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Revisiting the Role of Anti-Circumvention Provisions under the WTO Agreement: Lessons for East Asia

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Abstract

"Circumvention" is a growing challenge to the effectiveness of international law as the incentive to circumvent laws grows as the "legalization" of international society continues. This analysis on the anti-circumvention provisions within the WTO Agreement reveals a lack of clarity and coherence in the existing disciplines. Ongoing negotiations to modify trade rules also do not fully address these concerns. Therefore, this article proposes that there is a need for a comprehensive approach consisting of amendment, coherent interpretation, use of general principles, and functional reallocation for the WTO Agreement to address circumvention more effectively. In particular, to establish an efficient legal framework for economic integration in East Asia, this article notes that the priority in improving and clarifying anti-circumvention disciplines is to strike multidimensional balances between legitimate interests, including those between sovereign liberty and the effectiveness of international agreements, and those between the predictability of obligations and the effectiveness thereof.

Keywords

anti-circumvention – WTO – economic integration in East Asia – anti-dumping – agricultural export subsidies – state trading enterprises (STEs) – Doha Round negotiations – tax evasion

1 Introduction

For thousands of years, East Asian countries have learned enormous lessons from Confucian teachings. Confucius said, "If you govern the people by law and punishment, they will try to avoid both without shame."[1] As this maxim suggests, people tend not to violate laws out of fear of severe punishment. Rather, they try to avoid laws by manipulating measures to make their actions beyond the scope of the rules, thereby reducing the applicability of the disciplines and undermining their fundamental purpose. Such acts of "circumvention" threaten the effectiveness of law.[2]

Circumvention of the law is hardly unusual in either national or international society. For hundreds of years, efforts have been made to establish the international rule of law by implementing wider, stricter substantive norms and more detailed, stronger procedural norms (e.g., dispute settlement and enforcement mechanisms). Thus, there is already a vast body of research on how to ensure the effectiveness of international agreements by elaborating rules, preventing violation of obligations, enforcing obligations, and supervising non-compliant parties.[3] However, there is another challenge to the effectiveness of law as substantive and procedural disciplines are enhanced.

Naturally, the incentive to circumvent laws grows as the "legalization" of international society continues. As a matter of law, how and to what extent we should prevent circumvention is not obvious. It is true that there are legitimate reasons to counteract the circumvention of disciplines. Using a variety of legal rhetoric too is not necessarily detrimental, but rather necessary to ensure the effectiveness of law. On the other hand, too broad a prohibition of circumvention will lead to overregulation that hinders the predictability and legitimate liberty of legal subjects. This makes circumvention difficult to define in a legal/illegal dichotomy; instead, it might fall in a legal vacuum, somewhere between legal and illegal action. How should we define circumvention in the first place? Do we need explicit provisions dedicated to addressing circumvention? Alternatively, can general principles of treaty interpretation, such as good faith, sufficiently address circumvention? So far, there has been little attention paid to the problem of circumvention, much less than it deserves as an emerging challenge to the effectiveness of international law.

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[1] *Lunyu,* Chapter 2, Verse 3.

[2] *See* Tomohiko Kobayashi, Pinning Down the Circling Concept of Circumvention: A Comprehensive Approach to Anti-Circumvention Disciplines under the WTO Agreement on Agriculture, 54 *Japanese Yearbook of International Law* 365–385 (2011).

[3] *See, e.g.*, Harold Hongju Koh, Why Do Nations Obey International Law?, 106(8) *Yale Law Journal* 2599 ff. (1997); Abram Chayes & Antonia Handler Chayes, On Compliance, 47(2) *International Organization* 175 (1993).

As a step toward across-the-board studies, this article focuses on an emerging legal issue in the field of international trade law, namely, the effectiveness of anti-circumvention provisions to address emerging threats to the regulations over agricultural export subsidies. For the purpose of this analysis, the provisions in the World Trade Organization (WTO) Agreement are examined. However, the ultimate objective of this research is to extend the lessons learned from the WTO to regional trade agreements in East Asia. Due to the deadlock of Doha Development Agenda (Doha Round) negotiations, the need for further economic integration is increasing. In the context of economic integration in East Asia, a number of legal frameworks are proposed for political as well as academic debates, such as FTAs among China, Japan and Korea, and the Regional Comprehensive Economic Partnership (RCEP) Agreement. As an area in which people share common philosophies and cultures, how can the region address the threat of circumvention in order to ensure effective regional integration?

Thus, the body of this article has two sections. Section II evaluates the role and limits of current disciplines on anti-circumvention under the WTO Agreement. Section III then takes a comprehensive approach to cure the deficiencies to ensure the proper functioning of anti-circumvention disciplines within the WTO, by extending the analysis into general international law, along with remarks on the implications for East Asia. The final section follows with a summary and conclusions.

To state the conclusion first, this analysis reveals a lack of clarity and coherence in the existing anti-circumvention disciplines. Therefore, this article proposes that there is a need for a comprehensive approach consisting of amendment, coherent interpretation, use of general principles, and functional reallocation – in a manner mutually complementary – for the WTO Agreement to address circumvention more effectively. In particular, to establish an efficient legal framework for economic integration in East Asia, this article notes that the priority in improving and clarifying anti-circumvention disciplines is to strike multi-dimensional balances between legitimate interests, including those between sovereign liberty and the effectiveness of international agreements, and those between the predictability of obligations and the effectiveness thereof.

2 Role and Limits of Anti-Circumvention Provisions in the WTO

2.1 Role of Anti-Circumvention Provisions

2.1.1 Overview of the Relevant Provisions

Addressing the circumvention of treaty obligations is not a new issue. For example, Article 14.25 of the Tokyo Round Agreement on Technical Barriers to Trade (Standard Code) of 1979 sets forth as follows:

> The dispute settlement procedures set out above can be invoked in cases where a Party considers that obligations under this Agreement are being *circumvented* by

the drafting of requirements in terms of processes and production methods rather than in terms of characteristics of products. [Emphasis added.]

Within the WTO Agreement, there are several explicit provisions to prevent member states from circumventing treaty obligations: Article 10.1 of the Agreement on Agriculture (AoA),[4] along with Articles IX:9 and XIII:5 of the Agreement on Government Procurement (GPA), and Paragraphs 6 and 8 of the Understanding on Commitments in Financial Services adopted on April 15, 1994 (1994 Financial Services Understanding).

First, the first paragraph of Article 10 of the AoA reads as follows:

> Export subsidies not listed in paragraph 1 of Article 9 shall not be applied in a manner which *results in, or which threatens to lead to, circumvention* of export subsidy commitments; nor shall non-commercial transactions be used to circumvent such commitments. [Emphasis added.]

Secondly, Article IX:9 of the GPA reads as follows:

> In the case of selective tendering procedures, entities maintaining permanent lists of qualified suppliers shall publish annually in one of the publications listed in Appendix III a notice of the following: [Sub-articles (a) to (e) omitted.]
>
> However, when the duration of the qualification system is three years or less, and if the duration of the system is made clear in the notice and it is also made clear that further notices will not be published, it shall be sufficient to publish the notice once only, at the beginning of the system. Such a system shall not be used in a manner which *circumvents* the provisions of this Agreement. [Emphasis added.]

Thirdly, Paragraph 6 of the Understanding on Commitments in Financial Services reads as follows:

> A Member may impose terms, conditions and procedures for authorization of the establishment and expansion of a commercial presence in so far as they do not *circumvent* the Member's obligation under paragraph 5 and they are consistent with the other obligations of the Agreement. [Emphasis added.]

Among these provisions, Article 10 of the AoA is the only provision in a multilateral agreement under the WTO.[5] In addition, there have been disputes over the role of this

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[4] Agreement on Agriculture, Apr. 15, 1994, 1867 U.N.T.S. 410.

[5] The GPA is a plurilateral agreement included in Annex 4 of the WTO Agreement, which is part of the WTO Agreement only for the member states that have accepted it, and is binding only on those states. Similarly, the Understanding on Commitments in Financial Services is not binding on every WTO member state, but only on those that have accepted them. See Council for Trade in Services, *Financial Services: Background Note by the Secretariat*, S/C/W/312 (Feb. 3, 2010), para. 35. For other contexts within the WTO Agreement, see Hagen Rooke, *L'autoprotection et le droit de l'OMC*, 217–271 (Editions Universitaires Europ.ennes, Saarbrücken, 2011).

Article, and there has long been negotiations to amend this provision, as part of the Doha Round negotiations in order to enhance its effectiveness.

Why does the WTO AoA have anti-circumvention provisions only for agricultural export subsidies when it is a matter common to all provisions? One reason may be that the provisions were the by-products of a last-minute deal after 1991. Let us briefly examine the drafting history of Article 10. To begin with, international legal regulations on trade in agricultural products are relatively new. Although global disciplines on international trade have evolved steadily since 1947 to reduce the discretionary powers of states parties to hamper international trade, it took almost half a century for the multilateral trade regime to secure the application of basic disciplines in the agricultural sector as a result of the Uruguay Round negotiations (1986–1993).

As mentioned above in the introduction, the basic concern in establishing global disciplines on agricultural export subsidies was the risk of an endless cycle of discipline and circumvention. The Secretariat of the WTO affirmed this issue in a note in 1988:

> Bearing in mind the need to give primacy to tackling trade distorting subsidy practices and to build on existing disciplines the Group needs to *avoid being side-tracked* by other aspects. This will ensure that *existing loopholes are closed and that no new loopholes emerge*. . . . For example, the prohibition of direct export subsidies on non-primary products can be *circumvented* by other practices having an equivalent effect, e.g. the subsidization of a primary product element.[6] [Emphases added.]

However, disagreement remained until mid-1991 among Uruguay Round negotiators regarding the scope of the reduction commitments and the definition of export subsidies.[7] Thus, disciplines for anti-circumvention were not on the agenda of negotiation until then.[8] In November 1991, the negotiators agreed to include general anti-circumvention provisions as part of export competition disciplines within the AoA.[9] While the primary concern was originally limited to food aid,[10] export credits

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[6] GATT Secretariat, *Negotiating Group on Subsidies and Countervailing Measures*, part I, MTN.GNG/NG10/W/9/Rev.3 (May 26, 1988).

[7] Chair's draft paper in August 1991 did not refer to the issue of circumvention. GATT Secretariat, *Export Competition: Export Subsidies to Be Subject to the Terms of the Final Agreement*, MTN.GNG/AG/W/1/Add. 10 (Aug. 2, 1991) at 1.

[8] GATT Secretariat, *Communication from the Chairman of the Trade Negotiations Committee*, MTN.TNC/W/85 (June 24, 1991), para. 52.

[9] *Progress of Work in Negotiating Groups: Stock-taking*, MTN.TNC/W/89/Add. 1 (Nov. 7, 1991) at 4.

[10] GATT Secretariat, *Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations: Revision*, MTN.TNC/W/35/Rev.1 (Dec. 3, 1990), Appendix B, para. 21; GATT Secretariat,

were added to the agenda after the negotiations failed to agree on whether export credit guarantees and export insurances fall within the definition of export subsidies.[11] In reality, it was an "agreement not to agree" with regard to the scope of Article 10.2 on export credit guarantees.[12] Finally, the prototype of the current Article 10.1 appeared in the so-called Dunkel Draft issued on December 20, 1991[13] without substantive modification in the later stage.

As this history shows, anti-circumvention provisions were not a product of careful drafting and the term "circumvention" was not clearly defined within the AoA. This is also the case of other provisions such as Article 5 of the ATC.[14]

2.1.2 Expected Role within the WTO

Even if the drafting was less than thorough during the course of the Uruguay Round negotiations, the meaning of anti-circumvention provisions is rather straightforward. For example, Article 10.1 of the AoA stipulates that WTO members must refrain from circumventing their export subsidy commitments by using export subsidies other than those listed in Article 9.1. The main objective of the export subsidy commitments is embodied in Article 8 which requires members to provide export subsidies that do not exceed their commitments under Articles 3 and 9. With regard to unscheduled agricultural products, Article 3.3 prohibits members from providing any export subsidies listed in Article 9.1 in excess of its commitments. Concerning scheduled products, Article 9 requires members to reduce certain types of export subsidies that are listed in Article 9.1. In other words, the AoA allows member states to provide export subsidies in line with the conditions set forth in Articles 3, 8, and 9.

In accordance with the dictionary definition of "circumvention," which is a synonym for evasion,[15] the Appellate Body defined circumvention in this Article as an attempt to "find a way around" or evade something.[16] Thus, the main purpose of Article 10 is to prevent abusive or the covert use of export subsidies other than those listed in

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Programme of Work: Proposal by the Chairman at Official Level, MTN.TNC/W/69 (Feb. 26, 1991), para. 5(c).

[11] WTO Panel Report, *United States – Subsidies on Upland Cotton*, para. 7.938, WT/DS267/R (Sept. 8, 2004) (adopted Apr. 20, 2005).

[12] Fiona Smith, *Agriculture and the WTO*, 155 (Edward Elgar Publishing, Cheltenham, 2009).

[13] GATT Secretariat, *Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations*, MTN.TNC/W/FA (Dec. 20, 1991) at L.9.

[14] Marcelo Raffaelli & Tripti Jenkins, *The Drafting History of the Agreement on Textiles and Clothing*, at 71 & 101–102 (International Textiles and Clothing Bureau, Grand Saconnex, 1995).

[15] *Oxford English Dictionary* (2d ed. 1989).

[16] Appellate Body Report, *United States – Tax Treatment for "Foreign Sales Corporations"*, WT/DS108/AB/R (Feb. 24, 2000), para. 148 [hereinafter Appellate Body Report, *US – FSC*].

Article 9.1 in order to ensure the effectiveness of the export subsidy commitments in the AoA. In this sense, the prohibition of circumvention under Article 10 does not prohibit violation of Article 9. Rather, it prohibits actions that do not literally violate Article 9 but avoid its application and thereby jeopardize its effectiveness. Since Article 10 covers export subsidies "not listed in paragraph 1 of Article 9," the scope of Article 10 depends on the determination of whether an export subsidy in question is on the list and within the scope of Article 9.1. By its very nature, Article 10 is "residual in character to Article 9.1."[17]

To illustrate the legal nature of Article 10 of the AoA, let us compare it with Article 4.2 of the AoA, which reads:

> Members shall not maintain, resort to, or revert to any measures of the kind which have been required to be converted into ordinary customs duties, except as otherwise provided for in Article 5 and Annex 5. [Footnote omitted.]

According to the Appellate Body in Chile – Price Band:

> 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". . . . [T]he difference between the two provisions [see below] 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.[18] [Underline added; italics in the original.]

Thus, while there is a difference in the wording, Articles 4.2 and 10 have the common purpose of combating circumvention by states, as a second-order obligation that prevents circumvention inclusively to ensure the effectiveness of first-order obligations. Article 10 does not justify anticipatory or precautionary action to preempt potential circumvention,[19] but there should be an inherent limitation in its scope somewhere between minimum protection and excessive preemptive actions.

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[17] Appellate Body Report, *Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products: Recourse to Article 21.5 of the DSU by New Zealand and the United States*, WT/DS103/AB/RW (Dec. 18, 2001) (adopted Jan. 17, 2003), para.121.

[18] Appellate Body Report, *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products*, WT/DS207/AB/R (Sept. 23, 2002) (adopted Oct. 23, 2002), para. 187. *See also* Appellate Body Report, Canada – Measures Relating to Exports of Wheat and Treatment of Imported Grain, WT/DS276/AB/R (Apr. 6, 2004) (adopted Sept. 27, 2004), para. 98 [hereinafter Appellate Body Report, *Canada – Wheat*]; Isabelle Van Damme, *Treaty Interpretation by the WTO Appellate Body*, 247 (Oxford University Press, Oxford, 2009).

[19] Appellate Body Report, *United States – Subsidies on Upland Cotton*, WT/DS267/AB/R (Sept. 8, 2004) (adopted Mar. 21, 2005), para. 707 [hereinafter Appellate Body Report, *US – Upland Cotton*].

2.2 Limits of Current Rules to Address Emerging Threats

However, there remains serious ambiguity with regard to the effectiveness of anti-circumvention provisions under the WTO Agreement. First of all, not all agreements within the framework of the WTO have anti-circumvention provisions, while risk of circumvention is common to almost all treaty obligations. For example, anti-circumvention provisions included in the Tokyo Round Standard Code (Section II.1.(1)) are not explicitly incorporated in the WTO Agreement on Technical Barriers to Trade (TBT Agreement) or the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU). Even if there are specific provisions, there are still serious uncertainties about their effectiveness.

Among the various provisions referred to above, let us focus on Article 10 of the AoA that is the most frequent subject of discussions and controversies. Following the general principle set forth in Article 10.1 of the AoA, Articles 10.2 and 10.4 indicate several types of activities as being within the coverage of the provision. Article 10.2 refers to export credits, export credit guarantees, or insurance programs (collectively referred to as "export financing support"). Article 10.4 refers to international food aid ("food aid"). Furthermore, Article 10.3 sets forth procedural disciplines that reverse the burden of proof on complaining members to establish a prima facie case of export subsidization of an excess quantity, provided they have established the quantitative part of the claim.

The risk of circumvention of agricultural export subsidy commitments by member states is not a matter of theory but a present danger to the effectiveness of the AoA. Naturally, there are a variety of potential measures other than export financing support and food aid to which Article 10 already refers.[20] Among many candidates for the potential circumvention of export subsidy commitments, exporting state trading enterprises (STEs) pose an issue that deserves immediate attention for the following three reasons. First, STEs – quasi-state organs that conduct trading activities – are difficult to identify and are more problematic compared to the export financing support and food aid mentioned in Article 10 of the AoA.[21] Secondly, emerging developing

[20] For example, tax exemptions and brand building support have already been raised in WTO dispute settlement proceedings. Another example of measures that may have cross-border economic effects equivalent to export subsidies is the formulary profit apportionment method in the transfer-pricing scheme. Reuven Avi-Yonah, *International Tax as International Law*, 112–113 (Cambridge University Press, New York, 2007).

[21] Merlinda Ingco & Francis Ng, *Distortionary Effects of State Trading in Agriculture: Issues for the Next Round of Negotiations*, 1915 (World Bank Policy Research, Working Paper No. 1, 1998); OECD, *State Trading Enterprises in Agriculture* (2001) at 10; Steve McCorriston & Donald MacLaren, 'Reforming Trade-distorting State Trading Enterprises', in Sisira Jayasuriya (Ed.), *Trade Theory,*

countries such as China, India, and Vietnam utilize varied forms of exports through STEs, which are big and growing bigger. Traditionally, the focus has been on regulating food exporting developed countries such as Canada, the EU, and the US, but exporting STEs are becoming more prevalent across the world. Not only China,[22] but other East Asian governments have also been trying to expand exports using a variety of means including quasi-governmental support mechanisms. Last but not least, the problem of exporting STEs was one of the three specific agendas, along with export financing support and food aid, which were until very recently on the table in the negotiations to amend Article 10 of the AoA as part of the Doha Round.

How and to what extent does Article 10.1 address potential circumventions such as exporting STEs? STEs are not new to international trade, especially in the agricultural sector.[23] Article XVII of the GATT directly deals with STEs, allowing contracting parties to give STEs exclusive or special privileges but requiring those parties to ensure that STEs perform in accordance with the "general principle of nondiscrimination" (Article XVII:1(a)) and take part in trade "solely in accordance with commercial considerations" (Article XVII:1(b)).[24] However, the substance of this Article is limited to protecting the most-favored-nation clause.[25] In addition, the "commercial considerations" requirement does not require STEs to conduct trade like private actors, allowing them to exploit the exclusive or special privileges given them by the government for their economic benefit.[26] Even if Article XVII of the GATT

Analytical Models, and Development, 163 (Edward Elgar Publishing, Cheltenham, 2005); Fengxia Dong, Thomas L. Marsh & Kyle W. Stiegert, State Trading Enterprises in a Differentiated Product Environment: The Case of Global Malting Barley Markets, 88(1) *American Journal of Agricultural Economics* 90 (2006).

[22] Steve McCorriston & Donald MacLaren, The Trade and Welfare Effects of State Trading in China with Reference to COFCO, 33(4) *World Economy* 615, 621–622 (2010).

[23] William J. Davey, 'Article XVII GATT: An Overview', in Thomas Cottier & Petros C. Mavroidis (Eds.), *State Trading in the Twenty-First Century*, 17–19 (University of Michigan Press, Ann Arbor, 1998).

[24] An obligation was added in 1955 to notify the GATT (now the WTO) Secretariat of the activities of STEs that was later supplemented by the Understanding on the Interpretation of Article XVII of the General Agreement on Tariffs and Trade 1994 (1994 Understanding on Article XVII GATT). This Understanding aims at facilitating the notifications, without prejudice to the substantive disciplines prescribed in Article XVII (see the preamble of the Understanding). However, less than a fourth of the notifications that need to be submitted have been actually submitted to the WTO in recent years. See G/L/898 (Oct. 20, 2009), para. 11.

[25] *Ibid*. para. 110; *see* GATT Secretariat, *Article XVII (State Trading Enterprises): Note by the Secretariat*, MTN.GNG/NG7/W/15 (Aug. 11, 1987) at 6–7.

[26] Appellate Body Report, *Canada – Wheat*, *supra* note 18, para. 149.

provides for some regulation of STEs, it cannot properly address contemporary developments in the function and form of exporting STEs that exist in many economies. While there are other provisions constraining the behavior of STEs such as Articles II:4 and VI of the GATT and the Ad Note to Articles XI, XII, XIII, XIV, and XVIII,[27] they do not fully address these new STEs. Thus, it is primarily Article 10 of the AoA, rather than other WTO provisions, which combats circumvention of agricultural export subsidy commitments by exporting STEs.

However, it is far from clear how and to what extent Article 10 of the AoA addresses contemporary exporting STEs. Among other things, the Article's scope and criteria for discovering circumvention are unclear. According to the Appellate Body in *US – FSC*, the "threat" of circumvention can be determined to exist "if they could transfer, through tax exemptions, the very same economic resources that they were, *at that time*, prohibited from providing through other methods under [Articles 3.3 and 9.1]."[28] Nevertheless, it is unclear whether the mere fact of transferring the "same economic resources" is always sufficient to find the "likelihood" of circumvention.[29] Whether this finding is an established interpretation of general application is open to question. At the very least, it cannot fully address self-sustaining exporting STEs that have sufficient resources and privileges to maintain themselves through indirect, ambiguous government support. There is a great need for further theoretical investigation of the issues that are not addressed in Article 10, such as exporting STEs; furthermore, there is even greater need to imagine and prepare for new or subtle forms of circumvention.

It is true that WTO member states can resort to non-violation complaints against agricultural export subsidies.[30] However, partly due to the heavy burden of proof on part of the plaintiff, non-violation complaints are not regarded as an effective instrument by the WTO member states.[31]

In summary, Article 10 of the AoA provides a separate obligation preventing WTO member states from circumventing export subsidy commitments and has a distinct role in ensuring the effectiveness of export subsidy commitments that differs from Articles 3, 8, and 9. However, even a cursory analysis of the risk of circumvention of export subsidy commitments reveals that the current disciplines set forth in Article 10 of the AoA are, to say the least, insufficiently clear in scope and content to prevent

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[27] *Ibid*. para. 98.

[28] Appellate Body Report, *US – FSC*, *supra* note 16, para. 152. Emphasis in original.

[29] With regard to the "likelihood" test, see *US – Upland Cotton*, *supra* note 19.

[30] Even during the first 6 years of implementation period, agricultural export subsidies were not exempt from non-violation complaints. *See* Article 13(c) of the AoA.

[31] Dominic Coppens, *WTO Disciplines on Subsidies and Countervailing Measures: Balancing Policy Space and Legal Constraints*, at 532 (Cambridge University Press, 2014).

the circumvention of WTO obligations by states. This means that there are considerable deficiencies in anti-circumvention provisions, even when addressing threats that have already been caused by existing exporting STEs. These threats represent only some of the many potential loopholes that endanger the effectiveness of agricultural export subsidy commitments under the AoA. To take one step forward is necessary to ensure the effectiveness of the AoA, let alone the effectiveness of anti-circumvention provisions within the WTO as a whole.

3 Catching Up with a Moving Target

3.1 Reconstructing Existing Rules

3.1.1 Conventional Methods

3.1.1.1 Amending the Text

If the current treaty provisions are insufficient to address emerging threats, as shown in Section II.2 above, one direct way of solving the problem would be to amend the relevant provisions in order to enhance and clarify them.

Doha Round negotiators have been trying to do this for the last dozen years. Regarding agricultural export subsidies, the WTO Ministerial Conference agreed in 2005 that all forms of agricultural export subsidies are to be prohibited across the board by the end of 2013.[32] While the deadline has already passed, it would have reduced the role of existing Articles 8, 9 and 10 significantly if this agreement had been ratified. In parallel to this, there have been detailed examinations of textual proposals that aim at strengthening the disciplines of Article 10 of the AoA, as shown below. On a different track, there are also a number of textual proposals for establishing anti-circumvention provisions in order to prevent circumvention by state members of new obligations concerning agricultural domestic support and fisheries subsidies, which are supposed to be part of the Doha Round package.[33]

However, TBT and government procurement are outside of the coverage of the negotiations. In addition, this round of multilateral negotiations has stalled in recent

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[32] *Hong Kong Ministerial Declaration*, WT/MIN(05)/DEC (Dec. 2, 2005) (adopted Dec. 18,2005), para. 6.

[33] *See* Committee on Agriculture, *Revised Draft Modalities for Agriculture*, TN/AG/W/4/ Rev.4 (Dec. 6, 2008) at 40, 42, 43; Negotiating Group on Rules, *Further Contribution to the Discussion on the Framework for Disciplines on Fisheries Subsidies – Paper from Brazil*, TN/RL/GEN/79 (Nov. 16, 2005) at 11; Negotiating Group on Rules, *Fisheries Subsidies: Negotiating Group on Rules, Proposed New Disciplines – Proposal from the United States*, TN/RL/GEN/145 (Mar. 22, 2007) at 6; Negotiating Group on Rules, *Fisheries Subsidies: Proposed New Disciplines: Revised Proposal from the Republic of Indonesia, Revision*, TN/RL/GEN/150/Rev.2 (Oct. 9, 2007) at 13.

years.[34] Moreover, another obstacle to the Doha Round negotiations is the uncertainty regarding legal procedures that crystallize political deals into legal text and the potential difficulty in obtaining a sufficient number of acceptances from member states.[35] At the very least, entry into force of the agreed outcomes is not likely to occur in the near future. Thus, we cannot fully rely on legislative reactions to address circumvention by states.

In addition to this examination of the exogenous obstacles to the use of amendments intended to improve or clarify anti-circumvention provisions in the WTO Agreement, the endogenous limits of the scope and content of textual proposals must be considered. Needless to say, they do not prejudge the final outcome of the negotiations. However, these proposals and the discussions on them will give useful insights to the current situation and future directions.

In the negotiations on agriculture, the latest draft modalities ("Chair's draft") for agriculture were issued in December 2008.[36] With regard to export financing support, the Chair's draft proposed an amendment to Article 10.2 to clarify the definition of the activities and entities it covers. Paragraphs 1 and 2 of the amended draft Article 10.2 are broad enough to cover "any other" form of governmental export financing support provided by or on behalf of "any bank or other private financial, credit insurance or guarantee institution which acts on behalf of or at the direction of governments or their agencies." In addition, paragraph 3 specifies a 180-day maximum repayment limit and a self-financing requirement to distinguish legitimate export financing support from evasive measures.[37] However, paragraph 4 places far more moderate disciplines on export financing support granted by developing countries, including an extended time limit for repayment and a decreased threshold for self-financing.[38] This raises concerns with regard to the risk of circumvention by

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[34] *See* WTO, C*hair Reports No 'No' but Also No 'Yes' for Farm Talks Proposal*, Nov. 16, 2012, available at http://www.wto.org/english/news_e/news12_e/agng_16nov12_e.htm. (last visited, 1 Mar. 1, 2014).

[35] For details, see Tomohiko Kobayashi, WTO Kyotei wo Kaisei suru saino Kokusaihojo no Ronten [Changing the Legal Text of the WTO Agreement: Practicable Ways to Implement the Doha Round Negotiation Results], 105(3) *Kokusaiho Gaiko Zasshi* [Journal of International Law and Diplomacy] 68–92 (2006).

[36] This draft was sustained by the Chair in April 2011, without changes. Negotiating Group on Rules, *Negotiating Group on Agriculture – Report by the Chairman, H.E. Mr. David Walker, to the Trade Negotiations Committee*, TN/AG/26 (Apr. 21, 2011), para. 71.

[37] Paras. 1–2 of Annex J to the Revised Draft Modalities for Agriculture, TN/AG/W/4/Rev.4 (Dec. 8, 2008) at 66.

[38] Para. 4 of Annex J, *ibid*. at 67–68.

emerging powers, including China, India, and Vietnam, all of which are developing members.

Concerns regarding the special treatment of developing members also include exporting STEs.[39] The Chair's draft proposed establishing a new Article 10 bis that specifically deals with exporting STEs, along with amendments to Articles 10.2 and 10.4 for the enhanced regulation of export financing support and food aid. It chiefly provides that, all WTO members are to eliminate export subsidies "to or by" exporting STEs and to eliminate the use of "monopoly powers" for exporting STEs.[40] While some commentators expect this amendment to help reduce the adverse inferences caused by exporting STEs,[41] draft Article 10 bis has a serious deficiency in its scope. According to paragraph 2 thereof, the scope of draft Article 10 bis is limited to that of the 1994 Understanding of Article XVII. Using the Understanding as a definition is a significant transformation of its legal status, since it was originally adopted as a simple technical standard for notification purposes and has no prejudice toward the substantive obligations of Article XVII of the GATT.[42]

Thus, doubts exist regarding potential gaps between disciplines under Article XVII of the GATT and the new Article 10 bis which may undermine the coherent application of the relevant provisions. More importantly, the scope of the 1994 Understanding of Article XVII is clear enough that it can easily be circumvented.

Finally, the nearly decade-long Doha Round negotiations do not fully address emerging threats of circumvention by states, especially those occurring recently in a subtler and more ambiguous manner, threatening the effectiveness of the AoA.

3.1.1.2 Building Coherent Interpretation

At this juncture, the potential of interpretative techniques to clarify the definition and scope of relevant provisions will be examined. While few disputes involving anti-circumvention have been filed to the WTO dispute settlement procedures, there are a number of contexts within the WTO Agreement that deal with different types of circumvention.

As already shown in Section II.1.(1) above, there are provisions prohibiting circumvention of international obligations by states, including Article 10 of the AoA. On the other hand, there are provisions asking states to address circumvention of

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[39] Para. 4–6 of Annex K, *ibid*. at 70.

[40] Para. 3(a), especially (i) and (iv) thereof, of Annex K, *ibid*. at 69.

[41] McCorriston & MacLaren, *supra* note 21, at 625.

[42] See Davey, *supra* note 23.

national laws and measures by non-state actors (i.e., private exporters or importers),[43] such as Article 5 of the Agreement on Textiles and Clothing and Article 3.1 of the Annex on Certain Milk Products attached to the International Dairy Agreement.[44] Circumvention by states raises the problem of the effectiveness of treaty obligations placed on WTO member states as a whole, while the impact of circumvention by non-state actors mainly relates to the enforcement of domestic laws and/or measures within a state. It is not clear if there should be coherent disciplines for these two types of circumvention; however, there is room to scrutinize the relevant factors common to a variety of anti-circumvention disciplines within the WTO Agreement.[45]

Seen from this angle, there are a number of instances where circumvention is addressed through interpretation without explicit anti-circumvention provisions. This includes Article II of the GATT,[46] Article 4.2 of the AoA (see supra section II.1.(2)), Articles 2.4.2 and 5.6 of the ADA,[47] Articles 1.1, 3.1, 11.6, and 14(d) of the Agreement on Subsidies and Countervailing Measures (SCM),[48] Article II of the General

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[43] In this context, there have also been proposals in the course of the Doha Round negotiations for inserting new provisions to combat circumvention by non-state actors in antidumping and fishery subsidies areas.

[44] For this type of anti-circumvention, the origin of existing provisions comes from Tokyo Round predecessors.

[45] *See* Yanning Yu, *Circumvention and Anti-circumvention Measures*, at xv (Kluwer Law International, London, 2008); Tomohiko Kobayashi, WTO Anti-dumping Kyotei niokeru Ukai no Ichizuke [Impacts of Anti-circumvention Measures on the Effectiveness of the WTO Anti-Dumping Agreement], 59(4) *Shogaku Tokyu* [The Economic Review] 204–205 (2009).

[46] Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R (May 22, 1997) (adopted Sept. 25, 1997), para. 190 [hereinafter Appellate Body Report, *EC – Bananas*].

[47] Respectively, Appellate Body Report, *United States – Final Anti-Dumping Measures on Stainless Steel from Mexico*, WT/DS344/AB/R (Apr. 30, 2008) (adopted May 20, 2008), para. 266; Appellate Body Report, *United States – Continued Dumping and Subsidy Offset Act 2000*, WT/DS217/AB/R (Jan. 16, 2003) (adopted Jan. 27, 2003), para. 293 [hereinafter Appellate Body Report, *US – CDSOA*].

[48] Respectively, Appellate Body Report, *United States – Countervailing Measures Concerning Certain Products from the European Communities*, WT/DS212/AB/R (Dec. 9, 2002) (adopted Jan. 8, 2003), para. 115; Appellate Body Report, *Canada – Measures Affecting the Export of Civilian Aircraft*, WT/DS70/AB/R (Aug. 2, 1999) (adopted Aug. 20, 1999), para. 167 [hereinafter Appellate Body Report, *Canada – Aircraft*]; Appellate Body Report, *US – CDSOA*, *supra* note 45; Appellate Body Report, *United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada*, WT/DS257/AB/R (adopted Feb. 17, 2004), para. 100 [hereinafter Appellate Body Report, *US – Lumber IV*].

Agreement on Trade in Services (GATS),[49] Article 6 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS),[50] and Article 21.5 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU).[51] As is evident from this list, the use of interpretation techniques to combat circumvention covers diverse areas of the WTO Agreement. It is in this context that this approach of interpretive construction is called "anti-circumvention."

The Appellate Body does not hesitate to seek consistent interpretations of the term used in different contexts across the agreements.[52] Without an authentic definition, the conventional usage of the term "circumvention" by panels and the Appellate Body will also serve as a clue for clarifying textual and contextual meanings of the term within the WTO Agreement. First, hiding behind formality is a factor in circumvention.[53] Second, artificiality is a factor in determining circumvention.[54] Third,

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[49] Appellate Body Report, *EC – Bananas*, *supra* note 44, para. 233.

[50] Appellate Body Report, *United States – Section 211 Omnibus Appropriations Act of 1998*, WT/DS176/AB/R (Jan. 2, 2002) (adopted Feb. 1, 2002), paras. 140–14. Alternatively, Article 18 of the WIPO Performances and Phonograms Treaty (WPPT), which works side by side with the TRIPS Agreement, has a provision that prohibits the circumvention of technological protection methods.

[51] Appellate Body Report, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing") – Recourse to Article 21.5 of the DSU by the European Communities*, WT/DS294/AB/RW (May 14, 2009) (adopted June 11, 2009), paras. 354–55 [hereinafter Appellate Body Report, *US – Zeroing (21.5 – EC)*]; Appellate Body Report, *United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada – Recourse by Canada to Article 21.5*, WT/DS257/AB/RW (Aug. 1, 2005) (adopted Dec. 20, 2005), para. 71 [hereinafter Appellate Body Report, *US – Lumber IV (21.5 – Canada)*]. See Appellate Body Report, *United States – Subsidies on Upland Cotton – Recourse to Article 21.5 of the DSU by Brazil*, WT/DS267/AB/RW (June 2, 2008) (adopted June 20, 2008), para. 211 [hereinafter Appellate Body Report, *US – Upland Cotton (21.5 – Brazil)*].

[52] Appellate Body Report, *US – Upland Cotton*, *supra* note 19, para. 705.

[53] Appellate Body Report, *US – Lumber IV (21.5 – Canada)*, *supra* note 49, para. 71 ("limits on the claims that can be raised in Article 21.5 proceedings . . . should not allow circumvention by Members by allowing them to comply through one measure, while, at the same time, negating compliance through another.").

[54] Appellate Body Report, *EC – Bananas*, *supra* note 44, para. 190 ("[i]t would be very easy for a Member to *circumvent* the non-discrimination provisions of the GATT 1994 and the other Annex 1A agreements, if these provisions apply only within regulatory regimes established by that Member."). Emphasis added.

harm to existing disciplines is a factor in determining circumvention.[55] Fourth, the ease of avoiding obligations is a factor in finding circumvention.[56]

Thus, from these findings, it is apparent that the Appellate Body considered a variety of factors in determining what constitutes circumvention and on what basis anti-circumvention is necessary, such as abuse of formality, artificiality, harm to obligations, and ease of avoidance. To date, however, there are no articulations of consistent treaty interpretation. The ascribing of essential factors of circumvention that justify anti-circumvention measures in a coherent manner is yet to be seen.

3.1.2 Complementary Methods

3.1.2.1 Recourse to General Principles

The conventional method, that is, the direct clarification of the role of anticircumvention disciplines through legislation and interpretative articulation, will take a long time to yield results. In order to fully understand the role of anti-circumvention disciplines, a more sophisticated approach to examine anti-circumvention disciplines in a comprehensive manner is needed. This article will now proceed to seek those other methods: indirect ways to address the deficiencies in existing anti-circumvention disciplines.

Assuming that the way to prevent WTO member states from circumventing export subsidy commitments is not necessarily limited to explicit circumvention disciplines, one alternative approach is to investigate the potential role of the general principles of treaty interpretation such as "good faith" or prohibition of "abuse of law" to address circumvention in an implicit manner. For example, in his extensive research, Hagen Rooke found commonality in the concepts of circumvention and "abuse of law."[57]

International lawyers have traditionally seen this approach as a matter of applying the general principles of treaty interpretation, including good faith and abuse of rights. "Good faith" is an established principle of international law.[58] As the

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[55] *Ibid*. para. 190 ("[i]f, by choosing a different legal basis for imposing import restrictions, or by applying different tariff rates, a Member could *avoid the application* of the non-discrimination provisions to the imports of like products from different Members, the *object and purpose* of the non-discrimination provisions *would be defeated*.").

[56] *Ibid*. para. 233 ("[i]f Article II [of the GATS] was not applicable to de facto discrimination, it would not be difficult – and, indeed, it would be a good deal easier in the case of trade in services, than in the case of trade in goods – to devise discriminatory measures aimed at *circumventing the basic purpose* of that Article."). Emphasis added.

[57] Rooke, *supra* note 5, at 250.

[58] Among them, the principle of "abuse of rights" is a corollary of good faith that forbids states exercising a right either (i) in a way that impedes the rights of other states or (ii) for an end different from

Appellate Body found in the *Brazil – Tyres* case, "the chapeau [of Article XX] serves to ensure that Members' rights to avail themselves of exceptions are exercised *in good faith* to protect interests considered legitimate under Article XX, *not as a means to circumvent* one Member's obligations towards other WTO Members."[59] Put differently, the chapeau of Article XX works in substance as part of the anti-circumvention disciplines to prevent the abuse of subparagraphs (a) to (j) under the name of legitimate exceptions.

However, good faith and its derivative principles are not a panacea. General principles may in some instances fall short of tracking well-arranged avoidance techniques. If they are applied in too broad a manner, they may have adverse effects on the security and predictability of disciplines.[60] Without clear textual arrangements such as Article 10 of the AoA, the elasticity of treaty interpretation has an inherent limit that panels and the Appellate Body have to accommodate on a case-by-case basis.[61] This means that general principles cannot totally replace the normative function of explicit anti-circumvention provisions; rather the former supplements the latter.

It is fair to say that there have been few scholarly attempts to examine the nexus between the use of general principles to address circumvention and explicit anti-circumvention provisions. While the role of the principle of good faith and its corollaries attract increasing attention from WTO scholarship,[62] the scope of previous studies is limited to principles of general application, without sufficient attention to addressing the threat of circumvention that is taken up here. It is true that the general principles of good faith and the explicit prohibition of circumvention are different in legal character since they work in a different manner in different contexts. However, there is still a functional commonality and an inherent nexus between these two types of disciplines. From the viewpoint of ensuring the effectiveness of the WTO Agreement, both disciplines (i) involve overall, general control over the actions by states to avoid WTO obligations and (ii) are not limited to specific or predetermined actions but are inclusive of a variety of potential types of circumvention. This is the point on which this article would like to cast light.

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that for which the right was created, to the detriment of another state. Marion Panizzon, *Good Faith in the Jurisprudence of the WTO*, 31 (Hart

Publishing, Portland, 2006).

[59] Appellate Body Report, *Brazil – Measures Affecting Imports of Retreaded Tyres*, WT/DS332/AB/R (adopted Dec. 17, 2007), para. 215. Emphases added.

[60] Andrew D. Mitchell, *Legal Principles in WTO Dispute Settlement*, 119 (Cambridge University Press, New York, 2008); Helge Elisabeth Zeitler, 'Good Faith' in the WTO Jurisprudence: Necessary Balancing Element or an Open Door to Judicial Activism?, 8(3) *Journal of International Economic Law* 756 (2005).

[61] Panizzon, *supra* note 56, at 34.

[62] Van Damme, *supra* note 18; Panizzon, *supra* note 56; Mitchell, *supra* note 58.

3.1.2.2 Re-Allocation of the Function

However, the allocation of regulatory functions between provisions is not without complication, as is shown in Section II.1.(2). Let us take up the Appellate Body's findings in *Canada – Dairy*. The Appellate Body in this case found that the term "payments" in Article 9.1(c) of the AoA includes payments-in-kind, partly on the basis that it would otherwise "*elevate form over substance* and permit Members *to circumvent* the subsidy disciplines set forth in Article 9."[63] This is important because the Appellate Body considered the need to combat circumvention in the context of interpreting Article 9, not Article 10 of the AoA.

At first sight, this may appear unusual, almost as if there were duplication between the explicit anti-circumvention measures under Article 10 and anti-circumvention by interpreting Article 9 itself. As already shown above, the scope of Articles 9 and 10 is mutually exclusive because Article 10 aims at protecting the effectiveness of Article 9 from circumvention. The scope of Article 10 depends on Article 9, not the other way around. Thus, reducing the scope of Article 10 either by amendment or by interpretation is not necessarily a problem if due attention is paid to the allocation of roles and their impact.

On the other hand, however, the principle of effective interpretation requires us to give this provision a proper function within the AoA. Article 10 will lose its significance if Article 9 can fully address all the threats of circumvention by itself. Careful scrutiny is necessary to understand how to split anti-circumvention disciplines between Articles 9 and 10 in order to address future threats of circumvention.[64] One possible construction would be that Article 9 covers easily expectable circumvention practices such as minor modifications to prohibited actions, while Article 10 deals with new and inventive actions of circumvention that may occur in the future that remain open for further investigation. However, it will not always be easy to distinguish them. Admittedly, the practice of anti-circumvention is diverse, with or without anti-circumvention provisions, and it lacks coherent frameworks in terms of factors and criteria.

The above analysis tells us that further research is necessary for streamlining anti-circumvention disciplines, not only for the improvement and clarification of specific provisions, such as Article 10, but also for a proper division of roles between relevant provisions, such as Articles 9 and 10. With these findings given due

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[63] Appellate Body Report, *Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products*, WT/DS103/AB/R (Oct. 13, 1999) (adopted Oct. 27, 1999), para. 110. Emphases added.

[64] For investigations of cases in the European Court of Justice in a similar context, see Anders Kjellgren, On the Border of Abuse: the Jurisprudence of the European Court of Justice on Circumvention, Fraud and Other Misuses of Community Law, 11(3) *European Business Law Review* 192 (2000).

consideration, the basic direction towards coherent theoretical frameworks will now be outlined.

3.2 In Pursuit of a Comprehensive Approach

3.2.1 What We Have Found

As shown in the previous subsection, we need a theoretical framework for understanding the nature and scope of anti-circumvention provisions from the perspective of examining their proper function to ensure the effectiveness of treaty obligations. Let us reorganize the structure of the questions we are facing. Assume that there is a treaty provision A that prohibits state parties from taking a category of action, say action x, while allowing other categories of action (non-x). If a state party commits action x, it is a violation of obligations set forth in provision A; on the other hand, it is legal in terms of Article A if the party conducts action non-x. If the party conducts quasi-x activities, whether or not provision A covers this action is a matter of treaty interpretation. If the party conducts action x but disguises it as a non-x action, it is a hidden violation of obligations under provision A that has to be addressed by discovery (if applicable) or the dispute settlement process. However, what if the party conducts action y, which is evidently different from x but has similar effects to x, as a loophole of provision A in order to avoid its obligations? If provision A is inapplicable, as intended by the circumventer, one option is to insert anti-circumvention provision B that prohibits the circumvention of obligations set forth in provision A, as a safety net or gatekeeper.

Thus, there are two opening questions concerning the normative function of anti-circumvention provisions. First, is the circumvention of obligations different from hidden, disguised violations thereof? Second, if the answer to the first question is affirmative, do explicit anti-circumvention provisions have an intrinsic normative value? This relates to the normative/logical role of anti-circumvention provisions: whether anti-circumvention provision B has a unique role when the first order provision A provides the same explicit prohibition to the specific actions in question on its own. Suppose two situations where a treaty contains (i) provision A that prohibits state parties from performing action x accompanied by provision B that obliges parties not to circumvent provision A by doing action y, and, (ii) provision A that prohibits both actions x and y in the first place. Is there any difference in terms of effectiveness of the norms in preventing actions x and y?

From the foregoing analysis, the answer to the first question is affirmative. In the AoA, Articles 3, 8, and 9 collectively set forth export subsidy commitments and prohibit violations thereof, whether explicit or implicit; separately, Article 10 puts an additional obligation on WTO member states not to circumvent these commitments in order to combat actions that do not constitute violations thereof. Although this is indicated in the text and structure of Article 10, we find support in the actual application

of the concept of "circumvention" in multiple contexts, as shown in Section III.1. What this article argues first is the need for primarily distinguishing the stage of examining the violation of obligations, whether overt or covert, from the stage that examines circumvention of the said obligation without violations thereof.

With regard to the second question that relates to the role of explicit anti-circumvention provisions, the answer is half-yes, half-no. On one hand, there is no difference between them to the extent that the explicit prohibition of action y is in its nature specific and interchangeable between provisions A and B. Anti-circumvention provisions are not necessary to address specified, easily imaginable risks. On the other hand, the risk of circumvention will remain if states try to invent new forms of circumvention based on an instinct to avoid legal restrictions. Rather, every prohibition of specific actions will eventually lose its strength, since they open new ways for further circumvention that require further anti-circumvention provisions, similar to a cat-and-mouse game as shown in Section II.2. To address the endless cycle of potential circumvention, an all-inclusive general prohibition of circumvention still works as a gatekeeper to ensure the effectiveness of treaty obligations. To accomplish this task, focusing only on explicit anti-circumvention provisions does not solve the problem. As is shown in Section III.1, a comprehensive approach is the key: we need to compile an overall design utilizing multiple methods to combat circumvention, with or without explicit provisions.

3.2.2 How to Move Forward

The findings in the previous sections lead us to the next question: is it reasonable and justifiable if provision B prohibits all non-x activities that circumvent provision A in a general and all-inclusive manner without defining what constitutes circumvention? Arguably, it is necessary for provision B to be effective in terms of its broad coverage, since any specification of actions in provision B would lead to circumventive action beyond the scope thereof. Anti-circumvention provisions thus primarily aim to address a variety of potential circumventions in an all-inclusive manner as a safety net or gatekeeper. However, inclusiveness and flexibility tend to be associated with uncertainty and unpredictability at the time of application. An overly broad interpretation with the application of anti-circumvention disciplines will do more harm than good. This is especially the case when there are multiple methods to address circumvention, with or without recourse to the explicit provisions.

Then *to what extent* should we expect anti-circumvention provisions to combat circumvention? Put differently, under what conditions may WTO member states lawfully avoid export subsidy commitments without violating Articles 3, 8, 9, and 10 of the AoA? Apparently, the answer depends on the extent to which Article 10 aims at protecting the export subsidy commitments in question. As the definition of circumvention is not clear under Article 10 of the AoA, there is a risk of excessive use

or overregulation in the name of anti-circumvention. This might hinder the predictability and legitimate liberty of the WTO member states to act for their own benefit. This is even more so because Article 10.1 may prevent both actions relating to circumvention and those that "threaten to lead to" circumvention, and because Article 10.3 shifts the burden of proof to the defending party. If overuse actually occurs, it may consequently undermine the effectiveness of the AoA, and by the same logic the WTO Agreement as
a whole.

Therefore, we must distinguish between legitimate measures and circumvention. Assuming that circumvention is different from the violation of obligations, we can categorize the measures in question into one of three categories: violation of obligations, circumvention thereof, and legitimate measures. This classification is inspired by the practice of several tax authorities that categorize certain activities by private parties as "tax avoidance" to distinguish them from legitimate manipulation (called as "tax mitigation")[65] and hidden violations (called "tax evasion").[66] In addition, there is ample experience in EU law to address the abuse of law.[67] Unsurprisingly, it is hard to find a direct analogy applicable to the field of international law. Independent theoretical investigations on an international level are needed. In order to do so, striking a balance between legitimate interests is necessary. Above all, a proper balance between effectiveness on the one hand and predictability and room for legitimate policy space on the other must take first priority. Without this balance, it is unclear under what circumstances and to what extent anti-circumvention disciplines should work for ensuring the effectiveness of export subsidy commitments. In addition, anti-circumvention provisions do not stand alone. The proper allocation of functions between overlapping provisions is necessary. Coordination of provisions within the WTO Agreement concerning anti-circumvention is an important next step.

In summary, firstly, this analysis revealed that amendments and interpretative clarifications of anti-circumvention provisions, more specifically Article 10 of the AoA, are important but not sufficient to cure the deficiencies of existing anti-circumvention disciplines. A comprehensive approach is necessary to ensure the orderly and proper functioning of the anti-circumvention disciplines within the WTO regime. Secondly, our knowledge is limited to the findings that circumvention is different from a violation of obligations, and the distinctive role of anti-circumvention provisions is its

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[65] See the findings by the UK Privy Council, *Commissioner of Inland Revenue v. Challenge Corp.*, Ltd., STC 548 (1986).

[66] OECD, *International Tax Avoidance and Evasion: Four Related Studies*, 17 (1987).

[67] Stefan Vogeneaur, 'The Prohibition of Abuse of Law: An Emerging General Principle of EU Law', in Rita de la Feria & Stefan Vogenauer (Eds.), *Prohibition of Abuse of Law: A New General Principle of EU Law?*, 530 (Hart Publishing, Oxford, 2011).

inclusiveness. Third and lastly, the next challenge facing us is how to clarify the role and limits of anti-circumvention.

The above findings are important especially in East Asia. Along with China, which maintains strong governmental influences on trade, it is becoming increasingly common in Japan and Korea to use quasi-governmental aids and/or public-private joint ventures for promoting exports of high-quality foods, aimed at addressing more severe international competition following the liberalization of the agricultural market in the near future. In this context, regulation of the risk of circumvention of agricultural export subsidy commitments is one of the key issues for negotiations aiming at further economic integration in East Asia. Finally, acknowledging the urgent need to address the risk of circumvention is the first lesson for East Asia to be learned from the application of the WTO Agreement.

4 Conclusion

The introduction raised the issue of circumvention of law as an emerging problem common to contemporary international law. Section II then analyzed anti-circumvention provisions within the WTO Agreement to find their limits and examined concerns over emerging threats. It was found that the role of explicit anti-circumvention provisions is inherently different from the discovery of violations of obligations that the provisions aim to protect. As shown in the case of exporting STEs, circumvention has latent ambiguity in terms of its definition and impact on the effectiveness of law. Accordingly, this ambiguity extends to the role of anti-circumvention disciplines.

To address the deficiencies in current disciplines within the WTO, Section III examined multiple tools to address circumvention, with a special focus on Article 10 of the AoA. The analysis illustrated multiple methods to address, directly or indirectly, the threat of circumvention. Amending anticircumvention provisions and elaborating a coherent interpretation within the WTO is a direct but relatively long-term option for solving ambiguities in the existing anti-circumvention provisions. In addition, Section III cast light on the role of general principles and the allocation (or outsourcing) of the function as indirect complementary methods, providing an overall picture of the available anti-circumvention disciplines. Section III.2.(1) proceeded to organize the findings by answering two basic questions. First, circumvention is different from violation not only as a matter of terminology but also functionally. Second, the essential factors of anti-circumvention disciplines are their inclusiveness and generality in terms of coverage that are necessary for preventin the potential circumvention of obligations set forth in other provisions.

A comprehensive approach reveals that anti-circumvention disciplines have a distinctive role in covering and combating potential forms of circumvention practices in order to ensure the effectiveness of export subsidy commitments. However, it is still unclear to what extent anti-circumvention provisions work. The scope of this article was

thus broadened in Section III.2.(2) to create a general formula for this theoretical investigation. Finally, the analysis indicates that seeking a proper balance between legitimate interests and coordination among relevant disciplines must take first priority.

It is clear that this article presents more questions than answers and illustrates a number of issues that require further collaborative research. Finding the lack of a theoretical framework for the anti-circumvention disciplines within the WTO Agreement as a whole is but a starting point from which we must proceed. To this end, investigations into the role of anti-circumvention disciplines (written or interpreted) within the WTO using a comprehensive approach are required; furthermore, elaborations for general applicability to the WTO Agreement as a whole and to other fields of international law is also required. At the least, this article has broad implications because the need to address the potential risk of circumvention is common in international trade both globally and regionally.

The circumvention of treaty obligations is a potential problem common to a variety of international trade agreements. Separate investigations from a comparative perspective for regional trade agreements are thereby necessary in the next phase. Compared to the European region where lawyers have amassed over many years' experience in addressing circumventions of law, there is little common knowledge in East Asia. To establish a more stable and sustainable framework for economic integration in East Asia, there is still a long way to go. However, a balanced and comprehensive approach will provide a direct way to move forward. To return to the maxim at the beginning of this article, Confucius went on to say that people stop avoiding rules if you govern them by "virtue" with propriety. On the basis of shared legal traditions and cultures, finding a shared virtue in East Asia is our goal in the long run.