

Switzerland's Agricultural Trade Strategy

The triple challenge of the WTO, the EU and the USA*

1. Introduction

As I understand it, this presentation comes at a time when agricultural policy in Japan is being challenged in a number of international for a as well as at the national level. Until today and despite WTO membership, border protection is arguably the single most important policy tool for all countries with high producer support, even though this fact may not be clearly understood by politicians. Yet Japan is located in a geographic area where tariffs are eroding rapidly. In a foreseeable future they are even likely to disappear altogether. Moreover, structural aspects such as demography, climate change, economic and fiscal crises, energy issues or new trends in consumer demand, but also important recent developments at home, and new policy perspectives for agriculture and agriculture-related issues, may demand a rethinking of the present agricultural policy.

It is not for me as an academic, who is a trade lawyer and a former trade diplomat, to comment or to give advice on policy choices in Japan. I will relate Switzerland's experience and policy reforms in some of these areas 'beyond agriculture', and I can offer my opinion on the compatibility of Japan's WTO obligations of certain policy measures. Furthermore, I am happy to discuss with my academic colleagues on ways and means for science to assist the public debate and to inform government decisions. But my presentation here at Waseda University has a different purpose. I have been asked to present Switzerland's experience with agricultural trade liberalisation made by the government and in a context of different international and national challenges.

I will start with the WTO and relate the regulatory changes which were required in the context of Switzerland's accession to the new trade organisation, taking into account the evolution of Swiss agriculture since WW2 (Section 2).

* Presentation 1 March 2012 at Waseda University, Tokyo, in the Seminar on Switzerland's agricultural trade policy: Triple Challenges with the WTO, EU and US, by Christian Häberli (PhD), Senior Research Fellow, National Centre of Competence in Research – Trade Regulation, World Trade Institute, Bern University (Switzerland) (christian.haerberli@wti.org).

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My second and third topics are the experiences made soon thereafter with our own 'Big Brother', the EU, and with Switzerland's then second most important trading partner, the USA (Sections 3 and 4).

Finally, I will draw a number of conclusions on the results of these developments and on the impact of possible future agricultural policy liberalisation, in the hope this is found useful as a basis for further discussions (Section 5).

Three of my publications relevant here are attached for further readings. Additional literature can be gleaned in footnotes to this text, on my website, or obtained on request.

2. Accession to WTO

The objective of the WTO Agreement on Agriculture (AoA), according to its Preamble, is 'to establish a fair and market-oriented agricultural trading system', where 'commitments under the reform programme should be made in an equitable way among all Members, having regard to non-trade concerns, including food security and the need to protect the environment.'

For the first time in history world agricultural trade is now regulated in basically three ways (the so-called three pillars of the AoA): (i) all domestic subsidies with a price support effect are limited, (ii) historic amounts and volumes of export subsidies have been reduced and new ones are prohibited, and (iii) all border protection measures must now consist in tariffs only, and these tariffs were bound and somewhat reduced.

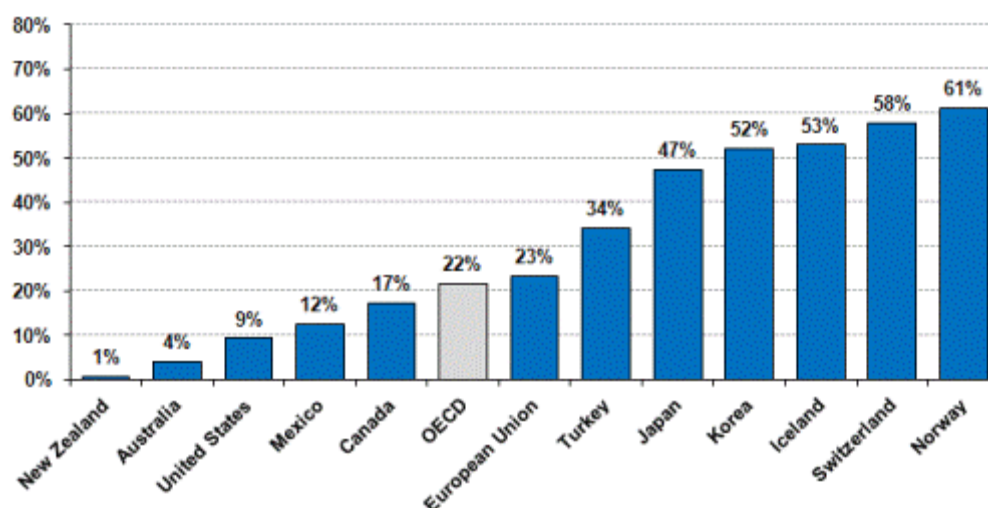
The main changes brought about by the WTO and, in particular, the AoA are basically the same for all countries. Of course, countries with higher levels of tariffs and support were more affected than others, and more than most developing countries to which lesser disciplines apply.

The below OECD table shows the combined effect of border protection and producer support in OECD countries, expressed in "Producer Support Equivalents" (PSE). Even today, Japan and Switzerland are the biggest supporters of their farmers, together with Norway, Iceland, and Korea.¹ But Switzerland is the coun-

¹ According to OECD, *Agricultural Policies in OECD Countries: At a Glance 2010*, The level of producer support (expressed as % of producer revenues) in OECD countries in 2007-09 ranged widely: it was less than 1% in New Zealand, 4% in Australia, 9% in the United States, 12% in Mexico, 17% in Canada, 23% in the European Union, 34% in Turkey, 47% in Japan, 52% in Korea, 53% in Iceland, 58% in Switzerland and 61% in Norway.

try with the highest scheduled agricultural tariffs and one of the highest overall producer support systems. Please note that this is not the same as “trade distortion”, and that it does not correspond to the presently applied domestic support levels allowed in WTO.

Producer Support Estimates as % of gross farm receipts, 2007-09 average



Source: OECD, PSE/CSE database, 2010.

In Switzerland, the main changes brought about by the WTO, requiring legislative and other regulatory modifications were the following:

1. Tariffication and Border Protection

Switzerland's GATT accession in 1966 was negotiated on a basis of “carte blanche for agriculture vs lowest industrial tariffs of all GATT Contracting Parties”.²

Tariffication as decided in the Uruguay Round was therefore a particularly daunting challenge. Implementation was made easier by the fact that (i) our main trading partner, the EU, refused to talk with us throughout the Uruguay Round and (ii) the time for the verification of the WTO schedules was so short that attention focused on bigger economies. Besides, and contrarily to what many exporters and some scholars now say, so-called ‘dirty tariffication’ was part of a deal called “(almost) 100% tariffication vs high tariffs”. In fact, tariffication at higher than formula levels was almost the rule, and not an exception.

The structure of support also varies considerably among countries. Among the countries with the highest level of support the share of the potentially most distorting policies represents around 90% in Japan and Korea, it is around 70% in Iceland and around a half in Norway and Switzerland.

² See http://www.wto.org/english/res_e/booksp_e/gatt_ai_e/art33_e.doc accessed 14 February 2012, p.1023.

Like others, Switzerland made ample use of high tariffs e.g. when tariffing converting import prohibitions and quantitative restrictions. Nevertheless, the border protection today is systemically very different from GATT times when we could basically decide what to import, when, and how much. Today there are considerable out-of-quota imports (despite OQTR of 300% and more e.g. for ham). But fresh fruits and vegetables can still be managed by opening or not opening the TRQ (outside the minimum period scheduled for unlimited IQTR imports). On the other hand, the Special Safeguard (Art.5 AoA) was only used once, for pork meat, and even that was “too little too late”, because the Trade Division had for a long time opposed the proposal made by the Agriculture Division.³

Similarly, the duty-free quota-free preferences for Least Developed Countries (LDC) envisaged at the WTO Hong Kong Ministerial in 2005 had by 2009 been fully implemented by Switzerland – but with an autonomous safeguard allowing the Ministry of Economy to suspend or withdraw this preference in case of serious prejudice to Swiss agricultural interests.⁴

A conclusion of the Doha Round negotiations on agriculture anywhere near the reduction formulae envisaged in the so-called “modalities” in December 2008 would clearly pose an altogether different and much more serious threat to Swiss agricultural production. I will revert to that in my conclusions.⁵

2. Direct payments

Direct payments constitute a key element in Swiss agricultural policy and make it possible for price policy to be separated from incomes policy. They represent compensation for services provided by farmers for the common good. A distinction is made between general and ecological direct payments. Measures to be taken to improve structures will improve living standards and incomes in rural areas. This applies in particular to mountain regions and peripheral areas.

The introduction of this new policy instrument dates back to 1992. Heated debates, a change in the agricultural policy mandate laid down in the Federal con-

³ Switzerland has a federal government with only 7 Ministers, including the President. The Ministry of Economy is therefore (like others) rather big and includes Trade, Industry, Agriculture, Veterinary and Plant Protection, Housing, Stockpile policy and a few others.

⁴ See p.47 of my Working Paper “Market Access in Switzerland and in the EU for Agricultural Products from Least Developed Countries” (http://phase1.nccr-trade.org/index.php%3Foption=com_content&task=view&id=1402&Itemid=199.html) The criteria for deciding whether Swiss agricultural interests are being violated are the following: “une hausse inhabituelle des quantités importées, une augmentation de l’offre domestique et une stagnation de la demande indigène qui conduisent ou risquent de conduire à un effondrement des prix des producteurs indigènes”.

⁵ Please also refer to my article in Annex 3 which analyses this impact in detail.

stitution, and another referendum, preceded the introduction. Moreover, this came at a time when the contours of the Uruguay Round applying to domestic support were already foreseeable. This being, the Swiss direct payments system can be seen as a truly innovative solution later adopted by many other countries especially in the G10 and beyond. It has helped acceptance of another major reform step, the abolition of milk production quotas in May 2009 which had been introduced in the 1970ies. Switzerland is together with Australia the only country which has taken this bold step. Repeated requests for a reintroduction of production limitations have so far been refused by the Government, but there are some implicit measures like mandatory butter disposal contributions with a similar effect. Other “planned economy mishaps” include 50’000 tons of food potatoes and 14’000 tons of bread wheat downgraded into hog feed. Also, after a bumper harvest for sugar beet the sugar quota farmers have to accept “Class C” types of prices and sometimes the exceeding quantities have been dumped on the world market, in violation of Switzerland’s WTO commitments.

Today, direct payments are a well-established instrument, both politically (large consensus, easy budget approvals) and financially (SFR 2.8bn vs total agriculture and food subsidies of around SFR 3.5bn/year, or 6% of total expenditures at the federal level). Smaller and bigger revisions (“greening”) are important for insiders and all stakeholders including NGO but do no longer interest politicians at large.

Remuneration for services provided for the common good

Services provided by agriculture for the common good⁶ are remunerated through general direct payments. These include payments based on acreage and payments for grazing animals. Their aim is to ensure the appropriate use and care of all agricultural land. The more difficult farming conditions in hilly and mountainous regions are compensated for through additional payments for steep terrain and for keeping animals under difficult conditions. With the exception of payments for summer pasturing, direct payments are conditional upon proof of ecological performance (PEP).

⁶ ‘Public goods’ production as defined in the OECD literature on multifunctionality

Compensation for special performance with regard to the environment and livestock

Ecological, ethological, eco-quality, summering and water protection payments are an incentive for achieving levels beyond PEP stipulations. The federal authorities' aims in this respect are the following:

- to promote biodiversity in agricultural areas,
- to reduce the level of nitrates and phosphates in rivers and lakes,
- to reduce the use of fertilisers and pesticides,
- to promote especially animal-friendly conditions for livestock,
- to ensure the sustainable use of summer pastures.

The further development of the direct payment system (and other support policies) will soon be debated and decided in the Swiss Parliament. A proposal by the Government submitted on 1 February 2012 foresees similar financial support for what is called the "Politique agricole 2014-17", but it also proposes an abolition of the general direct payments in favour of the direct payments with specific purposes and conditionalities. Another major modification is the abolition of the animal per head contributions and the introduction of new payments for the food security role of Swiss agriculture as per its constitutional mandate. Many farmers are opposed to this and prefer price support subsidies and income guarantees, recalling their objective to ensure a "producing agriculture". Socialist and environmentalist parties, as well as consumers, advocate on the contrary for even more rural development, environmental and ethological conditionalities than is the case today. OECD standards and WTO disciplines seem to matter little in this debate.

On this topic and for further information please consult the website of the Agriculture Division, in English or, more complete, in French (Federal Office for Agriculture FOAG).⁷

3. Export subsidies

Like all WTO Members having subsidised agricultural exports in the base period 1986-90, Switzerland had to reduce the volumes and financial outlays for these subsidies by 21 and 36%, respectively. No WTO Member is allowed to exceed the scheduled quantities and volumes, or to introduce new subsidies for other products. This new discipline prevents certain product developments but it also se-

⁷ <http://www.blw.admin.ch/index.html?lang=en>

cures sustainability and contributes to more transparency and efficiency in agricultural trade.

In the context of the so-called "Politique agricole 2011" Switzerland has gone beyond its WTO obligations and phased out all export subsidies by 2009, except for processed agricultural products. However, since then export subsidies for butter were reintroduced on a privately-organised basis, with the above-mentioned governmental approval of mandatory milk producer contributions which in turn finance such exports. Requests for a reintroduction of livestock export subsidies were, however, refused at governmental and parliamentary levels.

4. Geographical Indications

Switzerland has introduced legislation for the protection of geographical indications in the 1997, along the system established by the EU. Presently 28 products are protected, with 13 applications pending, as well as some demands for revisions of the registered fabrication methods or for the region where production is authorised.⁸

Before and during the Doha Round negotiations Switzerland consistently argued that the absolute protection for wines and spirits under the TRIPS Agreement must be extended to GIs as part and parcel of the Doha Round; unfortunately without much success and with little support from the Asian members of the G10.

With the EU a new Mutual Recognition Agreement has entered into force on 1 December 2011 as a new Annex 12 to the bilateral Agreement on Agriculture (see above), after a protracted and emotional multi-year negotiation about Swiss Gruyère and Emmental cheeses.⁹

In many Free Trade Agreements (FTA) concluded by Switzerland, all or some of these GIs are also recognised, including in the bilateral FTA with Japan: Annex X protects 4 names for Japanese spirits, and Sake, and for Switzerland there is a long list of 13 cheese names, 2 meat-based products, 5 pastries, 5 spirits, and producer names of origin for 9 wines, 4 watchmaker regions, for 3 textiles and for 2 chemical products.¹⁰

⁸ <http://www.blw.admin.ch/themen/00013/00085/00094/index.html?lang=fr>

⁹ Cf <http://www.blw.admin.ch/themen/00009/00813/index.html?lang=fr>

¹⁰ <http://www.seco.admin.ch/themen/00513/02655/02731/02970/index.html?lang=en>

It is important to emphasise that the value-added and the effectiveness of the GI protection of names are debatable and depend on a whole lot of conditions and circumstances.¹¹ In my opinion protection alone is clearly not sufficient. Close producer-processor cooperation, strict controls of quality and commodity origin, and important joint marketing efforts with or without the support of the state are essential ingredients and the same is true for enforcement (possibilities) in cases of usurpation. Basically, in my view the most important function of a GI is to protect a name whose market value has been and must continuously be promoted by publicity and marketing, all along the food chain which benefits from this value. Moreover, there are limits to 'GI protection' e.g. for Mexican tequila (5 manufacturers trying to prohibit the use of the name 'agave-based' for spirits in all other regions of Mexico).

5. Other promotional instruments used in Switzerland

Even under the WTO/AoA framework there are numerous ways of protecting and promoting farm products other than by way of GIs. Four of them are described here, but there are others.

1. *Organic agriculture* has reached a record 10% of consumption in Switzerland but is unlikely to further increase. "Organic" does not mean domestic, of course. And a MRA with the EU on organic agriculture has been enshrined as an annex to the bilateral 1999 Agreement on Agriculture. Nevertheless, a substantial share of organic products on the Swiss market is of national origin.
2. An "Ordinance on the *labelling* of agricultural products obtained using methods which are banned in Switzerland" regulates the conditions under which all imports e.g. of hormone-treated beef meat and eggs from caged laying-hens must be labelled at retail and restaurant levels. The Federal Office for Agriculture (FOAG) is responsible for the recognition of equivalent bans on production methods (legislation and private-law agreements) and the recognition of foreign certification authorities. These regulations are applied according to legislation on agriculture and implemented by cantonal health authorities (food inspection).

¹¹ References to severable studies undertaken by NCCR Trade are available on my website (see under "Phase I/Archive").

3. Another instrument is a “*Swiss made*” label regulation in the context of Switzerland’s decision to autonomously apply the so-called “Cassis de Dijon” doctrine applied by the EU for all parallel intra-EU imports. This is a contested issue where farmer and food industry interests are sometimes conflicting on a case-by-case basis.¹²
4. Other intellectual property instruments involving upstream agricultural production are *collective trademarks* and *brands*.

I recently saw an interesting way of export promotion practised by the Italian Ministry of Agriculture “certifying” Italian restaurants in Switzerland – even a little pizzeria in Geneva.

A similar initiative by Japan, extending to restaurants in Europe and to ‘Kobe’ beef, seems to have lost steam but I don’t know any details. But in Brussels I once ate ‘Kobe Beef’ which was made in Belgium...

Finally, as Japanese experts know very well since the ‘Shochu’ case, tariff discrimination for ‘like products’ is not allowed.¹³

6. Export tariffs and restrictions

An old topic concerns export restrictions, differential export tariffs and other export restrictions. Commodity-poor countries have an essential interest in free sourcing of their import needs. For agriculture, feed grains. Switzerland is the only country which has consistently advocated the abolition of all export taxes by way of adequate WTO rules, in particular in Article XI of the GATT 1994. Even Japan which for decades was a victim of so-called ‘voluntary export restrictions’¹⁴ and which basically shares these concerns of all countries without abundant natural resources has only partly sided with Switzerland and (more recently) the EU. A new attempt has been made in the G20 and in the context of the food security debate, so far without endorsement by the WTO. And a first litigation case has shed light on this serious lack in terms of WTO disciplines – especially in a context of ever dwindling import protection.¹⁵

¹² Switzerland has for decades practised a “Swiss made” regulation for watches, with varying conditions for minimum local content requirements.

¹³ Cf. http://www.wto.org/english/tratop_e/dispu_e/cases_e/1pagesum_e/ds10sum_e.pdf

¹⁴ On VERs cf. http://www.wto.org/english/tratop_e/tpr_e/tp5_e.htm.

¹⁵ Cf. *China — Measures Related to the Exportation of Various Raw Materials* (DS 394/395/398 at http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds394_e.htm)

3. Agricultural Trade with the EU

The European Union (EU) is by far Switzerland's most important trading partner. This is due not only to the EU's political and economic weight, but also to Switzerland's close geographical and cultural proximity to the countries of the EU. The Swiss economy is heavily outward-oriented, with almost half the GDP earned through international goods and services trade, including tourism.

Switzerland earns one franc out of three in its exchanges with the EU (and approximately half its GNP is export-related). 60 % of Swiss exports go to the EU, 80 % of its imports come from there. An active European policy is therefore essential.

Basic Economic Data Switzerland - EU

Commercial exchange with the EU (2010)

<i>Product categories</i>	<i>Part commercial trade with the EU (%)</i>	
	Export	Import
Agriculture and forestry	4.84	7.70
Chemical products	38.54	22.53
Metals	8.65	9.17
Machines	18.10	18.76
Precision instruments, watches, jewels	13.87	6.47
Others	16.00	35.37

Source: Swiss Federal Customs Administration FCA

Manpower in Swiss Firms Abroad

Year	Total	EU (%)
2009	2'629'117	1'179'683 (44.9)

Direct investment

(in mio CHF)		Swiss investment abroad		Foreign investment in Switzerland	
Year	Total	in EU (in %)		Total	from EU (in %)
2009	865'517	377'662 (43.6)		512'789	428'690 (83.5)

Source: Die Volkswirtschaft 03-2011

Switzerland is not a member of the European Union; instead it conducts its relations with the EU on the basis of bilateral agreements. Specific questions and

issues are regulated with the EU via a series of treaties in clearly defined areas. Swiss-EU relations have developed and deepened over the decades.

A Free Trade Agreement dated 1972, with annexes, regulates all trade in industrial goods and for processed agricultural products. Since the Free Trade Agreement of 1972, an ever denser network of agreements has been developed in several steps. After the rejection by Swiss voters of Swiss accession to the European Economic Area (EEA) in 1992, Switzerland and the EU concluded, among other things, seven agreements in 1999 (Bilaterals I), covering seven specific areas: the free movement of persons, the elimination of technical barriers to trade, public procurement markets, civil aviation, overland transport, agriculture and research.

The Agreement on Agriculture is the cornerstone for trade in agriculture. A closer look shows a both bold and very careful design with a view to the establishment of a common market including in many non-tariff matters.

The Swiss – EU Agreement on Agriculture (1999; in force since 2002)

The EU is the main export market for Swiss agricultural exports.

Partly liberalises the agricultural market. It simplifies trade in agricultural products in certain areas (cheese, meat, fruits and vegetables, processed products etc), partly through the dismantling of tariffs (free trade only for cheese since 01.6.2007, reduced tariffs and tariff-rate quotas for other agricultural products) and partly by the mutual recognition of the validity of regulations in the areas of veterinary medicine, plant protection and organic agriculture. Cheese exports to the EU have risen by 14% since then.

On 01.12.2011 the Protocol for the Mutual Protection of Designations of Origin (GUB/GGA) entered into force.

These were followed by the “Bilaterals II” (eight agreements and one exchange of letters) in 2004. These agreements provide both parties with extensive market access and form the basis for close cooperation in such key policy areas as research, security, asylum, the environment and cultural affairs. This bilateral approach allows Switzerland to conduct a policy of openness and close collaboration with all its European neighbours. It has been submitted to the Swiss electorate and endorsed at regular intervals, the last time being the clear approval of voters

to the extension of the Agreement on the Free Movement of Persons, on 8 February 2009.

In its report on the assessment of Swiss European policy in 2010 the Federal Council concludes that the bilateral way remains the most suitable instrument for Switzerland's European Policy at this point in time. Institutional questions that have arisen in the framework of the bilateral agreements are being reviewed together with the EU with a view to finding solutions that will facilitate the application of the agreements and ensure respect for the sovereignty of the two parties and the smooth functioning of their institutions. The institutional questions concerned include the modalities for adjusting existing agreements to new developments in EU law, the interpretation of the agreements, and the settlement of disputes.

Total free trade in agriculture with the EU?

Since November 2008, Switzerland and the European Union have been conducting negotiations on opening up entirely their respective food production and processing sectors and on establishing closer cooperation in the areas of food and product safety and public health.

So far, three comprehensive rounds of negotiations have taken place.

Agriculture, food and product safety, and public health are closely related. For this reason, the Federal Council has decided to group them together in one single negotiating mandate. But the negotiations then came to a halt due among other things (i) to open institutional issues on behalf of the EU, and (ii) to clear opposition to EU accession and (iii) opposition to free agricultural trade by most political parties in Switzerland. The talks with the EU on technical issues will be continued. Recently a parliamentary committee ("Ways and Means" of the Swiss Senate) has rejected proposals to formally terminate these negotiations.

In my opinion, absent a breakthrough of multilateral negotiations along the results envisaged in the now dead Doha Round, the chances for a conclusion, within the present decade, of free trade on food and agriculture between Switzerland and the EU are nil. Whether the agricultural reform process, in the meantime, continues is another question. In my opinion rather the opposite is presently the case.

The outline of a new agriculture agreement Switzerland – EU might nonetheless be of interest here.

Agriculture, Food safety, Product safety and Public health

Coordination of the negotiations			
Agriculture	Food Safety Veterinary law	Product safety	Public health
Full mutual market access for agricultural products and food-stuffs through (i) Dismantling of customs barriers and quantitative re-strictions (ii) Further harmoni-sation of norms	Cooperation with the European Food Safety Au-thority (EFSA). Participation in the Rapid Alert System for Food and Feed (RASFF).	Participation in the Rapid Alert System for Non Food Consumer Products (RAPEX).	Cooperation with the Eu-ropean Centre for Dis-ease Control and Preven-tion (ECDC). Participation in the Early Warning Response Sys-tem (EWRS). Participation in EU Health Programme 2008-2013.

Agriculture: In its bilateral negotiations on agriculture, the Federal Council is seeking full access to the EU agricultural and food markets. The agreement would cover all levels of the food production and processing chain, which include:

- the so-called upstream level, which refers to production equipment and investment goods (e.g. fertilisers, seeds, machines);
- agriculture per se, i.e. the production of raw materials (e.g. milk, fruit, cereals, livestock);
- the so-called downstream level, i.e. the processing of agricultural products. This comprises initial processing (such as milk and cheese production, meat processing and milling) as well as second-level processing (products such as biscuits, pasta and chocolate).

Full access to the agricultural and food markets means that there will be no more customs duties on the import or export of agricultural goods, no export subsidies and no quotas. Alongside the dismantling of these so-called tariff barriers, all non-tariff barriers will also be eliminated, i.e. various production-related regulations (e.g. with regard to the use of additives), specifications (e.g. fruit content in yoghurt) or the certification of products (e.g. pesticides).

So far, the question of trade-distorting domestic support seems however to remain excluded from these negotiations. Fortunately for Switzerland – but even the EU and its Member states provide some highly doubtful support, from a WTO

and OECD vantage point, to its farmers (Single Farm Payment) and to its food industry (industrial subsidies).

Opening Switzerland's agricultural sector to the EU would continue existing efforts to reform agricultural policy. A new agreement on agriculture would help ensure that the agricultural and food processing sectors will be ready to meet the challenges associated with the global trend to liberalisation of agricultural markets.

In the framework of a future WTO Doha Round result, Switzerland would also be forced to significantly lower its currently high level of protection in the agricultural sector – gaps in this protection have already appeared.

These agreements are expected to secure jobs in agriculture and in the upstream and downstream sectors in the long term, by opening up new markets for the agricultural and food processing sectors and by increasing its competitiveness. Only through liberalisation of the upstream levels (production goods, investment goods) will it be possible to reduce farmers' production costs.

It is clear that mutual access to markets in the food sector will increase pressure on Swiss farmers. Sector income for agriculture is likely to fall more quickly in the short term. There will be a gradual reduction of income throughout the agricultural sector: in a protected market cannot increase the amount of products sold at will. Technological progress would lead into the same direction even without the opening of access to the EU.

Thanks to the reciprocal opening of markets, the agreement with the EU creates better conditions than the present system for attaining increased productivity in the medium and long term. Swiss products have a high level of quality and good prospects of selling well on the European market.

A working group mandated by the Federal Council has designed a number of parallel measures to cushion the immediate impact of opening the agricultural market. The focus will be on the strengths of the Swiss agricultural and food-processing sectors, notably by enhancing the conditions for positioning, ensuring the quality, and marketing the sustainable and animal-friendly production of high-quality Swiss products.

In view of the opening up of the borders, the strategy currently being developed on ensuring high quality standards in Swiss agricultural and food processing is

indicative of future trends. Compensatory payments to farmers are expected to make these changes socially tolerable.

Food safety:

The mutual opening of markets in the area of foodstuffs requires measures to ensure that a high level of food safety is maintained. Incidents such as dioxin in pork meat or melamine in baby food underline the necessity of international coordination as well as swift and comprehensive information to the public about possible dangers. Switzerland is therefore striving, in the framework of the bilateral negotiations on food safety, for collaboration with the European Food Safety Authority (EFSA). Based in Parma (Italy) the EFSA ensures uniform risk assessment on the basis of the harmonised EU-food law and thus makes a rapid and coordinated procedure possible in all of the concerned states. The Federal Council's objective of participation in the Rapid Alert System for Food and Feed (RASFF) follows the same goal. The RASFF is responsible for the exchange of information on dangerous foodstuffs or animal feed within the EU.

Product safety:

International coordination is also necessary in the non-food sector to ensure the safety of consumers and to prevent the distribution and sale of hazardous products (such as lead paint on children's toys). Switzerland is therefore negotiating participation in the EU's «Rapid Alert System for Non Food Consumer Products» (RAPEX), in order to maintain a high level of safety for Swiss consumers.

Public health:

Switzerland and the EU share a common interest in deepening their cooperation in the area of public health. In the public health sector negotiations, the focus is on Swiss cooperation with the European Centre for Disease Control and Prevention (ECDC), as well as participation in the Early Warning Response System (EWRS) and in the EU Health Programme 2008-2013. The ECDC has been responsible, since 2005, for efforts to strengthen protection against such infectious diseases as influenza, SARS, HIV/Aids and the swine flu pandemic (H1N1). It is essential to protect the health of the population in view of a possible global spread of infectious diseases. The aim of the EU Health Programme 2008-2013 is to offer EU citizens better health protection and to reduce inequalities in healthcare. This includes health promotion measures in

areas such as food, alcohol and smoking, as well as a better and more rapid exchange of information, for example on rare diseases and in the area of children's health.

4. Why no FTA with the USA?

Economic relations between Switzerland and the United States of America (USA) are important and enjoy a longstanding tradition, even though it was a not an always untainted history.

Swiss-U.S. economic relations: Trade and investment, and Employment Impact

- Swiss Exports of goods to the USA CHF 18.8bn = 10% of Swiss Exports (2009)
- Swiss Imports of goods from the USA CHF 9.9bn = 5.8% of Swiss Imports (2009)
- U.S. Imports of Services from Switzerland USD 14.8bn = 4.1% of U.S. Imports of Services (2008)
- U.S. Exports of Services to Switzerland USD 17.2bn = 3.3% of U.S. Exports of Services (2008)
- Swiss foreign direct investments in the USA (capital stock) CHF 149.4bn (2008) 18.5% of Swiss foreign direct investments (2008)
- U.S. foreign direct investments in Switzerland (capital stock) CHF 86.5bn = 18.5% of foreign direct investments in Switzerland (2008)
- Swiss firms employ around 350'000 persons in the U.S. Relations are further strengthened by more than one million U.S. citizens with Swiss roots and 75'000 Swiss living in the U.S.
- In turn, 16'500 U.S. citizens live in Switzerland.

Sources: Swiss Customs Administration, Swiss National Bank, U.S. Department of Commerce

The idea of a Free Trade Agreement (FTA) with the USA was launched in a politically difficult context (Bank secrecy, WWII holocaust accounts etc). From the inception it was clear that only a comprehensive agreement covering all sectors including agriculture would stand a chance in the US Congress.

Example: Trade in meat

Swiss meat exports to the U.S. never exceeded a small volume and were limited to Swiss specialities such as air-dried beef ("Viande des Grisons"). Following the outbreak of Bovine Spongiform Encephalopathy (BSE) in Switzerland, the U.S. rigorously restricts since 1996 the import of Swiss meat and meat products. In 2001, the U.S. suspended imports of all meat stored or processed in Switzerland. This ban primarily affects exports of "Viande des Grisons" processed in Switzerland using meat originating in a "BSE-free" third country (Argentina, Brazil).

Since 2001, no Swiss meat has been exported to the U.S., although Switzerland meets presently all the international requirements.

Under the Swiss-U.S. Trade and Investment Cooperation Forum, Switzerland and the U.S. Department for Agriculture (USDA) have set up a roadmap to re-launch Swiss meat exports to the U.S.. The process is very slow and mainly depends on U.S. rulemaking. In addition, firms must comply with U.S. requirements (costly additional controls and specific laboratory tests: CHF 10-15 per kilo) which do not bring any additional benefit regarding food safety. Presently, Switzerland discusses these issues with the USDA.

Source: Fact Sheet: Swiss-U.S. Trade and Investment Cooperation Forum 2008-02-14/380 \ COO.2101.104.5.1566943 4/4

Exploratory talks commenced on a substantial level in 2005. They involved the lead agency (Trade Division in the Ministry of Economy) and every line agency with a trade interest in the matter (including the Agriculture Office in the Ministry of Economy). Stakeholders from the private sector, political parties, trade unions and NGOs were associated in part. A baseline study was conducted by a US-based think tank directed by Gary Hufbauer.

Numerous impact studies were conducted, followed by meetings and videoconferences with US counterpart agencies during more than one year. Details of a lacking negotiating capacity transpired e.g. for wrist watch leather armbands. Another little “non-negotiable” glitch was on the “yarn forward” rules of origin advocated by the US textile industry – quite unacceptable for the Swiss textiles which incorporate non-Swiss basic products. A similar bad experience made under the NAFTA rules of origin for car parts surfaced again. A more serious consequence of a Swiss-US FTA became apparent for intellectual property where, according to the competent Swiss agency, Switzerland would have been obliged to leave the European Patent Convention.

When the various export interests in Switzerland were informed of the possible gains, and limits, of such an agreement political support dwindled rapidly. The fact that the actual duty rates in the US were not very high were also considered in this context.

Based on these talks, and on the reactions from the various stakeholders, the Minister of Economy made a proposal for a formal negotiating mandate from the Federal Council (Swiss Government). This proposal was rejected by 6:1 votes.

The matter has not been raised again since. On 25 May 2006 an Agreement on the Swiss-U.S. Trade and Investment Cooperation Forum was signed between the two parties. It is mainly in this forum that the bilateral economic relations are being addressed.

Other Economic Agreements between Switzerland and the USA

- Vertrag der Freundschaft, der gegenseitigen Niederlassung, des Handels und der Auslieferung der Verbrecher vom 25. November 1850 (SR 0.142.113.361)
- Abkommen zur Vermeidung der Doppelbesteuerung auf dem Gebiete der Steuern vom Einkommen vom 2. Oktober 1996, in Kraft getreten am 19. Dezember 1997 (ersetzt das Abkommen von 1951) (SR 0.672.933.61). Zugehörige Verordnung: SR 672.933.61.
- Briefwechsel von 1968 über GMP (Good Manufacturing Practice) im Bereich der Herstellung pharmazeutischer Substanzen und Erzeugnisse
- Memorandum of Understanding von 1985 über GLP (Good Laboratory Practice) mit der FDA im Bereich nicht-klinischer Laboruntersuchungen (pharmazeutische Produkte für die Anwendung im human- und veterinärmedizinischen Bereich)
- Memorandum of Understanding von 1988 zu GLP (Good Laboratory Practice) mit der EPA im Bereich nicht-klinischer Laboruntersuchungen (Industriechemische Produkte und Pestizide)
- Gemeinsame Erklärung zur Errichtung einer Bilateralen Wirtschaftskommission (Joint Economic Commission; JEC); unterzeichnet am 29. Januar 2000
- Memorandum of Understanding vom 23. September 2003 betreffend die Zusammenarbeit und den Informationsaustausch zwischen Swissmedic und der FDA
- Memorandum of Understanding Establishing a Framework for Intensified Cooperation, zwischen EDA und U.S. State Department, unterzeichnet am 11. Mai 2006
- Joint Declaration of the Swiss Confederation and the USA on Cooperation and Promotion regarding Electronic Commerce, unterzeichnet 10. Oktober 2008
- Briefwechsel zur Errichtung eines "U.S.-Swiss Safe Harbor Framework" zur Übermittlung von personenbezogenen Daten zwischen Unternehmen in Schweiz und in den USA, unterzeichnet am 1. resp. 12. Dezember 2008. Am 16. Februar 2009 in Kraft getreten.
- Bilaterales Abkommen zur vertieften wissenschaftlichen und technologischen Zusammenarbeit, unterzeichnet 1. April 2009.

Source (partly in French):

<http://www.seco.admin.ch/themen/00513/00561/00566/index.html?lang=fr>

5. Prospects for and Impact of further liberalisation

The Doha Round is clinically dead. There is no date for a resumption of real negotiations, and even partial results for agriculture appear difficult in a "single undertaking" philosophy. There are certainly several possibilities for self-contained partial results (e.g. the GPA revision approved in December 2011), and for 'sectoral initiatives (e.g. ACTA). Regardless of the present stalemate in Agriculture (and even more so in NAMA), it is clear to me that any future multilateral negoti-

ation will start where the Doha Round ended, i.e. with the "Modalities" in December 2008. For academics, this has the positive consequence that our WTO-related research can take this text as a basis for some time to come!

In this situation, free trade in agriculture with the EU is in my opinion politically impossible. The difference in border protection is simply too big. Even so, the Swiss Parliament has approved a kind of "saving scheme" whereby agricultural import duty receipts will be set aside and used for future compensation measures if and when future liberalisation steps are decided.

For the time being, however, the reform process has come to a halt and in some instances is even in reverse gear. Some export subsidies have been reintroduced – sometimes with doubtful WTO-compatibility to say the least. Some price support comes back too. Most of all, structural adjustment is slower than ever. While throughout the post-war period the rate of annual farm disappearance was between 2 and 3% p.a. it has dropped to 1.5%.¹⁶ This is clearly insufficient to improve the competitive position of Swiss agriculture. Moreover, absolute and relative incomes are on the decrease, and there are numerous complaints on working hours, working conditions and work accidents, lack of holidays, finding a wife willing to live on the (remote) farm etc. But the agricultural schools are full. Many farmers want to buy their neighbours' land, and this may imply considerable tension at the village level. In other villages, intensive agriculture like hog farms leads to production constraints and delocalisation. Nonetheless, social, ecological and ethological performances are still increasing. Climate change adaptation has started (e.g. with more irrigation), but the overall impact of global warming is estimated to be positive despite expectations of more erratic weather changes and irregular/untimely rainfalls.

At the same time, agricultural trade is developing satisfactorily. In 2010 imports remained stable and exports increased despite the penalising strength of the Swiss franc. The deficit of SFR 3.7bn reached a record low. Self-sufficiency (defined as the percentage of inland production in total consumption of agricultural products) increased by almost 2 percent to 63.3% (2009). Net self-sufficiency (including imported feed grains incorporated in animal production) also increased

¹⁶ Cf. Rapport agricole 2011 p.10 (<http://www.blw.admin.ch/dokumentation/00018/00498/index.html?lang=fr>)

to 56.0% despite the continuously increasing animal feed imports which reached almost 1'300 million metric tons in 2009.¹⁷

In 2010 we have calculated the impact of a tariff-free and Green Box only regime on Swiss agriculture (Annex 1). This "WTO+" scenario is of course highly unlikely for the next 20 years. Nevertheless, to our surprise we find that the total agricultural land under cultivation will not diminish. In other words there will be less farmers, and substantially different production, but the landscape will not be very different from today. This matters in the public debate because many voters care more for the landscape than for the number of farmers. Even so, in our scenario farm revenues will diminish, especially in the plains, unless additional productivity efforts are undertaken, structural adjustment accelerates, and better support programmes are designed.

Switzerland is a country where total agriculture employment is less than 3%, and less than 1.5% of GDP. The federal structure and long-time traditions provide farmers with a more than proportionate say in politics, especially at the village level. Public interest overall tends to focus on other issues, and while agriculture is still considered very important – including for food security reasons – farmers can no longer take support for granted notwithstanding all other competing public interests.

Annexes

1. A 'beyond WTO' scenario for Swiss agriculture: Consequences for income generation and the provision of public goods
2. Can the World Trade Organization ensure that International Food Aid is Genuine?
3. WTO: The July Framework on Agriculture from a Swiss Perspective (written in 2004)

¹⁷ *Ibidem* p.14

A 'beyond WTO' scenario for Swiss agriculture: Consequences for income generation and the provision of public goods

by Robert Huber & Christian Häberli

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full paper with tables available at

<http://www.sagw.ch/en/agrarwirtschaft/Jahrbuch/Ausgaben/2010.html>

Main text without tables follows here:

Abstract

The future agricultural policy framework seems clear despite the fact that present prospects for the WTO Doha Round and for agricultural free trade with the European Union are dim. In the long run, Swiss agriculture may well have to completely forfeit border protection, while domestic support will be restricted to green box compatible direct payments.

We use a normative mathematical programming model to illustrate possible effects for agricultural production and the corresponding agricultural income in the short and medium term (2012 – 2018) under such a 'beyond WTO' scenario. Furthermore, we discuss the results with respect to the provision of the public goods stated in Article 104 of the Swiss Federal Constitution.

The potential effects for agricultural production in Switzerland are considerable. Other factors remaining constant, the agricultural sector in the lowlands would be especially affected, with dairy remaining the most viable sector. For commercial production to survive, a further drastic cost reduction would be indispensable.

With respect to public goods our results indicate a mixed outcome. Agriculture would still use the entire present surface. Production intensity would be lower. This has positive effects on the environment. However, it comes at the expense of a large reduction in production volumes and workloads in the agricultural sector, a development which would lessen the contribution of Swiss agriculture to food security and a decentralised settlement.

JEL classification: Q11, Q17, Q18

Introduction

Further multilateral disciplines, and in particular a conclusion of the Doha Round negotiations in the World Trade Organization (WTO), are likely to influence Swiss agriculture substantially. The same goes for a Free trade agreement in agriculture and food with the European Communities. Neither of them will abolish all tariffs and other border measures, nor will they prevent all kinds of subsidies. Nevertheless, both would represent a big step in that direction. The question addressed in this paper is how, in terms of incomes and the provision of public goods, Swiss agriculture would fare under a radical liberalisation scenario.

We have designed such a scenario as follows: no tariffs, no import quotas, and all domestic support measures limited to those without impact on production and trade, as per the definition in the WTO Green Box. There is no empirical evidence on the effect of such a counterfactual scenario for Swiss agriculture (Aerni 2009). We therefore use a normative mathemati-

cal programming model to illustrate possible effects for agricultural production and the corresponding agricultural income for the short and middle term (2012 – 2018). Furthermore, we discuss the results with respect to the provision of public goods under the assumption of strictly green box-compatible direct payments.

Our scenario is obviously a far cry from where we are today. Present prospects appear dim both for a rapid conclusion of the WTO Doha Round and for Swiss-EU agricultural free trade. Nevertheless, the direction seems clear. Our aim in this article is to provide new insights on the effects of freer and less distorted trade on a multifunctional agricultural policy.

Problem statement and research questions

Agricultural trade liberalisation is seen by some as a threat especially to the multifunctionality of agriculture and to its ability to continue to provide public environmental and social benefits (Dibden et al. 2009, Potter and Tilzey 2007). A radical WTO scenario is also seen as a threat to the survival of (less competitive) agricultural producers (Burrell 2001). In Switzerland, some argue that without border protection and by focusing on green box compatible payments, agricultural production would vanish altogether and farmers become mere ‘landscape gardeners’ (Binswanger 2009).

In our view this debate is largely opinion-driven. There is no empirical evidence on the effects of a scenario comprising a duty-free and quota-free market access, and domestic support measures being restricted to green box-compatible support for Swiss agriculture. Such a scenario clearly has complex and multifaceted consequences across the value chain. This makes a sound analysis of all the consequences for the agricultural sector extremely demanding. What can be assessed, however, is the effect on agricultural production in a normative economic framework. Which agricultural activities would maximise the income for price taking farmers? The results of our enquiry provide the baseline for a further – more holistic – impact analysis of such a scenario.

We use a normative mathematical programming model to illustrate possible effects for agricultural production and the corresponding agricultural income. We then discuss the results with respect to the provision of public goods under the assumption of strictly green box-compatible direct payments. Thereby we address the following research questions:

1. What consequences result from the implementation of our scenario for agricultural production, for plains, hills, and mountain areas, and in the short and middle term?
2. What effects can be expected on agricultural incomes?
3. What effects could be expected for the provision of multifunctional public goods and services (secure food supply, conserving natural resources, taking care of the landscape and encouraging decentralised settlement)?

This article is structured as follows. In the next section we present the development of agricultural policy in Switzerland and describe a Green Box compatible direct payment system. Our methodological approach is presented in Section 4. Section 5 provides a description of the scenarios. Results and discussion are provided in Sections 6 and 7 respectively. Section 8 concludes.

Policy background

Swiss agricultural policy and the WTO

In the 1990ies Swiss agricultural policy underwent a major change (Joerin et al. 2006, BLW 2004). In line with the Agreement on Agriculture (AoA) which embodies the result of the Uruguay round of multilateral trade negotiations in 1994, Switzerland changed the constitutional base for its agricultural policy. In 1996 the Swiss electorate approved a new constitutional Article in a public vote. This article 104 assigns multifunctional tasks to agriculture, which includes contributing to a secure food supply, conserving natural resources, taking care of the landscape and encouraging decentralised settlement. More importantly, the policy instruments to reach these objectives were completely reformulated. Price and sales guarantees were abolished, and price support has been gradually reduced. In contrast, direct payments which should represent incentives to remunerate farmers for specific services of public and common interest were increased.

This change in the agricultural policy framework was introduced step by step. Lower price support was compensated by different direct payments. Thus, overall support in Switzerland remained high, actually one of the highest of all OECD countries (OECD 2009a). At the same time, the effectiveness of the actual direct payment system has been put into question even by the Federal Parliament (WAK 2006). In 2009, the Federal Office for Agriculture proposed a new designed direct payment system (Vogel et al. 2008, BLW 2009, Lanz et al. 2010). However, this concept also includes payments for specific products which cannot be classified under the present Green Box-definition.

The Doha Round negotiations at the WTO are in a stalemate. The December 2008 agricultural 'modalities' foresee a 70% reduction of the highest tariffs and price support measures as well as the elimination of all export subsidies by 2013 (WTO 2008). Given the high level of support in Switzerland, the implementation of such a scenario, even with some softeners such as the so-called 'sensitive products' would affect the agricultural sector and income generation considerably (BLW 2008).

Green Box

As already indicated, our model only foresees fully Green Box-compatible support instruments, even though a certain amount of product support (the so-called 'Amber Box') will still be allowed after the implementation of the Doha Round results. It is therefore useful to briefly recall the concept and definition of the Green Box.

The Agreement on Agriculture is part of the Uruguay Round Agreements which led to the establishment of the WTO. Its aim is to establish "a fair and market-oriented agricultural trading system", and the proposed means is a "substantial progressive reduction in agricultural support and protection" (WTO 1994). It consists of three main pillars: market access, domestic support, and export competition. Different types of domestic support disciplines are defined in 'boxes' of different colours: The legal basis for the so-called Green Box is Annex 2 of the Agreement. It contains a list of specific measures which according to Article 7 are not subject to any reduction commitments, and can even be increased without limitation. The categories mentioned in Annex 2 include general government services, direct producer payments, decoupled income support, disaster relief, producer and resource retirement programmes, investment aids, environmental and regional assistance programmes. Specific conditions apply to each of these categories. Most importantly, all of them must meet the chapeau condition enumerated in paragraph 1 and have "no, or at most minimal, trade-distorting effects or effects on production." Furthermore, they must not "have the effect of providing price support to producers" (lit.b). The adverb 'minimal' clearly leaves some room for interpreta-

tion; it has never been quantified in a dispute settlement process. The substantive provisions of the Green Box of interest to Switzerland are very unlikely to be changed as a result of the Doha Round.

It has been argued that many support measures notified under the Green Box have more than a 'minimal' trade impact (Anderson 2006). Some authors are calling for more flexibility allowing developing countries to ensure their needs for food security, livelihood security and rural development (Meléndez-Ortiz et al. 2009). While this debate is yet to produce results in respect of the existing rules and disciplines, we would argue that non-product-specific measures involving an extensification of production, and measures partly compensating a production cost increase would pass even a stringent Green Box-compatibility test. In particular, we retain the following criteria for our selection in Section 6 of the support measures presently used by Switzerland:

1. A 'more than a minimal' impact on production would result from measures which are product-specific, such as oilseed subsidies.
2. This also applies to generally applicable animal-based subsidies (payments for all grazing animals) and, of course, to the allocation for transforming milk into cheese and for not using silo fodder for such cheese.
3. However, measures implying an extensification of production would probably still be 'green' (e.g. allocations for sloping terrain in upland and mountain areas, and summer pasture contributions).
4. We would also argue that ethological contributions to animal-friendly production methods involve a reduction in outputs and/or increase production costs, and would therefore qualify them as 'green' measures.
5. Finally, we still accept contributions for maintaining 'open arable land', although we have some doubts as to their specific production impact. Under certain, relatively stringent conditions such contributions might nevertheless qualify as tools for landscape management, or environmental and biodiversity promotion.

We are fully cognisant of the fact that each of the above measures would need to be assessed in detail before reaching an authoritative conclusion on its legal status under the Green Box, and that even then opinions may diverge on their 'more than minimal' production impact. As will be shown below, the type, and extent, of possible 'green' support measures remain nevertheless considerable.

Methodology

Since there is no empirical evidence with respect to our research questions we use the normative mathematical programming model S_INTAGRAL which maximises the sectoral income of Swiss agriculture.

S_INTAGRAL has been used in various analyses of the agricultural sector for the Swiss federal administration (Peter et al. 2010, 2009, 2008, 2006 and Huber et al. 2010). Thus, its acceptance in the relevant policy administration is high. Moreover, the model depicts the agricultural production cycle and the existing structures in Switzerland in a detailed manner. Ex-post analyses show that the model is able to reproduce the development of the past in a powerful way (Hartmann et al. 2009).

The model can be characterized as a recursive-dynamic agricultural supply model, maximizing sectoral farm income (labour and land rents). This occurs subject to a specific factor endowment and under consideration of different system-specific constraints such as cropping constraints (Peter 2008). In addition, opportunity costs represent minimal factor compensation for land and labour. If the farmer earns less than the level of opportunity costs, the corre-

sponding economic activity does not enter the optimal solution. As a result, the income per hour and the rental value of land have a lower limit and thus represent an exit threshold. The level of opportunity costs is given by the observed average income per hour and the observed land rental values in Swiss agriculture.

S_INTAGRAL consists of a 'livestock farming' and a 'plant cultivation' module. The 'livestock-farming module' is integrated with the 'plant-cultivation module' through balances between grassland- and cropland-based forage production and its use, as well as with livestock manure production and application on soil. Additionally, system-specific dynamics, such as the development of farm size or livestock populations, are embedded into the model in a recursive-dynamic manner (Day and Cigno, 1978).

The agricultural supply module was finalised by embedding an environment module, which contained the scientific calculation methods for agricultural emissions of nitrogen and greenhouse gases. Because the core of the model is designed to estimate agricultural supply behaviour under different political and economical framework conditions, it can be used for different types of sectoral land-use allocation analyses as well.

The model distinguishes three major production zones: plains, hills, and mountain areas. This allows the calibration of the model with respect to the regional factor endowment and to consider differences in Input-Output coefficients (e.g. vegetation period, harvest level, mechanization types, labour costs). S_INTAGRAL integrates all important activities in livestock farming and plant cultivation with regard to revenue, land use, and livestock population. These are cattle-, swine-, and poultry farming on the animal front and permanent grassland, arable land and cash/forage crop cultivation in the plant category. Table 1 provides an overview of the farm products, activities and its specifications in the model.

Moreover, a characteristic feature of the proposed programming model is the consideration of different technology options with regard to mechanisation (machinery) and livestock management (different farm sizes), manure-management systems, shares of grazing time, and feed concentrate), in addition to different options for forage production (grazing, fresh grass, dry grass, silage, forage crops) and market outputs (cash crops and animal products). A more detailed insight into the S_INTAGRAL model and its mathematical formulation is provided by Hartmann et al. (2009) and Peter (2008a).

The combination of the agricultural production cycle with an environmental module allows the calculation of a multitude of indicators. In spite of various shortcomings in the application of indicators, they are helpful in the assessment of multifunctional agriculture. In combination with a comprehensive mathematical programming model, indicators enable a comparison between alternative policy scenarios and can enhance policy dialogue (Lehtonen et al. 2005, p. 66).

Table 2 provides the indicators chosen for the analysis of our scenario and the corresponding meaning with respect to multifunctional agriculture. They are listed with respect to economic and social as well as environmental functions of agriculture. Beyond the indicators related to the agricultural income, these indicators can be related to the public goods objectives mentioned in Article 104 of the Federal Constitution (last column of Table 2): secure food supply (A), conserving natural resources (B), taking care of the landscape (C) and encouraging decentralised settlement (D). The level of production may be used to indicate a secure food supply. The level of employment relates to structural change and can be used as an indicator for social sustainability and (in remote areas) as a contribution to decentralised settlement. Conserving natural resources and taking care of the landscape can be assessed by the ecological indicators.

We are aware that there is a difference between an economically sound definition of public goods and the goals formulated in Article 104. However, in order to contribute to the discussion on the effects of freer trade on multifunctional agriculture from a policy perspective, we also have to address the objectives formulated in the actual legal framework.

Furthermore, it should be underlined that S_INTEGRAL has inherent limitations. Firstly, the one-dimensional objective function (income maximisation) does not represent diverging preferences, values and risk behaviour. Secondly, there is a lack of feedback effects which would be expected from input and output markets. Thirdly, the model is linear. Linearity is mathematically convenient, but in reality it may lead to erroneous conclusions if threshold effects occur. Moreover, the regional farm approach implemented in S_INTEGRAL tends to overestimate factor mobility. As a consequence, the results of our calculations must be discussed in respect of these caveats (Section 7).

Scenarios

We use the normative programming model to calculate two different scenarios. These scenarios differ from each other with respect to prices and costs.

- *Prices*: Switzerland represents a small country case. Thus, we assume prices to be exogenous. The projection of agricultural output prices vary in our scenarios with respect to source, commodities and the underlying assumptions of the different reports (Peter et al. 2010, FAPRI 2009, OECD 2009b). We consider two price developments representing an upper and lower bound of the expected prices. The upper bound is given by the expected prices of a FHAL with the European Union (Peter et al. 2010). The lower bound is given by world market price in the reports of FAPRI and OECD/FAO. A selection of price assumptions is given in Table 4.
- *Costs*: Production costs in Swiss agriculture are high compared to neighbouring countries. More open markets will certainly allow for lower production costs. However, the degree of this reduction potential is unknown and depends on the type of cost. We assume two different levels for production costs (Table 4). 'High' costs imply that market imperfections hinder the possibility to reduce costs to the full. The 'low' level refers to a situation in which variable production costs approach the level of neighboring countries (e.g. Schmid 2005).

In our calculations, we combine the upper (lower) bound of output prices with high (low) production costs. This results in a best and worst case of the returns from selling agricultural products.

In order to illustrate these assumptions in more detail, Table 4 resume some more details of the underlying assumptions. A selection of the different upper (lower) bound prices and low (high) cost assumptions is given for the years 2010 to 2018. For 2011, prices and costs are held constant at 2010 levels. From 2012 to 2015, these parameters decrease stepwise to the world market price level in the corresponding variation of the scenario. These levels of prices and costs are held constant over the last period from 2015 to 2018.

The price decrease varies between 58% for wheat, pig as well as cattle meat and 21% for milk production. This variation reflects the different levels of existing support in Switzerland. The reduction in production costs varies between 50% for the costs of concentrated feed to 5% for the purchase of seeds. Moreover, some of the costs also increase in the corresponding period. Fuel price, for instance, increases by 60% in accordance with the OECD / FAO scenario (OECD 2009b, p. 16).

Moreover, we implement a Green Box-compatible direct payment system. Table 5 shows an overview of the direct payments system implemented in the normative programming model

S_INTAGRAL compared to the existing system. Direct payments per unit, the corresponding overall spending of the Federal Government and the percentage of each direct payment category of total spending from the model are presented for the years 2009 and 2018. General (ecological) direct payments comprise 86% (14%) of total direct payments in the year 2009. These levels are held constant in our calculations. However, the payments per animals are decreased from 35% in the existing system to 7% for particularly animal-friendly conditions in the Green Box compatible system.

The conditions for the allocation of direct payments are not altered in our scenarios. Thus, farmers have to provide a proof of ecological performance (balanced use of fertilizer, appropriate proportion of ecological compensation areas, crop rotation suitable for soil protection measures etc.) and comply with further conditions such as a minimal amount of work, age limit and a basis of agricultural qualifications (BLW 2004, p. 18).

Results

Firstly, results of the calculations are presented with respect to the two scenarios. In a second step, the scenarios are compared to each other.

Scenario 'high returns'

In 2018 the sectoral income in the Swiss lowlands is reduced by 42% compared to the base level in 2009 (2nd-5th column in Table 7). At the same time, labour demand sinks by 21%. As a consequence, income per farmer (working equivalent) at world market prices and without product subsidies decreases to CHF 52'420 which represents 72% of the income in 2009.

In contrast, income per full time farmer increases to a level of 102% (CHF 57'420) and 155% (CHF 75'124) in the hill and mountain region respectively. This can be inferred from the smaller reduction in the sectoral income of 31% and 21% and the higher decrease in the demand of full time working equivalents of 32% and 42% in the hill and mountain regions. Thus, the most severe impact of income reduction can be observed in the lowlands.

For all regions, the overall production sinks to a level of 85% for milk, 59% for meat and 76% for plant production. The reduction in production is illustrated in more detail in Table 6. This table reveals that regional differences are important with respect to production activities. In the lowlands, the number of milking cows remains constant. On the other hand, milk production in the hill and mountain areas is reduced to 82% and 59% respectively. Under this scenario, suckler cows are not competitive in any region. This can be inferred from the fact that this activity profited the most from the present per head payment for grazing animals in all regions which is abandoned in our scenario. Pig production diminishes too. In contrast, under our assumptions poultry production remains competitive in the lowlands and in the hills. The level of plant production is reduced significantly for wheat and fodder crops. Other cash crops such as rape seeds, sugar beets and potatoes are also reduced. The reasons for the remaining level of such commercially unprofitable cash crops are the cropping constraints in the model: payments for open arable land are an incentive to cultivate crops. In order to get these payments, farmers have to apply crop rotation, a fact which impedes the cultivation of only the most profitable crops. Two effects can be observed for grassland: (i) Permanent grassland replaces high yield rotational grassland and crop activities and increases to a level of 546'000 ha; and (ii) The amount of extensive used grassland more than doubles in the period between 2009 and 2018. Consequently, more than one third of the total agricultural area is cultivated less intensively. This is also represented by the gross profit per land unit which decreases by 33% (Table 7). In contrast, the overall gross profit per working hour is reduced only slightly to a level of 96%. However, the regional differences mentioned above are not covered by this indicator. In this scenario, general direct payments increase slightly to a level of 104% which

corresponds to an amount of 2.2 Billion Swiss Francs. These payments ensure that the whole agricultural surface is still cultivated even though open arable land will be reduced. The increase in extensively used grassland is highest in the hill region. Still, the amount of these ecological compensation areas doubles also in the lowlands and the mountain region. The level of emissions is also reduced due to the reduced production. Greenhouse gas (GHG) emissions decrease to a level of 72%. Nitrogen (N) emissions also sink to the same extent. Ammonia representing N emission from animal activities is reduced by one third, Nitrate emissions from plant production by one fourth.

Scenario 'low returns'

The implementation of this scenario has a profound impact on the sectoral income in the Swiss lowlands. The income from product sales sinks to a level of 35%, mainly as a result of free trade conditions. Workload reduces by 34% which results in an income level per (present) full time farmer of 53% compared to the baseline income in 2009. The reduction in the hill region is much smaller. Income per full time farmer remains at a level of 95%. In contrast, the income per full time farmer in the mountain region increases by 76%. This is the consequence of a particularly large reduction of workload in this region (-48%).

Agricultural production reduces significantly for all commodities. Milk production sinks to a level of 72%. Even larger is the reduction in meat and crop production with 85% and 67%, respectively. This large reduction is confirmed by the development of agricultural activities (3rd column in table 6). Whereas milk production reduces to a level of 71%, meat production disappears to a great extent. Pig and poultry production are no longer profitable in any region. An exception is the low intensity meat production of suckler cows in the hill and mountain regions. However, the level of production is low compared to the year 2009. For crop production, a shift of intensive to mid-intensive cultivation can be observed. Thus, almost 75% of the open arable land is still used but only 33% of the production level is maintained. This effect can also be found for grassland. There is an increase of permanent and extensively used grassland which translates into an extensification of the agricultural production. Again, the highest extensification can be found in the hill region where the amount of extensive grassland increases more than threefold.

The reduction in gross profit per unit of land is reduced to a level of 54%. With respect to the income per working hour in all three regions, the reduction amounts to 22%. This corresponds to an income of only CHF 19 per working hour. The amount of general direct payments is increased by 13%. On the other hand, ecological direct payments are decreased by 29%. This can be explained by the reduction of the payments for particularly animal-friendly conditions: since the income maximising solution results in a strong reduction in the number of animals, the amount of payments per head also decreases. GHG emissions decrease by 37%. N emissions are also decreasing. However, there is a difference between ammonia and nitrate. The reduction in the latter is much smaller than for the former. This can be explained by the fact that the number of animals is strongly reduced whereas a level of 75% of land in crop production is maintained.

Scenario comparison

Figure 2 illustrates representative developments in the different scenarios for the sectoral income, the number of milking cows and land-use. The vertical line indicates the level before the first price cut. As imposed in our scenarios, the income level in the 'high return' scenario is higher compared to the level in the 'low return' scenarios. However, the reduction in income varies significantly between the regions. The sectoral income in the mountain region remains at the same level in scenario "high returns". In contrast, the sectoral income in the lowlands falls to the level of less than 550 Million CHF in the 'low returns' scenario: here it is

one third compared to the level in 2009. The reason for these differences can be explained by the existing structures: agriculture in the mountain regions are already heavily dependent on the direct payment system in order to produce at all. Thus, the fall in returns from agricultural production is less severe since a smaller fraction of their income is affected. In contrast, the effect of decreased production prices changes the income level in the lowlands considerably. This effect is accentuated by the flexibility in the amount of work. On average, more than 5.3% of work equivalents leave the sector in the mountain region. In contrast, this rate amounts to approximately 3.7% in the lowlands. These two effects, higher impact on income and lower reduction rates in workload, leads to the fact that in our scenarios the lowlands are much more vulnerable to price decreases than the other two regions.

Milk production turns out to be the most competitive agricultural activity in our model. Thus, the number of milking cows in the lowlands remains constant under the 'high returns' scenario. In the hill and mountain region, the implementation of our scenarios leads to a lower number. Still, the reduction is much smaller than for other activities. The same holds for all regions in the 'low returns' scenario. However, some of the milking cows are replaced by suckler cows in the hill and mountain regions.

The development of land-use is comparable in both scenarios. The transition from the existing price to the world market prices result in a peak of extensively used grassland. However, after 2014 the amount levels off at 200'000 ha.

In conclusion, our results show the following effects:

- Other factors being unchanged, our 'beyond WTO' scenario decreases the sectoral income in agriculture considerably. However, there are differences between the different regions.
- Under our assumptions, the lowland area is the most vulnerable region. Despite structural change, the sectoral income decreases up to one third of the level in 2009. In addition, the production incentives favour a grassland based milk production. Meat and crop production are reduced to low levels.
- In contrast, the income per farmer increases in the mountain region. This is caused by a higher level of general direct payments compared to the lowlands, a higher rate in the structural reform process (working equivalent), and a lower share of returns from market production with respect to the total income. Despite a large decrease, grassland based milk production remains the dominant activity in the mountain region.

Discussion

Sustainability Impact

From a social perspective, the implementation of our scenarios has mixed effects. The reduction in income per full time farmer is severe in the Swiss lowlands. In contrast, this indicator is improved in the mountain region. However, this increase comes together with a strongly reduced overall demand for work in the agricultural sector. Thus, the total number of farmers would decrease to a low level. As a consequence, the contribution to the constitutional objective of 'encouraging decentralised settlements' would be reduced. It is however debatable to what extent the agricultural sector in the first place can contribute to this goal (OECD 2008, Anderson 2000).

In addition, direct payments are the main (and in the 'low returns' scenario even the only) source of income. Thus, farmers would be even more dependent on public support in the short and medium term. Consequently, economic effects have also to be judged as double edged. The reduction in price support leads to an increase in allocation efficiency since there is a shift to more profitable milk production. Moreover, the food processing industry can profit

from lower input costs which would result in lower consumer prices. From a national perspective, the total loss of agricultural import duty revenues would be at least offset by lower consumer prices and lesser transaction costs for trade and industry.

Under all scenarios, the level of production decreases substantially. This reduces the domestic market share of Swiss agriculture. To what extent this also reduces food security is questionable. Hättenschwiler and Flury (2008) show that under the assumption of a standardised crisis scenario food security could be affected in the medium and long term. In contrast, Anderson (2000) argues that food security is a consumer issue, while Mann (2008) does not view food security as a joint product of agricultural production.

In essence, results show that a WTO compatible direct payment system in the same extent as today can not make up for the complete loss in returns from selling agricultural commodities. Clearly, the agricultural sector needs further efforts beyond structural change especially in the lowlands. Without an additional increase in labour productivity and production efficiency resulting in lower production costs, economic and social goals of a multifunctional agricultural sector are hardly achievable. On the other hand, further efforts to reach higher output prices by implementing a value added or export strategy are also needed.

From a strictly ecological perspective, the effects are positive. The whole agricultural surface is still cultivated in our scenarios. The high general direct payments per area of farmland prevent an abandonment of agricultural land. In addition, an ecologically beneficial extensification can be anticipated. Especially the extent of extensively used grassland increases considerably, thereby also improving biodiversity. The level of this extensification depends not only on the direct payment system chosen but also on the level of future returns from agricultural production, since a lower level in production reduces also greenhouse gas and nitrogen emissions.

Methodology

Our results show which activities would emerge in the short and medium term if farmers were income maximisers and price takers. However, this does not rule out that farmers can behave in a way which is not addressed by our methodology.

Farmers could, for instance, work (more) outside the agricultural sector. In this case they would be less dependent on their agricultural income and might continue some agricultural activities. Another possibility would be further progress with a value added strategy such as regional products (Swissness), geographical indications or organic farming. Both developments would result in a less severe outflow of work of the sector, a fact also observed in the case of Austria when entering the EU in 1995 (Hofreither 2006).

Another constraint in the interpretation of our results is the high factor mobility of land and labour. If structural change is lower and more farmers would remain in the sector, the positive environmental effects from a lower production would decrease and agricultural production increase.

In addition, high payments based on acreage lead to less mobility of the land due to increased land rents (Happe et al. 2008, Hofer 2002, Baur 1999). In this case, the increase in income from the farmer may be lower since some of these payments spill over to the land owner. This effect, however, is not reflected in our model since general direct payments have no allocative effects in our methodological approach.

Besides the question of the impact of trade-liberalisation on importing countries there is of course also the wider issue, not addressed here, of how these countries prevent access to their markets of more competitive foreign suppliers. This includes many poor countries for which

agriculture is a powerful tool for rural development and for trade-induced food security (Häberli 2001, 2008).

Summary and conclusions

We use a normative mathematical programming model to illustrate possible effects for agricultural production and the corresponding agricultural income in the short and medium term (2012 – 2018) for a ‘beyond WTO’ scenario.

The effects for Swiss agriculture of a duty-free and quota-free market access, and domestic support measures being restricted to green box compatible support, are profound. Moreover, they vary to a considerable extent in the different regions.

Despite structural change (increase in farm size, lower work demand and increase in productivity) the sectoral income reduces considerably in the Swiss lowlands. Milk production is the most profitable activity whereas crop and meat production are decreased. High acreage-based direct payments prevent an abandonment of agricultural land.

In the hill and mountain regions, our scenario leads to a further extensification of agricultural production. Furthermore, the change in the production portfolio leads to a much lower reduction in the sector income compared to the lowlands. In parallel with a high outflow of work demand, the income per (remaining) farmer in the mountain region even increases.

The reason for these differences between the regions can be explained by the existing structures: agriculture in the mountain regions are already heavily dependent on the direct payment system in order to produce at all. Thus, the fall in returns from agricultural production is less severe since a smaller fraction of their income is affected.

With respect to the provision of public goods mentioned in Article 104 of the Swiss constitution, our result shows mixed effects. Whereas the effects on the environment (conserving natural resources, landscape management) are positive, the contributions to social and economic goals and to public goods such as decentralised settlement and food security are decreased.

Consequently, further reductions in production costs beyond the ones made in our assumptions are vital especially in the Swiss lowlands. Also, efforts in order to realise price premiums have to be intensified.

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Can the World Trade Organization ensure that International Food Aid is Genuine?

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Abstract:

The Doha Round negotiation mandate of the World Trade Organization (WTO) proposes to minimise trade distortions and commercial displacement under the cover of international food aid, without preventing genuine food aid from reaching people in need. This paper presents problematic aspects of international food aid for trade and competition and an overview of the international governance of food aid. The latest available Draft Modalities for Agriculture (December 2008) are seen as being only halfway successful in implementing the Doha mandate. A new text with better-targeted disciplines and a political food aid commitment are proposed as part of the Doha Round Final Act.

Key Words:

Food Aid, Doha Round, World Trade Organization, Food Aid Convention

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Introduction

When delegates assembled in Hong Kong for the Sixth WTO Ministerial Conference and opened the *Financial Times* in the morning, they were greeted by an advertisement sponsored by the World Food Programme (WFP) and the then Special Rapporteur on the right to food. An African boy with a food bowl was begging the delegates not to decrease food aid.¹⁸ Indeed, stricter disciplines on food aid to prevent the circumvention of commitments to reduce export subsidies were on the agenda. The fears of the advertisers were addressed in the Hong Kong Ministerial Declaration, which stated that “[t]here is consensus among Members that the WTO shall not stand in the way of the provision of genuine food aid”.¹⁹ To this end, a “safe box” for bona fide food aid was to be established preventing unintended impediments in emergency situations.²⁰

It was mainly the G20 and the Cairns Group²¹ together with the European Communities (EC)²² that put the issue of food aid on the negotiation agenda because they considered the complexity of food aid in kind, the implied export subsidies, the involvement of the food industry, distributors and shipping as trade-distorting. In the July 2004 framework, the WTO Members agreed that the objective of WTO disciplines on food aid, as instruments of trade liberalisation, should focus on the prevention of commercial displacement.²³

The aim of this article is to test the objectives set out in the Hong Kong Ministerial Decision against the state of the negotiations as captured in Annex L of the latest available Revised Draft Modalities (6 December 2008).²⁴ The first two sections describe food aid from a trade and competition viewpoint and analyse food aid governance other than in the WTO. Section three discusses the present WTO rules pertaining to food aid. Negotiations on food aid disciplines during the Doha Round are outlined in section four while section five contains an assessment of the December 2008 Modalities. Section six offers some conclusions and suggestions for solutions.

It should be emphasised that *national food aid* – which are of capital importance in countries like India – can also have a major impact on production, trade and competition. However, despite certain WTO disciplines applying, national food aid including public stockholding schemes is not addressed in this article focussing on international competition aspects of international food aid.

Food Aid from a Trade and Competition Viewpoint

Food aid has helped to achieve many humanitarian and development goals but it has also been criticised for damaging local markets, fostering dependency, and for being susceptible to cor-

¹⁸ *Financial Times* Asia Edition, 16 December 2005, Advertisement Identification Number 600351.

¹⁹ World Trade Organization, Doha Work Programme: Ministerial Declaration adopted on 18 December 2005, WTO Doc. WT/MIN(05)/DEC (22 December 2005), annex A, para. 14.

²⁰ *Ibid.*, para. 6.

²¹ See, e.g. World Trade Organization, Committee on Agriculture Special Session, Schedule for the Elimination of all Forms of Export Subsidies: Joint G-20 - Cairns Group Contribution, para. 3, WTO Doc. JOB(06)148 (18 May 2006). Available at: http://www.cairnsgroup.org/proposals/060518_g20.html (accessed 16.05.2010).

²² The EC suggested that Article 10.4 should be strengthened to prevent the abuse of food aid as a mechanism for disposal of surpluses. Committee on Agriculture, Special Session, European Communities Proposal Export Competition, WTO Doc. G/AG/NG/W/3 (18 September 2000).

²³ World Trade Organization, Doha Work Programme: Decision Adopted by the General Council on 1 August 2004, WTO Doc. WT/L/579 (2 August 2004), para. 18.

²⁴ World Trade Organization, Committee on Agriculture Special Session, Revised Draft Modalities for Agriculture, WTO Doc. TN/AG/W/4/Rev.4 (6 December 2008).

ruption.²⁵ This section gives a brief overview of the most important issues and controversies surrounding international food aid, especially the trade distortion and competition aspects.

Food Aid Developments

Food aid is one of the oldest forms of foreign aid and was once a central part of overseas development assistance (ODA). Accounting for about 13.5 per cent of total ODA flows in 1971,²⁶ it had decreased to only 3.4 per cent of ODA in 2005.²⁷ However, despite this overall trend, for the least developed countries, food aid ranged between 15 and 20 per cent of total food imports during 1994–2003.²⁸ The impact of food aid can be very significant for recipient countries, the proportion of food aid including concessional sales may account for up to 70 per cent of the total food imports of a country.²⁹

Five donors (United States, European Union, Canada, Japan and Australia) provide more than 90 per cent of all food aid. The United States of America has traditionally been by far the largest donor providing over 60 per cent of total food aid.³⁰

Food aid is generally categorised in three ways: emergency, project and programme food aid. The first, emergency food aid, is distributed in times of natural disasters or extreme food insecurity during armed conflicts or economic shocks.³¹ The second, project aid, is provided to support development projects to a recipient government, a multilateral development agency or a non-governmental organisation operating in the recipient country. It is either directly distributed, for example in school feeding or food for work programmes, or sold (“monetised”) to fund other development projects. The third category, programme food aid, is bilateral development support to governments of developing countries; it is generally monetised at below market prices on the local market in order to generate government income. Donors often impose conditions on the provision of programme food aid such as to negotiate on military matters or to adopt particular macroeconomic, trade or agricultural policies.³²

Because recipients would not otherwise be able to purchase food and are most likely to consume the food aid they receive rather than sell it on the market, emergency food aid is considered to have the least market-distorting impact.³³ In contrast, project food aid is often monetised and can therefore have trade and competition distorting effects. Since most programme food aid is monetised on the open market, thereby simply augmenting the supply in recipient countries, this type of aid is considered as having the most market distorting effect.³⁴

In a trend towards less market-distorting forms of food aid deliveries, emergency food aid in recent years has constituted nearly two-thirds of food aid, while programme food aid has fallen to 15–20 per cent of total food aid flows from a high of 60–70 per cent at the beginning of the 1990s.³⁵ In addition, local and triangular purchases of food are increasing (as opposed to

²⁵ United Nations Economic and Social Commission for Asia and the Pacific, *Sustainable Agriculture and Food Security in Asia and the Pacific* (2009), 190.

²⁶ Christopher B. Barrett and Daniel G. Maxwell, *Food Aid after Fifty Years: Recasting Its Role* (London: Routledge, 2005), 6.

²⁷ Edward Clay, “Resolving the Outstanding Issues on Food Aid: Response to the ‘Communication from the Chairman of the Committee on Agriculture Special Session, 30 April 2007,’” (2007), 2.

²⁸ Panos Konandreas, “WTO Negotiations on Agriculture: A Compromise on Food Aid Is Possible,” in *WTO Rules for Agriculture Compatible with Development*, ed. Jamie Morrison and Alexander Sarris (Rome: Food and Agriculture Organization of the United Nations, 2007), 317.

²⁹ Ruosi Zhang, “Food Trade and Food Aid: What Is the Impact of International Law on Food Security?,” in *La Sécurité Alimentaire / Food Security and Safety*, ed. Ahmed Mahiou and Francis Snyder (Leiden: Nijhoff, 2006), 711.

³⁰ Konandreas, “WTO Negotiations on Agriculture: A Compromise on Food Aid Is Possible,” 314.

³¹ Barrett and Maxwell, *Food Aid after Fifty Years: Recasting Its Role*, 14.

³² *Ibid.*, 13.

³³ Konandreas, “WTO Negotiations on Agriculture: A Compromise on Food Aid Is Possible,” 319.

³⁴ *Ibid.*

³⁵ *Ibid.*, 317.

procurement in the donor country). While this seems to indicate a considerable improvement, food aid has still to be fully decoupled from being an instrument to dispose of surpluses and to circumvent domestic support and export subsidy commitments. As will be discussed in section four the negotiations on food aid in the Doha Round are trying to disentangle genuine food aid from commercial displacement. This could mean a major step towards complete de-linking and ensuring genuineness of food aid.

The Problem with Food Aid

Whether food aid is an instrument of politics or philanthropy has been the subject of many studies. Food aid has been shown, for example, to be a function of donor country strategic motives, driven by closeness of economic and military ties between donor and recipient.³⁶ However, this article focuses on at least six critical aspects in food aid as a trade competition issue.

First, food aid is sometimes used for *surplus disposals*.³⁷ This may result in the situation that food aid is least available when the need is greatest: in-kind food aid peaked in 1999–2000 when there were large surpluses and low prices for cereals.³⁸ When food prices started to rise sharply in 2007, food aid deliveries fell to their lowest levels since 1961.³⁹ The World Food Programme's Food Aid Flows Report 2007 contains the following table clearly establishing this inverse relationship between the wheat price and direct transfers of wheat as food aid.⁴⁰

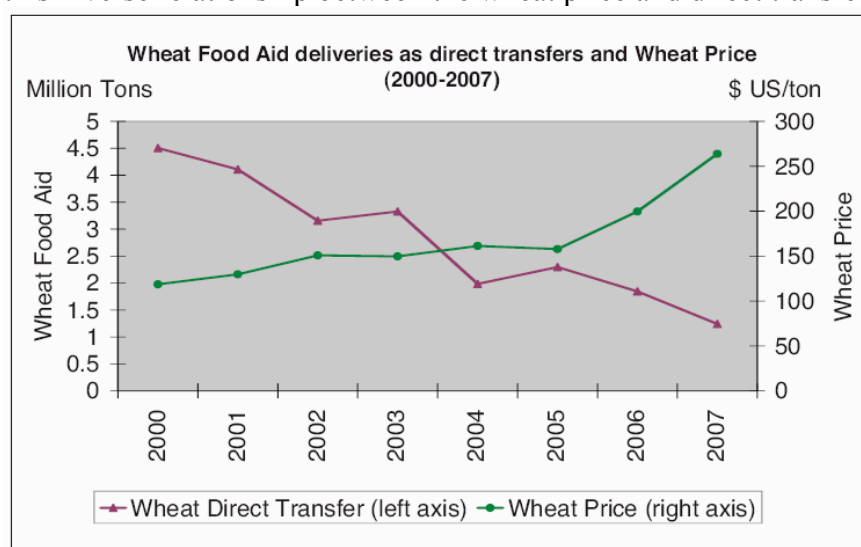


Figure 1: Wheat food aid deliveries as direct transfers and wheat price (Source: WFP 2008)

Second, more than any other kind of aid, 88 per cent of *in-kind food aid is still tied to procurement in the donor country* (instead of cash transfers),⁴¹ even though the actual costs of

³⁶ Nikolaos Zahariadis, Rick Travis, and James B. Ward, "U.S. Food Aid to Sub-Saharan Africa : Politics or Philanthropy?," *Social Science Quarterly* 81, no. 2 (2000).

³⁷ Barrett and Maxwell, *Food Aid after Fifty Years: Recasting Its Role*, 27-28. Polly J. Diven, "The Domestic Determinants of US Food Aid Policy," *Food Policy* 26, no. 5 (2001): 471.

³⁸ Oxfam International, "Food Aid or Hidden Dumping?: Separating Wheat from Chaff," Oxfam Briefing Paper No. 71, (2005), 2.

³⁹ United Nations World Food Programme and International Food Aid Information System, *2007 Food Aid Flows*, International Food Aid Information System - The Food Aid Monitor, June 2008 (Rome: WFP, 2008), 1.

⁴⁰ *Ibid.*, 2.

⁴¹ Ryan Cardwell, Brooke Fridfinnson, and James Rude, "Food Aid as Surplus Disposal? The WTO, Export Competition Disciplines and the Disposition of Food Aid," Canadian Agricultural Trade Policy Research Network, Commissioned Paper 2007-3 (2007), 6.

local purchases are 46 per cent and those of triangular transactions⁴² are 33 per cent lower than those of tied direct aid.⁴³ This transfer inefficiency benefits interest groups in donor countries.⁴⁴

Third, the practice of *monetisation* of food aid has become a subject of controversy. Its impact on local market prices is determined by several factors, including supply and demand elasticity, the relative quantity of monetised aid, local storage capacity, trade policies, import parity prices and the economies of neighbouring countries.⁴⁵

Fourth, food aid may serve to *capture new markets*. Until the 2008 Food, Conservation, and Energy Act in the United States, the desire to develop new markets and the requirement that commercial development potential be considered in choosing recipient countries were explicit policy objectives.⁴⁶ However, there is scant empirical evidence that food aid is a suitable instrument to build long-term commercial markets for donor country exports.⁴⁷

Fifth, there is the risk of *displacement of unsubsidised commercial exports from third countries*. In 2000, Guyanese rice exports to Jamaica were said to be displaced by US food aid which suddenly doubled following a bumper crop in the USA.⁴⁸ In the absence of more empirical research, it is difficult to prove that food-exporting developing countries face unfair competition from 'non-genuine' food aid. However, the example of Guyana underlines the need for WTO rules and disciplines to address export competition aspects also from a development perspective.

Finally, food aid may *damage local production in recipient countries*. For example, in 2002/2003 food aid donors over-reacted to a projected food deficit of 600,000 metric tonnes in Malawi, causing a severe decline in cereal prices and hurting local producers.⁴⁹ As early as 1960, later Nobel Laureate Theodor Schultz published an influential analysis demonstrating that food aid may be detrimental to the recipient country by depressing local food prices and creating production disincentive effects.⁵⁰ In contrast, recent empirical studies have found that food aid does not appear to undermine local agricultural production, at least in the long term.⁵¹ Without going into the details of this controversy, it can be concluded that the risk of negative effects is greater when local markets are not well integrated with regional and international markets⁵² and that food aid's negative effects on prices and production incentives can be minimised through proper timing and targeting.⁵³

⁴² Triangular operations are transactions by which a donor provides commodities that have been purchased or exchanged in a third country as food aid to a recipient country. See United Nations World Food Programme, *2007 Food Aid Flows* (Rome: 2008), VII.

⁴³ Organisation for Economic Co-operation and Development, *The Development Effectiveness of Food Aid - Does Tying Matter?* (Paris: OECD Publishing, 2006), 17.

⁴⁴ A glance at the list of participants of the 2008 International Food Aid conference hosted by the United States Department of Agriculture and the United States Agency for International Development shows the diverse interests in in-kind food aid: besides governmental representatives and NGOs, there were commodity vendors, representatives from packaging companies, domestic transporters, freight forwarders, port facility services and steamship line industries. See http://www.fsa.usda.gov/Internet/FSA_File/2008_ifac_registration_list.xls (accessed 15.05.2010).

⁴⁵ United Nations World Food Programme, *World Hunger Series 2009: Hunger and Markets* (London: Earthscan, 2009), 130.

⁴⁶ See United States Department for Agriculture, Economic Research Service, *2008 Farm Bill Side-by-Side*, 42, available at <http://www.ers.usda.gov/FarmBill/2008/2008FarmBillSideBySide041509.pdf> (accessed 15.05.2010).

⁴⁷ Barrett and Maxwell, *Food Aid after Fifty Years: Recasting Its Role*, 78.

⁴⁸ Oxfam International, "Food Aid or Hidden Dumping?: Separating Wheat from Chaff," 18.

⁴⁹ *Ibid.*, 2.

⁵⁰ Theodore W. Schultz, "Value of U.S. Farm Surpluses to Underdeveloped Countries," *Journal of Farm Economics* 42 (1960).

⁵¹ See, e.g. Awudu Abdulai, Christopher B. Barrett, and John Hoddinott, "Does Food Aid Really Have Disincentive Effects? New Evidence from Sub-Saharan Africa," *World Development* 33, no. 10 (2005).

⁵² Food and Agriculture Organization of the United Nations, *The State of Food and Agriculture: Food Aid for Food Security*, FAO Agriculture Series No. 37 (Rome: Food and Agriculture Organization of the United Nations, 2006), 41.

⁵³ United Nations World Food Programme, *World Hunger Series 2009: Hunger and Markets*, 93.

Food Aid Governance outside the WTO

International food aid is closely linked with trade, but also with policies on agriculture, development and humanitarian assistance. Besides international economic law containing food aid norms, both within the framework of the WTO (Agreement on Agriculture) and within international commodity agreements (Food Aid Convention), international human rights, humanitarian, refugee, criminal and environmental law all contain norms that are relevant for the provision of food aid.⁵⁴ While there may be overlap or collision of norms, it is not necessarily a bad thing that different treaty regimes exist. Law making and law enforcement by specialised organisations can generally be assumed to lead to even better legislation.⁵⁵ However, to avoid a potentially disruptive fragmentation effect, the specialized institutions should take account of general international law *and* of rules made in other institutions.⁵⁶ With regard to the international governance of food aid, the pertinent issue therefore is less a fragmentation of norms than a fragmentation of international authority leading to the question of whom, among the plethora of organisations and treaty regimes, should have the authority to make a determination on a particular question arising under international law.⁵⁷

Attempts to regulate for example the untying of food aid and monetisation within the WTO could be characterised as a form of legislative “forum shopping” where states, if their goals are not reached by the norms produced in one forum, just shift regime to fulfil them in other international fora.⁵⁸ In that sense, fragmentation of international food aid law provides powerful states with the opportunity to abandon, or threaten to abandon, any given venue for a more sympathetic one.⁵⁹ It is difficult to disentangle the interests of states in setting food aid on the agenda in the WTO. While the initial driving force was to prevent the circumvention of commitments to reduce export subsidies, the proposal on the table, as we will see in section five, is regulating many aspects of food aid going beyond this initial concern.

The following sections discuss the main provisions regulating competition aspects of the governance of food aid outside the WTO.

Principles of Surplus Disposal (FAO)

The Council of the United Nations Food and Agricultural Organization (FAO) endorsed the Principles of Surplus Disposal and Consultative Obligations in 1954, soon after the United States established the Food for Peace Program in summer 1954.⁶⁰ The Principles of Surplus Disposal seek to ensure that food aid results in additional consumption, defined as consumption that would not have taken place in the absence of the transaction on concessional terms, and which does not displace normal commercial imports. This is to be ensured by the maintenance of the Usual Marketing Requirements (UMRs) that are defined as being satisfied when

⁵⁴ For an overview, see, e.g., Food and Agriculture Organization of the United Nations, “The Right to Adequate Food in Emergencies,” FAO Legislative Studies 77, (2002).

⁵⁵ Joost Pauwelyn, “Bridging Fragmentation and Unity: International Law as a Universe of Inter-Connected Islands,” *Michigan Journal of International Law* 25 (2004): 904.

⁵⁶ *Ibid.*

⁵⁷ Cf. Tomer Broude, “Fragmentation(s) of International Law: On Normative Integration as Authority Allocation,” in *The Shifting Allocation of Authority in International Law: Considering Sovereignty, Supremacy and Subsidiarity*, ed. Tomer Broude and Yuval Shany (Oxford: Hart, 2008), 100.

⁵⁸ *Ibid.*, 109.

⁵⁹ Adarsh Ramanujan, “Conflicts over ‘Conflict’: Preventing Fragmentation of International Law,” *Trade, Law and Development* 1, no. 1 (2009): 190.

⁶⁰ United States, Agricultural Trade and Development Assistance act of 1954 which established the Food for Peace programme, the primary food aid programme of the United States. The Food for Peace programme had become “the single most extensive foreign aid programme in American history, with exception of the Marshall Plan” See D. John Shaw, *The UN World Food Programme and the Development of Food Aid* (Basingstoke: Palgrave, 2001), 15.

current-year commercial food aid imports do not fall below a five-year historical average. The FAO Consultative Sub-Committee on Surplus Disposal (CSSD), based in Washington, monitors adherence to the principles by reviewing food aid transactions. However, in recent years the reporting of food aid shipments to the CSSD has largely collapsed, both causing and reflecting tensions over the effect of food aid on commercial agricultural trade.⁶¹ The latest update of the Principles of Surplus Disposal was published in 2001 and takes into account the existing food aid provisions in the WTO Agreement on Agriculture.⁶²

Multilateral Food Aid (WFP)

In 1962, the World Food Programme (WFP) was established by parallel resolutions of the FAO and the UN General Assembly, marking the beginning of multilateral food aid. The world food crisis of 1973–1974 and the World Food Conference were significant events marking the rise of multilateral food aid efforts and the WFP became a central part of that agenda.⁶³ In 2000, WFP was responsible for more than 95 per cent of multilateral food aid allocated and 30–40 per cent of all food aid worldwide. Central features of most bilateral food aid programmes such as supplier interests in expanding export markets and surplus disposal are absent from the WFP's stated mission.⁶⁴

In recent years, WFP has developed sophisticated tools and guidance that make the work of assessment officers easier. For example, there are standard questionnaires for household, trader and focus group surveys that pay specific attention to markets allowing the impact of shocks on food prices to be estimated, while simultaneously evaluating the effect of these price changes on consumers, producers and traders. This model also allows estimates of the quantity of food aid that can be received by a country without disturbing its local markets.⁶⁵

Food Aid Convention (IGA)

The institutional basis of food aid was further strengthened with the signing of the Food Aid Convention (FAC) as part of the International Wheat Agreement in 1967, now called the International Grains Agreement 1995 (IGA).⁶⁶ The FAC was negotiated at the same time as the Kennedy Round of negotiations on the General Agreement on Tariffs and Trade, establishing the close link between international trade and food aid as far back as 1967.⁶⁷ Weak as its enforcement may be, the FAC is the only treaty under which signatories have accepted a binding legal obligation to provide international development assistance.⁶⁸

⁶¹ Barrett and Maxwell, *Food Aid after Fifty Years: Recasting Its Role*, 73.

⁶² Food and Agriculture Organization of the United Nations, *Reporting Procedures and Consultative Obligations under the FAO Principles of Surplus Disposal* (Rome: 2001). Available at: <ftp://ftp.fao.org/docrep/fao/007/y1727e/y1727e00.pdf> (accessed 15.05.2010).

⁶³ Barrett and Maxwell, *Food Aid after Fifty Years: Recasting Its Role*, 61.

⁶⁴ *Ibid.*, 62.

⁶⁵ United Nations World Food Programme, *World Hunger Series 2009: Hunger and Markets*, 115.

⁶⁶ See <http://www.igc.int/en/downloads/brochure/iga1995.pdf> (accessed 15.05.2010).

⁶⁷ The United States insisted on greater burden sharing on international food aid as the price for agreeing to a new international wheat agreement while the European Economic Community wanted to secure their role as a grain exporter. The American objective was that the FAC would allow a reduced food supply on global markets by the increased use of non-American resources for food aid. See Barrett and Maxwell, *Food Aid after Fifty Years: Recasting Its Role*, 55–6.

⁶⁸ John Hoddinott, Marc J. Cohen, and Christopher B. Barrett, "Renegotiating the Food Aid Convention: Background, Context, and Issues," *Global Governance* 14, no. 3 (2008): 283. See also, Edwin Kessie, "The Legal Status of Special and Differential Treatment Provisions under the WTO Agreements," in *WTO Law and Developing Countries*, ed. George A. Bermann and Petros C. Mavroidis (2007).

The membership in the FAC is limited to donor countries⁶⁹ which pledge to provide a specified minimum level of food aid disbursements to guarantee a predictable flow of food aid every year. However, certain features such as the possible declaration of commitments not in tonnage but in value terms and the possibility of carrying over unfulfilled commitments to the following years can create incentives not to provide food aid when prices are high.⁷⁰ Moreover, quite often the minimum commitments have been set at such a low level, far below actual deliveries, that they are not very meaningful.⁷¹

The FAC encourages members to provide food aid in grant form rather than concessional sales, and to decouple food aid from export promotion. It also stipulates that food aid transactions, including bilateral food aid that is monetised, are to be carried out in a manner consistent with the FAO's Principles of Surplus Disposal and Consultative Obligations.⁷² However, there is no systematic evaluation of individual donors and the Food Aid Committee does not make public failures to meet commitments under the FAC.⁷³ Overall, the monitoring of compliance with FAC commitments remains weak.

Human Rights

From a competition viewpoint, human rights law adds the perspective of food aid beneficiaries and addresses the concern that poorly targeted food aid may disrupt local markets and harm rural livelihoods. The Committee on Economic, Social and Cultural Rights in its General Comment 12 on the right to adequate food stated that food aid should be provided, as far as possible, in ways that do not adversely affect local producers and local markets, and should be organised in ways that facilitate the return to food self-reliance of the beneficiaries.⁷⁴ In the same vein, Guideline 15 of the FAO Voluntary Guidelines to Support the Progressive Realization of the Right to Adequate Food in the Context of National Food Security recommends, *inter alia*, that donor states should provide assistance in a manner that takes into account the importance of not disrupting local food production, has a clear exit strategy and promotes increased use of local and regional commercial markets.⁷⁵

Present WTO Rules on Food Aid

For the regulation of food aid, the WTO Agreement on Agriculture (AoA) has established two different elements: first, Article 10 aims to prevent the circumvention of disciplines to reduce export subsidies. Second, Article 16 incorporates a commitment to “establish appropriate mechanisms to ensure that the implementation of the results of the Uruguay Round on trade in agriculture does not adversely affect the availability of food aid”. While the latter commit-

⁶⁹ Membership as of July 2007: Argentina, Australia, Canada, European Community and its Member States, Japan, Norway, Switzerland and the United States. See <http://www.igc.org.uk/en/aboutus> (accessed 15.05.2010).

⁷⁰ See Hoddinott, Cohen, and Barrett, "Renegotiating the Food Aid Convention," 287-88.

⁷¹ Food and Agriculture Organization of the United Nations, *Food Aid for Food Security*, 19.

⁷² Food Aid Convention 1999, Article IX(e)(ii), available at <http://www.igc.org.uk> (accessed 15.05.2010).

⁷³ Hoddinott, Cohen, and Barrett, "Renegotiating the Food Aid Convention," 289.

⁷⁴ UN Committee on Economic, Social and Cultural Rights, *General Comment 12, the Right to Adequate Food (Art. 11)*, UN Doc. E/C.12/1999/5 (12 May 1999), para. 39. The Committee on Economic, Social and Cultural Rights is the supervisory body of the International Covenant on Economic, Social and Cultural Rights that enshrines in Art. 11 the right to adequate food.

⁷⁵ Food and Agriculture Organization of the United Nations, *Voluntary Guidelines to Support the Progressive Realization of the Right to Adequate Food in the Context of National Food Security* (Rome: 2005), guideline 15.1.

ment cannot be seen as more than a best endeavour, Article 10.4, addressing international food aid, will now be discussed in more detail.

Substantive Provisions of Article 10.4 AoA

Article 10 belongs to part V of the AoA, which is the export competition pillar and regulates the prevention of circumvention of export subsidy commitments. Article 10.4 attempts to discipline food aid as a tool for surplus disposal used to circumvent export subsidy restrictions. Transactions that are claimed to fall under food aid but do not meet the three requirements discussed in the following sub-sections are considered export subsidies and prohibited or limited by the AoA and the country schedules. It is noteworthy that Article 10.4(a) and (b) are identical to Article VII(2) of the 1995 Food Aid Convention. This indicates that the food aid needs of food-deficient countries were left exclusively to the provisions of the FAC, whereas FAC provisions addressing donors' specific trade-related concerns were imported into the AoA.⁷⁶

Not tied to commercial exports

Article 10.4(a) stipulates that Members donors of international food aid shall ensure "that the provision of international food aid is not tied directly or indirectly to commercial exports of agricultural products to recipient countries."

This rule bans the practice of tying the provision of food aid to other commercial sales. There are no explanations on which elements of concessionality would fall under "direct or indirect" tying. The Food Aid Convention specifies that the provision of food aid should not be "tied directly or indirectly, formally or informally, explicitly or implicitly, to commercial exports of agricultural products or other goods and services to the recipients".⁷⁷ Article 10.4(a) speaks only of commercial exports of agricultural goods. It would be interesting to assess a case of food aid indirectly linked to the supply of other goods and services. However, Article 10.4(a), like the rest of Article 10.4, has never been tested in dispute settlement.

Monetisation

Article 10.4(b) prescribes that "Members donors of international food aid shall ensure [...] that international food aid transactions, including bilateral food aid which is monetized, shall be carried out in accordance with the FAO 'Principles of Surplus Disposal and Consultative Obligations', including, where appropriate, the system of Usual Marketing Requirements (UMRs)".

The Consultative Subcommittee on Surplus Disposal (CSSD) monitors adherence to the Principles of Surplus Disposal.⁷⁸ The requirements to ensure that commercial exports are not displaced include a prohibition on the export of the product (or similar products) received by the recipient country, the calculation of a UMR indicating the quantity of commercial purchases the recipient country must make, and the possibility for review and challenge of notifications

⁷⁶ Melaku Gebeye Desta, "Food Security and International Trade Law: An Appraisal of the World Trade Organization Approach," *Journal of World Trade* 35 (2001): 462.

⁷⁷ Food Aid Convention, 1999, Article IX(e). Article IX(d) states more generally that all food aid transactions are to be conducted "in such a way as to avoid harmful interference with normal patterns of production and international commercial trade".

⁷⁸ See section 2.1 above.

by other exporting countries. However, under the existing rules it is hardly possible to determine whether a transaction entails commercial displacement.⁷⁹ Furthermore, reporting requirements were effectively being ignored leaving the CSSD almost non-functioning.⁸⁰ Given the stricter disciplines on export subsidies in the AoA, the sharp decline in notification to the CSSD over the past decade has fuelled renewed concerns that food aid is used to circumvent export subsidy commitments.⁸¹

Fully grant form

Article 10.4(c) provides that Members donors of international food aid shall ensure “that such aid shall be provided to the extent possible in fully grant form or on terms no less concessional than those provided for in Article IV of the Food Aid Convention 1986.”

This article contains aspirational language in the formulation of “to the extent possible” and calls for food aid to be provided in grant form as opposed to being sold under credit or subsidy agreements. Most donors comply with this guideline. The United States continues to provide food aid as concessional sales, although the importance of credit programmes has declined in recent years.⁸² Article IV of the Food Aid Convention 1986 includes sales on credit.⁸³ While still included in the 1999 Food Aid Convention, the EU and other FAC members are of the opinion that such programmes are a competition issue and that sales on credit should no longer be included in the list of food aid operations.

Analysis of the normative value of Article 10.4

Article 10.4 AoA allows unlimited amounts of food aid as long as they are (i) not tied directly or indirectly to commercial exports of agricultural products to recipient countries, (ii) in conformity with the FAO Principles of Surplus Disposal and Consultative Obligations, and (iii) provided to the extent possible in fully grant form or on terms no less concessional than those provided for in the 1986 Food Aid Convention.

According to one commentator, Article 10.4 AoA effectively shields all official food aid satisfying OECD-DAC definitions for ODA from WTO export competition disciplines, arguing that these definitions exclude any link to the export of other goods at least to LDCs.⁸⁴ Another opinion holds that Article 10.4 AoA stands apart from other parts of the Agreement because the disciplines on food aid are merely provided in the hope that WTO Members will abide by them in good faith; according to this somewhat surprising line of argument these disciplines are not enforceable under WTO dispute settlement.⁸⁵

⁷⁹ Edward Clay, "Getting It Right? The Doha Round Proposals on International Food Aid," (2007), 4.

⁸⁰ See, e.g., Edward Clay, "Food Aid and the Doha Development Round: Building on the Positive," Overseas Development Institute Background Paper, February 2006, (2006), 6.

⁸¹ Barrett and Maxwell, *Food Aid after Fifty Years: Recasting Its Role*, 70.

⁸² Linda M. Young, "Options for World Trade Organization Involvement in Food Aid," *The Estey Centre Journal of International Law and Trade Policy* 3, no. 1 (2002): 20.

⁸³ Article IV of the 1986 Food Aid Convention reads: Food aid under this Convention may be supplied on any of the following terms: (a) gifts of grain or gifts of cash to be used to purchase grain for the recipient country; (b) sales for the currency of the recipient country which is not transferable and is not convertible into currency or goods and services for use by the donor members; (c) sales on credit, with payment to be made in reasonable annual amounts over periods of 20 years or more and with interest at rates which are below commercial rates prevailing in world markets; on the understanding that such aid shall be supplied to the maximum extent possible by way of gifts, especially in the case of least developed countries, low per capita income countries and other developing countries in serious economic difficulties. (asterisks omitted)

⁸⁴ Clay, "Food Aid and the Doha Development Round," 4.

⁸⁵ Ryan Cardwell, "Food Aid and the WTO: Can New Rules Be Effective?," *The Estey Centre Journal of International Law and Trade Policy* 9, no. 1 (2008): 77-78.

While there is no provision preventing Article 10.4 claims under the WTO dispute settlement mechanism, it is true that so far, not a single case has included a claim under Article 10.4 AoA. One reason could be the not very clearly defined obligations, in the case of Article 10.4(c) AoA even framed in aspirational language. This obviously increases the burden of proof for a complainant under the export competition aspect of AoA food aid disciplines. The case of *US – Upland Cotton* does however offer a small clarification since the parties, the Panel and the Appellate Body have reasoned about Article 10.4 AoA in connection with the United States' claim that Article 10.2 AoA⁸⁶ excludes the application of Article 10.1 AoA.⁸⁷ The Appellate Body in *US – Upland Cotton* held that Article 10.2 must be interpreted in a manner that is consistent with Article 10.1, that is “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”.⁸⁸ Likewise, Article 10.4 does not exclude international food aid from the scope of Article 10.1, since food aid is covered by the second clause of Article 10.1 to the extent that it is a “non-commercial transaction”.⁸⁹ Article 10.4 provides specific disciplines that may be relied on to determine whether international food aid is being “used to circumvent” (Article 10.1) export subsidy commitments. The Appellate Body concluded its analysis by stating that WTO Members were free to grant as much food aid as they wish, provided they did so in conformity with Articles 10.1 and 10.4.⁹⁰ In *EC – Sugar* both the Panel and the Appellate Body stopped with conclusions on Article 9 AoA and saw no reason to examine claims made under Article 10.1.⁹¹ Regrettably, this case does not offer additional clarifications. The present formulation of Article 10.4, by leaving open a number of criteria and disciplines, makes it more difficult for a complainant invoking this provision in a particular case of litigation. However, the intent and purpose of Article 10 as a whole clearly focuses on the impact of agricultural policy instruments on competition: export subsidy commitments must not be circumvented through non-commercial transactions including food aid. As will be discussed in section five, the question arises whether the current Doha Round proposal on food aid disciplines is a step forward in this direction.

NFIDC-Decision

While Article 10.4 AoA reflects a concern that food aid donors could circumvent export subsidies obligations, Article 16 incorporates into the AoA the Decision on Measures Concerning the Possible Negative Effects of the Reform Programme on Least-Developed and Net Food-Importing Developing Countries (NFIDC-Decision).⁹² In this decision, Ministers also agreed to establish mechanisms ensuring that the reform programme would not adversely affect the

⁸⁶ Article 10.2 AoA reads: Members undertake to work toward the development of internationally agreed disciplines to govern the provision of export credits, export credit guarantees or insurance programmes and, after agreement on such disciplines, to provide export credits, export credit guarantees or insurance programmes only in conformity therewith.

⁸⁷ Article 10.1 AoA reads: 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.

⁸⁸ Appellate Body Report, *United States – Subsidies on Upland Cotton*, WTO Doc. WT/DS267/AB/R (3 March 2005), para. 616. Cf. separate opinion, paras 631–35.

⁸⁹ *Ibid.*, para. 619. Cf. Joseph A. McMahon, *The WTO Agreement on Agriculture: A Commentary* (Oxford: Oxford University Press, 2006), footnote 147.

⁹⁰ *Ibid.* (emphasis added).

⁹¹ Appellate Body Report, *European Communities – Export Subsidies on Sugar*, WTO Doc. WT/DS265,266,285/AB/R (28 April 2005), para. 346.

⁹² Article 16 reads:

1. Developed country Members shall take such action as is provided for within the framework of the Decision on Measures Concerning the Possible Negative Effects of the Reform Programme on Least-Developed and Net Food-Importing Developing Countries.

2. The Committee on Agriculture shall monitor, as appropriate, the follow-up to this Decision.

availability of food aid. To this end, they agreed to review the level of food aid under the Food Aid Convention, initiate negotiations in the appropriate forum to establish a sufficient level of food aid and to adopt guidelines on how to deliver an increasing proportion of food aid in fully grant form.⁹³

However, the implementation of the NFIDC-Decision has been limited to a fruitless exchange of views during the November meetings of the Committee on Agriculture – and without reference to other international rules and commitments.⁹⁴ This did not change with the inclusion of the NFIDC-Decision at the Doha WTO Ministerial Conference as one of its implementation-related issues and concerns.⁹⁵ An even more blatant testimony to the uselessness of this decision is the fact that it was never even referred to during the food crisis of 2007–08.⁹⁶

Food Aid in the Doha Round

From Doha to Hong Kong

According to Article 20 AoA, trade liberalisation for agriculture is an ongoing ‘reform process’. Interestingly, the Doha Development Agenda (DDA) with respect to agriculture is limited to just two paragraphs (paras 13 and 14). As for export disciplines, there is only half a sentence regarding export subsidies, without any mention of the larger notion of “export competition” (Art.8 AoA), and even less on the specific matter of food aid.⁹⁷

In preparations for the DDA, the EC had noted that forms of export competition other than export subsidies were subject to less stringent rules and fewer transparency requirements.⁹⁸ But export competition as a whole remained a minefield. When the Ministers reassembled two years later in Cancun, in September 2003, negotiations got as far as a second revision of the preparatory document. As for agriculture, a new sentence explained what was meant by “export competition”: “[D]isciplines shall be established on export subsidies, export credits, export state trading enterprises, and food aid programs.”⁹⁹ Before the collapse of that conference, Ministers also had been about to approve the parameters of the negotiation on food aid: “Additional disciplines shall be agreed in order to prevent commercial displacement through food aid operations.”¹⁰⁰ However, this conference finished without a final document being adopted. From then on the Doha negotiations continued with less clarity than would have been necessary for a successful conclusion.

⁹³ World Trade Organization, *Decision on Measures Concerning the Possible Negative Effects of the Reform Programme on Least-Developed and Net Food-Importing Developing Countries*, Marrakesh Agreement Establishing the World Trade Organization, Decisions Adopted by the Trade Negotiations Committee (Adopted on 15 April 1994), 1867 UNTS 60 (1994), paras. 3(i), 3(ii).

⁹⁴ See Kerstin Mechlem, “Harmonizing Trade in Agriculture and Human Rights: Options for the Integration of the Right to Food into the Agreement on Agriculture,” in *Max Planck Yearbook of United Nations Law*, ed. Armin von Bogdandy and Rüdiger Wolfrum (2006), 158–60.

⁹⁵ World Trade Organization, *Ministerial Declaration, Adopted on 14 November 2001*, WTO Doc. WT/MIN(01)/DEC/1 (20 November 2001), para. 12. World Trade Organization, *Implementation-Related Issues and Concerns, Decision of 14 November 2001*, WTO Doc. WT/MIN(01)/17 (20 November 2001), para. 2.2.

⁹⁶ On the normative value of the NFIDC-Decision also see Christian Häberli, “Food Security and WTO Rules,” in *Food Crises and the WTO*, ed. Baris Karapinar and Christian Häberli (Cambridge: Cambridge University Press, 2010), 307–08., particularly 07–08.

⁹⁷ Regarding the NFIDC-Decision, Ministers simply re-approved in Doha the four measures contemplated as possible remedies for the negative effects of the Uruguay Round.

⁹⁸ McMahon, *The WTO Agreement on Agriculture*, 207.

⁹⁹ World Trade Organization, *Preparations for the Fifth Session of the Ministerial Conference, Draft Cancun Ministerial Text*, WTO Doc. JOB(03)/150/Rev.2 (13 September 2003), para. 3.

¹⁰⁰ *Ibid.*, para. 3.5.

The informal ministerial gathering held in July 2004 in Geneva allowed for considerable progress, especially on agriculture (the “July framework”). The provisions regarding food aid took another step forward as part of the decision to work towards “detailed modalities ensuring the parallel elimination of all forms of export subsidies and disciplines on all export measures with equivalent effect by a credible end date”.¹⁰¹ Ministers decided to eliminate by the end date (“to be agreed”):

Provision of food aid that is not in conformity with operationally effective disciplines to be agreed. The objective of such disciplines will be to prevent commercial displacement. The role of international organizations as regards the provision of food aid by Members, including related humanitarian and developmental issues, will be addressed in the negotiations. The question of providing food aid exclusively in fully grant form will also be addressed in the negotiation.¹⁰²

At the same time, the link with other export competition disciplines was established with more precision:

In exceptional circumstances, which cannot be adequately covered by food aid, commercial export credits or preferential international financing facilities, ad hoc temporary financing arrangements relating to exports to developing countries may be agreed by Members. Such agreements must not have the effect of undermining commitments undertaken by Members in paragraph 18 above, and will be based on criteria and consultation procedures to be established.¹⁰³

An intensive negotiation process followed this rather successful, albeit informal, result. When the next occasion presented itself at the Sixth Ministerial Conference in December 2005 held in Hong Kong, one of the few meaningful results of that conference was an agreement on the date on which export subsidies would be eliminated (i.e. the end of 2013). The text adopted on food aid reads as follows:

On food aid, we reconfirm our commitment to maintain an adequate level and to take into account the interests of food aid recipient countries. To this end, a “safe box” for bona fide food aid will be provided to ensure that there is no unintended impediment to dealing with emergency situations. Beyond that, we will ensure elimination of commercial displacement. To this end, we will agree effective disciplines on in-kind food aid, monetization and re-exports so that there can be no loop-hole for continuing export subsidization.¹⁰⁴

The December 2008 ‘Draft Modalities’

The latest document on the results of the negotiations following the Hong Kong Ministerial Conference was submitted on 6 December 2008 by Ambassador Crawford Falconer from New Zealand as the then chairperson of the “Agriculture Committee in Special Session”. These so-called “modalities” are in fact a highly complex text reflecting Falconer’s personal views on the state of the negotiations and on the areas where a consensus might be reached. The text extends over 130 pages and is the basis for the following analysis of the disciplines envisaged for international food aid. It consists of general disciplines both in the main text

¹⁰¹ World Trade Organization, *Doha Work Programme, Decision Adopted by the General Council on 1 August 2004*, WTO Doc. WT/L/579 (2 August 2004), para. 17.

¹⁰² *Ibid.*, para. 18.

¹⁰³ *Ibid.*, para. 26.

¹⁰⁴ World Trade Organization, *Doha Work Programme, Ministerial Declaration Adopted on 18 December 2005*, WTO Doc. WT/MIN(05)/DEC (22 December 2005), para. 6.

and in a new Annex, a new definition of the ‘Safe Box’, and further disciplines for non-emergency food aid.¹⁰⁵

The chapeau text regarding export competition insists that these modalities will not diminish in any way existing export subsidy obligations or their “circumvention through non-commercial transactions.”¹⁰⁶ Food aid is mentioned in four places: first, paragraph 160 again underlines that there can be no alteration to existing WTO commitments or to the institutional food aid arrangements and commitments in place (para. 161).¹⁰⁷ Second, the December 2008 Modalities further specify that food aid disciplines are to be implemented in parallel with those on all other forms of export subsidies.¹⁰⁸ Third, all other proposed international food aid disciplines are contained in Annex L of the December 2008 Modalities. Finally, special provisions apply to cotton, even though a practical case of application for this non-food commodity is difficult to imagine.¹⁰⁹

General disciplines applicable to all food aid transactions

The main thrust of the proposed disciplines is to prevent commercial displacement, as specified in the above-quoted ministerial texts. To this end, international food aid volumes shall be maintained and take into account the interests of food aid recipients (para. 1). In addition, food aid shall be needs-driven, provided “in fully grant form” and “not tied directly or indirectly to commercial exports of agricultural products or of other goods and services”, nor shall they be “linked to the market development objectives of donor Members” (para. 2). The WTO Members shall also ensure that such food aid is not re-exported except in specified circumstances (para. 2 lit.e). Most importantly, there is an obligation to avoid “an adverse effect on local or regional production of the same or substitute products” (para. 3). The term “food aid” covers both in-kind and cash-based food aid donations.¹¹⁰ According to paragraph 3, Members commit to making their best efforts to move increasingly towards untied cash-based food aid.

Further disciplines for emergency situations (Safe Box)

In order to avoid an “unintended impediment to the provision of food aid during an emergency situation” Annex L establishes the conditions under which food aid (whether cash or in-kind) shall be presumed to be in conformity with the objective of avoiding commercial displacement. Among the conditions, there is the declaration of emergency and a needs assess-

¹⁰⁵ World Trade Organization, *Revised Draft Modalities for Agriculture*, WTO Doc. TN/AG/W/4/Rev.4 (6 December 2008), Annex L, 72-74. Available at: http://www.wto.org/english/tratop_e/agric_e/agchairtxt_dec08_a_e.pdf (accessed 18.05.2010).

¹⁰⁶ Ibid., para. 160 of the main text: “Nothing in these modalities on export competition can be construed to give any Member the right to provide, directly or indirectly, export subsidies in excess of the commitments specified in Members’ Schedules, or to otherwise detract from the obligations of Article 8 of that Agreement. Furthermore, nothing can be construed to imply any change to the obligations and rights under Article 10.1 or to diminish in any way existing obligations under other provisions of the Uruguay Round Agreement on Agriculture or other WTO Agreements.

¹⁰⁷ Ibid., para. 161: Nor can anything in these modalities be construed to diminish in any way the existing commitments contained in the Marrakesh Decision on Measures Concerning the Possible Negative Effects of the Reform Programme on Least-developed and Net Food-importing Developing Countries of April 1994 and the Decision on the Implementation-related Issues and Concerns of 14 November 2001 on, inter alia, commitment levels of food aid, provision of food aid by donors, technical and financial assistance in the context of aid programmes to improve agricultural productivity and infrastructure, and financing normal levels of commercial imports of basic foodstuffs. Nor could it be understood to alter the regular review of these decisions by the Ministerial Conference and monitoring by the Committee on Agriculture.

¹⁰⁸ Cf. Annex K, para. 3.

¹⁰⁹ “To the extent that new disciplines and commitments for export credits, export credit guarantees or insurance programmes, agricultural exporting state trading enterprises and international food aid create new and additional obligations for Members as regards cotton, any such obligations shall be implemented on the first day of the implementation period for developed country Members, and by the end of the first year of the implementation period for developing country Members” (para. 169).

¹¹⁰ Cf. Footnote 1 of Annex L.

ment during which there can be no initiation of dispute settlement (paras 6–7). Emergency food aid, including in-kind, may not be sold (“monetised”) except within LDCs for the sole purpose of transport and delivery (para. 8). It may be continued “as long as the emergency lasts subject to an assessment of continued genuine need” by the relevant multilateral agency, and subject to repeated notifications (paras 9–10).

Further disciplines for non-emergency situations

Non-emergency in-kind food aid is subject to a targeted assessment, which “would incorporate and reflect objective and verifiable poverty and hunger data” and with the objective of preventing, or at the very least minimizing, commercial displacement (para. 11). Monetisation is subject to similar conditions as for Safe Box food aid, but in addition to fund the internal transportation and delivery of food aid, it was broadened in the December 2008 Modalities to allow for funding the procurement of agricultural inputs to low-income or resource-poor producers (para. 12).

Assessment of the December 2008 Modalities

The aim of this article is to test whether the December 2008 Modalities can prevent food aid from being used as a loophole for continuing export subsidisation while complying with the other objectives set out in the Hong Kong Ministerial Decision. These were to maintain an adequate level of food aid, to ensure that there is no unintended impediment to dealing with an emergency situation and to ensure elimination of commercial displacement.¹¹¹

It may be difficult to reach a fully satisfactory solution for such a sensitive topic. Nevertheless, the new disciplines at the very least should not make it more difficult for an exporter without food aid to prove commercial displacement by a competitor whose government is a food aid donor, than is possible particularly under the present version of Article 10.4 AoA.¹¹² This assessment of the December 2008 Modalities starts with some remaining “loose language” (5.1) before looking at potential dispute settlement cases (5.2). Finally, the present proposals are compared with the existing disciplines in Articles 10 and 16 of the AoA (5.3).

December 2008 Draft Modalities: The loopholes

After so many years of little progress on the food aid component in the DDA agriculture negotiations, especially with regard to export competition, the December 2008 version is a step forward. However, a closer look reveals a number of loopholes allowing considerable policy space for both donors and recipients of food aid.

Grant form and untied aid – a reality check

The proposed disciplines insist on the need to avoid food aid, which is in any way tied to commercial interests or market development objectives:

¹¹¹ World Trade Organization, *Doha Work Programme, Ministerial Declaration Adopted on 18 December 2005*, para. 6.

¹¹² See chapter 3.

Members shall ensure that all food aid transactions are provided in conformity with the following provisions: [...] that [...] they are in fully grant form [...] they are not tied directly or indirectly to commercial exports of agricultural products or of other goods and services [...] they are not linked to the market development objectives of donor Members.¹¹³

On the face of it, this looks good for two reasons. Firstly, this text finally rules out food aid on concessional terms.¹¹⁴ Secondly, even though the insistence on untied aid is only a reaffirmation of the wording in the present Article 10.4, it is indeed the link to commercial trade interests which causes the main trade-distorting effects of food aid.

A second look at these provisions reveals a more mixed picture. First, in the July 2004 framework agreement, the issue of “less than free” food aid was still disputed. It had been argued, not entirely without reason, that in certain circumstances food aid in fully grant form would be too costly to cover even a small production shortfall such as for rice in Indonesia. Export competition can be impaired in several ways by food aid.

For instance, concessional food aid is also a case for export credit disciplines - but this article cannot look in detail at the technically very demanding Annex J of the December 2008 Modalities. However, for basic foodstuffs to LDCs and NFIDCs, a potentially important export credit loophole has been left open in that annex, because its paragraph 5 might also be invoked for food aid.¹¹⁵

Second, for tied aid the problem is that it is often extremely difficult to prove such links. For example, the Economic Research Service of the US Department of Agriculture clearly associates food aid to agricultural trade in general.¹¹⁶ US food aid to Egypt is almost exclusively provided in fully grant form, cash-based, and never formally linked to the purchase of US cereals or other goods. It so happens, however, that all of Egypt’s food aid imports are from the United States of America. Incidentally, Egypt also happened to be among the first countries in Africa to approve a genetically modified version of corn for planting.¹¹⁷

In addition, proof positive of commercial displacement is only likely to be obtainable until well after the objective is reached, for instance when market shares have increased or a new commercial market has been successfully developed by way of food aid as a ‘gate-opener’.

Emergencies – who can pull the trigger?

Emergency food aid, as pointed out in section 4.2.2, may be provided without following the rules and disciplines of AoA Article 10, subject only to (a) an *emergency declaration* or (b) an *emergency appeal*, followed by a *needs assessment*.

Both the recipient government and the Secretary General of the United Nations can declare an emergency.¹¹⁸ And a very long list of bodies can launch an emergency appeal:

“a country; a relevant United Nations agency, including the World Food Programme and the United Nations Consolidated Appeals Process; the International Committee of the Red Cross or the International Federation of Red Cross and Red Crescent Societies; a relevant regional or

¹¹³ World Trade Organization, *Revised Draft Modalities for Agriculture*, para. 2.

¹¹⁴ Cf. section 3.1.3.

¹¹⁵ “Least-developed and net food-importing developing countries as listed in G/AG/5/Rev.8 shall be accorded differential and more favourable treatment comprising allowance for a repayment term in respect of them of between 360 and 540 days for the acquisition of basic foodstuffs. Should one of these Members face exceptional circumstances which still preclude financing normal levels of commercial imports of basic foodstuffs and/or in accessing loans granted by multilateral and/or regional financial institutions within these timeframes, a further extension of such a time frame shall be provided.”

¹¹⁶ Cf. USDA Agricultural Outlook, August 1999/AGO-263, p. 4, available at <http://www.ers.usda.gov/publications/agoutlook/aug1999/ao263.pdf> (accessed 14 May 2009).

¹¹⁷ <http://www.fas.usda.gov/gainfiles/200804/146294295.pdf> (accessed 18.05.2010).

¹¹⁸ Para. 6, lit.a.

international intergovernmental agency; a non-governmental humanitarian organization of recognized standing traditionally working in conjunction with the former bodies.”¹¹⁹

In both cases Article 6 prescribes a needs assessment either by a “*relevant*” UN Agency (normally the WFP) or by the International Committee of the Red Cross or the International Federation of Red Cross and Red Crescent Societies. When these conditions are fulfilled, all food aid provided in such cases will fall in the Safe Box and thus be deemed not to constitute a case of commercial displacement.

In so-called non-emergency cases, the criteria are only slightly stricter. The overall objective of avoiding commercial displacement still applies, but with a “softener”:

“...even in-kind aid is allowed, based on a “targeted assessment” [...] with the objective of preventing, or at the very least minimizing, commercial displacement.”¹²⁰

A positive result of the negotiations so far is that paragraph 11 (lit.c) defines commercial displacement in rather clear terms, and it implicitly also applies to situations of competition with domestic production:

“Commercial displacement in this context shall arise where the provision of in-kind food aid by a Member materially displaces commercial transactions that would otherwise have occurred in or into a normally functioning market in the recipient country for the same product or directly competitive products.”

Nevertheless, it is quite clear that not all possibilities of abuse are thus being eliminated. In addition, the distinction between emergency and non-emergency situations is also blurred by the fact that there is no definition of ‘emergency’, and how long it can last.

The then Chairman of the Committee on Agriculture was quite clear that a definition of emergency situations in WTO law could not be a possible solution:

[I]t seems to me at least clear that WTO has no business trying to set itself up as the authority to pass judgement on these things. It simply has no credibility as it does not have the expertise to do so; nor is its function to set itself up as some kind of judge and jury on such matters within the international system. The definition that has been under consideration is that of the World Food Programme. [...] Therefore, in the absence of a compelling reason to override the definitions used by those that are responsible for administering and delivering food aid the furthest it would seem to me to be reasonable to go as regards a definition is to include the WFP definition as a reference.¹²¹

Furthermore, any definition of an emergency can evolve over time, and the relevant international organisations use slightly different definitions.¹²² The World Food Programme, as the dominant player in emergency food aid, defines three types of emergencies: sudden-onset emergencies, slow-onset emergencies and complex and protracted crises.¹²³ It is however questionable whether the third type should fall under the Safe Box, given that it can extend over years, *or even decades*.¹²⁴ Paragraph 10 of Annex L merely states that food aid may be provided as long as the emergency lasts, subject only to an assessment of continued genuine need as a result of the initial onset of the emergency. WTO Members decided, perhaps wisely

¹¹⁹ Para. 6, lit.b.

¹²⁰ Paras 11 lit.(a) and (c) (excerpts).

¹²¹ See, e.g., World Trade Organization, Communication from the Chairman of the Committee on Agriculture (30 April 2007), para. 58, available at http://www.wto.org/english/tratop_e/agric_e/agchairtxt_30apr07_e.pdf (accessed 01.06.2010)

¹²² On the normative value of the NFIDC-Decision also see Christian Häberli, Food Security and WTO Rules, in Baris Karapinar and Christian Häberli (eds), *Food Crises and the WTO*, Cambridge, New York, 2010 (in particular pp. 307-08).

¹²³ Food and Agriculture Organization of the United Nations, *Food Aid for Food Security*, 47-62.

¹²⁴ *Ibid.*, 56. (emphasis added). See also, World Food Programme, Definition of Emergencies, WFP Doc. WFP/EB.1/2005/4-A/Rev.1 (4 February 2005).

so, not to include a definition of emergency situations in WTO law. However, given the growing prevalence of complex and protracted crises,¹²⁵ some tightening of the Safe Box may be necessary in order not to open a Pandora's Box for food aid shipments that are not challengeable.

Safe Box = Genuine food aid?

The present formulation in paragraph 6 of the modalities in respect of the Safe Box has a clear, political objective. It is based on the Hong Kong mandate and is therefore an unlikely candidate for further changes. The assumption is that all food aid – cash and in-kind – supplied in cases of “certified” emergencies does not constitute commercial displacement or market creation, and therefore falls outside WTO disciplines on export competition. Obviously, this sentence intends to reassure food aid donors that their emergency interventions will escape scrutiny under the new WTO export competition disciplines.

Bearing in mind the uncertainties surrounding the emergency triggers the question remains whether the Safe Box will really serve as a haven for genuine food aid only. This article cannot address particular cases of supposed abuse in the past. For instance, corrupt import agencies or food stockpile managers can declare an emergency, or a needs assessment may conclude that emergencies can last for decades. The question in this context is therefore whether Safe Box food aid should under any circumstances be shielded from scrutiny. The next section addresses this question.

As for non-emergencies, it is hardly possible, without detailed case studies, to assess and quantify the commercial impact of, for instance, project aid such as free school meals with official ‘sponsors’ on which the WFP spent US\$ 340 million in 2007.¹²⁶ This leads to the conclusion that it will in many instances be difficult, to say the least, to assess the genuine character of food aid from an export competition perspective.

Furthermore, from a human security perspective, there is the concern that the Safe Box may impede the delivery of food aid to prevent or forestall an emergency, requiring that human disasters must have already taken place in order for food aid to be permissible.¹²⁷ A procedural distinction between emergency and non-emergency cases of hunger is probably useful to prevent bureaucrats from discussing calories while people are dying of hunger. However, as pointed out in the previous sub-section, the duration of an emergency remains an open issue. It is an unfortunate fact that emergencies as envisaged by the Safe Box cannot easily be distinguished from situations in a number of developing countries where the human security of people is threatened on a daily basis by lack of access to adequate food. Since in most cases, poverty or lack of income generation is the underlying cause of chronic hunger, providing food aid without also providing support for improving livelihoods is not likely to help those affected over the long term.¹²⁸

Monetisation

The last square brackets in the July 2008 Draft Modalities were on the issue of monetisation in non-emergency situations. The December 2008 Draft Modalities have broadened the scope

¹²⁵ Ibid. The number and scale of complex and protracted crises associated with violent conflict have risen sharply over the past decade, especially in sub-Saharan Africa.

¹²⁶ <http://documents.wfp.org/stellent/groups/public/documents/newsroom/wfp199570.pdf> (accessed 15 May 2009).

¹²⁷ Robert Howse and Ruti G. Teitel, "Beyond the Divide: The Covenant on Economic, Social and Cultural Rights and the World Trade Organization," Friedrich-Ebert-Stiftung, Occasional Papers Geneva No. 30 (2007), 26-7.

¹²⁸ Oxfam International, "Food Aid or Hidden Dumping?: Separating Wheat from Chaff," 10.

for monetisation for non-emergency situations. It is now allowed if it is necessary to fund the internal transportation and delivery of food aid or the procurement of agricultural inputs to low-income or resource-poor producers (para. 12). Whether the removal of these square brackets reflects the Members' compromise over monetisation or rather the push by the then Chairman of the Committee on Agriculture to reduce square brackets remains to be seen in future versions of the modalities.

Fit for Dispute Settlement?

It can be concluded so far that the avoidance of commercial displacement through food aid is recognised as an overarching principle in negotiations on export competition. At the same time, all emergency operations will fall into the Safe Box of Annex L. They will therefore be "presumed" not to constitute cases of commercial displacement or market creation. Whether or not the conformity presumption mentioned in paras 4 and 6 means that emergency food aid will no longer be challengeable under the new Article 10.4 is not quite clear. In theory, all food aid operations remain challengeable, but it is quite clear that in emergency situations the burden of proof establishing circumvention of export competition is on the complainant – probably without supporting evidence from an international organisation.

In any case, it would be necessary to look at all the facts together. In such an analysis, the proposed procedural requirements and new disciplines in respect of non-emergency food aid and monetisation can show the way forward in different situations where the question of circumvention of WTO disciplines on export competition arises.

First, and regardless of the less-than-clear distinction between emergency and non-emergency cases, the principle of different procedures for different situations seems appropriate. True emergencies lend themselves less well to commercial operations than longer-term needs of hungry but resource-poor people. From a trade law angle, an apportioning of the burden of proof commensurate with the potential for circumvention would appear a good procedural solution. This means that the presumption of conformity with WTO export competition disciplines is highest when food aid is provided in extreme emergencies, on a cash basis and locally or regionally procured (cf. paragraph 3). At the other end of the scale, food aid for non-emergency situations, in-kind, monetised and/or on a multi-year basis would seem automatically to call for a test of genuineness.

If such a principle is accepted, challenges under the DSU could be handled accordingly. A principle of *circumvention risk proportionality* could be a yardstick for the question of when the burden of proof shifts from the complainant to the respondent.

As pointed out above, the normal timelines of WTO dispute settlement may not allow for an adequate prevention of commercial displacement. It may therefore be necessary to establish a fast-track procedure, at least for non-emergency cases, where a presumption of displacement would be easier to establish by, say, the lack of a correct needs assessment. This could also involve the Committee on Agriculture. In such cases, it would be relatively quick to indicate non-compliance with export competition disciplines. The expertise in the WFP and other food aid organisations may be helpful – but other views such as those of commercial operators and local traders and producers may be useful too.

The next step, before reaching some conclusions on the proposed new disciplines, is a closer look at the present rules.

Comparison with food aid provisions in Articles 10 and 16 AoA

Section 3.1 examined the present rules on food aid, namely (i) the export subsidy circumvention disciplines in Article 10, (ii) Article 16.1 that commits developed country Members to the actions provided for in the so-called NFIDC-Decision, and (iii) paragraph 2 of that decision mandating the Committee on Agriculture to monitor the follow-up.¹²⁹

Before comparing these provisions with the December 2008 Modalities three aspects are noteworthy. First, as pointed out in the Appellate Body Report on *US – Foreign Sales Corporation* (FSC), the term “export subsidy commitments” in Article 10.1 has a “wider reach [than reduction commitments] that covers commitments and obligations relating to *both* scheduled and unscheduled agricultural products.”¹³⁰ Second, Article 10.4 specifically deals with international food aid; it obliges donors to ensure that “the provision of food aid is not tied directly or indirectly to commercial exports” (lit.a). Third, although the NFIDC-Decision has remained without any concrete effect, it does mention food aid as one instrument to mitigate possible negative effects of trade liberalisation.

When considering food aid from a competition and commercial displacement perspective, it is true that the *US – FSC* case addressed export subsidies and not Article 10.4 AoA on international food aid. Nevertheless, building on the examination of *US – Cotton* in section 3.1, recourse to Article 10.1 in a future food aid case remains possible: the ruling in *US – FSC* clarifies the application of Article 10.1 also to unscheduled commodities.

The Doha Round results should take this line a step further: Article 10.4 would increase in normative value if the proposed provisions on compliance with the Usual Marketing Requirements and the prohibition on tying food aid to commercial exports were made more stringent. For instance, the December 2008 Modalities define commercial displacement more explicitly.¹³¹ Furthermore, even without a quantifiable definition of commercial displacement in Article 10.4 AoA, the obligation to adhere to the Principles of Surplus Disposal including the system of Usual Marketing Requirements (Article 10.4 lit.b) could already serve as a test for circumvention. A complainant could argue that a successful demonstration of commercial displacement as defined through the Usual Marketing Requirements, would *eo ipso* constitute a violation of Article 10.4(b).

Today there is no ‘Safe Box’ *de facto* shielding all emergency aid from a challenge. The present formulation of Article 10.4 might therefore offer, by way of its implicit reference to the Principles of Surplus Disposal, a more comprehensive and satisfactory approach to challenge market displacement through food aid than the December 2008 Modalities. On the other hand, the system of UMRs has never effectively prevented commercial displacement.¹³² This leads to the conclusion that, either in the Doha negotiation or in other fora such as the FAO Consultative Sub-Committee on Surplus Disposal, the indicators for the occurrence of market displacement should be refined and their enforcement strengthened.

Finally, although the NFIDC-Decision contains no binding commitments on food aid levels, there is a clear obligation of the WTO Membership “to establish appropriate mechanisms to ensure that the implementation of the results of the Uruguay Round on trade in agriculture does not adversely affect the availability of food aid.” The fact that these mechanisms have never been established raises the question how a new commitment, similar to the NFIDC-Decision, could be made more useful. If Annex L is enshrined in WTO law, it may at least improve the general commitment of WTO Members to “to maintain an adequate level of international food aid” (para. 1, Annex L). However, the question of what constitutes an *ade-*

¹²⁹ World Trade Organization, *Decision on Effects of the Reform Programme*.

¹³⁰ Appellate Body Report on *US – FSC*, para. 144.

¹³¹ Cf. section 5.1.2. Para. 11 lit.c of Annex L reads: “[...] Commercial displacement in this context shall arise where the provision of in-kind food aid by a Member materially displaces commercial transactions that would otherwise have occurred in or into a normally functioning market the recipient country for the same product or directly competitive products.”

¹³² Christopher B. Barrett and Daniel G. Maxwell, *Food Aid after Fifty Years: Recasting Its Role* (London: Routledge, 2005), 69-71. This also applies to the so-called Bellmon Analysis which recipient agencies of US food aid have to undertake before monetisation, see *ibid*, 190-1.

quate level will be a contentious issue. If the WTO membership is serious about this commitment, it should be phrased in such a way as to entail clear, measurable and enforceable commitments.

Summing up, it appears that despite some clear progress in terms of food aid disciplines it would be wrong to shield all sorts of emergency actions from legal scrutiny by way of a dispute settlement case, simply because they happen to fall into the Safe Box. The burden of proof of abuse would in any case rest on the complainant – but the respondent would need good arguments to rebut such clear facts as market share changes following food aid operations, even if undertaken in official emergency cases and on the basis of a needs assessment. On the other hand, even non-emergency operations such as school meals may fully qualify as genuine food aid – provided they are undertaken in good faith and according to internationally agreed guidelines.

Conclusions

International food aid comes in many shapes and sizes. Beneficiaries and needs are numerous and varied. Clearly, there are many situations where hungry people have neither money nor resources for food production, such as in a newly established refugee camp. At the same time there are other situations with partial food self-sufficiency, or where people earn enough to cover some of their calorific intake needs. A clear rule for all circumstances allowing an assessment of the commercial impact of all forms of food aid will hardly be possible. In any case the WTO is not the place to assess the quality of food aid operations, nor can it decide on quantitative targets or commitments for its Members.

The main driver for establishing the Safe Box and for allowing monetisation even for in-kind food aid and in non-emergency situations was the concern not to see food aid dwindle as a result of too stringent WTO disciplines on export competition. This concern was addressed at the 2005 WTO Ministerial in Hong Kong where the WFP and a number of NGOs made a strong plea not to have the WTO deal with such a sensitive item. While this concern is shared, the Doha Round can nevertheless be seen as an opportunity to better de-link food aid from serving as an instrument of surplus disposal. Given the right formulations food aid will not decrease in volume and commercial displacement can be avoided.

The conclusions are, firstly, that Annex L goes partly beyond the WTO's main role of fighting protectionism (6.1) and, secondly, that the food aid negotiation should focus very narrowly on the real WTO issues in this field, i.e. commercial displacement and market creation through directly or indirectly tied food aid (6.2). Finally, with a pledge on food aid governance attached to the Doha Round Final Act the donor community could commit to reversing the trend towards reducing food aid when world market prices are high (6.3).

Annex L is reaching beyond the trade-related aspects of food aid

Put simply, WTO is about protectionism and not about the quality nor the quantity of food aid. 'Doha' is a so-called Development Round that may justify expansion of regulation of food aid-issues going beyond food aid as circumvention of export subsidy reductions. Nevertheless, it appears that some issues dealt with in the December 2008 Modalities such as the problems arising from monetisation and in-kind food aid as well as displacement of local production by food aid should be addressed in a more appropriate forum. If the competent international organisations have been unable to come to grips with these problems, it is doubtful

whether the WTO can solve them. The mandate of the WTO extends to trade distortion and surplus disposal. With regard to food aid, there is a need for better institutional cooperation and coordination to ensure that different international regimes are making coherent effects on international food aid and global food security.

In this context, the recent proposals for a Global Food Aid Compact (GFAC) to replace the Food Aid Convention are worth mentioning.¹³³ While this is still a scholarly discussion, the proposals envisage a GFAC Secretariat within the WFP, co-chaired by the WFP, the WTO and by OECD-DAC.¹³⁴ This configuration would explicitly recognise the interlinkages between food aid, global agricultural trade and overseas development assistance. The GFAC would absorb the CSSS, rendering that body unnecessary by subjecting food aid to WTO disciplines. A new GFAC outside the International Grains Council would signal clearly that food aid is no longer viewed as a trade promotion tool.¹³⁵ Finally, the GFAC would not entrust the WTO to exercise global oversight on each and every aspect of food aid operations, but merely demand that its proven trade-related disciplines and dispute resolution mechanisms be made available within the realm of food aid.¹³⁶

WTO to focus exclusively on commercial displacement

If it is to ensure a level-playing field for traders without the backing of their Finance Ministers, the WTO must address all cases of export competition. Today this happens only for export subsidies. For the new disciplines including those on food aid it will often be rather difficult to prove hidden subsidies. Worse, in most cases the infringement of the new disciplines will take place long before a final ruling in a dispute settlement case, which means that the non-subsidised food exporters will have lost market shares or market creation opportunities long before a WTO Dispute Settlement Body decision is implemented.

These shortcomings were pointed out by recent literature.¹³⁷ However, this does not mean that the attempt to discipline export competition through food aid is futile. This paper argues for a re-focussing on WTO's mandate to combat protectionism and anti-competitive trade-distortions. There is no accepted definition of 'genuine' food aid, and the WTO is not the place to develop such a definition. Nevertheless, when developing additional disciplines in this field, perhaps a negative formulation might be more appropriate, i.e. the absence, through international food aid, of trade distortion and/or commercial displacement effects.

What is needed are clear rules, and enforcement through the established channels in the WTO including the Committee on Agriculture, bilateral consultations, trade policy reviews, good offices and dispute settlement. For food aid disciplines, there is the possibility of shifting the burden of proof according to the likelihood of abuse. Obviously, the *prima facie* burden of proof remains on the complainant. But the task of the complainant will be easier if the presently available international criteria for genuine food aid are made mandatory under WTO litigation (e.g. recourse to the Usual Marketing Requirements, or other relevant WFP or FAC provisions). These criteria should remain the competence of the appropriate fora. In the WTO a kind of fast track procedure could be entrusted to the WTO Committee on Agriculture. Such a procedure could follow a list of indicators for commercial displacement, making it easier to detect non-genuine food aid and to raise the issue in the appropriate forum, including under the DSU.

¹³³ See, e.g., Christopher B. Barrett and Daniel G. Maxwell, "Towards a Global Food Aid Compact," *Food Policy* 31, no. 2 (2006).

¹³⁴ Barrett and Maxwell, *Food Aid after Fifty Years: Recasting Its Role*, 229.

¹³⁵ Ibid.

¹³⁶ Ibid.

¹³⁷ See, e.g., Cardwell, "Food Aid and the WTO: Can New Rules Be Effective?."

Box 1 presents a proposal for a new Annex L in the December 2008 modalities, replacing Art.10.4 of the AoA.

Box 1: International Food Aid (Replacing Article 10.4 of the Agreement on Agriculture)

1. Members shall ensure that food aid* is provided in full conformity with the disciplines below, thereby contributing to the objective of preventing commercial displacement or market creation. Commercial displacement shall arise where the provision of food aid by a Member materially displaces commercial transactions that would otherwise have occurred in or into a normally functioning market in the recipient country for the same product or directly competitive products.

* Unless otherwise specified, the term food aid is used to refer to both in-kind and cash-based food aid donations.

General disciplines applicable to all food aid transactions

2. Members shall ensure that all food aid transactions are provided in conformity with the following provisions:

- (a) they are needs-driven
- (b) they are in fully grant form
- (c) they are not tied directly or indirectly to commercial exports of agricultural products or of other goods and services
- (d) they are not linked to the market development objectives of donor Members.

3. The provision of food aid shall take fully into account local market conditions of the same or substitute products. Unless authorised by the organisations mentioned under paragraph 6 below, Members shall refrain from providing food aid in situations where this would cause, or would be reasonably foreseen to cause, an adverse effect on local or regional production of the same or substitute products.

4. Members are encouraged to procure food aid from local or regional sources to the extent possible, provided that the availability and prices of basic foodstuffs in these markets are not unduly compromised.

5. The recipient government has a primary role and responsibility for the organization, coordination and implementation of food aid activities within its territory.

6. The competent international bodies, i.e. a relevant United Nations agency, the International Committee of the Red Cross or the International Federation of Red Cross and Red Crescent Societies, and the Food Aid Convention, shall establish rules and guidelines for monetisation and re-exports of food aid, in-kind and non-emergency operations, and for monitoring and surveillance.

Further disciplines for food aid transactions in emergency situations (Safe Box)

7. To ensure that there is no unintended impediment to the provision of food aid during an emergency situation, food aid provided under such circumstances (whether cash or in-kind) shall be within the ambit of the Safe Box and, therefore, deemed to be in conformity with this Article, provided that the emergency is confirmed, within a period of three months, by an assessment of need coordinated under the auspices of one of the international bodies referred to in paragraph 6 above.¹³⁸

8. All emergency food aid provided in conformity with the conditions of paragraphs 2 to 7 and all the other relevant provisions of this Article shall remain in the Safe Box, i.e. unless proven otherwise it shall be presumed to be in conformity with this Article.

9. A notification will be required on an *ex-post* basis by donor Members at six-month intervals in order to ensure transparency.

¹³⁸ Needs assessment should be done with the involvement of the recipient government and may involve a relevant regional intergovernmental organization or an NGO, but while the latter bodies may be involved, this is in a context where they are in coordination with the relevant United Nations agency or ICRC/IFRCRCS as the case may be. A needs assessment shall not have standing for the purposes of access to the safe box under these provisions unless it has been conducted in such a coordinated manner, and has obtained the demonstrable consent or approval of the relevant multilateral agencies.

10. Subject to its continued conformity with the other provisions of this Article, emergency food aid may be provided as long as the emergency lasts subject to an assessment of continued genuine need as a result of the initial onset of the emergency. The relevant multilateral agency shall be responsible for making or conveying such a determination, and notification thereof shall be provided to WTO.

Further disciplines for food aid transactions in non-emergency situations

11. Food aid in non-emergency situations outside the Safe Box shall be:
- (a) based on a targeted assessment of need as under paragraph 7 above or, where such a targeted assessment is not reasonably obtainable, by an international humanitarian non-governmental organisation of recognized standing, working in partnership with a recipient country government. That assessment would incorporate and reflect objective and verifiable data on poverty and hunger published by an international or regional intergovernmental organisation or by a recipient country that objectively identifies the food security needs of the target populations described in sub-paragraph (b) below;
 - (b) provided to redress food deficit situations which give rise to chronic hunger and malnutrition and, accordingly, such food aid shall be targeted to meet the nutritional requirements of identified food insecure groups; and
 - (c) be provided consistently with the objective of preventing commercial displacement.

Monitoring and surveillance

12. Food aid donor and recipient Members shall be required to notify to the Committee on Agriculture, on an annual basis, all relevant data.

Pledge on the maintenance of total food aid flows after Doha

The WTO should not determine levels of spending on food aid. Even though the effectiveness of the Food Aid Convention is constrained by its nature as a voluntary agreement, the FAC is the appropriate forum for pledges by donor countries. However, the WTO cannot ignore the fact that food aid levels in the past often went down when world market prices rose – whether or not as a consequence of multilateral trade liberalisation. When they adopted the NFIDC-Decision at Marrakesh, back in 1994, Trade Ministers acknowledged the link between trade liberalisation and the possibility of disruptions, including in levels of food aid. The Doha Round Final Act will provide an opportunity to improve on that decision which has never been put to use. Even though the WTO can neither guarantee food aid levels nor supervise the operations, it must ensure that its decisions do not diminish food security among the poorer segments of its membership. In addition, Members may be more willing to make concessions on their food aid positions within the reciprocal deal-making environment of the WTO. A political but enforceable commitment in the Final Act not to reduce food aid when prices are rising would go a long way towards the acceptance of the Doha package – and improve the functioning of the Food Aid Convention. Therefore, it is proposed to add the following pledge on food aid governance as an annex to the Doha Round Final Act.

Box 2: Proposal for a Food Aid Commitment in the Doha Round Final Act

Ministers,

Recognizing the need to make every effort to ensure that adequate food aid levels be maintained throughout the agriculture reform process, which will continue as a result of the Doha Round negotiations;

- *commit* not to reduce their actual food aid spending levels for commodities whose world market prices rise above the preceding three-year average.

Summing up

As matters stand today, the potential for Doha Round improvements, from an export competition viewpoint, of food aid and food security is rather limited.

Food aid, basically, comes in two forms: either untied and cash (implemented by UN/WFP or ICRC), or directly and indirectly tied. Only part of the latter has a potential for trade distortion through market creation and commercial displacement, including emergency aid, aid in-kind, monetisation, and re-exports. This is where new WTO disciplines could improve the situation from an export competition viewpoint. However, 'emergency aid' and some other forms of tied aid will escape the new disciplines even if they are trade distorting.

Finally, and as a flanking measure, a WTO-based commitment to improve food aid governance could avoid a reduction of total food aid when prices increase.

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WTO: The July Framework on Agriculture from a Swiss Perspective

Written in October 2004 by Christian Häberli, Ph.D.¹

Introduction and Summary

From a negotiator's viewpoint, drawn-out negotiations with many opposing parties and numerous and complex subjects are a challenging but often also a rather frustrating experience. Especially when the stakes are high and positive outcomes, if any, small. In GATT/WTO negotiations, the final result in practice must always obey the rule of consensus.

Therefore, where the stakes are high on all sides, almost any result will inevitably entail frustration and bitterness. The present negotiation on agriculture as a part of the Doha Development Agenda (DDA) is no exception. Yet there are win-win results in view, even from the perspective of an importing country. As every economics schoolbook points out, freer trade brings about economic welfare – for the world as a whole, and for the consumers in the importing country. The problem, as everybody knows, is the fact that concessions made in the multilateral system are perceived at home as being sacrifices and acceptable only in order to win comparable concessions from others. If the DDA should boil down to a Round on Agriculture – unfortunately a not too farfetched possibility – the benefits for farmers in net importing developed and developing countries must come from elsewhere.

This article is written from a Swiss perspective, i.e. from the country with the highest combined taxpayer and consumer support to its farmers.² The difficulties for such countries are particularly daunting, and this has been acknowledged by Tim Groser, the Chairman of the Committee on Agriculture in Special Session (COASS) – himself a New Zealander. A recognition of these difficulties had to be found, after two failed attempts in Seattle (1999) and Cancún (2003). The Framework for Establishing Modalities in Agriculture adopted by the General Council on 31 July 2004³ does contain inter alia a whole section dealing with “sensitive products” – but without specifying which kind of special treatment will be available to such products, and at what price. Despite these uncertainties in one of the most important negotiating issues, Switzerland has accepted the July 2004 package, along with all the other members of the so-called Group of 10, comprising countries in a similar situation.⁴ Put simply, this acceptance – and the one by all other WTO Members – is an expression of that “comparable level of dissatisfaction” often necessary for taking package decisions in a consensus-based organisation.

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² The OECD's Producer Support Estimate (PSE) 2003 figure for Switzerland is 74. This means that Swiss farmers derive 74% of their income from the combined effects of border protection and direct support by consumers and taxpayers. In comparison, PSE figures for New Zealand are just 2%, for the USA 18% and for the EC 37%. The other OECD Members of the G10 (see below) are in the Champions League next to Switzerland: Japan (58%), Korea (60%), Iceland (70%) and Norway (72%). Cf. OECD, *Agricultural Policies in OECD Countries: At a Glance*, Paris, 2004

³ Cf. Document WT/GC/W/535 of 31 July 2004.

⁴ The G-10 consists of Bulgaria, Iceland, Israel, Japan, Korea, Liechtenstein, Mauritius, Norway, Chinese Taipei, and is led by Switzerland.

Before analysing the framework text, it is necessary to summarise the situation of a country like Switzerland. We then turn to examine the guiding principles laid down in the framework. When looking forward into the next stage of the negotiation one prediction is easy to make: The difficulties ahead are even greater than those behind. Obviously, the final outcome, and in particular the extent of the new concessions and commitments will also depend on the other DDA results. But the outcome of several ongoing dispute settlement procedures will also have an impact, especially on domestic support disciplines, and indirectly on Members' willingness to further commitments. A political appraisal will conclude the article: The key to a successful conclusion of the Doha Round lies in the appropriate combination of ambition and time.

1. Up-Hill Battlers: The Swiss Situation

Agricultural policy in Switzerland has come a long way. As a result of two world war experiences of food insecurity, Swiss agriculture was assigned maximum self-sufficiency objectives until well into the 1970s. Starting only in the last decade, a fundamental change has taken place. Awareness of the increasing shortcomings of the old policies, rejected in several people's votes at the beginning of the nineties, led to this autonomous reform process.⁵ In addition, the results of the Uruguay Round negotiations in agriculture also contributed to the strengthening of this reform, in particular with regard to the progressive decoupling of income from market support and the subsequent "recoupling" of direct payments to, for instance, environmentally beneficial practices or higher animal welfare standards. The Green Box was and is thus seen as a safe haven where support policies in line with the criterion of "no or at most minimal impact on trade and production"⁶ can be maintained, subject only to the availability of funds or, in other words, the readiness to pay of the Swiss voters and taxpayers.

⁵ For further readings on the Swiss Agricultural Reforms, cf. Agricultural Reports 2000-2004, published by the Federal Office for Agriculture in Berne (www.blw.admin.ch) and: Doing it the Swiss Way, by Stephan Mann, in *EuroChoices*, vol.2, no.3, 2003.

⁶ Chapeau in Annex 2 of the WTO Agreement on Agriculture

⁷ Art. 104 of the Federal Constitution, in relevant parts, reads as follows:

Agriculture

¹ The Confederation shall ensure that agriculture will, through sustainable and market oriented production, contribute meaningfully to:

- a. ensuring the supply of food to the population;
- b. the preservation of the natural habitat and the countryside;
- c. the decentralised settlement of the territory.

² In addition to such mutual assistance as can be required from the agricultural sector, and as an exception to the principles of free market economy where necessary, the Confederation shall support farm enterprises engaged in working the land.

³ The Confederation shall enact measures to ensure that agriculture sector accomplishes its multifunctional tasks. In particular, the Confederation's powers and duties shall include the following:

- a. It shall supplement farm incomes with direct payments so as to provide reasonable compensation for services rendered, provided that said services are duly justified and directed towards the established ecological requirements;
- b. It shall encourage, using economically viable incentives, production methods which are particularly suited to and respectful of the natural environment and the animal life;
- c. It shall issue regulations governing the labelling and declaration of origin, the quality, the production and processing methods used in relation to foodstuffs;
- d. It shall protect the environment against the damage of excessive use of fertilisers, chemical products and any other substances;
- e. It can encourage agricultural research, extension and training and distribute grants to promote investment;
- f. It can issue regulations to consolidate rural land holdings.

⁴ To these ends, the Confederation shall use funds especially set aside for the agricultural sector as well as general federal funds.

The result of this parallel process of national and international developments is a constitutional article voted by 78% of the people, in 1996, assigning a multifunctional role to agriculture which is to be both market-oriented and sustainable.⁷ Based on this political consensus, a complete revision of the Federal Law on Agriculture (1951) was adopted in 1998, with subsequent reform steps taken, on a legislative basis, every four years. Presently, “Agricultural Policy 2007” runs from 2004-07. The next domestic reform phases (2008-2011 and 2011-2015) could thus coincide with the implementation of the Doha Round results.

The second major result of the Uruguay Round was, of course, the comprehensive and mandatory tariffication obligation, i.e. the transformation of all border measures for all products into tariffs. In Switzerland, this meant a complete re-instrumentation of border protection. As a matter of fact, upon its accession to the GATT, in 1966, Switzerland had obtained a virtual ‘carte blanche’ agricole (in exchange it had to adopt the lowest bound tariffs on industrial goods of all contracting parties to the GATT).⁸ It was thus free to regulate imports just about as it wanted to.

Domestic and international policy reforms had further mutual reinforcing effects: Before and after accession to WTO, a number of domestic policy instruments were abolished, such as price guarantees for wheat and (by 2009) milk production quotas introduced in 1976. Others were introduced, like the auctioning of tariff rate quotas – a measure still questioned by lawyers but advocated by economists.

However, apart from two limited market openings resulting from the minimum access obligations (for pork and potatoes), actual border protection decreased only marginally for Switzerland, like for others, i.e. by the minimum 15% prescribed by the Marrakesh Agreement. Tariffication, indeed, does not imply market access increase. For example, previous import prohibitions and quotas were transformed into a still prohibitive tariff and an access commitment in the form of a tariff rate quota. Admittedly, tariffication was a process implying arbitration, and also negotiation. The price paid for tariffication by the agricultural exporters was the acceptance of a certain margin of appreciation by the importers. The resulting “water in the tariffs” in many schedules is sometimes called “dirty tariffication”.

According to the WTO Secretariat 2000 Trade Policy Review Report, Switzerland has an average agricultural tariff protection of 34.3%, whereas the ad valorem equivalent of tariffs on products such as meat reaches 678%.⁹ Like the other G10 as well as many developing countries, its’ agricultural market shares are therefore extremely vulnerable to tariff reduction rates even of the size of the Uruguay Round, let alone of some more ambitious formula.

II. Laying down the ground rules: Disagreeing on “substantial” progress in agricultural reforms

The root of the major problem of the New Agriculture Round is already found in Article 20 of the Agriculture Agreement. This evolutionary clause provides for “substantial progressive reductions in support and protection” and enjoins new negotiations along the “reform process” to start six years after the inception of WTO, i.e. on January 1, 2000.¹⁰

⁸ Tariffs on non-agricultural products had an *ad valorem* equivalent average of 2.3% in 1999 (cf. Document WT/TPR/S/77 dated 6 November, 2000).

⁹ Cf. Document WT/TPR/S/77 dated 6 November, 2000.

¹⁰ *Article 20 AoA Continuation of the Reform Process*

Recognizing that the long-term objective of substantial progressive reductions in support and protection resulting in fundamental reform is an ongoing process, Members agree that negotiations for continuing the process will be initiated one year before the end of the implementation period, taking into account: (a) the experience to that date from implementing the reduction commitments; (b) the effects of the reduction commitments on world trade in agriculture; (c) non-trade concerns, special and differential treatment to developing country Members, and the objective to establish a fair and market-oriented agricultural trading system, and the other objectives and concerns mentioned in the preamble to this Agreement; and (d) what further commitments are necessary to achieve the above mentioned long-term objectives.

Attempts to elaborate on “substantial progressive reductions” and to define a ministerial negotiating mandate were initiated right after the First Ministerial in Singapore (1997). However, these negotiations gloriously collapsed behind the smokescreens of Seattle, in November 1999.

In November 2001, the Doha Ministerial finally broke the deadlock when it adopted the DDA. Yet, the Ministers again thwarted the definitional issue when they simply agreed to aim at “substantial improvements in market access”.¹¹ Indeed, a Cairns Group reading of this phrase quite obviously diverges from what many importing countries consider as substantial. The art of adding imprecise adjectives to ministerial commitments does allow the bridging of differences at the launching of a new negotiation. But it makes even more difficult the ensuing negotiation and its conclusion. Lawyers beware!

“Substantial improvements in market access” are clearly the biggest challenge arising from the agriculture negotiation to developed agricultural net importers like Switzerland.¹² Some exporters feel “frustrated” by the fact that the eight GATT negotiating rounds have not brought about market access comparable to industrial goods, where bound average tariffs for OECD countries decreased from 45 to 4.5%. This frustration is understandable – although it could be wondered why these governments had asked their parliaments to ratify the results in each of the previous rounds...

¹¹ Doha Ministerial Declaration / Agriculture (*in* WT/MIN(01)/DEC/1 dated 20 November 2001):

13. We recognize the work already undertaken in the negotiations initiated in early 2000 under Article 20 of the Agreement on Agriculture, including the large number of negotiating proposals submitted on behalf of a total of 121 Members. We recall the long-term objective referred to in the Agreement to establish a fair and market-oriented trading system through a programme of fundamental reform encompassing strengthened rules and specific commitments on support and protection in order to correct and prevent restrictions and distortions in world agricultural markets. We reconfirm our commitment to this programme. Building on the work carried out to date and without prejudging the outcome of the negotiations we commit ourselves to comprehensive negotiations aimed at: substantial improvements in market access; reductions of, with a view to phasing out, all forms of export subsidies; and substantial reductions in trade-distorting domestic support. We agree that special and differential treatment for developing countries shall be an integral part of all elements of the negotiations and shall be embodied in the Schedules of concessions and commitments and as appropriate in the rules and disciplines to be negotiated, so as to be operationally effective and to enable developing countries to effectively take account of their development needs, including food security and rural development.

We take note of the non-trade concerns reflected in the negotiating proposals submitted by Members and confirm that non-trade concerns will be taken into account in the negotiations as provided for in the Agreement on Agriculture.

14. Modalities for the further commitments, including provisions for special and differential treatment, shall be established no later than 31 March 2003. Participants shall submit their comprehensive draft Schedules based on these modalities no later than the date of the Fifth Session of the Ministerial Conference. The negotiations, including with respect to rules and disciplines and related legal texts, shall be concluded as part and at the date of conclusion of the negotiating agenda as a whole.

¹² A simple calculation shows that repeating the Uruguay Round reduction formula (-15% minimum/-36% average) would lead to a halving of border protection between Marrakesh (1994) and, say, 2012, i.e. in just 18 years. A tall order, considering the fact that no two GATT Rounds ever achieved such reductions for sensitive products – and since July 2004 an even sharper reduction has become likely!

III. The Framework Agreement: A First Step at Bridging the Gap

The July 2004 framework agreement is a first step towards defining the ambitious but also ambiguous word “substantial”. The following analysis along the so-called three pillars of the negotiation reveals that, behind renewed diplomatic smokescreens, there are indeed a few new and more precise commitments, albeit without hardly any quantification.

(1) Domestic Support

Framework Text: Subsidising Members are required to reduce the overall sum of their trade-distortive subsidies (*idem est* Amber Box, Blue Box and *de minimis* support) under a 'tiered' formula, which would reduce all such subsidies with a “strong element of harmonisation” – i.e. higher subsidy levels would be cut more than lower ones. A reduction of at least 20% has been agreed for the first year of implementation – the same as over the whole Uruguay Round implementation period, and possibly the single biggest challenge for the United States (para 7). Product-specific support would be capped “at their respective average levels”, and “substantial reductions” will have to result in “reductions of some product-specific support” (para 9).

On Blue Box payments (partially decoupled payments under production-limiting programmes), the framework text foresees reductions to be agreed, but such support “will not exceed 5% of a Member’s average total value of agricultural production during an historical period”. Members with particularly high Blue Box levels would, however, not be asked to make “a wholly disproportionate cut” – a solution found, in particular, to the Norwegian problem in this respect. And “any new criteria to be agreed will not have the perverse effect of undoing ongoing reforms” (para 15). The bottom line – a reference to the US situation – will however be that “Blue Box payments are less trade-distorting than AMS measures” (para 14).

Regarding the Green Box (decoupled support), the framework provides for the review of its criteria in order to ensure that measures in the box are truly at most minimally trade-distorting. Its “basic concepts, principles and effectiveness” would remain, and non-trade concerns taken into account (para 16).

Appreciation: The key phrase is “harmonisation in the reductions made by developed countries”. This involves higher cuts for big spenders, both in absolute terms (US, EC) and as a part of the resulting value of production (most G10 countries). Also, the gateway from Amber Support (AMS or *de minimis*) to Blue Box measures is likely to be a narrow one, in order to avoid “box shifting” of measures without improvements in disciplines. This is the main concern here, especially by developing countries competing against domestically subsidized products on their own and on third markets. Another innovation is the requirement of product-specific capping. This will put an end to the present possibility of shifting support between products, within the aggregated ceiling agreed to in the schedules. It remains to be seen whether the additional obligation to reduce support on a product basis will also apply to sensitive products (para 9). West Africans will of course aim at US cotton, Brazil at EC and US sugar, and so on.

The main point for countries like the G10 is the assurance given that the Green Box will basically remain untouched. Its criteria will be reviewed, but only to ensure that they are fully compatible with the magic formula in Annex 2 of the AoA (“have no, or at most minimal, trade-distorting effects or effects on production”). Another imprecision which is a puzzle for good lawyers and economists – yet the only formula with any chance of acceptance by all and sundry, for a long, long time to come.... As a matter of fact, although many questions were raised in the Committee on Agriculture with regard to measures notified as being “green”, no legal challenge has as yet been settled on the rather important question of “how green is green?”

(2) Export Competition

Framework Text: All forms of export subsidies are to be eliminated in parallel, and disciplines on all export measures established, with equivalent effect, "by a credible end date" (para 17). This includes export subsidies, the trade-distorting elements of export credits and insurance programmes, trade distorting practices of state trading enterprises, and food aid leading to commercial displacement (para 18).

Appreciation: This is the biggest breakthrough since the Doha Ministerial (which agriculture negotiators spent almost exclusively on finding the mind-numbing formula of "reductions of, with a view to phasing out, all forms of export subsidies"). The acceptance of this text by the EC had been strongly criticized by some of its own Member States, in particular by France. But countries like the USA (for export credits and food aid) and especially Canada, even Australia and New Zealand, had similar problems, the latter ones in respect of their state trading entities which will have to be disbanded or operate under new disciplines in addition to Article XVII GATT. They finally accepted it only on the understanding that the phase-in of these disciplines would likely last for up to 10 years.

This agreement in principle is also the one with most of the technical work still outstanding. The key word is "parallelism", both in respect of "measures with similar effects" and of the phasing-out of the complete armory of export competition instruments. A difficult negotiation ahead, for a result which is likely to look much like a disarmament treaty: Indeed, exporters today enjoying governmental support of any kind will not agree to phase those payments out unless they are given sufficient assurances that their competitors will not benefit from support measures with a similar effect. Incidentally, it is interesting to note that this negotiation concerns not only the major exporters and some of the Cairns Group countries. As a matter of fact, not less than six G10 countries (13) still have the right to use export subsidies, Switzerland alone to the extent of almost 500 million francs. They have agreed to renounce these rights if given sufficient assurances in respect of their non-trade concerns and their sensitive products.

Finally, it should not be forgotten that, after the phase-out of eliminated export subsidies and similar measures, many net food importing developing countries are likely to find their food bills considerably increased, without being able to substantially improve their market shares abroad or even at home.¹⁴ Sub-Saharan African countries, with a few exceptions like South Africa and Kenya, are concerned here – the same countries that will lose export markets through the erosion of their tariff preferences in Europe. Some of them, like Mauritius, will be directly and negatively affected by the phasing-out of export subsidies, since the EU will probably no longer be able to guarantee preferential imports at above-world market prices for sugar.

(3) Market Access

Framework Text: Like for domestic support reductions, a "tiered" formula will apply for reducing tariffs in both developed and developing countries, i.e. a formula "that takes into account their different tariff structures" and under which tariffs would be divided into different bands depending on their respective bound tariff level (para 28ss). Least-developed countries (LDC) would be excluded from any tariff reduction commitments. Reductions would be made from bound rates, with higher tariffs being cut more than lower ones (harmonisation). Notably, the number of bands, the thresholds for defining the bands, as well as the type of reduction methodology – e.g. using the Swiss formula or Uruguay Round formula – will have to be determined in the modalities negotiations. The burning issue in Cancún, the establishing of an overall tariff cap, has arguably become redundant in a context of bands and a distinct treatment for sensitive products. Consequently, and in order to accommodate the US delegation, capping remains on the table but only as a subject which "will be further evaluated" (para 30).

¹³ Bulgaria, Israel, Iceland, Norway, Switzerland-Liechtenstein. Today, the first three of these countries do not make use of their rights in this respect.

¹⁴ The tide of free trade will not float all boats, by Arvind Panagariya, Financial Times, 2-3 August 2004

On “sensitive products” the framework text establishes rules for their selection and treatment:

- “Members may designate an appropriate number, to be negotiated, of tariff lines to be treated as sensitive”, but “without undermining the overall objective of the tiered approach” (para 31).
- “Substantial improvements” for each product (but not tariff lines!), through “combinations of tariff quota commitments and tariff reductions” and on the basis of “coherent and equitable criteria” yet to be established (paras 32-34).

Sensitive products in developing countries will have to be determined in the post-framework stage. The framework text merely states that developing countries would - under special and differential treatment (S&D) - generally be subject to lesser reduction commitments (paras 39s). They would also be able to designate a number of “special products” (SPs), based on criteria of food security, livelihood security and rural development needs (para 41). For such products “more flexible treatment” is granted. Also, developing countries will have access to a new special safeguard mechanism (SSM; para 42).

Appreciation: Undoubtedly the most difficult pillar for most countries, the framework text, while representing a step forward, cannot be considered a break-through. Compared with Doha and Cancún, there is some higher degree of precision, e.g. with the “single approach” applying to all countries (except for LDC), and the tiered formula implying deeper cuts in higher tariffs with flexibilities for “sensitive products”. Three paragraphs are allocated to this other core issue – besides export competition – of the agriculture negotiation. But the main question remains open: To what extent will the more lenient treatment of sensitive products have to be compensated with tariff quota quantity increases and higher tariff reductions? Certainly the whimsical reference to the “overall balance” is of no help for the interpretation of these provisions!¹⁵ This acknowledgement of sensitivities also in industrialized countries is in any case an extremely narrow one, something for which Chairman Groser coined the term “constrained flexibility”.

In other words, the biggest difficulty, namely reaching consensus on “substantial” improvements in market access remains unsolved.

(4) Other Issues

Safeguards: While the need of developing countries for adequate safeguards has been recognised, the question of the special agricultural safeguard (SSG), laid down in Article 5 of the AoA, merely “remains under negotiation” (para 38). The use of this instrument has been relatively sparse, and for certain cases contested. But what is considered standard for almost all trade agreements seems no longer acceptable or necessary, even for countries like the USA that are using the SSG until today. Considering the relative comfort provided by safeguard possibilities to tariff reducers, thus encouraging them to make greater commitments, the SSG may yet play a role in this negotiation.

Cotton: As will be remembered, cotton was one of the reasons for the failure of the Cancún Conference. The outcome on this particularly sensitive item – for the least-developed producers in West Africa as well as for the United States – was therefore crucial to the agreement reached by end of July 2004. The framework text states that this issue would be addressed as an integral part of the agriculture negotiations, but in an ambitious and expeditious manner. This could be achieved through effective reductions and capping of product-specific subsidies, through significant reduction commitments per tariff line, and the elimination of trade-distorting elements of export competition instruments such as export subsidies. Moreover, the substantive part of the draft General Council Decision states that Members will try to work towards building coherence between the trade and development aspects of the cotton issue, e.g. by promoting cooperation between the WTO Secretariat, the international financial institutions, and the development community. However, the framework marks no progress in substance. It merely recalls the existence of the issue, and mandates negotiators

to “achieve ambitious results expeditiously” in all three pillars (para 46) and in a new sub-committee on cotton (para 4). What to think of such almost empty promises? Is this a step back for the cotton producers in West Africa, a sad case of “aid not trade”? Such a rather pessimistic assessment is however mitigated by the fact that “substantial” results in all three pillars will, in any case, contribute to solving the cotton issue.

Geographical Indications: No major developments since Doha. Thus an important non-trade concern (for the 40-strong “Group of GI friends” comprising the EC and Switzerland, but also developing countries like India and Thailand) remains unsolved (para 49). Opponents in the “new world” argue that there is no mandate in the DDA to negotiate on this issue. The question remains also open whether to address it in the agriculture negotiation or, probably more appropriately, in the TRIPS Agreement (extension of Article 23 and the question of the Register of Wines and Spirits). The only reference left is the request by the General Council to the Director General “to continue with his consultative process on all outstanding implementation issues ... including on issues related to the extension of the protection of geographical indications”. This report is due by May 2005, and “any appropriate action no later than July 2005” (para 1 lit.d of the chapeau).

Tariff Erosion: A problem without a solution is the fact that each tariff reduction agreed on an MFN basis will erode the preferential advantage hitherto enjoyed by developing countries under the Habilitation Clause and the Generalised System of Preferences (GSP). Recent improvements of preferential margins are the “Everything But Arms” initiative of the EC and other countries like Norway and Switzerland. These initiatives progressively allow for zero duty/no quantity limitation access for all products from all LDC. Nevertheless, preference erosion through MFN reductions provides an only temporary reprieve, for preference beneficiaries, from competition by non-LDC including Brazil and Australia. No wonder then that most of the so-called G-90 countries oppose steep tariff reductions not only in their own markets but also in countries where their major exports are likely to face stiffer competition from other suppliers. But who will hear them in an organisation whose main brand is the most favoured nation treatment?!

Peace: The issue of the peace clause in relation with the Agreement on Subsidies and Countervailing Measures (SCM) is wide open. All attempts to insert a reference to the Peace Clause into the agricultural framework have been thwarted by the self-confident exporting countries in the G-20 and the Cairns Group. Of course, the question remains whether the reintroduction of the peace clause would need to be paid with bigger reductions, namely in domestic support or, in more diplomatic words, allow for a “higher level of ambitions in trade liberalisation”.

IV. The next stage: Modalities

Had the framework agreement laid down the ground rules for a revised AoA as well as all applicable formulae for tightening the disciplines in the three pillars, the elaboration of the modalities would have been limited to the negotiation of a set of inter-linked numbers. This by itself would not have been an easy task. But the framework being what it is, namely a somewhat less imprecise road map on the way to the Sixth Ministerial Conference, to be held in Hong Kong at the end of 2005, the difficulties ahead remain enormous and require political ownership, especially of all those which will have to deliver substantial concessions. Without sufficiently precise modalities it will not be possible to finalise the offers for new schedules of tariff and other concessions, i.e. the last stage in the DDA negotiation. This opens a prospect of additional, drawn-out negotiations on the new draft schedules. These difficulties are compounded by the fact that the agriculture dossier has stalled progress in the other topics of the DDA, and that important subjects have been altogether removed from the DDA. Unfortunately for ambitious package negotiators, these are the subjects of particular interest to those countries from whom the biggest agriculture concessions are expected. This concerns particularly the so-called Singapore issues of investment, competition and transparency in public procurement.

In addition, there are a number of agricultural trade issues likely to have an impact on the agriculture negotiation but presently sub iudice.¹⁶ The Peace Clause has been mentioned already, and especially the cotton and sugar cases were still pending at the time of writing. Even geographical indications may weigh in this balance of interests. It appears that the countries hoping to win these cases based on the present AoA are against renegotiating the relevant terms of the Agreement. In particular, and in combination with the end of the peace clause, a number of domestic support instruments is coming under scrutiny under the SCM. The outcome of these cases could well determine the future nature of many support instruments – and paralyse the agriculture negotiation. It is not surprising that US Trade Representative Zoellick has recently cautioned Brazil and others to choose between negotiation and litigation. But why should they oblige?!

V. Looking forward

The adoption of the July 2004 texts clearly brings a fresh wind into the DDA negotiation. This is true even though three Singapore issues have been dropped from the agenda. Several unresolved, fundamental differences in positions and ambition have been papered over with much “flou artistique”. But the Cancún failure has been repaired. Negotiators will now be able to return to the table with fresh mandates and impetus. New governments, in particular in the EC, India and [possibly] the US will deal with old subjects from a perhaps different perspective.

The DDA, including the new schedules of concessions and commitments, could thus be brought to a successful conclusion within about 2 years, with ratifications in 2007 and implementation starting in 2008. Such a rapid scenario and timeframe imply political leadership without further failures and a strong, common will to continue strengthening the multilateral trading system, including in the field of agriculture.

There is however one still unanswered legal question. Will the negotiation change the AoA beyond the envisaged “arithmetic” deepening in the three pillars? In other terms, will agriculture now or eventually become “just like any other sector of the economy” as is the wish of the exporting countries? This book is about “reconciliation” of agricultural trade and its integration into the multilateral system. With a question mark...

The answer, at least from a Swiss perspective, is clearly no. And quite simple. Support to agriculture in its various forms, especially tariffs, is simply too important domestically to give up lightly. Also, a number of societal demands are imposed on farmers – call them non-trade concerns. The potential trade problems arising from such differences in standards can only be addressed through specific rules under the WTO framework. On the other hand, while speed can only be limited, the direction has been accepted as being the right one. Eventually, only non-distorting forms of support will be allowed. During the implementation of the

DDA, export subsidies will be eliminated, and tariffs and domestic support will be substantially reduced. But simply reducing tariffs won't do. There is also an issue of equity, for instance in true environmental costs. And an issue of food security, for instance when envisaging the not unlikely prospect of only one country supplying the whole world with sugar. One can be reasonably doubtful whether such a perspective would serve the free trade philosophy, and the development agenda, of the WTO.

The prospect of still increasing litigation in WTO agriculture is real. More than half of the WTO dispute settlement cases are concerned with agriculture and SPS issues. This is unfortunate.

Even for the “winners”. Indeed, only successful rule-making provides the necessary safety and assurances to traders. Rule-enforcement is of course indispensable. But the ever increasing cases of litigation will also limit governments' readiness to further rule-tightening. Given the many subjects still at issue, this would be a pity. Agricultural trade will always need more and careful rule negotiation. For instance, different production standards, chosen not by farmers but imposed on them by legislators, will always constitute issues of competition

and contention, even more so when tariffs are reduced. Animal welfare and biotech/GMO issues are just two examples coming to mind.

In conclusion, agriculture will remain a special case, in the multilateral trading system as well as in most national economies. Progress along the three pillars will eliminate one of them and reduce the two others. Green Box support will remain basically untouched. But a total integration into the WTO treatment of goods, such as the one reached for textiles and clothing in the Uruguay Round, will not be possible in the foreseeable future. It is not advisable either, not even from an exporters' perspective. Indeed, further normalisation is only possible if the specificity of agriculture continues to be recognized. It should be noted that in 1947, agriculture was fully included in the GATT, but the reality for the next 50 years was one of ignored disciplines, refused enforcement and waivers. The AoA was made possible only by recognising the specificity of agriculture. Any new attempt for a full integration would only lead to a renewal of exceptions, waivers and safeguards, as well as a flow of litigation – a situation positively not in the interest of the trading system.

The philosophy of GATT and WTO is one of progressive liberalisation. Given the right combination of timing and ambition, the July 2004 framework has made possible the next step on the successful but arduous road of the multilateral trading system.

¹⁵ “However, balance in this negotiation will be found only if the final negotiated result also reflects the sensitivity of the product concerned.” (para 33, second sentence)

¹⁶ Cases of interest in the context of these negotiations (quoted from the WTO Secretariat Index as of 13 July 2004):

1. Argentina - Definitive Safeguard Measure on Imports of Preserved Peaches (DS 238)
2. Australia - Quarantine Regime for Imports (DS 287; 270, 271)
3. Canada - Measures Relating to Exports of Wheat and Treatment of Imported Grain (DS 276, 310)
4. Chile - Price Band System and Safeguard Measures Relating to Certain Agricultural Products (DS 207, 220)
5. European Communities - Measures Affecting the Approval and Marketing of Biotech Products (DS 291, 292, 293)
6. European Communities - Export Subsidies on Sugar (DS 265, 266, 283)
7. European Communities - Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs (DS 290, 174)
8. European Communities - Conditions for the Granting of Tariff Preferences to Developing Countries (DS 246)
9. European Communities - Customs Classification of Frozen Boneless Chicken Cuts (DS 269, 286)
10. Japan - Measures Affecting the Importation of Apples (DS 245)
11. Mexico - Definitive Anti-Dumping Measures on Beef and Rice (DS 295)
12. Peru - Tax Treatment on Certain Imported Products (DS 255)
13. United States - Subsidies on Upland Cotton (DS 267)
14. Venezuela - Import Licensing Measures on Certain Agricultural Products (DS 275)