and export refunds on poultry and pigmeat and eggs were calculated on the basis of their theoretical cereal content. This close connection was also used to calculate the "*monetary compensatory payments on pork, poultry and eggs... from the compensatory amounts on the appropriate amount of feed grain*".

This close connection between the CMOs for cereals and poultry and pigmeat is a clear evidence that the reduction in cereal prices, offset by direct payments to the COPs, was mainly designed to make it a direct substitute for customs duties and export refunds on poultry and pigmeat. As a result, direct payments to the COPs are as much coupled subsidies as the customs duties and export refunds they have replaced. This is why the generalised claim by the EC, EU Member States and even by most farmers unions and NGO – that the poultry and pork CMO have not been touched by the CAP reforms of 1992 and 1999 is clearly a lie.

Let us add that, conform to the ASCM agreement, the subsidies to animal feed may be considered as input subsidies benefitting to animal products in the same supply chain, by conducting a pass-through analysis.

4.3.5 – <u>The subsidies to feed has conferred PS AMS to animals consuming the feed</u>

The part of the COPs devoted to animal feed has conferred PS AMSs to the animal products having consumed this subsidized feed. First we must remember that as soon as a product-specific (PS) support reaches 5% of the production value of the product, it loses its PS *de minimis* and gets a PS AMS which is added to the applied total AMS and the production value of that product is added to the production value of all products with PS AMSs, as confirmed by H. de Gorter and J. Daniel Cook[56]. SOL (formerly Solidarité) has shown that the EU production value of all products notified with a PS AMS has been on average of €122.922 bn in the base period 1995-2000 so that, given a total value of production (VOP) of €222.577 bn, the

[52] Before the cereal sector reform process, feed costs constituted 70% of the production cost of EU poultry farmers. An average 50% reduction in EU cereal prices has had profound effects on the competitiveness of EU poultry production, which has been reflected in a rapid expansion of EU poultry meat exports.

[53] This is according to a recent report compiled on behalf of Action Aid on the impact of CAP aids on poultry farming in the Gambia, entitled "Free Trade or Fowl Deeds?"

[54] European Commission, *The CAP dimension*, 30-04-2002. I can send the paper on request as I cannot find it on the EU website.

[55] John A. Usher, *Legal aspects of agriculture in the European Community*, Clarendon Press, 1988.

[56] http://siteresources.worldbank.org/INTRANETTRADE/Resources/239054-1126812419270/7.DomesticSupport_updated_on12Dec05.pdf

production value of products without PS AMSs has been of €99.655 bn and the allowed PSdm, being 5% of that value, of €4.983 bn. And adding the production value of animal products, oilseeds and pulses getting PS AMSs to that of the products already notified with a PS AMS increase the production value of products with AMSs to €201.323 bn on average in the 1995-2000 period so that the average production value of products without a PS AMS shrinks to €21.253 bn and the allowed PSdm, which is 5% of this value, shrinks to €1.063[57].

And, because €9.743 bn of BB payments to cereals, oilseeds and pulses (COPs) have been transferred to the PS AMSs of animal products having consumed the COPs, the actual EU BB has been of only €11.145 bn on average in the base period instead of €20.888 bn.

Therefore the EU allowed OTDS for 1995-00 becomes €90.496 bn [67.159 (Final Bound Total AMS or FBTA) + 11.129 (NPSdm) + 1.063 (PSdm) + 11.145 (BB)] instead of €110.305 bn in Canada's simulations[58].

By the same token the US production value of products with PS AMSs in the base period 1995-2000 rise from $49.734 bn (production value of the products notified with PS AMSs) to $106.987 bn (once added the production value of $57.075 bn for all meats) so that the production value of products without PS AMSs falls to $87.152 bn and the allowed PSdm in the base period falls to $4.372 bn[59]. Therefore the allowed OTDS in the base period falls from $48.224 bn to $42.875 bn.

SOL has shown that the EU feed subsidies, essentially hidden in the decoupled SPS, were much higher in 2012 than in the US, at €14.740 bn, of which €3.260 bn to beef, €5.360 bn to pig meat, €3.680 bn to poultry and eggs and €2.441 to cow milk[60]. A more recent conservative estimate shows that, on the extra-EU28 exports of 5.449 million tonnes (Mt) of dairy products in 2016 – or 30.2 Mt of milk equivalent – total subsidies reached €2.030 billion, of which €513 million (M) of feed subsidies (17 €/t)[61]. And the feed subsidies to the EU28 dairy exports to the 4 EPA regions of West Africa, SADC, CEMAC and EAC were of €54.7 M in 2016 on €216.3 M of total dairy subsidies.

To conclude, the decoupled payments were a legal artifice to allow the developed countries to notify a maximum of subsidies in the GB. To the extent that GB subsidies can increase without limit and benefit to exports, their trade distorting effect, of which dumping, is larger than that of explicit export subsidies which were eliminated.

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[57] Solidarité, *The EU minimal OTDS in the implementation period*, 18 July 2008: https://www.sol-asso.fr/wp-content/uploads/2008/12/The-EU-minimal-OTDS-in-the-implementation-period-Solidarit%C3%A9-18-07-08.pdf

[58] On May 22, 2006, Canada prepared simulations, endorsed by the US, the EU and most WTO Members, on the possibilities of the US, the EU and Japan to honour their offers to reduce the Final Bound Total AMS (FBTA) and the Total Trade-Distorting Domestic Support (OTDS), simulations that Solidarity has denounced as highly erroneous, in particular by considering that *de minimis* SP support (dmSP) corresponds to 5% of the value of total production, which applies only to dm support other than by product (dmAPP). Read "*To unlock the agricultural negotiations, the US must first comply with the WTO rules*", Solidarité, 8 February 2007 : https://www.sol-asso.fr/wp-content/uploads/2019/12/To-unlock-the-agricultural-negotiations-the-US-must-first-comply-with-the-WTO-rules-Solidarité-8-February-2007.pdf

[59] *The US allowed OTDS of the base period cannot be cut by more than 52.7%*, Solidarité, 13 July 2008: https://www.sol-asso.fr/wp-content/uploads/2008/12/The-US-allowed-OTDS-in-the-base-period-cannot-be-cut-by-more-than-51.6-1.pdf

[60] *The EU dumping of cereals, dairy and meats in 2012, total and to ACP countries*, Solidarité, March 5, 2014, http://www.solidarite.asso.fr/Papers-2014?debut_documents_joints=30#pagination_documents_joints

[61] *The huge dumping of extra-EU exports of dairy products and to the EPAs of West Africa, SADC, CEMAC and EAC in 2016*, SOL, April 17, 2017: https://www.sol-asso.fr/analyses-politiques-agricoles-jacques-b-2/

The best criticisms of the EU alleged decoupled subsidies come from Peter Einarsson and Michel Jacquot. For Peter Einarsson (2000) "*All forms of direct payments function as a dumping mechanism to the extent that the production supported results in products for export. When border protection is reduced and replaced with direct payments (as required by the AoA), the result is lower prices in protected markets. The gap between the protected internal price level and world market prices is reduced, and the need for export subsidies thus reduced correspondingly (again in conformity with the AoA). But for the importing country, there is no difference. Whether the export price is artificially reduced by export subsidies or by direct payments, the dumping effect is the same… Within the EU, the price level for virtually all agricultural products is now considerably below actual cost of production. This is not accidental, but a deliberate consequence of the AoA requirements (reduced border protection). Direct payments are a necessary complement to fill the gap between the price level allowed by the AoA and the real cost of food production. The situation in the USA is very similar, although production costs are lower and the gap to prices therefore smaller… Export of a product benefiting from any combination of public support (direct payments, export credits, free public services, or other) would be allowed only if the exporting country applied an export levy equalling the value of that support*"[62].

For Michel Jacquot, former director of the EAGGF – the European Agricultural Guidance and Guarantee Fund, which managed the budget of European agriculture – from 1987 to 1997, and member of the French Academy of Agriculture: "*All these people are still living in the simplistic scheme that was sold to them in 1992 (notably by the Commission), when the WTO Agreement on Agriculture was established, according to which there were direct export subsidies (in jargon "refunds") and direct income aids, which were also to be reduced, unless they were decoupled. This scheme was not based on anything just: how can one imagine that a subsidy (SPS or BPS) does not affect exports (or imports)... Crap! Total Blindness! It took at the EEC level that the WTO Appellate Body on Sugar (April 2005)... wrote roughly that "any payment financed by virtue of a government measure in the form of resource transfers through cross-subsidization is an export subsidy" to open their eyes. But this, the Commission has never said openly, the decoupling has been presented – and continues to be – as the magic potion to say and assert, as the FOLL said, that "we"... were no longer subsidizing exports. Up to when will we continue to lie? When will it be known that European negotiators have been fooled by their American colleagues? When is the hour of truth?*"[63].

4.4 – <u>The blue box subsidies are themselves trade-distorting</u>

Table 3 shows the evolution of the EU BB from 1995-96 (first notified year) to 2016-17 (last notified year).

Table 3 – Evolution of the EU blue box subsidies notified to the WTO from 1995-96 to 2016-17

Euros million	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005
Fixed area	15648	17193	16191	15812	15128	16822	18144	16268	17074	18108	8264
Fixed cattle heads	5197	4328	4252	4526	4664	5401	5582	8459	7708	9129	5181
Total	20845	21521	20443	20338	19792	22223	23726	24727	24782	27237	13445
	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016
Fixed area	2886	2891	3090	3064	1136	977	833	771	_832	1516	1575
Fixed cattle heads	2811	2275	2258	2260	2006	2004	1921	1893	2047	2815	3066
Total	5697	5166	5348	5324	3142	2981	2754	2664	2879	4331	4641

Source: WTO, https://www.wto.org/english/tratop_e/agric_e/ag_work_e.htm

[62] https://iatp.org/files/Agricultural_Trade_Policy_As_If_Food_Security_.pdf

[63] http://blogs.mediapart.fr/blog/j-berthelot/260514/les-subventions-de-lue-lexportation-suite

The exemption of BB subsidies from reduction commitments are not justified by their non trade distorting character, i.e. by their absence of impact on production or prices, but first and foremost by a pure political dictate imposed by the two superpowers EU-US as a result of their Blair House agreement of November 18, 1992.

The Dunkel draft issued by the WTO Secretariat on December 20, 1991 did not exempt the EU direct payments already decided for the CAP reform which were to be adopted in May 1992, to compensate the reduction of the intervention prices of cereals and bovine meat: "*it is noteworthy that neither the EC's compensatory amounts nor the US restitution*[64] *payments were included in this list of exemptions from domestic supports*"[65]. Indeed, "*It was found that the compensatory payments at the centre of the MacSharry plan would not meet the criteria laid down by Dunkel for direct income support to be classified as "decoupled", and therefore exempt from reduction*"[66]. No wonder that the European Commission (EC) rejected the draft and on January 8, 1992, "*the EC communicated its position to the U.S. that a farm trade agreement could not be reached unless such payments were included in the 'green box'*".

Thus, up to then, compensatory payments were considered by the Uruguay Round negotiators as coupled subsidies. But, by the government fiat of the two superpowers, the Blair House agreement of 18 November 2002 decided to exempt from reduction "*direct payments under production-limiting program*s", i.e. BB payments, by adding to the Dunkel draft the whole paragraph 5 in Article 6 of the AoA and the words "*or to be exempt from reduction by reason of any other provision of this Agreement*" in Article 7.2(a). Therefore, "*the concept of an international agreement that would force reductions in trade-distorting domestic subsidies was abandoned in the Blair House agreement. First, the US and EU agreed to move to an aggregate measure of support for all products, and to reduce the aggregate level without reference to a specific commodity. This brought them back to the initial position of the EU. Second, they agreed to exempt the major support policies of both the EU and the US, even though neither met the strict criteria for belonging in the "green box" of non-distorting category… This means that there is likely to be few policy changes that will reduce the incentives to produce in high cost areas, and thus the hoped-for cut backs in subsidized output are unlikely to be realized*"[67]. And the Blair House went much further, since it "*contained a so-called "peace clause" that would protect against GATT actions by the United States against EC internal compensation payments*" (this "peace clause" corresponds to the AoA Article 13).

And one year more would be required to convert into a multilateral agreement this pure bilateral political bargain of what should have otherwise remained coupled subsidies subject to reduction commitments.

And it is also because the BB was created in the ultimate months of the UR negotiations that the provisions conferring them a character of decoupled subsidies exempt from reductions are contradicted by several other provisions of the AoA, not to speak of the SCM Agreement (on Subsidies and Countervailing Measures).

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[64] The editor should have written "deficiency" instead of "restitution".

[65] John M. Breen, *Agriculture*, in Terence P.Stewart, editor, *The GATT Urugay Round. A negotiating history, Volume I: Commentary,* Kluwer Law and Taxation Publishers, 1993, pp. 125-254.

[66] *Joanna O'Riordan,* Agriculture and GATT How the Compromise was Reached http://www.maths.tcd.ie/local/JUNK/econrev/ser/html/eugatt.htm

[67] Will Martin, L. Alan Winters, *The Uruguay Round and the developing economies*, World Bank discussion paper, 1995. http://www.ssdairy.org/AdditionalRes/UruguayDevEco/UraguayWP.htm#P2180_67949

The EU and the US escaped their reduction commitments by transferring more than 20% of their AMS from the base period (1986-1988) to their blue and green boxes. The AMS for this period – ECU 79.7 bn for the EU and $23.1 bn for the US – included subsidies that were placed during the implementation period in the BB (EU) or GB (US). The US deficiency payments were excluded from the AMS in the last months of the negotiation and notified in 1995 in the BB, but disappeared in 1996 with the Farm Act creating the so-called "contractual production flexibility payments" decoupled and notified in the GB while maintaining deficiency payments in the 1986-88 AMS. Similarly, the direct aids decided by the 1992 CAP reform, and notified in the BB, replaced the amber box aids (AMS) without changing the 1986-88 AMS. As the 20% reduction commitments for domestic support were based on this 1986-88 AMS, the total AMS for 1995-96 was already lower than the 20% reduction commitment for the entire 6-year period from 1995 to 2000: €64.4 bn for the EU (-20.2%) and $6.2 bn for the US (-75%), cancelling all actual reduction commitments for coupled EU and US subsidies. This sleight of hand from the amber box to the BB and GB clearly shows the real coupled nature of the transferred subsidies.

Let us add a theoretical inconsistency that BB subsidies are considered decoupled to the extent they limit production, but this limit will itself increases prices, hence is a coupled measure contradicting paragraph 1 of Annex 2.

<u>4.5 - Counting the GB and BB subsidies is all the more justified as the WTO does count the subsidies of the 'gold box'</u>

WTO rules take only into account the subsidies *specific* to an industry, in this case agriculture, and only for the current year or at best for the most recent years. This is in accordance with Articles 1, 2 and 8 of the Agreement on Subsidies and Countervailing Measures (ASCM):
"*1.2 A subsidy… shall be subject to the provisions of Part II or shall be subject to the provisions of Part III or V only if such a subsidy is specific in accordance with the provisions of Article 2…*
2.1 In order to determine whether a subsidy, as defined in paragraph 1 of Article 1, is specific to an enterprise or industry or group of enterprises or industries… the following principles shall apply...
8.1 The following subsidies shall be considered as non-actionable: (a) subsidies which are not specific within the meaning of Article 2".

This is why SOL (then Solidarité) proposed at the WTO Ministerial Conference in Hong Kong of December 2005 to put all types of present and past non-agricultural support and past agricultural support in a "gold box"[68].

Indeed, the current greater competitiveness of agri-food products from developed countries, particularly the EU, compared to that of developing countries, particularly ACP countries, is much less due to the difference in their level of tariffs and/or current agricultural subsidies – all the more so when calculated per capita or per agricultural worker in full-time equivalent or AWU (agricultural worker unit) – than current and past non-agricultural support and past agricultural support, for decades and even centuries, including through strong import protection and domestic and export subsidies, as well as export taxes.
These current and past non-agricultural support has significantly reduced the unit cost of production of agri-food products in Western countries, particularly in the EU, compared to

[68] *The gold box: a black box which hides the gold box,* Solidarité, 9 December 2005, https://www.wto.org/english/forums_e/ngo_e/posp55_e.htm

those in developing countries, in particular through the following elements (non-exhaustive list):
- efficient transport and information infrastructures (including intangible infrastructures, of which research);
- free generalised access to education, at least for primary and secondary education, including specific agricultural education;
- farmers' health and pensions largely financed by taxpayers, at least in the EU;
- well-off consumers (compared to those in DCs), with increasing purchasing power, able to pay minimum prices to farmers, even if they are too low; unlike the situation in poor DCs where consumers' purchasing power is very low and often declining;
- low inflation rates: the December 2016 rate was 1.1% in the euro area and 2.1% in the US, compared with 18.5% in Nigeria and 15.4% in Ghana;
- low interest rates, particularly for subsidised agricultural loans;
- high protection of agricultural imports and infant industries for decades;
- relatively democratic States able to enforce commercial contracts, fighting corruption (but not tax evasion in tax havens), including by collecting tariffs and preventing illegal extortion by law enforcement agencies;
- plundering of the resources of developing countries during centuries of slavery and colonization;
- neo-colonial exploitation since then, by the indebtedness of DCs to developed countries and international institutions under their control, and by unfair free trade agreements.

This is why, even if the WTO were to decide stricter criteria for the GB, developed countries could still increase their gold box subsidies to maintain the competitiveness of their farmers and agri-food industries. They will always find ways to ensure their food sovereignty. In particular, instead of maintaining specific agricultural institutions, it will be sufficient to integrate them into broader institutions so that, the specific nature of subsidies disappearing, they could not be sued at the WTO.

A good example is the public financing of transport infrastructure that is not specific to agricultural products but is very beneficial to them, as shown by the subsidies to improve Mississippi's navigability: "*Congress' passage of the Waterways Resources Reform and Development Act recognized the importance of maintaining vital waterways like the Mississippi River… The Mississippi River is a vital artery for grain shippers moving product from the Midwest to the Gulf of Mexico. For many years, the grain industry has been vocal about the need to update some of the river's nearly 100-year-old locks and dams... The world is coming to the breadbasket of America for its food stocks and we need to be ready... Another reason to invest in Mississippi River infrastructure is the expected increase in traffic from the expansion of the Panama Canal. The canal is anticipated to open later this year, and will lead to a 12% decrease in the cost of transporting grain from the U.S. Corn belt to Asia, according to Rabobank projections… The upgrades planned for U.S. waterways and railways will help preserve one of the United States' most competitive advantages to foreign buyers — affordable transportation costs… Having [infrastructure] that is reliable provides us with the transportation services we need to keep and expand foreign markets," said Salmonsen. "And that's why investment in transportation is so important to everyone in agriculture*""[69].

[69] http://www.feedandgrain.com/magazine/u.s.-invests-in-key-rail-and-river-infrastructure