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The Relationship Between the WTO Agreement on Agriculture and the SCM Agreement: An Analysis of Hierarchy Rules in the WTO Legal System

Lorand Bartels

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By Lorand Bartels, Faculty of Law, University of Cambridge.

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For more information contact the Series Editor: Dr Mohammad A Razzaque, m.razzaque@commonwealth.int

Abstract

Since the expiry of the 'peace clause' at the end of 2003, it has been unclear which obligations under the WTO SCM Agreement apply to subsidies granted to agricultural products. This is in particular important for export subsidies, which are prohibited under the SCM Agreement, but, to some degree, recognised in the Agriculture Agreement. The matter is regulated by Article 21.1 of the Agriculture Agreement, which has been interpreted by the WTO Appellate Body in different ways, including as an expression of the *lex specialis* principle. This paper analyses this provision, and considers how it affects different forms of agricultural subsidies. It concludes that it would take an extension of the Appellate Body's current interpretive framework to save export subsidies from the disciplines of the SCM Agreement.

JEL Classification: H2, H20, H3, H7, H71, K3, K33, Q17

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Abbreviations and acronyms

DSU	Dispute Settlement Understanding
GATT 1994	General Agreement on Tariffs and Trade 1994
SCM Agreement	Agreement on Subsidies and Countervailing Measures
URAA	The Uruguay Round Agreement on Agriculture
WTO	World Trade Organization

1. Introduction

The advent of the World Trade Organization (WTO) in 1995 brought with it new disciplines on subsidies and, in particular, agricultural subsidies. However, these were disciplines introduced in a way that resulted in uncertainty. In principle, agricultural subsidies might be regulated by the Agreement on Subsidies and Countervailing Measures (SCM Agreement), the Agreement on Agriculture (Agriculture Agreement) or, in some cases, both.[1]

The difference is material. The SCM Agreement prohibits WTO members from granting or maintaining import substitution subsidies and export subsidies and from causing adverse effects to the interests of other WTO members through the 'use' of other subsidies.[2] In addition, the SCM Agreement (together with the General Agreement on Tariffs and Trade 1994 (GATT 1994))[3] allows importing WTO members to impose countervailing duties on subsidised imports that cause injury to their domestic producers. In contrast, the Agriculture Agreement merely sets upper limits on the amount of trade-distorting subsidies.[4] This makes it important to determine whether, for any given subsidy, the SCM Agreement or the Agriculture Agreement applies.

At least in relation to agricultural export subsidies, one might think that this question had been resolved by the WTO Nairobi Ministerial Decision on Export Competition, which states that '[d]eveloped Members shall immediately eliminate their remaining scheduled export subsidy entitlements as of [19 December 2015]' (WTO Ministerial Conference 2015, paragraph 6).[5] The reference in this Nairobi decision to 'scheduled export subsidy entitlements' seems to imply that the prohibition on export subsidies under the SCM Agreement does not apply to scheduled agricultural export subsidies. In addition, this decision expressly exempts a number of scheduled agricultural export subsidies from this obligation.[6]

Nonetheless, the legal status and effects of this Nairobi decision are far from clear. It does not purport to be an authoritative interpretation of the WTO agreements, a waiver of obligations in those agreements or an amendment to those agreements under Articles IX:2, IX:3 and X, respectively, of the WTO Agreement. Nor would this decision seem capable of overriding in any other way primary WTO law applicable to agricultural export subsidies (WTO Appellate Body 2008, paragraphs 391–3). At most, then, this decision can provide context for the interpretation of WTO law[7] or, perhaps, preclude WTO members from making dispute settlement claims contrary to its terms (WTO Appellate Body 2015, paragraph 5.25).

Turning then to the primary law, the key provision concerning the relationship between the SCM Agreement and the Agriculture Agreement is Article 21.1 of the Agriculture Agreement, which states:

> The provisions of GATT 1994 and of other Multilateral Trade Agreements in Annex 1A to the WTO Agreement [including the

1 Article XVI of the General Agreement on Tariffs and Trade 1994 (GATT 1994) imposes additional disciplines on export subsidies, but in practice an independent claim under this provision would be difficult to envisage (Steinberg and Josling 2003, pp. 369 and 382–4).

2 Articles 3 and 5 of the SCM Agreement. Article 27 of the SCM Agreement establishes certain exceptions for developing countries.

3 Part V of the SCM Agreement applies together with Article VI of the GATT 1994 (see WTO Appellate Body 1997a, pp. 9–17). Article 27 of the SCM Agreement establishes different rules for products originating in developing countries.

4 Article 3 and Parts IV and V of the Agriculture Agreement.

5 In an unusually categorical statement, given the legal uncertainty on the issue the WTO Secretariat said recently that '[u]nder the current WTO rules, 16 WTO members are allowed to subsidize exports of certain agricultural products'. See WTO Secretariat (2015).

6 WTO Ministerial Conference 2015, notes 3 and 4 make an exception for certain subsidies for sugar, processed products, dairy products and swine meat, and the decision also makes certain exceptions for developing countries.

7 The decision could be a 'subsequent agreement' or 'subsequent practice' under Article 31(3) of the Vienna Convention on the Law of Treaties. See *infra* at text to note 46.

SCM Agreement] shall apply subject to the provisions of this [i.e. the Agriculture] Agreement.[8]

Article 21.1 is a hierarchy rule, in the sense of a rule that determines which of two ‘primary’ rules applies to a given fact.[9] The following makes some general comments about hierarchy rules in order to provide a conceptual framework for understanding Article 21.1 and the Appellate Body’s various approaches to this provision.

2. A typology of hierarchy rules

It is submitted that one can identify three main categories of hierarchy rule. First, there are hierarchy rules that state that a primary rule applies (or, more commonly, does not apply) to certain facts (usually conduct). Thus, Article 1.5 of the Agreement on Technical Barriers to Trade states that ‘[t]he provisions of this Agreement do not apply to sanitary and phytosanitary measures as defined in [the Agreement on the Application of Sanitary and Phytosanitary Measures]’. This category also includes exceptions stating that ‘nothing shall prevent’ certain conduct or ‘notwithstanding’ a given obligation certain conduct is permitted. Such provisions require a determination that a measure meets the given description; once that determination is made, the rule automatically disables the application of any contrary rule (typically, but not necessarily, an obligation).[10] There is no need to determine, for example, whether a given fact is legal under one rule but illegal under another. Provided that the exceptions provision applies, the second rule will not be relevant.[11]

Hierarchy rules in the second category operate by comparing the sets of facts described by the two competing primary rules. The classic example of such hierarchy rules is the *lex specialis* principle, which operates by displacing a ‘general’ rule that describes a set of facts in favour of any ‘special’ rule that describes a subset of those facts (International Law Commission 2006, paragraph 57, citing Larenz 1975, pp. 251–252). It should be noted that, whereas the first category of hierarchy rule itself defines the relevant set of facts (although this can be contracted out to a primary rule), for the second category of hierarchy rule the two sets of facts are necessarily defined by the two primary rules.

Both of these categories of hierarchy rules are to be distinguished from hierarchy rules that operate by comparing the legal consequences of applying the competing primary rules to the same fact. The primary examples of rules in this category are those based on a ‘conflict’ between different provisions. An example is the General Interpretive Note to Annex 1A

8 Article 21.1 of the Agriculture Agreement was formerly less important because of Article 13 of the same agreement (the ‘peace clause’). Article 13 expressly provided that, until the end of 31 December 2003, certain types of agricultural subsidies were exempt from challenges under the SCM Agreement and the GATT 1994. Article 13 is also referenced in Articles 5, 6 and 7 of the SCM Agreement.

9 For the purpose of hierarchy rules, ‘facts’ can include both ‘brute facts’ such as things (e.g. fruit or a ‘measure’) or conduct (e.g. the eating of apples or the adoption of a measure) and ‘institutional facts’ such as rules (e.g. a rule stating that eating apples is prohibited). See Anscombe (1958), p. 69, and McCormick (1974), p. 102. At a greater level of abstraction, one can conceive of ‘facts’ for these purposes as the minor term in any legal syllogism (or an ‘if-then’ propositional logical formula) in which the major term is the rule, and the conclusion is a legal outcome (typically a binary determination of validity or legality).

10 For an argument that a non-violation claim under Article XXIII:1(b) of the GATT 1994 could prevent the adoption or enforcement of a measure, see Bartels (2015), pp. 95 and 114.

11 Cf. WTO Panel (2004), paragraph 7.45, stating that ‘as an exception provision, the Enabling Clause applies concurrently with Article I:1 and takes precedence to the extent of the conflict between the two provisions’. The Enabling Clause states that ‘[n]otwithstanding the provisions of Article I of the General Agreement, contracting parties may accord [certain described] differential and more favourable treatment to developing countries’.

of the WTO Agreement, which states that '[i]n the event of conflict between a provision of the [GATT] 1994 and a provision of another agreement in Annex 1A … the provision of the other agreement shall prevail to the extent of the conflict'. However, strictly speaking, it cannot be said that provisions are ever in 'conflict' in the abstract. The conflict is between the two legal consequences of applying each provision to the same fact.[12]

What is a 'conflict' for these purposes? At a minimum, there will be a conflict when one rule prohibits conduct that another rule requires. In this case, the two results are in logical contradiction: conduct cannot be both prohibited and required at the same time. However, rules can also conflict in the absence of a logical conflict. This is the case, for example, when one rule prohibits conduct that another rule permits. It is logically possible to comply with both rules, namely by refraining from that conduct. Doing so, however, nullifies the right established by one of the rules (Pauwelyn 2003; Vranes 2006, p. 395). This is why it is wrong, as a general proposition of law, to limit legal conflicts to logical conflicts.[13] However, it is particularly wrong to do so in the WTO legal system, given that Articles 3.2 and 19.2 of the WTO Dispute Settlement Understanding (DSU) prohibits findings, rulings and recommendations that 'add to or diminish' either the rights or the obligations set out in the covered agreements.

The difference between these categories can be illustrated by reference to the rather unusual hierarchy rule in Article 1.2 of the DSU, which states that '[t]o the extent that there is a difference between the rules and procedures of this Understanding and the special or additional rules and procedures set forth in Appendix 2, [the latter] shall prevail'. Textually, rules and procedures are 'different' when they describe different facts (i.e. conduct), and so Article 1.2 would ordinarily fall into the second category of hierarchy rules as a rule that compares the two sets of facts described in the respective primary rules (but without requiring that these facts comprise a set–subset dyad, as for the *lex specialis* rule). In *Guatemala – Cement I*, however, the Appellate Body said that '[a] special or additional provision should only be found to *prevail* over a provision of the DSU in a situation where adherence to the one provision will lead to a violation of the other provision, that is, in the case of a *conflict* between them' (WTO Appellate Body 1998, paragraph 65).[14] In other words, it saw Article 1.2 of the DSU as a rule requiring a comparison of the legal consequences of applying a rule to one of those facts, and thereby falling into the second category of rules described above.

In summary, there are three main categories of hierarchy rule. One is based on a simple description of a fact, and states that when that fact exists a given rule applies (or does not apply). Exceptions fall into this category. A second is also based on facts, but operates by comparing the facts described by the two competing primary rules. This is where the *lex specialis* rule is to be found. Both of these categories must be distinguished from a third category of hierarchy rules, which operates by comparing the legal consequences of applying the two primary rules to the same fact. This is where conflicts rules are located.

12 Montaguti and Lugard (2000), pp. 473 and 476, say that the General Interpretive Note to Annex 1A expressly states that 'whenever compliance with one provision of an Annex 1A Agreement would lead to a violation of GATT 1994 or vice versa – in other words, when the two provisions are "mutually exclusive" – the Annex 1A Agreement prevails'. However, the General Interpretive Note does not define 'conflict'. See also Pauwelyn (2002), pp. 63 and 81.

13 Cf. High Court of Australia (1925), in which it is stated that '[s]tatutes may do more than impose duties: they may, for instance, confer rights; and one statute is inconsistent with another when it takes away a right conferred by that other even though the right be one which might be waived or abandoned without disobeying'. For the opposite view, see WTO Panel (1998), paragraph 14.28, note 649, and WTO Panel (1999), paragraph 9.92–9.95. For a critique, see Pauwelyn 2003.

14 The Appellate Body was concerned to establish a unified dispute settlement system for all measures (WTO Appellate Body 1998, paragraph 66). Note also that the reference to 'adherence' indicates that the Appellate Body might have understood the concept of legal conflict to include situations in which a right overrides an obligation (Bartels 2008).

3. Article 21.1 of the Agriculture Agreement

These different types of hierarchy rule having been set out, it is possible to address Article 21.1 of the Agriculture Agreement, and in particular what it means for the SCM Agreement to be 'subject to' the provisions of the Agriculture Agreement. As will be seen, the Appellate Body has adopted a variety of different approaches to this question, sometimes virtually simultaneously.

The first Appellate Body report to consider Article 21.1 was *EC – Bananas III* (WTO Appellate Body 1997b). The question was whether the prohibition on quantitative restrictions on goods in Article XIII of the GATT 1994 was 'subject to' Article 4.1 of the Agriculture Agreement. The Appellate Body said (WTO Appellate Body 1997b, paragraph 155):

> [T]he provisions of the GATT 1994 … apply to market access commitments concerning agricultural products, except to the extent that the Agreement on Agriculture contains specific provisions dealing specifically with the same matter.

The Appellate Body continued (*ibid*. paragraph 157):

> [W]e do not see anything in Article 4.1 to suggest that market access concessions and commitments made as a result of the Uruguay Round negotiations on agriculture can be inconsistent with the provisions of Article XIII of the GATT 1994. There is nothing in Articles 4.1 or 4.2, or in any other article of the Agreement on Agriculture, that deals specifically with the allocation of tariff quotas on agricultural products. If the negotiators had intended to permit Members to act inconsistently with Article XIII of the GATT 1994, they would have said so explicitly.

The Appellate Body here seemed to adopt several different hierarchy rules. In the first of these quoted paragraphs, and in the second sentence of the second, it seemed to adopt a hierarchy rule falling into the second category identified above. That is to say, it saw Article 21.1 as a *lex specialis* test involving 'institutional facts', namely rules governing tariff quotas on agricultural products,[15] the implication being that, if those rules are more detailed in the Agriculture Agreement than equivalent rules in the GATT 1994, they will be considered more 'specific' and will prevail over those other rules. (The reason for saying 'seemed' is that it is also possible that such rules would conflict with each other, which would involve a hierarchy rule in the third category identified above. It was unnecessary to consider this possibility.)

In contrast, the first and third sentences of the second quoted paragraph indicate a conception of Article 21.1 of the Agriculture Agreement as a hierarchy rule falling into the first category identified above. It stated that Article 21.1 requires an indication in the Agriculture Agreement that a prohibition in another agreement would be disabled for a certain type of measure, in other words, an exception. The Appellate Body elaborated with two examples.

The first of these examples was Article 5 of the Agriculture Agreement. The Appellate Body said (WTO Appellate Body 1997b, paragraph 157) that:

> Article 5 of the Agreement on Agriculture allows Members to impose special safeguards measures that would otherwise be inconsistent with Article XIX of the GATT 1994 and with the Agreement on Safeguards.[16]

15 On this type of 'institutional fact', see *supra* at note 13.

16 In fact, Article 5 of the Agriculture Agreement does not say anything about measures that would be inconsistent with Article XIX of the GATT 1994 or the Safeguards Agreement. Article 5.8 is the only part of Article 5 that refers to Article XIX of the GATT 1994 and the Safeguards Agreement, and this paragraph does not say whether or not a special safeguard measure would be inconsistent with Article XIX of the GATT 1994 or the Safeguards Agreement. It states, rather, that in respect of certain special safeguard measures WTO members will not exercise their rights to suspend concessions in response. The Appellate Body's description suits Article 5.1 better, which states that special safeguard measures may be taken 'notwithstanding' the obligation in Article II:1(b) of the GATT 1994 (but not the other provisions cited by the Appellate Body).

The second example was Article 13 of the Agriculture Agreement, which disables dispute settlement actions based on Article XVI of the GATT 1994 or Part III of the SCM Agreement (but not Article XIII of the GATT 1994) in respect of certain measures during the implementation period.[17]

In summary, in *EC – Bananas III* the Appellate Body seems to have understood Article 21.1 of the Agriculture Agreement in terms of two different types of hierarchy rule. First, Article 21.1 could be seen as a *lex specialis* rule triggered by more 'specific' (i.e. detailed) rules on the allocation of agricultural quotas in the Agriculture Agreement. Second, Article 21.1 could be seen as reinforcing any provision in the Agriculture Agreement that disables rules in another agreement in respect of certain measures.

In *Chile – Price Band System* (2002), the Appellate Body adopted another type of hierarchy rule. The question in this case was whether, for the purposes of determining the order of analysis, the first sentence of Article II:1(b) of the GATT was 'subject to' Article 4.2 of the Agriculture Agreement (WTO Appellate Body 2002a).[18] The Appellate Body said (WTO Appellate Body 2002a, paragraph 187):

> Article 4.2 prevents WTO Members from *circumventing* their commitments on 'ordinary customs duties' by prohibiting them from 'maintaining, reverting to, or resorting to' measures other than 'ordinary customs duties'. The first sentence of Article II:1(b) of the GATT 1994 *also* deals with 'ordinary customs duties', by requiring Members *not* to impose 'ordinary customs duties' in excess of those recorded in their Schedules. Thus, the obligations in Article 4.2 of the *Agreement on Agriculture* and those in the first sentence of Article II:1(b) of the GATT both deal with 'ordinary customs duties' and market access for imported products. As we see it, the difference between the two provisions is that Article 4.2 of the *Agreement on Agriculture* deals more specifically with preventing the circumvention of tariff commitments on *agricultural products* than does the first sentence of Article II:1(b) of the GATT 1994.[19]

Here the Appellate Body decided that Article 4.2 was more specific than the equivalent GATT 1994 provisions[20] because it concerns agricultural products, whereas the GATT concerns *all* products, including agricultural products. This is a very simple version of the *lex specialis* principle in which the 'brute facts' in the Agriculture Agreement are a subset of the 'brute facts' in the SCM Agreement.[21] It would follow that, on this basis, the Agriculture Agreement will always be more 'specific' than the other WTO agreements.

Probably for this reason, this approach has not been followed in subsequent Appellate Body jurisprudence. In *US – Upland Cotton*, the Appellate Body endorsed the WTO Panel's statement that Article 21.1 would apply in the following three situations:

> [W]here … an explicit carve-out or exemption from the disciplines in Article 3.1(b) of the *SCM Agreement* existed in the *text* of the *Agreement on Agriculture*. … [W]here it would be impossible for a Member to comply with its domestic support obligations under the *Agreement on Agriculture* and the Article 3.1(b) prohibition simultaneously. … [W]here there is an explicit authorization in the text of the *Agreement on Agriculture* that would authorize a measure that, in the absence of such an express authorization, would be prohibited by Article 3.1(b) of the *SCM Agreement*.
>
> (WTO Panel 2005, as modified by Appellate Body 2005a, paragraph 7.1038)

17 The rights to bring actions based on these provisions are contained in Article XXIII of the GATT 1994 and in the DSU. The Appellate Body was technically inaccurate when it said that Article 13 provides that 'Members may not bring dispute settlement actions *under* either Article XVI of the GATT 1994 or Part III of the [SCM Agreement]' (emphasis added).

18 At stake was the order of analysis between the two agreements.

19 This passage was quoted and its result followed in WTO Panel (2015), paragraph 7.19–7.20.

20 In fact, Article 4.2 of the Agriculture Agreement does not concern ordinary customs duties but rather other measures that, by definition, are precisely *not* ordinary customs duties, because they are required by this provision to be converted into ordinary customs duties. The equivalent rules in the GATT 1994 would probably be the second sentence of Article II:1(b), which governs 'all other duties and charges', Article XI:1, which governs quantitative restrictions, and Article III, which establishes an obligation not to discriminate against imported products.

21 See *supra* at note 13.

The first and third of these situations are the same as one of the situations mentioned in *EC – Bananas III*, namely where a provision in the Agriculture Agreement authorises a measure that would be prohibited in another agreement (i.e. an exception). The second involves hierarchy rules of the third category based on logical contradiction and legal conflict (i.e. respecting rights as well as obligations). But then, interestingly, the Appellate Body added that '[t]here could be … situations other than those identified by the Panel where Article 21.1 of the Agreement on Agriculture may be applicable' (WTO Appellate Body 2005a, paragraph 532). It elaborated as follows (WTO Appellate Body 2005a, paragraph 541):

> It may well be that a measure that is an import substitution subsidy could fall within the second sentence of paragraph 7 [of Annex 3 of the Agriculture Agreement] as '[m]easures directed at agricultural processors [that] shall be included [in the AMS calculation]'. There is nothing, however, in the text of paragraph 7 that suggests that such measures, when they are import substitution subsidies, are exempt from the prohibition in Article 3.1(b) of the SCM Agreement.

How is one to interpret this passage? On the one hand, the Appellate Body might simply have been describing the types of hierarchy rules that have already been discussed, and this explains the Appellate Body's approach to Article 6.3 of the Agriculture Agreement (WTO Appellate Body 2005a, paragraphs 543–5). However, another intriguing possibility emerges from its treatment of the USA's argument concerning paragraph 7 of Annex 3 of the Agriculture Agreement. The USA had argued that this provision would have no meaning if it did not establish a right to adopt import substitution subsidies (WTO Appellate Body 2005a, paragraph 542). The Appellate Body disagreed that this was the case, but, in doing so, it appeared to agree with the assumption that Article 21.1 would be triggered by a provision in the Agriculture Agreement that would otherwise have no meaning (WTO Appellate Body 2005a, paragraph 542). Such a rule would fall into the third category of hierarchy rules mentioned above but, importantly, without requiring a determination that a given fact is expressly permitted under one of the primary rules: it is sufficient if it is not prohibited.

The last case to consider Article 21.1 of the Agriculture Agreement is *EC – Sugar Subsidies* (2005), decided a month after *US – Upland Cotton* (2005). The Appellate Body said (WTO Appellate Body 2005b, paragraph 221):

> Members explicitly recognized that there may be conflicts between the *Agreement on Agriculture* and the GATT 1994, and explicitly provided, through Article 21, that the *Agreement on Agriculture* would prevail to the extent of such conflicts. Similarly, the *General interpretative note to Annex 1A* to the *WTO Agreement* states that '[i]n the event of conflict between a provision of the [GATT 1994] and a provision of another agreement in Annex 1A ..., the provision of the other agreement shall prevail to the extent of the conflict.' The *Agreement on Agriculture* is contained in Annex 1A to the *WTO Agreement*.

The analogy offered here with the conflicts rule in the General Interpretive Note indicates that Article 21.1 of the Agriculture Agreement requires a determination of the legality of a subsidy under both the Agriculture Agreement and under the GATT 1994, and that it is only when these outcomes are in 'conflict' that Article 21.1 will apply in favour of the relevant provision of the Agriculture Agreement.

3.1 Summary of interpretations of Article 21.1

The Appellate Body has offered several different interpretations of Article 21.1 of the Agriculture Agreement. It has seen Article 21.1 as a rule in the first category of hierarchy rules mentioned above, and it has done so in two ways. The Appellate Body has said that Article 21.1 is a rule triggered by a provision in the Agriculture Agreement that expressly disables a contrary provision in one of the competing agreements, such as Articles 5[22] and 13 of the Agriculture Agreement (*EC – Bananas III*; *US – Upland*

22 However, as noted *supra* at note 24, this would be Article 5.1 of the Agriculture Agreement, not Article 5.8, to which (by implication) the Appellate Body was referring.

Cotton); but, significantly, it has also seen Article 21.1 as triggered by a provision in the Agriculture Agreement that would otherwise be rendered inutile by a rule in a competing agreement (*US – Upland Cotton*).

The Appellate Body has also seen Article 21.1 as a hierarchy rule falling into the second category, which is to say one that requires a comparison between the facts described in the competing primary rules. It has also done this in two main ways, depending on the facts that it has considered relevant. In this context, it will be recalled that 'facts' for this purpose can be of any type; the only condition is that they are described by a primary rule.

Thus, the Appellate Body has seen Article 21.1 as a *lex specialis* rule favouring the Agriculture Agreement because this agreement contains rules concerning agricultural products, whereas the GATT 1994 contains rules concerning all products (*Chile – Price Band System*). On the other hand, the Appellate Body has seen Article 21.1 as a *lex specialis* rule favouring the Agriculture Agreement because the rules in that agreement covering agricultural products are more 'specific' than the equivalent rules in the GATT 1994 covering the same products (*EC – Bananas III*). There are problems with both of these approaches. The problem with the first is that the Agriculture Agreement would always have priority over the GATT 1994, which does not seem to have been a popular conclusion. The problem with the second is that, in practice, not many rules in the Agriculture Agreement are obviously more 'specific' than an equivalent rule in the GATT 1994.[23] Article 13 of the Agriculture Agreement is a rare example of a rule that could be seen in this way.

Finally, the Appellate Body has seen Article 21.1 as a hierarchy rule of the third kind, which is to say one that is triggered by a conflict between the Agriculture Agreement and another relevant agreement (*US – Upland Cotton*; *EC – Sugar Subsidies)*. In principle, this is unproblematic, but for the practical difficulty that the Agriculture Agreement does not contain many express rights that conflict with the other agreements, once one discounts exceptions, which are more properly seen as rules falling into the first category of hierarchy rules.

4. Agricultural subsidies under the Agriculture Agreement and the SCM Agreement

The range of interpretations given to Article 21.1 of the Agriculture Agreement makes it somewhat difficult, in theory, to determine when that agreement will prevail over the SCM Agreement. Nonetheless, it is possible to draw some conclusions based on these different interpretations.

4.1 Import substitution subsidies

In *US – Upland Cotton*, the Appellate Body decided that the Agriculture Agreement does not override the prohibition in the SCM Agreement on import substitution subsidies: the Agriculture Agreement contained no provision establishing a right to adopt such measures or that would have been rendered inutile by the SCM Agreement.

4.2 Export subsidies

In relation to export subsidies, the key provision is Article 8 of the Agriculture Agreement, which states that WTO members agree 'not to provide export subsidies otherwise than in conformity with [the Agriculture Agreement]'.[24] Some authors have said that this amounts to an 'explicit authorization' of conforming agricultural export subsidies (Coppens 2014, p. 328) or that 'it is patent that the Uruguay Round Agreement on Agriculture (URAA) allows

23 Again, the Appellate Body's own example was not convincing, as discussed *supra* at note 24.

24 Article 3.3 of the Agriculture Agreement also prohibits unscheduled agricultural export subsidies.

Members to use export subsidies under precisely defined conditions' (Chambovey 2002, pp. 305 and 347). This goes too far. There is nothing explicit or patent about Article 8. However, there are reasons why Article 8 might nonetheless prevail over the prohibition on export subsidies in the SCM Agreement.

It could, namely, be argued that Article 8 would be rendered inutile if it did not authorise subsidies that are in conformity with the Agriculture Agreement (Steinberg and Josling 2003, p. 377. Unlike the situation in relation to import substitution subsidies, the SCM Agreement prohibits export subsidies regardless of whether or not they conform to the Agriculture Agreement. As a result, it can be said that Article 8 would have no meaning if it did not immunise export subsidies from this prohibition. If so, then on the interpretation of Article 21.1 of the Agriculture Agreement implicitly adopted by the Appellate Body in *US – Upland Cotton*, export subsidies that conform to the Agriculture Agreement must be permitted.

Such a reading is also supported by the 2015 WTO Nairobi Ministerial Decision, which, by requiring the elimination of some agricultural export subsidies and expressly permitting the continuation of certain others, implies that such subsidies are not already prohibited (WTO Ministerial Conference 2015).[25] Moreover, while, as noted above,[26] this decision does not fall within the usual framework of WTO decision-making, it may still have a bearing on the interpretation of Article 8 of the Agriculture Agreement as a 'subsequent agreement' or 'subsequent practice' concerning that provision within the meaning of Article 31(3)(a) or (b), respectively, of the Vienna Convention on the Law of Treaties.[27]

Concerning the first option, the Appellate Body has previously considered a decision of a WTO Ministerial Conference and a decision of the Committee on Technical Barriers to Trade to qualify as a 'subsequent agreement' regarding the interpretation of WTO law. However, in the same context, the Appellate Body also stated that such an agreement must 'bear … specifically' on the provision being interpreted; a vague reference to whether a type of measure is permitted or not is not sufficient (WTO Appellate Body 2015, paragraph 5.103).[28] Given the absence of any reference in this decision on export competition to Article 8 of the Agriculture Agreement, it might be difficult to consider it a 'subsequent agreement' bearing specifically on the interpretation of that provision.

This leads one to consider the second option, namely that the decision might constitute 'subsequent practice' regarding the interpretation of a treaty provision. While the interpretive effects of 'subsequent agreements' and 'subsequent practice' are essentially the same, it would appear that they differ formally insofar as a subsequent practice does not require an express reference to the provision being interpreted. In *US – Gambling*, the Appellate Body said that '(i) there must be a common, consistent, discernible pattern of acts or pronouncements; and (ii) those acts or pronouncements must *imply* agreement on the interpretation of the relevant provision' (WTO Appellate Body 2005c, paragraph 192; emphasis added). Subsequent practice may also constitute an understanding that a certain provision does *not* relate to certain facts. For example, in its advisory opinion on *Nuclear Weapons* the International Court of Justice (1996, paragraphs 55–6) said that the parties to relevant international instruments had, in their practice, shown their understanding that the term 'poison or poisoned weapons' did not include nuclear weapons (Dörr and Schmalenbach 2012, p. 557; International Law Commission 2014, paragraph 12). It is therefore possible to consider the Nairobi Decision on Export Competition, along with the series of previous instruments on the issue (WTO 2001, paragraph 13; WTO General Council 2004, Annex A, paragraph 17; WTO 2005,

25 *Supra* note 7.

26 *Supra* at text to notes 9-11.

27 For examples of 'subsequent agreements' within the meaning of Article 31(3)(a) of the Vienna Convention on the Law of Treaties, see WTO Appellate Body (2002b), paragraph 268 (a WTO Ministerial Conference decision) and WTO Appellate Body, (2012), paragraph 372 (a decision of the Committee on Technical Barriers to Trade).

28 The wording 'bearing specifically' originates in WTO Appellate Body (2008), paragraph 390. This condition may be stricter than the norm (see, e.g., International Law Commission (2014), paragraphs 4–19.

paragraph 6; WTO 2013, paragraph 2),[29] as subsequent practice evincing the common assumption – and therefore interpretation – of all WTO members that Article 8 of the Agriculture Agreement permits, for the time being, scheduled agricultural export subsidies (at the same time, of course, as this decision purports to require the elimination of at least some of these subsidies). Consequently, as a result of Article 21.1 of the Agriculture Agreement, Article 8 prevails over the prohibition on such subsidies in Article 3 of the SCM Agreement.

4.3 Actionable subsidies

As mentioned, the SCM Agreement prohibits WTO members from granting subsidies that cause 'adverse effects' to the interests of WTO members, and (together with Article VI of the GATT 1994) permits WTO members to impose countervailing duties on subsidies that cause 'injury' to their domestic industries. The Agriculture Agreement does not establish any explicit right to adopt subsidies causing such 'adverse effects' or 'injury', but does it contain any provisions concerning such subsidies that would be rendered inutile by the SCM Agreement? Again, the most likely candidate is Article 8 of the Agriculture Agreement. The question then is whether all of the subsidies described in this provision will necessarily cause adverse 'effects' to the interests of other WTO members or 'injury' to their domestic producers. That cannot be said with certainty; as a result, Article 21.1 will not operate to give priority to Article 8 over these competing provisions in the SCM Agreement.[30]

5. Conclusion

Article 21.1 of the Agriculture Agreement, which has governed the relationship between the Agriculture Agreement and the SCM Agreement since the expiry of the 'peace clause' at the end of 2003, has been given numerous different meanings by the Appellate Body.

Some of these meanings appear to have melted away, at least for the Appellate Body, for example the idea, suggested in *Chile – Price Band System*, that the Agriculture Agreement is more 'specific' than the GATT 1994 because it covers agricultural products rather than all products. In contrast, Article 21.1 can be understood to apply when the Agriculture Agreement explicitly displaces a contrary rule in a competing agreement or establishes an express right to adopt a measure. Beyond this, significantly, *US – Upland Cotton* indicates that Article 21.1 also applies when otherwise a provision of the Agriculture Agreement would be rendered 'inutile' by a contrary provision of a relevant WTO agreement. This reading is also confirmed by subsequent practice, notably the 2015 Nairobi Ministerial Decision on Export Competition, even as this decision purports to require the elimination of at least some agricultural export subsidies.

On this reading, one can arrive at the conclusion that agricultural export subsidies that, in accordance with Article 8 of the Agriculture Agreement, conform to the commitments of WTO members in the Agriculture Agreement remain exempt from the prohibition set out in Article 3.1(a) of the SCM Agreement. In contrast, as already decided, agricultural import substitution subsidies remain prohibited under Article 3.1(b) of the SCM Agreement. Beyond this, agricultural subsidies causing adverse effects to the interests of WTO members remain actionable under Article 5 of the SCM Agreement, and agricultural subsidies causing injury to the domestic industries of WTO members may be subject to the imposition of countervailing duties by those members under Part V of that agreement, in conjunction with Article VI of the GATT 1994.

29 Although WTO (2013), paragraph 13, states that 'the terms of this declaration do not affect the rights and obligations of Members under the covered agreements nor shall they be used to interpret those rights and obligations'.
30 For the same result, see Steinberg and Josling (2003), p. 385 and Coppens (2014), p. 329.

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