

# International trade rules and the agriculture sector

## Selected implementation issues



# International trade rules and the agriculture sector

## Selected implementation issues

by  
**Victor Mosoti**  
**Ambra Gobena**

for the  
Development Law Service  
FAO Legal Office

The designations employed and the presentation of material in this information product do not imply the expression of any opinion whatsoever on the part of the Food and Agriculture Organization of the United Nations (FAO) concerning the legal or development status of any country, territory, city or area or of its authorities, or concerning the delimitation of its frontiers or boundaries. The mention of specific companies or products of manufacturers, whether or not these have been patented, does not imply that these have been endorsed or recommended by FAO in preference to others of a similar nature that are not mentioned.

ISBN 978-92-5-105885-5

All rights reserved. Reproduction and dissemination of material in this information product for educational or other non-commercial purposes are authorized without any prior written permission from the copyright holders provided the source is fully acknowledged. Reproduction of material in this information product for resale or other commercial purposes is prohibited without written permission of the copyright holders. Applications for such permission should be addressed to:

Chief

Electronic Publishing Policy and Support Branch  
Communication Division

FAO

Viale delle Terme di Caracalla, 00153 Rome, Italy

or by e-mail to:

[copyright@fao.org](mailto:copyright@fao.org)

© FAO 2007

## TABLE OF CONTENTS

<b>FOREWORD .....</b>	<b>v</b>
<b>ABBREVIATIONS .....</b>	<b>vii</b>
<b>INTRODUCTION .....</b>	<b>1</b>
<b>PART I - BASIC LEGAL OBLIGATIONS .....</b>	<b>3</b>
1. WTO AGREEMENTS AND NATIONAL LEGISLATION .....	9
2. THE EVOLUTION OF THE WTO AGREEMENT ON AGRICULTURE .....	31
3. STATE TRADING ENTERPRISES .....	89
4. INTERPRETIVE ISSUES IN ARTICLE 27(3)(b) OF THE TRIPS AGREEMENT .....	107
5. GEOGRAPHICAL INDICATIONS AND TRADE IN AGRICULTURAL PRODUCTS .....	167
6. IMPORT SURGES AND SAFEGUARD PROVISIONS WITH A PARTICULAR FOCUS ON ANTIDUMPING MEASURES .....	205
<b>PART II - COUNTRY CASE STUDIES .....</b>	<b>255</b>
1. KAZAKHSTAN .....	257
2. KENYA .....	323
3. NEPAL .....	381
<b>CONCLUSIONS .....</b>	<b>425</b>



## **FOREWORD**

The conclusion of the Uruguay Round of multilateral trade negotiations marked a turning point in the history of global trade relations. It ushered in the WTO, whose members agreed to fourteen substantive agreements, many of which specify the coverage and application of the more general provisions in the GATT. It also gave momentum to the process of further economic liberalization that is still underway. Whereas the GATT only covered trade in goods and excluded agricultural and textile products, the WTO covers trade in services and intellectual property rights, as well as trade in all goods, including agricultural and textile products. In addition, there has been effort to extend the WTO's reach into other trade-related areas such as investment, government procurement and trade facilitation.

Since the establishment of the WTO, there have been significant changes in the legal and institutional landscape of many developing countries. Some of these changes are a direct consequence of WTO obligations while others may have been merely inspired by those obligations or were part of ordinary legal reform processes in the respective countries. By and large however, whatever the motivation for trade-related legal reform, our experience in the FAO Legal Office has been that besides the substantial costs involved, there are many challenges to successful and meaningful legal and institutional reforms. Mere changes of legal texts are unlikely to automatically induce respective changes in administrative practice. Legal drafters must therefore be well aware of the existing legal and administrative culture and get a realistic appreciation of the resource constraints in the country - for inadequate resources certainly restrict the ability of implementing bodies to put new rules into practice.

This study is about the nature and extent of these trade-related legal and institutional reforms with a particular focus on those of direct relevance to the agricultural sector. In addition to the sectoral focus on agriculture, the study places distinct emphasis on the challenges of developing countries in the implementation of trade-related international obligations in the agricultural sector. No doubt, evidence has and continues to be gathered to show that trade does indeed have the capacity to increase the pace of economic development in the developing world. What is lacking, however, is a sustained analysis of the legal effects of those agreements at the domestic level. This would in turn be useful, in determining the requisite legal infrastructure, the necessary technical assistance package and the long-term

sustainability of the entire body of trade rules at the domestic level. Most importantly however, it will be useful for countries that are in the process of accession, first of all, to gain an appreciation of the extent of legal reforms they would be required to undertake and, secondly, to request and sequence technical assistance and other resources in the most efficient manner. This study seeks to fill that knowledge gap.

I would like to take this opportunity thank the various contributors to this legislative study. Melaku Desta contributed Part I, Chapter 2, Victor Mosoti Part I, Chapters 4, 5 and 6, Emmanuelle Bourgois Part I, Chapter 5, Ida Ngueng-Feze, Part I, Chapter 3, Ramesh Sharma and Lorenzo Cotula, Part I, Chapter 6, Jan Ceyssens, Part II, Chapter 1, Ambra Gobena, Part II, Chapter 2, and Charlotta Jull, Part II, Chapter 3. I wish to extend special thanks to Victor Mosoti and Ambra Gobena who compiled and edited the study. In addition, Victor initiated the study and guided the process of its preparation to fruition.

Stefano Burchi  
Chief  
Development Law Service  
Legal Office

## ABBREVIATIONS

ACP	African, Caribbean and Pacific states
ADP	Anti-Dumping Agreement
AGOA	African Growth and Opportunity Act
AMS	Aggregate Measure of Support
AoA	Agreement on Agriculture
ARIPO	African Regional Industrial Property Organization
ASEAN	Association of South-East Asian Nations
CAC	Codex Alimentarius Commission
CARICOM	Caribbean Community and Common Market
CBD	Convention on Biological Diversity
CET	Common External Tariff
COMESA	Common Market for East and Southern Africa
CSD	Customs Services Department
CU	Customs Unions
EAC	East African Community
EIA	Economic Integration Agreements
EPA	Economic Partnership Agreements
EPC	Export Promotion Council
EPZ	Export Processing Zone
ETI	Ethical Trading Initiative
Eurep-GAP	European Retailers Protocol for Good Agricultural Practice
FTA	Free Trade Areas
GAP	Good Agricultural Practice
GATT	General Agreement on Tariffs and Trade
HACCP	Hazard Analysis & Critical Control Points
HCDA	Horticultural Crop Development Authority
HS	Harmonized Commodity Description and Coding System
IGAD	Intergovernmental Authority on Drought and Desertification
IPPC	International Plant Protection Convention
ISTA	International Seed Testing Association
ITC	International Tin Commission
ITPGRFA	International Treaty on Plant Genetic Resources for Food and Agriculture
LDC	Least Developed Countries
MFN	Most Favoured Nation
MRL	Maximum Residue Levels
MUB	Manufacturing-Under-Bond
NFIDCs	Net Food Importing Developing Countries



NT	National Treatment
OECD	Organization for Economic Cooperation and Development
OIE	Office International des Epizooties
RTA	Regional Trade Arrangements
SAARC	South Asian Association for regional Co-operation
SAP	Structural Adjustment Programs
SAPTA	South Asian Preferential Trade Agreement
SCM	Agreement on Subsidies and Countervailing Measures
SME	Small and Medium Enterprises
SPS	Agreement on the Application of Sanitary and Phytosanitary Measures
SSG	Special Agricultural Safeguard
STE	State Trading Enterprises
TBT	Agreement on Technical Barriers to Trade
TDCA	Trade, Development and Cooperation Agreement
TRIM	Agreement on Trade-Related Investment Measures
TRIPS	Agreement on Trade-Related Aspects of Intellectual Property Rights
TRQ	Tariff Rate Quotas
UPOV	Union for the Protection of New Plant Varieties Conventions 1979, 1991
USAID	United States Agency for International Development
WIPO	World Intellectual Property Organization
WTO	World Trade Organization

## INTRODUCTION

There are divergent views on the role of law in economic development. What is clear however is that unambiguous laws together with well functioning institutions contribute to the requisite certainty and security to realise particular policy objectives. In promoting the agricultural sector, the law should not only reflect policy proposals geared towards greater productivity, but more concretely, it should support the creation of an enabling environment in order to realize these objectives. In this regard, it should provide the institutional basis for organized agriculture, including spelling out the formation of agricultural cooperatives, marketing boards and farmers associations. A sound legal framework is also important regarding land tenure and property rights, rural financing and collateral, bankruptcy, consumer protection and anti-competitive practices, all of which help to create an economic climate that is conducive to productive enterprise.

Membership of the WTO has generally prompted a number of economic, legal and institutional reforms at national level. When implemented, these internationally agreed disciplines designed to liberalise and facilitate trade between countries, can ultimately stimulate economic development. In the decade since the WTO came into existence, developing country WTO members and countries considering membership have often grappled with questions including the real costs of implementation of such WTO commitments, and on the "legal capital" and extent of the overall package of domestic reforms necessary for effective compliance.

Many important changes have taken place in the agricultural sector throughout the developing world over the past two decades, but particularly in the last ten years or so since the WTO came into existence. Many governments have implemented market reforms such as commodity and input price de-controls and extensively liberalized the domestic economic environment by dismantling existing trade restrictions and transferring to private players many of the functions previously undertaken by governments. It should be noted however, that by the early 1990s, many developing countries that had been beneficiaries of the World Bank's Structural Adjustment Programmes (SAP) had only minimal trade restrictions in place because a liberalized trade regime was one of the conditions that came with the SAP assistance. Alongside policy reforms have been institutional changes, often resulting in the divestiture of government-owned stakes in public enterprises and a reduced oversight role for governments generally. The motivation was and remains to increase

efficiency gains and minimise government expenditure in sectors or roles in which it has little added value, or in which such a role ends up being a hindrance to the flourishing of private enterprise.

Agriculture has always been a paradox in GATT-WTO history. On average, protectionism has increased in the agricultural sector while it has been significantly reduced or completely eliminated in most other sectors that have been the subject of multilateral negotiations, especially industrial goods. While the agricultural sector is taxed, sometimes quite heavily in many developing countries, and forms an important source of government revenue, in the developed world it remains the coveted beneficiary of large amounts of government expenditure in the form of subsidies and other support programmes. These payments, offered in support of a wide range of agricultural produce distort both trade and production. Underlining the need to do away with such distortions is the assertion that eliminating barriers to merchandise trade could result, according to the WTO Annual Report (2003), in "welfare gains ranging from US\$250 billion to US\$260 billion annually of which one third to one half will accrue to developing countries. The more rapid growth associated with global reduction in protection could reduce the number of people living in poverty by as much as 13 percent by 2015."

Beyond the Agreement on Agriculture (AoA) and the General Agreement on Tariffs and Trade (GATT), international agricultural trade involves other instruments that control the imposition of border measures, including the Agreements on Subsidies and Countervailing Measures (SCM), Customs Valuation, the Application of Sanitary and Phytosanitary Measures (SPS) and on Technical Barriers to Trade (TBT). Broader sectoral issues touching on agricultural productivity include the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs), the Agreement on Trade-Related Investment Measures (TRIMs) as well as the Marrakesh Decision. Whereas this list entails a vast panoply of commitments for member states, this study aims to highlight the major aspects of some of the key ones with a detailed focus on the AoA and TRIPs.

The basic premise of this study rests on FAO's determination "to contribute towards an expanding world economy and ensuring humanity's freedom from hunger", espoused in its Constitution. As was recognised in the Rome Declaration on World Food Security of 1996, in today's globalized world, "trade is a key element in achieving world food security." In paragraph 12 of the Declaration of the World Food Summit: Five Years Later, FAO

members urged "all members of the WTO to implement the outcome of the Doha conference, especially the commitments regarding the reform of the international agricultural trading system ... given that international agricultural trade has a role to play, consistent with Commitment 4 of the World Food Summit Plan of Action, in promoting economic development, alleviating poverty and achieving the objectives of the World Food Summit, in particular in developing countries."

This study focuses on WTO rules in the area of agriculture, and the legal and institutional implications of these rules for members. In identifying the commitments to which WTO members are bound, it is clear that the ability of countries to comply with requirements varies widely. The nature and extent of legal and institutional reforms has not to date been extensively documented, particularly in the agricultural sector; yet it is an important quantification of the welfare gains from trade liberalization and an assessment of the practical operation of trade facilitation measures. If the assessment is carried out in the context of giving domestic effect to an international treaty to which a state is party, the legal obligations contained therein are the standards by which the law will be held to account. This study is an exercise in such an assessment - it analyses the principal obligations set out in select WTO Agreements relevant to agricultural trade and offers examples of how these standards are applied in various national legislations.

The study is structured so that the first part discusses the basic legal obligations contained in the WTO instruments, and a second part which provides a contextual analysis in the form of three case studies. The latter give a country blow-up of the issues and processes involved in amending legislation and offers an assessment of the degree of compliance to the commitments they have signed up to. After this introduction, the first chapter gives a targeted overview of the multilateral commitments relevant to the agricultural sector, with an emphasis on what the WTO Agreements mean for national laws and the domestic legal environment. It reflects the dominant theme and purpose of this legislative study, which is what membership means for the domestic legal frameworks of member states. Starting with a brief overview of the general role of the WTO in the agricultural trade context, the chapter sets the stage for the study introducing the key elements of the AoA, TRIPS and SPS Agreements which entail obligations for members. While giving an idea of the reform processes involved, it is by reference to the standards discussed briefly here that an assessment of national legislation and institutions can begin. Identifying what

exactly the terms of an international agreement demands for domestic application is half the battle. At this level, there is a lot of literature which analyses the scope of the agreements, specifically the more ambiguous provisions and that generate significant academic discussion.

The second chapter discusses the evolution of the AoA, being the primary international legal instrument for interstate trade relations in the agricultural sector. It traces its development from the Uruguay Round and concludes with a synopsis of the current provisions and possible trends following the Hong Kong Ministerial Conference. As the only sector-specific agreement, chapter three provides an understanding of why insufficient attention was seemingly paid to agriculture in the GATT, and how it was pushed to centre-stage at the Uruguay Round. It provides information on the origins, nature, structure, scope and obligations contained in the AoA, including a behind-the-scenes look at the drafting and negotiation process. Set against this context, it also includes the legislative implications of these rules for WTO members. For each of the three central pillars of the agreement the key concepts are laid out and problematic areas highlighted.

Seventy-five percent of all State Trading Enterprises (STEs) are found in the agricultural sector. For this reason alone, any discussion of the state of liberalization in the agricultural sector should of necessity include STEs. Chapter 4 discusses the controversies surrounding STEs and provides background on the legal problems and economic benefits associated with the different types of agricultural-sector STEs.

The chapters on "Interpretative Issues in Article 27(3)(b) of TRIPS" and on "Geographical Indications and Agricultural Trade" in the first segment of the study attempt an explanation of the precise nature of obligations created by the relevant WTO agreement. Chapter 4 uses decisions of WTO panels and the Appellate Body to enrich the explanation of the interpretive issues in TRIPS, article 27(3)(b), a much discussed but little understood aspect of the TRIPs Agreement for many developing countries. Following a brief look at the negotiation history and how it made its way onto the GATT agenda, chapter 5 presents the nuances in the language of the provision, particularly on the scope and form of *sui generis* protection.

Chapter 5, on geographical indications (GI) discusses the relevant international legal framework through the prism of the relevance of GIs to the marketability

of agricultural products. It highlights the different approaches to GIs protection in the EU and the US, as well as other countries.

Import surges can damage agricultural productivity, particularly fledgling businesses in developing country economies. Safeguard measures that are imposed on imports and provide temporary assistance to domestic industries are discussed in chapter seven. This chapter offers a conceptual analysis of import-surge related terms and phrases within the WTO framework that are economically and legally noteworthy, exploring in detail the relevant GATT provisions, and the Antidumping and Safeguards Agreements. This analysis is placed in context through illustrations of safeguard mechanisms as found in the national legislations of select CARICOM countries, the US and EU.

The three case studies in the second part of the study discuss trade-related legal and institutional reforms in three selected countries. They review the legislation in place, assessing compliance against international standards and describing the network of institutions that support the legal and policy trade framework. The similar structure of the case studies also facilitates comparison. All the three countries examined underwent market-based reforms for different reasons in the nineties.

The Kazakhstan case study adopts more of a legalistic approach while the Nepal chapter has an institutional focus; the Kenya case study falls between these two. The Kazakhstan case study expounds upon the process of modifying the domestic legal framework in line with WTO commitments necessary in order to accede to the organization - it notes the related steps and procedures, specific commitments and points for negotiation.

The Kenya case study sheds light on the domestic legal and institutional framework of a developing country with original membership and paints a picture of a country with more than ten years implementing experience. Agriculture's important role in the Kenyan economy is reflected in the priority given to this sector in its trade policy, and shows how developing countries similarly reliant on the contribution of agriculture are constrained by budgetary considerations in their implementation of measures and standards mandated by the WTO. The Nepal case study examined in chapter 3 looks at a recently acceded WTO member and highlights the trade relationships with its principal trade partner India, highlighting its vulnerability to shocks as a result of its heavy reliance on this partner and its dependence on few exports.

At its core therefore, this study is about developing countries, and the legal effects of agricultural trade rules on their economies. Broadly, the study seeks to build on the compelling argument for the full integration of developing countries into the multilateral trading system, and *a fortiori*, to make a case for meeting the development challenges of these countries.

## **PART I**

### **BASIC LEGAL OBLIGATIONS**





## 1.

### WTO AGREEMENTS AND NATIONAL LEGISLATION

#### *Contents*

I.	INTRODUCTION	11
1.1	The WTO and Domestic Legal Reforms	13
II.	RELEVANT MULTILATERAL TRADE COMMITMENTS	14
2.1	The Agreement on Agriculture	14
2.2	The TRIPs Agreement	17
2.3	The SPS Agreement	25
2.3.1	The scope of the SPS Agreement	26
2.3.2	Country obligations under the SPS Agreement	27
2.3.3	The main features of the SPS Agreement	27
	MAIN REFERENCES	30



## I. INTRODUCTION

The conclusion of the Uruguay Round of multilateral trade negotiations was a turning point in the history of global economic relations. Besides ushering in the WTO (whose members agreed to fourteen substantive agreements, many of which specify the coverage and application of the more general provisions in the initial General Agreement on Tariffs and Trade (GATT)), it brought about a certain momentum to the process of further economic liberalization that continues to date.<sup>1</sup> Whereas the GATT only covered trade in goods and for the most part excluded agricultural and textile products, the WTO covers trade in services and intellectual property rights, as well as trade in all goods, including agricultural and textile products. In addition, there have been intense efforts to extend the WTO's reach into other areas such as investment, government procurement and trade facilitation. With the exception of trade facilitation over which WTO members have already agreed to negotiate, proposals for negotiations in the other areas have been met with stiff resistance from developing countries.<sup>2</sup>

The WTO, established in 1995 as a successor to the GATT, is easily one of the most studied and commented upon amongst the many inter-governmental institutions that in some way have an impact on economic development in recent times. It is charged with implementing a set of agreements, adopted by all its members in a "single undertaking", which create legally binding rights and obligations as between the members.

Over the past decade, there is evidence that international trade relations have indeed become much more legalized under the WTO, pursuant to the adoption of the Uruguay Round agreements and, in particular, the Dispute Settlement Understanding (DSU). The DSU ushered in a variety of reforms to the old GATT system, including greater clarity of rules, binding decisions,

---

<sup>1</sup> See *Marrakesh Agreement Establishing the World Trade Organization*, 15 April 1994, *Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Legal Instruments-Results of the Uruguay Round* 6, 6–18; 33 I.L.M. 1140, 1144–1153 (1994).

<sup>2</sup> See generally, Simon Evenett (ed). 2003. *The Singapore issues and the world trading system*. World Trade Institute and Swiss State Secretariat for Economic Affairs; Mosoti, V. 2003. Non-Discrimination and its dimensions in a possible WTO framework agreement on investment: reflections on the scope and policy space for the development of poor economies. *Journal of World Investment and Trade*, 4(6).

and a standing Appellate Body.<sup>3</sup> This highly legalized WTO system applies to a much broader membership and subject coverage. Article 1(1) of the DSU spells out the reach of the dispute settlement system stating that the DSU "shall apply to disputes brought pursuant to the consultation and dispute settlement provisions of the agreements listed in Appendix 1 to this Understanding (referred to in this Understanding as the 'covered agreements')." The Appellate Body in *Brazil-Desiccated Coconut*, defined "covered agreements" to "include the WTO Agreement, the Agreements in Annexes 1 and 2, as well as any Plurilateral Trade Agreement in Annex 4 where its committee of signatories has taken a decision to apply the DSU." It went on to state that "in a dispute brought to the DSB, a panel may deal with all the relevant provisions of the covered agreements cited by the parties to the dispute in one proceeding."<sup>4</sup>

From the 23 original members under the GATT, which had expanded to 99 members by 1979, the WTO now has 151 members. Soon, others like Russia, Saudi Arabia and a host of other countries from Sudan to Kazakhstan that are negotiating their accession might also be able to join. To a certain extent, the increase in numbers has been advantageous to developing countries despite the unique decision-making process of the WTO. It has been advantageous in the sense that they are becoming more assertive and in command of the issues under negotiation, and their demands cannot easily be wished away.<sup>5</sup>

Serious questions have been posed about trade liberalization, the WTO's *leit motif*, and its effects on poor economies. No doubt, enough evidence could be gathered to show that trade does indeed have the capacity to increase the pace of economic development in the poor world. Yet, trade should be about more than simply GDP and other esoteric economic

---

<sup>3</sup> For a detailed discussion on the mechanics of dispute settlement in the WTO, see for example, Vermulst, E. and Driessen, B. 1995. An overview of the WTO dispute settlement process and its relationship with the Uruguay Round Agreements. *Journal of World Trade*, 29:136.

<sup>4</sup> See *Brazil-Measures Affecting Desiccated Coconut*, (WT/DS22/AB/R)(1997) p. 13. Recent scholarship pegged on the premise that WTO law is only part of the *corpus* of wider public international law, suggests that a complainant can lodge or argue a dispute based on non-WTO law. See Pauwelyn, J. 2003. How to win a WTO dispute based on non-WTO law: questions of jurisdiction and merits. *Journal of World Trade*, 6: 997-1030, and Pauwelyn, J. 2005. The Transformation of World Trade. *Michigan Law Review*, 104.

<sup>5</sup> See for example, Mangeni, F. 2002. *African influence at the WTO*. Study Commissioned by the Secretariat of the Common Market for Eastern and Southern Africa (COMESA). Lusaka.

calculations. It should be about the broader concerns of global welfare; it comes down to food security, and general wellbeing.

### **1.1 The WTO and domestic legal reforms**

Legal commitments made by countries at the multilateral level typically have to be implemented through reforms to domestic law and national institutional or administrative structures. Sometimes such multilateral commitments constrain countries to effect particular changes to the existing national legal framework or to come up with laws where none exist.

Good examples of specific multilateral commitments of this nature in the agricultural sector would be article 27(3)(b) of the TRIPS Agreement, which makes it mandatory for WTO members to provide for a system of plant variety protection; the export subsidy reduction commitments in article 9 of the Agreement on Agriculture; or the requirement that agricultural marketing boards, generally falling under the definition of "state trading enterprises" in the context of article XVII of the General Agreement on Tariffs and Trade 1994, carry out their purchases (for example of farm inputs), in a non-discriminatory manner.

The implementation of WTO commitments has both legal and institutional dimensions, which means that a body of effective laws has to be developed and implemented. Both of these are heavily involving and expensive. The drafting of new laws or the revision of existing ones, usually quite extensive, can often be undertaken with the expert assistance of competent international organizations or through bilateral arrangements with trading partners.

Yet, laws are not enough. Implementation structures have to be erected. To take one example, it was estimated eight years ago by UNCTAD that it would cost US\$1.5 million to draft the necessary laws and develop the enforcement capability for the TRIPS Agreement in Tanzania.<sup>6</sup> Other examples cited in the UNCTAD study include: the cost for Egypt of US\$1.8 million to train staff administering the IPR laws; the cost for India US\$5.9 million to modernize its patent office; and the cost for Bangladesh US\$250 000 one-off in addition to the US\$1.1 million required annually to

---

<sup>6</sup> UNCTAD. 1996. *The TRIPS Agreement and developing countries*, p. 21. UNCTAD/ITE/1.

draft the IPR laws and develop the enforcement capability.<sup>7</sup> There are other agreements with similarly onerous requirements.

## **II. RELEVANT MULTILATERAL TRADE COMMITMENTS**

### **2.1 The Agreement on Agriculture**

Leading commentators agree that agriculture was not in fact exempt from the GATT, (noting that the view that agriculture was exempt from the GATT is not correct, and that it however reflects the "unfortunate reality that agriculture has been the most difficult part of international trade to bring under the international treaty rule discipline of the GATT" <sup>8</sup>) and that it posed the most difficult "problems for the architects of the international trading system from the earliest days of planning for the post-war era."<sup>9</sup> It was therefore treated as an exceptional case. According to Melaku Desta:

"... when governments got together to negotiate for multilateral liberalization of international trade, agricultural products were considered a special case befitting the status of an exception rather than the rule. This was reflected in the content of the first drafts as well as the final versions of both the Havana Charter as well as the General Agreement. Two particularly important trade restrictive and protective measures generally outlawed by the General Agreement were explicitly, albeit conditionally, permitted for agricultural products. They concern the use of quantitative restriction and export subsidies – the two traditional weapons used by governments to protect domestic producers from foreign competition in the domestic market and to artificially enhance the competitive advantage of their producers in foreign markets, respectively. What is more, even in areas where no such express exceptions were provided, countries often ignored the rules more in the area of agriculture than elsewhere."<sup>10</sup>

The Agreement on Agriculture (AoA) is one of the less auspicious results of the Uruguay Round - measured against initial aspirations of what it should

---

<sup>7</sup> Id.

<sup>8</sup> Jackson, J. 2000. *The world trading system* p. 313. MIT Press.

<sup>9</sup> Josling T., Tangermann, S. and Warley, T.K. 1996. *Agriculture in the GATT*, p. 11. Macmillan Press.

<sup>10</sup> See Desta, M.G. (2002), p. 6.

have achieved, simply because it did not go far enough. This agreement is extensively examined in chapter 2. In brief terms however, the agreement deals with international trade in agricultural products along four main themes: First, as provided for in article 4(2) of the AoA, members agreed to phase out non-tariff barriers, including quotas, by converting them into their tariff equivalents. This process, known as "tariffication" is a central feature of the market access pillar of the agreement, though there have always been complaints that tariffication for some countries was done in a manner to yield overly exaggerated tariffs. In their schedules, countries also negotiated minimum concessions for specific products, proposed tariff reductions some products, and tariff bindings for all agricultural products. To emphasize the linkages between the GATT and the AoA, a WTO panel has interpreted a violation of article 4(2) of the AoA as a violation of GATT, article XI. In *Korea – Various Measures on Beef*, the panel held, with respect to a certain practice of the Korean state trading agency for beef imports, as follows: "when dealing with measures relating to agricultural products which should have been converted into tariffs or tariff-quotas, a violation of article XI of GATT and its Ad Note relating to state-trading operations would necessarily constitute a violation of article 4(2) of the Agreement on Agriculture and its footnote which refers to non-tariff measures maintained through state-trading enterprises."<sup>11</sup>

Secondly, the agreement contains commitments on four broad categories of domestic support, with the general requirement being that, unless exempted, such domestic support measures should be reduced over time. These reduction commitments are included in the members' schedules and form an integral part of the binding commitments under the AoA. A "Green Box" of measures exempt from these commitments such as domestic food aid, decoupled income support, and social support programmes, is included in Annex 2 to the AoA. These measures are described as those that "... have no, or at most minimal, trade distorting effects or effects on production."<sup>12</sup> Members also agreed on the rather complex concept of "Aggregate Measure of Support" (AMS) for calculating the total extent of the domestic support programmes and their reductions over a period of time.

Thirdly, the agreement focuses on export subsidies with a series of basic obligations on the lowering of export subsidies over a period of time. Article 9(1) specifies the export subsidies that are subject to reduction

---

<sup>11</sup> WTO Doc. WT/DS161/R, Panel Report on *Korea – Various Measures on Beef*, para. 762.

<sup>12</sup> See paragraph 1 of Annex 2 to the AoA.



commitments, and states that they include "... the provision by governments or their agencies of direct subsidies, including payments-in-kind, to a firm, to an industry, to producers of an agricultural product, to a cooperative or other association of such producers, or to a marketing board, contingent on export performance." Various parts of this provision have been the subject of interpretation by WTO panels and the Appellate Body. In its ruling in the *Canada - Dairy* case, the panel erroneously determined that "payments-in-kind" were *per se*, direct subsidies. In an appeal, the Appellate Body clarified that "where the recipient gives full consideration in return for a 'payment-in-kind' there can be no 'subsidy', for the recipient is paying market-rates for what it receives." Stating what it understood by 'payment-in-kind' and laying the interpretive rule, the Appellate Body went on to say:

"In our view, the term 'payments-in-kind' describes one of the forms in which 'direct subsidies' may be granted. Thus, article 9(1)(a) applies to 'direct subsidies', including 'direct subsidies' granted in the form of 'payments-in-kind'. We believe that, in its ordinary meaning, the word 'payments', in the term 'payments-in-kind', denotes a transfer of economic resources, in a form other than money, from the grantor of the payment to the recipient. However, the fact that a 'payment-in-kind' has been made provides no indication as to the economic value of the transfer effected, either from the perspective of the grantor of the payment or from that of the recipient. A 'payment-in-kind' may be made in exchange for full or partial consideration or it may be made gratuitously. Correspondingly, a 'subsidy' involves a transfer of economic resources from the grantor to the recipient for less than full consideration ... The panel erred in finding that 'a determination in the instant matter that 'payments-in-kind' exist would also be a determination of the existence of a direct subsidy.' The panel should have considered whether the particular 'payment-in-kind' that it found existed was a 'direct subsidy'. Instead, because the panel assumed that a 'payment-in-kind' is necessarily a 'direct subsidy', it did not address specifically either the meaning of the term 'direct subsidies' or the question whether the provision of milk to processors for export under Special Classes 5(d) and 5(e) constitutes 'direct subsidies'." <sup>13</sup>

---

<sup>13</sup> WTO Doc. WT/DS103/AB/R, Appellate Body Report in *Canada - Dairy*, paras. 87 and 88.

In *Canada - Dairy*, the meaning of "governments or their agencies" was also interpreted:

"According to Black's Law Dictionary, 'government' means, *inter alia*, '[t]he regulation, restraint, supervision, or control which is exercised upon the individual members of an organized jural society by those invested with authority'. This is similar to meanings given in other dictionaries. The essence of 'government' is, therefore, that it enjoys the effective power to 'regulate', 'control' or 'supervise' individuals, or otherwise 'restrain' their conduct, through the exercise of lawful authority. This meaning is derived, in part, from the functions performed by a government and, in part, from the government having the powers and authority to perform those functions. A 'government agency' is, in our view, an entity which exercises powers vested in it by a 'government' for the purpose of performing functions of a 'governmental' character, that is, to 'regulate', 'restrain', 'supervise' or 'control' the conduct of private citizens. As with any agency relationship, a 'government agency' may enjoy a degree of discretion in the exercise of its functions."<sup>14</sup>

Fourthly, the AoA contains the famous peace clause at article 13, which requires that governments exercise due restraint for the first nine years of the agreement from taking domestic countervailing duty proceedings or initiating WTO dispute settlement proceedings, regarding any measures they may consider challengeable. Lastly, the AoA provides linkages at article 14 to the SPS Agreement which addresses health standards and safety conditions regarding health risks from plant or animal-borne pests or diseases, additives or other disease-causing organisms in foods, beverages, or feed.

## 2.2 The TRIPs Agreement

The primary objective of the WTO Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) is the removal of any trade-restrictive domestic intellectual property measures. Such measures could be laws, regulations, policy positions or their manifest implementation through administrative action. (It is interesting to note in this context, article 6(2) of the Dispute Settlement Understanding which states that any complaining

---

<sup>14</sup> WTO Doc. WT/DS103/AB/R, Appellate Body Report on *Canada – Dairy*, para. 97.

party should "identify the specific *measures* at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly." In WTO law, a "measure" usually refers to some type of governmental action, although the Appellate Body has held that certain private actions could be attributable to governments. In the *Japan - Agricultural Products II* case, the Appellate Body interpreted the term "measure" (in relation to Annex B of the *SPS Agreement*) by listing examples of "measures" to include "laws, decrees and ordinances". Further, the Appellate Body stated that the term could refer to all "other instruments which are applicable generally and are similar in character to the instruments explicitly referred to".<sup>15</sup> The *Japan - Film* case dealt with the issue of private actions that qualify as "measures" within the meaning of article 6(2) of the DSU. The panel held: "As the WTO Agreement is an international agreement, in respect of which only national governments and separate customs territories are directly subject to obligations, it follows by implication that the term *measure* in article XXIII:1(b) and article 26(1) of the DSU, as elsewhere in the WTO Agreement, refers only to policies or actions of governments, not those of private parties. But while this 'truth' may not be open to question, there have been a number of trade disputes in relation to which panels have been faced with making sometimes difficult judgments as to the extent to which what appear on their face to be private actions may nonetheless be attributable to a government because of some governmental connection to or endorsement of those actions."<sup>16</sup>

In its preambular language, the TRIPS Agreement calls on all WTO members to provide "effective and adequate" intellectual property rights (IPRs),<sup>17</sup> and to ensure that these IPRs do not amount to trade restrictions in themselves. In the *India - Patents* case, the panel observed the "effective and adequate" IPRs protection objective of TRIPS in relation to article 70(8)(a) thus: "The panel's interpretation...is consistent also with the object and purpose of the TRIPS Agreement. The Agreement takes into account, *inter alia*, 'the need to promote effective and adequate protection of intellectual

---

<sup>15</sup> See *Japan - Measures Affecting Agricultural Products*, WT/DS76/AB/R (1999), paras. 126–129.

<sup>16</sup> See *Japan - Measures Affecting Consumer Photographic Film* (WT/DS44/R) (1998), paras. 10–52.

<sup>17</sup> See Trachtman, J.P. 2002. The boundaries of the WTO: institutional linkage: transcending "trade and ..." 96 *American Journal of International Law*, 77:78 (observing that one of the primary reasons why the United States supported the negotiations on the TRIPS Agreement was to ensure that countries would enhance the protection they gave to intellectual property rights within their domestic laws).

property rights."<sup>18</sup> Article 27(1) in particular compels WTO members to create domestic legal frameworks that allow for patent protection of inventions from all fields of technology as long as they meet the basic substantive conditions for patentability: that is, the inventions must be novel, involve an inventive step and be capable of industrial application.<sup>19</sup> These three criteria are not defined in the TRIPS Agreement. Hence, their precise meaning is left to each WTO member. According to Watal, no effort was even made to arrive at a definition or harmonization during the Uruguay Round negotiations. For a comprehensive discussion of the approach of the European and American approaches see chapter 6.

Articles 3 and 4 of the TRIPS Agreement require WTO members not to employ discriminatory measures against IPRs-holders based on their country of origin, on the field of technology of the invention or on whether the resulting products are local or foreign.<sup>20</sup> Non-discrimination, that is, national treatment and most-favoured-nation (MFN) treatment, is not unique to the TRIPS Agreement, but rather is one of the very central pillars of the international trading system. The interpretation of when a measure flouts the non-discrimination rule in WTO law is anything but easy. It is an issue that panels and the Appellate Body have struggled with despite the long history of the provision and its importance particularly in the area of trade in goods. Regarding IPRs, it has also been the subject of panel decisions. In the *Canada—Pharmaceutical Patents* case,<sup>21</sup> the panel was emphatic that "discrimination" in article 27(1) is a negative term whose meaning goes beyond simple "differentiation" between national and foreign IPRs protection or their beneficiaries. The message that the panel was putting across was therefore that a WTO member that wishes to use a discriminatory or IPRs "differentiation" measure, can do so as long as there is a legitimate regulatory reason. Put simply, the panel wanted to be clear that regulatory policy space is not constrained by the requirement for non-discriminatory policies. The impact of WTO agreements on domestic regulatory policy space has long been a concern for developing countries. Recently however, it

---

<sup>18</sup> See *India - Patent Protection for Pharmaceutical and Agricultural Chemical Products* (WTO Doc. WT/DS50/R) (September 1997), para 57.

<sup>19</sup> See Watal, J. 2001. *Intellectual property in developing countries* p. 90. Kluwer Law International.

<sup>20</sup> See articles 3 and 4 of the TRIPS Agreement.

<sup>21</sup> See *Canada – Patent Protection of Pharmaceutical Products*, Complaint by the European Communities (WTO Doc. WT/DS/114).

has been raised more emphatically, and is increasingly linked to the concept of special and differential treatment.<sup>22</sup>

Beyond the bold call for patent protection in article 27(1) of the TRIPS Agreement, some exceptions exercisable at the option of WTO members are provided. Article 27(2) excludes "inventions the commercial exploitation of which might be contrary to *ordre public* or morality."<sup>23</sup> Article 27(3)(a) excludes "diagnostic, therapeutic and surgical methods for the treatment of humans or animals"<sup>24</sup> while article 27(3)(b) excludes plants and animals, but with many significant qualifications and exclusions, which we discuss later. It leaves it up to the individual WTO members to decide which of the options to exercise. Should they choose, they may exclude all or some of the identified materials from protection. This 'option flexibility' was included in the TRIPS Agreement in recognition of the differences in domestic legal systems regarding what is or is not excluded from protection. United States patent law for example grants protection to "whoever invents or discovers any new and useful process, machine, manufacture, or composition of nature, or any new and useful improvement thereof."<sup>25</sup> This broad potential scope may be contrasted with the European approach.<sup>26</sup> Articles 52 and 53 of the *European Patent Convention* expressly exclude from protection any "discoveries, methods of human treatment, inventions the exploitation of which would be contrary to morality, and plant and animal varieties."

By dint of article 27(3)(b), most developing countries committed themselves to an entirely novel set of IPR obligations because the vast majority of them did not provide for a system of plant varieties protection prior to the coming into force of the WTO Agreement. Llewelyn notes, that in contrast, for developed countries the TRIPS provision was simply "a restatement of

---

<sup>22</sup> See Werner, Corrales-Leal *et al.* 2003. *Spaces for development policies: re-visiting special and differential treatment*. ICTSD (available at [www.ictsd.org](http://www.ictsd.org)).

<sup>23</sup> The TRIPS Agreement does not define the term "*ordre public*." See Arckermann, T.G. 1997. Disorderly loopholes: TRIPs patent protection, GATT and the ECJ. *Texas International Law Journal*, 32: 489, 495 (stating that *ordre public* originated in French law and is related to the concept of public policy).

<sup>24</sup> For a discussion on the patenting of medical procedures such as surgery techniques see, Judge, L.R. 1997. Issues surrounding the patenting of medical procedures. *Santa Clara Computer and High Technology Law Journal*, 13:181, 203.

<sup>25</sup> See 35 USC § 101.

<sup>26</sup> See Van Overwalle, G. 1999. Patent protection for plants: a comparison of American and European approaches. *Journal of Law and Technology*, 39:143–194.

existing intellectual property practice."<sup>27</sup> Citing evidence of deliberations on what took place in Europe for example in the 1950s on how to protect the results of plant breeding activity, and those that took place later on about the *European Union Directive on the Legal Protection of Biotechnological Inventions*, Llewelyn concludes that Europe has had a long history of robust debate and enforcement of plant variety protection. This is in stark contrast to the situation in much of the developing world where there was "no history of protecting plant material", and which had had "no equivalent opportunity to decide whether plant varieties should indeed be protected."<sup>28</sup> As evident from the incorporation of a review sub-clause in article 27(3)(b), the framers of the agreement anticipated the challenges ahead, particularly because of the absolute "shall" requirement in the provision and the relatively short implementation periods required. It was foreseeable first, that in their haste to comply, on the pain of trade sanctions, developing-country WTO members that did not have such an IPRs system may have been compelled to adopt systems of protection that were against their prospects and priorities in enhancing agricultural productivity, food security and other national policy interests.<sup>29</sup> Secondly, given the key players that had been involved in the negotiations and the underlying business interests, it was not difficult to imagine a situation where developing countries in particular would be under pressure to borrow or be compelled to follow legislative models from their more developed trading partners, or ratchet up the level of protection afforded beyond that required in the TRIPS Agreement. Now, with the wisdom of a decade's experience in implementing TRIPs, all of these concerns have indeed come to pass.

Article 27(3)(b) of the TRIPS Agreement makes it mandatory for WTO members to provide for the protection of plant varieties through patents, an effective *sui generis* system, or a combination thereof. This *sui generis* option provides valuable policy space for developing countries to draft national legislation that accords with their national agricultural development priorities

---

<sup>27</sup> See Llewelyn, M. 2003. *Which rules in world trade law – patents or plant variety protection?* p. 306. Cottier, T. and Mavroidis, P. *Intellectual property: trade competition and sustainable development*. The World Trade Forum Vol. III University of Michigan Press.

<sup>28</sup> Id.

<sup>29</sup> See United Nations Conference on Trade and Development (UNCTAD). 1996. *The TRIPS Agreement and developing countries*. No. 25, U.N. Doc. UNCTAD/ITE/1 (stating that developed countries were the main beneficiaries of the disciplines in the TRIPs Agreement); cf. Hamilton, M. 1996. The TRIPS Agreement: Imperialistic, Outdated, and Overprotective. *Vanderbilt Journal of Transnational Law*, 29: 613, 614–20 (in which developing countries liken the TRIPs Agreement to imperialism).

and that at the same time meets their WTO commitments. The coming into force of the International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA) will inspire countries to prepare laws to protect plant varieties and farmers rights. This inspiration should come from the fact that under patents, farmers would be prohibited from using seeds from patented varieties without the consent of the patent holder. As seeds saved by farmers and exchanged among them can account for up to 80/90 percent of the total seed requirements in developing countries, a patent system would indeed constrain subsistence farming and imperil the realization of food security. Workable *sui generis* systems are therefore a priority.

How do countries go about implementing their obligations in article 27(3)(b)? This is a question that may appear obvious but often one that many under-resourced developing countries grapple with. A number of considerations need to be borne in mind before a decision on what to do is actually made. First, at the policy level, an evaluation of the nature and size of the domestic seed industry, meaning seed production, certification, supply, trade and marketing, and the value and potential of the plant breeding programs will need to be made. The seed industry, the resource poor farmers who save seed from season to season, and the plant breeders are usually most affected by legislative changes in the manner of protection of plant varieties.

Second, again at the policy level, a clear determination of the national development goals, including prospects for the development of plant breeding programs, the biotechnology sector, the need for foreign direct investment and other related concerns. Third, the policy makers will need to consider the diplomatic implications of aligning national legislation with certain international agreements. In multilateral trade negotiations at the WTO, the issue of alliances is important. It is the only way to command clout and influence the evolution of trade policy for poor economies. Hence, the country will need to consider the kinds of diplomatic links and alliances it may need in the long-run, and therefore make an effort not to undermine them through ill-advised legislation. Fourth and most importantly, an evaluation of what options there are and their implementation costs, will be necessary. This should be done in a comprehensive and accurate manner. Often, such costing would include setting up an entirely new institutional mechanism, with skilled legal and technical personnel, infrastructure and

laws to back it up. Given the heavy costs of implementing IPR laws,<sup>30</sup> some commentators have often advised poor countries to set up regional institutions, or to use existing national institutions such as Attorney Generals' offices.

Once the preliminary policy decisions are made, the next step is to consider the method of implementation. In accordance with article 1(1) of TRIPS, WTO members are "free to determine the appropriate method of implementing the provisions of this Agreement within their own legal system and practice." To a large extent, this depends on the legal system of the country at issue. In this regard, there are two main legislative options. The first is a relatively short statute that incorporates the TRIPS Agreement into the laws of the country, giving it the force of domestic law. Regardless of the legal system, this is never a good option to take because the TRIPS Agreement is a framework set of minimum standards that involves options, and presupposes further action.

With particular regard to article 27(3)(b), such a statute would inevitably need to be accompanied by legislation that indicates the choices that the country made in terms of the method of plant variety protection, and it will also have to deal with the administrative issues. A second approach is a comprehensive statute that sets out a series of clear objectives on the protection of IPRs. It would also spell out what IPRs and obligations are protected, the scope and exceptions of protection, and the procedure for enforcement, and remedies available in the event of infringement.

Related to this overall process of implementation, countries have to specifically avail themselves to the issue of how they will deal with the requirement of non-discrimination, meaning the national treatment and Most-Favoured-Nation requirements obligations. The straightforward way is simply by a rigorously neutral drafting and practical application of IPR legislation. For the legal draftsman, compliance legislation would need to be drafted in such a way that first, it does not predicate the granting of protection on nationality, or indeed refer to the nationality of a potential right-holder, and second, that it does not grant any favours, privileges or immunities to the nationals that it does not give to other applicants or right-holders.

---

<sup>30</sup> See UNCTAD. 1996. *The TRIPs Agreement and Developing Countries*, UNCTAD/ITE/1.



National treatment in the TRIPS Agreement, unlike its equivalent provisions in agreements on trade in goods where it applies to like products, refers to the treatment that individual nationals receive in the country in which they are applying for IPR protection.

As explained earlier, MFN yields a multilateralizing effect for rights accorded to a WTO member's nationals, in the sense that it extends those rights to others. There are a few exceptions to the MFN requirement in the TRIPS Agreement. For example, it does not apply to benefits accorded nationals of other countries under agreements for general judicial assistance or law enforcement, and international agreements on IPR protection that predate the TRIPS Agreement, meaning those that entered into force prior to 1 January 1995. Such IPR agreements should be notified to the TRIPS Council and they must "not constitute arbitrary or unjustifiable discrimination against nationals of other members."<sup>31</sup>

There has been a tremendous amount of legal drafting and institutional changes in keeping with the commitments made under the TRIPS Agreement. For instance, Zambia is currently amending its legislation on intellectual property in this regard for example by increasing the lifespan of a patent from 16 to 20 years. In addition, a new Plant Varieties Protection Act in compliance with article 27(3)(b) is under consideration by the Seed Control and Certification Institute. All the necessary changes are expected to be completed by January 2006.

In terms of the implementing institutional structure, the Patents and Companies Registration Office, which is part of the Ministry of Commerce, Trade and Industry, executes most of the Zambian industrial property laws. India, the world's largest grower of tea, enacted the Geographical Indications Act in September 2003. The new law protects, among other GIs, the popular "Darjeeling Tea". To protect this mark of quality, the Indian Tea Board has spent approximately US\$200 000 in the last four years on legal and registration expenses – hiring an international watch agency and fighting infringements in overseas jurisdictions. This does not account for administrative expenses including manpower working on the job in the Tea Board, the cost of setting up monitoring mechanisms, software development and other implementation related costs.

---

<sup>31</sup> Article 4(d), TRIPs Agreement.

### 2.3 The SPS Agreement

The marketability of agricultural products depends on the producer's ability to meet the expectations of the consumer. This applies both for the domestic and export markets. Productivity, product standards and export competitiveness in general are subject to various hazards, be they human-induced such as deliberate food contamination and wars, or naturally occurring ones such as bad weather, diseases or pests. Sanitary and phytosanitary measures are applied in order to lower or eliminate the risk posed to human, animal or plant life or health by pests, diseases, various food additives or contaminants. These measures are hence closely related to agricultural productivity and profitability.

The commencement of negotiations on an agreement to discipline the application of sanitary and phytosanitary measures during the Uruguay Round was directly linked to the expected outcome in agriculture negotiations. As the negotiations on agriculture progressed, and negotiators became confident that non-tariff measures would be dealt away with and replaced by bound tariffs, certain GATT Contracting Parties were fearful that sanitary and phytosanitary measures would be used as disguised barriers to their agricultural exports. This was the major impetus behind the negotiations for the SPS Agreement. Hence, the SPS Agreement and the Agreement on Agriculture are complementary.

Prior to the coming into force of the SPS Agreement, the "Standards Code" negotiated during the Tokyo Round as the Agreement on Technical Barriers to Trade, covered all SPS and related measures. This Agreement was revised and strengthened during the Uruguay Round, and now covers all measures except for those specifically covered under the TBT Agreement. Both agreements seek to define and expand the scope of protective measures under GATT, article XX(b). GATT, article XX(b), provided that border measures to protect the health and safety of people, animals and plants which inhibit trade could be deemed GATT-consistent as long as they were not applied in a discriminatory and trade restrictive way. This provision is still part of GATT-WTO law although it has long been considered too wide and imprecise, hence the SPS Agreement. Effectively, and in the light of the General Interpretive Note,<sup>32</sup> the more stringent SPS Agreement provisions now trump the health exception in GATT, article XX(b).

---

<sup>32</sup> See *Agreement Establishing the World Trade Organization*. Annex IA, General Interpretative Note.

### 2.3.1 The scope of the SPS Agreement

The intent of the SPS Agreement is to guide WTO members in the setting of health standards in a way that is least trade-restrictive. In the event of doubt as to the legality or proportionality of an imposed measure, the agreement provides guidance on how to determine whether a measure is primarily a barrier to trade or primarily for health protection. The agreement disciplines what are popularly known as "quarantine measures", meaning all those border control measures necessary to protect human life or health and animal or plant life or health. Sanitary measures relate to human or animal health and phytosanitary measures relate to plant health. The agreement recognizes the sovereign right for WTO members to take measures that may be trade restrictive for the sake of protecting the life or health of people, animals and plants. It clarifies which factors should be taken into account when imposing any such protective measures.

The SPS Agreement aims at ensuring food safety and animal and plant health protection. Within this scope, it covers products, processes and production methods. Consequently, the agreement makes it mandatory that certain sanitary standards be adhered to in the food production process. These sanitary standards apply both to in-country food products and those that have been imported. The key trade law principle of non-discrimination as between foreign suppliers applies, and any derogation thereof must be justified on the basis of prevailing animal and plant health conditions in that country. In brief therefore, the SPS Agreement applies to any measure, which directly or indirectly may affect international trade and which has the following objectives: the protection of human or animal life or health from risks arising from additives, contaminants, toxins or disease-causing organisms in the food; the protection of human life from plant-borne or animal-borne diseases; the protection of animal or plant life from the introduction of pests, diseases or disease-causing organisms; the protection of a country from damage caused by entry, establishment or spread of pests, commonly called "invasive species".

The most trade distortive SPS measures are usually imposed on agricultural products. Such measures could be, for instance, certification procedures, quarantine regulations, labelling, setting guidelines on minimum pesticide residues, requiring certain product or process criteria or the use of only certain prescribed food additives.

In general, WTO members are allowed to impose SPS measures as long as they are backed by scientific evidence. However, there is a caveat to the effect that such trade measures must not be any more trade restrictive than is necessary to protect health and that they should not arbitrarily or unjustifiably discriminate between members where identical or similar conditions prevail. Further, such SPS measures should not amount to a disguised trade restriction. As much as possible, WTO members are encouraged to base their SPS Measures on international standards, guidelines and recommendations.

### 2.3.2 Country obligations under the SPS Agreement

Quite unlike the Agreement on Agriculture, the SPS Agreement does not require countries to formulate any quantitative and legally binding schedules of concessions. The agreement is simply a set of legally binding rules, principles and minimum standards for WTO members to ensure that any SPS measures they impose are justified and backed by sound science, and that they do not constitute a barrier to international trade. The SPS capability of a country comprises of institutional, regulatory and technical aspects. Hence, complying with the SPS Agreement requires an enforceable legislative framework, adherence to standards, inspection and certification systems, monitoring and surveillance systems, effective management frameworks, trained and competent staff, well equipped laboratories, and well-defined and effective communication channels between the various players. For acceding countries, the WTO has prepared a document, Checklist of Illustrative SPS and TBT Issues for Consideration in Accessions (WT/ACC/8) (annexed to the paper), which points out the particular areas in respect of which information is required for purposes of discussions in the Working Parties.

### 2.3.3 The main features of the SPS Agreement

#### (a) Harmonization

WTO members are at liberty to set whatever human, plant and animal health and safety standards they may consider appropriate. The SPS Agreement however encourages harmonized standards through the "establishment, recognition and application of common sanitary and phytosanitary measures by different Members." The agreement specifically refers to three international standards-setting bodies; the FAO/WHO Codex Alimentarius

Commission, the Office International des Epizooties (OIE), and the International Plant Protection Convention (IPPC).

These three have observer status in the WTO SPS Committee. In general, developing countries are taking an increasingly active role in the work of the three bodies. Efforts are being made to support this. In particular, the FAO/WHO Codex Alimentarius Commission launched, in February this year, a trust fund to assist developing countries to participate in its work. The fund's objectives include strengthening "the capacity of developing countries and countries with economies in transition to build strong and compatible food control systems through collegial exchanges, knowledge transfer and professional development through the Codex Alimentarius Commission and its committees and task forces." The fund will also reinforce collaborative national Codex structures and stakeholder participation in all recipient countries, and support the identification of new national delegates to Codex committees, task forces and governance meetings, and reinforce their participation over a 12-year period.

The IPPC, housed within FAO, develops international plant import health standards, mainly on quarantine pests, basic principles governing phytosanitary laws and regulations, and harmonized plant quarantine procedures. The IPPC guidelines for pest risk assessment provide a scientific basis for governments to evaluate risks from imports. The OIE, based in Paris offers international animal health standards and procedures. Its manuals and guides are updated regularly taking into account advancements in scientific research. The OIE has also developed methodologies for animal disease risk assessment.

Guidelines, standards or principles developed by these organizations are voluntary. Hence, they are not legally binding in and of themselves. However, the legal effect of their being referred to in the SPS Agreement is that any WTO member that adopts these standards is presumed to be in full compliance with the relevant SPS Agreement commitments.<sup>33</sup> Members remain free to formulate their own standards of protection, perhaps even

---

<sup>33</sup> The legal status of the standards issued by the Codex Commission was directly addressed in a WTO decision not too long ago. In *European communities - trade description of sardines*, (WT/DS231/R, delivered on 29 May 2002, WT/DS231/R/Corr.1.) both the panel and the Appellate Body held that Codex Stan 94 was a "relevant international standard" within the meaning of Article 2.4 of the TBT Agreement. No one would doubt that a similar holding would have been the result in relation to the SPS Agreement.

more stringent than the internationally accepted standards. In this case, scientific justification will be necessary. Article 5 of the SPS Agreement regulates the situation when a member decides to adopt standards of protection that deviate from international standards.

(b) Equivalence

Members can usually negotiate at a bilateral or regional level, the mutual recognition of standards if they are deemed to be "equivalent". In these circumstances, the burden to demonstrate "equivalence" lies with the exporting country. For members, equivalent standards have to be notified to the WTO Secretariat.

(c) Risk assessment

The SPS Agreement requires that members should impose SPS measures only after an evaluation of the actual risks involved. Countries are at liberty to either use international standards to justify SPS measures or to conduct their own risk assessment in order to evaluate the risks and their possible consequences. Similar levels of risk should attract similar levels of protective measures. The agreement allows members to take precautionary measures in the case of an emergency and when sufficient scientific evidence does not exist to support definitive measures. However, effort should be made within a reasonable period to seek any additional information necessary for a more objective risk assessment.

(d) Transparency

This is a major obligation under the SPS Agreement. Each WTO member must establish or designate a national central government authority as responsible for the implementation of the notification procedures. Any new sanitary or phytosanitary law or regulation, or revision thereof, that may restrict trade and that differs from international standards has to be notified to the WTO Secretariat. These should be sent, in standard format, prior to the date of entry into force, so that other WTO members can react to them. Every WTO member is also required to set up a "national enquiry point", an office that will provide information to trading partners in the national laws and regulations on food safety and animal and plant health. This office will also have information on any equivalence agreements, risk assessment procedures and decisions. In effect, the office should be staffed by officers

who can answer any reasonable question on the SPS Agreement and its implementation in the country, and also provide copies of national legislation or revisions and any other relevant documentation.

In general therefore, the SPS Agreement has onerous implementation challenges. Each WTO member must establish or designate a national central government authority as responsible for the implementation of the notification procedures. Any new sanitary or phytosanitary law or regulation, or revision thereof, that may restrict trade and that differs from international standards has to be notified to the WTO Secretariat.

### MAIN REFERENCES

**Cottier, T. & Mavroidis, P.** 2003. *Intellectual property: trade competition and sustainable development*. The World Trade Forum Vol. III. University of Michigan Press.

**Desta, M.G.** 2002. *The Law of International Trade in Agricultural Products: From GATT 1947 to the WTO Agreement on Agriculture*. Kluwer Law International.

**Echols, M.** 2001. *Food Safety and the WTO: The Interplay of Culture, Science and Technology*. Kluwer Law International.

**Josling, T.E., Roberts, D. & Orden, D.** 2004. *Food Regulation and Trade, Toward a Safe and open Global System*. Institute for International Economics.

**Josling, T.E., Tangerman, S. & Warley T.K.** 1996. *Agriculture in the GATT*, Macmillan.

**Watal, J.** 2001. *Intellectual Property in Developing Countries*, Kluwer Law International.

**WTO.** 1999. *Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Legal Instruments-Results of the Uruguay Round*, WTO and Cambridge University Press.

## 2.

### THE EVOLUTION OF THE WTO AGREEMENT ON AGRICULTURE

#### *Contents*

I.	INTRODUCTION	33
1.1	Origins of the AoA	34
1.2	Nature and structure of the AoA	36
II.	THE DOHA NEGOTIATIONS: GENERAL	38
2.1	Background	38
2.1.1	Agriculture on the road to Hong Kong: highlights	40
III.	AGRICULTURAL MARKET ACCESS	45
3.1	Tariff reductions in the current negotiations	49
3.1.1	Negotiations on tariff reductions on the road to Cancun	49
3.1.2	Negotiations on tariff reductions	54
3.2	Tariff rate quotas and their administration	58
3.3	Special Agricultural Safeguard	62
3.4	Conclusion on market access	64
IV.	AGRICULTURAL EXPORT SUBSIDIES AND OTHER FORMS OF EXPORT SUPPORT	64
4.1	Background	64
4.2	Export subsidies: negotiations on the road to Cancun	68
4.3	Other forms of export support: negotiations on the road to Cancun	69
4.4	Export competition: from Cancun to Hong Kong	71
V.	AGRICULTURAL DOMESTIC SUPPORT	72
5.1	Amber box measures	75
5.1.1	Approach and structure in the AoA	75
5.1.2	Major issues in amber box support	77



32	<i>Basic Legal Obligations</i>	
5.2	Blue box measures	79
	5.2.1 Approach and structure in the AoA	79
	5.2.2 Major issues in blue box support	80
5.3	Green box measures	81
	5.3.1 Approach and structure in the AoA	81
	5.3.2 Major issues in green box support	82
	5.3.3 The direction of negotiations on domestic support	83
VI.	CONCLUSION	85
	MAIN REFERENCES	87

## I. INTRODUCTION

The AoA<sup>1</sup> came into existence over ten years ago as one of the instruments annexed to the Marrakesh Agreement establishing the WTO. The AoA declares in its preamble that the long-term objective of WTO members is "to establish a fair and market-oriented agricultural trading system." The current agricultural negotiations at the WTO are part of the endeavour to bring this objective one step closer to reality. The short-term mission of the AoA, on the other hand, was to launch the reform process and to take the first steps towards that long-term goal. The AoA disciplines on, *inter alia*, the three pillars of agricultural market access, domestic support and export subsidies, constituted that first step on the path of reform. The in-built agenda contained in article 20 of the AoA, was designed to ensure that these AoA disciplines would be only the first step in a reform process culminating in the establishment of a fair and market-oriented agricultural trading system.

This chapter provides a background on the origins, nature, structure, scope and obligations of the AoA. To that end, the chapter is structured in three parts: market access, domestic support, and export subsidies. Each of these three sections is examined in the same format. First, the key concepts in every section are introduced. Thereafter, the currently applicable legal regimes in these areas are described. Next, the contentious issues in each section are identified. And finally, the prospects in each area are assessed on the basis mainly of the following official documents: the Harbinson modalities draft papers,<sup>2</sup> subsequent negotiation submissions by the major players, the draft Ministerial Declaration issued on 24 August 2003 by General Council Chairman Carlos Perez del Castillo,<sup>3</sup> the final draft that emerged on 13 September 2003 during the Cancun negotiations<sup>4</sup>, the

---

<sup>1</sup> Agreement on Agriculture (hereafter the AoA) in Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Marrakesh, 15 April 1994.

<sup>2</sup> WTO. *Negotiations on Agriculture: First Draft of Modalities for the Further Commitments*. (WTO doc. TN/AG/W/1), 17 February 2003 (hereafter first draft modalities or first modalities draft); WTO. *Negotiations on Agriculture: First Draft of Modalities for the Further Commitments: Revision* (WTO doc. TN/AG/W/1/Rev.1), 18 March 2003 (hereafter revised first draft modalities). Reference is made to the modalities text in general in cases where both original and revised versions provide for the same proposed rules.

<sup>3</sup> WTO. *Preparations for the Fifth Session of the Ministerial Conference: Draft Cancun Ministerial Text – Revision* (WTO doc. JOB(03)/150/Rev.1), 24 August 2003 (hereafter the pre-Cancun Draft).

<sup>4</sup> WTO. *Preparations for the Fifth Session of the Ministerial Conference: Draft Cancun Ministerial Text – Second Revision* (WTO doc. JOB(03)/150/Rev.2), 13 September 2003 (hereafter the Cancun Draft).

July 2004 Framework Agreement<sup>5</sup>, and the Hong Kong Ministerial Declaration.<sup>6</sup> A brief conclusion summarizes the issues and provides some perspectives into the future of the agriculture negotiations. The issues of special and differential treatment and non-trade concerns<sup>7</sup> are discussed as appropriate in each section. The final section provides a brief summary of the legislative implications of the AoA rules and commitments for WTO member countries.

### 1.1 Origins of the AoA

The roots of the AoA are to be found in the text of GATT itself. The special status of agriculture, whether real or imagined, got its legal expression in the body of GATT rules which left some important loopholes in respect of agricultural trade from the very beginning. The loopholes had been there since early negotiations for the ITO Charter and the 1947 version of the GATT, particularly in market access. It is notable that the size of the agricultural loophole in GATT continued to grow over time, particularly in the first two decades of its life, thereby further alienating agricultural trade from other sectors. This widening gap between agriculture and other sectors could be seen in the 1955 waiver granted to the United States from its obligations under the key GATT provisions of articles II and XI;<sup>8</sup> the exclusion of agricultural products from the new GATT prohibition of export subsidies in 1955<sup>9</sup>; the creation of the European Common Agricultural Policy in the 1960s<sup>10</sup>, which was later subjected to a series of re-negotiations of commitments every time the Community expanded as envisaged under

---

<sup>5</sup> See WTO, *Doha Work Programme: Decision Adopted by the General Council on 1 August 2004* (WT/L/579, 2 August 2004) (hereafter the "July 2004 Package" or simply the "July Package").

<sup>6</sup> See WTO, Sixth WTO Ministerial Conference, Hong Kong (13–18 December 2005), *Doha Work Programme Ministerial Declaration* (WT/MIN(05)/DEC), adopted on 18 December 2005, 22 December 2005 (hereafter the Hong Kong Declaration).

<sup>7</sup> On the place of non-trade concerns in the current agriculture negotiations, see WTO Committee on Trade and Environment, *Environmental Issues Raised in the Agriculture Negotiations: Statement by Mr. Frank Wolter*, WT/CTE/GEN/8/Suppl.1, 5 October 2005.

<sup>8</sup> See *Waiver Granted To The United States in Connection with Import Restrictions Imposed under Section 22 of the United States Agricultural Adjustment Act of 1933, as Amended* Decision of 5 March 1955 BISD § 03S/32, 41 June 1955.

<sup>9</sup> See GATT, article XVI:3 in particular.

<sup>10</sup> See Meester, G. 2005. European Union, Common Agricultural Policy, and World Trade. *Kansas Journal of Law & Public Policy*, 14: 389.

GATT, articles XXIV:6 and XXVIII<sup>11</sup>; the use of a "grandfather clause" by newly-joining countries in their protocols of accession to protect their agricultural sectors<sup>12</sup>; the use of grey-area measures, such as EC variable import levies, whose legality was always questionable but no clear-cut decision was ever taken; and a habitual disregard of such disciplines by other contracting parties more readily in agriculture than in other sectors.<sup>13</sup> A steadily increasing number of agricultural cases were brought before the GATT dispute settlement system; but they could not address the real problem areas simply because the rules were not designed to bring discipline in agricultural trade, the more so with respect to the most important trading powers. Hudec found that between 1960 and 1989 exactly one-half of GATT cases involved agricultural products (based on a working definition of agricultural products that was narrower than the definition given to agricultural products under Annex I of the AoA).<sup>14</sup> Even the most creative panels could not create law; they could only interpret and apply existing law. There was simply a consensus that the GATT legal system "has not yet been able to engage agricultural trade policy in a significant way."

The frustration with this reverse development in GATT's disciplining power over national agricultural trade policy finally resulted in growing calls, and later an emerging consensus (particularly from the early 1980s), that GATT had to do something about agriculture. In the words of the 1982 GATT Ministerial Declaration, "there is widespread dissatisfaction with the application of GATT rules and the degree of liberalization in relation to agricultural trade", and "there is an urgent need to find lasting solutions to the problems of trade in agricultural products".<sup>15</sup> The only solution to the

---

<sup>11</sup> For more on renegotiations and their legal consequences, see *European Economic Community—payments and subsidies paid to processors and producers of oilseeds and related animal-feed proteins*, report of the panel (L/6627 BISD 37S/86) adopted on 25 January 1990.

<sup>12</sup> See *Protocol for the Accession of Switzerland*, BISD 14S/6-11 (July 1966) paragraph 6. See also, Haberli, C. 2005. The July 2004 Agriculture Framework Agreement. In O'Connor, B. (ed.) *Agriculture in WTO Law* p. 404. Cameron May. London (hereafter O'Connor (2005)).

<sup>13</sup> Writing about the pre-Uruguay Round situation of agriculture within the GATT, Trebilcock and Howse observed: "a number of the major exporting states had come close to ignoring GATT requirements altogether, even to the point of refusing to implement GATT panel decisions." Trebilcock, M. and Howse, R. 1999. *The regulation of international trade*, p. 247. Routledge. London and New York. Second edition.

<sup>14</sup> Excluding disputes involving cigarettes (which in fact fall under HS Chapter 24 of the AoA). See Hudec, R. 1993. *Enforcing international trade law: The evolution of the modern GATT legal system*, p. 327. Butterworth Legal Publishers.

<sup>15</sup> See, e.g. the 1982 GATT Ministerial Declaration.

problem of agricultural trade could thus come only from the "political organ" of the GATT – and it took the form of the 1986 Punta del Este Ministerial Declaration which launched the Uruguay Round. This Declaration put agriculture at the heart of the negotiations and declared: "there is an urgent need to bring more discipline and predictability to world agricultural trade by correcting and preventing restrictions and distortions including those related to structural surpluses so as to reduce the uncertainty, imbalances and instability in world agricultural markets."<sup>16</sup> The Uruguay Round negotiations aimed "to achieve greater liberalization of trade in agriculture and bring all measures affecting import access and export competition under strengthened and more operationally effective GATT rules and disciplines ...."<sup>17</sup> Translating these political commitments into legally enforceable rights and obligations proved much tougher than anticipated in 1986. About eight years of testing negotiations finally came to a successful end with overall achievements that transcended the expectations of even the most optimist observers at the launch of the round in 1986. Agriculture played a key role in the success or failure of the whole negotiation process.

## **1.2 Nature and structure of the AoA**

The AoA stands on three pillars – market access, domestic support, and export subsidies. This structure was not chosen arbitrarily by the negotiators; it was in a sense dictated by the very nature of the GATT loopholes that the AoA was designed to plug. As will be developed further later on, GATT had explicit agriculture-specific exceptions in the areas of subsidies and market access, which were essentially loopholes in the body of the GATT text. As argued earlier, these loopholes expanded rather than becoming smaller over the years and one of the most important objectives of the Uruguay Round was to find a lasting solution to the problems of agricultural trade. The AoA's three pillars could thus be described as a three-pronged plug that went into the agriculture-specific loopholes in the body of the GATT. It shall be seen later in the chapter, however that GATT had only two agriculture-specific holes – market access and export subsidies – and the three prongs of the AoA were somehow designed to fill those two holes. The third prong, domestic support, was found necessary in order to properly address the issues on the two other subjects.

---

<sup>16</sup> See GATT. Ministerial Declaration on the Uruguay Round (MIN.DEC) adopted in Punta del Este, Uruguay, on 20 September 1986, *BISD* 33S/19–28.

<sup>17</sup> See *Id.*

The AoA has been a subject of controversy since its birth in 1995. Some look at it as an instrument with the potential to redress the imbalance in trade relations between developing and developed countries. Others look at it as an instrument that "systematically favours agricultural producers in industrialized countries at the expense of farmers in developing countries", thereby institutionalizing inequality.<sup>18</sup> Gonzalez goes further and argues that the AoA "increases food insecurity by exacerbating rural poverty and inequality" in developing countries and hampers their ability to adopt appropriate measures to address the problem.<sup>19</sup> For some the AoA is an embodiment of "the recognition that agriculture has always been different and that difference needs to be recognized in something more than limited exceptions."<sup>20</sup> Still others accuse it of having overly neo-liberal leanings, ignoring such facts as the lack of power for millions of people to purchase their daily food on the market; their dietary preferences, and even of ignoring the importance of agriculture in providing livelihoods for an estimated seventy percent of the world's population.<sup>21</sup> It is further argued that the AoA ignores important ecological considerations and undermines genetic diversity.<sup>22</sup>

Related to the perception of AoA, is the more academic question of why agriculture is so different as to make it effectively the only sector governed by a sector-specific agreement within the WTO. The explanations offered by different people range from what Ragosta calls the "farmers' unique role in maintaining an independent republic"<sup>23</sup> to the U.S. Senate's tendency "to represent land more than people"<sup>24</sup>, to agriculture's role as the source of our food, to its unique relevance to biodiversity and the environment at large, to the cultural issue of ensuring the survival of a rural way of life. O'Connor provides strategic and economic explanations and concludes that "agriculture

---

<sup>18</sup> See Gonzalez, C.G. 2002. Institutionalizing inequality: the WTO Agreement on Agriculture, food security, and developing countries. *Columbia Journal of Environmental Law* 27:438.

<sup>19</sup> *Id.*, p. 476.

<sup>20</sup> O'Connor (2005), p. 418.

<sup>21</sup> See, e.g. Murphy, S. 2002. Structural distortions in world agricultural markets: do WTO rules support sustainable agriculture? *Columbia Journal of Environmental Law* 27: 609–610.

<sup>22</sup> See *Id.*, p. 610.

<sup>23</sup> See Ragosta, J.A. 2005. Trade and agriculture, and lumber: why agriculture and lumber matter. *Kansas Journal of Law & Public Policy* 14: 414-15.

<sup>24</sup> See *Id.* Dam also observed in 1970 that "no treaty that impinged upon the U.S. Farm program could receive the constitutionally required senatorial approval" Dam, K. 1970. *The GATT: law and the international economic organization*, p. 260. University of Chicago Press.

is different from any other sector and is rightly treated according to the rules of a separate WTO Agreement."<sup>25</sup>

Amid all this diversity of opinion, almost everyone agrees that the AoA has taken the single most important step to bring agriculture more firmly within a system of multilaterally agreed rules – rules that led to the adoption by WTO member countries of new national legislation in order to bring their pre-Uruguay Round practices into line with AoA requirements.<sup>26</sup> An excellent example of national legislative changes that followed adoption of the AoA is the amendment of the Swiss Federal Constitution in 1996, which had to go through a national referendum and the complete revision of the 1951 Federal Law on Agriculture in 1998. What is also clear is that, in as long as the AoA remains in place, agricultural products will remain a special category in themselves subject to special treatment within the WTO framework. An understanding of those areas of GATT that provided special rules for agriculture is essential for a proper appreciation of the meaning and effect of the AoA that came out of the Uruguay Round as well as the direction it is taking in the current negotiations.

## **II. THE DOHA NEGOTIATIONS: GENERAL**

### **2.1 Background**

The share of agricultural exports in global trade has fallen from 47 percent of total merchandise exports in 1970 to just 9.1 percent in 2001.<sup>27</sup> This is, of course, an average and masks very wide variations among countries; extreme examples would be Japan with agricultural exports accounting for a mere 1.3 percent of its merchandise exports and Ethiopia with 84.2 percent of its merchandise exports accounted for by agricultural products. However, despite this decline in its share of world trade, agriculture remains the most sensitive subject for international trade negotiators and the multilateral trading system. Just like the Punta del Este conference in 1986 which launched the Uruguay Round, agriculture was the deal-maker or -breaker during the Doha WTO Ministerial conference which launched the Doha Development Agenda.<sup>28</sup> Just like in the more than seven years of Uruguay Round negotiations, agriculture is still the most contentious and also the

---

<sup>25</sup> O'Connor, (2005), p. 419.

<sup>26</sup> For the details on this, see Haberli in O'Connor (2005), pp. 403 and 404.

<sup>27</sup> See WTO, 2003. *International trade statistics 2002*, pp. 105–112.

<sup>28</sup> See Decision of the Council for TRIPS, IP/C/W/405, 30 August 2003.

most important issue in the ongoing Doha trade negotiations. As a World Bank study put it, "Reducing protection in agriculture alone would produce roughly two-thirds of the gains from full global liberalization of all merchandise trade".<sup>29</sup> Just as the many deadlines that came and went during the Uruguay Round negotiations were largely blamed on agriculture, so also are the many negotiating deadlines already missed so far in the Doha process<sup>30</sup> and the collapse of the Cancun Ministerial Conference blamed largely on agriculture.<sup>31</sup> For example, the failure of WTO negotiators to meet the 31 March 2003 deadline for agreement on agricultural trade liberalization modalities was taken as a setback not just for the agriculture negotiations, but for the entire Doha process. Indeed, the subsequent failure to meet the 31 May 2003 deadlines for a Modalities Agreement on market access for non-agricultural products was blamed on that previous failure to meet the agricultural modalities deadline.

As noted earlier, although the Uruguay Round took the first most important step in the process of liberalizing agricultural trade, the developments thus far have been limited to a reshaping of the rules with little immediate actual liberalization. The treatment of agricultural products as a distinct category still forms part of the WTO architecture. The Agriculture Agreement provides for a system of rules significantly different from mainstream GATT provisions for most other products, and its provisions have been made to prevail over inconsistent GATT/WTO rules. As such, agriculture is still a class in itself. Agriculture still stands alone as the sector where export subsidies are expressly and generously – albeit selectively – permitted under WTO law; where three-digit tariffs are rather common; where significant additional duties can be introduced in the name of "safeguard measures" regardless of injury considerations and in the most unpredictable of ways; where a proven trade-distortive and injurious domestic support programme may escape any challenge; etc. In short, agricultural trade still has a long way to go on the road to liberalization. Seen from this perspective, therefore, although the Agreement certainly represents a significant breakthrough in the history of international trade regulation, it is also possible to say that the same Agreement is a standing symbol of continued failure to integrate agricultural trade into the mainstream system.

---

<sup>29</sup> World Bank. 2003. *Global economic prospects realizing the development promise of the Doha Agenda: 2004*, p. xvi. Washington D.C.

<sup>30</sup> See, for example [www.ictsd.org/weekly/03-05-28/story1.htm](http://www.ictsd.org/weekly/03-05-28/story1.htm).

<sup>31</sup> The so-called Singapore issues – investment, competition, transparency in government procurement, and trade facilitation – were also partly responsible for the Cancun collapse.



### 2.1.1. Agriculture on the road to Hong Kong: highlights

One virtue of the Agriculture Agreement has been that it had an in-built agenda for a continuation of the liberalization process so as to realize its long-term objective of bringing fundamental change in the level of protective and distortive devices at work in many countries. Article 20 of the Agreement on Agriculture provided as follows:

"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."

At the same time, many members had long argued that agriculture should be brought within the fold of a broader round so as to allow trade-offs to take place – a strategy successfully applied more than a decade ago by developed countries to bring in intellectual property and services in exchange for a promise to re-integrate agriculture and textiles into the system. Launching the already mandated negotiations in agriculture as part of a broader negotiation round was also one of the primary objectives of the third WTO Ministerial Conference at Seattle.<sup>32</sup>

Seattle proved to be a disappointing failure, and the widely expected Millennium Round of trade negotiations was not launched. But, since agriculture was one of the few areas on which a negotiation had already been mandated by the results of the Uruguay Round, the WTO General Council was

---

<sup>32</sup> Held at Seattle, United States, from 30 November to 3 December 1999. For details on this Conference, see [www.wto.org/wto/seattle/english/about\\_e/07ag\\_e.htm](http://www.wto.org/wto/seattle/english/about_e/07ag_e.htm).

able to launch a sector-specific negotiation process on 7 February 2000.<sup>33</sup> In accordance with a programme agreed on that occasion, the WTO agriculture negotiators held their first meeting on 23–24 March 2000. In the first phase of the process (which covered the period between March 2000 and March 2001), several meetings were held and dozens of proposals submitted by about 89 percent of the WTO's membership. These submissions were further developed with more technical details during the largely informal meetings of the second phase of the negotiations (from March 2001 to March 2002). An important development during this second phase of the sectoral negotiations in agriculture came from the Doha ministerial conference (November 2001) which launched a comprehensive trade negotiation round and brought the already proceeding agricultural negotiations within its fold. Indeed, the pre-Doha phase of the agriculture negotiations was sending the clear message that progress in agriculture would be possible only if a broader round was launched at Doha. On agriculture, the Doha Declaration provided as follows:

"... 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

---

<sup>33</sup> See WTO. *Services and Agriculture negotiations: meetings set for February and March*. (WTO Press Release (Press/167)), 7 February 2000.

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."<sup>34</sup>

Five broad negotiation issues have been identified in this paragraph: market access, export subsidies, domestic support, special and differential treatment, and non-trade concerns. While this is clear from the text, countries have subsequently argued over the degree of importance that should be attached to each of these issues – some wanted to give equal weight to all five of them while others contended that there was a hierarchy built into them. A useful summary of the negotiation process prepared by the Information and Media Relations Division of the WTO noted the following on 21 October 2002:

"Some countries have described the mandate given by article 20 as a 'tripod' whose three legs are export subsidies, domestic support, and market access. Non-trade concerns and special and differential treatment for developing countries would be taken into account as appropriate. Others say it is a 'pentangle' whose five sides also include non-trade concerns and special and differential treatment for developing countries as separate issues in their own right."<sup>35</sup>

But of course, the order and tone of presentation of these five items clearly shows a hierarchy which puts the three pillars of the AoA (market access, export subsidies, and domestic support) on top, followed in second place by special and differential treatment (note the use of such strong terms as "shall be an integral part of all elements of the negotiations") and lastly, the so-called non-trade concerns (indicated by the weaker wording of the commitment to "take note of the non-trade concerns"). Also among the three pillars, there is a difference in the immediate negotiation objectives. The commitments in the areas of market access and domestic support are similar in that they talk about introducing "substantial improvements in market access", and "substantial reductions in trade-distorting domestic support". On the other hand, the commitments on export subsidies sound stronger: "reductions of, with a view to phasing out, all forms of export subsidies." This was one of the most contentious subjects during the Doha ministerial talks; indeed, success and

---

<sup>34</sup> WTO. *Doha Ministerial Declaration*. (WT/MIN(01)/DEC/1) adopted on 14 November 2001, para. 13.

<sup>35</sup> WTO. Agriculture negotiations: where we are now p. 12 (available at [www.wto.org](http://www.wto.org)).

failure in the talks were hanging on the wording of the clause "with a view to phasing out" export subsidies in this paragraph.<sup>36</sup>

The third phase in the agriculture negotiations, known as the modalities phase, began in March 2002. The hope was to conclude this phase on 31 March 2003 with the adoption of a Modalities Agreement.<sup>37</sup> As per the Doha negotiation schedule, the fifth session of the WTO Ministerial Conference (held in Cancun Mexico, 10–14 September 2003) was the time for members to submit comprehensive draft tables of concessions in agriculture based on these modalities. However, as so often in trade negotiations, reality once again fell short of ambition; progress was lacking in many areas. Agriculture Committee Chairman Stuart Harbinson nonetheless managed to put together a first modalities draft paper which he circulated on 17 February 2003.<sup>38</sup> The reaction was typical of agriculture negotiations – some condemning it for going too far, others for not going far enough. A month later, on 18 March 2003, Harbinson circulated a revised version of his draft,<sup>39</sup> but only to elicit the same reactions. Indeed, as Harbinson himself noted, several participants did not even "accept the revised First Draft as a basis for the negotiations".<sup>40</sup> Over time, a tacit agreement was reached to pursue the goal in two stages: first agree on some kind of a "framework Modalities Agreement" and then proceed to the full modalities. On that basis, and in an effort to break the deadlock, the US and the EU got together and came up with what was called the "US-EU joint proposal".<sup>41</sup> The immediate impact of this bilateral submission on the negotiations was such that, in the words of WTO spokesperson Keith Rockwell, it "galvanised the process in a way that we have not seen in three-and-a-half years of agriculture negotiations".<sup>42</sup> However, later developments suggested that the

---

<sup>36</sup> Financial Times, 14 November 2001, p. 14. The date scheduled for the conclusion of the Doha ministerial talks – noted that France objected to "wording in the draft WTO agenda that calls for negotiations 'with a view to phasing out' all farm export subsidies." The following day, the Financial Times reported that an all-night haggling in Doha ended in agreement and pointed out: "France was bought off with an assurance that the ministers' declaration did not 'pre-judge' the outcome of future farm trade talks", p. 15.

<sup>37</sup> Paragraph 14 of the Doha Declaration provided: "Modalities for the further commitments ... shall be established not later than 31 March 2003."

<sup>38</sup> See first modalities draft.

<sup>39</sup> See revised first modalities draft.

<sup>40</sup> See *Negotiations on agriculture: report* by the Chairman ... to the TNC TN/AG/10, 7 July 2003, para. 8.

<sup>41</sup> See *EU-US Joint Text on Agriculture* (13 August 2003), (available at [www.ictsd.org](http://www.ictsd.org)).

<sup>42</sup> See ICTSD, ([www.ictsd.org](http://www.ictsd.org)); see also 2003, US-EU agriculture framework sees partial elimination of export subsidies. *Inside US Trade*.

joint proposal might have backfired in the sense that "instead of encouraging consensus, the proposals prompted Brazil, India, China and about 20 other developing countries to group together to demand radical cuts in wealthy nations' farm subsidies and trade barriers."<sup>43</sup> This demand from the so-called G20 countries came in the form of a "proposal for a framework document."<sup>44</sup> The effect of these and other developments was that the Cancun ministerial could only talk about a framework for modalities, further delaying the already overdue agreement on modalities. In the preparation for Cancun, WTO General Council Chairman, Carlos Pérez del Castillo, prepared a framework proposal for agricultural modalities hoping to translate the resulting document into detailed and full modalities in the post-Cancun phase. What is worse, ministers failed to reach an agreement even on such a framework document – a failure which, together with the deadlock over the so-called Singapore issues, led to the collapse of the whole Cancun ministerial session. With the Cancun failure, the agriculture agenda and the future of the WTO itself came under question.

The feeling of disappointment that followed the Cancun setback was later tempered by the July 2004 Package, and the Framework Agreement reached for the establishment of the agricultural Modalities.<sup>45</sup> Although the July Package was full of broad and vague declarations without any specific commitments, it nonetheless managed to give a sense of direction to the entire exercise. Among the main achievements of the July Package are its adoption of a single but tiered formula for the reduction of agricultural tariffs (the higher the tariff levels the steeper the cuts); and its use of a similarly tiered formula to reduce trade-distorting domestic support (the higher a member's support levels, the higher the cuts) both at the specific level of amber box measures subject to AMS commitments and the overall level of trade distortive domestic support measures in general (i.e. amber box, *de minimis*, and blue box combined) with a 20 percent downpayment at the beginning of the implementation period. Also noteworthy of the July Package is the agreement to eliminate export subsidies as listed in members' schedules, as well as other forms of export support, such as export credits, export credit guarantees or insurance programmes, exporting state trading

---

<sup>43</sup> See de Jonquieres, G. Comment and Analysis, p. 21. *Financial Times*. 16 September 2003.

<sup>44</sup> See WTO, *Agriculture - Framework Proposal, Joint Proposal by Argentina, Bolivia, Brazil, Chile, China, Colombia, Costa Rica, Cuba, Ecuador, El Salvador, Guatemala, India, Mexico, Pakistan, Paraguay, Peru, Philippines, South Africa, Thailand and Venezuela*, WT/Min(03)/W/6, 4 September 2003 (hereafter the pre-Cancun G20 proposal).

<sup>45</sup> See the July Package.

enterprises and food aid practices that market access has the same effect as the listed export subsidies. However, the developments between July 2004 and December 2005 had been so disappointing that the WTO had to lower its expectations from the sixth WTO Ministerial in Hong Kong (13–17 December 2005), lest the Cancun experience be repeated.<sup>46</sup> The Hong Kong Ministerial Declaration has added some specifics to the otherwise broad commitments of the July Package, such as the decision to have three bands for reductions in trade-distorting domestic support, to complete the elimination of all forms of export subsidies by 2013, and to adopt four bands for structuring tariff cuts. Members also committed to complete the agriculture modalities by 30 April 2006 and to submit comprehensive schedules based thereon by 31 July 2006, which would then lead to the conclusion of the Doha Round by the end of 2006. Whether such an ambitious agenda will be met is yet to be seen. Most observers are naturally pessimistic about it. Compared to Cancun, Hong Kong was of course a success. However, it was also taken by many as a missed opportunity and a disappointment.<sup>47</sup> Indeed, EU trade commissioner Peter Mandelson himself was quoted to have said: "If we didn't make the conference a success, we certainly saved it from failure."<sup>48</sup>

### III. AGRICULTURAL MARKET ACCESS

Agricultural market access refers to the terms and conditions under which agricultural products could be imported into WTO member countries. Countries often set up different forms of barriers against the importation of goods and services for several reasons.<sup>49</sup> These barriers are generally of two types: tariffs and non-tariff barriers (NTBs). From its very beginning, GATT has had a preference for tariffs over NTBs, and article XI prohibits NTBs with only a few general<sup>50</sup> and one agriculture-specific exceptions. Article XI:2(c) provides for the only agriculture-specific exception in the

---

<sup>46</sup> See Williams, F. WTO chief meets ministers in bid to salvage talks p. 10. *Financial Times* 9 November 2005, quoting EU trade commissioner Peter Mandelson as saying: "There is a clear preference by the great majority to adjust expectations for Hong Kong."

<sup>47</sup> See *inter alia*, Hard truths: The Doha trade round is still alive, but hardly healthy. *The Economist*, 20 December 2005.

<sup>48</sup> See Bradsher K. Trade officials agree to end subsidies for agricultural exports. *New York Times*, December 2005.

<sup>49</sup> These include protection of competing domestic producers, generation of governmental revenue, enforcement of internal health, technical, and other regulations, etc.

<sup>50</sup> The general exceptions include the balance-of-payments restrictions allowed under article XII, the development provisions of article XVIII, and those covered under article XX.

GATT as follows: the prohibition of quantitative restrictions under paragraph 1 does not extend to:

"import restrictions on any agricultural or fisheries product, imported in any form, necessary to the enforcement of governmental measures which operate: (i) to restrict the quantities of the like domestic product permitted to be marketed or produced, or, if there is no substantial domestic production of the like product, of a domestic product for which the imported product can be directly substituted; or (ii) to remove a temporary surplus of the like domestic product, or, if there is no substantial domestic production of the like product, of a domestic product for which the imported product can be directly substituted, by making the surplus available to certain groups of domestic consumers free of charge or at prices below the current market level; or (iii) to restrict the quantities permitted to be produced of any animal product the production of which is directly dependent, wholly or mainly, on the imported commodity, if the domestic production of that commodity is relatively negligible. Any contracting party applying restrictions on the importation of any product pursuant to sub-paragraph (c) of this paragraph shall give public notice of the total quantity or value of the product permitted to be imported during a specified future period and of any change in such quantity or value. Moreover, any restrictions applied under (i) above shall not be such as will reduce the total of imports relative to the total of domestic production, as compared with the proportion which might reasonably be expected to rule between the two in the absence of restrictions. In determining this proportion, the contracting party shall pay due regard to the proportion prevailing during a previous representative period and to any special factors which may have affected or may be affecting the trade in the product concerned."

The agriculture-specific exception contained in article XI:2(c) is a tightly-defined exception with a history of narrow interpretations by GATT panels. Although it was invoked by defendants in several GATT cases to justify their

agricultural import restrictions, not a single country was successful throughout the history of GATT.<sup>51</sup>

However, the tight conditions attached to this exception as well as the strict construction it enjoyed in the hands of GATT panels did not deter countries from resorting to quantitative restrictions. Indeed the major obstacles to international agricultural trade were non-tariff barriers of the sort prohibited under article XI and not justified by either the agriculture-specific or general exceptions of GATT. An essential question here is as to why GATT contracting parties allowed this to happen and did not challenge more of these measures under article XI. The explanations suggested by Bernard O'Connor include: the fact that many countries with comparative advantage in agricultural production were not GATT contracting parties; that many countries had their own programmes in place and did not want to promote jurisprudence that could come back to haunt them; and that governments did not take international action because they agreed on the need to manage domestic production and supply.<sup>52</sup> An important challenge in the area of agricultural trade was to bring some discipline to the widespread use of non-tariff barriers, often in violation of the rules. Given that they were often maintained in violation of GATT rules, the logical outcome should be their elimination. This was however practically unachievable. The most that the Uruguay Round could do was convert all pre-existing "non-tariff" barriers (NTBs) into their tariff equivalents via the innovative approach of tariffication regardless of whether those measures were maintained consistently with GATT rules. This tariffication exercise applied to a range of measures including not just the traditional NTBs, such as quotas and quantitative restrictions, but also such other measures as "variable import levies [often associated with EC agricultural protectionism], minimum import prices, discretionary import licensing, non-tariff measures maintained through state-trading enterprises, voluntary export restraints, and similar border measures other than ordinary customs duties".<sup>53</sup> According to the Appellate Body, these different forms of border measures have one thing in common: "they restrict the volume or distort the price of imports of

---

<sup>51</sup> For more on this, see Desta, MG. 2002. *The law of international trade in agricultural products: from GATT 1947 to the WTO Agreement on Agriculture*. Kluwer Law International.

<sup>52</sup> O'Connor B. 2003. Book Review: the law of international trade in agricultural products: From GATT 1947 to the WTO Agreement on Agriculture. *Journal of International Economic Law* 6(2): 537 and 538.

<sup>53</sup> See footnote 1 to article 4:2 of the Agreement on Agriculture.



agricultural products."<sup>54</sup> One may of course question whether ordinary customs duties also do exactly that: restrict the volume or distort the price of imports of agricultural products. But, as the Appellate Body itself emphasised throughout the report, transparency and predictability are the reasons behind the preference for ordinary customs duties. The resulting tariffs were also bound against any future increase and then subjected to a 36 percent minimum reduction commitment on the average tariff levels (and a 15 percent minimum per tariff line) over a six year implementation period (for developing countries, the reduction rate is two-thirds of the above percentages over a ten-year implementation period). At the same time, because the actual conversion of non-tariff barriers into their tariff equivalents was left to the member countries themselves, the resulting tariffs were often much higher than their genuine equivalents (due to what was called the problem of "dirty tariffication").

This whole process gave rise to two contradictory but more or less well-founded concerns: some feared that the final outcome of the tariffication exercise could be more restrictive – or at least no less restrictive – than the pre-tariffication period; some others feared that tariffication would lead to excessive and/or low-priced imports thereby injuring their domestic producers. Several supplementary arrangements were made to accommodate these concerns.

To protect against the unintended but likely result of a more restrictive regime after tariffication, countries undertook what are called "current access commitments" that attempted to guarantee that historic levels of imports would remain not adversely affected by the tariffication process. This commitment applied in situations where imports of a product during the base period (1986–1988) already represented at least 5 percent of corresponding domestic consumption, which was far from common in agriculture. In cases where imports during the base period were less than 5 percent, members undertook a commitment to create what are called "minimum access opportunities" representing three percent of domestic consumption of the product for the base period for the first year of the implementation period (1995), reaching 5 percent by the end of the implementation period (2000). In theory, therefore, a minimum of 5 percent of the domestic consumption of every product in every member country today must be accounted for by

---

<sup>54</sup> See *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products*, report of the Appellate Body, (WT/DS207/AB/R, issued on 23 September 2002), para. 200.

imports; or at least the business opportunities to do so must be in place. To give effect to the minimum/current access commitments, countries were obliged to establish tariff quotas at "low or minimal" duty rates. Administering these tariff quotas has proved to be much more difficult than anticipated during the Uruguay Round negotiations.

On the other hand, in order to assuage fears of excessive or low-priced imports into the newly-opened markets, a special arrangement was made to allow the introduction of special safeguard (SSG) measures on tariffed products under less stringent conditions than those set by GATT, article XIX, and the Safeguards Agreement (the most important being the absence of an injury requirement under article 5 of the AoA). The fate of these arrangements and their practical administration, together with the traditional question of how to further reduce the existing agricultural tariffs, constitute the core of the market access aspect of the ongoing negotiations.<sup>55</sup> These will be discussed in turn.

### 3.1 Tariff reductions in the current negotiations

#### 3.1.1 Negotiations on tariff reductions

Now that tariffs are the only means of protection at the border<sup>56</sup>, the most important market access issue in the current negotiations relates to the depth of tariff reductions and the method by which to achieve desired reduction targets. While several options have been proposed so far, those from the US and the Cairns Group on the one hand and from the EU on the other appear to represent the two extreme positions and most others fall somewhere in between. At the most conservative end, the EC proposed to stick to the Uruguay Round tradition both in terms of style as well as numerical targets, and suggested a formula for "an overall average reduction of 36 percent and a minimum reduction per tariff line of 15 percent as was

---

<sup>55</sup> There are also a few new market access issues, such as protection of geographical indications, that are currently being pushed by some members.

<sup>56</sup> Note that there are a few temporary exceptions, maintained under special treatment provisions, currently in use by Chinese Taipei, Korea and the Philippines on rice. See WTO. 2002. *WTO Agriculture Negotiations: The Issues, and Where We are Now* (available at [www.wto.org](http://www.wto.org)). The OECD has also noted that Hungary and Poland tariffed only 91 percent and 96 percent respectively of their agricultural NTBs. See OECD. 2001. *The Uruguay Round Agreement on Agriculture: an Evaluation of Its Implementation in OECD Countries*, p. 23. Paris.

the case in the Uruguay Round."<sup>57</sup> At the most liberal end stood the US proposal – also supported by the Cairns Group – which ambitiously called for the adoption of what it called the "Swiss 25" formula (see below) of tariff harmonization (higher cuts on higher tariffs) so as to reduce all higher tariffs to a maximum of 25 percent (keeping in-quota tariffs still lower) to be implemented in equal annual instalments over a five-year period. Curiously, the US went further and asked members to set a date for the eventual elimination of agricultural tariffs<sup>58</sup> – a move that, if successful, could have given agriculture a further lead over manufactures.<sup>59</sup> Knowing the sensitivity of WTO members to agricultural issues, it was not difficult to dismiss this latter point as too ambitious for the Doha negotiations. Indeed, given that several agricultural tariffs in several member countries are bound at three digit levels, even the tariff harmonization formula that would set 25 percent as the maximum for any tariff line was already an ambitious one. It is notable, however, that from quite early on there was a growing consensus to use some tariff harmonization mechanism – such as the Swiss formula – that would help to overcome the extreme tariff dispersion between different agricultural tariff lines.<sup>60</sup> The "Swiss formula" is a term used to describe a tariff harmonization formula originally suggested by Switzerland during the Tokyo round of negotiations for tariff reductions in manufactured products; it is not supported by the Swiss in the current agricultural negotiations. Because the US proposed to reduce all higher tariffs to a maximum of 25 percent, Robert Zoellick called it the Swiss 25" formula.<sup>61</sup>

Former Agriculture Committee Chairman Harbinson's first draft of the modalities proposed a three-tier distinction among agricultural products on

---

<sup>57</sup> *The EC'S Proposal for Modalities in the WTO Agriculture Negotiations* (29 January 2003), available at [europa.eu.int](http://europa.eu.int).

<sup>58</sup> For the latest US positions, see [www.fas.usda.gov/itp/wto/proposal.htm](http://www.fas.usda.gov/itp/wto/proposal.htm). This is not accidental; the US argues that its agriculture is "more than twice as dependent on exports as the US general economy. About 25 percent of gross cash receipts from agricultural sales are for export, compared with 10 percent on average for manufactured goods." Henke, H. 2001. WTO negotiations offer the best chance for agricultural trade reform. *AgExporter*.

<sup>59</sup> Note, however, that the US has also made a similarly ambitious proposal to eliminate all tariffs on all non-agricultural products by 2015. See WTO. *Market access for non-agricultural products: communication from the United States* (TN/MA/W/18) (5 December 2002). Agriculture is already ahead of manufactures in terms of the proportion of tariff lines with bound rates.

<sup>60</sup> For more on the different formulae used in the trade negotiations, see WTO. *Negotiating Group on market access: formula approaches to tariff negotiations – note by the Secretariat* (TN/MA/S/3/Rev.2, 11 April 2003).

<sup>61</sup> See *Statement of Robert B. Zoellick U.S. Trade Representative before the Committee on Agriculture of the U.S. House of Representatives*, 21 May 2003 (available at [www.ustr.gov](http://www.ustr.gov)) (hereafter Zoellick (2003)).

the basis of their bound tariff levels, thus suggesting higher reduction rates for higher tariffs and lower reduction rates for lower tariffs.<sup>62</sup> The draft (both original and revised versions) suggested that agricultural tariffs in excess of 90 percent *ad valorem* be reduced by an average of 60 percent and a per-tariff-line minimum of 45 percent; for those products with tariffs between 15 and 90 percent *ad valorem*, the average would be 50 percent and the per-tariff-line minimum 35 percent; and for those products with tariffs of 15 percent *ad valorem* or lower, the average reduction requirement would be 40 percent and the per-tariff-line minimum 25 percent.<sup>63</sup> The modalities draft also proposed methods by which this tariff reduction formula would be applied in cases where members are applying non-*ad valorem* tariffs.<sup>64</sup> If successful, this approach would have significantly reduced the current high level of tariff dispersion; it would not however have created anything like a maximum permissible tariff level.<sup>65</sup>

The Harbinson draft also contained provisions intended to address the problem of tariff escalation – a situation where tariff rates rise with the degree of processing (i.e. higher tariff rates on more processed products than on primary or less processed forms of the same product). The original version of the modalities draft simply stated "where the tariff on a processed product is higher than the tariff for the product in its primary form, the tariff reduction for the processed product shall be higher than that for the product in its primary form."<sup>66</sup> The revised version further refined this higher-tariff-reduction requirement for the processed product to mean that "the rate of tariff reduction for the processed product shall be equivalent to that for the product in its primary form multiplied, at a minimum, by a factor of [1.3]."<sup>67</sup>

The structure proposed for reductions by developing countries was even more complicated. Firstly, in recognition of the food security and rural development concerns of these countries, the proposal allowed them the right to declare an unspecified number of products (presumably those that might be called food staples and/or export products) as "special products" – the original first draft modalities used the term "strategic products" – and

---

<sup>62</sup> See first draft modalities, paras. 7 and 10; revised first draft modalities, paras. 8 and 12.

<sup>63</sup> See first draft modalities, para. 7; revised first draft modalities, para. 8.

<sup>64</sup> Revised first draft modalities, para. 9.

<sup>65</sup> According to Robert Zoellick, the Harbinson proposal on market access would result in an average agricultural tariff of 36 percent (down from the current 62 percent) while the US proposal would have cut them down to an average of 15 percent. See Zoellick (2003).

<sup>66</sup> See first draft modalities, para. 7.

<sup>67</sup> See revised first draft modalities, para. 8.

designated them the symbol "SP" in their schedules. These products would then be subject to a uniform requirement of 10 percent average and 5 percent per-tariff-line minimum reduction regardless of existing tariff levels. For all other non-SP products, the approach would be generally similar to that proposed for developed countries. But, in this case, the thresholds were higher, the rates of reduction lower, the number of categories bigger, and the implementation period longer.

Accordingly, there are four categories of products here<sup>68</sup>: those with *ad valorem* tariffs higher than 120 percent would be reduced by 40 percent average and 30 percent per-tariff-line minimum; those with tariffs between 60 and 120 percent by an average of 35 and a per-tariff-line minimum of 25 percent; those with tariffs between 20 and 60 percent by an average of 30 and a per-tariff-line minimum of 20 percent; and those with tariffs 20 percent or lower *ad valorem* to be reduced by a 25 percent average and a 15 percent per-tariff-line minimum.<sup>69</sup> These reduction commitments would also benefit from a longer implementation period – ten years as opposed to five years.

While tariff reductions would naturally be a welcome development to international agricultural trade, many developing countries – and particularly LDCs – have been worried about the potential loss of competitive advantage due to erosion of the preferential margin that would necessarily result from reduction of MFN tariffs.<sup>70</sup> In recognition of this, the modalities draft proposed to impose a soft-law, best-efforts, obligation on developed countries "to maintain, to the maximum extent technically feasible, the nominal margins of tariff preferences and other terms and conditions of preferential arrangements they accord to their developing trading partners."<sup>71</sup> The modalities draft further proposed to allow developed countries to delay their tariff reductions on products of vital export interest to preference beneficiaries (defined to mean a product constituting at least 20 percent of their total

---

<sup>68</sup> Note that the original first draft modalities had three categories just like that for developed countries; a fourth category was introduced by the revised first draft modalities.

<sup>69</sup> See revised first draft modalities, para. 12.

<sup>70</sup> Interestingly, this is a point that has been championed as much by the preference-providing countries as by the preference beneficiaries. See Fischler, F. and Lamy, P. *Financial Times*, p. 19. 1 April 2003. For an in-depth analysis of the impact of further reductions in MFN agricultural tariffs on the interest of preference-beneficiary developing countries, see Tangermann, S. 2001. *The future of Preferential Trade Agreements for developing countries and the current round of WTO negotiations on agriculture*. FAO/ESCP.

<sup>71</sup> See revised first draft modalities, para. 16.

merchandise exports) by two years and then to implement the reductions over another six year period. In-quota duties for such products would also be eliminated. Finally, the modalities draft also contained the usual loose undertaking by developed countries to provide "targeted technical assistance programmes and other measures, as appropriate, to support preference-receiving countries in efforts to diversify their economies and exports."<sup>72</sup> But, of course, this is a hollow promise with little, if any, practical significance.

Annex A to the pre-Cancun Draft contained a proposed "Framework for Establishing Modalities in Agriculture", which was based largely on the 'US-EU joint proposal'<sup>73</sup> and the "pre-Cancun G20 proposal".<sup>74</sup> All these three documents are unanimous in their approach to tariff reductions – they all advocate what is called a "blended formula", first suggested by the US-EU joint text proposing to divide all agricultural tariff lines into three groups. The first group would be subject to a Uruguay Round style average tariff cut with a mandatory per-tariff-line minimum; the second category would be subject to a Swiss formula with a coefficient; and a third one would be subject to the famous zero-for-zero approach on which all tariffs would be eliminated. The specific percentage of tariff lines that would be subject to each category, the average and per-tariff-line minimum reductions in the first category, as well as the coefficient in the second category were all to be left for the post-Cancun phase.

However, the similarities between the three documents on market access do not extend much beyond this point. The pre-Cancun G20 proposal to put a cap on the maximum permissible tariff level was replaced in the Cancun Draft by an alternative between tariff capping and the introduction of an effective additional market access in those or other areas through a request-offer process, a position taken from the 'US-EU joint proposal'. At Cancun, ministers spent most of their time on agriculture and the revised draft ministerial declaration (the Cancun draft) circulated on 13 September 2003 (i.e. one day before the conclusion of the session) closely followed the pre-Cancun Draft in most cases. On the issue of tariff reductions, the Cancun Draft reaffirmed the blended formula of the pre-Cancun Draft without much change. The only important modifications to this part of the pre-

---

<sup>72</sup> See revised first draft modalities, para. 16.

<sup>73</sup> See pre-Cancun Draft.

<sup>74</sup> See Cancun Draft.

Cancun Draft relate to non-trade concerns and tariff escalation on which the Cancun Draft echoed the Harbinson revised first modalities draft.<sup>75</sup>

### 3.1.2 Negotiations on tariff reductions: from Cancun to Hong Kong

Cancun was a failure, and any proposals on the table until that time are only part of the negotiating history of whatever comes out of this whole process. The first real breakthrough came in the form of the July Package.

The July 2004 Package adopted a "tiered" approach to the reduction of tariffs, which is just one form of what is traditionally known as the Swiss Formula that aims to cut higher tariffs more deeply than lower tariffs – thereby resulting in a higher degree of tariff harmonization. The July Package calls it "progressivity in tariff reductions".<sup>76</sup> All members, except LDCs, are required to reduce their tariffs according to this approach. The size of the cuts is however still under negotiation, and needs to be resolved in order for those elusive modalities to be achieved. The July Package already provides that tariff cuts, whatever their size, will apply from bound levels as opposed to applied ones. The high levels of agricultural tariff waters (i.e. the differences between bound and applied rates) particularly in developing countries will thus mean that the effect of such a reduction will be minimal in the short term.

Progressivity in tariff reductions would be possible only if tariffs across products are comparable in some objective form. The agriculture schedules of many WTO members are however made up of different forms of tariffs – such as *ad valorem*, specific, mixed and compound.<sup>77</sup> Comparison of tariff levels across different products is most straightforward in cases where tariff levels are expressed in *ad valorem* terms. However, unlike for non-agricultural products,<sup>78</sup> the July Package does not expressly require conversion of non-*ad valorem* agricultural tariffs into their *ad valorem* equivalents (AVEs). The conversion of the many non-*ad valorem* agricultural tariffs to their AVEs was nonetheless found to be a necessary precondition for the achievement of

---

<sup>75</sup> See pre-Cancun Draft and accompanying text.

<sup>76</sup> See July Package, para. 29.

<sup>77</sup> For comprehensive information on this see WTO Committee on Agriculture, Special Session: *Calculation of Ad Valorem Equivalents (AVEs): Data Requirements and Availability*, Note by the Secretariat (TN/AG/S/11, 15 November 2004).

<sup>78</sup> Paragraph 5 of Annex B of the July Package on the Framework for Establishing Modalities in Market Access for Non-Agricultural Products provides: "all non-*ad valorem* duties shall be converted to *ad valorem* equivalents on the basis of a methodology to be determined and bound in *ad valorem* terms."

progressivity in agricultural tariff reductions, as it would otherwise be difficult, if not impossible, to allocate specific tariff lines in the different tiers that will be subject to different levels of cuts. It is not clear whether members will use the AVEs only during the negotiation process for the allocation of particular tariff lines in the appropriate tiers while retaining their existing non-*ad valorem* tariffs in their final schedules. A couple of considerations suggest that this is a possibility: (1) the inclusion of a specific commitment prohibiting such possibility for non-agricultural products and its absence for agricultural products; and (2) the attempt by agricultural exporters to push for an AVE conversion methodology that would lead to higher AVEs and be subject to steeper tariff reductions and the importers' preferences for the opposite scenario.

The AVE calculation proved much more difficult than initially thought. Technical issues relating to methods of calculation, choice of data and data sources for the purpose and questions of verification procedures all combined to slow down progress in the negotiations. The problems in calculation methodology centred around two alternative methods, the "unit price method" and the "revenue method". In a unit price method, the AVE would be derived from a given specific duty (e.g. in US\$) as a percentage of a given reference price (e.g. also in US\$). In other words, the AVE is calculated as the specific duty expressed as a percentage of the unit value of a product. Using a revenue method, on the other hand, the AVE would be derived from the total tariff revenue of a member from the importation of a particular product over a given period as a percentage of total value of imports of the same product over the same period. The AVEs in this case are thus calculated directly from data on customs revenue collected for a particular product divided by the value of imports of the same product and expressed in percentage terms.<sup>79</sup> The value of products in either case would have to be set based on the world market prices of products.

In a manner reminiscent of the issues surrounding the agricultural tariffication exercise of the Uruguay Round, the root cause of the problem now lies with the interest of members with high protection levels to ensure that the effect of the AVE conversion exercise would still leave as wide a room as possible to protect their markets after the Doha reductions have been completed. As summarised by the ICTSD, "AVE conversion has

---

<sup>79</sup> See Id, paras. 7 and 8; WTO Committee on Agriculture, Special Session. *Calculation of ad valorem equivalents (AVEs): data requirements and availability*, Note by the Secretariat (TN/AG/S/11), 15 November 2004.



pitted the EU and G-10 countries against the US, the Cairns group of agricultural exporters and the G-20. The former groups make use of a large number of specific tariffs. Agricultural exporters would like to see the conversion based more closely on the lower world prices, which would lead to higher AVEs, and eventually, steeper tariff cuts."<sup>80</sup> The presence of sometimes widely diverging data on world market prices and volumes for some agricultural products (e.g. between the WTO's Integrated Database (IDB) and the United Nations Statistical Division Commodity Trade Statistics database (Comtrade)) meant that the level of protection available for a country after Doha would partly depend on the choice of databases to determine the relevant world market prices. This technical hurdle was overcome at a Paris "mini-ministerial" meeting in May 2005 in which a group of leading WTO members agreed to use IDB and Comtrade data with a complex formula on their weighting and sequencing.<sup>81</sup>

The July Package left the number of bands, the thresholds for defining the bands and the level of tariff reduction in each band for subsequent negotiations.<sup>82</sup> Several proposals have been submitted between the July Package and the Hong Kong Ministerial Declaration. To give just a few examples, the EC proposed to have four bands, with the highest tier subject to a 60 percent reduction, and a 100 percent tariff cap. Developing countries would be subject to less onerous commitments in the form of higher thresholds for each of the four tiers and lower reduction requirements within each; the cap for developing countries would be set at 150 percent.<sup>83</sup> The US on its part also proposed a four-tier system of cutting tariffs, but the thresholds for each tier are lower, the reduction rates higher (the highest being subject to a 90 percent cut), and a tariff cap of 75 percent for developed countries.<sup>84</sup> Likewise, the G20 also proposed a four-tier structure, but with reduction ambitions falling somewhere between those of the EC and the US.<sup>85</sup> This growing consensus on the structure of the tiers for agricultural tariff reductions and the divergence on the thresholds were reflected in the text of the Hong Kong Ministerial Declaration which stated

---

<sup>80</sup> ICTSD. 2005. *Agriculture: key trade ministers strike AVE deal in Paris* (available at [www.ictsd.org](http://www.ictsd.org)).

<sup>81</sup> For more on this, Id; see also FAO. 2004. *Tariff reduction formulae: methodological issues in assessing their effects*. In *FAO trade policy technical notes No. 2*. Rome.

<sup>82</sup> See July Package, para. 30.

<sup>83</sup> See EC Commission, *Making Hong Kong a success: Europe's contribution*, 28 October 2005 (available at [europa.eu.int](http://europa.eu.int)).

<sup>84</sup> See U.S. *Proposal for Bold Reform in Global Agriculture Trade* December 2005 (available at [www.ustr.gov](http://www.ustr.gov)).

<sup>85</sup> See *G20 Proposal on market Access*, 12 October 2005 (available at [www.ictsd.org](http://www.ictsd.org)).

that "We adopt four bands for structuring tariff cuts, recognizing that we need now to agree on the relevant thresholds – including those applicable for developing country members."<sup>86</sup> The search for a Modalities Agreement in respect of the tariff reduction formula is therefore a search for acceptable thresholds within these four bands and, possibly, fixing a cap for the maximum permissible tariff levels for both developed and developing countries.

However, the July Package also introduced the concept of "sensitive products", which are different from the "special products" introduced earlier. Under the July Package, the commitment to progressivity in tariff reductions is subject to "flexibilities for sensitive products". Accordingly, members are entitled to "designate an appropriate number, to be negotiated, of tariff lines to be treated as sensitive, taking account of existing commitments for these products."<sup>87</sup> The extent to which any flexibilities in favour of sensitive products will shield their tariffs from the reduction formulae that will be agreed in the future is still far from clear. The July Package hints that there will be "deviations from the tariff formula",<sup>88</sup> but the degree of this deviation and the conditions under which it could be allowed have yet to be negotiated. Apart from that, the July Package adopts a negative approach in the sense that it tells us only what the special treatment of sensitive products will not be rather than what it will be.<sup>89</sup> Thanks to the vagueness of the language of the market access commitment in the July Package, it still declares that designating a product as sensitive will not mean less-than-substantial improvement in market access in that product. Moreover, the July Package also left for future negotiations, such issues as the number of tariff lines that could be designated as sensitive products and the manner and criteria of their selection. Post-July Package proposals on the number of products, for example, range from one percent to 15 percent of tariff lines<sup>90</sup> and Hong Kong was not able to bridge this gap. The Ministerial Declaration simply recognized "the need to agree on treatment of sensitive products, taking into account all the elements involved". The importance of the decision awaiting negotiators in this respect is a crucial one which could have implications for the overall direction of agricultural trade rules *vis-à-vis* rules applying to trade in other products.

---

<sup>86</sup> See Hong Kong Ministerial Declaration, para. 7.

<sup>87</sup> See July Package, para. 31.

<sup>88</sup> See *Id.*, para. 34.

<sup>89</sup> See *Id.*, paras. 32–34.

<sup>90</sup> See Annex A to the Hong Kong Declaration, p. A-5.

Finally, the July Package also allowed developing countries the flexibility "to designate an appropriate number of products as Special Products, based on the criteria of food security, livelihood security and rural development needs."<sup>91</sup> Once again, however, the details as to the number of products to be so designated, their manner of selection and the degree of flexibility they would enjoy were left for subsequent negotiations. All the Hong Kong Declaration did in this respect was to clarify that developing countries would be entitled to self-designate their special products provided they are "an appropriate number" and guided by indicators based on the criteria of food security, livelihood security and rural development.<sup>92</sup> It is notable that developing countries have this right to self-designate special products in addition to their right to designate another category of sensitive products which will have to be negotiated just like the developed countries. The right to designate products as sensitive or special is not applicable to LDCs as they are already exempted from any tariff reduction commitments.<sup>93</sup>

The issues of sensitive and special products have been among the most controversial in the later phase of the negotiations. The lesson one could derive from the Uruguay Round is also limited, the only relevant point being the special treatment option that was invented primarily to address the sensitivities of rice in Japan and Korea who were allowed conditional exemption from the tariffication requirement in return for higher minimum access commitments. Given that all agricultural products are currently subject only to tariffs, the only way a special treatment could apply to a selected group of sensitive or special products is in the form of tariff cuts less than the otherwise applicable rate for the tier in which such products would fall.

### **3.2 Tariff rate quotas (TRQs) and their administration**

As noted earlier TRQs were introduced mainly to implement the minimum and/or current access commitments of the Agreement on Agriculture.<sup>94</sup> In order to satisfy these requirements, countries had to introduce a two-tier tariff structure made up of the normal bound rate resulting from the

---

<sup>91</sup> See July Package, para. 41.

<sup>92</sup> See Hong Kong Ministerial Declaration, para. 7.

<sup>93</sup> See July Package, para. 45.

<sup>94</sup> According to the WTO Secretariat, as of 8 March 2002, 43 members have tariff quota commitments for a total of 1425 individual tariff lines. See WTO. 2002. *Tariff and other quotas: background paper by the Secretariat* at para. 6 (TN/AG/S/5).

tariffication process (the out-of-quota rate) and a lower rate (the in-quota rate) designed to enable the importation of an amount equal to the minimum/current access commitment levels for a particular product in a particular country. Some three interrelated issues have been raised during the negotiations in this respect: firstly, there is concern that the required in-quota quantity is too small in many cases and therefore needs expansion; secondly, most of these already small in-quota quantities themselves have often remained unfilled<sup>95</sup>; and thirdly, trade-restrictive methods of TRQ administration, some of which was reminiscent of the pre-Uruguay Round NTBs, have contributed to the under-fill.

In response to the concern that in-quota volumes have been too small, the Harbinson first modalities draft suggested that tariff quota volumes be set at a minimum level of 10 percent of domestic consumption in every such product, with the flexibility that members could set an 8 percent commitment on as much as 25 percent of these products, provided they undertake a 12 percent commitment on another 25 percent of products. Importantly for most developing countries, the modalities draft proposed to abolish tariffs on in-quota volumes for tropical products (raw as well as processed), and for what are called products of particular importance to the diversification of production away from narcotic and other illicit products. The implementation period for this commitment was to be five years.

Again in pursuance of the special and differential treatment principle, the modalities draft proposed two things here: firstly, developing countries would be exempted from the requirement to expand in-quota volumes for their "special products"; and secondly, they would be entitled to lower levels of in-quota volume expansion on other products: an average of 6.6 percent of domestic consumption with the flexibility to undertake a 5 percent commitment on 25 percent of their products provided they also undertake an 8 percent commitment on another 25 percent of products.<sup>96</sup> Developing countries would also benefit from an implementation period of ten years.

Finally, the revised first modalities draft attempted to further strengthen the discipline governing in-quota trade by requiring reduction of in-quota tariffs

---

<sup>95</sup> According to the WTO Secretariat, the average TRQ fill rate for the six-year implementation period varied between 66 percent for 1995 and 60 percent for 2000. See WTO Secretariat. 2002. *Tariff quota administration methods and tariff quota fill: background paper by the Secretariat* (WTO Document TN/AG/S/6), 22 March 2002, para. 17, Table 5.

<sup>96</sup> See revised first modalities draft, para. 20.

in all cases where the average TRQ fill rate was below 65 percent.<sup>97</sup> This would potentially mean almost all tariff quotas, because the fill rate over the implementation period for Uruguay Round commitments almost always stood below 65 percent – the only exception being 1995, the first year of the implementation period for which the fill rate was 66 percent.<sup>98</sup>

While all the above market access issues have played a part in the Doha negotiations, much attention has been – rightly – focused on the problem of TRQ administration. Many agree that TRQs should be expanded but often do not mention by how much; the US has proposed a 20 percent increase together with elimination of in-quota tariffs. Members have so far used a variety of means in administering their TRQs. The most important ones are the following:

- *applied tariffs*. This is a situation where the in-quota tariff rate is applied as though it were an ordinary tariff without any tariff rate quota and imports are allowed in unlimited quantities at that rate.
- *first-come, first-served*. This is a situation where "imports are permitted entry at the in-quota tariff rates until such a time as the tariff quota is filled; then the higher tariff automatically applies. The physical importation of the good determines the order and hence the applicable tariff."<sup>99</sup>
- *licences on demand*. This is a situation where "importers' shares are generally allocated, or licences issued, in relation to quantities demanded and often prior to the commencement of the period during which the physical importation is to take place"<sup>100</sup>;
- *auctioning*. Here "importers' shares are allocated, or licences issued, largely on the basis of an auctioning or competitive bid system."<sup>101</sup>
- *historical importers*. In this case "importers' shares are allocated, or licences issued, principally in relation to past imports of the product concerned."<sup>102</sup>
- *imports undertaken by state trading entities*. Here "import shares are allocated either entirely or predominantly to a state trading entity which imports (or has

---

<sup>97</sup> See Id, para. 22.

<sup>98</sup> See WTO Document TN/AG/S/5, para. 51, Table 4.

<sup>99</sup> See WTO Document TN/AG/S/6, para. 5, Table 1.

<sup>100</sup> Id.

<sup>101</sup> Id.

<sup>102</sup> Id.

direct control of imports undertaken by intermediaries) the product concerned."<sup>103</sup>

- *producer groups or associations*. In this case "import shares are allocated entirely or mainly to a producer group or association which imports (or has direct control of imports undertaken by the relevant member) the product concerned."<sup>104</sup>

These 'principal' methods have sometimes been supplemented by 'additional' conditions which included domestic purchase requirements, limits on tariff quota shares per allocation, export certificates, and past trading performance.<sup>105</sup> While some of these TRQ administration methods (such as the use of applied tariffs) facilitate realization of the AoA's long-term objective of establishing a fair and market-oriented agricultural trading system, some others (such as auctioning and the domestic purchase requirements) could, arguably, even be challenged for their WTO-compatibility. The lack of transparency and predictability surrounding their application in many member countries has further exacerbated the problem. The Doha negotiations have thus rightly spent a significant amount of time and energy on the issue. The first Harbinson draft of the modalities proposed a long provision on TRQ administration containing a mixture of three approaches: restatement of the basic principles (of transparency and predictability), a positive list of do's (such as requiring all in-quota imports to be from MFN suppliers) and a negative list of don'ts (such as domestic purchasing requirements). Indeed this first draft shows a tendency to outlaw such prevalent practices as the allocation of import licences only to domestic producer groups/associations, the setting of exportation or re-exportation requirements as conditions for import permits, and even auctioning. A relevant part of the first modalities draft provided as follows: "No charges, deposits or other financial requirements shall be imposed, directly or indirectly, on or in connection with the administration of tariff quota commitments or with importation of tariff quota products other than as permitted under the GATT 1994."<sup>106</sup> The parts of the Harbinson draft dealing with TRQ administration were also among the areas on which relatively less displeasure was expressed by the negotiators in the run-up to Cancun - and the Cancun Draft hardly said anything about TRQ administration.

---

<sup>103</sup> Id.

<sup>104</sup> Id.

<sup>105</sup> Id. Table 2.

<sup>106</sup> Attachment 1 to the first draft modalities, para. 2(i).

The July Package did not say much on TRQs and their administration. It simply envisaged the possibility of "reduction or elimination of in-quota tariff rates, and operationally effective improvements in tariff quota administration".<sup>107</sup> The Hong Kong Declaration does not even mention the issue of TRQs. However, the amount of detailed work done prior to the Cancun ministerial, coupled with the growing consensus that prevailed at the time about the need to resolve the problem of TRQs and their administration, could suggest that the Harbinson modalities proposals may still play a role in future negotiations.

### 3.3 Special Agricultural Safeguard (SSG)

As noted earlier, the special safeguard provision was introduced to enable members to impose additional duties on the importation of products subject to tariffication in the event of unexpected import surges or price slumps without the need to prove injury as would otherwise be required under general safeguards rules. This right would exist only in respect of products for which countries expressly reserved the right to do so by putting the SSG symbol in their schedules of commitments. According to WTO data, 39 members have reserved the right to use the special safeguard option on hundreds of products; but so far only 10 members have used it "in one or several of the years 1995 to 2001".<sup>108</sup> This situation, coupled with its obvious trade-distortive impacts, has prompted many countries, including the US, the Cairns Group<sup>109</sup> and several developing countries, to demand its elimination. Others, including the EC<sup>110</sup> and Japan<sup>111</sup> have proposed to keep it, stressing the fact that the AoA foresees its duration throughout the reform process.

The original version of the Harbinson modalities draft suggested eliminating the special safeguard option for developed countries over an agreed transition period while maintaining a modified version of it for so-called

---

<sup>107</sup> July Package, para. 35.

<sup>108</sup> WTO. *Special agricultural safeguard: background paper by the Secretariat: Revision* (WTO Document G/AG/NG/S/9/Rev.1), 19 February 2002, para. 3.

<sup>109</sup> WTO. *Negotiations on agriculture: Cairns Group negotiating proposal: market access*. (WTO Document G/AG/NG/W/54), 10 November 2000.

<sup>110</sup> *EC Comprehensive Negotiating Proposal* (WTO Document G/AG/NG/W/90), 15 December 2000, para. 4.

<sup>111</sup> See *Negotiating proposal by Japan on WTO agricultural negotiations* (WTO Document G/AG/NG/W/91) 21 December 2000, para. 15. Indeed, Japan goes even further and proposes the introduction of a new safeguard mechanism to apply with respect to seasonal and perishable agricultural products (para. 14).

"strategic products" of developing countries.<sup>112</sup> The revised version of the same draft dropped the reference to "strategic products" for developing countries and envisaged the application of a "special safeguard mechanism" (SSM) by these countries on a wider range of products and under defined circumstances.<sup>113</sup> Both the pre-Cancun Draft agricultural framework as well as its Cancun counterpart simply noted that the SSG was still under negotiation. Both confirmed, however, that "a special agricultural safeguard (SSM) shall be established for use by developing countries subject to conditions and for products to be determined." This was also the position suggested by the "US-EU joint proposal"<sup>114</sup> and the "pre-Cancun G20 proposal" few weeks prior to Cancun.<sup>115</sup>

The July Package and the Hong Kong Declaration also leave the fate of the SSG open while reaffirming the commitment to establish the SSM for developing countries. The Hong Kong Declaration went further and provided that the SSM will be triggered by import quantity surges and price falls just like the SSG, but leaves the detailed arrangements for future negotiations. Now that the introduction of a developing countries-version of the SSG is already certain, two questions might be asked: first, how beneficial will the SSM be for developing countries, and second, what are the political implications of such a development particularly in terms of the fate of the SSG.

The first question, that is, the practical utility of the SSM, is relevant in that most developing countries have more than enough "water" between their bound and applied tariffs, and it is legal to use this water in response to any future unduly low-priced imports or surges in import quantities. As the Appellate Body observed in *Chile Price Band*, "A member may, fully in accordance with article II of the GATT 1994, exact a duty upon importation and periodically change the rate at which it applies that duty (provided the changed rates remain *below* the tariff rates bound in the Member's Schedule). This change in the *applied* rate of duty could be made, for example, through an act of a member's legislature or executive at any time."<sup>116</sup> The agreement in the July Package to make tariff reductions from bound rates rather than applied rates was considered a victory for developing countries largely because it is mainly in developing countries that we find significant

---

<sup>112</sup> See first draft modalities, paras. 23 and 24.

<sup>113</sup> See revised first draft modalities, para. 26.

<sup>114</sup> See Cancun Draft.

<sup>115</sup> See Cancun Draft.

<sup>116</sup> See *Chile Price Band*, Appellate Body Report, para. 232.



differences between these two tariff rates. Here also comes the second concern – that an SSM for developing countries will legitimize the case for the SSG. In other words, negotiations are always about give and take; there is always a price to be paid for any interest pursued by any country or grouping, and the fear is that the right for an SSM secured by the developing countries may be purchased at the price of accepting the continued existence of the SSG whose beneficiaries are the developed countries. At least from the perspective of most developing countries, an SSM that may not be of any use in practice is not a price worth paying for. Moreover, in both cases, it is the long-term objective of achieving a fair and market-oriented agricultural trading system that will suffer the most.

### **3.4 Conclusion on market access**

In sum, the agricultural market access issues in the current negotiations present some of the most complex issues of international trade. Despite these complexities, however, the market access part of the agricultural negotiations appears to be progressing relatively well and there is some room to be optimistic and expect significant reductions in tariffs, some expansion in TRQs, and a more rigorous discipline governing TRQ administration. Most importantly for developing countries, market access is the only area in which the principle of special and differential treatment is being pursued with a promise of a meaningful outcome. It is also notable that developed and willing developing countries have already committed themselves in the Hong Kong Declaration to implement duty-free and quota-free market access for a minimum of 97 percent of products originating from LDCs by 2008.<sup>117</sup>

## **IV. AGRICULTURAL EXPORT SUBSIDIES AND OTHER FORMS OF EXPORT SUPPORT**

### **4.1 Background**

The AoA defines export subsidies as "subsidies contingent upon export performance".<sup>118</sup> This formulation however raises the more basic question of what a "subsidy" is – a concept defined only by the Agreement on Subsidies

---

<sup>117</sup> See Hong Kong Declaration, para. 47, together with Annex F thereof.

<sup>118</sup> See article 1(e) of the AoA.

and Countervailing Measures<sup>119</sup> (the SCM Agreement). According to article 1 of the SCM Agreement, a subsidy is a financial contribution made by a government or any public body conferring a benefit on the recipient. Under the original text of GATT, subsidies (whether export or domestic), were not subject to any strict discipline. The only thing countries had to do was notify their subsidies and, if they were found to have any serious adverse impact on the trade interests of other countries, to discuss the possibility of limiting the subsidization.<sup>120</sup> During the 1954–55 GATT review session, article XVI was modified and a two-tier distinction was introduced between domestic and export subsidies on the one hand, and between export subsidies on primary and non-primary products on the other. The resulting regime kept domestic subsidies as legitimate instruments of support subject only to the old obligations of notification and consultation, while it put export subsidies under a stronger discipline. More specifically, export subsidies on non-primary products were prohibited if they resulted in the sale of export items at a price lower than their domestic market (often called the "dual pricing" requirement). But, the same export subsidies were permitted on non-primary products, subject only to the vague and impracticable condition that they did not use them to acquire a "more than equitable share of world export trade in that product".

Attempts were made during subsequent rounds of trade negotiations to bring export subsidies on primary products under the same rules as those applying to non-primary products. But this was all in vain. For example, during the Tokyo Round (1973–1979), a separate ("plurilateral-type") agreement was concluded addressing the issue of subsidies and countervailing duties, often referred to as the Subsidies Code.<sup>121</sup> This Code strengthened the export subsidies discipline of non-primary products by abolishing the "dual pricing" requirement and introducing a flat prohibition of them, but its provisions on export subsidies on "certain primary products" (redefined to exclude minerals from the old concept) were nothing more than the use of new words repeating old stories. As a result, agricultural export subsidies were freely and extensively used especially by developed countries until the Uruguay Round was concluded in 1994.

---

<sup>119</sup> Agreement on Subsidies and Countervailing Measures (hereafter the SCM Agreement) in *Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations*, Marrakesh, 15 April 1994.

<sup>120</sup> See article XVI, section A. For a more extensive survey of this subject, see Desta, MG (2002).

<sup>121</sup> Agreement on Interpretation and Application of articles VI, XVI and XXIII of the General Agreement, *BISD* 26S/56 (1980).

The Uruguay Round brought an important change to this situation not just through the conclusion of the AoA but also the generic SCM Agreement. The SCM Agreement itself has introduced substantial changes to the law of subsidies in general. Employing a "traffic light approach", this Agreement puts all subsidies into either of three boxes: "red" or prohibited, "amber" or actionable, and "green" or non-actionable. Falling in the "red" box are export subsidies and what are often called import substitution subsidies (i.e. subsidies contingent upon the use of domestic over imported products). The "green" box covered all non-specific subsidies as well as three types of specific subsidies: research and development subsidies, regional development subsidies targeting disadvantaged regions, and environmental subsidies to promote adaptation to new legal requirements. The "amber" box covers a residual category of subsidies (all non-red and non-green) against which action may be taken if they cause adverse trade effects to the interests of others. The discipline contained in the SCM Agreement is generic (as it applies to all sectors) but it often expressly excludes agricultural subsidies from its coverage. Yet provisions of the SCM Agreement could still affect agricultural trade in at least two ways: filling any loopholes that may, and do, exist within the subsidies provisions of the AoA, and serving as a principal contextual guide for the interpretation of relevant AoA provisions. However, as the *Canada Dairy* saga has shown, the relationship between the AoA and the SCM Agreement can be more complicated than this.<sup>122</sup>

Export subsidies flatly prohibited by the SCM Agreement are expressly permitted by the AoA in the agricultural sector. Indeed agriculture is the only sector where export subsidies are legal. The AoA has created two categories of export subsidies – listed and non-listed – each subject to distinct disciplines. Listed agricultural export subsidies (as under AoA, article 9.1) have generally been subject to reduction commitments of a dual nature - quantitative (by 21 percent) and budgetary (by 36 percent) - on a 1986–1990 base period and over a six-year implementation period. Developing countries were required to undertake only two-thirds of these obligations to be implemented over a period of ten years. This means that those countries that were providing export subsidies during the base period would be allowed to continue to do so on condition that they undertook (and remained within), specific reduction commitments. Those countries that had not been providing such export subsidies during the base period - almost by definition

---

<sup>122</sup> See *Canada - Measures Affecting the Importation of Milk and the Exportation of Dairy Products*, Reports of both the Panel and the Appellate Body, WT/DS113 and WT/DS103 (hereafter *Canada Dairy*).

developing countries - have been prohibited from providing any export subsidies. Following this process, 25 WTO members have scheduled export subsidy reduction commitments in respect of different products.<sup>123</sup> This also means that only these 25 countries are allowed to use the export subsidies listed in article 9.1 of the AoA and on the products they have scheduled in their commitments. As regards non-listed export subsidies, the only limitation is that they may not be used in a manner which results in, or which threatens to lead to, circumvention of export subsidy commitments.<sup>124</sup> Article 10.2 goes a step further and picks up three forms of non-listed export support practices, including export credit schemes, and declares that members shall undertake to work toward the development of internationally agreed disciplines governing their use. To the disappointment of many members including the EC, however, no such agreement was reached due largely to US opposition.

Agricultural export subsidies have long been perceived as the most contentious, and especially from the perspective of developing countries, the most destructive trade policy instruments. However, the users of these subsidies, particularly the EC, have been strongly opposed to any moves to eliminate agricultural export subsidies and bring the rules of agricultural trade in line with those applying to non-agricultural products. The Doha Declaration was thus considered a breakthrough when it provided, in relevant part, that "building on the work carried out to date and without prejudging the outcome of the negotiations we commit ourselves to comprehensive negotiations aimed at ... reductions of, *with a view to phasing out*, all forms of export subsidies."<sup>125</sup> Success or failure for the entire Doha Ministerial Conference were hanging until the very last minute, on the inclusion or otherwise of the italicised phrase in this declaration.<sup>126</sup>

---

<sup>123</sup> The countries are: Australia, Brazil, Bulgaria, Canada, Colombia, Cyprus, Czech Republic, European Communities, Hungary, Iceland, Indonesia, Israel, Mexico, New Zealand, Norway, Panama, Poland, Romania, Slovak Republic, South Africa, Switzerland-Liechtenstein, Turkey, United States, Uruguay, and Venezuela. See *Export subsidies: background paper by the Secretariat* (TN/AG/S/8), 9 April 2002, para. 4.

<sup>124</sup> See article 10.1 of the AoA.

<sup>125</sup> *Doha Ministerial Declaration*, para. 13 (emphasis added).

<sup>126</sup> De Jonquiers, G. and Williams, F. *Trade talks falter over farm subsidy deal*. Financial Times, 13 November 2001, at 2 (noting France objected to "wording in the draft WTO agenda that calls for negotiations with a 'view to phasing out' all farm export subsidies").

## 4.2 Export subsidies: negotiations on the road to Cancun

Agricultural export subsidies continue to be one of the most contentious throughout the Doha negotiations. Although there have been a wide range of proposals on this issue, one can generally say that the vast majority<sup>127</sup> demanded the phasing out of export subsidies while a small minority led by the EC, was initially prepared to consider only reductions and not total abolition. Reflecting this overwhelming demand for the phasing out of export subsidies, the Harbinson first draft of the modalities proposed a formula by which 50 percent of export subsidies (in budgetary as well as quantitative terms) would be phased out over a five year period, while the other half would be phased out over nine years, in both cases at equal annual instalments.<sup>128</sup> For developing countries, this same approach was proposed to be implemented over a period of 10 and 12 years respectively, while keeping the exemptions of AoA article 9.4 intact. The exemptions under article 9.4 relate to the provision of subsidies to reduce the costs of marketing and international transport and freight of exports of agricultural products, and internal transport and freight charges on export shipments on terms more favourable than for domestic shipments.<sup>129</sup> Curiously enough, the revised first modalities draft made almost no change to this section of the original draft.

However, the disagreement over export subsidies continued until the last minute in the preparation for Cancun. The 'US-EU joint proposal' suggested eliminating export subsidies only on products of particular export interest to developing countries over an agreed period. The proposed framework from the "G20 countries" suggested the elimination of all export subsidies with some hint that export subsidies on products of particular export interest to developing countries would be eliminated within a shorter time frame than other products. The pre-Cancun Draft framework prepared by General Council Chairman del Castillo took refuge in more vague language, proposing to eliminate export subsidies on products of particular export interest for developing countries over an agreed period while, on other products, proposing that members "shall commit to reduce, with a view to

---

<sup>127</sup> The US, the Cairns Group, the Africa Group, ASEAN, WAEMU, etc. are all in this group. But some developing countries, such as India, which call for the abolition of export subsidies also propose that developing countries be allowed to keep the preferential treatment they currently enjoy under article 9.4 of the AoA and other benefits.

<sup>128</sup> See the first draft modalities, paras. 28–31.

<sup>129</sup> See the first draft modalities, paras. 32–34.

phasing out, budgetary and quantity allowances for export subsidies". In the words of the pre-Cancun Draft framework, "the question of the end date for phasing out of all forms of export subsidies remains under negotiation."

The Cancun Ministerial Conference put agricultural export subsidies at the heart of the negotiations. However, the Cancun Draft ministerial declaration of 13 September 2003 only paraphrased the proposal contained in the pre-Cancun Draft with no substantive modifications. Coupled with the sensitive issues raised in the cotton sector by four West and Central African countries (known generally as the Cotton Initiative)<sup>130</sup> the stalemate over export subsidies once again played its traditional role in facilitating the collapse of the Ministerial Conference.

#### **4.3 Other forms of export support: negotiations on the road to Cancun**

Another important issue of export competition particularly in the eyes of the EC, but also several other countries, is the "discriminatory" nature of the current agricultural export subsidies regime in the sense of not applying the same discipline to similar measures of export support, particularly export credit schemes, state-trading export enterprises and abuse of international food aid. After years of reluctance, the US now appears to have accepted the need for an internationally agreed discipline particularly in the case of export credits, credit guarantees and insurance mechanisms.<sup>131</sup> Reflecting this encouraging progress, the Harbinson first modalities draft included a lengthy four-page-text providing the forms of export support to be covered by such an agreement, the terms and conditions under which they should be granted, and rules on transparency and special and differential treatment.<sup>132</sup> The pre-Cancun Draft framework reflected this emerging consensus by proposing to apply to export credits the same discipline that would apply to other agricultural export subsidies. (It is interesting to note that both the "US-EU joint proposal" as well as the "pre-Cancun G20 proposal" were at one on

---

<sup>130</sup> This is one of the rare success stories so far in the Doha agriculture negotiations. For an excellent background on the Cotton Initiative, see Kennedy KC. 2005. The incoherence of agricultural, trade, and development policy for sub-Saharan Africa: sowing the seeds of false hope for sub-Saharan Africa's cotton farmers? *Kansas Journal of Law & Public Policy* 14:307–356.

<sup>131</sup> Robert Zoellick described the US position on export credit schemes and food aid as a proposal "to guard against market disruption while maintaining the viability of these programs."

<sup>132</sup> See attachment 4 to the first modalities draft or attachment 5 to the revised version.

this point; and in fact the pre-Cancun Draft was taken directly from them). This position was also repeated by the Cancun Draft with no change.

The differences between the EU and the US on the issue of food aid continued as wide as ever until quite late in the negotiation process. The EC has always believed that the US uses food aid as a means of circumventing its export subsidy commitments. On that basis, the EC proposed to revise the food aid provisions in the AoA so as to establish a genuine food aid system which responds to the real food aid needs of countries rather than the presence or absence of surplus production in the donor countries.<sup>133</sup> The US, on the other hand, saw no problems with the rules and only wanted more transparency in their administration. The Harbinson first modalities draft went in line with the EU position and proposed rules that would require food aid to be provided in full grant form, and to give preference to financial grants for purchase by the recipient country from whatever source it may wish rather than actual food exports unless it is necessitated by humanitarian emergency situations declared by appropriate United Nations food aid agencies.<sup>134</sup> The pre-Cancun Draft framework is open on this point, saying "disciplines shall be agreed in order to prevent commercial displacement through food aid operations." Once again, the Cancun Draft also left this part of the pre-Cancun Draft unchanged.

The use of State-Trading Enterprises (STEs) as export monopolies is also another issue subject to the Doha negotiations. Interestingly, this is one issue on which the US and the EC have been speaking with the same language from quite early on. The *Canada Dairy* dispute has given a substantial majority of WTO members enough reason to stand united against the practice.<sup>135</sup> Both the EC as well as the US, just like many others, want to write further disciplines into the Agreement on Agriculture so that price pooling, cross-subsidization, and similar practices carried out through state trading export enterprises would be expressly prohibited. Reflecting this growing consensus, the first Harbinson modalities draft proposed a fairly stringent set of rules on state trading export enterprises which sought to

---

<sup>133</sup> For more on this subject, see Desta, MG. 2001. *Food security and international trade law: an appraisal of the World Trade Organization approach*. Journal of World Trade 35(3):449–468.

<sup>134</sup> See attachment 5 to the first modalities draft or attachment 6 to the Revised Version.

<sup>135</sup> See *Canada - Measures Affecting the Importation of Milk and the Exportation of Dairy Products* Reports of the panel (WTO Documents WT/DS103/R, WT/DS113/R) and the Appellate Body (WTO Documents WT/DS103/AB/R, WT/DS113/AB/R) adopted on 27 October 1999.

introduce not just market forces in their operation but even attempt to introduce competition by requiring governments to scrap their export monopoly powers.<sup>136</sup> Both the pre-Cancun as well as the Cancun Draft frameworks also proposed to introduce the same stringent disciplines to export state trading enterprises as those applying to export credits and other forms of export subsidies.

In sum, the Harbinson modalities draft was a fairly ambitious text on export subsidies. Although it may be difficult to think in terms of export subsidies continuing as legitimate instruments for over a decade to come, even such a result, if achieved, would have been an enormous accomplishment for the Doha negotiations. Moreover, apart from the ultimate phasing out of listed export subsidies, it appears that the long-promised discipline on export credits and other forms of export support is also probably within reach. Unfortunately, seeing how contentious this subject has been throughout the negotiations, it was already possible to predict further watering down of the modest proposals contained in the Harbinson draft. The pre-Cancun Draft framework from General Council Chairman del Castillo as well as the Cancun Draft itself are already much weaker than the Harbinson modalities draft. As export subsidies are the most destructive and most reviled instruments of trade distortion in use today, any attempts at further weakening this part of the proposed rules would endanger the entire negotiations with total collapse.

#### **4.4 Export competition: from Cancun to Hong Kong**

The July Package saw an important breakthrough in the area of export competition. Members agreed "to establish 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."<sup>137</sup> The commitment to eliminate applied to export subsidies as listed in members' schedules; export credits, export credit guarantees or insurance programmes with repayment periods beyond 180 days and those with a repayment period of under 180 days which fail to conform with disciplines that are to be negotiated; trade-distorting practices of state trading export enterprises that are considered to be subsidized; and food aid that does not conform with various disciplines, which will also be negotiated.<sup>138</sup> The July Package

---

<sup>136</sup> See attachment 6 to the first modalities draft, or attachment 7 to the revised version.

<sup>137</sup> See July Package, para. 17.

<sup>138</sup> See July Package, para. 18.



however left the issue of end date unresolved, on which negotiations continued up until the final minutes in the preparation for Hong Kong.

It was reported that a four-hour "Green Room" meeting on the second day of the Hong Kong session "saw every country in attendance except the EU and Switzerland endorse a 2010 end-date for agricultural export subsidies."<sup>139</sup> The final declaration set this date for the end of 2013, which is subject to confirmation upon the completion of the Modalities Agreement that was set for 30 April 2006.<sup>140</sup> Despite this condition and the long life that agricultural export subsidies have been allowed, this is perhaps what the Hong Kong Ministerial Declaration will be remembered for in the long term. The date set for modalities is also the date that the Hong Kong Declaration has set for the conclusion of new disciplines on export credits, export credit guarantees or insurance programmes (with a repayment period of less than 180 days), exporting state trading enterprises and food aid. Finally, the Hong Kong Declaration also provides that developing country members will continue to benefit from the provisions of article 9.4 of the AoA only for five years after the end-date for elimination of all forms of export subsidies.

## **V. AGRICULTURAL DOMESTIC SUPPORT**

Agricultural domestic support refers to subsidies provided to agricultural producers regardless of whether their products are exported. Although domestic support as a concept is used only in the AoA, it means essentially the same as the more familiar concept of "domestic subsidies".<sup>141</sup> Governments provide support to their agricultural producers in different ways – ranging from direct budgetary transfers to highly disguised forms of market price support. Although the forms of support are diverse, they have certain features in common: they are intended to guarantee certain levels of income for agricultural producers; and they are implemented mainly by way of either setting minimum artificial prices on the market (which are necessarily higher than world market prices) or through direct budgetary transfers to agricultural producers.

If the effect of such agricultural domestic support measures were limited to making recipient farmers better off, all would be well. The problem with several forms of domestic support is that, in trying to make the recipients

---

<sup>139</sup> See ICTSD. 2005. Will members reveal their cards in time? *Bridges Hong Kong Daily Update* 3(15).

<sup>140</sup> See Hong Kong Declaration, para. 6.

<sup>141</sup> For more on this, see Desta (2002), p. 306.

better off, they distort the patterns of agricultural production and trade at the international level and leave non-supported farmers elsewhere worse off. Indeed, domestic support measures may nullify benefits accruing from trade liberalization. For instance, the effects of the reduction and binding of tariffs in multilateral trade negotiations may be circumvented by domestic support measures taken in favour of competing domestic products or producers. An international agreement to discipline the use of border measures without a concomitant agreement addressing important domestic policy issues will therefore not achieve its goals. Moreover, domestic support measures also affect international trade indirectly because they stimulate domestic production and often result in excess supply. As a result of world market prices being invariably lower than the domestic market of the subsidizing countries, the excess can be exported only with the aid of subsidies or given in the form of food aid to other countries. Further, the artificially higher domestic market prices naturally attract imports; as a result, domestic support measures almost always need to be supplemented by some form of import restrictions so as to prevent importation of competing foreign products or re-importation of the subsidised exports themselves. Domestic support measures thus play a dual role in distorting agricultural markets, directly by giving artificial incentives for excess production, and indirectly by making the use of import barriers and export subsidies unavoidable.

GATT never imposed any meaningful discipline on the use of domestic support, whether agricultural or otherwise,<sup>142</sup> and the only constraint in this respect came from the doctrine of reasonable expectations introduced by the *Australia Ammonium Sulphate* case which implied that countries would not be allowed to introduce subsidies on goods that are already subject to tariff commitments.<sup>143</sup> This quasi-judicial development was soon followed by the 1955 Understanding which provided that "a contracting party which has negotiated a concession under article II may be assumed, for the purpose of article XXIII, to have a *reasonable expectation*, failing evidence to the contrary, that the value of the concession will not be nullified or impaired by the contracting party which granted the concession by the subsequent introduction or increase of a domestic subsidy on the product concerned."<sup>144</sup> The Tokyo Round attempted to introduce a more effective discipline on the

---

<sup>142</sup> See GATT, article XVI:1, which imposed only notification and consultation obligations. For more on this, see Desta (2002), chapter 9.

<sup>143</sup> *Chile v. Australia: subsidy on ammonium sulphate*, Working Party Report (GATT/CP.4/39) adopted on 3 April 1950, *BISD*, Vol. II.

<sup>144</sup> GATT, *BISD* 3S/224.

use of domestic subsidies; but the final version of the 1979 Subsidies Code merely required signatories to *seek to avoid* causing adverse effects to others' interests through the use of domestic subsidies. Under article 8(3), "Signatories further agree that they shall *seek to avoid* causing, through the use of any subsidy (a) injury to the domestic industry of another signatory, (b) nullification or impairment of the benefits accruing directly or indirectly to another signatory under the General Agreement, or (c) serious prejudice to the interests of another signatory." It was the Uruguay Round SCM Agreement which introduced a more meaningful discipline on domestic subsidies for the first time. In its 'traffic light approach', the SCM Agreement put domestic subsidies largely in the "amber" category of actionable subsidies, which are subject to challenge on proof of injury; but, this Agreement left agricultural domestic support measures largely to the AoA. The only types of domestic subsidy put under the red box are the so-called import-substitution subsidies; three others have been put in the category of non-actionable subsidies. But, this latter category has been terminated on 1 January 2000.

The AoA appreciated the causal role of domestic support measures behind market access restrictions and export subsidies, and its approach has been to promote decoupling of farm support from production decisions. The ubiquitous nature of domestic support measures particularly in developed countries, and the resolve of many to defend them, meant that the long-term objective of the AoA "to establish a fair and market-oriented agricultural trading system" had to be compromised to enable those countries to continue to intervene in the market on the side of their farmers. The result is a complex mix of rules and exceptions whose trade-liberalization impact was minimal at least in the short-term.

The AoA follows a positive list approach in the sense that trade-distorting domestic support measures are in principle prohibited unless specifically permitted. Measures so permitted may be put under three broad categories: some are available to all WTO members; others are available exclusively to developing countries; and a third category is available almost exclusively to developed or high-income developing countries. Two measures fall under the first category: all members are free to use the so-called 'green box' measures under Annex 2 to the AoA; and all are free to provide *de minimis* levels of non-green support (5 percent for developed countries and 10 percent for developing countries of the total value of production of a basic agricultural product in the case of product-specific support or of total

value of agricultural production in the case of non-product specific support). Secondly, in pursuit of the principle of special and differential treatment, three forms of support are available exclusively to developing country members: (i) investment subsidies that are generally available to agriculture; (ii) agricultural input subsidies that are generally available to low-income or resource-poor producers; and (iii) measures of producer support to encourage diversification from growing illicit narcotic crops. Finally come those measures available almost exclusively to developed and high-income developing countries: (i) direct payments provided under production-limiting programmes – called 'blue box' measures – which are *de jure* available to every member but *de facto* limited to developed countries; and (ii) the residual category of all other forms of support that are not covered by any of the exemptions, generally called the "amber box" measures, which are *de jure* limited to a group of 35, largely OECD, countries counting EC(15) as one.<sup>145</sup> These categories will be discussed further in this section.

## 5.1 Amber box measures

### 5.1.1 Approach and structure in the AoA

These are domestic support measures that are deemed to have significant (or more than minimal) trade-distorting impact. Market price support measures are the classic example. These measures are prohibited in all but 35 members.<sup>146</sup> These 35 members are the ones that had reported to have used such trade- and production-distorting measures during the 1986–88 base period<sup>147</sup> and on which they have undertaken Aggregate Measurement of Support (AMS) reduction commitments in their schedules. The AMS is defined as "the annual level of support, expressed in monetary terms, provided for an agricultural product or non-product specific support provided in favour of agricultural producers in general".<sup>148</sup> The calculation of the AMS takes into account both product-specific as well as sector-wide support, and the final commitments are expressed in aggregate terms in the

<sup>145</sup> For a list of these countries, see Committee on Agriculture, Special Session, *Total aggregate measurement of support, Note by the Secretariat*, TN/AG/S/13, 27 January 2005.

<sup>146</sup> These are: Argentina, Australia, Brazil, Bulgaria, Canada, Chinese Taipei, Colombia, Costa Rica, Croatia, Cyprus, Czech Republic, EC, Hungary, Iceland, Israel, Japan, Jordan, Korea, Lithuania, Mexico, Moldova, Morocco, New Zealand, Norway, Papua New Guinea, Poland, Slovak Republic, Slovenia, South Africa, Switzerland-Liechtenstein, Thailand, Tunisia, United States, Venezuela.

<sup>147</sup> This does not of course apply to countries that joined the WTO after the Uruguay Round.

<sup>148</sup> Article 1(a) of the Agriculture Agreement.

form of *Total AMS*.<sup>149</sup> The reduction commitments are then applied from the Total AMS determined by each country for the 1986–88 base period, called the *Base Total AMS*. It was from this benchmark that countries undertook 20 percent reduction commitments over a six-year implementation period in equal annual instalments (developing countries undertook only a 13.3 percent reduction commitment over a ten year implementation period).<sup>150</sup> A WTO member has complied with its obligations in any given year of the implementation period if the actual amount of support provided during that year – called the *Current Total AMS* – did not exceed the corresponding annual or final bound commitment level specified in its Schedule.<sup>151</sup> It is worth noting that this commitment applies on a sector-wide rather than a product-specific level. The effect is that countries could legally increase product-specific amber-box support to any level provided the aggregate limit was respected.

As noted earlier, the 35 members that had undertaken domestic support reduction commitments are allowed to provide amber box support within the limits of their commitments, while those members that had not undertaken such commitments – exclusively the poorest developing countries – are prohibited from providing amber box measures at all. The only exceptions to this rule are the right to provide *de minimis* levels of support and the special and differential treatment options available to developing countries. Although presented in the AoA more as an exception rather than a rule, it is this prohibition on the use of amber box support that applies to over two-thirds of the WTO membership. It is no wonder therefore, to see that the countries for which the use of amber box domestic support is already illegal are pursuing the goal of extending the ban to all members. But the argument for the elimination of amber box measures has also been made increasingly by countries that are entitled to use them today.<sup>152</sup>

---

<sup>149</sup> Article 1(h) of the Agriculture Agreement.

<sup>150</sup> See paragraph 8 of the *Uruguay Round modalities for the establishment of specific binding commitments under the reform programme*. GATT Document MTN.GNG/MA/W/24, 20 December 1993 (hereafter the Modalities Agreement).

<sup>151</sup> Article 6:3 of the Agriculture Agreement.

<sup>152</sup> See for example the positions of the US and the Cairns Group. In fact, the EU, Japan and the US alone "account for 90 percent of total domestic support (i.e. AMS, blue box, green box, *de minimis*, and special and differential treatment) for the OECD area as a whole." OECD (2001), p. 14.

### 5.1.2 Major issues in Amber box support

The main controversial issues in the ongoing negotiations regarding amber box domestic support include the following: (1) Should it be eliminated or just reduced? If it is the latter, by how much? and (2) Should the aggregate commitments be replaced by product-specific commitments?

To start with the second question, several countries argued that the aggregate nature of the commitments allowed countries to provide unlimited amounts of support to particularly sensitive sectors and that the only way domestic support commitments could help towards freer trade was if those commitments were product-specific. According to the Cairns Group, the current negotiations should "result in commitments on a disaggregated basis to ensure that trade and production-distorting support will be reduced for all agricultural products."<sup>153</sup> A submission by the Association of South-East Asian Nations (ASEAN) used a similar language on disaggregation, but to be applied for developed countries only.<sup>154</sup> On the opposite side stood, among others, Norway proposing that "the non-product specificity of the AMS support should be maintained in order to allow for flexibility to reallocate support among productions."<sup>155</sup>

On the more fundamental question concerning the fate of amber box measures in general, the US and the Cairns Group have been leading the camp that seeks to set a date by which all trade-distorting domestic support would be eliminated. The US stance on this subject has hardened over time. When the US presented its first comprehensive proposal on agriculture in June 2000, its primary objective was to introduce some form of "support harmonization" in which disparities in trade-distorting support among countries would be reduced.<sup>156</sup> In a later proposal, the US argued for a formula to limit all trade-distorting support to the *de minimis* level and for a date to be agreed for their eventual elimination.<sup>157</sup> The Cairns Group has consistently argued for the elimination of trade-distorting support

---

<sup>153</sup> Cairns Group Negotiating Proposal: Domestic Support G/AG/NG/W/35, 22 September 2000.

<sup>154</sup> See *Special and differential treatment for developing countries in World Agricultural Trade: submission by ASEAN* (WTO Document G/AG/NG/W/55), 10 November 2000.

<sup>155</sup> Proposal by Norway, G/AG/NG/W/101, 16 January 2001.

<sup>156</sup> See *Proposal for comprehensive long-term agricultural trade reform: submission from the United States*, (G/AG/NG/W/15), 23 June 2000; see also *Note on domestic support reform: submission from the United States*, (G/AG/NG/W/16), 23 June 2000.

<sup>157</sup> For later US positions, see [www.fas.usda.gov/itp/wto/proposal.htm](http://www.fas.usda.gov/itp/wto/proposal.htm).

since 2000.<sup>158</sup> The opposite camp has been led by, *inter alia*, the EU, Japan and Switzerland. According to the EU, the existing regime is "globally the right framework for addressing domestic support issues" and the only thing to talk about during the negotiations should be about the reduction of amber box support while maintaining the overall structure.<sup>159</sup> In its proposal for the modalities, the EU maintained its approach and suggested a 55 percent reduction on amber box support while maintaining the other boxes intact.<sup>160</sup>

Amid all this, the first modalities proposal from Stuart Harbinson suggested a 60 percent reduction in the final bound Total AMS in equal annual instalments over a five year implementation period. Interestingly, Harbinson also made a half-hearted move towards disaggregation and suggested that "Article 6.3 of the Agreement on Agriculture shall be amended so as to ensure that the AMS for individual products shall not exceed the respective levels of such support provided on average of the years [1999–2001]." This would mean that while the reduction commitment remains an aggregate one, product-specific benefits would be capped at a level equal to the average benefit they had received during the 1999–2001 period. Needless to say, while this modest reform could easily be condemned as too little, it might be enough to attract strong opposition from influential interest groups representing such sensitive sectors as sugar, dairy and beef which are more likely to be affected than others. Just as in the AoA, the Harbinson draft also proposed that developing countries undertake only two-thirds of the suggested reduction commitments to be implemented over ten years.

The "US-EU joint proposal" of August 13 2003 suggested reductions in a range – i.e. setting the minimum and maximum percentage points by which all amber box domestic support measures would be reduced. The joint text left the specific numbers for future negotiations. The framework proposed by the "G20 Countries" also accepted the overall approach of the "US-EU joint proposal" introducing reductions in a range, but added several more stringent requirements. Firstly, the reduction commitments would be on a product-specific basis. Secondly, specific products benefiting from an above-average level of support over a certain base period would be subject to the maximum reduction rate within the range (thus leading to some degree of support harmonization). Thirdly, a "down payment" would be made in the form of a first reduction (by an amount that would be negotiated) across the

---

<sup>158</sup> See Cairns Group proposal on domestic support.

<sup>159</sup> See EC comprehensive proposal.

<sup>160</sup> See EC proposal for the Modalities Agreement.

board for all products within the first year of the implementation period; and higher reductions, with a view to the phasing out of domestic support for products benefiting from such measures, if those products are also exported and account for a certain percentage of world exports of that product.

The pre-Cancun framework for agricultural modalities prepared by General Council Chairman del Castillo was more in line with the "US-EU joint proposal" described earlier: adopting the approach of reductions in a range at an aggregate sector-wide level, and with no reference to the support harmonization or down payment elements in the "pre-Cancun G20 proposal". Thanks to the tenacity of the G20 countries during the ministerial conference, the Cancun Draft framework proposed to cap product-specific support at their average levels for a representative period which would be agreed at a later stage.

## 5.2 Blue box measures

### 5.2.1 Approach and structure in the AoA

Under the AoA, direct payments made to farmers under production-limiting programmes, often known as the "blue" box measures, are excluded from the calculation of the Current Total AMS, and hence from the reduction requirements, on condition that certain important conditions are met. First of all, the payments need to be "direct" payments in the sense that they should not be transferred to farmers through market manipulation devices. Secondly, payment should be conditional upon some form of production-limiting measures being taken by the recipient, including on a fixed acreage and yields, or on 85 percent or less of the base level production, or, in the case of livestock payments, on a fixed number of head.<sup>161</sup> This option is *de jure* available to every WTO member; but a total of only nine members, counting EC (15) as one, notified blue box support in at least one of the years 1995 to 2003.<sup>162</sup> These are Czech Republic, Estonia, EC (15), Iceland, Japan Norway, Slovenia, Slovakia and the US – all OECD countries.

It is thus only natural that while almost all other countries have proposed to delete this box from the AoA and move its contents into the amber box and deal with them accordingly, those that have made use of the blue box – except the US which no longer maintains such measures – are its staunch

<sup>161</sup> See article 6:5 of the Agriculture Agreement.

<sup>162</sup> See Committee on Agriculture Special Session, *Blue Box Support: Note by the Secretariat* (TN/AG/S/14), 28 January 2005.



defenders. Switzerland and Korea are examples of countries that have not used the Blue box so far but that are defending it no less passionately. Indeed, Switzerland joined the EU in declaring that progress in the negotiations would be possible only if the blue and green boxes were to be maintained.<sup>163</sup> The US and the Cairns Group led the camp which advocated scrapping this box altogether.

#### 5.2.2 Major issues in blue box support

The most important issue involving blue box support in the Doha negotiations has thus been whether to retain or scrap it. The first Harbinson modalities proposal on this issue, perhaps more than on many others, was cluttered with parentheses, which indicates the high degree of contention involved. When looked at closely however, both parenthetical options would effectively eliminate the blue box and either put its contents in the amber category (and hence subject to reduction commitments as such), or keep it as a separate category but subject it to discipline similar to that applying to amber box.<sup>164</sup> The relevant proposal reads as follows:

"Direct payments under production-limiting programmes provided in accordance with the provisions of article 6.5 of the Agreement on Agriculture (blue box payments) [shall be capped at the average level notified for the implementation years [1999–2001] and bound at that level in Members' Schedules. These payments shall be reduced by [50] percent. The reductions shall be implemented in equal annual instalments over a period of [five] years.] [shall be included in a member's calculation of the Current Total Aggregate Measurement of Support (AMS)]."

The "US-EU joint proposal" suggested capping the total value of blue box support at five percent of total value of national agricultural production in each member country. The proposal from the 'G20 countries', on the other hand, called for the elimination of blue box support altogether. The pre-Cancun Draft framework for agricultural modalities as well as its Cancun revision proposed only a reduction approach based on the "US-EU joint proposal".

---

<sup>163</sup> For the Swiss position see its Statement to the Seventh Special Session of the Committee on Agriculture, 26–28 March 2001, (G/AG/NG/W/155).

<sup>164</sup> First modalities draft, para. 43.

### 5.3 Green box measures

#### 5.3.1 Approach and structure in the AoA

Annex 2 to the Agreement on Agriculture provides for a detailed but non-exhaustive list of practices for which governments may claim exemptions from reduction/elimination requirements – so-called "green" box measures. Most of them are measures generally considered trade-neutral and the following is a brief summary of the measures falling under this box and the requirements they have to satisfy as provided in Annex 2 to the AoA. The basic requirement is that such measures must have no, or at most minimal, trade distortion effects or effects on production. This basic requirement is supplemented by a detailed and virtually exhaustive (although explicitly described otherwise) list of measures along with general and policy-specific criteria they have to satisfy before being exempted from reduction commitments. The exemptions do not apply to market price support and all other forms of support involving transfers from consumers. Besides, while governments are allowed to take precautionary food security measures, provide general services (such as research, pest control, training, infrastructural development, etc.) to producers and domestic food aid to the needy, they are required to carry out these tasks as much as possible within the framework of market forces. Members may give an unlimited amount of direct income support to their farmers so long as the payments are made in a manner that is decoupled from production decisions and trade. Furthermore, members are allowed to provide income insurance and disaster relief services on condition that farmers are not thereby made to profit from such occurrences. Finally, members can also provide assistance for structural adjustment, and environmental and regional development purposes. In general, while decoupled payments may be made for whatever reason and to unlimited amounts, those payments that take the form of income insurance, disaster relief, structural adjustment assistance, environmental or regional development programmes have to comply with the requirement that they not be given in excess of the actual losses suffered (or extra costs incurred), to implement the government programme. According to WTO data, a total of 83 members (counting the EC-15 as one) had made notifications by 2004 concerning their domestic support measures since the 1995 implementation year, and 68 of these had provided green box notifications.<sup>165</sup>

---

<sup>165</sup> For comprehensive information about green box measures reported by WTO members, see Committee on Agriculture Special Session, *Green Box Measures: Note by the Secretariat*, (TN/AG/S/10), 8 November 2004.

### 5.3.2 Major issues in green box support

Although economists seem to agree that no domestic support could be trade-neutral, "green box" measures have been relatively the least-contentious area of domestic support in the current negotiations. Proposals were of course, submitted from different quarters: some wanted to abolish the box altogether and put its contents under the amber box category that is subject to reduction commitments<sup>166</sup>; some wanted to put a cap on the amount of money that could be spent on them; some others wanted to narrow the scope of measures falling under that box; still others wanted to enlarge the box so as to include additional measures.<sup>167</sup> On balance, however, it is more likely that this box will survive the current negotiations without much modification. The only important issue here has been whether the criteria for 'green box' exemptions should be tightened.<sup>168</sup>

The first Harbinson modalities draft suggested that the provisions of Annex 2 be maintained subject to minor modifications. Important among the suggested modifications were the following: (1) in response mainly to an EU insistence, the modalities draft suggested inclusion of animal welfare payments under paragraph 12 of Annex 2 along with payments under environmental programmes; and (2) in response to the concerns of developing countries, a long list of special and differential treatment provisions were proposed to exempt measures designed for *inter alia*, maintaining domestic production capacity for staple crops, and payments to small-scale or family farms for reasons of rural viability and cultural heritage.<sup>169</sup> Attachment 10 to the revised first modalities draft also introduced a catalogue of measures that would be included in a revised version of AoA article 6.2 on special and differential treatment for developing countries which could significantly increase the number of domestic support measures that would be exempted from reduction commitments. The pre-Cancun Draft framework for agricultural modalities (as well as its Cancun revision) left "green box" domestic support measures

---

<sup>166</sup> See, e.g. a proposal by a group of 11 developing countries in (WTO Document G/AG/NG/W/13), 23 June 2000.

<sup>167</sup> See WTO. *Services and agriculture negotiations: meetings set for February and March*. (WTO Press Release (Press/167)), 7 February 2000.

<sup>168</sup> For other proposals such as to take green box support into the amber box and subject it to reduction commitments, see, e.g. proposal by India, G/AG/NG/W/102, 15 January 2001.

<sup>169</sup> See revised first modalities draft, attachment 8, para. 6.

intact while noting that the criteria for a measure to be classified as such remained under negotiation.

### 5.3.3 The direction of negotiations on domestic support

An interesting feature of the July 2004 package is the support-harmonization approach it introduced for trade-distorting domestic support. Harmonization in domestic support is however different from harmonization in agricultural market access. In the latter case, harmonization refers to the process and objective of narrowing the gap between the tariff levels that apply to different products in different countries; it is in effect a means of minimising the level of tariff dispersion contained in the tariff schedules of a member country. In the context of domestic support however, harmonization refers to the process and objective of narrowing the gap between the levels of trade-distorting domestic support that could be provided by different countries; this is thus inter-country rather than inter-product harmonization. Indeed there is no room for inter-product harmonization for domestic support because the commitments in this area, unlike in market access or even export subsidies, are sector-wide.

The July Package injected harmonization as an objective in addition to the Doha objective to bring about "substantial reductions in trade-distorting domestic support". Two levels of commitments are clearly provided in the July Package with respect to trade-distorting domestic support, which is here understood to mean all non-green box measures of support (i.e. amber box measures, permitted *de minimis* levels, and the blue box) – overall and specific. The overall commitment would apply to a base level figure that would be made up of the Final Total AMS (for amber box), permitted *de minimis* levels and the higher of existing blue box payments during a recent representative period to be agreed.<sup>170</sup> In order to achieve its object of harmonization, the July Package provided that the overall base level thus constituted would be reduced according to a tiered formula under which "members having higher levels of trade-distorting domestic support will make greater overall reductions in order to achieve a harmonizing result."<sup>171</sup> The July Package further agreed on a 20 percent reduction as a down payment at the beginning of the implementation period. This overall reduction commitment is supplemented by commitments specific to each trade-distorting domestic support – i.e. amber box, blue box

---

<sup>170</sup> See July Package, paras. 7 and 8.

<sup>171</sup> See *Id.* at para. 7.

and *de minimis* support. The tiered formula was once again agreed to apply to the reduction of the amber box measures so that members with higher AMS levels would make steeper cuts. However, the number of support bands and the rate that would apply to each were left for future negotiations. The July Package also contained a commitment to cap product-specific AMS at their respective average levels according to a methodology to be agreed so as "to prevent circumvention of the objective of the Agreement through transfers of unchanged domestic support between different support categories".<sup>172</sup> Reductions on *de minimis* levels were left for future negotiations; however there is already an agreement to exempt developing countries from any such reduction requirement provided they "allocate almost all *de minimis* support for subsistence and resource-poor farmers."<sup>173</sup>

The Hong Kong Declaration made some notable progress in this respect. It was agreed that there will be three bands for reductions in Final Bound Total AMS and in the overall cut in trade-distorting domestic support, with higher linear cuts in higher bands. Moreover, the gap in the amount of Final Bound Total AMS within the 35 members that undertook commitments in the area is so big that the Hong Kong Declaration was able to be more specific about the allocation of countries to each of the three tiers. Accordingly, "the member with the highest level of permitted support will be in the top band, the two members with the second and third highest levels of support will be in the middle band and all other members, including all developing country members, will be in the bottom band."<sup>174</sup> On the basis of the latest WTO data, the one member that has the highest level of permitted support and that is going to be put in the top band is the EC(15) – which may do so as EC(25) following its latest expansion; the two members with the second and third highest levels of support that will be put in the middle band will be Japan and the US respectively; while the remaining 32 members with domestic support commitments will be put in the third band.<sup>175</sup> The rights of developing countries with no domestic support commitments to provide *de minimis* levels of support remain unaffected. The rate that will apply to each of the three bands is a matter left for the Modalities Agreement.

The blue box also saw important developments in the July Package. On top of the overall commitments that will apply to all trade-distorting domestic

---

<sup>172</sup> See Id, at para. 9.

<sup>173</sup> See Id, at para. 11.

<sup>174</sup> See Hong Kong Declaration, para. 5.

<sup>175</sup> For the latest data on this, see TN/AG/S/13.

support, including the blue box, a specific agreement was reached to cap the blue box at no more than 5 percent of the value of a country's agricultural production over a period to be negotiated. The Hong Kong Declaration did not say much on the blue box.

In relation to the green box measures, the July Package simply commits members to review and clarify the criteria for measures to be put in this box so as to ensure that they have no, or at most minimal, trade-distorting effects or effects on production.<sup>176</sup> The Hong Kong Declaration merely refers back to the July Package to review the green box criteria and extend their coverage to "programmes of developing country members that cause not more than minimal trade-distortion".<sup>177</sup>

## **VI. CONCLUSION**

The foregoing discussion has shown that agriculture is once again dictating the pace of progress in trade negotiations at the WTO. Interestingly, the sticking points of today are very similar to the issues that immobilized the whole Uruguay Round process of negotiations over a decade ago. Nor is there any major change in the positions of the leading Uruguay Round players. Apart from the fact that developing countries are gaining strength in making their voices heard with increased force and momentum, the traditional alignment of forces which we had during the Uruguay Round is still more or less intact – the old protectionists and conservatives are still trying their best to conserve their protectionist policies while the old liberalisers are still working hard for further and quicker liberalisation. The latter group have boosted their positions by injecting into their argument the enduring cause of developing countries and their special interest in this sector. The emergence of the high-profile issue of cotton subsidies later in the negotiations has further boosted this aspect of the argument.

However, whatever governments may say in this respect, the issue of agriculture is one of principle. If the multilateral trading system claims to be based on any principle, it is fairness, transparency and equal opportunities for all on the basis of the economic law of comparative advantage. The current rules of agricultural trade are only an embodiment of sheer hypocrisy in global economic relations. The solution proposed under paragraph 27 of

---

<sup>176</sup> See July Package, para. 16.

<sup>177</sup> See Hong Kong Declaration, para. 5.

the Cancun Draft ministerial declaration on cotton was considered as one of the most blatant expressions of this hypocrisy. The negotiations since Cancun have changed many things, often in favour of developing countries. The commitment to eliminate developed countries' export subsidies on cotton by 2006 and the agreement to extend duty- and quota-free market access for most goods originating in LDCs are worthy outcomes of the Hong Kong Ministerial Declaration.

Despite the slow progress, the agriculture negotiations still promise important developments in each of the three pillars. The elimination of all forms of agricultural export subsidies by 2013 is an historic achievement that should be protected from any last-minute diplomatic second-thoughts and compromises. Although the changes in this regard will require legislative and institutional modifications in only the 25 or so WTO members that have export subsidy commitments, the parallel disciplines that are expected to be completed as part of the Modalities Agreement by 30 April 2006 on such issues as export credits, food aid and state trading export enterprises may have more direct implications for other members as well.

The picture will look broadly similar in the other two pillars as well. With respect to domestic support, the dual commitments to apply a tiered formula at the level of overall trade-distorting measures and specifically the amber box would not create any obligations for countries with no trade-distorting domestic support measures in place – and most developing countries fall into this category. Indeed, to the extent their financial status permits, most of these countries may be able to introduce new support measures within their *de minimis* levels (for trade-distorting ones) and the green box. The agreement in the Hong Kong Declaration to review the green box criteria so as "to ensure that programmes of developing country members that cause not more than minimal trade-distortion are effectively covered" appears to indicate that the review of green box criteria may even introduce further flexibilities for the benefit of developing countries.

Likewise, the agreement to apply the tariff reduction commitments from bound rates rather than applied ones also has the effect of allowing most developing countries to retain their existing applied rates while reducing their bound rates to levels which should in many cases still remain far higher than what most of these countries may want to apply. In most developed countries, on the other hand, the gap between bound and applied tariffs is either small or non-existent, and the implications of the commitments will be

more immediate in many cases. The introduction of the categories of sensitive and special products as well as the SSM will also require a revision of the national schedules of particularly the developing countries both to designate the beneficiary products as well as apply the permitted deviations from whatever tariff reduction formulae are going to be agreed.

### MAIN REFERENCES

**Desta, M.G.** 2002. *The law of international trade in agricultural products: from GATT 1947 to the WTO Agreement on Agriculture*. Kluwer Law International.

**WTO.** 2005. Sixth WTO Ministerial Conference, Hong Kong (13–18 December 2005), *Doha Work Programme Ministerial Declaration* (WT/MIN(05)/DEC), adopted on 18 December 2005, 22 December 2005.

**WTO.** 2004. *Doha Work Programme: Decision Adopted by the General Council on 1 August 2004* (WT/L/579, 2 August 2004).

**WTO.** 2003a. *Negotiations on Agriculture: First Draft of Modalities for the Further Commitments* (WTO doc. TN/AG/W/1), 17 February 2003.

**WTO.** 2003b. *Negotiations on Agriculture: First Draft of Modalities for the Further Commitments: Revision* WTO doc. TN/AG/W/1/Rev.1, 18 March 2003.

**WTO.** 2003c. *Preparations for the Fifth Session of the Ministerial Conference: Draft Cancun Ministerial Text – Revision*, WTO doc. JOB(03)/150/Rev.1, 24 August 2003.

**WTO.** 2003d. *Preparations for the Fifth Session of the Ministerial Conference: Draft Cancun Ministerial Text – Second Revision*, WTO doc. JOB(03)/150/Rev.2, 13 September 2003.





### 3.

## STATE TRADING ENTERPRISES

### *Contents*

I.	INTRODUCTION	91
II.	STATE TRADING ENTERPRISES and AGRICULTURE	92
2.1	Defining STEs	92
2.1.1	An evolving definition?	92
2.1.2	The scope and types of agricultural STEs	94
2.2	Benefits and the controversy associated with agricultural STEs	97
2.2.1	The benefits of STEs	97
2.2.2	The controversy regarding STEs	99
III.	CONCLUSION	103
	MAIN REFERENCES	105



## I. INTRODUCTION

State Trading Enterprises (STEs) have been an important part of international agricultural trade for decades. However, it is only recently that they became a controversial international trade negotiations issue.<sup>1</sup> In general, the idea of international co-operation to reduce the place of government in trade has gained currency since the end of World War II:<sup>2</sup> The subject was debated at the time of the Preparatory Committee for the Havana Conference.<sup>3</sup> Countries that wanted to "clip the wings of state trading enterprises" were unable to force disciplines in the area of STEs because of the large number of states who relied on such entities to retain control over trade at the domestic level.<sup>4</sup> This deadlock relegated the development of a regulatory framework for STEs framework to the background of international trade negotiations. Thus, rules on STEs were scarce and controversial, monitoring non-existent, and the actual impact of STEs on trade was the subject of speculation but largely definitively unknown.

Many developing countries do however use STEs. In Africa, STEs were a prominent feature of post-independence economic development planning. They remain so to date. Despite international pressure for privatization and liberalization, key sectors such as agriculture remained largely under the STE umbrella.

More recently, agricultural trade liberalization efforts, in the context of the WTO, have revived the importance of stricter controls on the potential distortive effects of STEs. The implementation and enforcement of internationally negotiated rules on agricultural trading set the stage for closer scrutiny on the different international actors, notably STEs, the concern being the circumvention of those newly negotiated international trade rules and principles. The current debate over the role and regulation of STEs is actually more a reflection of competition between developed countries rather than a further attempt to restrict developing countries, even if that is the

---

<sup>1</sup> Roberts, M.T. 2001. The unique role of State Trading Enterprises in world agricultural trade: sifting through rhetoric. *Drake Journal of Agricultural Law*, 6(287) (hereafter Roberts (2001)).

<sup>2</sup> Jackson, J.H. 1969. World trade and the law of GATT (a legal analysis of the General Agreement on Tariffs and Trade). Bobbs-Merrill Co. Indianapolis (hereafter Jackson (1969)).

<sup>3</sup> Dixit, P.M. 1997. *State trading in agriculture: an Analytical framework*, p. 1. International Agricultural Trade Research Consortium, Working Paper No. 97-4.

<sup>4</sup> Ibid.

ultimate result. It is also noteworthy that some of the biggest STEs are to be found in developed nations such as Canada and Australia.

This brief chapter highlights the evolving debate on STEs. It discusses the benefits and problems associated with the different types of agricultural STEs.

## **II. STEs AND AGRICULTURE**

### **2.1 Defining STEs**

The legal definition of an STE is currently a hotly debated subject.<sup>5</sup> The source of contention arises from the classification of STEs for notification requirements which would then make them subject to WTO disciplines. The existing WTO definition is imprecise and depends to a large extent upon self-identification by members of their institutions and the measures that they consider to be state controlled. As a result, many enterprises with state-sanctioned powers are excluded from the WTO's STE disciplines.<sup>6</sup>

#### **2.1.1 An evolving definition?**

The history of drafting a definition of STEs demonstrates the difficulties in reaching a consensus over such a diverse and complex trade actor.<sup>7</sup> One of the major problems contributing to confusion, contention and the lack of information regarding STEs is in fact the absence of a legal definition of an STE in GATT, article XVII.<sup>8</sup>

In the absence of a legal definition, economists often substituted their own by stating that "state trading occurs when there exists a trading organization for which the prices and/or quantities of international transactions in commodities are determined as an instrument in the pursuit of government policies."<sup>9</sup> While this definition focuses on government control for public policy objectives, other economists argue that deference should be given to

---

<sup>5</sup> Annand, M. and Rude, J. 2002. European Union grain export practices: do they constitute a State Trading Enterprise? *Estey Journal of International Law and Trade Policy* 3(2): 176. Saskatoon (hereafter Annand and Rude (2002)).

<sup>6</sup> Ibid.

<sup>7</sup> Roberts (2001).

<sup>8</sup> Annand and Rude (2002), p. 36.

<sup>9</sup> Loyd, P. 1981. State trading and the theory of international trade. In Kostecki, M. *State trading in international markets*. St. Martin's Press. New York.

the interpretation made by WTO Panel reports.<sup>10</sup> This definition also suggests that the use of tariffs, quotas and other traditional trade instruments do not constitute state trading, while trade by government-chartered marketing boards with monopolies does.<sup>11</sup>

Nevertheless, despite several GATT panel reports containing references to what an STE entails, the definitional issue has not yet been specifically ruled on by any dispute settlement panel to date.<sup>12</sup> Moreover, none of the panel reports have dealt with STE exporters, and therefore there is no GATT jurisprudence specifically directed to the issue of defining the latter.<sup>13</sup> This initial lack of a working definition was later addressed somewhat in 1994 through the Understanding on the Interpretation of Article XVII,<sup>14</sup> which stipulates that STEs are:

"[A] governmental and non-governmental enterprise, including marketing boards, which have been granted exclusive or special rights or privileges, including statutory or constitutional powers, in the exercise of which they influence through their purchases or sales the level or direction of imports or exports."<sup>15</sup>

This definition is a functional one, which focuses on the exercise of special rights or privileges that have an influence on the level or direction of imports or exports. This represents a shift from the early United States-suggested institutional approach which focused on the control of the enterprise exercised by government.<sup>16</sup> Despite this working definition, the United States seems to maintain a different view of STEs. In a report to Congress in 1996, the United States General Accounting Officer stated: "STEs are generally considered to be enterprises that are authorized to engage in trade and are owned, sanctioned, or otherwise supported by the government."<sup>17</sup> Thus, it seems the debate over a STE definition will remain open until a challenge before a WTO panel decides definitively on the matter.<sup>18</sup> Current

---

<sup>10</sup> Smith, V.H. (2006), p. 2.

<sup>11</sup> Roberts (2001).

<sup>12</sup> Annand and Rude (2002), p. 176.

<sup>13</sup> Ibid.

<sup>14</sup> Ibid.

<sup>15</sup> Understanding on the Interpretation of Article XVII of the General Agreement on Tariff and Trade, 1994, article 1.

<sup>16</sup> Annand and Rude (2002), p. 36.

<sup>17</sup> Ibid.

<sup>18</sup> Ibid.

usage accommodates a broad definition of "enterprise" using the objective of GATT (to liberalize trade and reduce trade distortions) as its parameters; it would be inconsistent with the purpose of GATT to allow member states to circumvent their trade obligations by creating enterprises that fall outside this definition.<sup>19</sup> However, the lack of a legal definition has not prevented definitions in practice of STEs characterised by their economic attributes.

### 2.1.2 Scope and types of agricultural STEs

An STE is a government enterprise or quasi-government enterprise that operates with special protections and privileges granted by the country's central authority. Seventy-five percent of STEs notified to the WTO are involved in agriculture.<sup>20</sup> The prevalence of STEs in agriculture stems from the belief that state trading is an appropriate means by which governments can meet agriculture-related policy objectives.<sup>21</sup> They generally exist for one of two reasons. Sometimes, as is the case with many African government parastatals, they are created to tax the domestic industry and imports for revenue generation purposes.<sup>22</sup> Alternatively, an STE's mission is often to increase revenue or profit from sales for domestic producers, processors and other marketing chain operations.<sup>23</sup>

The list of agricultural products traded by STEs is long. It includes alcoholic beverages, cotton, dairy products, edible oils, ethyl alcohol, fresh and chilled vegetables, fruits and dried fruits, garlic, grains, honey, hops, meat and livestock, oilseeds, opium, potatoes, poultry and eggs, raw silk, soybeans, sugar, tea, tobacco and tobacco products, and wool.<sup>24</sup> Among these, the products most traded by STEs are wheat, feed, grains, rice, dairy products and sugar.<sup>25</sup>

---

<sup>19</sup> Annand and Rude (2002), p. 176.

<sup>20</sup> FAO. 2002. *Agricultural state trading enterprises and developing countries: some issues in the context of the WTO negotiations*, p. 89. FAO Papers on selected issues relating to the WTO Negotiations on Agriculture. Commodities and Trade Division. Rome (hereafter FAO (2002)).

<sup>21</sup> Ibid.

<sup>22</sup> Smith, V.H. 2006. *Regulating State Trading Enterprises in the GATT: an urgent need for change? Evidence from the 2003–2004 US–Canada Dispute*, p. 1. Agricultural Marketing Policy Paper No. 12. Agricultural Policy Center. Montana (hereafter Smith (2006)).

<sup>23</sup> Ibid.

<sup>24</sup> Roberts (2001).

<sup>25</sup> Ibid.

Agricultural STEs have many forms and functions, and may be categorized as: statutory market boards, export marketing boards, regulatory marketing boards, fiscal monopolies, channelling agencies, and foreign trade enterprises.<sup>26</sup> Regulatory boards and canalizing agencies tend to be government agencies or corporations, while agricultural producers own some statutory marketing boards.

(a) Statutory market boards

Also known as statutory marketing authorities or control boards, statutory market boards are the most common type of STE in the agricultural sector. Those boards may have any or all the following objectives: domestic price stabilization, market regulation, and control and promotion of exports.

STEs are usually producer-controlled, state-sanctioned monopolies with exclusive authority for a wide range of market interventions, such as the regulation and purchase of domestic distribution, and conducting foreign trade. They typically have control over the movement, pricing, quality standards, and marketing of the agricultural products that they cover. Other types of STEs generally have a narrower range of objectives and make less market interventions.<sup>27</sup>

(b) Export marketing boards

These are often of a similar structure to statutory marketing boards but with the distinctive characteristic of dealing exclusively with export items,<sup>28</sup> mainly by controlling the export marketing of the products they are responsible for. They are responsible for entering into long-term sales or supply contracts with the governments of importing countries, or entering into joint ventures with importing firms.<sup>29</sup> These boards often guarantee buying prices to smallholder farmers thus shielding them from price fluctuations in the world market. The risks inherent in the export process are

---

<sup>26</sup> Ibid, pp. 294 and 295.

<sup>27</sup> FAO (2002), pp. 89–101.

<sup>28</sup> [www.wto.org/English/thewto\\_e/whatis\\_e/eol/e/wto05/wto5\\_11.htm#note2](http://www.wto.org/English/thewto_e/whatis_e/eol/e/wto05/wto5_11.htm#note2).

<sup>29</sup> *The competition in 1996: selected expenditures for export subsidies and export market promotion activities of major US competitors in global markets for agricultural and food products* (available at [www.fas.usda.gov](http://www.fas.usda.gov))



thus borne by the board.<sup>30</sup> These boards are considered to be an efficient mechanism for the collection of government revenue.

(c) Regulatory marketing boards

These boards often carry out the same tasks as statutory marketing boards, but do not engage in trade and instead contract this role to private companies.

(d) Fiscal monopolies

Fiscal monopolies allow the government to generate revenue from price increases on imported products as a result of the "elasticity" of foreign demand.<sup>31</sup> To a large extent these Boards control marketing and distribution of items with particular health or tax implications such as tobacco and alcohol.<sup>32</sup>

(e) Canalizing or channelling agencies

Canalizing agencies direct import and export items through a specific agency dealing with these products which facilitates better pricing for large transactions.<sup>33</sup> Often they have monopolies over trade of a specific commodity in order to stabilise domestic prices, local supply or regulate foreign exchange.<sup>34</sup>

(f) Foreign trade enterprise

This is the term given to the marketing boards of centrally planned economies, which by and large have been dismantled, but in some countries such as China, still have a large role in agricultural trade. These bodies shielded the country economy from world prices as their imports were directed by the central government in accordance with specific targets.<sup>35</sup>

---

<sup>30</sup> van der Laan, L. 1986. The selling policies of African export marketing boards. *African Affairs*, 85(340):365.

<sup>31</sup> *How prevalent is state trading in agricultural trade?* (available at [www.ers.usda.gov](http://www.ers.usda.gov)).

<sup>32</sup> FAO (2002), pp. 90 and 91.

<sup>33</sup> *How prevalent is state trading in agricultural trade?* (available at [www.ers.usda.gov](http://www.ers.usda.gov)).

<sup>34</sup> FAO (2002), p. 91.

<sup>35</sup> Ibid.

## 2.2 Benefits and problems associated with STEs in the agricultural sector

STEs have access to various policy tools (export subsidies, pricing, supply controls, tariff-rate quotas, quantitative restrictions on trade, and marketing arrangements) which enhance their ability to compete in international markets. All these instruments are permitted under the Uruguay Round Agreement in one form or another, though some may have greater potential than others to distort trade.<sup>36</sup> The following section reviews some of the benefits derived from the use of STEs and also examines their potential trade-related problems.

### 2.2.1 The benefits of STEs

#### (a) Policy implementation tool

STEs are often used to implement diverse agricultural policies. Some were intended primarily as a device for collecting revenue, others were instituted for security reasons or to protect public health. Others may be used primarily as a device to stabilize the price level for the benefit of consumers or small producers.<sup>37</sup> This is essentially a price discrimination mechanism which differentiates price according to sensitivity of the recipient country to higher prices.<sup>38</sup> STEs also use domestic supply control policies to maintain domestic market power and control the level of product exported.<sup>39</sup> The main advantages of STEs are that their revenues may be transferred to other agricultural agencies to support domestic farm prices or subsidize consumer prices.<sup>40</sup> Governments may even contribute to such funding by providing for insurance against risk for STE importers.<sup>41</sup> Further, the considerable impact of STEs on world agricultural markets means that they can have a stabilising role and contribute to food security.

---

<sup>36</sup> FAO (2002), p. 14.

<sup>37</sup> Jackson (1969), p. 333.

<sup>38</sup> Ackerman, K.Z., Dixit, P. and Simone, M. 1997. *State Trading Enterprises: their role in world markets*. Economic Research Service/United States Department of Agriculture, Agricultural Outlook (hereafter Ackerman, Dixit and Simone (1997)).

<sup>39</sup> Ibid.

<sup>40</sup> Ackerman, Dixit and Simone (1997)

<sup>41</sup> Ibid.

## (b) Price pooling

Price pooling allows STEs greater flexibility in export pricing relative to private grain trading companies, particularly when pool payments are underwritten by the government, or where the STE controls domestic supplies as well as exports.<sup>42</sup> In this way prices are set averaged according to quality and grade of grains, times of year (marketing period), freight charges and location; the degree to which these categorizations are made determines the degree of price flexibility the STE has.<sup>43</sup>

## (c) Countervailing force to multinationals

STEs benefit from the financial backing of the central government, either through direct subsidies or from government guarantees that private traders do not benefit from.<sup>44</sup> Moreover, STEs also enjoy tax benefits, transport subsidies, preferential foreign exchange, public utility rates, capital expansion funds, and underwriting, which give them the liberty to take more risks than a company without such financial protection.<sup>45</sup>

Some export STEs may provide countervailing power to multinational trading firms and hence may improve competitive conditions in the market.<sup>46</sup> Given the fact that there are a relatively small number of players in international agricultural commerce and significant barriers access, STEs provide a considerable countervailing force in such an oligopolistic market.<sup>47</sup> This policy rationale is particularly applicable with respect to the world grain trade. In fact, given that this market is largely dominated by a few privately-owned multinationals, STEs are among the few effective tools that developing countries have over their grains imports.<sup>48</sup>

STEs may operate on a commercial basis, have monopoly power, use the commercial practice of differential pricing, and may receive government assistance during financial difficulties, which enable them to compete.

---

<sup>42</sup> Ibid.

<sup>43</sup> Ackerman, Dixit and Simone (1997), p. 13.

<sup>44</sup> Roberts (2001), p. 299.

<sup>45</sup> Ibid, p. 300.

<sup>46</sup> de Gorter, Ingo, and Ruiz. 2003. *Export subsidies: agricultural reform and developing countries*, p. 3. International Trade Department Trade Note 8, World Bank Group. Washington. (hereafter de Gorter, Ingo and Ruiz (2003)).

<sup>47</sup> Roberts (2001), p. 296.

<sup>48</sup> Ibid, pp. 296 and 297.

Nevertheless, by their very nature, STEs impact trade whether it is through reasonable distortions or more pronounced negative impacts. The following section discusses the negative aspects of STEs.

### 2.2.2 The controversy regarding STEs

There are numerous reasons why governments are apprehensive regarding the existence and behaviour of STEs when negotiating commitments to liberalize trade. Many economists argue that given the current language of GATT and its interpretation by various dispute settlement panels, STEs are a potential vehicle through which countries can evade WTO disciplines.<sup>49</sup>

For example, the government can create an enterprise that is granted a monopoly over a certain product in the domestic market, which gives the enterprise control over related imports and exports, and its decisions are hard to challenge. The transactions of such a body must be based on commercial considerations only in order to remain within the WTO disciplines. Where the entity is state controlled, its buying decision for example buying domestically for a higher price than imported items may be based on domestic or international political pressures.<sup>50</sup> The element of government control enables the STE to be used as a protective measure by setting prices and controlling distribution.<sup>51</sup> STEs may block market access even with instruments such as tariffs set at zero, no quotas and national treatment privileges,<sup>52</sup> thereby offering a seemingly liberal trade environment but in fact taking protective measures behind the scenes which in effect amount to a subsidy.<sup>53</sup> Where STEs have exclusive rights over a commodity, it can influence the price paid for a particular domestic commodity as well as controlling the distribution of imports of that commodity. Also the STE may chose to apply high prices for foreign items reducing the demand for imported goods.

---

<sup>49</sup> Smith (2006), p. 2.

<sup>50</sup> Jackson (1969), p. 331.

<sup>51</sup> Ibid, p. 333.

<sup>52</sup> Hoekman, B. and Kostecki, M. 2001. *The political economy of the world trading system: the WTO and beyond*. Oxford 2nd edition.

<sup>53</sup> Ibid.

## (a) Trade distortions

The trade effects from STEs have traditionally been equated to those produced by tariffs.<sup>54</sup> For example, STEs that restrict imports into a country affect domestic prices in a similar way to an import tariff, while an STE that expands exports affects domestic prices in the same way as an export subsidy.<sup>55</sup> As detailed above, STEs can create market distortions where they apply high prices for imports, tax domestic sales or where they subsidize or tax exports to different destinations at varying rates.<sup>56</sup> Such distortions are not dealt with in GATT provisions, and counter-trade activities are therefore unregulated and unmonitored;<sup>57</sup> in fact, with the exception of the Government Procurement Agreement there is no reference to countertrade in the WTO framework.<sup>58</sup> Countertrade describes a situation where governments or enterprises barter and exchange products, rather than simply paying a price for goods.<sup>59</sup> It involves exporters and importers negotiating reciprocal deliveries in partial or full settlement of specific exchanges. Some forms of countertrade can be accomplished through STEs or other government monopolies or regulations. Motivations for counter-trade in the international context include circumvention of foreign exchange and credit controls, hiding price cuts, satisfying governmentally imposed local content or offset requirements and surmounting barriers to otherwise closed markets.<sup>60</sup> Examples are counter-purchase, offset, buyback, advance purchase and barter;<sup>61</sup> in some cases, these are set up under bilateral treaty frameworks. Of course, countertrade can also be carried out by purely private enterprises in a free market context, in which case GATT may have rules that apply. Countertrade mandated by governments, however, may be inconsistent with certain GATT obligations, such as the MFN principle, or obligations prohibiting the use of quotas, or national treatment.<sup>62</sup>

---

<sup>54</sup> Roberts (2001), p. 298.

<sup>55</sup> Ibid.

<sup>56</sup> Smith (2006), p. 1.

<sup>57</sup> Ibid, p. 2.

<sup>58</sup> Hoekman and Kostecki (2001), p. 185.

<sup>59</sup> Jackson, J. 1989. State trading and non-market economies. *International Lawyer* 23: 893.

<sup>60</sup> Ibid.

<sup>61</sup> Hoekman and Kostecki (2001), p. 185.

<sup>62</sup> Jackson, J. 1989. State trading and non-market economies. *International Lawyer* 23: 893.

## (b) Inconsistencies with WTO rules and threat to competition

It was recognized that enterprises granted exclusive trading rights and privileges could circumvent liberalization commitments in a number of ways.<sup>63</sup> First, STEs could circumvent the MFN principle by discriminating among trading partners in their purchasing and selling decisions, and go against the national treatment principle by discriminating against import items regarding distribution or sale. Further, their control over import and export quantities above the free trade level is inconsistent with article XI on GATT which proscribes against quantitative restrictions.<sup>64</sup> Also, the imposition of mark-ups for certain items may surpass the bound tariff levels.

A fifth point is the anti-competitive effect of STEs as a result of government assistance and as well as subsidising activities on their own, particularly where their privileges enable undercutting of other suppliers.<sup>65</sup> Moreover, activities which effectively amount to domestic subsidies would be beyond the reach of disciplines on domestic support as a result of the non-transparent manner in which the subsidies are provided.<sup>66</sup> Domestic marketing arrangements that have been used to channel resources to farmers can also amount to an export subsidy where domestic consumer prices are higher than world prices.<sup>67</sup> Domestic production expands with pooling and consumption decreasing, just like a taxpayer financed export subsidy. Pooling can occur across markets, time or commodities. It was established that if an STE has control over all exports, domestic marketing, commodity procurement, and processing, its ability to impact international markets is likely to be much greater than if it controlled a portion, or none.<sup>68</sup> Finally, STEs' handling of tariff quotas remains contentious. One argument is that STEs are often less influenced by market considerations compared with firms or other commercial enterprises and may therefore have no incentive to fill the quota. Another complaint is that the STE, especially if it represents producer interests, will choose to limit the quota to lower-valued imports within that category or to pay the exporter lower prices for the good in

---

<sup>63</sup> Hoekman and Kostecki (2001), p. 179.

<sup>64</sup> Ibid.

<sup>65</sup> Hoekman and Kostecki (2001), p. 179.

<sup>66</sup> Smith (2006), p. 1.

<sup>67</sup> de Gorter, Ingo and Ruiz (2003), p. 3.

<sup>68</sup> Ackerman, Dixit and Simone (1997), p. 13.

question than would be paid under private market transaction.<sup>69</sup> Therefore, allocating quotas to STEs can reduce market access, even with 100 percent fill rates, by discriminating across countries or choosing low-quality products. Some STEs even deliberately allocate export quotas to higher-cost exporters for political reasons, resulting in inefficiencies and inequalities.<sup>70</sup>

(c) Lack of transparency

The secrecy of STEs in administering international market transactions coupled with control of domestic and export markets gives STEs the power to distort trade.<sup>71</sup> The combination of the fact that STEs are not often required to provide information related to their activities, transaction prices, quality of goods or degree of government support coupled with the lack of competition for obtaining the commodities precludes the possibility of discovering prices through an open bidding process.<sup>72</sup>

(d) Special concerns for importer and exporter STEs

STEs dealing with imports cover supply control and procurement through to the marketing of the item. Here the concerns focus on the extent to which the distortion or restriction on market access is created. The monopoly status of importing STEs makes it difficult to ascertain whether imports are determined by market demand (commercial considerations) or by governmental policy constraints. Examples of such discrimination include the allocation of tariff rate quotas (TRQ) or the control of grades and standards. Where the same enterprise has the capacity to influence prices and quantities traded both domestically and internationally, there is a strong possibility of concealing the true costs and returns of its activities and therefore disguising the degree of market distortion. Reforms that would reduce the monopoly power of importing STEs and increase the transparency of their operations could overcome these concerns to a degree.<sup>73</sup>

---

<sup>69</sup> de Gorter, Ruiz, and Ingco. 2004. Export competition policies, pp. 43–62. In Ingco and Nash, eds. *Agriculture and the WTO: creating a system for development*. World Bank Group. Washington DC.

<sup>70</sup> Ibid.

<sup>71</sup> Ackerman, Dixit and Simone (1997), p. 14.

<sup>72</sup> Roberts (2001), p. 298.

<sup>73</sup> FAO (2002), p. 94.

Exporting STEs may control domestic marketing which enables price discrimination of foreign items, while procuring export commodities provides the STE with greater competitive leverage with domestic buyers for production.<sup>74</sup> However, the real trade issues concerning STE exporters is whether or not the STEs are being used to subsidize exports<sup>75</sup> or whether their exclusive power of domestic monopoly (operating as the sole purchaser of domestic production) and/or export monopoly (operating as the sole exporter of domestic supply) is used to engage in unfair trading competition.

The concerns therefore revolve around the competitive advantages gained from their special rights and privileges and their official status. Additionally, STEs may have: greater certainty regarding sources of supply as a result of their legal mandate, and thus more scope for concluding discriminatory agreements with importing countries; greater scope for predatory pricing on account of their access to short-term government subsidies; and the possibility of benefiting from discriminatory interest rates and other government subsidies. As export subsidies are already constrained by the Agreement on Agriculture, export-oriented STE activities will not significantly distort international trade, but a lack of transparency in the activities could nevertheless enable export subsidy disciplines to be circumvented.<sup>76</sup>

### III. CONCLUSION

In the developing world, the role of STEs is not limited to trade and market issues but extends into rural development and food security. While the role of marketing boards in developing countries tends to cover a wide scope encompassing aspects such as risk management and production inputs that are insufficiently provided by the private sector, still the impact of most developing country STEs globally on price distortion and international markets is minimal. In this way, STEs can be used to augment farm incomes and ensure a base price for commodities. The creation of formal and informal exporter and importer associations enhances the collective bargaining power of the group and increases efficiency through joint or bulk operating and handling expenses. In line with structural adjustment measures, many developing countries in Africa have shifted towards less

---

<sup>74</sup> Ackerman, Dixit and Simone (1997), p. 13.

<sup>75</sup> Annand, M. 2000. State Trading Enterprises: a Canadian perspective. *Estey Centre Journal of International Law and Trade Policy* 1:36.

<sup>76</sup> FAO (2002), pp. 93 and 94.



government intervention in the market particularly through divestiture of parastatals towards the private sector. Although taking place earlier, Latin American reforms have also shown a change towards privatisation to a much more significant extent while the trend in Asian countries varies somewhat; in the latter case instead of privatisation, emphasis has been on increasing transparency and eliminating monopolistic practices rather than a complete withdrawal of the state. The mixed experiences of different countries with varying degrees of state involvement also renders definitive conclusions difficult to draw: "It has been argued that the reduced importance of STEs in Africa as a result of structural adjustment programmes has had an adverse impact on the availability of agricultural inputs, particularly credit, where private intermediaries have not moved in to take on the role of provider. On the other hand, wherever they have done so, as notably in Asia, their involvement has driven down margins and allowed greater returns to producers. This has been demonstrated in a number of case studies of successful agricultural development, where price transmission was found to be higher in the absence of marketing boards."<sup>77</sup> This highlights the danger with advocating a one size fits all global approach to the parameters of state intervention of STEs.

The foregoing suggests that where the potential of an enterprise to distort trade through its influence on the market is negligible and the privileges gained through its relationship to the government are minimal thereby not operating to negate the Agreement on Agriculture principles, these enterprises can in fact be viable under the WTO framework. Within set parameters, they can be useful to promote development, enhance food security as well as other broader implications such as natural resource management public health issues, and access to and control over investment resources.

---

<sup>77</sup> Ibid.

## MAIN REFERENCES

**Annand, M. & Rude, J.** 2002. *European Union grain export practices: do they constitute a State Trading Enterprise?* Estey Journal of International Law and Trade Policy 3(2). Saskatoon.

**FAO.** 2002. *Agricultural state trading enterprises and developing countries: some issues in the context of the WTO negotiations.* FAO Papers on selected issues relating to the WTO Negotiations on Agriculture. Commodities and Trade Division. Rome.

**Hoekman, B. & Kostecki M.** 2001. *The political economy of the world trading system: the WTO and beyond.* Oxford 2nd edition.

**Jackson, J.H.** 1969. *World trade and the law of GATT (a legal analysis of the General Agreement on Tariffs and Trade).* Bobbs-Merrill Co. Indianapolis.

**Roberts, M.T.** 2001. *The unique role of State Trading Enterprises in world agricultural trade: sifting through rhetoric.* Drake Journal of Agricultural Law, 6(287).

**Smith, V.H.** 2006. *Regulating State Trading Enterprises in the GATT: an urgent need for change? Evidence from the 2003-2004 US -Canada Dispute.* Agricultural Marketing Policy Paper No. 12. Agricultural Policy Center. Montana.



#### 4.

### INTERPRETIVE ISSUES IN ARTICLE 27(3)(b) OF THE TRIPS AGREEMENT

#### *Contents*

I.	INTRODUCTION	109
II.	THE NEGOTIATING HISTORY	112
III.	KEY INTERPRETIVE ISSUES	124
3.1	"Plants"	124
3.2	"Other than micro-organisms"	126
3.3	"Essentially biological", "non-biological" and "micro-biological"	129
3.4	The scope and form of <i>sui generis</i> protection	131
3.5	The "effectiveness" condition and the scope of <i>sui generis</i> systems	132
IV.	METHODS OF PLANT VARIETIES PROTECTION	137
4.1	Plant varieties protection through patents	138
4.2	Plant varieties protection through <i>sui generis</i> systems	142
4.2.1	The UPOV system as a <i>sui generis</i> system	144
4.2.3	National Treatment in the UPOV Acts and the TRIPS Agreement	154
4.3	PVP through a combination of patents and <i>sui generis</i> systems	156
V.	IMPLEMENTATION	157
5.1	Obligations created by article 27(3)(b)	158
5.2	The mechanics of implementation	159
5.3	General obligations of particular relevance to implementation	160
5.3.1	The issue of transition periods	160
5.3.2	Complying with the non-discrimination requirement	162
5.3.3	Complying with the notification procedures	163
VI.	SUMMARY AND CONCLUDING THOUGHTS	163
	MAIN REFERENCES	165



## I. INTRODUCTION

The primary objective of the TRIPs Agreement is the removal of any trade-restrictive domestic intellectual property measures. Such measures could be laws, regulations, policy positions or their manifest implementation through administrative action.<sup>1</sup> Article 6(2) of the Dispute Settlement Understanding states that any complaining party should "identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly." In WTO law, a "measure" usually refers to some type of governmental action, although the Appellate Body has held that certain private actions could be attributable to governments. In the *Japan – Agricultural Products II* case, the Appellate Body interpreted the term 'measure' (in relation to Annex B of the SPS Agreement) by listing examples of 'measures' to include "laws, decrees and ordinances". In its preambular language, the TRIPS Agreement calls on all WTO members to provide "effective and adequate" intellectual property rights (IPRs),<sup>2</sup> and to ensure that these IPRs do not amount to trade restrictions in and of themselves.<sup>3</sup> Article 27(1) in particular compels WTO members to create domestic legal frameworks that allow for patent protection of inventions from all fields of technology as long as they meet the basic substantive conditions for patentability: that is, the inventions must be novel, involve an inventive step and be capable of industrial application.<sup>4</sup> These three criteria are not defined in the TRIPS Agreement, and thus their precise meaning is left to each WTO member.

Articles 3 and 4 of the TRIPS Agreement require WTO members not to employ discriminatory measures against IPRs-holders based on their country of origin, on the field of technology of the invention or on whether the resulting products are local or foreign. Non-discrimination, that is national treatment and MFN treatment, is not unique to the TRIPS Agreement, but rather is one of the very central pillars of the international trading system. The interpretation of when a measure flouts the non-discrimination rule in

---

<sup>1</sup> See *Japan – Measures Affecting Agricultural Products*, WT/DS76/AB/R (1999), at paras 126–129.

<sup>2</sup> See Charnovitz, S. 2002. The boundaries of the WTO: triangulating the World Trade Organization. *American Journal of International Law* 96: 28, 29; and see, Trachtman, J.P. 2002. The boundaries of the WTO: institutional linkage: transcending "Trade and ..." *American Journal of International Law* 96: 77 and 78.

<sup>3</sup> See *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products*. WTO Document WT/DS50/R (September 1997), para. 57.

<sup>4</sup> According to Watal, no effort was even made to arrive at a definition or harmonization during the Uruguay Round negotiations. Watal, J. 2001. *Intellectual property in developing countries*, p. 90. Kluwer Law International (hereafter Watal (2001)).

WTO law is anything but easy. It is an issue that panels and the Appellate Body have struggled with despite the long history of the provision and its importance particularly in the area of trade in goods. Regarding IPRs, it has also been the subject of panel decisions. In the *Canada–Pharmaceutical Patents* case,<sup>5</sup> the panel was emphatic that "discrimination" in article 27(1) is a negative term whose meaning goes beyond simple "differentiation" between national and foreign IPRs protection or their beneficiaries. The message that the panel was putting across was therefore that a WTO member that wishes to use a discriminatory or IPRs "differentiation" measure, can do so as long as there is a legitimate regulatory reason. Put simply, the panel wanted to be clear that regulatory policy space is not constrained by the requirement for non-discriminatory policies. The impact of WTO agreements on domestic regulatory policy space has long been a concern for developing countries. Recently however, it has been raised more emphatically, and is increasingly linked to the concept of special and differential treatment.<sup>6</sup>

Beyond the bold call for patent protection in article 27(1) of the TRIPS Agreement, some exceptions exercisable at the option of WTO members, are provided. Article 27(2) excludes "inventions, the commercial exploitation of which might be contrary to *ordre public* or morality."<sup>7</sup> Article 27(3)(a) excludes "diagnostic, therapeutic and surgical methods for the treatment of humans or animals"<sup>8</sup> while article 27(3)(b) excludes plants and animals but with many significant qualifications and exclusions, which shall be subsequently discussed. It leaves it up to the individual WTO members to decide which of the options to exercise. Should they choose, they may exclude all or some of the identified materials from protection. This 'option flexibility' was included in the TRIPS Agreement in recognition of the differences in domestic legal systems regarding what is or is not excluded

---

<sup>5</sup> See *Canada – Patent Protection of Pharmaceutical Products*, Complaint by the European Communities (WTO Doc. WT/DS/114).

<sup>6</sup> See Corrales-Leal, W. et al. 2003. *Spaces for development policies: re-visiting special and differential treatment*. ICTSD (available at [www.ictsd.org](http://www.ictsd.org)).

<sup>7</sup> The TRIPS Agreement does not define the term *ordre public*. See Arckermann, T.G. Disorderly loopholes: TRIPS patent protection, GATT and the ECJ. *Texas International Law Journal* 32: 489 and 495 (stating that *ordre public* originated in French law and is related to the concept of public policy). See also, Otieno-Odek, J. 1995. Public domain in patentability after the Uruguay Round: a developing country's perspective with specific reference to Kenya. *Tulsa Journal of International and Comparative Law* 4(15): 28 (in which the author refers to the imprecise nature of *ordre public*).

<sup>8</sup> For a discussion on the patenting of medical procedures such as surgery techniques see, Judge, L.R. 1997. Issues surrounding the patenting of medical procedures. *Santa Clara Computer and High Technology Law Journal* 13:181, 203 (1997).

from protection. United States patent law for example grants protection to "whoever invents or discovers any new and useful process, machine, manufacture, or composition of nature, or any new and useful improvement thereof."<sup>9</sup> This broad scope may be contrasted with that found in Europe.<sup>10</sup> Articles 52 and 53 of the *European Patent Convention* expressly exclude from protection any "discoveries, methods of human treatment, inventions the exploitation of which would be contrary to morality, and plant and animal varieties."

By way of article 27(3)(b), most developing countries committed themselves to an entirely novel set of IPR obligations because the vast majority of them did not provide for a system of plant varieties protection prior to the coming into force of the WTO Agreement.<sup>11</sup> As evident from the incorporation of a review sub-clause in article 27(3)(b), they anticipated the challenges ahead particularly because of the absolute "shall" requirement in the provision as well as the relatively short implementation periods required. It was foreseeable first, that in their haste to comply, on the pain of trade sanctions, developing-country WTO members that did not have such an IPRs system may have been compelled to adopt systems of protection that were against their prospects and priorities in enhancing agricultural productivity, food security and other national policy interests.<sup>12</sup> Secondly, given the key players that had been involved in the negotiations and the underlying business interests, it was not difficult to imagine a situation where developing countries in particular would be under pressure to borrow or be compelled to follow legislative models from their more developed trading partners, or ratchet up the level of protection afforded beyond that required in the

---

<sup>9</sup> See 35 USC § 101.

<sup>10</sup> See Van Overwalle, G. 1999. Patent protection for plants: a comparison of American and European approaches. *Journal of Law and Technology* 39: 143–194.

<sup>11</sup> Llewelyn, M. 2003. Which rules in world trade law – patents or plant variety protection? In Cottier and Mavroidis, eds. *Intellectual property: trade competition and sustainable development*, at p. 306. The World Trade Forum Vol. III. University of Michigan Press (hereafter, Cottier and Mavroidis, (2003)) (noting in contrast also that for developed countries, the TRIPs provision was simply "a restatement of existing intellectual property practice").

<sup>12</sup> See UNCTAD. 1996. *The TRIPs Agreement and developing countries*. Document No. 25, U.N. Doc. UNCTAD/ITE/1 (stating that developed countries were the main beneficiaries of the disciplines in the TRIPs Agreement); Hamilton, MA. 1996. The TRIPs Agreement: imperialistic, outdated, and overprotective. *Vanderbilt Journal of Transnational Law* 29: 613, 614–20 (in which developing countries liken the TRIPs Agreement to imperialism).



TRIPS Agreement.<sup>13</sup> Now, with the wisdom of a decade's experience in implementing TRIPs, all of these concerns have indeed come to pass.

This chapter concentrates its analytical focus on article 27(3)(b) of the TRIPS Agreement, and in particular, the precise dimensions of the obligations which that provision creates when it clarifies that only plant varieties, as a category of protectable material, cannot be excluded from protection. Although a lot has been written about the scope, interpretation and options in the implementation of article 27(3)(b),<sup>14</sup> somehow tremendous confusion still remains, particularly among developing countries, regarding the precise nature of obligations created by that provision. Further, the nature of the exceptions, and the implementation and interpretive flexibilities that they give rise to have not been fully brought home to developing countries. To date, much of the discussion is cast in absolutes, which does not allow developing country policy makers to actually come to terms with what flexibilities they have, as a result of the language in that provision. This chapter attempts to fill this gap.

## II. THE NEGOTIATING HISTORY OF ARTICLE 27(3)(b)

It is unclear when exactly the issue of plant varieties protection entered into discussions during the Uruguay Round. Granted, developed countries (but most particularly the United States) wanted the negotiations to comprehensively address all aspects of intellectual property rights. Implicitly, at least according to the United States, plant varieties protection was therefore on the agenda from the beginning. The European Community was also supportive of a broad scope for IPRs coverage saying that "the goals of the [Uruguay Round Negotiating Group on Trade-Related Aspects of Intellectual Property Rights Including Counterfeit Goods] should apply to all intellectual property rights, in particular patents, trademarks, industrial designs, indications of source and appellations of origin, *plant varieties*, copyright and neighbouring rights as well as new forms of intellectual

---

<sup>13</sup> See for example, Stewart, T. 1993. *GATT Uruguay Round: a negotiating history*, p. 573. Aspen. Publishing. (quoting remarks of the representative of the Dominican Republic upon the conclusion of the TRIPS Agreement who was urging "other developing countries to resist bilateral pressure to increase the scope of protection of industrial property rights beyond their TRIPs obligations voluntarily but to use further advances as bargaining chips to extract concessions from developed countries.")

<sup>14</sup> Cottier and Mavroidis, (2003); Leskien, D. and Flitner, M. 1997. *Intellectual property rights and plant genetic resources: options for a sui generis system*. IPGRI Issues in Genetic Resources No. 6. International Plant Genetic Resources Institute. Rome (hereafter Leskien and Flitner (1997)).

property."<sup>15</sup> The US had also suggested that "annexes to a GATT agreement should include standards for the protection of *all forms of intellectual property rights*."<sup>16</sup> It is also noted that "some participants" in the TRIPS and counterfeit goods negotiating group had suggested that "the group should adopt the working hypothesis of a *broad coverage* of rights."<sup>17</sup> These "participants" included Japan<sup>18</sup> and Canada.<sup>19</sup> As stated previously, the US and Europe, unlike much of the developing world, had had robust and long-running domestic debates on the need for, and implications of such a system, and therefore had the benefit of clear negotiating priorities; and in the case of the United States, strong support from the private lobby.<sup>20</sup>

Given the 'single-comprehensive-package' on IPRs approach insisted upon by the major players in the Uruguay Round negotiations, it is not possible to highlight the negotiating history of article 27(3)(b) completely de-linked from the rest of the TRIPS Agreement. The genesis of the TRIPS Agreement as a whole has been extensively addressed elsewhere in relevant literature.<sup>21</sup> It is therefore unnecessary to go into the finer details, save to mention that initial motivation for an international agreement on trade related IPRs has been traced to the issue of trade in counterfeit goods in the waning years of the Tokyo Round.<sup>22</sup> During the Tokyo Round negotiations, this had emerged as

---

<sup>15</sup> Submission by the European Communities to the Negotiating Group on Trade Related Aspects of Intellectual Property Rights Including Counterfeit Goods, p. 2. GATT Doc. MTN/GNG/NG11/W/16 (emphasis added).

<sup>16</sup> Submission by the United States to the Negotiating Group on Trade Related Aspects of Intellectual Property Rights, Including Counterfeit Goods, p. 5. GATT Doc. MTN/GNG/NG11/W/14 (emphasis added).

<sup>17</sup> GATT Secretariat, *Negotiating Group on Trade-Related Aspects of Intellectual Property Rights Including Counterfeit Goods: Compilation of Written Submissions and Oral Statements*, p. 26. GATT Document MTN.GNG/NG11/W/12/Rev.1, 5 February 1988 (emphasis added).

<sup>18</sup> Submission by Japan to the Negotiating Group on Trade Related Aspects of Intellectual Property Rights, Including Counterfeit Goods. GATT Doc. MTN/GNG/NG11/W/17.

<sup>19</sup> Submission by Canada, GATT Document MTN/GNG/NG11/W/42.

<sup>20</sup> See generally, Dutfield, G. 2003. *Intellectual property rights and the life science industry: a twentieth century history*. Ashgate; and Fowler, C. 2000. The Plant Patent Act of 1930: a sociological history of its creation. *Journal of the Patent and Trademark Office Society* 82: 621, 636.

<sup>21</sup> See, Gervais, D. 2003. *The TRIPS Agreement, drafting history and analysis*. Sweet and Maxwell, second edition. London; and Drahos, P. 2002. Developing countries and international intellectual property standard-setting. *Journal of World Intellectual Property* 5: 765, 769 and 770 (which debunks the myth that TRIPs was a negotiation between equal trading partners).

<sup>22</sup> See Agreement on Measures to Discourage the Importation of Counterfeit Goods, GATT Doc. L/4817, 31 July 1979. See Matthews, D. 2002. *Globalising intellectual property rights: the TRIPs Agreement*, p. 8 and 9. Routledge (hereafter Matthews, D. (2002)).

a serious obstacle to trade.<sup>23</sup> Although no agreement was reached on the formulation of rules, Matthews notes that the United States and the European Union continued their efforts which eventually yielded a draft agreement aimed at discouraging the importation of counterfeit goods.<sup>24</sup> The draft agreement did not receive support from other GATT contracting parties. Yet, as Matthews further notes: "it was this absence of an international consensus to support the draft that paradoxically provided the stimulus for US businesses to overcome the perceived lack of evidence of infringements, and which galvanised corporate interests to support the common aim of getting intellectual property protection on the agenda for the subsequent Uruguay Round of GATT negotiations."<sup>25</sup>

At the 1982 GATT ministerial meeting to address issues that had been left outstanding from the Tokyo Round,<sup>26</sup> developing countries led by India and Brazil opposed the United States proposal for further negotiations particularly on the issue of trade in counterfeit goods.<sup>27</sup> Developing countries contended that the World Intellectual Property Organization (WIPO) was the right place for intellectual property issues.<sup>28</sup> Upon the conclusion of the conference, the agreed text of the Ministerial Declaration however requested the GATT Director General to hold consultations with the WIPO leadership on the issue of counterfeit goods. The consultations continued until 1984, when even with the formation of an expert group within the GATT on the issue, it became clear that developing countries were too strongly opposed for it to gain approval.<sup>29</sup> Subsequent attempts at WIPO, a forum in which developing countries were numerically strong, were also shot down. In frustration, the US business sector, resorted to exerting pressure on the US government to in turn use its clout in bilateral negotiations to improve IPRs protection.

---

<sup>23</sup> For an extensive analysis of the entire issue of trade in counterfeit good, see Sodipo, B. 1997. *Piracy and Counterfeiting: GATT TRIPs and Developing Countries*. Kluwer.

<sup>24</sup> Matthews (2002), p. 9.

<sup>25</sup> Id.

<sup>26</sup> For an excellent account of the circumstances leading to the 1982 GATT Ministerial and the outstanding issues from the Tokyo Round see, Croome, J. 1995. *Reshaping the world trading system: a history of the Uruguay Round*, pp. 5–27. World Trade Organization. Washington DC (hereafter Croome, J. (1995)).

<sup>27</sup> Croome (1995), p. 16.

<sup>28</sup> Stewart, T.P. ed. 1993. *The GATT Uruguay Round: a negotiating history (1986–1992)*, p. 2261. Kluwer Law and Taxation; and Adede, A. 2003. Origins and history of the TRIPs negotiations. In C Bellmann, G Dutfield, and R Melendez-Ortiz, eds. *Trading in knowledge: development perspectives on TRIPs, trade and sustainability*, p. 24. Earthscan Publications (hereafter Bellman, Dutfield and Mendelez-Ortiz (2003)).

<sup>29</sup> Bellman, Dutfield and Mendelez-Ortiz (2003), p. 24.

Also during this period, the GATT dispute *United States – Imports of Certain Automotive Spring Assemblies*<sup>30</sup>, linked to patents and a general exclusion order of patent-infringing products, served to increase the profile of the issue of IPRs. This was the first time a specific case of patent infringement involving GATT, article XX(d) had been brought before the GATT. GATT, article XX(d) provides that:

"Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures ... (d) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to ... the protection of patents, trade marks and copyrights, and the prevention of deceptive practices."

In this case, the United States International Trade Commission (ITC), because of a finding of patent infringement, had issued an order directing that imports of certain automotive spring assemblies from all foreign sources be excluded from entry and sale in the United States for a period of time.<sup>31</sup> Canada challenged the legality of the measure, arguing that the United States had not met the 'necessity' criteria in GATT, article XX(d). The panel found that the general exclusion was not in violation of GATT and therefore ruled in favour of the US. This dispute placed the whole question of IPRs on the discussion agenda. In one sense it worked in favour of the countries that were proposing the inclusion of disciplines on counterfeit goods in the GATT framework, and also widened the scope beyond counterfeit goods and into IPRs more broadly.<sup>32</sup>

In preparatory work for the Uruguay Round of negotiations, the GATT Council in 1985 asked the committee that was identifying issues for the

---

<sup>30</sup> *United States – Imports of Certain Automotive Spring Assemblies* (GATT Doc. L/5333 – 30S/107) (26 May 1983).

<sup>31</sup> The exclusion order followed a determination by the ITC that imports from and sales by a Canadian firm constituted a violation of section 337 of the *United States Tariff Act of 1930*.

<sup>32</sup> Croome (1995), p. 16.

negotiations to take into account the failed counterfeit goods initiative.<sup>33</sup> The United States proposed that instead of only focusing on counterfeit goods, all IPRs should be included in the negotiations, amidst opposition from developing countries who insisted that the GATT was an inappropriate forum for negotiations on IPRs.<sup>34</sup> Separate proposals were submitted on the issue to the Punta del Este ministerial meeting, including those by Brazil and Argentina, opposing the inclusion of IPRs on the agenda of negotiations.<sup>35</sup> The Swiss-Colombian proposal eventually carried the day at the Punta del Este ministerial.<sup>36</sup> Consequently, the *Punta del Este Ministerial Declaration* of 1986, which launched the Uruguay Round negotiations included trade-related aspects of intellectual property rights as a negotiating issue.<sup>37</sup> It stated, in the relevant part, as follows:

Trade-related aspects of intellectual property rights, including trade in counterfeit goods

"In order to reduce the distortions and impediments to international trade, and taking into account the need to promote effective and adequate protection of intellectual property rights, and to ensure that measures and procedures to enforce intellectual property rights do not themselves become barriers to legitimate trade, the negotiations shall aim to clarify GATT provisions and elaborate as appropriate new rules and disciplines.

Negotiations shall aim to develop a multilateral framework of principles, rules and disciplines dealing with international trade in counterfeit goods, taking into account work already undertaken in the GATT.

These negotiations shall be without prejudice to other complementary initiatives that may be taken in the World Intellectual Property Organization and elsewhere to deal with these matters."<sup>38</sup>

---

<sup>33</sup> Matthews (2002), p. 9.

<sup>34</sup> Id.

<sup>35</sup> Id.

<sup>36</sup> Croome (1995), p. 31.

<sup>37</sup> See *Ministerial Declaration on the Uruguay Round*, pp. 7 and 8. GATT Doc. No. MIN.DEC (20 September 1986)

<sup>38</sup> Ministerial Declaration on the Uruguay Round. GATT Doc. MIN.DEC (20 September 1986), reprinted as an Annex in Croome (1995), pp. 382–392.

With the commencement of the Uruguay Round, GATT contracting parties submitted proposals on the issue of IPRs. The first proposals by several developed countries, including the United States and Japan, aimed at achieving a significantly broad patent coverage for plants and living organisms.<sup>39</sup> In a compilation of written submissions and oral statements prepared by the GATT Secretariat in 1987 for the Negotiating Group on Trade-Related Aspects of Intellectual Property Rights Including Counterfeit Goods, it is reported that some participants expressed concern about the "lack of patent or other protection in many countries for biotechnological inventions [and that] in this connection, reference has been made to the absence of protection for plant breeders' rights in some countries or differences in the systems of law under which they are protected (specific legislation or patent law)."<sup>40</sup> Hence, the primary objective for the *demandeurs* in the negotiating group at this very early stage in the Uruguay Round seems to have been the need for enhanced breeders' rights, and the need to fill in the gaps in domestic law to enable stronger protection for biotechnological inventions. On the whole, developing countries were unsympathetic to the broad coverage approach taken in the negotiations. They insisted that the role of the Negotiating Group should be circumscribed and that its work "must not interfere with, or intrude upon, the work of WIPO and all other relevant organizations on all aspects of intellectual property rights."<sup>41</sup> In addition, they insisted on a narrower reading of the mandate for the group stating that a set of multilateral principles or agreement was envisaged only with respect to trade in counterfeit goods. Referring to the negotiating objectives of the group, as stated in the Punta del Este ministerial document, they:

"... also emphasized the distinction between the first and second paragraphs of the negotiating objective. Only the second paragraph, concerning international trade in counterfeit goods, spoke of a multilateral framework of principles, rules and disciplines. The objective in this paragraph was qualitatively

---

<sup>39</sup> Stewart, T.P. 1993. *The GATT Uruguay Round: a negotiating history (1986–1992)*, p. 2294. Kluwer Law and Taxation.

<sup>40</sup> GATT Secretariat, Negotiating Group on Trade-Related Aspects of Intellectual Property Rights Including Counterfeit Goods: Compilation of Written Submissions and Oral Statements, p. 10. GATT Doc. MTN.GNG/NG11/W/12, 11 August 1987; and also MTN.GNG/NG11/W/12/Rev.1, p. 11, 5 February 1988, (emphasis added).

<sup>41</sup> GATT Secretariat, Negotiating Group on Trade Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods: Meeting of the Negotiating Group of 5–8 July, p. 14. GATT Doc. MTN/GNG/NG11/8, 29 August 1988.

different from that in the first paragraph and this underlined the need for these two specific aspects of the group's work to be kept separate. The primary purpose of the first paragraph was to clarify existing GATT provisions and it had to be approached from this angle. The purpose of the GATT provisions as they related to intellectual property was not to protect intellectual property or to enforce intellectual property rights but to ensure that action avowedly taken for these purposes did not in reality distort or impede international trade by constituting a disguised restriction on trade or a means of discrimination. It also had to be borne in mind that there was an underlying conflict between the protection of intellectual property, which involved the restriction of trade, and the basic objective of the General Agreement which was to liberalize trade. For these reasons, the group should consider trade distortions or impediments arising from excessive or discriminatory enforcement of intellectual property rights, but it was not its function to consider whether the rights granted were themselves sufficient; this was a matter for national governments."<sup>42</sup>

A proposal by Thailand, perhaps more than any other at this early stage by a developing country, was most forceful in its articulation of the narrow scope of the mandate of the Negotiating Group. The Thailand representative stated in oral remarks that "The motives and objectives of some contracting parties in proposing wider coverage including the establishment of international norms and standards of intellectual property protection went beyond the intent and spirit of the Ministerial Declaration at Punta del Este" and further that "As GATT dealt with the liberalisation of international trade in goods as they crossed national boundaries, the scope of negotiations should be confined to issues related to enforcement of IPRs at the border."<sup>43</sup> Thailand's position has since changed, however.

An early proposal by the European Community on guidelines and objectives for the Negotiating Group<sup>44</sup> was extensively discussed in the meeting of the

---

<sup>42</sup> Ibid, pp. 13 and 14.

<sup>43</sup> GATT Secretariat, Negotiating Group on Trade Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods: Meeting of the Negotiating Group of 12–14 September 1988, p. 8. GATT Doc. MTN/GNG/NG11/9, 13 October 1988. See also Submission by Thailand, GATT Doc. MTN/GNG/NG11/27.

<sup>44</sup> Submission by the European Communities, GATT Doc. MTN/GNG/NG11/W/26.

Negotiating Group on 5–8 July 1988. During this meeting, discussions focused on among other issues, the question of what constituted patentable subject matter. In its proposal, the EC had included plant and animal varieties as exceptions to the general rule on patentability, much as it is in the European Patent Convention and as it turned out to be later on in the early drafts of the TRIPS Agreement.<sup>45</sup> The proposal by Japan had also excluded "plants and general biotechnology issues"<sup>46</sup> from patentability with inspiration being drawn from relevant Japanese law.<sup>47</sup> In Japan at the time, plant varieties were protected by a special type of right under the "Law on Seeds and Seedlings" established in accordance with the UPOV Convention.<sup>48</sup> This 'exclusion approach' adopted by the major players in the negotiations was not without controversy. It is reported that one participant "believed that the exclusion of plant or animal varieties and of essentially biological processes was inappropriate, and another participant asked the reasons for these exclusions."<sup>49</sup> Switzerland argued differently, emphasizing that "no field of technology should be excluded *per se* from patentability, what determined whether a subject matter is patentable was its technical character."<sup>50</sup> However, Switzerland did acknowledge "the possibility that special correctives or demarcations might be necessary in specific areas [and an] example was *plant varieties*."<sup>51</sup> Intense discussions followed on the whole question of patentability of plants and plant varieties. The record notes:

"A participant was concerned about proposals for the exclusion of potentially valuable areas such as plant and animal varieties, as had been suggested in the Community's submission. Experience in his country had shown that the granting of patents to plants

---

<sup>45</sup> Submission by the European Communities, GATT Doc. MTN/GNG/NG11/W/26, section III.D.a(i).

<sup>46</sup> GATT Secretariat, Negotiating Group on Trade Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods: Meeting of the Negotiating Group of 12–14 September 1988, p. 5. GATT Doc. MTN/GNG/NG11/9, 13 October 1988.

<sup>47</sup> GATT Secretariat, Negotiating Group on Trade Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods: Meeting of the Negotiating Group of 30 October–2 November 1989, p. 15. GATT Doc. MTN/GNG/NG11/16, 4 December 1989.

<sup>48</sup> *Id.*

<sup>49</sup> GATT Secretariat, Negotiating Group on Trade Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods: Meeting of the Negotiating Group of 5–8 July. GATT Doc. MTN/GNG/NG11/8, 29 August 1988.

<sup>50</sup> GATT Secretariat, Negotiating Group on Trade Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods: Meeting of the Negotiating Group of 12–14 July 1989, GATT Doc. MTN/GNG/NG11/14, 12 September 1989, p. 24.

<sup>51</sup> *Id.*, p. 24.



and more recently to animal varieties had spurred a virtual explosion in research in these areas on account of the provision of appropriate incentives. It was asked of the Nordic and European Community submissions if the exclusion of plant varieties meant that the only form of protection for them would be that provided for in the UPOV Convention. The representative of Norway said that the Nordic proposal on this matter was drawn from the *Strasbourg Convention* and article 53 of the *European Patent Convention*. Responding to another question, the representative of Norway confirmed that the exception proposed in the Nordic paper for human beings was covered by that relating to animal varieties; it was considered necessary to specify it separately in order to avoid any possible doubts of interpretation that could arise."<sup>52</sup>

Developing countries were strongly opposed to patent protection over plants and plant varieties.<sup>53</sup> They viewed it as an issue that would unfairly prejudice their agricultural potential. The proposal by Peru, drawing from experience with the implementation of the relevant Andean Legislation, emphasized that the "protection of IPRs had mainly served the interests of transnational corporations and had had undesirable effects on developing countries."<sup>54</sup> In discussions of the Peruvian proposal, it was stated that:

"... biotechnological developments did not meet the requirements of patentability; the isolation of a gene of an animal species or plant variety was not an invention but a discovery of a pre-existing phenomenon. He was concerned that the protection of biotechnological developments could generate a conflict of interest within companies which at the same time produced for example pesticides and discovered plant varieties resistant to those pesticides. The patenting of biotechnological inventions could help such companies to maintain a dominant position and make more difficult the exchange of species between developed and developing countries."<sup>55</sup>

---

<sup>52</sup> Id, p. 24, para. 79.7.

<sup>53</sup> See for example Submission by India, GATT Doc. MTN/GNG/NG11/W/39.

<sup>54</sup> Submission by Peru, GATT Doc. MTN/GNG/NG11/W/45.

<sup>55</sup> GATT Secretariat, Negotiating Group on Trade Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods: Meeting of the Negotiating Group of 30 October–2 November 1989, p. 24. GATT Doc. MTN/GNG/NG11/16, 4 December 1989.

Some developing countries also took the view that an express requirement for plant varieties protection would go beyond what was necessary in a TRIPS agreement in order to fulfil the group's mandate of encouraging the fullest possible participation in the results.<sup>56</sup> In discussions before the Mid-term Review of the negotiations, developing countries were still strongly opposed to the issue of plant varieties protection. The *Chairman's Report of the Work in the Negotiating Group*, including a "simplified draft composite text" of a possible agreement on TRIPS, was circulated in July 1990.<sup>57</sup> The document, in true GATT tradition, was submitted exclusively on the chairman's responsibility and did not commit any delegation. It had a number of other caveats that were reflective of the divisions among the participants. It was not presented as having been agreed by all participants or even by all those participants who associated themselves with it, because none of its contents was the subject of agreement; nor did it limit the scope for participants to raise points in the further negotiations. The Chair emphasized that the report was not being presented as a draft agreement, but simply as a compilation of the options for legal commitments under examination in the group and therefore as a basis for further negotiation. In a meeting in late 1990 discussing the language of what had by then materialized as a possible article 27 as found in the Chair's Report, a developing countries' representative is reported to have said:

"With respect to article 27, he said that no exclusive rights of importation should be granted. As regards, part II, section 5, patents, he reaffirmed the vital importance to developing countries of the possibility of exclusion of certain products and processes from patentability on grounds of public interest, health or nutrition as provided in article 28. The reference to plant variety rights in paragraph 4A of that article was inappropriate and out of place, since plant variety rights were a distinct *sui generis* category of rights regulated by a separate convention. They bore no relationship to patents and should therefore be removed from the relevant section."<sup>58</sup>

---

<sup>56</sup> GATT Secretariat, Negotiating Group on Trade Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods: Meeting of the Negotiating Group of 2-5 April 1990, p. 11. GATT Doc. MTN/GNG/NG11/20, 24 April 1990.

<sup>57</sup> Status of Work in the Negotiating Group: Report of the Chairman to the GNG. GATT Doc. MTN/GNG/NG11/W/71.

<sup>58</sup> GATT Secretariat, Negotiating Group on Trade Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods: Meeting of the Negotiating Group of 1 November 1990, p. 3. GATT Doc. MTN/GNG/NG11/27, 14 November 1990.

Despite all the discussions and attempts at consensus, the *Brussels Draft Text* of December 1990 reflected significant differences amongst GATT contracting parties regarding the issue. It was heavily bracketed and stated in part that parties could exclude from patentability:

"[b) A. Animal varieties [and other animal inventions] and essentially biological processes for the production of animals, other microbiological processes or the products thereof. PARTIES shall provide for the protection of plant varieties either by patents or by effective sui generis system or by a combination thereof. This provision shall be reviewed [...] years after the entry into force of this Agreement.]  
[b) B. Plants and animals, including micro-organisms, and parts thereof and processes for their production. As regards biotechnological inventions, further limitations should be allowed under national law.]"

The *Dunkel Draft Text*, 20 December 1991, provided as follows:

"27.3. Parties may also exclude from patentability:  
(a) diagnostic, therapeutic and surgical methods for the treatment of humans or animals;  
(b) plants and animals other than micro-organisms, and essentially biological processes for the production of plants or animals other than non-biological and microbiological processes. However, parties shall provide for the protection of plant varieties either by patents or by an effective sui generis system or by any combination thereof. This provision shall be reviewed four years after the entry into force of this Agreement."

There were serious misgivings on the language regarding plant varieties in the *Dunkel Draft*. Indian negotiators, themselves under intense pressure from the farming community in India were strongly opposed to the language in the draft.<sup>59</sup> They expressed concerns that farmers would be forced to pay royalties to monopolistic multinational seed companies.<sup>60</sup> Indian farmers are reported to have ransacked the offices of one such company in India and termed "unreasonable" any payment of royalties, for example on varieties that had

---

<sup>59</sup> Stewart, T.P. 1993. *The GATT Uruguay Round: a negotiating history volume II*, p. 531. Kluwer Law and Taxation.

<sup>60</sup> Id.

taken them years to adapt and perfect to their climatic and soil conditions.<sup>61</sup> India finally agreed to support the draft text with its requirement for compulsory plant varieties protection because of the ten-year implementation period, and the option for a *sui generis* form of protection.<sup>62</sup>

The *Uruguay Round Final Act* of 15 April 1994 stated as follows:

"27.3. Members may also exclude from patentability:

- (a) diagnostic, therapeutic and surgical methods for the treatment of humans or animals;
- (b) plants and animals other than micro-organisms, and essentially biological processes for the production of plants or animals other than non-biological and microbiological processes. However, members shall provide for the protection of plant varieties either by patents or by an effective *sui generis* system or by any combination thereof. The provisions of this subparagraph shall be reviewed four years after the date of entry into force of the WTO Agreement."

Hence, the provision on plant variety protection was strenuously opposed by developing countries, but survived in the *Final Act* virtually unchanged.<sup>63</sup> The country that had the most leverage to influence a change in the three years between the Dunkel Draft and the Final Act - India - balked at the chance, upon agreement that there would be a ten-year transition period, and the relatively flexible *sui generis* language. Whether this move was ill-advised given the tremendous pressure that India has come under in its implementation is an open question. On April 4, 2005, the President of India signed into law the *Patents (Amendment) Act*, 2005<sup>64</sup> which in substance negates India's opposition, and brings it into compliance with the TRIPS Agreement, including the plant patents provisions.<sup>65</sup>

---

<sup>61</sup> Id.

<sup>62</sup> Ibid, p. 532.

<sup>63</sup> Ibid, p. 572.

<sup>64</sup> *Patents (Amendment) Act*, No. 15 of 2005.

<sup>65</sup> Shiva, V. 2005. *The Indian Seed and Patent Acts: sowing the seeds of dictatorship* (available at grain.org).

### III. SOME KEY INTERPRETIVE ISSUES RAISED IN ARTICLE 27(3)(b)

The questions that lawyers and negotiators have grappled with regarding article 27(3)(b) over the decade in which the TRIPS Agreement has been in force are many and varied. The most fundamental ones, in terms of legal analysis are: exactly what are the elements of this provision? What precise obligations do those elements invite? In other words, what possible interpretive options are discernible from the language of article 27(3)(b)? As stated, article 27(3)(b) allows WTO members to exclude from patentability:

"plants and animals other than micro-organisms, and essentially biological processes for the production of plants and animals other than non-biological and microbiological processes. However, members shall provide for the protection of plant varieties either by patents, or by effective *sui generis* systems, or by any combination thereof. The provisions of this subparagraph shall be reviewed four years after the date of entry into force of the WTO Agreement."

#### 3.1 "Plants"

Besides the unequivocal requirement to protect micro-organisms and plant varieties, the language of article 27(3)(b) is highly ambiguous, and theoretically open to as many interpretations as there are WTO members.

First, let us consider the interpretive difference between "plants" and "plant varieties" in article 27(3)(b). The provision distinguishes between "plants" which WTO members "may" exclude from patentability in general, in accordance with the first sentence of article 27(3)(b) and "plant varieties" for which a mandatory requirement for protection applies. Unfortunately, the TRIPS Agreement does not define either of the terms. "Plants" is fairly straightforward in the sense that it refers to anything that biologically belongs to the plant kingdom. "Plant varieties" on the other hand demands a more nuanced interpretation. Helpful guidance may be found in biological dictionaries;<sup>66</sup> in article 23(4)(b) of the European Patent Convention.

---

<sup>66</sup> See for example, E. Lawrence, ed. 2000. *Henderson's dictionary of biological terms* 507, pp. 204, 507 and 578. J. Wiley & Sons, 12<sup>th</sup> edition. New York.

'Plant variety' means any plant grouping within a single botanical taxon of the lowest known rank, which grouping, irrespective of whether the conditions for the grant of a plant variety right are fully met, can be: (a) defined by the expression of the characteristics that results from a given genotype or combination of genotypes, (b) distinguished from any other plant grouping by the expression of at least one of the said characteristics, and (c) considered as a unit with regard to its suitability for being propagated unchanged. A species is defined as a group of interbreeding individuals not normally able to interbreed with other such groups and subdivided into subspecies, races and varieties. A race is a group of individuals within a species which forms a permanent and genetically distinguishable variety while a variety is a taxonomic group below the species level. Further, that varieties are variances or deviations from the mean".

Most importantly for present purposes, guidance can also be found in the 1991 UPOV Convention, which was drafted more or less during the final phase of the negotiations on the TRIPS Agreement. According to its article 1(vi), a "plant variety" means:

"a plant grouping within a single botanical taxon of the lowest known rank, which grouping, irrespective of whether the conditions for the grant of a breeder's right are fully met, can be defined by the expression of the characteristics resulting from a given genotype or combination of genotypes; distinguished from any other plant grouping by the expression of at least one of the said characteristics and; considered as a unit with regard to its suitability for being propagated unchanged."

The essence of this definition may be narrowed down to the description of a plant variety as a "grouping" of plants with certain consistent differentiating characteristics when reproduced either by seeds, sexually or by asexual means, for example through cuttings, layering and grafting.<sup>67</sup> The ICTSD - UNCTAD Resource Book on TRIPS gives the easily accessible explanation of a plant variety as being the "technical modification of a naturally existing plant" and

---

<sup>67</sup> See UNCTAD-ICTSD *TRIPS Resource Book*, p. 50.

further that "plant varieties" differ from "plants" in the sense that the former have undergone some technical intervention ... whereas plants have not."<sup>68</sup>

This definition is significant because it has a direct impact on the scope of obligations that WTO members have to implement. Considering the use of "may" in the first line of article 27(3)(b), meaning that there is a choice whether or not to make plants and animals patentable, it is only proper for members to understand the dimensions of their flexibility. Second, what does or does not constitute a plant variety is all the more important in determining what to protect. If a member defines plant varieties too narrowly, and imposes a measure on another trading partner, or in some way infringes on the concessions of another, the definition would form a central point of contention in a dispute.

### 3.2 "Other than micro-organisms"

Article 27(3)(b) states that WTO members can exclude from patentability "plants and animals *other than micro-organisms*". This means that although WTO members have the option of excluding plants and animals from patentability, an option they are free to exercise if they choose as indicated from the operative "may," micro-organisms must be protected through patents. Again, unlike the requirement to protect plant varieties in which patents are just one of three options, the provision requires micro-organisms to be protected by patents.

But what exactly are "micro-organisms" in the context of article 27(3)(b)? As it has become the practice in the WTO Appellate Body's interpretive approach where the ordinary meaning of a term is to be considered first, let us examine the possibilities of what the term "micro-organism" would mean. According to the Concise Oxford Dictionary, a "micro-organism" is one that cannot be visualized without the use of a microscope or some form of magnification. Hence, "micro-organism" as a term has no taxonomic meaning but is rather a reference to the size of the 'organism'. Such organisms would include the taxonomical groupings of bacteria, fungi, algae, protozoa and viruses. The definition has however elicited controversy, mainly hinging on the fact that as in most other definitions, there is no real consensus on what micro-organisms would mean to a diverse body of membership such as the WTO.

---

<sup>68</sup> Id.

According to Watal, the various definitions diverge at the point where some view "micro-organism" as any microscopic or ultramicroscopic organism while others limit the definition exclusively to unicellular organisms.<sup>69</sup> Simply saying, as the ordinary meaning suggests, that they are organisms that are not visualized unaided by magnification is indiscrete, and therefore open to unlimited inclusions, which is a potentially serious problem with the pace of advances in molecular science. Such a definition may for instance include genes, which are also not visible to an unaided eye, and which are of significance in agriculture and are already subject to patentability in some jurisdictions. If the practice at the European Patent Office is anything to go by, the EC as a WTO member would conceivably take the view that the term "micro-organism" could include multi-cellular material for example plants, animals, plasmids and even viruses.<sup>70</sup>

The "scientific definition", for example in biological dictionaries,<sup>71</sup> which limits micro-organisms to those belonging to the five taxonomic classes mentioned earlier has been preferred by some developing-country commentators such as Correa<sup>72</sup> and Mangeni<sup>73</sup> for its narrowness. However, this position may not necessarily serve the purposes of diplomatic negotiations. The objective should not simply be to take as narrow a definition as possible – although it would probably be the best way of ensuring that unintended ground is not covered, hence broadening obligations. Rather, the objective should be a careful evaluation of the potential scientific, agricultural or medical limitations that may arise as a result of certain microscopic life being included within the definition, an analysis that would be best informed by science policy.

In interpretation of the possible meaning of "micro-organism" it is also worth remembering that the language of the provision is drawn largely from article 53(b) of the European Patent Convention, and as Watal has suggested, it is inevitable to take into account current practice in the

---

<sup>69</sup> Watal (2001), p. 132.

<sup>70</sup> See Case T. 356/93, *Plant cells/Plant Genetic Systems*, 1995 O.J. E.P.O. 545, para. 29 (1995).

<sup>71</sup> See for example, Coombs, J. 1986. *Macmillan dictionary of biotechnology*, p. 198. London.

<sup>72</sup> See Correa, C. 1994. *Sovereign and property rights over plant genetic resources*, p. 14. FAO Commission on Plant Genetic Resources: First Extraordinary Session. Background Study Paper No. 2. Rome.

<sup>73</sup> See Mangeni, F. 2000. *Technical issues relating to sui generis protection of plant varieties*. South Centre Occasional Paper No. 11. South Centre, Geneva. at para. 24 (hereafter Mangeni, F. (2000)).



countries that are party to that convention.<sup>74</sup> Having said that however, as there is no definition of the term in the TRIPS Agreement, the presumption would be that WTO members have flexibility in formulating their own definitions for purposes of implementation, as long as those definitions could be defended against the rest of WTO membership.<sup>75</sup> This is where a careful evaluation of the potential scientific, agricultural or medical limitations of any definition being considered would be imperative.

Having considered the definition, and the possible impact on the scope of obligations that it would engender, let us now turn to the related question whether micro-organisms should be patentable.<sup>76</sup> The question whether or not to patent life-forms as they exist in nature, or at all, has its core in the ethical realm, which is beyond the scope of this chapter.<sup>77</sup> In its submission to the TRIPS Council, the United States has stated that a micro-organism should not be patented if it remains only as it exists in nature.<sup>78</sup> Article 53(b) of the European Patent Convention on the other hand, allows the patenting of micro-organisms as they exist in nature, as long as the discovery of their existence is novel to the public and includes a characterization of their structure.<sup>79</sup> Article 53(b) excludes the patenting of "plant and animal varieties" or "essentially biological processes" for their production, allowing only "micro-biological processes and the products thereof."

---

<sup>74</sup> Watal (2001), p. 132 (noting that the European Patent Office recognizes cells and parts thereof as micro-organisms).

<sup>75</sup> Id. (stating in addition that those definitions adopted should be "reasonable").

<sup>76</sup> For a more elaborate discussion of this question see Scalise, DG and Nugent, D. 1995. International intellectual property protections for living matter: biotechnology, multinational conventions and the exception for agriculture. *Case Western Reserve Journal of International Law* 27: 83, 114.

<sup>77</sup> See Koopman, J. 2002. The patentability of transgenic animals in the United States of America and the European Union: a proposal for harmonization. *Fordham Intellectual Property, Media and Entertainment Law Journal* 13: 103 (hereafter Koopman, J. (2002)). See also, Emmott, S. 2001. No patents on life: the incredible ten-year campaign against the Europe Patent Directive. In B. Toker, ed. *Redesigning life? The worldwide challenge to genetic engineering*, pp. 373–384. Zed Books. London and New York.

<sup>78</sup> See UNCTAD-ICTSD, *TRIPs Resource Book*, p. 53.

<sup>79</sup> See, the *European Directive on Biotechnological Inventions* which states at article 3(2) that "biological material which is isolated from its natural environment or processed by means of a technical process may be the subject of an invention even if it already occurred in nature."

### 3.3 "Essentially biological", "non-biological" and "micro-biological" processes

Article 27(3)(b) says that WTO members may exclude from patentability "... essentially biological processes for the production of plants and animals *other than* non-biological and microbiological processes ... ." This means that "biological processes" may be excluded but "non-biological processes" and "micro-biological processes" cannot. The key issue here turns on the difference between "essentially biological processes" and the other two processes. This differentiation is baffling to commentators.<sup>80</sup> According to Watal, "it is not clear how "micro-biological" processes differ from "essentially biological" ones."<sup>81</sup> As included in the Strasbourg Convention of 1963,<sup>82</sup> "essentially biological processes" referred "only to the normal, or traditional, breeding activities of plants and animals."<sup>83</sup> Such processes were not to be patented as they lacked the requisite technical character necessary for their protection. With scientific advances and human ability to influence even naturally occurring biological processes, the definition underwent some re-interpretation in Europe. Hence according to the European Patent Office, "whether a non-microbiological process is to be considered essentially biological depends on the extent of human intervention, the result achieved thereby, and the essence of the invention."<sup>84</sup> This means that "essentially biological processes" are only those that take place entirely without human intervention.<sup>85</sup>

In sum, the implications of the above distinctions is that certain "micro-biological" processes are patentable while those that fall in the category of "essentially biological processes" would not be patentable. "Non-biological" processes on the other hand are indicative of human involvement, that is, a process that would otherwise not take place without the input of human scientific capacity. Article 2 of the European Directive on Biotechnological Inventions<sup>86</sup> seems to lend credence to this view as it states that "essentially

---

<sup>80</sup> The UNCTAD-ICTSD *Resource Book on TRIPs*, p. 54.

<sup>81</sup> Watal (2001), p. 133.

<sup>82</sup> *Convention on the Unification of Certain Points of Substantive Law on Patents for Inventions*, 1963.

<sup>83</sup> See Koopman (2002), p. 152.

<sup>84</sup> See the *Hybrid plants/Lubrizol* case, Case T 320/87, 1990 O.J. E.P.O. 71 (TBA 1988) at para. V(6).

<sup>85</sup> See Koopman (2002), p. 152.

<sup>86</sup> *European Council Directive* 98/44, 1998 O.J. (L 213) 13. For an elaborate discussion on the directive and the prior draft, see Nott, R. 1995. The biotech directive: does Europe need a new draft? *European Intellectual Property Review* 17: 563; and Nott, R. 1998. "You did it!" the European Biotechnology Directive at last. *European Intellectual Property Review* 20: 347.

biological" processes are natural phenomena while micro-biological processes involve some external intervention on microbiological material.<sup>87</sup> According to the Guidelines for Examination of the European Patent Office, the patentability of "essentially biological processes" is predicated on the extent to which technical scientific intervention has been injected into the process.<sup>88</sup> The explanation given to examiners regarding rule 23.b(5) is as follows:

"A process for the production of plants or animals is essentially biological if it consists entirely of natural phenomena such as crossing or selection. To take some examples, a method of crossing, inter-breeding, or selectively breeding, say, horses involving merely selecting for breeding and bringing together those animals having certain characteristics would be essentially biological and therefore un-patentable. On the other hand, a process of treating a plant or animal to improve its properties or yield or to promote or suppress its growth e.g. a method of pruning a tree, would not be essentially biological since although a biological process is involved the essence of the invention is technical; the same could apply to a method of treating a plant characterised by the application of a growth-stimulating substance or radiation. The treatment of soil by technical means to suppress or promote the growth of plants is also not excluded from patentability."

If technical scientific intervention is central to the process, then it can qualify for patent protection. Processes in which such intervention is limited, for example as is the case in conventional plant breeding methods, would not qualify for patent protection; whereas in contrast, methods of modern biotechnology such as genetic engineering and tissue culture, would qualify.<sup>89</sup>

The upshot of these unclear and overly technical definitions is that developing countries are justifiably wary. Depending on scientific manoeuvring, the scope of obligations could include the requirement for patentability of genes, perhaps as micro-biological process, an eventuality that is certainly ill-advised on a global scale.

---

<sup>87</sup> *European Council Directive*, article 2.

<sup>88</sup> See *Guidelines for Examination of the European Patent Office* No. X-232.2, available at [www.european-patent-office.org](http://www.european-patent-office.org) (last visited 3 March 2005).

<sup>89</sup> *UNCTAD-ICTSD Resource Book*, p. 54.

### 3.4 The scope and form of *sui generis* protection

Although the provision requires WTO members to provide for a system of plant varieties protection either by patents, *sui generis* systems or some combination of the two, it does not give an indication neither to the form the system of protection should take, nor does it define the scope or extent of such protection. This means that it is unclear whether WTO members should provide protection for all plant varieties or whether they can exclude some from such protection and still meet their TRIPS obligations. Reading this provision *in tandem* with the "TRIPS-as-a-minimum-standard" provision in article 1, and especially depending on the meaning one attaches to the term "extensive", might lead one to conclude that in fact, developing countries need only to be imaginative in the laws they craft in order to benefit from further flexibilities in their obligations.

As stated in article 1, WTO members can "implement in their law more extensive protection than is required ... provided that such protection does not contravene the provisions of this agreement." Without going into the scope or definitional dimensions involved, all that article 27(2) says is that a patentable invention should be new, involve an inventive step and be capable of industrial application. Hence, in a desire to protect their plant varieties, any developing country that chooses the patent route for protection will make it significantly more difficult to meet the criteria of patentability for plant varieties. That way, they can lock out the possibility that new strains arising from basic innovation around certain strategic plant varieties can qualify for patent protection.<sup>90</sup>

Inevitably however, the form of such a *sui generis* system pre-empts judgment of its effectiveness. In essence, for WTO members intent on complying with TRIPS, it comes down to a choice of - and the relationship between - regimes. The choice here is rather theoretical, or is only functionally useful as a policy orientation because, in fact all the different applicable regimes coexist. For example, virtually all WTO members have signed the Convention on Biological Diversity (CBD) and are active in the deliberations on the International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA). In addition, some have signed either UPOV 1978 or UPOV 1991. Hence the choice is not a stark "either/or" but a more

---

<sup>90</sup> According to Llewelyn, such a reading of the provision would "not only be possible but permissible." See Cottier and Mavroidis (2003), p. 307.

nuanced evaluation of what aspects to borrow from each regime in order to meet a particular national objective.

With respect to *sui generis* systems, inherent in the language of article 27(3)(b) is a degree of flexibility, first, as regards the form of *sui generis* protection. Unlike patents where the basic criteria are already spelt out, no comparable guidance is given for *sui generis* systems. This has often led commentators to the conclusion that the *sui generis* option is preferable for WTO members that wish to experiment with their freedoms under TRIPS. In particular, this flexibility means that such countries can look to other international instruments for guidance including the UPOV Conventions, the CBD and the ITPGRFA. Hence, there is significant leeway for WTO members to come up with various forms of *sui generis* systems, with the only condition being that such systems must be effective.

As an aside, it is debatable whether the pre-condition of effectiveness also applies to patents. The juxtaposition of the word "effective" between "*sui generis* systems" and "patents", should mean that only *sui generis* systems need meet the effectiveness criteria, while for patents, the fact that there is already a criteria spelt out in article 27(2) satisfies the requirement. Or indeed that patents should be evaluated as against the criteria already laid out. The only problem is that the patentability criteria is relatively straightforward and accepted already in most jurisdictions, while "effective" as a legal term is vague, undefined, and wrought with geographical relativity.

### 3.5 The "effectiveness" condition and its impact on the scope of *sui generis* systems

Therefore the question of what exactly constitutes an effective *sui generis* system becomes important, and potentially controversial, not least because of the virtual impossibility of determining a definite globally applicable criterion of "effectiveness". Raustiala has postulated that "effectiveness" as an aspect of compliance with international legal instruments means the "degree to which a given rule induces changes in behaviour that furthers the goals of those rules."<sup>91</sup> De-linked from concerns over the *form* of such a system, one may look to the quality of enforcement of such a system, in order to determine its effectiveness, as is contemplated for example in

---

<sup>91</sup> Raustiala, K. 2000. Compliance and effectiveness in international regulatory cooperation. *Case Western Reserve Journal of International Law* 32: 387.

article 41(1) or articles 42–49 of the TRIPS Agreement. Dutfield sees little significance in a laboured interpretation of the word "effective".<sup>92</sup> According to him, "there is no question that "effective" implies enforceable." To equate "effective" with "enforceable" is a rather un-sophisticated approach to legal interpretation, particularly in this case where "effective" imports into the equation myriad capacity challenges on the part of developing countries. Our view is that "enforceable" connotes a procedural emphasis, while "effective" is broader and has both a substantive and procedural element requiring a more wholesome examination of both those aspects. What is difficult to define however, is "adequate", the other general requirement on WTO members regarding the intellectual property systems that they must put in place. In this regard, the efficacy, efficiency and impartiality of the enforcement agencies, including the judicial system would be examined, as would be the legal sanctity of the procedure itself. Article 41(1) of the TRIPS Agreement requires WTO members to ensure that enforcement procedures permit effective action against infringement of IPRs and that appropriate remedies are provided. Further, it requires that enforcement procedures are applied in a legitimate manner and that avoids the creation of further barriers. Articles 42 through 49 demonstrate an attempt by the TRIPS Agreement to provide fairly comprehensive procedural aspects for the administration of the agreement. The provisions deal with civil and administrative procedures and remedies.

From the domestic perspective, one may alternatively, or in addition, look at the extent to which a particular system meets the national policy and development objectives. If it serves the legitimate domestic interest fully, then it may be concluded that such a system is indeed effective. In this sense therefore, one could emphasize national priorities, including domestic policy space, by bringing into this criteria of effectiveness, issues such as the level of protection that the system affords to domestic plant breeders, the extent to which it guarantees access and benefit sharing for local communities, the extent to which it contributes to or safeguards the food security situation in the country, and the extent to which it leaves some governmental regulatory policy space.

One may also look at the "effectiveness" requirement in article 27(3)(b) from the overall context of the TRIPS Agreement, as have Leskien and Flitner.<sup>93</sup>

---

<sup>92</sup> See Dutfield, G. (2003), p. 65.

<sup>93</sup> See Leskien and Flitner (1997), pp. 27–32.

They argue that looking at the context and objectives of the TRIPS Agreement as a whole, should lead a legal analyst to the conclusion that an effective *sui generis* system should provide for protection of plant varieties of all species and genera, through an intellectual property right system which meets the non-discrimination requirements in the TRIPS Agreement and that such a system should provide for effective enforcement.

Article 7 could be yet another window of evaluation of the effectiveness of a particular system. It says that "The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social economic welfare, and to the balance of rights and obligations." An analysis of this provision may lead one to shoot down as ineffective, any system that does not yield "mutual advantage" to producers and users of technological knowledge. Further, any system of IPRs, including plant varieties protection, that is not "conducive to social and economic welfare" could be found to be ineffective and defective under this criteria. Admittedly, what is "conducive to social and economic welfare" is one of those monumentally subjective determinations, and from a legal perspective, so imprecise as to be inapplicable. Activist individuals serving on WTO panels or in the Appellate Body, though difficult to conceive, may however find it a useful spring board for a development-centred interpretative approach. In general, without the benefit of jurisprudence however, it is of course difficult to outline the precise legal dimensions of these criteria, or indeed whether in fact they can be applied as such.

Article 8 is not commonly discussed as a possible additional exception to WTO members' obligations under article 27(3)(b).<sup>94</sup> It allows members to take "measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development." Improved agricultural productivity relies on access to suitable plant varieties. In turn, improved agricultural productivity, particularly of basic foodstuffs, generally translates into higher socio-economic welfare and better nutritional and health standards. If a patent granted to a particular entity over a plant variety makes its availability to farmers impossible, and thereby jeopardising the socio-economic, and nutritional well-being of the population, then theoretically

---

<sup>94</sup> Article 8 has proven enormously useful in the debate on TRIPs and public health.

under article 8, the concerned WTO member is perfectly within their rights to take the measures necessary to recover it for use. According to Mangeni:

"Don't the members determine which sectors are of vital importance to them? Doesn't socio-economic development of the members require measures to support rural or local communities, measures to ensure food security, in accordance with social justice as a national policy? Doesn't the prevention of abuse include the protection provided for in article 15 of the Convention on Biological Diversity (informed consent, source of biological material, benefit sharing)? Don't monopolies in supply of seeds restrain trade unreasonably say through production volumes, refusal to supply, absence of conditions for easily getting access to sources of supply or to right-holders of seeds for plant varieties? The answers to these questions are yes. *Sui generis* systems for the protection of plant varieties must contain provisions to implement the answers."<sup>95</sup>

Llewelyn on the contrary, expresses some doubt as to whether article 8 can indeed be used as a "mechanism for denying patent protection to genetic material or as a basis for a non-UPOV type right."<sup>96</sup> This ambivalence is in a sense understandable when one looks at it from the point of making it operational. Given the strength of competing interests, it would take an exceedingly radical decision for a developing country to deny patent - or other form of - protection on the basis of article 8. It would also reflect a certain degree of militancy that developing countries are finding increasingly difficult to muster, as their economies become more and more beholden to global economic actors. From a purely legal point of view therefore, nothing is required for it to be used as an additional flexibility for developing countries beyond the language already in article 8, but from a practical political-economy point of view, its utility is very limited.

A major legal lacuna left by the language of article 27(3)(b) is the scope of protection that should be afforded by a *sui generis* system. Does the qualification of "effective" also hearken to the "extent" or "coverage" of protection afforded to plant varieties? Put another way, could a country, for whatever reasons, exclude some plant varieties from protection? This

---

<sup>95</sup> Mangeni (2000).

<sup>96</sup> See Llewelyn, in Cottier and Mavroidis (2003), p. 308.



question is even more complicated given the absence of a definition of "plant variety" in the TRIPS Agreement. Leskien and Flitner argue that it is inconceivable for any such exclusions to be consistent with the agreement. They state:

"Since the TRIPS Agreement neither defines the term 'plant variety' nor specifies any species or genera the varieties of which have to be protected, it seems clear that member states have to provide for the protection of plant varieties of all species and botanical genera. Any other interpretation of article 27.3(b) would have to indicate for how many species or for which types of species member states have to grant *sui generis* protection and there is no such provision in the TRIPS Agreement."<sup>97</sup>

It is difficult to see why this openly debatable issue would be rendered in such conclusive language by the authors, save for a desire to read into the agreement commitments that WTO members themselves were completely unable to agree upon. First, it is clear that no indication whatsoever is given in the TRIPS Agreement itself regarding the extent or coverage of article 27(3)(b). There is also no record of the negotiating history that would cast light on, at the minimum, the scope that was considered by the negotiators during the Uruguay Round. It is therefore impossible to read into this provision such a broad scope. Secondly, article 7 says that the protection and enforcement of IPRs should contribute to the promotion of technological innovation, the transfer and dissemination of knowledge, and to the mutual advantage of producers and users of technological knowledge. They should also be protected and enforced in a manner conducive to social and economic welfare. Article 8 allows WTO members to put in place measures that promote the public interest in sectors of vital importance to their socio-economic and technological development. These provisions are significant in their state-centeredness, and their recognition of the legitimate interests of the state. The import is that because it is up to each individual WTO member to decide on the system that best works for them in the protection of plant varieties, and given the pointed omission of any strictures on the scope of such protection, it is quite conceivable that exclusions of certain plant varieties on grounds qualifiable under articles 7 and 8, are in fact legitimate.

---

<sup>97</sup> Leskien and Flitner (1997), p. 28.

In sum therefore, it should be clear that whereas the "shall" in article 27(3)(b) invites a compelling unavoidable obligation for WTO members to protect plant varieties, potentially significant leeway is left to countries in determining the form and scope of such protection. Their choices in this regard depend on their finesse in technical legal interpretation and draftsmanship and the extent to which they are able to look at the TRIPS Agreement in a holistic manner.

#### IV. THE METHODS OF PLANT VARIETIES PROTECTION IN ARTICLE 27(3)(b)

Article 27(3)(b) is often seen as presenting two predominant options for the protection of plant varieties. These are patents and/or *sui generis* systems. To frame the debate more simply using the legislative models currently in place with respect to the protection of plant varieties, the United States IPR system is more on the patent end, meaning patents are available over all plant material and varieties, while the European Union system is at the UPOV-style "plant varieties rights" end.<sup>98</sup> In the case of the United States, it should be remembered that a plant breeder can hold a patent, but with the option of additional protection through plant varieties rights. Further, in the European Union, plant varieties are explicitly excluded from patent protection. The *sui generis* system that is sympathetically viewed by many developing countries could lie somewhere in between, or indeed conform to neither, the patent model or the UPOV-style "plant varieties rights" model.

According to article 3(1) of the TRIPS Agreement, an IPR system set up by any WTO member, including that on the protection of plant variety rights whether *sui generis* or not, has to comply with the requirement of national treatment and most favoured nation treatment. As indicated, in the specific case of plant varieties, national treatment simply means that WTO members have to accord nationals of their trading partners treatment that is no less favourable than that which they give their own citizens in terms of IPRs protection. Most favoured nation treatment on the other hand would mean that any advantage, favour, privilege or immunity granted by a WTO member to nationals of trading partner should be multilateralized, that is, granted immediately and unconditionally to the nationals of all other WTO members.<sup>99</sup>

---

<sup>98</sup> In fact, the United States has both the patent system, and the plant varieties rights protection (UPOV-style) system.

<sup>99</sup> See Correa, C. 1994. The GATT Agreement on Trade Related Aspects of Intellectual Property Rights: new standards for patent protection, *European Intellectual Property Review*, pp. 327–335.

#### 4.1 Plant varieties protection through patents

The TRIPS Agreement gives the basic criteria for patentability. It requires a patentable invention to be new, to involve an inventive step, and to be capable of industrial application. At the national level, the criteria for patentability, as well as the interpretation and application of patent laws, differ. Hence, there is no universal system for patent protection. WIPO has been working on several patent law harmonization initiatives.<sup>100</sup> According to Dutfield, spurring the increase in the number of patent applications over life forms, including plant varieties, has been the power and influence of the biosciences industry.<sup>101</sup> In the past few years, there has been a significant increase in the number and breadth of patent applications over seed and plant varieties and a consolidation of the industry into a handful of global mega-corporations. Their influence in shaping global debate is keenly felt in the relevant intergovernmental fora, including at WIPO and FAO.

Whereas the TRIPS Agreement spells out the basic criteria for patentability, it does not define an "invention." The European Patent Convention does not also define an "invention" while in the United States, 35 USC §101 simply refers to what can be invented as including any new and useful process, machines, manufacture of composition of matter or any useful improvement thereof. It is not in doubt however, that for article 27(3)(b) to have been included in the TRIPS Agreement, there was some kind of consensus that plant varieties are in fact patentable. In the United States, all living matter, including plant varieties are, patentable. The United States Supreme Court, in its decision in *Diamond v. Chakrabarty*<sup>102</sup> held that "everything under the sun made by man" is patentable. A comparable decision was handed down by the Technical Board of the European Patent Office (EPO) in the 1984 *Ciba Geigy* case<sup>103</sup> which noted that "no general exclusion of inventions in the sphere of animate nature can be inferred from the EPC." More recent trends indicate that the EPO has backtracked from its position in *Ciba Geigy*. In *Plant Genetic Systems v. Greenpeace* the EPO Board of Appeal rejected patent claims for a plant on the grounds that the claims included plant varieties.<sup>104</sup> The two conflicting decisions reflected the prevailing confusion in

---

<sup>100</sup> See the *WIPO Patent Agenda* at [www.wipo.int/patent/agenda/en/](http://www.wipo.int/patent/agenda/en/).

<sup>101</sup> See generally, Dutfield G. (2003).

<sup>102</sup> See *Diamond v. Chakrabarty* 447 U.S. 303 (1980).

<sup>103</sup> See *Material/CIBA GEIGY* (T 49/83 – OJ EPO 1984, 112) as quoted in Leskien and Flitner (1997), p. 9.

<sup>104</sup> See *Plant Genetic Systems v. Greenpeace* (T356/93) of the EPO Board of Appeal.

Europe over the definition and patenting of plant varieties.<sup>105</sup> In the *Novartis* case, the Enlarged Board of Appeal of the EPO arrived at a conclusive determination consistent with the European Directive on Biotechnological Inventions<sup>106</sup> that "as long as specific plant varieties are not individually claimed, article 53(b) of the European Patent Convention could not exclude the patenting of plants."<sup>107</sup> The Directive was a compromise between the industry, that was keen to reap the benefits of patent protection, and ethicists who were concerned about the morality of patenting life-forms. According to article 4(1) of the Directive, plant and animal varieties will be excluded from patentability but plant inventions will continue to be patentable "if the technical feasibility of the invention is not confined to a particular plant variety."<sup>108</sup> At the core of the concerns over the appropriateness of patenting plant varieties is the fear of exclusive or monopolistic use of patented material and the commoditization of genetic material, particularly when the patent holder is a large multinational corporation.

Another concern stems from the fact that patents can be granted over processes, which means that patents can be granted over the plant breeding process itself. This would of course take the technology out of the scientific experimentation or research realm. As Dutfield notes, plant breeders are not often in support of patenting as they "worry about the possible impacts of other companies' patents on their own breeding programmes."<sup>109</sup> For developing countries, whose attraction to the TRIPS Agreement was mainly in its singular usefulness in facilitating technology transfer,<sup>110</sup> this would certainly amount to a double loss.

Other commentators cite the argument that plant breeding is in fact a unique science in which incremental improvements over years of research have such a fundamental reliance on prior-existing material that it is difficult to speak of genuinely new inventions worthy of patent protection.<sup>111</sup> In the United

---

<sup>105</sup> See Sterckx, S., ed. 1997. *Biotechnology, patents and morality*, pp. 31–39. Ashgate. (explaining the confusion in Europe over the definition of plant variety).

<sup>106</sup> *European Directive on Biotechnological Inventions*, *European Council Directive* 98/44, 1998 O.J. (L 213) 13.

<sup>107</sup> Watal (2001), p. 153.

<sup>108</sup> *Ibid*, p. 155.

<sup>109</sup> See Dutfield (2003), p. 192.

<sup>110</sup> See for example, the remarks of the representative of Brazil, *Brazil: Statement by H.E. Mr. L.F. Palmeira Lampreia, Ambassador, Permanent Representative*, p. 1. GATT Doc. MTN.TNC/40/ST/9 (January 19, 1994) (as quoted in TP Stewart, ed. 1993. *The GATT Uruguay Round: a negotiating history volume II*, p. 572. Kluwer Law and Taxation (hereafter Stewart (1993)).

<sup>111</sup> Dutfield (2003), p. 176

States, the appropriateness of patent protection as opposed to UPOV-style plant variety rights was at issue in *Pioneer Hi-Bred International Inc. v. J.E.M AG Supply Inc.*<sup>112</sup> The appellant alleged that the UPOV-style plant variety rights are the exclusive method for protection of plant varieties and further, that utility patents as a form of protection are not valid under law. In its holding, the Supreme Court found that plants are in fact proper subject matter for full patent protection under 35 U.S.C § 101, and that they are not necessarily limited to UPOV-type protection under the Plant Variety Protection Act<sup>113</sup> or the Plant Patent Act<sup>114</sup> despite the fact that the two statutes were designed specifically for plant varieties protection.<sup>115</sup> In addition, the court was clear that the fact that these two laws were intended specifically for plant varieties protection did not mean that they were the exclusive means of protection.<sup>116</sup> More instructively as to the broad basis of the court's decision was its reliance on the decision in *Diamond v. Chakrabarty*, in which it had said that anything under the sun made by man was patentable.<sup>117</sup> In its 1994 law, Singapore now allows for the patenting of plants, or indeed any living organism, because there is no specific barrier to this reading of the law. However, section 13(5) of this law gives some flexibility to the minister to reign in any abusive usage of the patent option.

Does the TRIPS Agreement in some way implicitly privilege patent protection of plant varieties over other forms of protection such as breeders' rights? This question is difficult to answer, particularly in the face of the dearth of relevant information in its negotiating history. Article 27 of the TRIPS Agreement addresses "patentable subject matter" and its first paragraph spells out that "patents shall be available for any inventions, whether products or process, in all fields of technology ... ." This is the main thrust of the provision. The pre-eminence of this provision would seem to be an emphatic reflection of the dominance of the United States and its patent approach. Plant varieties protection through means other than patents come rather casually, further down, and only within the framework of an exception to the general rule. In its listing of the methods of plant varieties protection, WTO members can choose between patents, *sui generis* systems, or a combination thereof, in that order. One might sense, despite the

---

<sup>112</sup> See *Pioneer Hi-Bred International Inc. v. J.E.M AG Supply Inc.* 534 U.S 124 (2001).

<sup>113</sup> See *Plant Variety Protection Act*, 7 U.S.C §§ 2321–2583 (2000).

<sup>114</sup> See *Plant Patent Act*, 35 U.S.C §§ 101–105 (2000).

<sup>115</sup> See *Pioneer Hi-Bred International Inc. v. J.E.M AG Supply Inc.* 534 U.S 124 (2001), p. 145.

<sup>116</sup> Ibid, pp. 132 and 138.

<sup>117</sup> Ibid, p. 130.

absence of any indications of a hierarchical approach, that patents ranked highly for the dominant parties in the negotiations or the draftsmen of that particular provision. Knowing that the United States was the main *demandeur* in the negotiations, and with the benefit of US domestic thinking from *Chakrabarty* and *Pioneer Hi-Bred International*, we could surmise that the structure and language of that provision certainly does privilege the patent approach, and the overriding idea that "everything under the sun made by man" should be patentable.<sup>118</sup> Lastly, the TRIPS Agreement is quite a study in cross-referencing between international instruments; it refers to the Paris Convention of 1967 on trademarks, the Berne Convention of 1971 on copyright and related rights, and the Rome Convention on integrated circuits. That such an otherwise demonstrably cognisant international agreement would fail to acknowledge the "predominant position"<sup>119</sup> of the UPOV Acts in the area of plant varieties protection is attributable probably to both the opposition by developing countries in multilateralizing the UPOV Acts<sup>120</sup> and the privileged position that the US accorded its own model of patenting plant varieties.

Significantly, during the Uruguay Round negotiations, the European Union sided with developing countries in opposing the view of the United States regarding patenting plant varieties in article 27(3)(b).<sup>121</sup> According to Correa, the EU's proposals during the negotiations aimed at "maintaining the position of European countries which were members of the European Patent Convention."<sup>122</sup> In this case, the EU was unwilling to end its method of granting plant breeders' rights in favour of the US approach on plant patents.<sup>123</sup> The resulting flexible language in article 27(3)(b) was therefore a reflection of the outstanding differences on the patenting of plants and animals and direct consequence of the desire to accommodate all plant varieties protection practices, including the possibility of new methods in the form of *sui generis* protection.

---

<sup>118</sup> According to Carlos Correa, "the exclusion of breeders' rights indicates that the major actors in the negotiations of TRIPs – particularly the USA – privileged a patent approach with regard to issues relating to innovation in the field of plants." (1994).

<sup>119</sup> It is well to remember however that as at the end of the Uruguay Round negotiations (1994), only a very small number of countries (35 in number, and mostly developed countries) had adopted the UPOV Acts. See Correa, C. (1994), p. 21.

<sup>120</sup> See Llewelyn, in Cottier and Mavroidis (2003), p. 315.

<sup>121</sup> Ibid, p. 313.

<sup>122</sup> See Correa (1994), p. 24.

<sup>123</sup> See Llewelyn, in Cottier and Mavroidis (2003), p. 313.

#### 4.2 Plant varieties protection through *sui generis* systems

WTO members that do not go the patent route in providing for plant variety protection have the option of using "effective *sui generis* systems" or a combination of such systems and patents. According to Leskien and Flitner, there is a wide range of possible TRIPS-compatible *sui generis* systems.<sup>124</sup> But what exactly is meant by "effective *sui generis* systems"? There is no clear answer to this question. Neither is there anything in the negotiating history of article 27(3)(b)<sup>125</sup> on which one could latch a proper analysis of the conceivable possible meaning, nor is the term defined anywhere in the TRIPS Agreement. Are *sui generis* systems nevertheless a category of "intellectual property rights" as defined by article 1(2) of the TRIPS Agreement? Certainly yes, because the paragraph refers to "*sui generis* systems" where the term "systems" is collective, in the sense that it is not supposed to refer to a discrete novel identifiable category of an IPR but rather IPR "systems" that derive from those currently existing or in practice, including quite obviously in this case, plant breeders' rights, various formulations that incorporate people-centred concepts such as farmers' rights and sustainable development. In addition, if indeed *sui generis* systems were not IPRs, it would mean that certain basic concepts such as national treatment and most favoured nation, would not apply, meaning a WTO member would not be compelled to confer equal protection to plant varieties of nationals from its trading partners.<sup>126</sup> The consequence of this would be ludicrous, especially to the extent that it defeats the very basic objectives of TRIPS as a "covered agreement" in the WTO.

Although the concept of farmers' rights is dealt with in greater detail later in the chapter, the reference to farmers' rights in the preceding paragraph should be clarified at this point. In various fora, "farmers' rights"<sup>127</sup> and

---

<sup>124</sup> See Leskien and Flitner (1997), p. 2.

<sup>125</sup> Ibid, p. 27.

<sup>126</sup> Ibid, p. 28.

<sup>127</sup> See generally Bjørnstad, S.B. 2004. *Breakthrough for the south? an analysis of the recognition of farmers' rights in the International Treaty on Plant Genetic Resources for Food and Agriculture*. Master of Arts Thesis in Political Science, University of Oslo, Institute of Political Science; FAO. 1994. *Providing farmers' rights through in situ conservation of crop genetic resources*. CPGRFA Background Study Paper No 3. Rome.

"traditional knowledge,"<sup>128</sup> both of which give dominant recognition to the role of local rural communities, have been mentioned as possible new forms of IPRs. Cottier and Panizzon make a number of arguments in support of IPR protection over traditional knowledge. The authors argue that although traditional knowledge (TK) does not lend itself to conventional IP protection, it deserves a suitable form of protection for "strategic and ethical thinking in the field of IPRs...recognize[s] that TK can become a trigger point for new product development, especially in sectors of specialty foods and beverages, horticulture, pharmaceuticals, personal care and cosmetics." Further, that IPRs on traditional knowledge may help developing countries become full players in global agricultural markets while at the same time ensuring that local communities benefit from their knowledge contributions. The authors also argue that without IPR protection over traditional knowledge, cases of misappropriation of such knowledge will continue, hence impacting the international IP system negatively as at present. The essence of both of these concepts is that the granting of any patent application for a product that in some way derives from or utilizes genetic material should be predicated on the veracity of an accompanying certificate of origin that details two things. First, it requires that genetic resources that were used, the applicable traditional knowledge and the communities from whence the information was obtained be specified, and second, that it provides evidence that the communities involved in the process were informed and their consent obtained prior to the filing of the patent application. Article 27(3)(b) requires WTO members to provide for plant varieties protection through patents, *sui generis* systems or some combination of these two. Farmers' rights, as a concept is not included in this list of options, though nothing precludes the possibility of including it in national legislation. Consequently farmers' rights are not an IPR within the meaning of article 1(2) of the TRIPS Agreement, and it is therefore inconclusive to speak of implementing article 27(3)(b) through the concept of farmers' rights. However, the vociferous debate around the issue seems to focus attention on the limitations that a strict application of breeders' rights would have on farmers' rights, and this is often lumped together as a shortcoming of article 27(3)(b). Objectively, whereas this approach does raise the profile of the concerns that developing countries have expressed over the

---

<sup>128</sup> See generally, Cottier, T. and Panizzon, M. 2004. Legal perspectives on traditional knowledge: the case for intellectual property protection. *Journal of International Economic Law* 7: 371. See also, Cottier, T. 1998. The protection of genetic resources and traditional knowledge: towards more specific rights and obligations in world trade law. *Journal of International Economic Law* 4: 561, 569–73.



implementation of article 27(3)(b), and in fact raises the profile of the whole concept of farmers' rights, it also essentially serves to muddle issues.

Going back now to the matter of *sui generis* systems, at the time of the conclusion of negotiations on the TRIPS Agreement, what could have amounted to *sui generis* systems were the UPOV Acts, and the various national laws that they had inspired. Significantly however, the TRIPS Agreement does not mention UPOV anywhere and does not require UPOV membership as a compliance mechanism. It does not also expressly or implicitly require any WTO member to align its legislation with any of the UPOV Acts. It does not mention "plant breeders' rights" either, which were already a distinct and well established IPR championed by UPOV and European countries by this time in the Uruguay Round negotiations.<sup>129</sup> (Although, according to Correa, this exclusion or failure to mention "plant breeders' rights" more specifically "does not mean, in exchange, that breeders' rights cannot be considered a specific kind of intellectual property right ... since they convey all the characteristics of such rights").

Quite importantly, in explaining what it would take to comply with the TRIPS Agreement, the then Director General of the GATT assured the Indian government in 1993 that in fact, if a country followed the standards of the 1978 UPOV Act, which was in force during the TRIPs negotiations, "it would be reasonable to claim that an effective *sui generis* protection had been provided."<sup>130</sup> The legal vacuum created by the absence of any mention of plant breeders' rights in the TRIPS Agreement, and thereby the lack of guidance at the international level has led to UPOV being the international standard-setter in matters of plant breeders' rights.

#### 4.2.1 The UPOV system as a *sui generis* system

The UPOV Acts are now the most common model for *sui generis* protection of plant varieties or breeders rights. The UPOV Acts provided for "plant variety protection" as a *sui generis* right, within the meaning of article 27(3)(b). The "plant variety protection" *sui generis* option has three key distinctions. First, the right extends only to the "variety" itself, and not to its constituent elements. Secondly, unlike patents, it does not also extend coverage to the production process. Thirdly, it is subject to certain exceptions whose

---

<sup>129</sup> Correa (1994), p. 24.

<sup>130</sup> See Stewart (1993), p. 532 (quoting from *The Times of India*, New Delhi, 12 March 1993); and see Leskien and Flitner (1997), p. 27 (also quoting from, *The Times of India*, New Delhi, 12 March 1993).

application has far-reaching implications, such as the research exception and the farmers' exception. The idea that in some way plant breeders should have some form of protection for their innovation predates UPOV, having begun prior to the enactment of the United States Plant Patent Act of 1930 which provided protection for asexually reproducing plants.

In Europe, a narrow view was taken of the plant patent approach, among other reasons, for the fact that it was not proper to grant monopoly or exclusive rights over crop varieties, that plant material could not meet the novelty requirement for patents and that plant breeding programmes were not sufficiently inventive. Consequently, European states sought an alternative form of protection leading to the formation of the Union for the Protection of Plant Varieties in 1961. However, the UPOV 1961 Act was not completely incompatible with the patent approach. The 1961 Act still provided members with so called "dual protection prohibition" that is the option of choosing either the plant patent route or a *sui generis* type route but not both, where both approaches accorded with the act.<sup>131</sup> It also allowed them to provide for both, in countries such as the United States where only the plant breeders' right was a right within the meaning of the act. According to Llewelyn, the reason why the United States grants both plant varieties protection through its Plant Varieties Protection Act of 1970, which provided for the protection of sexually reproducing plants, a plant patent system through its 1930 Act, and through the utility patent route, is because neither the 1930 Act nor the utility patents are rights according to UPOV. The option of patent or plant variety protection was later omitted from the UPOV 1991 Act.<sup>132</sup>

(a) The 1978 UPOV Act

According to the 1978 UPOV Act, a plant variety protection right is granted on varieties that are new, distinct, uniform, and stable.<sup>133</sup> The plant variety protection right means that the right-holder can sell, or offer for sale, any reproductive material of the protected variety, and is entitled to this right for a period of up to eighteen years.<sup>134</sup> This right is however subject to the research exception, which also extends to the products of the research, and the farmers' privilege, which means that farmers can, within certain limits,

---

<sup>131</sup> See Llewelyn, in Cottier and Mavroidis (2003), p. 315.

<sup>132</sup> Id.

<sup>133</sup> See UPOV 1978, article 6.

<sup>134</sup> See Llewelyn, in Cottier and Mavroidis (2003), p. 319.

save, replant, exchange or sell seeds. As indicated earlier, under the 1978 UPOV Act, members face the "dual protection prohibition", meaning they cannot provide for both patents and a *sui generis* right concurrently.

*Material covered and the sequence of application of the convention*

According to article 4(1), the convention "may be applied to all botanical genera and species." By the optional "may", it does not have to be applied to all plant varieties, but only those which the UPOV member designates. However, it does require them to start off with protection of "at least five genera or species"<sup>135</sup> from the date of entry into force of the convention<sup>136</sup> and then to undertake a progressive or sequenced application of the convention to the "largest possible number of botanical genera and species."<sup>137</sup> In any event, from the starting point of five genera or species, they are required to advance to 24 within eight years.

Within a particular genus or species, a member is allowed to limit the application of the convention to select sub-groups.<sup>138</sup> In the event that such a distinction is made within a genus or species, that genus or species shall nevertheless be considered as one genus or species for purposes of fulfilling the numbers of sequenced application in article 4.<sup>139</sup> The convention takes account of specific difficulties in meeting the program of phased application of the convention and the possibilities for extending those periods.<sup>140</sup> The convention extends the scope of covered material to include not only the variety itself but also its reproductive or vegetative propagating material.<sup>141</sup> This means the "whole plant" is protected including seeds, seedlings, cuttings and other vegetative material to the same extent as the variety itself. Protection in this case means that anyone wanting to use such material in any of three listed ways (production, sale or marketing) must obtain the authorisation of the breeder.<sup>142</sup>

---

<sup>135</sup> UPOV 1978, article 4(3)(a).

<sup>136</sup> UPOV 1978, article 4(3)(b).

<sup>137</sup> UPOV 1978, article 4(2) and Article 4(3)(b).

<sup>138</sup> UPOV 1978, article 2(2).

<sup>139</sup> UPOV 1978, article 4(3)(b).

<sup>140</sup> UPOV 1978, articles 4 and 5.

<sup>141</sup> UPOV 1978, article 5(1).

<sup>142</sup> UPOV 1978, article 5.

*Form, scope and duration of protection*

Article 2(1) is the so-called "dual-protection clause" which disallows the cumulation of rights of protection. It requires each member to protect plant varieties with either a breeder's right (which the convention describes as "a special title of protection") or a patent. However, a member cannot provide for the cumulation of both a breeder's right and patent right. It states that if a member allows for both systems of protection "only one of them for one and the same botanical genus or species" can be granted. This provision is omitted from the UPOV 1991 version.

Does UPOV 1978 protect discovered varieties, that is, those resulting from the conventional process of breeding as opposed to those merely discovered? According to Helfer, article 6(1)(a) which states that protected varieties can result from "a natural source of initial variation"<sup>143</sup> can be used to arrive at a positive response. The scope of the breeder's exclusive rights is dealt with at article 5, as indicated in the discussion above. The provision makes it an infringement if anyone does not seek and obtain the right-holder's authorization in producing, offering for sale or marketing any material that is protected under the convention and for which the breeder has exclusive rights. Article 8 states that the right of protection subsists for a minimum period of fifteen years. For vines, forest trees, fruit trees and ornamental trees, the minimum period of protection is slightly longer, not less than eighteen years.

*Conditions for protection eligibility (article 6)*

The conditions for the grant of protection to genera or species covered under UPOV 1978 are spelt out in article 6. The variety must be new, distinct, uniform and stable. The newness condition means that it must not have been offered for sale or in some way been marketed for a certain period of time prior to the date of granting protection. Article 6(1)(b) requires that the variety must not have been offered for sale or marketing with a year of the period when protection was sought by a state, or in the case of vines, forest trees, fruit trees and ornamental trees, within six years, including, in any other state. A further proviso states that the fact that the variety has

---

<sup>143</sup> See FAO. 2004. *Intellectual property rights in plant varieties: international legal regimes and policy options for national governments*, p. 22. FAO Legislative Study No. 86. by Helfer, L. FAO Legal Office. Rome (referencing the remarks of the Crucible Group, in *Seeding Solutions*, p. 137. Volume 2 (hereafter Helfer (2004)).

become a matter of common knowledge in ways other than through offering for sale or marketing shall also not affect the right of the breeder to protection. The rationale for this provision of newness is simply to avoid granting protection to varieties that are already registered or that have already been exploited.

The "distinctness" condition is found in article 6(1)(a) and although it is not defined, its effect is that the variety must be distinguishable from any other variety whose existence may be a matter of common knowledge, as at the time when protection is applied for. Common knowledge is to be established by reference to factors such as cultivation or marketing already in progress, entry in an official register of varieties already made or in the course of being made, inclusion in a reference collection, or precise description in a publication. Further, it requires that any such characteristics by which a variety is to be defined and distinguished must be capable of recognition and description.

The homogeneity condition requires that the variety be "sufficiently homogeneous, having regard to the particular features of its sexual reproduction or vegetative propagation."<sup>144</sup> It means in effect, that UPOV is dubious of diversity traits within a protectable variety, and that any intra-variety variation should be as minimal as possible.<sup>145</sup> This requirement has been used by environmentalists to insist that UPOV promotes the erosion of biological diversity.

The final precondition of stability means that the variety must "remain true to its description after repeated reproduction or propagation or, where the breeder has defined a particular cycle of reproduction or multiplication, at the end of each cycle."<sup>146</sup> The key point here is the "after repeated reproduction" aspect which imports a time element to the process. From the environmentalists' point of view, this particular condition simply makes permanent the loss of biodiversity already attained by the homogeneity requirement.

#### *Exceptions and restrictions to the protected rights*

There are three main exceptions to the exclusive rights conferred under UPOV 1978. These are: the breeder's exception, which allows a breeder to

---

<sup>144</sup> UPOV 1978, article 6(1)(c).

<sup>145</sup> See 2002. *Integrating intellectual property rights and development policy*, pp. 57–66. Report of the Commission on Intellectual Property Rights. London.

<sup>146</sup> UPOV 1978, article 6(1)(d).

use protected material for further research in view of the acknowledged fact that plant breeding is an incremental science; the farmers' exception, which allows farmers to save, replant, sell or otherwise exchange protected seed and other vegetative material from season to season; and the general exception in article 9 which allows a member to restrict the exclusive right accorded to a breeder for reasons of public interest, as long as equitable remuneration is paid to the breeder.

*The breeder's exception:* Article 5(3) of UPOV 1978 provides for a breeder's exception. It states that the authorisation of the breeder shall not be required either for the utilisation of the variety as an initial source of variation for the purpose of creating other varieties or for the marketing of such varieties. However it adds that authorization shall be required when the repeated use of the variety is necessary for the commercial production of another variety. The rationale for this exception is that plant breeding is an incremental science, hence the importance of allowing other breeders access to otherwise protected material.

*The farmers' exception:* The convention has only 42 articles, but it mentions the word "breeder" or "breeders" about 40 times. Clearly, the emphasis was on breeders' rights, and the limits of commercial use of protected varieties. It does not mention "farmers" even once, neither does it directly provide for the farmers' exception. However, implicit in this silence is permission to use seeds or other propagating material without the authorization of the breeder as long as such use is for non-commercial purposes.<sup>147</sup> This reading of UPOV 1978 resonates well, when one considers the extent of the farmers' exception in UPOV 1991 where it was considered necessary to reign it in somewhat.

The nature of the farmers' exception varies but the core of it is that a farmer has the right to save, replant, sell or exchange protected seeds or planting material from the previous season. The scope varies from country to country however, whereas in some, farmers will have the right only to replant seeds on their own farms, in others they are allowed to sell or exchange with other farmers, though usually on a limited scale and only at the local level. The scope of this farmers' exception is also one of the major points of divergence between UPOV 1978 and UPOV 1991. UPOV 1991 could be read to limit the farmers' exception only to the use of protected material for propagating purposes, on the farmer's own holding of the harvest product which they

---

<sup>147</sup> Helfer (2004), p. 25

have obtained by planting.<sup>148</sup> A diplomatic conference resolution on article 15(2) further recommends rather controversially, the narrowing down of this provision by excluding the applicability of the farmers' exception from horticultural crops and other agricultural sectors in which the activities that constitute the "farmers' privilege" are not common practice.

(b) The 1991 UPOV Act

*Material covered*

One of the major differences between UPOV 1978 and UPOV 1991 is precisely on the scope of coverage required at the first instance, once a country joins. As indicated earlier, UPOV 1978 requires a member to extend protection to at least five species upon gaining membership, and spreads the obligations over a period of time, culminating in at least 24 genera or species within a period of eight years. UPOV 1991 on the other hand, requires protection to be given to at least 15 genera or species upon accession, and to all species within ten years.<sup>149</sup> For those countries that are already members of UPOV 1961 or UPOV 1978, that wish to upgrade to UPOV 1991, it gives them an even shorter compliance period of only five years, and obliges them to provide protection for all genera and species. Article 3(1)(ii) requires those states to apply the provisions of the convention "at the latest by the expiration of a period of five years after the said date, to all plant genera and species" and article 3(2)(i) to "at least 15 plant genera or species ...".

*Form, scope and duration of protection*

UPOV 1991 introduces a definition of "plant variety" at article 1, which delimits the scope of the *sui generis* right. The right is granted to "any plant grouping within a single botanical taxon of the lowest known rank which, irrespective of whether the conditions for a grant of a plant variety right are fully met is new, distinct, uniform and stable."<sup>150</sup> According to article 1(vi) of UPOV 1991, "variety" means a plant grouping within a single botanical taxon of the lowest known rank, which grouping, irrespective of whether the conditions for the grant of a breeder's right are fully met, can be: defined by the expression of the characteristics resulting from a given genotype or combination of genotypes; distinguished from any other plant grouping by

---

<sup>148</sup> UPOV 1991, article 15(2).

<sup>149</sup> UPOV 1991, article 3(2).

<sup>150</sup> UPOV 1991, article 1(vi).

the expression of at least one of the said characteristics and; considered as a unit with regard to its suitability for being propagated unchanged. In its definition of a "breeder", UPOV 1991 includes a person that discovers a variety. This provision is an unambiguous extension of the scope of protection to mere discoveries, unlike UPOV 1978 whose provision in this regard was only implicit and rather tenuous.<sup>151</sup> One other important difference between the UPOV conventions discussed here regards the cumulation of plant breeder's rights and patent protection. In the preceding discussion on UPOV 1978, it was indicated that cumulation was explicitly forbidden. UPOV 1991 on the other hand omits this restriction, thereby effectively allowing a plant breeder to also hold a patent over the same variety.<sup>152</sup>

#### *Conditions for protection eligibility*

The basic criteria that have to be met for plant variety protection under the 1991 UPOV Act, are similar to the 1978 version. Plant varieties protection is granted over varieties that are:

- *new*,

"The variety shall be deemed to be new if, at the date of filing of the application for a breeder's right, propagating or harvested material of the variety has not been sold or otherwise disposed of to others, by or with the consent of the breeder, for purposes of exploitation of the variety ..."<sup>153</sup>

- *distinct*,

"The variety shall be deemed to be distinct if it is clearly distinguishable from any other variety whose existence is a matter of common knowledge at the time of the filing of the application ..."<sup>154</sup>

- *uniform*,

"The variety shall be deemed to be uniform if, subject to the variation that may be expected from the particular features of its propagation, it is sufficiently uniform in its relevant characteristics."<sup>155</sup> and

---

<sup>151</sup> Article 1(iv), stating in part that a "breeder" means the person who bred, or discovered and developed, a variety ."

<sup>152</sup> See Watal (2001), p. 149; and see also Helfer (2004), p. 26.

<sup>153</sup> UPOV 1991, article 6(1).

<sup>154</sup> UPOV 1991, article 7.

<sup>155</sup> UPOV 1991, article 8.



- *stable*

"The variety shall be deemed to be stable if its relevant characteristics remain unchanged after repeated propagation or, in the case of a particular cycle of propagation, at the end of each such cycle."<sup>156</sup>

*Exceptions and restrictions to protected rights*

Quite significantly, a reading of articles 14 and 15 does not yield an explicit recognition of the exception to the breeder's right on farmers' privilege, or to the extent it does, it severely limits its utility. Article 14 spells out the expansive scope of the breeder's right stating that anyone that wishes to use the breeder's material will need authorization from the right-holder. According to one commentator, this means that "any farmer engaging in this activity [of farm-saved seed] will infringe the rights of the holder [that is, the breeders' right]."<sup>157</sup> By article 15(1), the act limits the breeder's right from applying to acts "done privately and for non-commercial purposes,"<sup>158</sup> acts done for "experimental purposes"<sup>159</sup> and acts done for the purpose of breeding other varieties.<sup>160</sup> Article 15(2) recognizes that a member may restrict the breeder's right to permit farmers to use protected plant varieties for propagating purposes on their own holdings as long as the "legitimate interests of the breeders" are safeguarded.

Some interesting interpretive issues arise from the potential extent to which the "private and non-commercial purpose" language in the 1991 UPOV's article 15(1) allows for the farmers' privilege, particularly when reading it *in tandem* with the expansive scope of the breeder's right as contained in article 14. Particular concern here would be on the right of small scale, resource poor farmers to continue carrying on their age-old practices of saving, exchanging and selling seeds from season to season, without the precondition of asking for the breeder's authorization. What type of farmer meets the criteria of "small" or "poor" is itself a legal landmine, and the criteria for such a determination is undoubtedly bound to vary from country to country. Reference in this regard may be made to the size of the area of cultivated land, the volume of seed required or used, the seasonal production or output of the farmer, among other criteria.

---

<sup>156</sup> UPOV 1991, article 9.

<sup>157</sup> See Llewelyn, in Cottier and Mavroidis (2003), p. 321.

<sup>158</sup> UPOV 1991, article 15(1)(i).

<sup>159</sup> UPOV 1991, article 15(1)(ii).

<sup>160</sup> UPOV 1991, article 15(1)(iii).

In the phrase acts done "privately and for non-commercial purposes," the word "and" that links the two elements is crucial because it means that both elements must be present for the exception to hold. This means for example, that a farmer that wishes to benefit from the exception must save the seeds locally and use them for subsistence and not put them up for sale. The thrust in the "private" element would seem to be on the "individual", meaning, the individual single farmer for present purposes. An additional possible element would be the scale of farming operations of such an individual, either in terms of land size or production volume.<sup>161</sup>

As alluded to earlier, the spirit of the provision seems to point towards relatively small-scale farming operations, mainly subsistence, for the "private" precondition in the exception to apply. Experience in rural poor communities, such as those in many parts of Africa, should lead one to conclude that they would clearly fall within the scope of what is considered "private" because many of the communities and rural farmers conduct their seed saving activities locally, using simple technology such as sun-drying, and then storing the seed in pots, granaries or gunny bags. In terms of territorial scope therefore, their seed saving activities could easily be considered "private". This may be contrasted with seed traders' fairs or agricultural shows where corporations involved in seed trade meet, often in the glare of media publicity. A farmer participating in such events would certainly not meet the "private" condition in the language of the exception in article 15(1). The other pre-condition of "non-commercial purpose" could also be interpreted as constituting both a profit motive and a profit margin. For the condition to be fulfilled, it would have to be shown that the farmer had no motive of profiting from the act of selling, and that whatever earnings that may have been obtained should not be so large as to lead to the implication of a large scale business operation. Although motive or intent is a notoriously difficult legal element to establish, it could be gleaned from, for example, either the business records of a particular farmer, or the very circumstances of their existence and farming practices. Taking the example of article 30 of the TRIPS Agreement, regarding the curtailment of a patent right, it could also be determined by looking at the extent to which the

---

<sup>161</sup> See for instance, article 14 of the EU Council Regulation No. 2100/94 on Community Plant Variety Rights, which defines a "small farmers" as one whose farm is no bigger than an area required for the production of more than 92 tons of cereals.

farmers "non-commercial" acts impact on the breeder's right, for example on their profit margin.<sup>162</sup>

Article 15(2) is an exception to the breeder's right in cases where farmers use for propagating purposes, on their own holdings, the product of the harvest which they have obtained by planting the protected variety. The key limitations in this provision lie in the phrases "for propagating purposes" and "on their own holdings". The "private and non-commercial" precondition in article 15(1)(i) do not apply to article 15(2), otherwise if they did, the draftsmen would have included it as such. Hence, one interpretation centring on the language of article 15(2) could be that once a UPOV member exercises its option to restrict the breeder's right in favour of the farmers, such farmer's privilege can be exercised unfettered by the requirement that their acts be "private and non-commercial".

#### 4.2.3 National Treatment in the UPOV Acts and the TRIPS Agreement

According to article 3(1) of the 1978 UPOV Act, national treatment is granted on a reciprocal basis. This is quite distinct from the unconditional national treatment provisions in the TRIPS Agreement. A UPOV member can impose conditions and formalities:

"Without prejudice to the rights specially provided for in this Convention, natural and legal persons resident or having their registered office in one of the member states of the Union shall, in so far as the recognition and protection of the right of the breeder are concerned, enjoy in the other member states of the Union the same treatment as is accorded or may hereafter be accorded by the respective laws of such states to their own nationals, provided that such persons comply with the conditions and formalities imposed on such nationals."

Further, article 3(2) of UPOV 1978 makes the granting of national treatment conditional upon the presence of either a "registered office" or actual residence of the applicant, for protection in the granting UPOV member:

---

<sup>162</sup> See for example the holding of the panel in the *Canada – Patent Protection of Pharmaceutical Products (Generic Medicines)* case (WT/DS114/R (17 March 2000)), para. 7.36.

"Nationals of member states of the Union not resident or having their registered office in one of those states shall likewise enjoy the same rights provided that they fulfil such obligations as may be imposed on them for the purpose of enabling the varieties which they have bred to be examined and the multiplication of such varieties to be checked."

Article 3(3) reinforces this by predicating the granting of plant variety protection for a particular genus or species on similar entitlements in the country of the applicant for plant variety protection:

"Notwithstanding the provisions of paragraph (1) and paragraph (2), any member state of the Union applying this Convention to a given genus or species shall be entitled to limit the benefit of the protection to the nationals of those member states of the Union which apply this Convention to that genus or species and to natural and legal persons resident or having their registered office in any of those states."

Article 4(1) of the 1991 UPOV Act, is a little less onerous in the strictures it places on national treatment, referring only to the requirement that national treatment apply to "natural persons resident and legal entities having their registered offices within the territory of a Contracting Party" with the added proviso that "the said nationals, natural persons or legal entities [should] comply with the conditions and formalities imposed on the nationals of the said other Contracting Party." In the TRIPS Agreement on the other hand, national treatment means that nationals of trading partners are to be granted treatment no less favourable than that which a WTO member gives its own citizens in terms of IPRs protection.

Clearly, the UPOV Acts are inconsistent with the national treatment provision of TRIPS because they only require a UPOV member to accord treatment that is equal to that of their own nationals, to those that are from fellow UPOV member states and with headquarters in the concerned UPOV member state. Further, under UPOV 1978, a UPOV member can limit the right to apply for protection only to nationals from fellow UPOV-member states that give protection to the particular genus or species for which protection is sought.

#### 4.3 Plant varieties protection through a combination of patents and *sui generis* systems

This is the last of the three options in article 27(3)(b) - the least debated and the least used. The main questions addressed here are: First, what would be the motivation for a country to use the combination of patents and *sui generis* systems? Second, what would it mean when a WTO member says that it is opting for the combination of the two systems? As indicated in the discussion on what amounts to an effective *sui generis* system, national domestic policies, priorities and preferences, should be the guiding factor in formulating such a system. The option of a combined system should also be motivated by such factors. In this case therefore, the concerned WTO member should first evaluate what kind of agricultural system is predominant in the country.

Many poor countries, particularly those in Africa are characterized by an agricultural sector that is largely rural, poor and subsistence-based. A patent system for plant varieties protection would clearly be misplaced, especially given the fact that such farmers have been freely exchanging seeds and varieties since time immemorial. In addition however, there are some developing countries that have moved quickly in developing an urban or peri-urban agricultural export base, for example of cut flowers, fruits and vegetables. In this case, especially in the area of high-value flower varieties, there is a clear need for protection in order to prevent competitors from gaining an unfair market edge, or to encourage foreign direct investment in the cut flower industry, leading to job creation and export earnings. Here therefore, you have the coexistence of both systems of agriculture - one rural and subsistence, and the other urban or peri-urban and export oriented - forming a dual approach, perhaps with different levels of protection for different varieties.<sup>163</sup> On the other hand, in developed countries where agricultural production is highly competitive, mechanized, resource and research intensive, and almost entirely export oriented, it would make sense to provide the most stringent means of protection.

---

<sup>163</sup> See IPGRI. 1999. *Key questions for policy makers: protection of plant varieties under the WTO Agreement on Trade Related Aspects of Intellectual Property Rights*, p. 6. Rome.

## V. IMPLEMENTATION OF TRIPS ARTICLE 27(3)(b)

The TRIPS Agreement has an inbuilt flexibility regarding its implementation. Article 1 leaves it up to each WTO member "to determine the appropriate method of implementing [the] Agreement within their own legal system and practice." This provision applies to the implementation of article 27(3)(b) as much as it applies to all the other obligations in the TRIPS Agreement. In determining the options for implementation, the general starting point should be the nature of the legal system of the country seeking implementation. In some WTO members, international treaties such as the TRIPS Agreement are '*self executing*'. This means that the international treaty becomes directly applicable law once the concerned country has ratified, signed or acceded to it. In Brazil and Argentina for example, international treaties are self executing. The United States makes a distinction between self-executing and non-self executing treaties.

Even in countries where international treaties are self-executing, it was not enough to have simply signed the Final Act (including the TRIPS Agreement). The "compromise nature" of the TRIPS Agreement is such that some of its provisions must be fleshed out by domestic law. By "compromise nature" it is meant that some provisions are open to various interpretations, and therefore the scope and form of implementation depends on the implementing country. There are certainly unambiguous provisions such as article 33 which states explicitly that "The term of patent protection available shall not end before the expiration of a period of twenty years counted from the filing date." For countries that follow the "first to file" system, one would expect their domestic patent law to provide for a term of patent protection in language almost verbatim or significantly close to the language in article 33. For those that follow the "first to invent" rule, as provided in the footnote to article 33, one would expect language to that effect in domestic patent law. The basic point is, however that the term of patent protection would be a minimum of twenty years, either from the date of filing or from the date of invention, depending on the prevailing domestic system.

The real difficulty and source of variation in practice from country to country comes when one considers the equivocal nature of provisions such as article 27(3)(b). Here, the implementing country is faced with a number of choices. First, it would have to decide which plants and animals can be excluded from patentability, in line with the option not to patent certain of these animals and plants. Second, it would have to decide whether to exclude

biological processes from patentability, and if so, which ones. Third, it would have to decide which of the three options for protection of plant varieties (patents, *sui generis* systems, or a combination of the two) to use. Fourth, if the choice is that of a *sui generis* system, it would have to decide what would be an effective model for such a system, because "effective" in this case imports to the mind differing levels of protection. Fifth, it would have to decide on the scope and form of such a system. Sixth, if implementation will be done through legislation, which is practically the only way to do it, then it would have to decide on whether to draft a comprehensive piece of legislation or some framework law that applies it domestically. And seventh, once such a law has been drafted and passed, it would have to notify the TRIPS Council in accordance with article 63 of the TRIPS Agreement.

### 5.1 Obligations created by article 27(3)(b)

Article 27(3)(b) invites WTO members to implement a set of specific minimum obligations. First, members are obligated to implement some form of IPR protection for plant varieties. This requirement is complicated by the lack of clear definitions. They have three options to protect plant varieties, whatever they define them to be, that is, patents, effective *sui generis* systems, or a combination thereof. The basic characteristics of such an IPR system are that it should create a discrete enforceable right on the part of the right-holder, and that should such a right be violated, the right-holder should be provided with an avenue to challenge and seek recompense for the violation. Indeed, the TRIPS Agreement greatly emphasizes enforcement.

Second, article 27(3)(b) as read in context with the rest of the primary obligations in the TRIPS Agreement, creates the obligation that every WTO member should accord non-discriminatory treatment, basically national treatment, to all nationals of other WTO members. This means that a Member cannot treat its own nationals better than the treatment it gives to nationals from other member countries; for example, it cannot give greater recognition of IPRs to its nationals as opposed to others. Connected with national treatment is the most-favoured nation treatment requirement, which means that any favours, privileges or immunities granted by a member to its national right-holders should be extended immediately and unconditionally to nationals of all other members.

Third, derived from the basic character of the IPR system that a WTO member sets up as discussed above, is the requirement that such a system

should provide for a judicial procedure for redressing any violations of the right-holder's basket of IPRs. This judicial procedure should of course meet the basic requirements of due process. Enforcement procedures should in general be fair, equitable, simple and fast. Although there is no obligation in the TRIPS Agreement to create a separate system of intellectual property tribunals, some countries have created them, while others, among them, many African countries have had immense difficulties in dedicating resources into even basic enforcement mechanisms.<sup>164</sup>

## 5.2 The mechanics of implementation

What do WTO members that wish to meet their obligations typically do? This is a question that may appear obvious but often one that many under-resourced developing countries grapple with. A number of considerations need to be borne in mind before a decision on what to do is actually made. First, at policy level, an evaluation needs to be made of the nature and size of the domestic seed industry (meaning seed production, certification, supply, trade and marketing), as well as the value and potential of the plant breeding programs. The seed industry, resource poor farmers who save seed from season to season, and plant breeders are usually most affected by legislative changes in the manner of protection for plant varieties. Second, again at policy level, a clear elaboration is needed of the national development goals, including prospects for the development of plant breeding programs, the biotechnology sector, the need for foreign direct investment and other related concerns. Third, the policy makers will need to consider the diplomatic implications of aligning national legislation with certain international agreements. In multilateral trade negotiations at the WTO, the issue of alliances is important. It is the only way to command clout and influence the evolution of trade policy for poor economies. Hence, the country will need to consider the kinds of diplomatic links and alliances it may need in the long-run, and therefore make an effort not to undermine them through ill-advised legislation. Fourth and most importantly, an evaluation of what options there are and their implementation costs, will be necessary. This should be done in a comprehensive and accurate manner. Often, such costing would include setting up an entirely new institutional mechanism, with skilled legal and technical personnel, infrastructure and laws to back it up. Given the heavy costs of implementing IPR laws,<sup>165</sup> some

---

<sup>164</sup> Dutfield (2003), p. 67.

<sup>165</sup> See UNCTAD. 1996. *The TRIPs Agreement and developing countries*. UNCTAD/ITE/1.



commentators have often advised poor countries to set up regional institutions, or to use existing national institutions such as Attorney Generals' offices.

Once the preliminary policy decisions are made, the next step is to consider the method of implementation. In accordance with article 1(1) of TRIPS, WTO members are "free to determine the appropriate method of implementing the provisions of this Agreement within their own legal system and practice." To a large extent, this depends on the legal system of the country at issue. In this regard, there are two main legislative options. The first is a relatively short statute that incorporates the TRIPS Agreement into the laws of the country, giving it the force of domestic law. Regardless of the legal system, this is never a good option to take because the TRIPS Agreement is a framework set of minimum standards that involves options, and presupposes further action. With particular regard to article 27(3)(b), such a statute would inevitably need to be accompanied by legislation that indicates the choices that the country made in terms of the method of plant variety protection, and it will also have to deal with the administrative issues. A second approach is a comprehensive statute that sets out a series of clear objectives on the protection of IPRs. It would also spell out what IPRs and obligations are protected, the scope and exceptions of protection, and the procedure for enforcement, and remedies available in the event of infringement.

### **5.3 General obligations of particular relevance to implementation**

#### **5.3.1 The issue of transition periods**

Tied closely to the question of implementation are the transition periods. Article 65 of the TRIPS Agreement provides the transition periods for developing countries. It allowed developing countries and transition economies to delay the implementation of the TRIPS Agreement for a period of five years, with the exception of articles 3, 4 and 5.<sup>166</sup> Developing countries and newly independent states in Eastern Europe were allowed a period of five years from the date of entry into force, meaning 1 January 2000 was the deadline. For areas of technology not previously covered by legislation in developing countries, the deadline was set for 1 January 2005. For full implementation, LDCs were given until

---

<sup>166</sup> See articles 65(2) and 65(3) respectively.

1 January 2006. Article 65 adds the caveat that any changes to laws or regulations during the transition period should not result in "any lesser degree of consistency with the provisions of the Agreement." This provision basically means that the minimum standards of the TRIPS Agreement should remain inviolate, and blocks any WTO member that may want to start whittling away what had already been negotiated. This issue was addressed, albeit obliquely, in the *Indonesia – Autos* case<sup>167</sup> but with respect to the TRIPS provisions on trademarks. The United States claimed that Indonesia was in violation of its obligations under article 65(5) because its "National Car Programme", which had been introduced during its transition period imposed special requirements on nationals of other WTO members regarding the use of their trademarks. The United States contended that these obligations were inconsistent with article 20 of the TRIPS Agreement. The panel did not directly address the question of violation of article 65(5), because it made a finding based on article 20 itself, which precluded the necessity of a finding under article 65(5). The panel's finding was that the "National Car Program" trademark requirements were not 'requirements' in the sense of article 20. Further, that the United States had "not demonstrated that measures [had been] taken that reduce[d] the degree of consistency with the provisions of article 20 and which would therefore be in violation of Indonesia's obligations under article 65(5) of the TRIPS Agreement."<sup>168</sup>

The *India – Patents* case<sup>169</sup> related the obligation to provide for patent protection with the temporal nature of transition periods and stated that developing countries that were still in the transition period were under no obligation to meet their obligations, in this case, specifically to provide for patent protection until the period of transition had expired.<sup>170</sup> As indicated earlier, there are however certain provisions that apply even during the transition period, such as the non-discrimination requirement in article 3. Article 70(8) of the TRIPS Agreement has also been held to be one of those provisions that apply even during the transition period.<sup>171</sup> In *Indonesia – Autos*, the panel noted that the transition period under article 65(2) did not apply to article 3, stating: "... we note that Indonesia has been under an obligation to apply the provisions of article 3 since 1 January 1996, article 3

---

<sup>167</sup> *Indonesia – Certain Measures Affecting the Automobile* (WT/DS54/R), para. 15.1.

<sup>168</sup> *Id.*

<sup>169</sup> See *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products* (WTO Doc. WT/DS50/R) (September 1997).

<sup>170</sup> *Id.*, para. 5.27.

<sup>171</sup> *Id.*, para. 5.55.

not benefiting from the additional four years of transition generally provided by article 65(2) to developing country members."

The general view by developing countries is that transition periods are far too short, and do not allow for the requisite changes in order to ensure effective implementation. In addition, transition periods *per se*, unaccompanied by meaningful technical assistance for example, amount to little more than a waiting period. Recent experience shows that developing countries are often at pains to comply with so many obligations that priority in implementation is often given to those on which some assistance is available. According to Mangeni for example, WTO transition periods are arbitrary, inadequate and inappropriate as periods for adjustment and preparation.<sup>172</sup> He goes as far as to suggest that "in future, developing countries should not agree to any transition periods that lack a concrete plan and schedule, and specific funds availed and secured as part of the obligations of the agreements to ensure the implementation of any necessary adjustment and preparation."<sup>173</sup>

### 5.3.2 Complying with the non-discrimination requirement

How does a WTO member comply with the national treatment and MFN requirements? Simply by a rigorously neutral drafting and practical application of IPR legislation. For the legal draftsman, compliance legislation would need to be drafted in such a way that first, it does not predicate the granting of protection, or indeed refer to the nationality of a potential right-holder, and second, that it does not grant any favours, privileges or immunities to the nationals that it does not give to other applicants or right-holders.

National treatment in the TRIPS Agreement, unlike its equivalent provisions in agreements on trade in goods where it applies to like products, refers to the treatment that individual nationals receive in the country in which they are applying for IPR protection. As explained earlier, MFN yields a multilateralizing effect for rights accorded to a WTO member's nationals, in the sense that it extends those rights to others. There are a few exceptions to the MFN requirement in the TRIPS Agreement. For example, it does not apply to benefits accorded to nationals of other countries under agreements

---

<sup>172</sup> See Mangeni, F. *Implementing the TRIPs Agreement in Africa*, p. 6. In Bellmann, C., Dutfield, G. and Melendez-Ortiz, R. eds. *Trading in knowledge: development perspectives on TRIPs, trade and sustainability*. Earthscan Publications.

<sup>173</sup> Id.

for general judicial assistance or law enforcement, and international agreements on IPR protection that predate the TRIPS Agreement, meaning those that entered into force prior to 1 January 1995. Such IPR agreements should be notified to the TRIPS Council and they must "not constitute arbitrary or unjustifiable discrimination against nationals of other members."<sup>174</sup>

### 5.3.3 Complying with the notification procedures

Article 63 addresses transparency obligations. Article 63(1) requires WTO members to publish, or if publication is not practicable, to make publicly available all laws, regulations, judicial decisions and administrative rulings that relate to the subject matter of the TRIPS Agreement. Article 63(2) requires them to notify the TRIPS Council of any such laws or regulations from the date of compliance,<sup>175</sup> and article 63(3) requires them to respond to requests for information from other WTO members. In the *India – Patents* case,<sup>176</sup> one of the issues was precisely whether articles 63(1) and 63(2) apply during the transition periods. According to the panel's decision, India had not complied with the said provisions. On appeal, India argued that it was not obliged to make notifications until the expiry of the transition period, that is 1999. Although the Appellate Body did not rule on the issue, it seems that India's interpretation is correct.

## VI. SUMMARY AND CONCLUDING THOUGHTS

Under the TRIPS Agreement, WTO members can exclude from patentability plants and animals and essentially biological processes that give rise to them, but they cannot exclude micro-organisms from such protection. They are also required to provide for some system of plant varieties protection, either by patents, *sui generis* systems, or some appropriate combination of both. The language of article 27(3)(b) gives rise to many legal interpretation uncertainties and complexities. As we have explained in this chapter, it is quite unclear what is meant by "micro-organism", "essentially biological processes" and many other terms liberally used; and neither is the scope of the provision clear given the fact that there is no definition of what constitutes a "plant variety". Clearly, considerable leeway was deliberately left to WTO members in their formulation of domestic IPR laws and policies.

---

<sup>174</sup> Article 4(d), TRIPs Agreement.

<sup>175</sup> WTO Doc. IPC/C/2

<sup>176</sup> *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products* (WTO Doc. WT/DS50/R) (September 1997), para. 5.27.

The emphasis here is that such regulatory and policy space should not be stifled by an overly restrictive interpretive approach of the open-ended issues that arise from the TRIPS Agreement.

In this chapter, it has also been noted that there are a number of approaches that countries could follow in complying with their plants and plant varieties protection obligations. In this case there are two dominant models: the United States approach, which emphasizes the patent approach, and the European approach, which emphasizes the *sui generis* approach. The United States grant plant patents, which are different from normal patents, also called utility patents. Sometimes normal patents could also be granted to plants. Plant varieties (as opposed to plants) on the other hand are also patentable in the United States. Other countries grant *sui generis* plant variety protection, typically plant breeders' rights using a UPOV-style model. It should be remembered of course that in addition to this protection of plants and plant varieties, patents are heavily used in the protection of processes and scientific technologies used in research.

Many developing countries have viewed the *sui generis* option favourably. In fact, some like India only agreed to the TRIPS Agreement forming part of the single undertaking at the conclusion of the Uruguay Round precisely because of the flexibilities that they saw in that particular provision. Hence a choice of the *form* of *sui generis* system that both meets the requirements of TRIPS and also does not compromise national agricultural productivity priorities has remained a perennial concern. As we explained, inevitably, the form a *sui generis* system takes pre-empts judgment of its effectiveness. In essence, for WTO members intent on complying with TRIPS, it comes down to a choice of, and the relationship between, coexisting regimes. Almost all WTO members have signed the CBD and are active in the meetings of the ITPGRFA. In addition, some are members of UPOV 1978 or UPOV 1991. Therefore, the choice is not a stark "either/or" but a more nuanced evaluation of what aspects to borrow from each regime in order to meet a particular national objective.

This choice of regime is certainly not a trivial one, and many developing countries are often at a loss because of their relative unfamiliarity with the exact mechanics of either approach. They have also not had the benefit of long-running national debates on the functioning and benefits of either system, as is the case with both the United States and Europe, in which the issue has been on the table for some six decades. The UPOV system is at

least one of the models that have been proposed with the advantages being that it is some kind of off-the-shelf ready legal regime that countries could adopt and have no worries about WTO compliance. The down-side to it is that it is heavy on plant breeders' rights, especially the 1991 revision. In this sense, certain aspects of it are unsuited to the subsistence and collaborative approach of rural agriculture in much of the developing world.

### MAIN REFERENCES

**Adede, A.** 2003. *Origins and history of the TRIPS negotiations*. In C. Bellmann, G. Dutfield, & R. Melendez-Ortiz, eds. *Trading in knowledge: development perspectives on TRIPS, trade and sustainability*. Earthscan Publications.

**Correa, C.** 1994. *Sovereign and property rights over plant genetic resources*. FAO Commission on Plant Genetic Resources: First Extraordinary Session. Background Study Paper No. 2, Rome.

**Croome, J.** 1995. *Reshaping the world trading system: a history of the Uruguay Round*. World Trade Organization, Washington DC.

**Dutfield, G.** 2003. *Intellectual property rights and the life science industry: a twentieth century history*. Ashgate.

**FAO.** 2004. *Intellectual property rights in plant varieties: international legal regimes and policy options for national governments*. by Helfer, L., FAO Legislative Study No. 86. FAO Legal Office, Rome.

**Llewelyn, M.** 2003. Which rules in world trade law – patents or plant variety protection? In Cottier and Mavroidis, eds. *Intellectual property: trade competition and sustainable development*. The World Trade Forum Vol. III. University of Michigan Press.

**Mangeni, F.** 2000. *Technical issues relating to sui generis protection of plant varieties*. South Centre Occasional Paper No. 11, South Centre, Geneva.

**Matthews, D.** 2002. *Globalising intellectual property rights: the TRIPS Agreement*. Routledge.

**Stewart, T.P.** ed. 1993. *The GATT Uruguay Round: a negotiating history (1986–1992)*, p. 2294. Kluwer Law and Taxation.

**Watal, J.** 2001. *Intellectual property in developing countries*. Kluwer Law International.

## 5.

### **GEOGRAPHICAL INDICATIONS AND TRADE IN AGRICULTURAL PRODUCTS**

#### *Contents*

I.	INTRODUCTION	169
II.	INTERNATIONAL REGIMES FOR THE PROTECTION OF GIs AND RELATED IPRs	172
2.1	The 1967 Paris Convention for the Protection of Industrial Property	172
2.2	The 1891 Madrid Agreement for the Repression of False or Deceptive Indications of Sources on Goods	173
2.3	The 1958 Lisbon Agreement on the Protection of Appellations of Origin and their Registration	174
2.4	The 1951 Stresa International Convention for the Use of Appellations of Origin and Designations of Cheeses	175
2.5	The TRIPs Agreement	176
III.	THE PROTECTION OF GIs IN THE UNITED STATES	179
3.1	Features of the US approach	179
3.2	The BATF Regulations	181
3.3	The Lanham Act	182
IV.	THE PROTECTION OF GIs IN THE EU	183
V.	THE PROTECTION OF GIs IN OTHER COUNTRIES	185
5.1	The Bangui Agreement	186
5.2	The Andean Group	186
5.3	MERCOSUR, the "Group of Three" and the Revised Central American Convention	187
5.4	The EU-ACP Cotonou Agreement	187
VI.	GIs AND TMs	188
VII.	WTO DISPUTES ON TRADEMARKS AND GIs	191



168	<i>Basic Legal Obligations</i>	
VIII.	DOHA ROUND NEGOTIATIONS AND GIs	195
IX.	GIs, TMs, AND ENHANCED TRADE OPPORTUNITIES ACCESS	198
X.	SUMMING UP AND CONCLUSIONS	201
	MAIN REFERENCES	202

## I. INTRODUCTION

Geographical Indications (GIs) are place or country names that identify the origin, quality, reputation or other characteristics of products.<sup>1</sup> Often, they are associated with, and serve to distinguish, a particular product from its competitors. In that sense, GIs can be a valuable rural development and marketing tool, particularly for small and medium size enterprises involved in the production of niche, high quality or popular commodities.<sup>2</sup> Such enterprises are common in both developed and developing countries.

What is the conceptual origin of GIs? To respond to this question, it bears remembering that present-day popular or exotic products initially had specific geographical places of origin to which they were eventually inseparably associated in the minds of consumers. These qualities were often distinctive, superior or special in some way. They set the product apart from the rest of its competitors. With increased movement of people across geographical or national boundaries, these distinct, superior or special products gained increased popularity or usage, and became more widespread and readily available. In addition, some of the original producers sought markets beyond their geographical confines. They marketed and sold their products in other regions, often with positive reception in the destination markets contributing to even wider availability and distribution. Hence, the geographical name of such a product began to denote certain appreciable qualities in the market.

The legal protection of "trading names and marks" deriving from the origin of a product is not new in most countries. It has been done, in particular regarding food products, at least since the end of the nineteenth century using laws against false trade descriptions or passing off. Such laws generally make it illegal to attribute the origin of a product to a region where it does not in fact come from. They also disallow imputing certain misleading qualities to a product. Conceptually, the main objective of these laws is consumer protection; that is, that the consumer should not be misled into purchasing products by an erroneous representation of their origin or quality. In addition, there is a concomitant monopolistic and anti-

---

<sup>1</sup> Article 22.1 of the WTO Agreement on Trade Related Aspects of Intellectual Property Rights,

<sup>2</sup> Some commentators who are opposed to GIs advance the view that they do not in fact contribute to the marketability of products. See Spencer, D. 2005. *The way ahead – what future for geographic indications?* Address at the WIPO Worldwide Symposium on Geographical Indications. Parma (available at [www.wipo.int](http://www.wipo.int)) (hereafter, "Speech, David Spencer").

competitive effect, in the sense that the genuine producers of goods with the protected name are granted the right to use it to the exclusion of others. These producers therefore derive an exclusive benefit that is protected by law. The effect of national laws on the protection of GIs is to limit the use of GIs only to products (or parts thereof as the case may be) that originate from the designated area or region and that meet certain production standards and quality. In many instances, some kind of association, collective or industry group ensures that producers maintain the standards and quality, or they could forfeit the right to use the GI. Hence, the association or industry group may own the exclusive right to the use of the GI.

There are two main methods through which countries provide for the protection of GIs. First, they may do so through existing intellectual property or competition laws. Their second option is to offer protection through legislation dedicated to the specific protection of GIs. The example of South Africa, where general Trademarks (TM) and alcohol laws have been used to protect GIs, illustrates the first method. Section 10(2)(b) of the South African Trade Marks Act No. 194 of 1993 defines a trademark to include "a sign or an indication which may serve, in trade, to designate the kind, quality, quantity, intended purpose, value, and geographical origin" of a product. Hence, by virtue of the reference to "geographical origin" the TMs law covers the protection of GIs as well. Further, section 10(12) states that a TM that is "inherently deceptive" shall not be registered as such or shall, if registered, be capable of being expunged from the TM registry. The consequence of this provision is that if GIs are used in a manner misleading to the consumer, they shall be expunged from the record and their protection withdrawn. In addition to the TMs law, section 12(1) of the South African Liquor Products Act No. 60 of 1989 provides that "no person shall use any name, word, expression, reference, particulars or indication in any manner either by itself or in coherence with any other verbal, written, printed, illustrated or visual material in connection with the sale of a liquor product in a manner which conveys or creates, or is likely to convey or create, a false or misleading impression as to the nature, substance, quality, composition or other properties, or the class, cultivar, origin, age, identity, or manner or place of production, of the liquor product." This provision makes it an offence to use GIs in a false or misleading manner, but also raises the standard of protection in the sense that even if the geographical area of production may be correctly mentioned, a producer may be disallowed from using the GI if the other conditions, such as quality, are not met.

As mentioned above, the second method for protecting GIs is through legislation dedicated to their specific protection. A good illustration of this second approach is the European Union. On 14 July 1992, the EU passed Council Regulation (EEC) No. 2081/92 whose objective is to protect GIs and designations of origin for agricultural products other than wines and spirits. Article 2 of the regulation provides for two classes of GIs. The first, the "protected designation of origin", for example "*Prosciutto di Parma*", designates the name of a region, place, or country that is the origin of a product "whose quality is exclusively due to a particular geographic environment". According to recent judgment from the European Court of Justice regarding Greek "Feta" cheese, "...a PDO, a traditional name such as 'feta', which is not the name of a region, place or country, must refer to an agricultural product or a foodstuff from a defined geographical environment with specific natural and human factors which is capable of conferring on that product or foodstuff its specific characteristics. Moreover, the name cannot have become generic."<sup>3</sup> The second, "the protected geographical indication", for example "*Scottish Lamb*", designates a region, place, or country that is the origin of a product "which possesses a specific quality, reputation, or other characteristics attributable to the location or origin." By article 13 of the regulation, both of these are protected from "any direct or indirect commercial use of the name registered in respect of products not covered by the registration in so far as those products are comparable to the products registered under that name."

This chapter seeks to accomplish two things. First, it explains the existing regimes for the protection of GIs. In this regard, it focuses on the two dominant methods, that is the United States TM law-based approach, and the EU approach which to a large extent, but not exclusively, derives from the French concept of "appellations of origin". Second, the chapter maps out the broad outlines of the on-going debate on GI protection for products other than wines and spirits in the context of the WTO Doha Round of trade negotiations while paying particular attention to the position taken by developing countries in the on-going negotiations.

---

<sup>3</sup> See *Germany and Denmark v. The Commission*, Case No. C-465/02 and C-466/02 (2005).

## II. INTERNATIONAL REGIMES FOR THE PROTECTION OF GIs AND RELATED IPRs

There are a number of international legal instruments that provide for the protection of GIs and similar IPRs. These include: the Paris Convention for Protection of Industrial Property, the Madrid Agreement for the Repression of False or Deceptive Indications of Source on Goods, the Lisbon Agreement on the Protection of Appellations of Origin and their Registration, and the TRIPs Agreement.

### 2.1 The 1967 Paris Convention for the Protection of Industrial Property

According to its article 2(1), the convention applies to the widest range of industrial property, including "indications of source and appellations of origin and the repression of unfair competition." "Industrial property" is defined at article 1(3) of the Paris Convention to include "all manufactured or natural products, for example, wine, grain, tobacco leaf, fruit, cattle, minerals, mineral waters, beer, flowers, and flour." It was in the Paris Convention that the distinction between "indications of source" and "appellations of origin" was made for the first time. An "indication of source" refers to the geographical place or country of origin of a product. Hence, a typical infringement of an "indication of source" would be to produce it in a place other than what is stated in the name. (Owing to opposition to stronger wording during the Uruguay Round trade negotiations there is no absolute prohibition on the use of false indications of source in the current TRIPS framework).

Article 9 provides the remedies available in the event of infringement of marks and trade names. These remedies are seizure of all goods unlawfully bearing a trademark or trade name, or in the event that the law of a particular country does not allow seizure, then it shall be replaced by a prohibition of importation of the offending products. Article 10(1) provides that the remedies in article 9 shall apply in "cases of direct or indirect use of a *false indication of the source of the goods or the identity of the producer, manufacturer, or merchant*." Hence, the mischief that the provision seeks to address, that is the falsehood in the source of the goods, relies on consumer perception.

The Paris Convention approaches the issue of GI protection from the angle that it constitutes unfair competition. According to article 10*bis* unfair

competition arises when acts carried out by a competitor create confusion, when a competitor uses false allegations in the course of trade so as to discredit the establishment, the goods, or the industrial or commercial activities of a competitor, or when indications or allegations mislead the public as regards the "nature, the manufacturing process, the *characteristics*, the suitability for their purpose, or the quantity, of the goods." The use of the word "characteristics" in article 10*bis*, as opposed to the earlier proposed which was "the origin" means that only the importation of products containing "false" indications of geographic origin are prohibited. Geographic names which are merely misleading are not disallowed. Consequently, the Paris Convention only offers very limited GIs protection. A finding of infringement relies heavily on the consumer's perception of deception. In addition, its limited impact on GIs protection may be discerned from the fact that despite its many signatories totalling 169 as at April 2005, the Paris Convention has to be implemented through national law, which many of its signatories have not done.

## **2.2 The 1891 Madrid Agreement for the Repression of False or Deceptive Indications of Sources on Goods**

The Madrid Agreement states its purpose in its title: the "repression of false or deceptive indications of sources on goods." Despite the prominence of the phrase "indications of source" in the agreement, this phrase is not defined. According to article 1(i) of this agreement, "all goods bearing a false or deceptive indication by which one of the countries to which this agreement applies, or a place situated therein, is directly or indirectly indicated as being the country or place of origin shall be seized on importation into any of the said countries." In the event that seizure is not possible under national law, the agreement provides that import prohibitions should be applied.

Article 4 of the Madrid Agreement is most instructive in its categorical statement that geographical indications of wines shall not be used as generic terms. It states: "The courts of each country shall decide what appellations, on account of their generic character, do not fall within the provisions of this Agreement, *regional appellations concerning the source of products of the vine being, however, excluded from the reservation specified by this article.*" This agreement is therefore stronger than the Paris Agreement regarding the extent of protection it gives to geographical indications on wines. In fact, its very existence arose from the dissatisfaction with the Paris Agreement. As of

April 2005, the agreement had 34 contracting parties; it has not attained a high degree of popularity partly owing to the perception that its provisions on GIs protection are too exacting.

### **2.3 The 1958 Lisbon Agreement on the Protection of Appellations of Origin and Their Registration**

This agreement offers the strongest protection for GIs. It was negotiated in keeping with article 19 of the Paris Convention. It is influenced to a large extent by the French *Code de la consommation*, in the sense that it borrows the concept of "appellations of origin" as opposed to the concept of "geographical indications" used in the TRIPS Agreement. At article L.115–1, the *Code de la consommation* defines the *appellation d'origine controlée* as "the designation of a country, a region, or a locality that serves to indicate that a product originates from that place and owes its quality or characteristics to its geographical surroundings, including natural and human factors." It should be noted that the definition includes not only "human factors" but also "natural factors." The idea is therefore that only those products manufactured according to local traditions by local people qualify for protection under the protection of geographical appellations of origin.

According to article 2 of the Lisbon Agreement "appellation of origin" means the "geographical name of a country, region, or locality, which serves to designate a product originating therein, the quality and characteristics of which are due exclusively or essentially to the geographical environment, including natural and human factors." Like in the French *Code de la consommation*, this definition includes both the human and natural factors. According to its article 3, the agreement ensures the protection of appellations of origin against usurpation or imitation, even if the true origin of the product is indicated or if the appellation is used in translated form or accompanied by terms such as "kind", "type", "make", "imitation".

The main objective of appellations of origin is to guarantee the authenticity and origin of the raw materials and the traditional practices of the communities involved. As opposed to TMs law, appellations of origin guarantee consistency in manufacturing practices and the other natural (including climatic conditions and soil quality) and human practices that go into the production process of the protected item. Another difference with TMs is that an appellation of origin can never go into public domain and the name or designation cannot be used for "any similar product or for any other

product or service as long as such a use is capable of altering or weakening the distinctiveness of the appellation of origin." According to the Lisbon Agreement, an appellation of origin must first be protected under national law, and then notified to the World Intellectual Property Organization (WIPO). It is then WIPO's duty to publish and notify this protection to all the other members of the Lisbon Agreement. All participating countries must oblige by protecting the appellation of origin upon notification unless they object within one year. Article 6 is strict in terms of the level of protection it offers. It states that, "an appellation which has been granted protection in one of the countries ... cannot, in that country, be deemed to have become generic, as long as it is protected as an appellation of origin in the country of origin."

The agreement provides a two-year phase-out period for appellations of origin which conflict with TMs in cases where the TM was registered prior to the appellation of origin in violation of the "first in time first in right" rule. According to article 5, "If an appellation which has been granted protection in a given country pursuant to notification of its international registration has already been used by third parties in that country from a date prior to such notification, the competent office of the said country shall have the right to grant to such third parties a period not exceeding two years to terminate such use, on condition that it advises the International Bureau accordingly during the three months following the expiration of the period of one year." In sum, the Lisbon Agreement gives the greatest protection to appellations of origin, and considers them superior to TMs. However, relatively few countries, 23 in total, are parties to the agreement.

#### **2.4 The 1951 Stresa International Convention for the Use of Appellations of Origin and Designations of Cheeses**

According to its article 2(1), the Stresa Convention of 1951 is reserved for "fresh and matured products obtained by draining after the coagulation of milk, cream, skimmed or partially skimmed milk or a combination of these", or by "products obtained by the partial concentration of whey, or of buttermilk, but excluding the addition of any fatty matter to milk." It applies to all specifications which constitute false information as to the origin, variety, nature or specific qualities of cheeses, which are stated on products which might be confused with cheese.



Under article 3 of this convention only "cheese manufactured or matured in traditional regions, by virtue of local, loyal and uninterrupted usages" may benefit from protection based on designations of origin governed by national legislation. For example, "Gorgonzola (Italy)" is listed as a designation of origin under the convention. By law, Gorgonzola is only produced in a defined area which includes the provinces of Bergamo, Brescia, Como, Cremona, Cuneo, Milan, Novara, Pavia, and Vercelli, as well as the zone of Casale Monferrato. Gorgonzola is one of only three Italian cheeses which qualify, under the Convention, to be classified as *Denominazione di origine controllata*. Article 1 of the convention prohibits the use of any names which conflict with protection granted under the convention.

## 2.5 The TRIPS Agreement

The TRIPS Agreement, which came into force in 1995, is the most comprehensive agreement on intellectual property rights (IPRs). It covers all major IPRs, including trademarks and GIs. It should be noted that even before the TRIPS Agreement came into force, there was a provision in the GATT, article IX, which could have been used to confer protection on GIs. This provision was however framed very weakly, merely requiring the contracting parties to "cooperate" in ensuring that distinctive or geographical names in products were not used in a manner that would misrepresent the true origin of a product. The mechanism for cooperation was not specified and was never discussed. This provision amounted to little more than a best-endeavour un-enforced clause. This was probably deliberate, given that when the Havana Charter article corresponding to GATT article IX was discussed at the Havana Conference in 1947, "...it was agreed that the text of the paragraph 7 [present GATT article IX:6] should not have any effect of prejudicing the present situation..." In other words, as far as possible, the *status quo* should be maintained. In the 1987 *Japan-Taxes on and Labelling of Alcoholic Beverages* dispute, the European Communities claimed that wines and alcoholic beverages imported into Japan did not enjoy adequate protection regarding origin marking contrary to Japan's obligations under article IX:6. All that the panel could recommend regarding this was that the two parties should "cooperate...with a view to preventing the use of such trade names in such a manner as to misrepresent the true origin of a product, to the detriment of such distinctive regional or geographical names ..."

Contrary to the GATT provision, the TRIPS Agreement is much more elaborate in its treatment of GIs. At article 22(1), it defines GIs as

"indications which identify a good as originating in the territory of a member, or a region or locality in that territory, where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin" (emphasis added). A number of issues are evident from this definition. First, the availability of GI protection is limited to goods – it does not extend to services. Second, "a good" can mean any commodity, including all kinds of agricultural products and foodstuffs, despite the fact that article 23 is focused on wines and spirits. Third, the provision also mentions certain criteria that should be considered as being either quality, reputation or other characteristics alone. This means that any of the three are sufficient for eligibility, whereby quality would refer to some positive attributes, reputation would refer to favourable impression by users or consumers, and "other characteristics" could include physical attributes such as colour. And fourth, as a link between the product and its origin, the provision requires that the product should be "essentially attributable to its geographical origin." This language seems to have some flexibility in it, in the sense that "essentially attributable" is not only based on geographical connection (for example because of *terroir*, or the quality a product derives from the soils or climatic conditions of an area) but perhaps also by reputation.

Article 22(2) provides as follows:

"In respect of geographical indications, members shall provide the legal means for interested parties to prevent: (a) the use of any means in the designation or presentation of a good that indicates or suggests that the good in question originates in a geographical area other than the true place of origin in a manner which misleads the public as to the geographical origin of the good; (b) any use which constitutes an act of unfair competition within the meaning of article 10*bis* of the Paris Convention (1967)."

This provision outlines the basic standard for GIs protection. It also has some in-built interpretive flexibility. For example, "the legal means" can refer to any number of methods of protection. Legislation, regulations, administrative mechanisms or even principles of common law such as unfair competition or passing off, are all included within the scope of conceivable "legal means" of protection. The phrase "misleads the public" is comparable with the TM law concept of "consumer confusion" and "likelihood of confusion", as found for example in article 16 of the TRIPS Agreement. What "public" means here is open to various interpretations. It could mean for example the "wider public" or the specific habitual consumers of a particular product.

Further, the circumstances in which a consumer will be confused as to the geographical origin of product in practice are also not easy to establish legally. In addition, article 22(2)(b) refers to "any use which constitutes an act of unfair competition within the meaning of article 10bis of the Paris Convention." Article 10bis of the Paris Convention refers to the doctrine of "unfair competition." In this cross-reference, the TRIPS Agreement imports the common law and civil law causes of action for GIs. This is significant because it broadens the base for causes of action and therefore the degree of protection available for GIs.

Article 23 provides for a higher level of protection for GIs of wines and spirits. Article 23(1) states as follows:

"Each member shall provide the legal means for interested parties to prevent use of a geographical indication identifying wines for wines not originating in the place indicated by the geographical indication in question or identifying spirits for spirits not originating in the place indicated by the geographical indication in question, even where the true origin of the goods is indicated or the geographical indication is used in translation or accompanied by expressions such as "kind", "type", "style", "imitation" or the like."

"Legal means" in this provision also introduces flexibility as to the mechanisms for protection. Protection is accorded even in circumstances when use of a GI might not mislead the public or even if it is accompanied by expressions such as "kind", "type", "style" or "imitation". In sum, article 23 increases the protection for GIs of wines and spirits beyond what is contained in article 22(3) which does not prohibit incorrect GIs if they are not misleading to the public.

Article 24 spells out the exceptions to the rules, that is, situations when a WTO member may decide not to protect GIs. It allows persons who have used a GI in a continuous manner with regard to the same or related goods or services in the territory of that member either (a) for at least ten years preceding 15 April 1994 or (b) in good faith preceding that date, to continue doing so. Further, in case a GI is synonymous with the customary name of a grape variety existing in the territory of that member as of the date of entry into force of the WTO Agreement, that member does not have to protect that GI. Hence, generic GIs are not necessarily able to be protected,

although WTO members can opt to waive this provision and grant protection to generic GIs anyway. In France for example, a GI can never be generic. According to article 24(9), there is no obligation to protect GIs which are not protected or for which protection in the country of origin has ceased or which have fallen into disuse in that country.

### III. THE PROTECTION OF GIs IN THE UNITED STATES

#### 3.1 Features of the US approach

The historical core of the US approach to GIs can be found in the 1872 Supreme Court ruling in the case of *Canal Co. v. Clark* in which the court decided that GIs were not distinctive enough to warrant protection as trademarks because they "point only at the place of production, not the producer."<sup>4</sup> Accordingly, U.S. courts have held that GIs should only be protected if secondary meaning can be shown. Secondary meaning only exists when "customers [...] come to use a geographically descriptive word in a new and secondary sense of indicating only one source and quality for goods and services."<sup>5</sup> An example of an instance where a US court held secondary meaning existed was in *American Waltham Watch Co. v. United States Watch Co.*, where the court held that although "Waltham" originally only referred to the location of the company, it eventually developed a secondary meaning of watches that were made by a specific manufacturer.<sup>6</sup>

The central point of departure between the US and EU approaches to the protection of GIs lies in the fact that the US does not enthusiastically support the whole idea of GIs. Some commentators have attributed this to the absence of a long tradition of local food and wine processing industries and others to the prevailing economic orthodoxy:

The business world of the US is oriented towards liberal economic theory which is based on individual ownership. It follows that Americans are familiar and comfortable with trademarks as a way of protecting the intellectual property associated with a business name. Trademarks belong to individuals or corporations, and corporations are treated as individuals before American law. [...There are] collective certification marks, but these belong to a group of

---

<sup>4</sup> *Canal Co. v. Clark*, 80 U.S. 311 (1872).

<sup>5</sup> McCarthy on *Trademarks and Unfair Competition*, Vol. 2, § 14.9 (fourth edition, 2005).

<sup>6</sup> *Waltham Watch Co. v. United States Watch Co.*, 173 Mass. 85 (1899).

producers that is usually incorporated. The result is that collective certification marks act much like regular trademarks.<sup>7</sup>

The US does not have a law on GIs other than its law on TMs. Hence, while the EU takes the position that product names should be protected based upon their status as GIs, the US does not in general grant TM protection to such names because many product names are considered as simply generic rather than references to specific geographic locations. When a geographic term becomes so associated with a product that the term comes to mean the product, the geographic product name is considered generic, and receives no exclusive trademark rights. In the US, *McCarthy on Trademarks and Unfair Competition* lists as examples of familiar generic terms: French fried potatoes, Brussels sprouts, Danish pastry, English horn and Bermuda shorts.<sup>8</sup> It is important to note that it is also possible for a geographic term that started out as generic to eventually gain protected status if it is used exclusively by a single seller and acquires secondary meaning. In *Anheuser-Busch, Inc. v. Budweiser Malt Products, Corp.*, the court held that the term "Budweiser," which was derived from the term "Budweis", had previously come to be known as a generic term for a beer brewed in any location by a special brewing process first originating in Budweis, Bohemia and had acquired a secondary meaning to describe only beers sold by Anheuser-Busch.<sup>9</sup>

In the US, consumer protection is the primary legal concern. The basic objective of US TMs law was to protect those that use words, names, symbols or other devices to identify their goods and services. GIs that are merely generic as opposed to actually identifying a source are generally not protected under the TMs regime. The use of these generic GIs is controlled by a set of regulations issued by the Bureau of Alcohol, Tobacco and Firearms (BATF) found within the Office of the Secretary to the Treasury. The BATF's authority to issue these regulations derives from the 1935 Federal Alcohol Administration Act. This vests in the Secretary of the Treasury the authority to make regulations on the labelling of distilled wines, spirits and malt beverages. Hence, BATF is charged with regulating the use of domestic and foreign GIs through its labelling power.

---

<sup>7</sup> Barham, E. 2004. *Localization within globalization: better protecting geographical indications to favour sustainable development*. Speech Presented at the 2004 Annual WTO Public Symposium: Roundtable on Geographical Indications. (available at [www.wto.org](http://www.wto.org)).

<sup>8</sup> *McCarthy on Trademarks and Unfair Competition*, Vol. 2, § 14.8 (fourth edition, 2005).

<sup>9</sup> *Anheuser-Busch, Inc. v. Budweiser Malt Products, Corp.*, 295 F. 306 (2d Cir. 1923).

One of the fundamental differences between the EU and US approaches is that the EU does not give much credence to the view that certain GIs are merely generic. Hence, the regulations on the use of generic GIs issued by BATF are at odds with the EU approach, and this difference is evidence of the rift between the two regimes. The current provisions in the TRIPS Agreement provide for the protection of GIs and additional protection for GIs in wines and spirits. Owing to the exceptions in TRIPS, it did not change the US approach much even though an amendment to the TM law was made in 1996.

### 3.2 The BATF Regulations

The BATF Regulations divide GIs for wines into categories with differing protections. Hence, according to the Code of Federal Regulations, section 4.24, there are three categories of geographic significance: generic, semi-generic, and non-generic. The first category of "generic" names refers to those which according to BATF, designate a class of wine and which originally possessed geographical significance. Examples include sake and vermouth.

Semi-generic indications are those which do not originate from the geographical indication. They can be used as GIs as long as the label bears the actual place of origin in addition to the geographical name. Examples of these include *Burgundy*, *Chianti*, *Chablis*, *Champagne*, *Port*, *Sherry* and *Tokay*. Non-generic indications are those that are neither generic nor semi-generic, and are therefore not distinctive and can be freely used to designate a wine. Examples include American, California, Napa Valley, French, Spanish, and others. Non-generic indications might also be those that, according to BATF, are clearly distinctive of a specific grape wine distinguishable from all others, for example *Bordeaux blanc*, *Rhone*, *Schloss Johannisberger* and *Lacryma Christi*.

BATF also regulates appellations of origin, in a manner that is actually quite similar to the French appellations of origin concept. It requires wine grape growing areas to contain evidence: (i) that the name of the viticulture area is locally and nationally known; (ii) the boundaries of the viticultural area are known and specified in the application; (iii) and geographical features such as climate, soil, elevation, physical features, which distinguish the viticultural area from the rest of the surrounding areas.

### 3.3 The Lanham Act

Prior to the coming into force of the TRIPS Agreement, the Lanham Act (or the US Trademark Act, 15 U.S.C. section 1127) prohibited the registration or use of any "deceptive marks" and marks that were "primarily geographically descriptive" or "deceptively descriptive." Following the TRIPS Agreement, in 1996 Congress amended the law to specifically prohibit the use of GIs which when used on wines and spirits identifies a place other than the actual origin of the products.

The Lanham Act's refusal to register "primarily geographically descriptive" marks parallels the BATF's treatment of "generic" terms. What does "primarily geographically descriptive" mean in practice? The first step in analysing this phrase is to examine whether the mark is "primarily" geographically descriptive. This means determining whether the term's geographical significance is or is not of primary significance to purchasers. It also means looking at whether the geographic term is "minor, obscure, remote or unconnected to the goods". If it is found that the mark is primarily descriptive then it is not protected unless it acquires a secondary meaning.<sup>10</sup>

"Primarily geographically deceptively misdescriptive" marks use a term that does not describe the location where the goods or services originate. No protection is granted to such a mark if: (i) the primary significance of the mark is merely geographic; (ii) a purchaser is led to think that the product originates in the place identified in the mark; and (iii) the goods do not actually originate from the place identified.<sup>11</sup>

Finally, the Lanham Act does not grant any protection to marks that are "deceptive". In order to determine whether a mark is "deceptive", a similar test can be undertaken to the one above for "primarily geographically deceptively misdescriptive marks". The only difference is that an additional materiality prong is included, which asks whether the purchaser's erroneous belief as to the origin would materially affect his decision to buy the good.<sup>12</sup> The difference between the two types of deceptive geographic marks is that a mark found to be "primarily geographically deceptively misdescriptive" may be considered for registration on the Principal or Supplemental Register

---

<sup>10</sup> *Trademark Manual of Examining Procedure*, second edition, Revision 1.1 (August 1997) §1210.05 (hereafter, "T.M.E.P").

<sup>11</sup> T.M.E.P. §1210.06

<sup>12</sup> T.M.E.P. §1210.07

under certain conditions involving when the geographic term gained secondary meaning, whereas a mark found to be simply "deceptive" can never be considered for registration.

#### IV. THE PROTECTION OF GIs IN THE EU

The EU and its member countries have had a long history of regulating the use of GIs and related IPRs. Before 1992, the EC did not have a common approach to the protection of GIs. Each member adopted its own way of dealing with the issue, either through general or specific laws. At the EC level, "several acts regulating product designations for wines and spirits were adopted as from 1970, but there were no rules for agricultural products and foodstuffs".<sup>13</sup> This situation remained unchanged until 1992.<sup>14</sup> In that year, Council Regulation on the Protection of Geographical Indications and Designation of Origin for Agricultural Products and Foodstuffs, was adopted.<sup>15</sup> Subsequently, it entered into force on 26 July 1993. In broad terms, the EU's regulation of GIs is part of its wider economic and agricultural strategy including adjustments to the Common Agricultural Policy and consumer protection.

The scope of the regulation is limited only to agricultural products and foodstuffs. This means that industrial products are excluded from its coverage. The regulation therefore covers products such as mineral and spring waters, bread, pastry, cakes, confectionary, biscuits, natural gums and resins, beer and others. It does not cover wines and spirits which come under different regulations. The EU Regulation on wines<sup>16</sup> sets only minimum standards and thereby leaves room for individual EU members to formulate more precise protection. According to its article 6, Regulation 2081/92 provides for the maintenance of a register of GIs to be protected by the EC. In article 10, it also includes specifications that protectable GIs should meet and implementation mechanisms in the sense that member countries are required to have inspection procedures to ensure that the specifications are complied with.

---

<sup>13</sup> O'Connor, B. 2004. The legal protection of geographical indications. *Intellectual Property Quarterly*, 1: 37.

<sup>14</sup> Increasingly, the need to develop EC-wide legislation on GIs was felt. In particular, the case regarding Cassis de Dijon in 1978 served to emphasize this need and to push the EU to review its food law. See Case 120/78, *Rewe Zentrale v. Bundesmonopolverwaltung für Branntwein* (1979) E.C.R. 649 3 C.M.L.R. 494.

<sup>15</sup> Council Regulation (EEC) No. 2081/92. O.J. L208/1, as amended by Regulation 535/97 (1997) O.J. L83/3, and Regulation 692/2003 (2003) O.J. L99/1.

<sup>16</sup> For wines, see *Council Regulation* (EC) No. 1493/1999 of 17 May 1999.



The regulation has a number of distinctive features. For instance, rather than using the French concept of "appellations of origin", the regulation instead refers to "geographical indications" (like in the TRIPS Agreement), and "designations of origin". Article 2 distinguishes between these two. A "designation of origin" is the name of a region, specific place or a country, used to describe an agricultural product or a foodstuff. However, in order to be registrable, the "designation of origin" must meet three conditions: the product must originate in that geographical area, the quality or characteristics of the product must be essentially or exclusively due to the geographical environment including natural and human factors, and the production, processing and preparation of the product must take place in the defined geographical area.

A "geographical indication" on the other hand is the name of a region, a specific place or a country, used to describe an agricultural product or foodstuff. It can only be protected if the product originates in the designated geographical area, if the specific quality, reputation or other characteristics of the product are attributable to its geographical origin, and if the production, processing and preparation of the product takes place in the defined geographical area. The Appellation of Origin requires production, processing *and* preparation to take place in the designated region, while use of a GI is available as soon as just one of them takes place there. Hence, the GI is broader in scope as it does not include in its criteria the environment, natural and human factors. The French inclusion of all these factors in the "appellation of origin" doctrine is similar in definition to the "designation of origin". In article 13(3), the regulation precludes the possibility of a GI falling into public domain. In general, its protection of GIs is quite strong. For instance, its article 13 does not allow the use of a GI even if it is accompanied by a qualifying word such as an "*imitation* of Gorgonzola". According to this article, registered GIs and "designations of origin" benefit from the same protection in all member states of the EU. The bundle of rights it assigns a proprietor of such an IPR includes the right of exclusive use of the designation or GI.

Finally and quite importantly, the EU Regulation tries to resolve any tensions between GIs and designations of origin on the one hand, and TMs on the other. Article 14 relies on the motive of registration to distinguish between a TM whose protection can continue and one whose protection would have to cease in the event of conflict. In sum, it says that if a TM which predates a GI or designation of origin was registered in bad faith, its protection would

cease as soon as the parallel GI or designation of origin is registered. If on the other hand a TM was registered in good faith, it could co-exist with a GI or designation of origin for a specified period of time. Article 14 also places restrictions on the registration of GIs or designations of origin when they would overlap with a TM which enjoys a wide reputation and if such registration would be deceptive or confusing.

Recent changes have been introduced by way of Regulation No. 692/2003. This regulation has amended article 14 of Regulation 2081/92, by extending its application to non-EU countries if certain conditions are met. These conditions are: a comprehensive product specification, effective inspection arrangements and right to objection and, lastly, the conferral of equivalent protection to corresponding products coming from the European Union.

## V. THE PROTECTION OF GIs IN OTHER COUNTRIES

In general, the practice in common law countries for the protection of GIs is included in the laws on TMs, unfair trade practices and consumer protection. This is the case for example in Canada and Australia. The laws on unfair trade practices bar companies from engaging in deceptive practices such as wrongly and misleadingly stating the origin of a particular product. Controlling unfair trade practices is hence essentially a consumer protection strategy. The common law tort of *passing off* is designed to protect the reputation of producers against people seeking to trade on that reputation. It bars anyone from passing his products off as someone else's. False statements and resultant losses are essential components of passing off. Consumer protection may be secured by unfair trade practice law, or separate legislation. It broadly punishes any person who, in trading, gives a false description of products. In countries that apply the civil law system, the concept of *terroir* seems to be prominent as a basis for granting protection.

In compliance with the TRIPS Agreement, many African countries have just enacted or are in the process of drafting national legislation on GIs. Some, like Namibia, still use TMs law to protect GIs. Others like Côte d'Ivoire have specifically addressed GIs in keeping with the provisions of the Bangui Agreement. The South African Agricultural Product Standards Amendments Act No. 63 of 1998, which authorizes the government to restrict the use of a "specified" geographical name, brought South Africa into compliance with its GIs obligations in TRIPS. Additionally, in the Trade and Development Cooperation Agreement of 1999 (a free trade agreement between

South Africa and the European Union), an obligation was included in which South Africa committed itself to phase out the use of the terms "Oporto" or "Porto" and "Sherry" or "Jerez" and other "traditional expressions" of wines such as "regional wines" or "*vin de pays*." In Mauritius, the Geographical Indications Act of 2002 extends GIs protection to anyone that is engaged in the production of the protected product in the designated geographical area. In this sense therefore, it does not restrict Mauritian GIs to only holders of Mauritian nationality. The law also establishes a registration system for GIs with a fairly elaborate procedure for submitting and approval of applications.

### **5.1 The Bangui Agreement**

The Bangui Agreement signed on 2 March 1977 created the African Intellectual Property Organization. The agreement enjoins its members to recognize and cooperate in the enforcement of different categories of IPRs including appellations of origin. Members of the agreement declare their willingness to subscribe to all the major international conventions in intellectual property including the Trademark Registration Treaty of 1973. The agreement also provides for common administrative procedures through a centralized application and registration process for all IPRs. It does not restrict the usage of a GI to a particular group but instead extends it to anyone, including foreigners that meet the expected criteria in article 3 of its Annex VI, as long as they are carrying out business in the covered Bangui Agreement area.

### **5.2 The Andean Group**

The Andean Group Decision 344 of 1993 is the common patent and trademark law for the five Andean Pact countries. It applies directly in the member countries and does not require ratification. It provides for the protection of the exclusive right to make use of officially recognized "appellations of origin" at Chapter VII. In general, the decision prohibits the registration of marks consisting exclusively of signs or indications which may be used in commerce to designate or describe the species, quality, quantity, destination, value, origin, time of production, or other characteristics of the products or services to be protected.

### **5.3 MERCOSUR, the "Group of Three" and the Revised Central American Convention**

The 1995 MERCOSUR Protocol on Harmonization of Rules on Intellectual Property in Relation to Trademarks, Geographical Indications and Denominations of Origin contains a general obligation for parties to protect both geographical indications and appellations of origin. However, the protocol does not determine the scope of protection.

The agreement establishing the "Group of Three", comprising Colombia, Mexico and Venezuela, lays down the right of member countries to protect "designations of origin" and geographical indications. However, it is left to domestic legislation to determine the conditions for protection.

The Revised Central American Convention for the Protection of Industrial Property was signed between El Salvador, Guatemala, Costa Rica and Nicaragua. Its 1994 revision requires the protection of geographical indications, using the same definition of that notion as employed by article 22(1) of the TRIPS Agreement.

### **5.4 The EU-ACP Cotonou Agreement**

This agreement, which was signed in 2000, defines IPRs to include GIs. At article 46(1), it commits the parties to further negotiations on the protection of GIs:

"... the parties recognise the need to ensure an adequate and effective level of protection of intellectual, industrial and commercial property rights, and other rights covered by TRIPS including protection of geographical indications, in line with the international standards with a view to reducing distortions and impediments to bilateral trade."

However, in the on-going negotiations between the EU and ACP countries on Economic Partnership Agreements, it is unclear whether intellectual property rights in general or GIs in particular are included in the agenda of negotiations. In the negotiating mandate for the Eastern and Southern Africa (ESA) region for example, the relevant paragraph in the mandate ambiguously states:

"Taking into consideration the importance of trade-related issues [including IPRs issues] as reflected in the Cotonou Agreement and the progress being made in the development of trade-related issues at the regional level as part of the regional integration process, the ESA region will, through the Regional Preparatory Task Force, study at the ESA level how to build capacities in trade related areas and subsequently decide on whether to incorporate trade related issues into the ESA EPA negotiations after further progress on the Doha Development Agenda has been made."

The results of the negotiations, namely, the Economic Partnership Agreements, are due to enter into force in 2008. If and until the negotiations address specific IPRs issues, it is unlikely that a clear picture will emerge regarding the impact of these agreements on GIs protection. What is possibly true however is that the negotiations process will increase the level of awareness on GIs and their impact on trade and market access opportunities for ACP countries.

## **VI. GIs AND TMs**

In many countries the protection afforded to GIs by law is similar to the protection afforded to certain forms of intellectual property. In particular, there are similarities between the protection given to GIs and that given to TMs and certification marks.

Although a GI is not a type of TM as it does not serve to exclusively identify a specific commercial enterprise, there are usually prohibitions against registration of a trademark which constitutes a geographical indication. A TM is a distinctive sign of some kind used by a business to identify itself and its products or services to consumers, and to set the business and its products or services apart from those of other businesses. It does not only indicate the origin of a product but is also an expression of the producer's will to make an industrial effort. In a decision of the German Constitutional Court, the latter stated: "A trademark does not only indicate the origin of a product but is an expression of the producer's will to make an industrial effort. A person thus acquiring an asset must be protected by the constitutional guarantee of property. The aim of constitutional protection is to grant security concerning those acquired assets and the reliance on the continued existence of a person's rights. State measures depriving the

trademark owner of his rights do not comply with this constitutional protection of property."<sup>17</sup> A TM is always registered and legally restricted to the use of the owner or manufacturer of that particular product.<sup>18</sup> Like GIs, TMs that have been in use for long periods of time and that identify certain popular or high quality products can be of great commercial value.

Whereas one can produce a trademarked product in any geographical location and market it under the TM, a GI product is tied to a particular geographical location and method of production. This is the main conceptual distinction between GIs and TMs. Beyond this, save for the fact that GIs cover only products while TMs can cover both products and services, GIs and TMs clearly overlap. Conflicts between the two arise because of this overlap of otherwise legally distinct regimes, with differing levels of protection. The TMs system vests prior rights and renders the words used in the name in a manner that is generic and open, the GIs system vests stronger rights in the holder in the sense that the names used are used for purposes of attaching the product to its origin or mode of production. In this sense, the rights under the GIs system may be characterized as being largely more exclusive and closed. In France for example, GIs can never be generic. Further, as we explain later in this chapter, under the Madrid Agreement and the WTO Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS), GIs for wines can never also become generic over time.

The increase in popularity for GIs in products is exactly what happens with TMs. One *caveat* however relates to the place of production. For a GI, production has to take place in a particular designated geographical area while for a TM, production can occur anywhere. Despite a legal distinction in terms of the bundle of rights available under each of the two regimes, there is little practical difference in their daily effects or application. This is the genesis of the problem that is the subject of international debate regarding GIs, and their perceived clash or overlap with other systems such

---

<sup>17</sup> German Federal Constitutional Court, *Decision of 20 May 1997*, Constitutional Court Reports, 51: 216, 218.

<sup>18</sup> See the Opinion of the Advocate General Jacobs, European Court of Justice C-1089 SA *CNL-SUCAL NV v. HAG GEAG* of 13 March 1990, European Court Reports 1990, I-3711, para. 19 ("Hag II"). Noting as follows: "A trademark can only fulfil that role if it is exclusive. Once the proprietor is forced to share the mark with the competitor, he loses control over the goodwill associated with the mark. The reputation of his own goods will be harmed if the competitor sells inferior goods. From the consumers' point of view, equally undesirable consequences will ensue, because the clarity of the signal transmitted by the trademark will be impaired. The consumer will be confused and misled."

as TMs. This problem is further compounded by the fact that GIs and TMs are often used together, with some commentators even arguing that GIs were the forerunners of TMs. Some geographical names are used in certain TMs, for example in "Kyoto bean cakes", "Frankfurter sausages" or "Hershey's". Given the variations in the bundle of rights that a holder has under GIs and TMs, the use of geographical names in TMs potentially gives rise to the legal question of pre-eminence of rights. Simply put, what would prevail in the event that a registered GI uses a geographical name already in use in a TM? Various approaches have been used ranging from "collective TMs", which function almost like GIs, to clear provisions on precedence depending on the intentions of the GI or TM holder. One of the main legal problems with the TM model has to do with the means available in the event of an infringement. Under TMs law an aggrieved party has recourse to legal remedy when in the use of a word denoting a geographical area, (a) there has been a deceptive or confusing use, or (b) when there has been unfair competition. Are these two also sufficient for the protection of a holder of a GI? This is an open question, particularly given the fact that the logic of GIs is that it is not simply a distinctive name denoting certain qualities, but also a region and a culture.

A further blurring of the distinctions between GIs and TMs is found in the increasing use of "certification marks" and "collective TMs" which in the practical sense are GIs registered as TMs.<sup>19</sup> In the United States, Canada and Australia, certification and collective TMs can be registered. These are used precisely in order to indicate the specific qualities of goods including their geographical origin. Their use is not exclusive to a particular registered business enterprise but to a collective group as long each one of them meets the criteria required. Anyone using them is therefore a part of that collective. As in the case of certain high value GIs, membership in the collective is in most cases, subject to strict compliance with certain rules, such as the geographical area of production and methods used. Examples of geographical indications that are protected as certification or collective TMs in the United States include the expressions like "Parma Ham" owned by *Consorzio del*

---

<sup>19</sup> See, WIPO. 1993. *Protection of Geographical Indications through registration of collective marks or certification marks*, WIPO Information Paper, Symposium on International Protection of Geographical Indications, Funchal (Madeira, Portugal).

*Prosciutto di Parma*<sup>20</sup>, "Roquefort" owned by the Community of Roquefort<sup>21</sup>, and "Darjeeling" owned by the Tea Board of India Corporation.<sup>22</sup>

## VII. WTO DISPUTES ON TRADEMARKS AND GIs

In the 2005 Panel decision in the European Communities–Protection of Trademarks and Geographical Indications dispute,<sup>23</sup> at issue was an EC Council Regulation No. 2081/92 of July 14 1992, relating to the protection of GIs for agricultural products and foodstuffs. Australia and the United States claimed that this regulation was in violation of the EC's commitments under the TRIPS Agreement, articles 3(1) and 22(2) among other provisions. Article 3(1) of the TRIPS Agreement states:

"Each member shall accord to the nationals of other members treatment no less favourable than that it accords to its own nationals with regard to the protection of intellectual property, subject to the exceptions already provided in, respectively, the Paris Convention (1967), the Berne Convention (1971), the Rome Convention or the Treaty on Intellectual Property in Respect of Integrated Circuits"..."

At the outset, the panel set out the parameters of its analysis of the obligations contained in article 3(1). It stated: "two elements must be satisfied to establish an inconsistency with this obligation: [first] the measure at issue must apply with regard to the protection of intellectual property; and [second] the nationals of other members must be accorded "less favourable" treatment than the member's own nationals."<sup>24</sup> Regarding the first of the two conditions, the panel decided that it had been satisfied because GIs constitute intellectual property for the purposes of the TRIPS Agreement. Regarding the second of the conditions, that is, as to whether "less favourable treatment" had been accorded to the nationals of other WTO members, the panel stated that "it is not disputed that [the equivalence and reciprocity] conditions accord less favourable treatment to persons with interests in the GIs to which those conditions apply."

---

<sup>20</sup> US Registration No. 2,014,628.

<sup>21</sup> US Registration No. 0,571,798.

<sup>22</sup> US Registration No. 1,632,726.

<sup>23</sup> *European Communities – Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs* (WT/DS174/R and WT/DS290/R).

<sup>24</sup> Australia Report, paras. 7.174–175, U.S. Report, paras. 7.124–125.



Effectively, those conditions "modify the ... equality of opportunities to obtain protection with respect to intellectual property in two ways." First, GI protection "is not available under the regulation in respect of geographical areas located in third countries which the commission has not recognized under article 12(3)." And second, GI protection is available "if the third country in which the GI is located enters into an international agreement or satisfies the conditions in article 12(1)." These two conditions "represent a significant "extra hurdle" in obtaining protection that does not apply to geographical areas located in the European Communities." On this basis, the panel found that "the equivalence and reciprocity conditions modify the effective equality of opportunities with respect to the availability of protection to persons who wish to obtain GI protection under the regulation, to the detriment of those who wish to obtain protection in respect of geographical areas located in third countries, including WTO members." In the words of the panel, this was "less favourable treatment."

Hence, the panel found that "with respect to the equivalence and reciprocity conditions, as applicable to the availability of GI protection, the regulation accords treatment to the nationals of other members less favourable than that it accords to the European Communities' own nationals, inconsistently with article 3(1) of the TRIPS Agreement."

Article 22(2) of the TRIPS Agreement provides as follows:

"In respect of geographical indications, members shall provide the legal means for interested parties to prevent: (a) the use of any means in the designation or presentation of a good that indicates or suggests that the good in question originates in a geographical area other than the true place of origin in a manner which misleads the public as to the geographical origin of the good; (b) any use which constitutes an act of unfair competition within the meaning of article 10*bis* of the Paris Convention. "

The EC Regulation (above) contained two sets of detailed procedures for the registration of GIs for agricultural products and foodstuffs. The first set, in articles 5 through 7, applied to the names of geographical areas located within the European Communities. The second set in articles 12(a) and 12(b), applied to the names of geographical areas located in third countries outside the European Communities. Article 12(1) of the regulation contained further conditions including that a third country must provide

reciprocal and equivalent protection for GIs to those offered in the European Communities. In particular, it states:

"Without prejudice to international agreements, this regulation may apply to an agricultural product or foodstuff from a third country provided that: (a) the third country is able to give guarantees identical or equivalent to those referred to in article 4; (b) the third country concerned has inspection arrangements and a right to objection equivalent to those laid down in this regulation; and (c) the third country concerned is prepared to provide protection equivalent to that available in the Community to corresponding agricultural products or foodstuffs coming from the Community."

The United States claimed that the regulation is inconsistent with article 22(2) of the TRIPS Agreement "because it does not provide interested parties in other WTO members which do not satisfy the equivalence and reciprocity conditions, including inspection structures, the legal means to protect their GIs on a uniform basis throughout the territory of the European Communities." Furthermore, the United States also claimed that the regulation is inconsistent with article 22(2) "because interested parties in other WTO members must depend on their respective governments to intercede on their behalf in the verification and transmission of applications."

The United States also claimed that the regulation is inconsistent with article 22(2),

"... with respect to objections because (1) persons who wish to object to the registration of a GI cannot do so directly; (2) the regulation does not permit persons in other WTO members which do not satisfy the equivalence and reciprocity conditions the right to object; (3) persons who wish to object to the registration of a GI must have a legitimate interest or a legitimate economic interest in the European Communities, but an interested party can be any producer or seller established in the region falsely indicated as the source in a given territory; and (4) the grounds for objection based on a prior trademark in article 7(4) of the regulation are narrower than the rights required

to be made available under article 22.2 of the TRIPS Agreement." <sup>25</sup>

With respect to the first two claims, relating to "equivalence and reciprocity conditions" and "examination and transmission of applications," the panel recalled its earlier findings on these aspects of the regulation in the context of the national treatment obligations. For the article 22(2) claim, it noted that "the assessment of the conformity of measures with members' obligations generally requires an assessment of the manner in which they confer rights or protection on private parties." Thus, "in order to determine whether the European Communities has implemented its obligation owed to other members in article 22(2), the panel must examine whether it has provided the legal means required by that provision for interested parties who are nationals of other members."<sup>26</sup> Turning to the regulation, the panel noted that "it makes protection available, in the sense that it provides legal means to protect GIs." Notwithstanding, it said, "those legal means have *not* been provided to interested parties with respect to GIs located in a third country, including a WTO member, that does not satisfy the equivalence and reciprocity conditions, and the government of which does not examine and transmit an application." Therefore, the panel concluded that the United States "has made a *prima facie* case in support of its claim that the regulation does not make available the legal means to interested parties in accordance with article 22(2) of the TRIPS Agreement."<sup>27</sup>

The panel then noted that the United States "challenged the regulation only, and not other means by which the European Communities may have implemented article 22(2)." In this regard, the European Communities submitted that "it implements article 22(2) through other measures besides the regulation, including the foodstuffs labelling and misleading advertising directives, and implementing legislation of the EC member states." Thus, the panel said, the United States "has not demonstrated that these alternative measures, which lie outside the panel's terms of reference, are inadequate to provide GI protection to interested parties nationals of other members as required under article 22(2) of the TRIPS Agreement." Accordingly, the panel concluded, "with respect to the equivalence and reciprocity conditions and the examination and transmission of applications under the regulation, the United States has not made a *prima facie* case that the European

---

<sup>25</sup> U.S. Report, paras. 7.730–732.

<sup>26</sup> U.S. Report, paras. 7.739–43.

<sup>27</sup> U.S. Report, para. 7.745.

Communities has failed to implement its obligation under article 22(2) of the TRIPS Agreement."<sup>28</sup> With regard to the US claim related to "objections," the panel noted that article 22(2) "does not provide for a right of objection to the registration of a GI." Therefore, the panel rejected the United States' arguments "insofar as they relate to objections to GI registration, including objections by trademark owners." In addition, the panel recalled its finding "that the equivalence and reciprocity conditions do not apply to the right of objection by persons resident or established in WTO members", and thus it concluded that the United States' "second argument relating to objections in support of its claim under article 22(2) is unfounded for this reason as well".<sup>29</sup> Another finding on which the EC has placed considerable emphasis is that the panel in principle accepted that to a certain extent GIs may prevail over prior trademarks according to article 17 of TRIPS.<sup>30</sup>

### **VIII. DOHA ROUND NEGOTIATIONS AND GIs**

As part of the built-in agenda for further negotiations on GIs in the WTO, three provisions in the TRIPS Agreement lay a basis for the on-going negotiations. According to article 23(4) WTO members agreed that negotiations would be undertaken in the TRIPS Council "...concerning the establishment of a multilateral system of notification and registration of geographical indications for wines eligible for protection in those members participating in the system." Further, in article 24(1), WTO members agreed "... o enter into negotiations aimed at increasing the protection of individual geographical indications under article 23". Lastly, in article 24(2) it is required that the "Council for TRIPS shall keep under review the application of the provisions of this section", with the reference here meaning section 3 which addresses GIs in its entirety.

Hence, in addition to the general review foreseen in article 24(2), there are two items on the negotiations agenda specific to GIs. These are, negotiations on a multilateral system for notification and registration of wines, and negotiations on the expansion of GI protection. The Doha Ministerial Declaration of 14 November 2001 recognized both of these items in paragraph 12 thus:

---

<sup>28</sup> U.S. Report, paras. 7.747–51.

<sup>29</sup> U.S. Report, paras. 7.752–57.

<sup>30</sup> Cf. para. 7.670.

"With a view to completing the work started in the Council for Trade-Related Aspects of Intellectual Property Rights (Council for TRIPS) on the implementation of article 23(4), we agree to negotiate the establishment of a multilateral system of notification and registration of geographical indications for wines and spirits by the Fifth Session of the Ministerial Conference. We note that issues related to the extension of the protection of geographical indications provided for in article 23 to products other than wines and spirits will be addressed in the Council for TRIPS pursuant to paragraph 12 of this declaration."

In the General Council Decision<sup>31</sup> of 1 August 2004 (the so-called "July Package") it was agreed as follows regarding GIs:

"Without prejudice to the positions of members, the Council requests the Director-General to continue with his consultative process on ... issues related to the extension of the protection of geographical indications provided for in article 23 of the TRIPS Agreement to products other than wines and spirits, if need be by appointing chairpersons of concerned WTO bodies as his friends and/or by holding dedicated consultations. The Director-General shall report to the TNC and the General Council no later than May 2005. The Council shall review progress and take any appropriate action no later than July 2005."

The consultations by the Director General referenced in the decision above concern mainly two issues. The first controversy is that it is unclear as to what the scope of negotiations foreseen in article 24(1) should be. In other words, the controversy revolves around the question of whether the negotiations should seek to extend the coverage of GI protection to products other than wines and spirits. In a 1999 submission by Turkey,<sup>32</sup> it was proposed that GIs protection should go beyond wines and spirits. This proposal was endorsed by the African Group. According to the African Group, GIs protection should be extended "to other products recognizable by their geographical origins (handicrafts, agro-food products)".<sup>33</sup>

---

<sup>31</sup> WTO Doc. No. WT/L/579 (2 August 2004).

<sup>32</sup> WTO Doc. No. WT/GC/W/249 (13 July 1999).

<sup>33</sup> WTO Doc. No. WT/GC/W/302 (6 August 1999).

WTO members advocating the extension of GIs coverage to other products include the European Communities, Bulgaria, China, the Czech Republic, the EU, Hungary, Liechtenstein, Kenya, Mauritius, Nigeria, Pakistan, the Slovak Republic, Slovenia, Sri Lanka, Switzerland, Thailand and Turkey. These countries see the higher level of protection as a means of improving the marketability of some of their niche products. Essentially, they do not want other countries to take away and use "terms" that are distinctive and therefore advantageous to them. In a submission by the European Communities,<sup>34</sup> which builds upon its earlier submission,<sup>35</sup> the position remains substantially the same in the sense that it maintains the EC's level of ambition regarding both the extension of GIs coverage and the multilateral register. Regarding extension of GIs coverage to products other than wines the EC is clear that its proposal seeks to achieve this purpose as stated in article 23 of TRIPS. The EC also maintains its views regarding the multilateral register which it proposes should be an annex to the TRIPS agreement. A few novel additions include those relating to trademarks that overlap with GIs and the mechanism for financing the proposed multilateral register of GIs for all products.

The countries that oppose the extension of GIs coverage such as the United States, Australia and Canada argue that the extension would be needlessly expensive and burdensome. They do not see themselves as taking away anything as many of the terms under contention were taken to these "new" lands by voluntary migrants from their original lands that moved with the know-how to make the products. The second controversy is that WTO members have disagreed on virtually all the aspects of the proposal for the establishment of a multilateral register for wines and spirits. Some of the most divisive issues include the legal effects of registration, the meaning of "notification" and "registration", who should bear the costs of registration and the role of WIPO in the administration of such a system. On the whole, the debate on GIs has been very divisive with little progress in terms of a convergence of positions. Quite unlike many other issues on the Doha Agenda, it does not necessarily pit developed countries against developing countries.

---

<sup>34</sup> WTO Doc. No. WT/GC/W/547 (14 June 2005).

<sup>35</sup> WTO Doc. No. TN/IP/W/11.

## **IX. GIs, TMs, AND ENHANCED TRADE OPPORTUNITIES ACCESS**

In general, the idea behind a place name used in a GI is that it distinguishes a particular product from others because its region and method of production are superior or distinctive. The GI thereby becomes a marketing tool that derives its usefulness from the unique characteristics associated with the region or production methods of its origin. Many strongly held or contested GIs concern niche and high value products such as food items. Good examples here include Parma ham and Roquefort cheese. In this sense, if in fact the effect of a GI is to make it more difficult to gain access to a particular protected food item, then it can impact negatively on food security.

As defined by FAO, food security refers to when "people at all times, have economic and physical access to sufficient, safe and nutritious food to meet their dietary needs and food preferences for an active and healthy life." The issue of "food preferences" and economic access is important here. If people prefer to have a certain food product that is the subject of exclusive GI protection, and cannot acquire it because it is priced out of reach and cheaper reproductions are disallowed because of extensive GI protection, then doubts can be raised regarding the extent to which GIs support the attainment of food security. In addition, GIs are often described by opponents to their use, such as the United States, as being inherently trade restrictive. For instance, a case can be made that a particularly strong GIs protection regime can undermine the fundamental rule of national treatment, which is also contained in the TRIPS Agreement.

GIs are central to many economies, both developed and developing. In the European Union for example, there are over 640 GIs and designations of origin for food, and 4 200 registered designations for wines and spirits.<sup>36</sup> All of these GIs together are valued at upwards of Euro 40 billion in annual sales. India is reported to have about 3 000 textile-related GIs and up to 40 mango varieties that may be protected as GIs, in addition its other well known GIs for instance over tea.<sup>37</sup> As a marketing tool, GIs and TMs can also be of great economic benefit to rural or local communities producing niche or widely popular products such as Basmati rice, Darjeeling tea,

---

<sup>36</sup> O'Connor, B. 2005. *Geographical Indications and the challenges for ACP countries: a discussion paper*.

<sup>37</sup> Speech, David Spencer.

medicinal herbs and others. It can also be of great benefit to small or medium enterprises that produce items that can be protected. In a 1999 study for instance, two authors concluded that:

"Both geographical indications and trademarks show the greatest potential where traditional small-scale production is still present, on the supply side, and where end-use products are marketed directly to consumers. In other words, they are less likely to be appropriate when the product is a commodity traded primarily in bulk. Most promising are commodities where at least part of the market is significantly segmented. Markets for specialty food, beverage, and medicinal products are among those where consumer taste and preference has great impact. In recognition of this potential, certification schemes relating to organic, environmental or social responsibility criteria have been developed for bananas, coffee, cocoa, and other products."<sup>38</sup>

The down side to GIs is that their illegal use can be very expensive to monitor, as can making sure that the quality of production methods match the standards required in order to protect the GI's reputation and economic value. For example, the Tea Board of India, a statutory body, registered "Darjeeling Tea" under the Geographical Indication of Goods (Registration & Protection) Act, of 1999. The Tea Board also instituted a mandatory system of certifying the authenticity of Darjeeling tea for export purposes. The system requires all Darjeeling Tea dealers to be licensed by the Tea Board and to pay an annual fee. The licensees commit themselves to furnish the Tea Board with information on their production, manufacture and sale of Darjeeling Tea. The licensees are barred from blending Darjeeling Tea with other teas. The Tea Board issues them with Certificates of Origin for any exports of Darjeeling Tea. The Indian customs authorities at all potential export check-points are under instructions to check for and ensure that the Certificates of Origin accompany any Darjeeling Tea consignments. Paired to this domestic authenticity verification process, the Tea Board has also advised foreign buyers, sellers and tea councils and associations to insist on seeing the Certificate of Origin for any consignment. The Board also hired the services of an international agency to monitor for possible legal action the global use or abuse of the protected GI at the cost of about US\$100 000 a year.

---

<sup>38</sup> Downes, D.R., Laird, S.A. *et al.* 1999. *Innovative mechanisms for sharing benefits of biodiversity and related knowledge – case studies on Geographical Indications and Trademarks*, p. 42. Paper prepared for UNCTAD Biotrade Initiative. Geneva.



Besides Darjeeling Tea, another example of a geography-specific product that has the potential to benefit its country of production greatly is Rooibos Tea. It is only produced on the slopes of the Cedar Mountain range near Clanwilliam, South Africa. Rooibos Tea is classified as a horticultural product by the South African Department of Agriculture. Prior to its commercial sale in the 1930s, it was used for many years by the indigenous peoples of the South African Cape region. Besides being used as an antioxidant herbal caffeine free drink, it is also used as a natural hair dye, a meat tenderizer, as a substitute for water or milk in any recipe, as allergy, asthma and insomnia medicine, and as an anti-ageing potion. Annique Theron, a South African national credited with having "accidentally discovered" its many health benefits, was awarded a WIPO Gold Medal in 1997, for the "Invention of a tea, extracted exclusively from the plant *Aspalathus Linearis*, having anti-allergic properties." She founded "Forever Young", a company that markets Rooibos and describes its many uses.

Theron and Forever Young registered "Rooibos" as a TM in the United States. In 2001, Theron sold the "Rooibos" TM to Virginia Burke-Watkins of Burke International Corporation for a nominal US\$10. Having acquired the TM, Burke International then spent about US\$250 000 in policing and enforcing their TM rights, and began demanding fees from shops, cafes and other small internet-based tea traders for the use of the name in the US. The problem is that Rooibos Ltd., a South African company, is the world's market leader in the production and sale of Rooibos Tea. Rooibos Ltd. challenged the claims by Burke International as being the sole owner of the name Rooibos in the US and that other companies or traders could only sell products with that name through Burke, in a case filed in a Missouri District court. It is noteworthy that clearly, "Rooibos Tea" is a GI, in the manner it is defined in the TRIPS Agreement. However, Rooibos Ltd. has not sought to have it recognized as such, but rather as a generic name that should not be protected in the manner Burke had. In addition to District Court proceedings, Rooibos Ltd. petitioned the US Patent and Trademark Office to expunge the "Rooibos" TM. According to Rooibos Ltd., all of these processes cost a great deal:

"The cost of the lawsuit to Rooibos Ltd is astronomical. Considering this and the fact that the unrestricted use of the word "Rooibos" is in the interest of the entire Rooibos industry and South Africa, it was decided to approach the South African Government for financial assistance and support. Both the Western Cape and the national government have made positive

contributions to this matter and the parties are in the process of negotiating further assistance."<sup>39</sup>

Eventually, in a dispute between Republic of Tea, a US company that trades in Rooibos Tea and the TM owners, the Missouri District Court ruled that there was no TM infringement as "Rooibos" is a generic term.<sup>40</sup> The ruling was hence in favour of Republic of Tea and effectively also in favour of Rooibos Tea Ltd. This ruling was appealed. In an out of court settlement reported on 17 June 2005, it was agreed that "Rooibos" was too generic to be registered as a TM and therefore it could be freely used in any product by any distributor. It was also agreed that all similar TMs would be deregistered all over the world. It was however acknowledged that the registration of the TM by Theron had greatly benefited the producers of Rooibos tea. "A previously almost non-existent Rooibos market is now booming, creating numerous job opportunities for local Rooibos farmers and workers in the beauty industry."<sup>41</sup> The extent to which GIs can enhance the marketability of a good quality product seems clear. GIs are a means for giving an edge to small and medium scale businesses, for promoting exports and rural development. However, the exact economic benefits of extending GIs protection to products beyond wines and spirits are yet to be determined. An economic quantification of such benefits would be of particular advantage to developing countries that are unsure as to what they stand to gain or lose by joining either sides of the debate on the extension of GIs protection.

## X. SUMMING UP AND CONCLUSIONS

In international economic relations, GIs present a dichotomy of approaches in state practice. While the US has a TMs law-based approach to GIs protection, the EU has a stronger system with roots in the French concept of "appellations of origin". Prior to the entry into force of the TRIPS Agreement, the United States had not adhered to any international instrument that sought significant GIs protection. Presently, however, the TRIPS Agreement provides certain minimum standards on GIs protection that all WTO members have to apply. As a result of this, many countries besides the US and the EU that represent the dominant approaches to GIs protection, have sought to find ways of meeting their obligations. The debate still continues regarding the

---

<sup>39</sup> See [www.rooibosltd.co.za/news](http://www.rooibosltd.co.za/news).

<sup>40</sup> *Republic of Tea v. Virginia Burke-Watkins*, Case No. 4:03CV1862HEA, U.S. District Court, Eastern District of Missouri (27 January 2005).

<sup>41</sup> Evans, J. *Rooibos storm finally off the boil*. Mail & Guardian 17 June 2005.

multilateral register for wines and spirits and the possible extension of GIs protection to other products besides wines and spirits.

For developing countries, GIs represent a dilemma with both the potential for positive and negative outcomes. For developing countries such as Argentina, which has a large population of European origin that favours European-style foodstuffs, extending GI protection to certain food products might mean that production and marketing of local versions of a range of products like cheeses will become more difficult. On the other hand, other developing countries such as India and some African countries that produce high quality tea, coffee and other products are of the view that extending GIs might be economically beneficial to them. This is because it might give their marketing agents an edge over competitors. These differences are reflected in the on-going negotiations at the WTO. Contributing to the resolution of these differences would be an objective but comprehensive assessment of the potential market gains deriving from GIs protection, particularly considering many of the products that they feel should benefit from protection are agricultural. Necessarily, the costs of administering, monitoring and enforcing a system of GIs protection, such as India's Darjeeling Tea for example, would need to be factored into such an economic analysis. With that kind of information, it would be easier for both the proponents and opponents to know what they stand to lose or gain in terms of market share from the negotiating position that they opt for.

### MAIN REFERENCES

**Barham, E.** 2003. Translating terroir: the global challenge of French AOC labelling. *Journal of Rural Studies*, 19:127.

**Blakeney, M.** 2001. *Geographical indications and TRIPS*. Occasional Paper No. 8. Quaker United Nations Office. Geneva.

**Bowers, S.** 2003. Location, location, location: the case against extending geographical indication protection under the TRIPS Agreement. *AIPLA Quarterly Journal*, 31:129.

**Downes, D & Laird, S.** 1999. *Innovative mechanisms for sharing benefits of biodiversity and related knowledge: case studies on geographical indications and trademarks*. Prepared for UNCTAD BioTrade Initiative.

- Dutfield, G.** 2000. *Intellectual property rights, trade and biodiversity*. Earthscan. London.
- Echols, M.A.** 2003. Geographical indications for food, TRIPS, and the Doha Development Agenda. *Journal of African Law*, 47: 2.
- Echols, M.A.** 2004. Expressing the value of agrobiodiversity and its know-how in international sales. *Howard Law Journal*, 48: 431.
- FAO.** 2004. *Intellectual property rights and plant varieties: international legal regimes and policy options for national governments*. by Helfer, L., Legislative Study No. 86. FAO Legal Office. Rome
- Heald, P.J.** 1996. Trademarks and geographical indications: exploring the Contours of the TRIPS Agreement. *Vanderbilt Journal of Transnational Law*, 29:635.
- Homere, J.R.** 2004. Intellectual property rights can help stimulate the economic development of Least Developed Countries. *Columbia Journal of Law and the Arts*, 27: 277.
- LaFrance, M.** 2004. Innovations palpitations: the confusing status of geographically misdescriptive trademarks. *Journal of Intellectual Property Law*, 12:124.
- Rangnekar, D.** 2003. *Geographical indications: a review of proposals at the TRIPS Council*. UNCTAD/ICTSD.
- Torsen, M.** 2005. Apples and oranges (and wine): why the international conversation regarding geographic indications is at a standstill. *Journal of the Patent and Trademark Office Society*, 87:31.
- WIPO.** 2001. *Geographical indications: historical background, nature of rights, existing systems for protection and obtaining effective protection*. Standing Committee on the Law of Trademarks, Industrial Designs and Geographical Indications, 6<sup>th</sup> session, 12–16 March. SCT/6/3.
- WTO.** 2000. *Geographical indications, article 24(2) review of the application of Part 2, Section 3: some background issues*. Communication from Australia. IP/C/W/211.

**WTO.** 2001. *Work on Issues Relevant to the Protection of Geographical Indications, Extension of the Protection of Geographical Indications for Wines And Spirits to Geographical Indications for Other Products.* WIPO Doc. IP/C/W/308/Rev.1.

**WTO.** 2003. *The Various Positions for International Wines and Spirits Registry,* TRIPS Council Secretariat, TN/IP/W/7/Rev.1, 23 May 2003 and TN/IP/W/7/Rev.1/Corr.1 (20 June 2003)

**Zylberg, P.** 2003. Geographical indications v. trademarks: the Lisbon Agreement: a violation of TRIPS? *University of Baltimore Intellectual Property Law Journal* 11: 2.

## 6.

### **IMPORT SURGES AND SAFEGUARD PROVISIONS WITH A PARTICULAR FOCUS ON ANTIDUMPING MEASURES**

#### *Contents*

I.	INTRODUCTION	207
1.1	Safeguard measures, anti-dumping and anti-subsidy measures	209
1.2	Anti-dumping in domestic legal systems	210
II.	IMPORT SURGES – DEFINITION AND DETERMINATION	211
2.1	Is there a quantitative threshold to define a surge?	211
2.2	Benchmark for measuring a surge and its length	212
2.3	How recent should the data be?	212
2.4	Is there a need for a trend analysis?	213
2.5	Absolute surge or relative to production or both?	214
III.	DUMPING – DEFINITION AND DETERMINATION	214
3.1	Definitions for calculation purposes	215
3.2	Determinations of dumping and injury	217
3.3	National legislation	218
3.3.1	Barbados, Dominica, Grenada, St. Lucia, St. Vincent and the Grenadines	218
3.3.2	EU	220
3.3.3	Trinidad and Tobago	221
IV.	INJURY AND THREAT OF INJURY	222
4.1	Serious injury	223
4.2	Threat of serious injury	224
4.3	Material injury and threat of material injury	225
4.4	National legislation	227
4.4.1	Jamaica	227

V.	LIKE AND COMPETITIVE PRODUCTS	229
5.1	Like products	229
5.2	Directly competitive products	231
5.3	Directly competitive or substitutable products in GATT, article III.	232
VI.	DOMESTIC INDUSTRY	233
VII.	THE CONCEPT OF CAUSATION	236
7.1	National Legislation	241
7.1.1	Trinidad and Tobago	241
VIII.	ANTI-DUMPING DUTIES	242
8.1	National Legislation Procedural Rules	243
8.1.1	EU	243
8.1.2	Jamaica	246
8.1.3	Trinidad and Tobago	248
IX.	CONCLUDING OBSERVATIONS	250
	MAIN REFERENCES	253

## I. INTRODUCTION

Import surges and their perceived negative effects on producers is a sensitive economic policy matter; depending on the vulnerability of the affected sector, it also tends to quickly become political – reports of import-surge episodes and their impact typically hit headlines. In the last decade or so, there has been an increase in the incidence of import surges and many observers relate this phenomenon to the opening up of domestic markets with the implementation of the AoA.

The effect of these liberalisation reforms in developing countries combined with the export and domestic subsidies of developed countries has left the former vulnerable to the flooding of their domestic markets with products sold on the world market at less than their cost of production.<sup>1</sup> This is also said to cause a loss in local trading capacity in developing countries, with production shortfalls in some of the same products where there were import surges. Anti-dumping mechanisms seek to avoid the negative effects of the importation of products at a price below their normal value, which has an injurious effect on the domestic industry. There have been many GATT-WTO dispute settlement cases concerning anti-dumping practices in both agricultural and non-agricultural sectors. This chapter offers a conceptual examination of import-surge related elements within the WTO legal framework, and juxtaposes that with an analysis of how anti-dumping measures have been used at the domestic level, particularly the US, EU and countries in the Caribbean.

Import surges may result in safeguard measures being taken by the importing state, which are not always anti-dumping procedures – but can be if such imports spikes are the consequence of prices being lowered below the product's worth and result in injury to the local industry. Other measures to offset some negative consequences of spikes in imports are contained in article VI of GATT and fleshed out in the Agreements on Subsidies and Countervailing Measures (SCM Agreement), and the Agreement on Safeguards (SG Agreement); the Agreement on the Implementation of Article VI of GATT 1994 (the Antidumping Agreement (AD Agreement)) disciplines anti-dumping actions taken by WTO members.

---

<sup>1</sup> *Some Trade Policy Issues relating to Trends in Agricultural Imports in the Context of Food Security*.  
FAO Committee on Commodity Problems, Sixty-fourth session March 2003.



The term "safeguards" is used in reference to government actions responding to imports that are considered "harmful" to the importing country's economy, or domestic industries that produce goods in competition with, or "similar" to, the imported products. Typically, government intervention takes the form of an import restraint or control through increased tariffs or quantitative restrictions. Sometimes, the exporting country may voluntarily restrict its own exports, usually in negotiation with the importing country, hence achieving some form of mutual solution. Article XIX of GATT and the SG Agreement prescribe the obligations of WTO members with regard to how they should apply safeguard measures in response to import surges. Hence, an economic analysis of the impact of import surges has to be conducted in order for the response to be consistent with the rules.

Like all WTO Agreements, these instruments contain terms and phrases that are either open to various interpretations or ambiguous. Mostly, this is a result of the difficulties in striking a compromise during negotiations, or simply a desire to accommodate the various state practices on a particular issue. Often this is motivated by the need for countries to justify their use of safeguard protection in most circumstances. Making sense of these unclear or ambiguous provisions can be a daunting task – particularly when a sound economic analysis of a problem is predicated on a precise definition or identification of the elements of a provision.

Measuring the impact of import surges on local economies is a difficult task which requires a sound and in-depth analysis of all facets to the problem. This chapter will render a legal analysis of the interpretive approaches to some of the key concepts in the WTO agreements complemented by illustrations of relevant anti-dumping provisions provided. It will identify and discuss some of the economically relevant terms and phrases in the Anti-Dumping, Safeguard and other Agreements relevant to import surges and anti-dumping, with examples of national legislation to illustrate the latter. Throughout, reference is made to panel and Appellate Body reports, showing interpretations on the various phrases and terminologies. It will also outline the economic implications of the interpretations that have been given as well as possible alternatives, including some recommendations on how these definitions impact the ability of developing country policy makers to properly implement their obligations under the SG Agreement. Finally, on a more practical level it gives an idea of the concepts and procedural rules included in national laws, facilitating a cursory analysis of compliance with WTO rules.

## 1.1 Safeguard measures, anti-dumping and anti-subsidy measures

Exceptions to bound tariffs, or to the non-discrimination principle can be permitted as contingency measures designed to offset any potential circumvention or manipulation of the rules which result in injury to the domestic industry. These types of protection or safeguard mechanisms include: antidumping measures (actions taken against selling at an unfairly low price), countervailing duties (imposed to offset subsidies), and other safeguard actions (emergency measures that temporarily limit imports) – see box 1.<sup>2</sup> This chapter is concerned with the first and third mechanisms.

### Box 1: Types of WTO safeguards<sup>3</sup>

There are many types of safeguard mechanisms. The main ones are: *Anti-dumping* measures; *countervailing* duties; and *Emergency protection*. In addition however, there is the *Special Safeguard* provisions in article 5 of the AoA which is designed to protect domestic industries from sudden import surges. It is limited to those agricultural products which underwent tariffication in the Uruguay Round. Others include:

- Through the *balance of payments* safeguard provisions of GATT article XII and XVII:B and developed by the "Understanding of the Balance-of-Payments Provisions of the GATT 1994", members may apply import restrictions; they are encouraged to use the price-based option measures, such as import surcharges and import deposits, rather than quantitative restrictions;
- *Infant industries* in developing countries are protected by GATT articles XVIII:a and XVIII:c through the use of safeguard measures to restrict imports, for temporary periods. This option is subject to WTO Approval;
- *General waivers* can be granted by the WTO Council for permission not to be bound by an obligation;
- *General exceptions* measures under GATT article XX can be taken for non-economic purposes to safeguard for example, public morals, health, laws and natural resources, subject to the requirement that such measures are non-discriminatory and are not a disguised restriction on trade;
- *Modification of Schedules* and *tariff renegotiations* permit the withdrawal of certain concessions subject to compensation to affected members (GATT articles XXVIII and XXVIII *bis*).

<sup>2</sup> The interplay between anti-dumping measures, countervailing duties and safeguard actions is visible in *European Communities – Antidumping Measure on Farmed Salmon from Norway* (2006) (WT/DS337).

<sup>3</sup> Compiled by Hoekman, B and Kostecki, M. 1996. *The Political Economy of the World Trading System: From GATT to WTO*, chapter 7. Oxford University Press.

The two principal categories of safeguards are temporary increases in import barriers under predefined circumstances and permanent exceptions from general obligations. Most of those identified in the preceding list fall under the temporary suspension of obligations, with the exception of the modification of schedules and the general exception provisions.

## 1.2 Anti-dumping in domestic legal systems

The US, EU, Australia, Canada and some East Asian countries have had anti-dumping legislation in place for much longer than most developing countries. Countries that previously did not feel the need for anti-dumping legislation due to high tariff and non-tariff protection have enacted laws as a result of increased trade liberalisation after the Uruguay Round.

Antidumping provisions can be found in legislation specifically addressing dumping, for example EU Regulation 384/96 or in general customs legislation such as the US Tariff Act. In most cases, the same authority is competent for investigations on the different types of unfair trade practices, such as dumping, subsidies, predatory pricing or import surges, and is responsible for establishing safeguard measures to counter their negative effects.

Procedural rules are a necessary component to ensure the transparency of safeguard investigations and to protect the rights of the parties. Detailed rules often govern the initiation of investigations (upon application or *motu proprio*), judicial review, set time limits, grant interested parties the opportunity to participate in the proceedings and enable them to provide and access information.

Confidential information is protected, and safeguard proceedings have requisite rules of evidence to determine conditions and modalities for both provisional and proper safeguard duties. Finally, WTO rules on AD apply to all domestic laws, regulations and administrative practices covered in the AD Agreement, regardless of whether or not domestic norms or practices explicitly refer to dumping, and even if additional provisions are included.<sup>4</sup>

---

<sup>4</sup> See for example the US-Antidumping Act, a case in which the United States argued that the challenged norms actually referred to predatory pricing rather than to dumping.

## II. IMPORT SURGES: DEFINITION AND DETERMINATION

Article 2(1) of the SG Agreement sets forth the conditions for the application of a safeguard measure:

"A member may apply a safeguard measure to a product only if that member has determined ... that such product *is being imported* into its territory in such *increased quantities*, absolute or relative to domestic production, and under such conditions as to cause or threaten to cause serious injury to the domestic industry that produces the like or directly competitive products. (Emphasis added; footnote omitted) "

The panel in the *US – Steel* case<sup>5</sup> opined that article 4(2)(a) of the SG Agreement sets forth the "operational requirements" for determining whether the conditions identified in article 2(1) exist. That provision states, in relevant part:

"In the investigation to determine whether increased imports have caused or are threatening to cause serious injury to a domestic industry under the terms of this Agreement, the competent authorities shall evaluate ... the rate and amount of the increase in imports of the product concerned in absolute and relative terms ..."

### 2.1 Is there a quantitative threshold to define a surge?

The answer to this question is no. In the *US – Steel* dispute, the panel responded to some arguments raised by parties in the dispute on "whether Article 2(1) imposes any threshold for [the] "increased imports" requirement, whether quantitative and/or qualitative." In *Argentina – Footwear*, the increased imports requirement was interpreted by the Appellate Body to mean "that the increase in imports must have been recent enough, sudden enough, sharp enough, and significant enough, both quantitatively and qualitatively, to cause or threaten to cause 'serious injury'." In the *US – Steel* case, the United States had argued that these four standards do not appear in the SG Agreement itself and so the threshold issue does not apply in relation to these four features.

---

<sup>5</sup> *US – Steel Safeguards*, WT/DS298/AB/R (hereafter *US – Steel* case).

In response, the *US – Steel* Panel clarified that the panel's "increased import" finding is a statistical matter, albeit reached in a subjective way. The finding of a surge is called "*the condition of the increase*". However, the question of whether a particular increase is "sudden, sharp, recent and significant *enough as to cause serious injury*" is a question that is appropriately to be addressed in the context of *causation of serious injury*, not in the context of the *condition of the increase* alone." Thus, the panel's increased imports finding "must be read together" with its subsequent findings on the other article 2(1) conditions.

Ultimately, the standard that panels have used to determine if there was indeed a surge or not is referred to as the "adequate and reasoned explanation" by national investigating authorities. This is the standard against which panels have based their findings. It is a subjective judgement of the panel, there being no objective criteria on what constitutes "adequate" or "reasoned". This phrase is however invoked in every case.

## 2.2 Benchmark for measuring a surge and its length

The panel stated in the *US – Steel* case that while GATT and the SG Agreement are silent on the *points in time that are to be compared*, as well as on the *length of the period to be investigated*, a determination of whether imports have increased "would normally call for a comparison of levels of imports in different periods or at different points in time." In the *US – Steel* case, the complainants did not challenge the five-year period of investigation used by the United States International Trade Commission (USITC). According to the panel, some of these parameters may vary on a case-by-case basis. This five year standard was also used by the US in *United States – Lamb Meat*. For comparison purposes, examples of the varying time periods adopted for purposes of injury analysis is ten years in Chile (powdered and UHT milk investigation), three years in Brazil (desiccated coconuts) and three years in the Czech Republic (sugar).

## 2.3 How recent should the data be?

The panel in *US – Line pipe*<sup>6</sup> interpreted that "recent" does not mean that it must continue up to the period immediately preceding the investigating authority's determination, nor up to the very end of the period of

---

<sup>6</sup> United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea (2002), (WT/DS202/17).

investigation. While the most recent data must be the focus, it should not be considered "in isolation" from the data pertaining to the less recent portion of the period of investigation.

Nonetheless, the panel emphasized that given the language "are being", "there is an implication that imports, in the present, remain at higher (i.e. increased) levels." As a result, it explained that whether a decrease at the end of the period would preclude a finding of "increased imports" will depend on whether a previous increase nevertheless results in the product still being imported in "increased quantities." In short, in the case of a decrease at the end of the period of investigation, the panel explained that the key factors that "must be taken into account are the duration and the degree of the decrease ..., as well as the nature, for instance the sharpness and the extent, of the increase that intervened beforehand."

#### **2.4 Is there a need for a trend analysis?**

The panel also stated that "competent authorities are required to consider the *trends* in imports over the period of investigation, as suggested by article 4(2)(a)." However, it added that the rate of the increase need not always accelerate or need not always be positive at each point in time during the period of investigation. In addition, given the requirement in GATT article XIX that the purpose of a safeguard measure is to address "unexpected events," increased imports must therefore be "sudden." Regarding "unforeseen developments", while the panel in the Korea – Dairy case, found that the sentence in GATT article XIX:1(a) "If, as a result of unforeseen developments and of the effect of the obligations incurred by a contracting party under this Agreement, including tariff concessions ..." does not add conditions for any measure to be applied, the Appellate Body determined otherwise, and found that the "unforeseen developments" clause did in fact impose an additional condition before safeguard measures under this article could be imposed. The Appellate Body elaborated at paragraphs 84–84 as follows:

"Thus, it seems to us that the ordinary meaning of the phrase 'as a result of unforeseen developments' requires that the developments [...] must have been 'unexpected'. In our view, the text of article XIX:1(a) of the GATT 1994, read in its ordinary meaning and in its context, demonstrates that safeguard measures were intended by the drafters of the GATT to be matters out of the ordinary, to be matters of urgency, to be, in short, 'emergency

actions'. And, such 'emergency actions' are to be invoked only in situations when, as a result of obligations incurred under the GATT 1994, an importing member finds itself confronted with developments it had not 'foreseen' or 'expected' when it incurred that obligation."

## 2.5 Absolute surge or relative to production or both?

The operative word in article 2(1) is "or" – in "absolute *or* relative to domestic production". In *US – Steel*, of the 10 products, the panel chose to look at the relative surge data, instead of the absolute data, and made a positive judgement on this basis (see Figure 2.5.a). It noted that the SG Agreement makes clear that the increased imports requirement is one of an increase in *either* absolute or relative terms. Moreover, the panel explained, "if absolute imports decrease, but imports relative to domestic production are on the increase, this means that the decrease of domestic production is stronger than that of imports (in absolute levels)." The case of *Argentina – Preserved Peaches*<sup>7</sup> looked at *inter alia* whether there was an increase in imports in absolute or relative terms. Chile argued that "the increases in imports in both absolute and relative terms correspond to a foreseen and expected recovery by those imports of their historical levels that were severely disrupted in 1997 and 1998 by an isolated and unexpected climatic situation which affected the production and export capacity of Greece, the leading world producer and exporter of preserved peaches."<sup>8</sup> The panel found that "the treatment of imports relative to domestic production is particularly sparse in the competent authorities' report" (para. 7.72). While the Argentinean technical report contained data on quantities of imports relative to domestic production for the 1997–2000 period, the year 1996 was omitted for the review. Therefore the case highlighted that a WTO compatible safeguard may be implemented only when there is an absolute or relative increase in imports covering the period of analysis in its entirety.

## III. DUMPING: DEFINITION AND DETERMINATION

Dumping is defined in GATT article VI and in the AD Agreement as the introduction of products of one country into the commerce of another country "at less than the normal value of the products". Hence the issue of

---

<sup>7</sup> *Argentina – Definitive Safeguard Measure on Imports of Preserved Peaches* (2003), WT/DS238/R.

<sup>8</sup> Para. 7.37.

price and its correlation with "increased quantities" is at the core of an anti-dumping measure.

### 3.1 Definitions for calculation purposes

The margin of dumping is calculated as the difference between the export price and the "normal value" according to article VI of GATT, ("the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country").<sup>9</sup> The "like product" is defined as "a product which is identical, i.e. alike in all respects to the product under consideration." However, according to article 2(6) of the AD Agreement in the absence of identical products, the like product is "another product which, although not alike in all respects, has characteristics closely resembling those of the product under consideration." The comparable price of the like product must be determined "in the ordinary course of trade." For instance, transactions between distinct companies having common ownership may not be "in the ordinary course of trade", as the price may be different from the market price (higher or lower, to subsidise the selling or the buying affiliate, respectively); these transactions must therefore be excluded when constructing the comparable price. In allowing the exclusion of such transactions, AD legislation must be "even-handed" – thus, legislation excluding prices below a very narrow range from the weighted average price, while excluding prices above the weighted average price only when "aberrationally" or "artificially" high, was held inconsistent with the AD Agreement.<sup>10</sup>

If there is no comparable price in the exporting country (due either to absence of sales or to impossibility of a "proper comparison" because of "particular market situations" or low volumes of sales), the normal value is either "a comparable price of the like product when exported to an appropriate third country" or a constructed value based on production costs increased by "a reasonable amount for administrative, selling and general costs and for profits."<sup>11</sup> With regard to constructed normal values, the determination of costs and profits involves detailed technical analysis. Article 2(2)(1)(1) of the AD Agreement costs must normally be calculated on

---

<sup>9</sup> Article VI(1) GATT; and article 2(1) of AD Agreement

<sup>10</sup> See for example, *United States – Anti-dumping Measures on certain Hot-rolled Steel Products from Japan* AB-2001-2, WT/DS184/AB/R (01-3642).

<sup>11</sup> Article VI:1 GATT and article 2(2) AD Agreement.



the basis of records kept by exporters or producers.<sup>12</sup> Administrative, selling and general costs as well as profits are to be determined on the basis of actual data pertaining to production and sales in the ordinary course of trade of the like product by the exporter or producer under investigation. When this is not possible, costs and profits are to be determined on the basis of either the actual costs and profits of the exporter or producer in question in the domestic market of the exporting country (or the weighted average of costs and profits of several exporters or producers), or of other reasonable methods.<sup>13</sup> When costs and profits are determined on the basis of "actual amounts incurred and realised", the AD Agreement does not allow the exclusion of the amounts incurred or realized in transactions not "in the ordinary course of trade" (*EC – Bed Linen*<sup>14</sup>). The comparison between the export price and the normal value must be "fair", which means it must be made at the same level of trade, normally the ex-factory level (that is, retail prices in one country cannot be compared with wholesale prices in the other). Moreover, the comparison must be made "in respect of sales made at as nearly as possible the same time." Differences affecting price comparability (for example, differences in terms and conditions of sale, in taxation, in levels of trade, etc.) must be taken into account. This norm has been interpreted as not allowing adjustments for "an unanticipated failure of a customer to pay for certain sales" (*US – Plate and Sheet*,<sup>15</sup> para. 6.77).

When the comparison requires currency conversion, the exchange rate is that of the date of sale, and exchange rate fluctuations must be ignored.<sup>16</sup> The comparison must be made either between a weighted average normal value and a weighted average of prices of all comparable export transactions or alternatively between the normal value and export prices on a transaction-to-transaction basis. Dumping margins must be ascertained with regard to the identified "product", not with regard to the sub-categories of product determined on the basis of diversified product "types" or "models" (*EC – Bed Linen*). Where the dumped products are imported from an intermediate country and not from the country of origin directly, the comparable price is

---

<sup>12</sup> Article 2(2)(1) AD Agreement.

<sup>13</sup> Article 2(2)(2) AD Agreement.

<sup>14</sup> *Anti-dumping duties on imports of cotton-type bed-linen from India* (WT/DS141/AB/RW).

<sup>15</sup> *United States — Anti-Dumping Measures on stainless steel plate in coils and stainless steel sheet and strip from Korea* (2000), (DS179/R).

<sup>16</sup> Article 2(4) AD Agreement.

that found in the exporting country, although comparisons with the price in the country of origin may be made in certain circumstances.<sup>17</sup>

### 3.2 Determinations of dumping and injury

Determinations of dumping and injury must be based on evidence to the satisfaction of the authorities as to the "accuracy of the information supplied by the interested parties upon which their findings are based."<sup>18</sup> Evidence must be provided in writing, or provided orally but reproduced in writing and made available to other interested parties.<sup>19</sup> In situations where an interested party denies access to information in a timely manner or "significantly impedes the investigation", determinations may be made based on information from other sources.<sup>20</sup> In *New Zealand – Electrical Transformers*<sup>21</sup> which was decided prior to the adoption of the AD Agreement, the panel held that in the absence of a comparable domestic price, and where all necessary information on costs by the exporters (whether at fault or not) is not provided, investigating authorities could determine production costs under article VI:1(b)(ii) "on the basis of price elements obtained from other sources."<sup>22</sup>

The *Argentina – Floor Tiles*<sup>23</sup> case further stipulated that investigating authorities were to make determinations on the basis of "facts available" only when that requirement was specifically and clearly stated by the investigating authority. In the same case, it was held that individual dumping margins must be calculated for each exporter or producer included in the sample. Where this is impracticable due to the large number of exporters, producers, importers or types of products, the authorities may limit the investigation to a statistically valid sample including a reasonable number of interested parties or products, which should preferably be made with the consent of those interested groups.<sup>24</sup>

---

<sup>17</sup> Article 2(5) AD Agreement.

<sup>18</sup> Article 6(6) AD Agreement.

<sup>19</sup> Article 6(3) AD Agreement.

<sup>20</sup> Article 6(8) AD Agreement.

<sup>21</sup> *New Zealand – Imports of Electrical Transformers from Finland*, GATT Panel (1985), BISD 32S/55 (hereafter *New Zealand – Electrical Transformers*).

<sup>22</sup> *Ibid*, at para. 4(2).

<sup>23</sup> *Argentina – Definitive Anti-Dumping Measures on Imports of Ceramic Floor Tiles from Italy*, 2001, DS 189/R (hereafter *Argentina – Floor Tiles*).

<sup>24</sup> Article 6(10) AD Agreement.

Case law clarifies that determinations must be "based on the totality of [the] evidence", including confidential information. In *Thailand – H-Beams*<sup>25</sup>, the Appellate Body rejected the argument that the "positive evidence" and "objective examination" requirements under article 3(1) AD Agreement entail that the reasoning behind the conclusions must be "formally or explicitly stated" in documents accessible to the interested parties (which would in practice prevent the use of confidential information as the basis for determinations). Therefore, while the disclosure of confidential information is limited to protect the party supplying the information, confidential information may be relied upon in dumping and injury determinations – this ruling was upheld in *Argentina – Floor Tiles*. If an affirmative preliminary determination is made on the basis of the threat of injury, and the subsequent definitive affirmative determination is made on the basis of actual injury, no provision in the AD Agreement requires investigating authorities to inform interested parties during the course of the investigation about the changed legal basis of the proceeding (*Guatemala – Cement II*<sup>26</sup>).

### 3.3 National legislation

#### 3.3.1 Barbados, Dominica, Grenada, St Lucia, St Vincent and the Grenadines

Anti-dumping legislation is virtually identical across these countries. The relevant statutes are<sup>27</sup>: Barbados, the Customs Duties (Dumping and Subsidies) Act 1959 (Cap. 67); Dominica, the Customs Duties (Dumping and Subsidies) Act 1960 (Cap. 69:03); Grenada, the Customs Duties (Dumping and Subsidies) Ordinance No. 12 of 1960; St. Lucia, the Customs Duties (Dumping and Subsidies) Ordinance No. 25 of 1964; and, St. Vincent and the Grenadines, the Customs Duties (Dumping and Subsidies) Act 1958, as amended in 1971, 1978 and 1980 (Cap. 304).

These statutes define export price as the price of sales "in the open market between buyer and seller independent of each other"; if this standard is not met, the authority determines the export price "by reference to such sales of the goods [...] as he may select with such adjustments as may appear to him to be proper". Differently from the other acts and ordinances, Grenada's

<sup>25</sup> *Thailand – Anti-dumping duties on angles, shapes and sections of iron or non-alloy steel and H-beams from Poland*, (2001), DS122/AB/R (hereafter *Thailand – H-Beams*).

<sup>26</sup> *Guatemala - Anti-dumping Investigation regarding Portland Cement from Mexico*, WT/DS60/AB/R.

<sup>27</sup> For further details see sections 3, 8 and 9 of the Acts and Ordinances.

Ordinance stipulates that this standard entails that "price is the sole consideration"; that "price is not influenced by any commercial, financial or other relationship [...] between the seller or any person associated in business with him and the buyer or any person associated in business with him"; and that the seller or associated persons do not participate in the proceeds of subsequent resale, use or disposal of the goods.<sup>28</sup>

The fair market price is the price at which identical or comparable goods are sold in the ordinary course of trade for consumption in the exporting country (or country of origin), with adjustments relating to: differences in conditions and terms of sale, differences in taxation or other differences that must be considered to ensure that the comparison is "effectively" made "between the prices on two similar sales." If the goods are not sold in the exporting country (or country of origin), or if they are not sold in the ordinary course of trade, the fair market price is determined by reference to the export price to a third country or, if the authority "thinks fit", by reference to production costs considering "selling cost and profit as may appear to the [authority] to be proper."

Anti-dumping mechanisms in these countries have hardly been used. Two AD investigations (with no imposition of duties) have been reported from Grenada<sup>29</sup> and from St. Vincent and the Grenadines.<sup>30</sup> No anti-dumping investigation has been carried out in St. Lucia after it became a WTO member.<sup>31</sup> Against Barbados, duties have been imposed once by the Minister of Finance against imports of milk and dairy products from Trinidad and Tobago<sup>32</sup>. The anti-dumping legislation in these five countries does not provide a sufficient legal framework to meet needs arising from current international trade arrangements, particularly considering the reduction of tariffs and the resultant increasingly liberal trade climate potentially increasing the need for anti-dumping measures. Further, it does not meet the standards imposed by WTO disciplines. As investigations often entail very

---

<sup>28</sup> Section 8(4).

<sup>29</sup> WT/TPR, Trade Policy Review: Grenada – Report by WTO Secretariat. 7 May 2001. WT/TPR/S/85/GRD.

<sup>30</sup> WT/TPR, Trade Policy Review: St. Vincent and the Grenadines – Report by WTO Secretariat. 7 May 2001. WT/TPR/S/85/VCT.

<sup>31</sup> WT/TPR, Trade Policy Review: St. Lucia – Report by WTO Secretariat, 7 May 2001. WT/TPR/S/85/LCA.

<sup>32</sup> Customs Duties (Dumping and Subsidies) Order No. 118 of 1996, as amended by the Customs Duties (Dumping and Subsidies) (Amendment) Order No. 51 of 1997 and by the Customs Duties (Dumping and Subsidies) (Amendment) (No. 2) Order No. 126 of 1997.

complex analyses, the responsible authorities must have sufficient capacity to deal with the technical information as well as having well-established and clear procedures through which investigations can be carried out.

The legislation identified above does not establish any specific authority to conduct investigations, procedural rules such as for applications initiating investigations are missing, and no provision is made for provisional or interim measures pending investigations. Several key elements are missing from the texts: the definition of domestic industry, requiring the contemporaneous comparison at the same level of trade for investigations, causation, *de minimis* and limits on the amount of duties. The major procedural considerations omitted include time limits, due process and procedural rights provisions, protection of confidential information, rules of evidence, public notices and judicial review. Moreover, the legislation confers very broad discretionary powers to competent authorities such as the determination of the export price and fair market price. These significant discrepancies between the national texts and WTO disciplines mean that the use of the anti-dumping measures under these arrangements risk a WTO challenge. Dominica, Grenada, St. Lucia and St. Vincent and the Grenadines have no specific legislation on safeguard measures; in this regard, the relevant provisions of the CARICOM Treaty apply.

### 3.3.2 EU

In the EU, measures against dumped imports from third countries are regulated within the common commercial policy, which is within the exclusive competence of the Community (article 133, formerly 113, of the EC Treaty).<sup>33</sup> Therefore, unlike in CARICOM, individual member states cannot take anti-dumping action against third countries, nor amongst themselves in intra-community trade – this area is instead regulated under EC competition law. European anti-dumping legislation was previously contained in Council Regulation 1423/88 of 1988, as subsequently amended. After the Uruguay Round, Council Regulation 3283/94 of 1994 was adopted to bring European law into line with the AD Agreement, and is supplemented by Council Regulation 384/96 of 1995. Following this was the

---

<sup>33</sup> In analysing EC anti-dumping legislation, useful guidance was provided by Montag, F and Fiebig, A. 1996. The European Union. In K Steele ed., *Anti-Dumping under the WTO: a comparative review*. Kluwer Law International; and Mueller, W. Khan, N. and Neumann, A.H. 1998. *EC Anti-Dumping law: a commentary on Regulation 384/96*. John Wiley and Sons. Chichester. (hereafter Mueller *et al* (1998)).

EC Council Regulation No 384/96 of 1995 on protection against dumped imports from countries not members of the European Community.

Dumping must be ascertained by comparing the export price with the price paid, in the ordinary course of trade, by independent customers in the exporting country;<sup>34</sup> or, if unavailable by comparison with a third country export price, or with a value constructed on the basis of production costs.<sup>35</sup> Regarding third country export prices, Regulation 384/96 requires "appropriate" countries and "representative" prices, and abolishes previous norms explicitly allowing the use of the highest third country export price.<sup>36</sup> The comparison must be fair, made at the same level of trade and in respect of sales made as contemporaneously as possible, and should take into account differences affecting comparability.<sup>37</sup>

The commission has developed very complex methods for determining dumping margins, which are examined elsewhere.<sup>38</sup> The zeroing method whereby dumping margins (negative and positive) are first ascertained for sub-categories of the product and then summed together to determine the overall dumping margin for the product with negative margins counted as zero, was declared inconsistent with article 2(4) of the AD Agreement in the *EC – Bed Linen* case. The regulations must operate "by way of complement" to EU regulations in the agricultural sector; considering these regulations subject lower priced imports to equalising levies, anti-dumping has hardly been applied to agricultural products.<sup>39</sup>

### 3.3.3 Trinidad and Tobago

While the obsolete Anti-Dumping and Countervailing Duties Act No. 11 of 1992 was based on the 1968 GATT Anti-Dumping and Subsidies Code, the more recent Anti-Dumping and Countervailing Duties (Amendment) Act No. 23 of 1995 sought to bring the legislation in line with the new AD Agreement. This statute is supplemented by the Anti-Dumping and Countervailing Duties Regulations 1996, adopted under section 34 of the amended act.

---

<sup>34</sup> Article 2(1) Regulation 384/96.

<sup>35</sup> Article 2(3) Regulation 384/96.

<sup>36</sup> See article 2(3)8(b)(i) (Regulation 2423/88).

<sup>37</sup> Article 2(10).

<sup>38</sup> See generally Muller *et al* (1998).

<sup>39</sup> See generally Muller *et al* (1998).

Duties may be imposed if the export price is less than the normal value of the goods in the exporting country; and such imports would cause or threaten to cause material injury to the domestic industry or materially retard the establishment of such. Section 13(1) defines the export price as the price paid or payable by the importer and according to section 12, the normal value is the price of the like goods sold in the ordinary course of trade for home consumption in the exporting country. If this norm is not applicable – because there are no relevant sales in the exporting country, either due to the fact that the market situation in that country is not "suitable", or because the transactions are not carried out in the ordinary course of trade – the normal value is either constructed on the basis of production costs plus administrative and selling costs and profits, or alternatively it should be determined by reference to the export price to a third country. The comparison between the export price and the normal value must be made at the same level of trade (preferably at ex factory level), in respect of sales made at as nearly as possible the same time and with allowances for differences affecting price comparability.<sup>40</sup> Individual dumping margins must be calculated, and section 7A provides a sampling procedure.

As directed by section 16, the act is administered by the Anti-Dumping Authority designated by the minister responsible for trade (previously the Ministry of Trade and Industry, now merged with the Ministry of Foreign Affairs into the new Ministry of Enterprise Development and Foreign Affairs, which is currently being reorganized). In practice, the authority is the Permanent Secretary within the Ministry, and an Anti-Dumping Unit has been established within the ministry to operate under the direction of the authority.

#### IV. INJURY AND THREAT OF INJURY

There are five concepts of injuries in trade remedy measures: serious injury; threat of serious injury; material injury; threat of material injury; and material retardation. The first two are used in the SG Agreement and the last three in the Antidumping and Subsidies and Countervailing Measures Agreements. Article 4 of the SG Agreement on the *Determination of serious injury or threat thereof* defines the concept as follows:

(a) "*serious injury*" shall be understood to mean a *significant overall impairment* in the position of a domestic industry;

---

<sup>40</sup> Section 12(7).

(b) "*threat of serious injury*" shall be understood to mean serious injury that is clearly imminent, in accordance with the provisions of paragraph 2. A determination of the existence of a threat of serious injury shall be based on facts and not merely on allegation, conjecture or remote possibility.

Paragraph 2(a) of article 4(1) requires competent authorities to evaluate *all* relevant factors of an objective and quantifiable nature having a bearing on the situation of that industry, *in particular*: rate and amount of the increase in imports of the product concerned in absolute and relative terms; share of the domestic market taken by increased imports; and changes in the level of sales, production, productivity, capacity utilization, profits and losses, and employment.

Further, paragraph 2(b) lays down a condition that the above determination shall not be made unless it can be demonstrated that there is a causal link between increased imports and serious injury or threat thereof. The next sentence puts forward the *non-attribution* requirement, which means that when factors other than increased imports cause injury to the domestic industry at the same time, such injury shall not be attributed to increased imports.

#### 4.1 Serious injury

Like GATT article XIX and the SG Agreement, the Appellate Body has not attempted to define "serious injury" with any precision. The focus of the Appellate Body has instead been on the evaluation of all relevant factors to determine serious injury. It has found that the text requires that all of the listed factors be "evaluated" in every case, and it has found safeguard measures wanting under WTO law whenever a member has failed to discuss one or more of these factors in its official report on safeguard action. The Appellate Body has also determined that the obligation to evaluate "all relevant factors" may extend to factors not raised by any of the parties to the safeguards investigation (for example, in *US – Wheat Gluten*<sup>41</sup>). The Appellate Body has insisted that serious injury represents "significant overall impairment"; in fact, it has been seen to even refrain from detailed commentary on the reasoning behind findings of serious injury by national authorities. One notable exception is *US – Lamb*<sup>42</sup>. In this case, the USITC

---

<sup>41</sup> *United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities* WT/DS166/AB/R (2000).

<sup>42</sup> *United States – Safeguard Measures on imports of fresh, chilled or frozen lamb meat from New Zealand and Australia* DS178/AB/R (2001).



had found lamb prices in the US to be "depressed" even though they were generally higher than four or five years earlier. Further, it had found a threat of serious injury even though prices had risen toward the end of its period of investigation. The Appellate Body held that these findings were insufficient to support the USITC determination.

Nevertheless, while an examination of all relevant factors is needed, it is not necessary that every "relevant factor" reflect industrial decline. As interpreted in *Argentina – Footwear*<sup>43</sup>, for serious injury to be present, even if a certain factor is not in decline, it is the *overall picture* that should demonstrate a "significant overall impairment". On the whole therefore, the Appellate Body has provided relatively little guidance on the meaning of "serious injury," a situation that is perhaps understandable given the vagueness of the pertinent textual obligations. Beyond a requirement that all factors listed in the Safeguards Agreement be "evaluated" in each case, it remains unclear what conditions will support a finding of serious injury or threat, and what degree of deference on the matter will be afforded to national authorities.

## 4.2 Threat of serious injury

Here also, the SG Agreement itself contains no explicit guidance on any specific methodology that a competent national authority must employ when establishing threat of serious injury. The relevant factors to take into account are the same as those for serious injury, in SG Agreement article 4(2)(a). However, in this case, the key terms are "imminent", "impending" or "soon to happen." In the *US – Lamb* case, the panel itself drew some inferences on how to conduct a threat analysis, as follows: A threat determination needs to be based on an analysis of objective and verifiable data *from the recent past*; These recent past facts need to be complemented by fact-based projections concerning developments in the industry's condition, and concerning imports, in the *imminent future*; and lastly - that the analysis needs to determine whether injury of a *serious* degree will *actually* occur in the near future *unless safeguard action is taken*.

Thus, the key distinguishing aspect of a "threat" of injury, in contrast to only "injury" or current injury, is the almost exclusive reference to future developments in imports (that is, future-oriented considerations). In *Argentina – Footwear*, the panel held that an analysis of the *threat* of serious

---

<sup>43</sup> *Argentina – Safeguard Measures on Imports of Footwear* WT/DS121/AB/R (1999).

injury in the safeguards context is a separate matter from an analysis of *actual* serious injury, meaning that an analysis to determine the latter must be explicitly undertaken. In *US – Lamb*, for example, the USITC did not find *present* serious injury – "... we found that the US lamb industry is not currently experiencing serious injury, but rather is threatened with serious injury." The complainants (Australia and New Zealand) had argued that the USITC's analysis of threat of serious injury is flawed because it was not "prospective", that is, it was rather based on past data, and should instead have been based on projections as to how the industry was likely to perform in the immediate future.

#### 4.3 Material injury and threat of material injury

These concepts are used in the SCM and AD Agreements. In the SCM Agreement article 15(7), in order to establish a threat of material injury, it is essential that the change in circumstances which would create a situation in which the subsidy would cause injury must be clearly foreseen and imminent. In making a determination regarding the existence of a threat of material injury, the investigating authorities should consider, *inter alia*, such factors as:<sup>44</sup> *nature of the subsidy* or subsidies in question and the trade effects *likely* to arise therefrom; a significant rate in increase of subsidized imports onto the domestic market indicating the *likelihood* of substantially increased importation; sufficient freely disposable, or an imminent, substantial increase in, *capacity of the exporter* indicating the likelihood of substantially increased subsidized exports to the importing member's market, taking into account the availability of other export markets to absorb any additional exports; whether imports are entering at prices that will have a *significant depressing or suppressing effect* on domestic prices, and would likely increase demand for further imports; and *inventories* of the product being investigated (with the exporter).

It is also said that no single factor by itself can necessarily give decisive guidance but the *totality* of the factors considered must lead to the conclusion that further subsidized exports are imminent and that, unless protective action is taken, material injury would occur. Thus, the determination of the ultimate judgement is left to a panel or the Appellate Body.

---

<sup>44</sup> The following list is identical to that in the AD Agreement (article 3(7)) except that (i) is not relevant to anti-dumping.

The characterization of injury is similar in the AD Agreement. *Actual* injury determinations must be based on the evaluation of all relevant economic factors (see *Thailand – H-Beams*) and indices having a bearing on the state of the industry, including<sup>45</sup>: actual and potential decline in sales, profits, output, market share, productivity, return on investments, or utilization of capacity; factors affecting domestic prices; the magnitude of the margin of dumping; actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital or investments. It is said that this list is not exhaustive, nor can one or several of these factors necessarily give decisive guidance.

*Threat* of injury determinations must be based *both* on actual injury indicators, and on those specific to threat of injury assessments (such as the "likelihood of substantially increased importation" and its effect on prices).<sup>46</sup> In the *Mexico – HFCS – Panel* case, the panel held that the factors and indicators listed above must be considered in every case, and that factors and indicators specifically concerning threat of injury under the article 3(7) AD Agreement supplement (but do not substitute for) those under article 3(4).

A determination of dumping alone is not enough to justify the adoption of anti-dumping measures. The importing country must also determine that dumping is causing or threatening material injury to an established domestic industry or is retarding the establishment of such an industry.<sup>47</sup> Such a finding must be based on positive evidence and an objective examination of: (a) The volume of dumped imports (whether there has been "a significant increase in dumped imports" in absolute or relative terms), and its effect on prices in the importing country (whether dumped imports undercut local prices, or depress prices or prevent price increases "to a significant degree"); and (b) The resulting impact of dumped imports on domestic producers: when actual injury is alleged, a causal relationship between dumped imports and injury must be demonstrated, taking into account all other factors affecting domestic producers; where threat of injury is alleged, this must be "based on facts and not merely on allegation, conjecture or remote possibility", and must be "clearly foreseen and imminent."<sup>48</sup> The AD Agreement in article 3(5) provides that investigating authorities must "examine any known factors other than the dumped imports which at the

---

<sup>45</sup> Article 3(4) AD Agreement.

<sup>46</sup> Article 3(7) AD Agreement.

<sup>47</sup> Article 6(6) GATT.

<sup>48</sup> Article 3 AD Agreement.

same time are injuring the domestic industry, and the injuries caused by these other factors must not be attributed to the dumped imports."

In the EU, article 3(1) of Regulation 384/96, defines "injury" to include material injury to the Community industry, threat of material injury to the Community industry and material retardation of the establishment of such an industry. Industry is defined as Community producers as a whole of like products or those whose collective output constitutes a major proportion of the total Community production. A causal link must be established having considered all other known factors injuring the domestic industry. *De minimis* exceptions regarding the termination of investigations are: margin of dumping below 2 percent of the export price; and volume of imports from the country below 1 percent of the market share. Under the AD Agreement, duties cannot be applied where the margin of dumping is *de minimis* (less than 2 percent of the export price), where the volume of dumped imports is negligible (normally less than 3 percent of all imports of the like product), or where the injury is negligible. This provision may prevent CARIFORUM countries from being subject to imposition of AD duties in their export markets, as the large size of the EU market may render "negligible" the volumes of imports from and/or the injury caused or threatened by small island economies.

#### 4.4 National legislation

##### 4.4.1 Jamaica

Jamaica has established an active anti-dumping institution and amended its legislation, originally adopted in 1959 but reviewed after the Uruguay Round.<sup>49</sup> Under the Customs and Duties (Dumping and Subsidies) Act 1959, the investigating authority was the Anti-Dumping Advisory Board, while decisions were taken by the Minister of Finance and Planning. No measures were ever taken under the 1959 Act, although one investigation was carried out on dairy products and a duty recommended, but partly because the authorities considered Jamaican AD legislation inconsistent with WTO rules, the duty was not actually imposed.<sup>50</sup>

---

<sup>49</sup> [www.mct.gov.jm/antidumping.htm](http://www.mct.gov.jm/antidumping.htm)

<sup>50</sup> WTO/TPR/G/42, 1998.

In 1999, a new Customs Duties (Dumping and Subsidies) Act was adopted which aligned Jamaican anti-dumping legislation more closely with the AD Agreement. This area is also governed by the Customs Duties (Dumping and Subsidies – Determination of Fair Market Price, Material Injury and Margin of Dumping) Regulations 2000. Injury is established once due consideration has been given to: a) the volume of dumped imports, b) to the consequent impact on prices (significant price reductions or significant prevention of price increases), c) on domestic producers (having assessed all relevant factors and indicators, including output, sales, market share, profits, productivity, investment returns, cash flow, employment, wages, growth, and ability to raise capital). Article 12 of the 2000 Regulations stipulates that injury caused by factors other than dumped imports cannot be attributed to the dumped imports.

The Anti-Dumping and Subsidies Commission established under section 3 of the law determined injury on the basis of a dynamic analysis, focusing not on static levels of performance indicators, but on their upward or downward trends in *Cement from Indonesia*. Moreover, the commission took into consideration known injuring factors other than dumped imports. In *Fertilisers from the Dominican Republic*, the commission made an affirmative preliminary injury determination, finding evidence of the following: negative volume effects, price suppression, loss of market share, increase in raw material inventory, together with declines in profit, investment returns, productivity, wages, output and capacity utilisation. Other factors such as agricultural decline and exchange rate devaluation was considered and found to have a negative impact on the domestic industry; however, in spite of these additional factors, the commission held that material injury attributable to dumping was found, and was held to be the "principal factor" causing material injury.

Determinations of the threat of material injury can only be made where the threat is "likely to develop into material injury" and is "clearly foreseen and imminent". Also to be taken into consideration are factors such as significant increases in dumped imports, potential for product shifting, prices at importation, magnitude of the dumping margin, and any other relevant indicators as stated in Regulation 13. In both *Cement from Indonesia* and *Fertilisers from the Dominican Republic*, the commission made affirmative preliminary threat determinations.

Interestingly, in its determinations, the commission, while applying the rules of the 1999 Act, also takes into account the AD Agreement. For instance, in imposing retroactive duties in *Fertilisers from the Dominican Republic*, not only did it ensure that the requirements of the act (for example, "significant" import increases) were satisfied, but it also examined the satisfaction of the more stringent requirements of the AD Agreement (holding that "massive importation" had occurred and that there was the danger of "devastating" and "irreparable" harm for the domestic industry "likely to seriously undermine the remedial effect of the application of definitive/final antidumping duties").<sup>51</sup>

## V. LIKE AND COMPETITIVE PRODUCTS

Safeguards disputes require a definition of "like" or "competitive products" in order to establish the relationship with imports and therefore also to define the domestic industry that is affected by the import of such "like" or "competitive products." The concept of "like" or "competitive products" is found in all trade remedy agreements and in GATT, especially at article III on national treatment. The key concepts are as follows: Like products; directly competitive products; and, directly competitive or substitutable products

### 5.1 Like products

Although this term appears 16 times in GATT 1994, it was deliberately omitted from specific definition. According to *GATT Analytical Index*, lengthy discussions took place in GATT since 1947 including in working parties, to determine the desirability of a formal definition. This was never done. The 1970 *Report of the Working Party on Border Tax Adjustments* set out the basic approach for interpreting "like or similar products" generally in the various provisions of the GATT 1947.

The interpretation of the term should be examined on a case-by-case basis. This would allow a fair assessment in each case of the different elements that constitute a "similar" product. Some criteria were suggested for determining, on a case-by-case basis, whether a product is "similar": the product's end-uses in a given market; consumers' tastes and habits, which change from country to country; the product's properties, nature and quality.<sup>52</sup>

---

<sup>51</sup> para. xv.

<sup>52</sup> *Report of the Working Party on Border Tax Adjustments*, BISD 18S/97.

The case-by-case basis interpretation, which would allow a fair assessment in each case of the different elements that constitute a "similar" product, was followed in almost all panel reports subsequent to the *Border Tax Adjustments* report.

The SG Agreement does not define the term, nor is the phrase "directly competitive" defined. The AD and SCM Agreements, however, define like products formally, and identically, as follows: "Throughout this Agreement the term "like product" ("*produit similaire*") shall be interpreted to mean a product which is identical, i.e. alike in all respects to the product under consideration, or in the absence of such a product, another product which, although not alike in all respects, has characteristics closely resembling those of the product under consideration."<sup>53</sup>

Therefore although some distinctions have been made between grain-fed and grass-fed lambs, and tomatoes grown for wholesale and those to be sold to processors for derivative products these are not sufficiently different not to be considered "like or directly competitive."<sup>54</sup> Under GATT, the determination of whether two items are "like products" is often analyzed under two distinct frameworks: the *Border Tax Adjustments Test* ("BTA") and the "Aim and Effect" test. The former approach has been followed and developed by many panels and the Appellate Body. The BTA framework consists of the following criteria: The properties, nature and quality of the products; The end-uses of the products; Consumers' tastes and habits; and the tariff classification of the products.

However, the Appellate Body has cautioned that these criteria are also to be applied on a case-by-case basis and are "neither treaty mandated nor a closed list." In *Japan – Alcoholic Beverages II*, the Appellate Body emphasized that: "... there can be no one precise and absolute definition of what is "like". The concept of "likeness" is a relative one that evokes the image of an accordion. The accordion of "likeness" stretches and squeezes in different places as different provisions of the WTO Agreement are applied." Most panels have focused on the more objectively ascertainable criteria of product properties, end-uses and tariff classifications, and less so on the more subjective criteria of consumer habits. Some clarification was made in *EU – Asbestos* case, in which the Appellate Body concluded that the greater the similarities of two

---

<sup>53</sup> SCM Agreement article 15, footnote 46; and para 2.6 of AD Agreement.

<sup>54</sup> FAO Manual on Safeguards (2007).

products in the marketplace, the higher the probability that they will be deemed "like products." As market competitiveness and substitutability are most reflected in the end-uses and consumer tastes criteria, the Appellate Body found that market substitutability is a necessary and sufficient condition for finding likeness.

This concept has also been discussed in a number of recent cases involving agricultural products. In the *US – Lamb* case, the panel concluded that live lamb cannot be a like product of the imported lamb, in view of different physical characteristics and other considerations. In *Canada – Beef*, an identical argument was made, that cattle cannot be a like product to imported beef. Similarly, in *US – Wine and Grapes*, it was held that grapes cannot be a like product to wine. In *Chile – Agricultural Products*, domestic rape-seed was not said to be the like product of imported vegetable oils. And in *Korea – Dairy*, domestic fresh milk was held not to be a like product of imported milk powder. When trying to determine what constitutes a "like product", as noted above article 2(6) of the AD Agreement guides interpretation to represent a product which is "identical, i.e. alike in all respects to the product under consideration, or in the absence of such a product, another product which, although not alike in all respects, has characteristics closely resembling those of the product under consideration."

In summary, several criteria guide the assessment of whether imported items are like or directly competitive such as: the use of the same Harmonized Tariff System (HTS) codes, the sale in accordance with industry standards of that product, and whether they share common technical characteristics.<sup>55</sup>

## 5.2 Directly competitive products

It is unclear why the interpretation of the phrase "directly competitive products" in SG Agreement article 4(1)(c) has not been addressed by any panel to date. Indeed, GATT article III is the only context in which the concept of directly competitive products has been addressed in GATT/WTO dispute settlement practice.

For example, in *US – Lamb*, the panel did not go into the issue of directly competitive products because the US International Trade Commission (USITC) did not do so, limiting the arguments to like products only in

---

<sup>55</sup> FAO Manual on Safeguards (2007).



defining domestic industry. Although two of the USITC Commissioners stated their view that domestically produced live sheep were "directly competitive" with imported lamb meat, the USITC did not rely on this concept, and thereafter the panel did not consider it necessary to delve into the matter.

### 5.3 Directly competitive or substitutable products in GATT article III.

The phrase "directly competitive or substitutable products" is not found in trade remedy agreements but rather in GATT 1994 article III:2, in the context of national treatment. GATT article III:2 is concerned with two different factual situations: article III:2 in the first sentence, is concerned with the treatment of like products, whereas the second sentence, is concerned with the treatment of directly competitive or substitutable products, meaning, products other than like products. Article III:2 further clarifies the distinction between these two sets of products, and hence two distinct obligations in this provision.

Several of the disputes involving this phrase have taken place in the context of differential domestic taxes on alcoholic products. For example in *Japan – Alcoholic Beverages*, the question asked was whether various imported products, whisky, brandy, gin, genever, rum and liqueurs, are directly competitive or substitutable with *sochu*, the Japanese product. Similar investigations were conducted in *Korea – Alcoholic Beverages*, imported western alcoholic beverages versus the Korean *soju*, and in *Chile – Alcoholic Beverages*, imported western alcoholic beverages versus the Chilean *pisco*.

The panels have always held that directly competitive or substitutable products should be interpreted more broadly than the term like products. In all three disputes, the panels went through in depth evidence on the elasticity of substitution, and held that these elasticities are valuable and should be examined as part of the evidence. In the *Japan – Alcoholic Beverages* case, the panel concluded that imported liquors were directly competitive or substitutable with *shochu*, for the following reasons: the products concerned are all distilled spirits; the previous GATT case of 1987, *Japan – Alcohol Panel* report had made similar findings; the evidence demonstrates that there is a "significant elasticity of substitution" among the products; and, there is evidence that whisky and shochu are "essentially competing for the same market."

Also relevant for agricultural products is the *EEC – Animal Feed Proteins* case of 1978. The issue was whether the EU measure that favoured the use of domestic denatured skimmed milk powder as a protein source for use in animal feed stuff came at the cost of other protein feed stuffs. The panel concluded that other protein products in dispute could not be considered as like products with denatured skimmed milk powder because the basic characteristics are very different. However, both parties to the dispute had agreed that most products in question were substitutable under certain conditions. It was also noted that in contrast to the technical nature of the word substitutable, the interpretation of the word competitive is based on economic reasoning, from the demand or consumer side. In the case, the panel found that the EU measure in question did tilt the demand in favour of milk powder and, by virtue of this measure, made the product directly competitive with other protein feeds.

## VI. DOMESTIC INDUSTRY

According to article 4(1)(c) of the Agreement on Safeguards, in determining injury or threat thereof, a "domestic industry" shall be understood to mean "the producers as a whole, of the like or directly competitive products operating within the territory of a member, or those whose collective output of the like or directly competitive products constitutes a major proportion of the total domestic production of those products." This definition is fraught with challenges, and it is useful to look at the WTO panels to elucidate how this term may be applied.

In the *US – Lamb* case, the Appellate Body found that in an investigation in which the relevant "like product" was defined as lamb meat, the term "domestic industry" could not be interpreted as including growers and feeders of live lambs. The Appellate Body stated that in determining the scope of the domestic industry, the first step should be the identification of the products which are "like or directly competitive" with the imported product. It further asserted that "Only when those products have been identified is it possible then to identify the "producers" of those products."<sup>56</sup>

Hence, in *US – Lamb Meat*, first the Appellate Body considered the definition of "domestic industry" with reference to products:

---

<sup>56</sup> *US – Lamb Meat*, Appellate Body Report, paragraph 87.

A safeguard measure is imposed on a specific "product", namely, the imported product. The measure may only be imposed if that specific product ("such product") is having the stated effects upon the "domestic industry that produces like or directly competitive products" (emphasis added). The conditions in article 2(1), therefore, relate in several important respects to specific products. In particular, according to article 2(1), the legal basis for imposing a safeguard measure exists only when imports of a specific product have prejudicial effects on domestic producers of products that are "like or directly competitive" with that imported product. In our view, it would be a clear departure from the text of article 2(1) if a safeguard measure could be imposed because of the prejudicial effects that an imported product has on domestic producers of products that are not "like or directly competitive products" in relation to the imported product.<sup>57</sup>

Once the definition of "domestic industry" had been analyzed with respect to products, it was then examined with respect to producers as follows:

As the panel indicated, "producers" are those who grow or manufacture an article; "producers" are those who bring a thing into existence. This meaning of "producers" is, however, qualified by the second element in the definition of "domestic industry". This element identifies the particular products that must be produced by the domestic "producers" in order to qualify for inclusion in the "domestic industry". According to the clear and express wording of the text of article 4(1)(c), the term "domestic industry" extends solely to the "producers ... of the like or directly competitive products" (emphasis added). The definition, therefore, focuses exclusively on the producers of a very specific group of products. Producers of products that are not "like or directly competitive products" do not, according to the text of the treaty, form part of the domestic industry.<sup>58</sup>

Finally, in concluding that the US was following a definition of "domestic industry" that was too broad the Appellate Body upheld the panel findings in the following words:

"There is no dispute that in this case the 'like product' is 'lamb meat', which is the imported product with which the safeguard investigation was concerned. The USITC considered that the

---

<sup>57</sup> Id., para. 86.

<sup>58</sup> Id., para. 84.

'domestic industry' producing the 'like product', lamb meat, includes the growers and feeders of live lambs. The term 'directly competitive products' is not, however, at issue in this dispute as the USITC did not find that there were any such products in this case. In this respect, we are not persuaded that the words 'as a whole' in article 4(1)(c), appearing in the phrase 'producers as a whole', offer support to the United States position. These words do not alter the requirement that the 'domestic industry' extends only to producers of 'like or directly competitive products'. The words 'as a whole' apply to 'producers' and, when read together with the terms 'collective output' and 'major proportion' which follow, clearly address the number and the representative nature of producers making up the domestic industry. The words 'as a whole' do not imply that producers of other products, which are not like or directly competitive with the imported product, can be included in the definition of domestic industry. Like the panel, we see the words 'as a whole' as no more than 'a quantitative benchmark for the proportion of producers ... which a safeguards investigation has to cover.'<sup>59</sup>

According to the Appellate Body, the degree of integration of the production process should not impact on the eventual determination of the "domestic industry."<sup>60</sup> The Appellate Body also considered the phrase "those whose collective output...constitutes a major proportion" and the question of data coverage as follows:

"The Agreement expressly envisages that, in certain circumstances, the 'domestic industry' may consist of those domestic producers 'whose collective output of the like or directly competitive products constitutes a major proportion of the total domestic production of those products'. This implies that complete data coverage may not always be possible and is not required. While the fullest possible data coverage is required in order to maximize the accuracy of the investigation, there may be circumstances in a particular case which do not allow an investigating authority to obtain such coverage."

---

<sup>59</sup> Id., para. 91.

<sup>60</sup> Id., para. 94.

The definition of domestic industry within the meaning of the AD Agreement was addressed in several panels and reports. In *US – Wine and Grape*, the panel upheld the definition by the US International Trade Commission (ITC) of two separate industries, the growers of wine-grapes on the one hand and the wineries on the other, notwithstanding the integration between the two (with wineries buying grapes from grape-growers). However, in *Mexico – HFCS – Panel*, the panel held inconsistent with article 4(1) of the AD Agreement the division of the cane sugar industry in two "domestic industries" merely on the basis of the identity of the purchasers (industrial users or consumers). In *New Zealand – Electrical Transformers*, the panel rejected New Zealand's contention that the domestic industry was to be determined specifically considering the various types of electric transformers available; instead, it was "the overall state of health of the New Zealand transformer industry" which had to be considered.<sup>61</sup> National authorities have considerable latitude in making these determinations, and have examined for example whether there is a continuous line of production from the raw to the processed item – the value for the former viewed as higher than the latter, even though both are ultimately dictated by the demand for the final product.<sup>62</sup>

In the Trinidad and Tobago legislation, the domestic industry is defined as Trinidad and Tobago producers of like goods whose collective output constitutes at least 25 percent of the domestic production of the like goods, excluding operators related to the exporters or importers and allowing for the division of the territory of the country in two competitive markets where specific circumstances occur.

## VII. CAUSATION

Articles 2, 4 and 5 of the SG Agreement spell out how WTO members should conduct an injury determination, (meaning, how they should determine whether increased imports actually cause or threaten to cause serious injury to a domestic industry); and how they should apply safeguard measures in response to injury or potential injury arising from imports from a trading partner. Article 2(1) requires the concerned national authority to render a determination on whether the product concerned is being imported into the territory of a member "in such increased quantities, absolute or

---

<sup>61</sup> Para. 4.6.

<sup>62</sup> FAO Manual on Safeguards (2007).

relative to domestic production, and under such conditions as to cause or threaten to cause serious injury." Thus, this provision delimits the territorial limits of the WTO member as the relevant import market. While it outlines the required effects of increased imports, that is, serious injury or threat of serious injury, it is noteworthy however, that article 2(1) is silent as to the *origin* of the imports which can or should be taken into account in determining injury.

However, merely demonstrating the "increased quantities" in the serious injury or the threat of serious injury determination is insufficient. According to article 2(b), an investigation to determine whether increased imports have or are threatening to cause serious injury to a domestic industry should go a step further and demonstrate on the basis of objective evidence, that there exists a *causal link* between the increased imports of the product concerned and serious injury or the threat thereof. The phrase "*causal link*" is also to be found in article 4(2). In the 2001 *US – Wheat Gluten* decision, the Appellate Body gave useful indications of what "*causal link*" means:

"The word 'causal' means 'relating to a cause or causes', while the word 'cause', in turn, denotes a relationship between, at least, two elements, whereby the first element has, in some way, 'brought about', 'produced' or 'induced' the existence of the second element. The word 'link' indicates simply that increased imports have played a part in, or contributed to, bringing about serious injury so that there is a causal 'connection' or 'nexus' between these two elements. Taking these words together, the term 'the causal link' denotes, in our view, a relationship of cause and effect such that increased imports contribute to 'bringing about', 'producing' or 'inducing' the serious injury."<sup>63</sup>

For the government authority rendering a determination on injury, the fundamental questions that arise are therefore the following: What sort of technical analysis does confirming the element of "causation" give rise to? And in addition, how should WTO members conceptualize imports as a causal variable in injury determinations? The analytical technique adopted in causation analysis may impact on the injury determination. Although it is a matter of individual country practices, there are at least three common

---

<sup>63</sup> *US – Wheat Gluten*, Appellate Body Report, WT/DS166/AB/R, para. 67.

techniques for establishing the causal connection between increased imports and injury.<sup>64</sup>

Firstly, investigating government authorities may use the "correlation approach", whereby the rise in import volume or market share, is correlated to sectoral industrial or market decline in the form of decline in prices, production, employment or profits. The positive finding of such a correlation indicates the increased imports caused injury. Secondly, investigating government authorities may use the so-called "hypothetical quota" approach in which an econometric analysis is conducted to determine how the imposition and removal of a hypothetical quota might have prevented the deterioration of the affected sector. The results from impact of the hypothetical quota are then compared with the other potential causes of harm to the industrial sector. Thirdly, authorities may use the "import supply curve" approach, where a presumption is made that any harm to the domestic industry is attributable to an increase or decrease in domestic costs, changes in domestic demand, or changes in domestic supply. The investigating authorities are then able to attribute to increased imports any harm caused by to the changes in the import supply curve.

It appears that Appellate Body endorses the "correlation approach" for determining causation analysis. The 1999 decision of the Appellate Body, *Argentina – Footwear*,<sup>65</sup> discussed the proper method for determining whether imports are the "cause" of injury. The panel had determined that if causation is present, an increase in imports should normally coincide with a decline in the relevant injury factors. It stated:

"In making our assessment of the causation analysis and finding, we note in the first instance that article 4(2)(a) requires the authority to consider the 'rate' (i.e. direction and speed) and 'amount' of the increase in imports and the share of the market taken by imports, as well as the 'changes' in the injury factors (sales, production, productivity, capacity utilisation, profits and losses, and employment) in reaching a conclusion as to injury and causation. As noted above we consider that this language

---

<sup>64</sup> See, Sykes, A. 2004. The persistent puzzles of safeguards: lessons from the steel dispute. *Journal of International Economic Law* 7(3): 523–564.

<sup>65</sup> *Argentina – Safeguards on Imports of Footwear*, WT/DS121/RC Panel Report, (25 June 1999); Appellate Body Report, *Argentina – Safeguards Measures on Imports of Footwear*, WT/DS/AB/R (14 December 1999).

means that the trends – in both the injury factors and the imports – matter as much as their absolute levels. In the particular context of a causation analysis, we also believe that this provision means that it is the relationship between the movements in imports (volume and market share) and the movements in injury factors that must be central to a causation analysis and determination. In practical terms, we believe therefore that this provision means that if causation is present, an increase in imports normally should coincide with a decline in the relevant injury factors. While such a coincidence by itself cannot prove causation (because, *inter alia*, article 3 requires an explanation – i.e. 'findings and reasoned conclusions'), its absence would create serious doubts as to the existence of a causal link, and would require a very compelling analysis of why causation still is present."<sup>66</sup>

In substance, the Appellate Body concurred with the panel's finding stating that in an analysis of causation, "it is the relationship between the movements in injury factors that must be central to a causation analysis and determination."<sup>67</sup> The implication here is therefore that correlation and causation in ordinary circumstances, though different, go together. More generally in causation analysis, the *Korea – Dairy* decision rendered in 2000, is most useful in setting out the basic approach that should be followed by national authorities:

"In performing its causal link assessment, it is our view that the national authority needs to analyse and determine whether developments in the industry, considered by the national authority to demonstrate serious injury, have been caused by the increased imports. In its causation assessment, the national authority is obliged to evaluate all relevant factors of an objective and quantifiable nature having a bearing on the situation of that industry. In addition, if the national authority has identified factors other than increased imports which have caused injury to the domestic industry, it shall ensure that any injury caused by such factors is not considered to have been caused by the increased imports. To establish a causal link,

---

<sup>66</sup> Appellate Body Report, WT/DS121/AB/R (1999), para. 141.

<sup>67</sup> *Id.*, para. 144.



Korea has to demonstrate that the injury to its domestic industry results from increased imports. In other words, Korea has to demonstrate that the imports ... cause injury to the domestic industry producing milk powder and raw milk. In addition, having analysed the situation of the domestic industry, the Korean authority has the obligation not to attribute to the increased imports any injury caused by other factors."<sup>68</sup>

Much of the substance in the above approach was repeated more succinctly in the 2001 *US – Wheat Gluten* decision:

"We consider that an appropriate approach for a panel to take in assessing whether a member has fulfilled the requirements of article 4(2)(a) and (b) SA with respect to causation consists of a consideration of: (i) whether an upward trend in imports coincides with downward trends in the injury factors, and if not, whether an adequate, reasoned and reasonable explanation is provided as to why nevertheless the data shows causation; (ii) whether the conditions of competition between the imported and domestic product as analysed demonstrate the existence of the causal link between the imports and any injury; and (iii) whether other relevant factors have been analysed and whether it is established that injury caused by factors other than imports has not been attributed to imports."<sup>69</sup>

According to article 4(2) of the SG Agreement, a WTO member is not allowed to impose safeguard measures unless there is objective evidence of the existence of a causal link between increased imports and the resulting serious injury or threat of serious injury. This provision states further that "When factors other than increased imports are causing serious injury to the domestic industry at the same time, such injury shall not be attributed to increased imports." In the *Argentina – Footwear* case, the panel emphasized the importance of a sufficient consideration of "other factors" in a "non-attribution analysis" in order to satisfy the requirements of article 4(2)(b) in the following words:

---

<sup>68</sup> *Korea – Dairy*, Panel Report, WT/DS98/R, paras. 7.89 and 7.90.

<sup>69</sup> *United States – Wheat Gluten*, Panel Report, WT/DS177/R, para. 8.91.

"We recall that article 4(2)(b) requires that 'when factors other than increased imports are causing injury to the domestic industry at the same time, such injury shall not be attributed to increased imports.' Thus, as part of the causation analysis, a sufficient consideration of 'other factors' operating in the market at the same time must be conducted, so that any injury caused by such other factors can be identified and properly attributed."

However, the language in article 4(2) that injury should not be wrongly attributed to imports when there are other factors at play is rendered in deceptively simple wording. In practice the issue is quite complex as a result of the strict time limitations within which a determination has to be made and also because of other difficulties including a lack of verifiable, reliable or sufficient data. Though an econometric model, or some other quantitative method, is not a requirement as was said in the *US – Steel* case,<sup>70</sup> it is impossible to imagine how the standard can be met without employing such a device.

In *New Zealand – Electrical Transformers*, the panel held that a small share of the export market controlled by the exporter was not sufficient to establish a causal link, but nevertheless stated that "any known factors" must be taken into consideration and the injury caused by them must not automatically be attributed to the dumped imports.<sup>71</sup> This means that while the particular assessment methods are chosen by investigating authorities, the injurious effects of dumped imports and of other factors must be clearly "separated" and "distinguished" (*US – Steel*, paras. 224 and 228).

## 7.1 National legislation

### 7.1.1 Trinidad and Tobago

When establishing causation, all relevant factors must be considered, and injuries caused by other factors must not be attributed to the dumped imports.<sup>72</sup> The authority may initiate an investigation at the direction of the minister, on its own initiative, upon complaint by or on behalf of domestic

---

<sup>70</sup> *United States – Definitive Safeguard Measures on Imports of Certain Steel Products*, Report of the Appellate Body, WT/DS248/AB/R (10 November 2003).

<sup>71</sup> Article 3.5 AD Agreement.

<sup>72</sup> Section 10 of the Regulations.

producers or upon request by a third country under sections 7 and 18(1), and submit its findings and make recommendations to the minister under section 17. The authority must not initiate the investigation if the domestic producers supporting the complaint do not account for more production than those explicitly opposing the complaint, or in any case for at least 25 percent of the domestic production.<sup>73</sup> The content of the complaint is determined by section 18(2) of the act and section 2 of the regulations.

Before initiating an investigation upon complaint, the authority must ascertain that there is sufficient *prima facie* evidence of actionable injury; and a "causal link between such imports and the alleged actionable injury."<sup>74</sup> Notice of the initiation of the investigation must be given to the government of the exporting country, to known interested importers and exporters, to the complainant, and must be published in the official gazette.<sup>75</sup>

## VIII. ANTI-DUMPING DUTIES

According to the AD Agreement, anti-dumping duties cannot be applied where the margin of dumping is *de minimis* (less than 2 percent of the export price), where the volume of dumped imports is negligible (normally less than 3 percent of all imports of the like product), or where the injury is negligible.<sup>76</sup> These duties must be applied on a non-discriminatory basis on dumped imports regardless of the origin of the item, except where price undertakings are in force.<sup>77</sup> Price undertakings are essentially price revisions or halting of dumped price exports may be used to settle an on-going investigation where a preliminary finding confirmed the existence of dumping and injury.

Anti-dumping duties provisions have a sunset clause, and are to remain in force "only as long as, and to the extent, necessary to counteract dumping which is causing injury", and in any case not for longer than five years.<sup>78</sup> After this time period, duties may be extended only if the authorities determine upon request or *motu proprio*, "that the expiry of the duty would be

---

<sup>73</sup> Sections 3(1) and 18(1).

<sup>74</sup> Section 18(5)(b) and (c), amended Anti-Dumping and Countervailing Duties Act No. 23 of 1995.

<sup>75</sup> Sections 18(3) and 32.

<sup>76</sup> Article 5.8 AD Agreement.

<sup>77</sup> Id.

<sup>78</sup> Article 11 AD Agreement.

likely to lead to continuation or recurrence of dumping and injury."<sup>79</sup> The case of *Japan – Semi-Conductors*<sup>80</sup> noted that WTO-inconsistent actions may not be taken by the exporting country to prevent dumping.

The competent national authorities must determine the existence of the conditions required for the imposition of AD duties on the basis of an investigation. The AD Agreement, in particular article 5, regulates the conduct of this investigation, in order to ensure transparency and to protect the procedural right of interested parties. The investigation is initiated upon application "by or on behalf of the domestic industry" of the like product. For this condition to be met, the application must be supported by information supplied by domestic producers accounting for at least 50 percent of the country's total production; and in any case, the application must be expressly supported by domestic producers accounting for at least 25 percent of total domestic production of the like product. Investigations must be concluded within one year, except in special circumstances, and in any case, within 18 months.

## 8.1 National Legislation Procedural Rules

### 8.1.1 EU

Under article 5 of the EU Regulation 384/96 investigations are initiated upon written complaint by any natural or legal person, or any association not having legal personality, acting on behalf of the Community industry; the complaint may be submitted to the commission or to a member state, which then forwards it to the commission. The complaint must be supported by Community producers accounting for at least 25 percent of total production and 50 percent of the production of producers expressing support or opposition to the application. The commission must determine whether there is sufficient evidence to justify the initiation of an investigation within 45 days from the date of the complaint. In "special circumstances", the commission may also initiate investigations *ex officio*, provided that there is "sufficient evidence" of dumping, injury and causation. In determining whether to initiate an investigation, the commission must consult the representatives of each of the member states that comprise the advisory

---

<sup>79</sup> Id.

<sup>80</sup> In this case, Japan, the exporting country, had adopted quantitative restrictions on exports inconsistent with article XI of the GATT; the panel found that these measures could not be justified under article VI of the GATT.

committee. If proceedings are initiated, a notice is published in the Official Journal and communicated to exporters, importers, representative associations, exporting country government and complainant.

Exporters have 30 days from the receipt of questionnaires to complete and return them (with the possibility of extensions), and interested parties have a right to a hearing upon written request.<sup>81</sup> If interested parties withhold information or provide false or misleading information, the commission may make a determination on the basis of "facts available"; moreover, "the result [of the investigation] may be less favourable to the party than if it had cooperated", which essentially means that the commission may use the least favourable information available (typically that supplied by the applicant).<sup>82</sup> Complainants, exporters and importers, their representative associations, and users and consumers organizations have, upon written request, the right to inspect all information provided by any party. However, protection is accorded to confidential information. If samples are used, the selection is carried out by the commission, although preference must be given to selection with the consent of interested parties.<sup>83</sup> Except in cases which involve a large number of exporters or producers, individual dumping margins must be calculated for exporters and producers which although are not included in the sample, have supplied the required information.

Investigations must be concluded within one year "whenever possible", and in any case within 15 months from initiation. Upon provisional affirmative determination, provisional measures (article 9) may be imposed by the commission in consultation with the representatives of the member states in the advisory committee. Definitive duties are imposed by the council voting by a simple majority upon proposal by the commission and after consulting the advisory committee. In addition to the substantive requirements of the AD Agreement (dumping, injury and causation), EU law also conditions the imposition of provisional and definitive duties upon the existence of a "Community interest", "based on the appreciation of all the interests taken as a whole", including the interests of the domestic industry and those of users and consumers. Both provisional and definitive duties are imposed by the regulation and collected by member states in form, rate and conditions as set out therein.

---

<sup>81</sup> Article 6.

<sup>82</sup> Article 18.

<sup>83</sup> Article 17(2).

Proceedings must be terminated if price undertakings are accepted. The commission may suggest undertakings, but exporters are not obliged to accept them. The commission has broad discretion in accepting or refusing undertakings offered by exporters; it may accept undertakings only after consulting the advisory committee. Undertakings may be suggested or accepted only after an affirmative preliminary determination of dumping and consequent injury.<sup>84</sup> Duties expire after five years unless renewed.<sup>85</sup>

Judicial review of all Community acts including relating to anti-dumping measures, is available before the Court of First Instance and, on appeal, by the European Court of Justice.<sup>86</sup> Procedures for refunds of duties improperly collected are accommodated and should last for no longer than 18 months from the application for refund.<sup>87</sup> Thus, while the Community has exclusive competence over the measures, member states retain partial control over the proceedings, both through the consultation of their representatives constituting the advisory committee and through the control of decisions on imposition of duties (that are taken by the council, consisting of the competent ministers of the member states).

EU law also contains "anti-circumvention" rules, which are not included in the AD Agreement. Under these rules, anti-dumping duties imposed by the Community may be extended to imports from third countries of like products if there is "circumvention", which, according to article 13 is: a change in the pattern of trade between third countries and the Community which stems from a practice, process or work for which there is insufficient due cause or economic justification other than the imposition of the duty; evidence that the remedial effects of the duty are being undermined in terms of the prices and/or quantities of the like products; and, evidence of dumping in relation to the normal values previously established for the like or similar products.

A typical circumvention is the setting up of an assembly plant in the Community or in a third country after the imposition of the anti-dumping duty, where the added value of the assembly plant is below a specified threshold, and where the remedial effects of the duty on the assembled like product are effectively undermined.

---

<sup>84</sup> Article 8.

<sup>85</sup> Article 11(2).

<sup>86</sup> Article 230, formerly 173, of the Treaty establishing the European Community.

<sup>87</sup> Article 11(8) EU Regulation 384/96.

## 8.1.2 Jamaica

The Anti-Dumping and Subsidies Commission carries out anti-dumping investigations both upon complaint and on its own initiative.<sup>88</sup> If it receives a written complaint, the commission must initiate an investigation within 45 days, where it is properly documented, and evidence is shown both of dumping and indicating material injury and causation; and the complaint is made by or on behalf of the domestic producers, accounting for at least 25 percent of total production.<sup>89</sup> In both *Cement from Indonesia* and *Fertilisers from the Dominican Republic*, the complainant was the sole domestic producer, thus accounting for 100 percent of the domestic industry. If the commission decides to initiate an investigation, it must give notice to the Minister of Industry, Commerce and Technology, to exporters and importers, to the government of the exporting country, to the complainant and to "any other person as prescribed"; it must also publish a copy in the official gazette and a national newspaper. The items that must be included in this notice are identical to those identified by article 12(1)(1) AD Agreement, with the exception of the requirement to include the investigation start date.

In the conduct of investigations, the commission may request interested parties to provide information and/or evidence,<sup>90</sup> and may apply to courts for an injunction to provide the required information subject to criminal sanctions. The wilful provision of false or misleading evidence triggers criminal liability.<sup>91</sup> In *Fertilisers from the Dominican Republic* and in *Cement from Indonesia*, the commission distinguished section 4(6), relating to non-provision of required information, and section 10, relating to uncooperative behaviour throughout the investigation. Under section 4(6), the commission held it had "broad discretion" for making findings on the basis of the facts available to it, as the threshold is that information has not been furnished to the commission's "satisfaction". Moreover, while section 10 explicitly refers to conformity with Annex II of the AD Agreement, no such provision is contained in section 4(6); in both these cases, the commission relied on section 4(6).

Provisional anti-dumping measures, in the form of duty or security (as opted by the importer), may be imposed after a preliminary determination and not

---

<sup>88</sup> Section 4(1)(a), Customs Duties (Dumping and Subsidies) Act (1999).

<sup>89</sup> Section 22.

<sup>90</sup> Sections 4(6) and 7(1).

<sup>91</sup> Section 7(5).

earlier than 60 days from the initiation of the investigation. Provisional measures can be in force for no longer than four (or, upon request, six) months. Section 15 stipulates that any provisional duty paid and security posted is returned upon termination of the investigation. Provisional duties have been imposed in *Fertilisers from the Dominican Republic* (retroactive duties under section 13 were provisionally imposed) and in *Cement from Indonesia*. Within 90 days from the preliminary determination, the commission must make a definitive determination, which must be notified to the minister and published in both the official gazette and in a daily newspaper.<sup>92</sup>

Applications for judicial review of definitive determinations and of any finding of the commission may be filed to the Supreme Court by any person directly affected by the determination.<sup>93</sup> The grounds for judicial review are: violation of natural justice principles or of jurisdiction rules; error in law; and erroneous finding of fact made "in a perverse or capricious manner or without regard to the material before the commission."<sup>94</sup> Where anti-dumping findings are set aside by the Supreme Court, duties cease to be payable, and those paid must be refunded.<sup>95</sup> Where the matter is referred back to the commission, the latter must reconsider the matter and make a new determination.<sup>96</sup>

Although the new legislation follows the model of the AD Agreement, some problems remain. Firstly, Jamaican AD legislation is silent on some key issues like: anti-dumping duty review by authorities; a "sunset clause" limiting the duration of the application of AD duties; and "fair comparison" to be made at the same level of trade and in respect of sales made at as nearly as possible the same time. Also no reference is made to determine the individual dumping margin of each known producer or exporter, nor to rules concerning sampling.

Jamaican legislation differs from the standards set out in the AD Agreement in the following ways:

---

<sup>92</sup> Section 30.

<sup>93</sup> Sections 33 and 34(2).

<sup>94</sup> Section 34(1).

<sup>95</sup> Section 17.

<sup>96</sup> Section 31(1).



- injury determinations, import volumes, price effects and impact on domestic producers must be given "due consideration", rather than the "higher" standard of "positive evidence" and "objective examination";
- the 30-day minimum time limit for the exporters is counted from the initiation of the investigation rather than from the receipt of questionnaires (although the wording of the AD Agreement is not mandatory);
- the adoption of provisional duties is not explicitly subject to showing a necessity to prevent injury during the investigation;
- the conditions for retroactive duty imposition are less stringent than those of the AD Agreement ("significant importation" causing material injury, instead of "massive dumped imports [...] likely to seriously undermine the remedial effect of the definitive anti-dumping duty"); and
- the commission must not accept price undertakings after it has made a preliminary determination, while under the AD Agreement the existence of a preliminary affirmative determination is a condition for the acceptance of undertakings.

Jamaica notified the WTO of the fact that it has no specific laws, regulations or administrative procedures<sup>97</sup> pertaining to safeguard measures; instead, the relevant provisions of the CARICOM Treaty apply.

### 8.1.3 Trinidad and Tobago

The act protects the procedural rights of interested persons, i.e. of persons engaged in the production, export or import of the goods, of domestic operators, of persons acting on behalf of the former.<sup>98</sup> Interested persons must be given "reasonable opportunity" to present all relevant evidence, to have access to all relevant non-confidential information and to present opposing views and rebuttals; only evidence reproduced in writing in non-confidential form and available to the interested persons may be taken into account. However, the procedures set forth in the act must not prevent the authority from proceeding expeditiously in the investigation.<sup>99</sup>

---

<sup>97</sup> WTO/TPR/G/42, 1998.

<sup>98</sup> Sections 19, 19A and 3(1), Anti-Dumping and Countervailing Duties (Amendment) Act No. 23 of 1995.

<sup>99</sup> Section 19.

If there is insufficient evidence of dumping or injury, the authority must terminate the investigation, and publish notice.<sup>100</sup> The investigation may also be terminated by request on behalf of the complaining domestic industry, or if dumping margins or the volume of dumped imports are negligible. The minister must make a preliminary determination within three months from the initiation of the investigation. The preliminary determination must be published in the gazette, and notice must be given to the government of the exporting country, to affected exporters and importers and to the claimant. The minister may impose a provisional duty if he deems it necessary to prevent material injury.<sup>101</sup> The minister must make a final determination within six months from the preliminary determination and within 18 months from the initiation of the investigation, and must publish notice.<sup>102</sup> Antidumping duties are imposed by order of the minister. The duty must not exceed the dumping margin and must be applied on a non-discriminatory basis, except for sources with regard to which undertakings are in force.<sup>103</sup> Price undertakings are governed by section 28 along the lines of rules of the AD Agreement. By way of section 27, a person aggrieved by an anti-dumping duty may appeal to the Tax Appeal Board. The minister must review the imposition of the duty on his own initiative, upon recommendation by the authority or upon documented request by an interested person. Duties expire after five years, unless the minister determines that this would lead to the continuation of material injury.

Duties are applied to goods imported after the date of the order. Where a final determination of actual material injury has been made, duties may be imposed retrospectively for the period in which a provisional duty was applied. Moreover, duties may applied retrospectively for the period of 90 days before the date of the provisional determination under specified circumstances (that is, where there was found to have been a "history of dumping" or importer's awareness of dumping and "substantial dumped imports") under section 30. No express provision on judicial review is included, although the Supreme Court of Trinidad and Tobago (consisting of the High Court and the Court of Appeal) has general jurisdiction to review administrative acts.

---

<sup>100</sup> Sections 23 and 32.

<sup>101</sup> Section 25.

<sup>102</sup> Sections 26 and 32.

<sup>103</sup> Sections 5(2) and 8.

The 1992 Act also includes anti-circumvention provisions, whereby goods are considered to originate in another country either if they are wholly produced in that country or, if they are produced in more than one country, if some stage of production of the goods or of their components or materials was carried out in that country - provided that subsequent production phases account for less than 25 percent of the total production cost of the goods.<sup>104</sup> The 1992 Act, as amended, seems consistent with the obligations arising from WTO membership.

The authority has been active in enforcing the legislation, and training has been provided to the officers of the Anti-Dumping Unit.<sup>105</sup> For instance, an anti-dumping investigation on cheddar imports from New Zealand was carried out in 1996. Here, a dumping margin was calculated, and the case was resolved through an undertaking.<sup>106</sup> An anti-dumping investigation was carried out and a provisional duty was imposed in 1999 with regard to imports of pasta products from Costa Rica. In this dispute, the government of Costa Rica requested consultations under the WTO DSU, claiming violations of articles 1, 2, 3, 5, 6, 7, 10, 12 and 18, Annex I and II of the AD Agreement (Trinidad and Tobago – *Macaroni and Spaghetti*). However, no panel was subsequently requested by Costa Rica.

## IX. CONCLUDING OBSERVATIONS

From the above discussion, it is evident that the legal interpretation of the relevant concepts is often based on fine distinctions. This often means that the achievement of those standards is difficult to fulfil. This is evidenced by the fact that not a single antidumping trade remedy case has ever been determined in favour of the WTO member that employed antidumping measures. Needless to say, the standards would be much more onerous for low-income countries, and doubly difficult to achieve. Panel and Appellate Body reports are useful in understanding the dimensions of import-surges, their determination and appropriate economic policy responses by governments. They serve to clarify the concepts and the various

---

<sup>104</sup> Section 15.

<sup>105</sup> In 1994, training was provided to three officers. Briefings were provided by a law firm, exercises were given on the conduct of AD investigations, a five-day attachment with a Washington-based law firm, and a visit to the Unfair Trade Unit of the Department of Trade and Industry of the government of the UK.

<sup>106</sup> WT/TPR, 1998b, Trade Policy Review: Trinidad and Tobago – Report by WTO Secretariat, January 1999. WT/TPR/S/49.

interpretations. Appellate Body reports in particular are legal interpretations of the contents of the agreements, and therefore a useful accompaniment to the agreements themselves. Regarding the definition of import surges the Appellate Body has explained that an increase that would warrant the imposition of safeguard measures has to be recent, sudden, sharp and significant enough as to cause or threaten to cause serious injury. In addition, it has been held that the finding of "increased imports" is a statistical matter, whose other characteristics must nevertheless be subjectively evaluated by a panel. Consequently, panels have used the "adequate and reasoned explanation" by national investigating authorities as the standard to determine if there was indeed a surge or not.

Regarding injury or threat of injury, it has been seen that there are five distinct concepts to be found in the relevant WTO agreements: serious injury; threat of serious injury; material injury; threat of material injury; and material retardation. The Appellate Body has not had occasion to clearly flesh out the dimensions of these definitions. The panel in *US – Lamb* indicated how to a threat of injury analysis should be conducted. On "like" and "competitive" products, this paper has noted that although the terms appear many times in the GATT and other agreements, there is significant controversy as to what exactly are "like" or directly "competitive" products. Whereas "likeness" has somewhat been explored, the meaning of "directly competitive" products has never been addressed to date. The GATT tradition was to assess likeness on a case-by-case basis. This was confirmed by the Appellate Body in the *Japan – Alcoholic Beverages* case. Panels have focused on certain criteria to assess likeness including, product quality, end-uses, tariff classifications and to some extent consumer habits.

The definitions of injury, or threat of injury as a result of like or directly competitive products are all with reference to the affected "domestic industry". The definition of domestic industry has hence been considered in *US – Lamb* where the Appellate Body formulated criteria to determine the affected domestic industry. For a country to justify the imposition of safeguard measures, all of these concepts have to be linked through the concept of causation, meaning, that the country that wishes to use safeguard measures must demonstrate a "cause and effect" relationship between increased imports and injury to a domestic industry.

A model framework legislation may be developed for CARIFORUM countries may be developed, drawing on the provisions of the AD

Agreement. Efforts to develop model legislation are already under way in the Caribbean under the CARICOM Secretariat. It is put forward that the model legislation should incorporate specific provisions on issues of particular interest for small island developing countries where appropriate, for instance on the use of non-governmental experts in investigating teams as found in the Jamaican 1999 Act. In order to ensure favourable conditions for implementing this model legislation, technical and institutional capacities within national authorities should be assessed at field level. Training and capacity building on WTO-consistent implementation of anti-dumping and safeguard rules may be required. In the light of the significant cross-country variations, capacity-related assessments should be carried out taking into account the specific situation of each country. Capacity assessment should also be carried out for entities other than authorities responsible for anti-dumping or safeguard measures. Where the agricultural sector is dominated by small-holders, as is the case with most CARIFORUM countries, the capacity of such producers to file complaints should be assessed, with particular emphasis to agricultural associations.

Investigations involve high costs, mainly owing to the use of specialised personnel for protracted periods but the effectiveness of actions could be enhanced for developing countries if taken at regional level, which would involve imposing duties on market access to the whole region. On the other hand, it may be more difficult to establish material injury to the whole community industry rather than to a national industry. The developing countries which rely on few export markets may remain vulnerable to anti-dumping and safeguard actions taken. Current CARICOM rules do not envisage institutions and procedures at the regional level. However, Protocol VIII of the CARICOM Treaty, not yet in force, envisages anti-dumping investigations by COTED for both intra-CARICOM states and non-member states. These norms are being provisionally applied by most CARICOM countries. An assessment of whether there is a need for clearer rules of procedure for investigations by COTED would also be useful.

## MAIN REFERENCES

**MacLean, R. & Volpi, B.** 2000. *EU trade barrier regulation – tackling unfair foreign trade practices*. Palladian Law Publishing. Bembridge.

**Montag, F. & Fiebig, A.** 1996. The European Union. In K. Steele ed., *Anti-Dumping under the WTO: A Comparative Review*. Kluwer Law International.

**Morcom, C., Roughton, A. & Graham, J.** 1999. *The modern law of trade marks*. Butterworths. London.

**Müller, W Khan, N & Neumann, HA.** 1998. *EC Anti-Dumping Law – a commentary on Regulation 384/96*. John Wiley and Sons. Chichester.

**Palmer, N.** 1996, United States. In K. Steele ed., *Anti-Dumping under the WTO: a comparative review*. Kluwer Law International.



**PART II**  
**COUNTRY CASE STUDIES**





# 1.

## KAZAKHSTAN CASE STUDY\*

### *Contents*

I.	INTRODUCTION	259
1.1	The agricultural sector	259
1.2	Accession to the WTO	262
1.3	Agricultural trade policy	264
II.	LEGAL AND INSTITUTIONAL FRAMEWORK	266
2.1	GATT and related concepts	266
2.1.1	Tariffs, levies and other charges	266
2.1.2	Preferential trade arrangements	268
2.1.3	Quantitative restrictions	270
2.1.4	Import and export procedures	272
2.1.5	Customs valuation	273
2.1.6	VAT and excise duties	276
2.1.7	General economic policy issues	276
2.2	The AoA	278
2.2.1	Domestic support measures	278
2.2.2	Export subsidies	285
2.2.3	Public corporations in the Kazakhstani agricultural system	287
2.2.4	General observations	294
2.3	The SPS Agreement	295
2.3.1	Food safety and trade in food products	296
2.3.2	Plant health and trade in plant and plant products	301
2.3.3	Animal health and trade in animal and animal products	303
2.4	The TBT Agreement	309
2.5	General observations	313
2.6.	Intellectual Property Rights and Agriculture	316
III.	CONCLUSION	319
	MAIN REFERENCES	321

\* This chapter was prepared by Jan Ceyssens.



## I. INTRODUCTION

The objectives of this chapter are to analyse the implementation of WTO requirements in agricultural trade-related laws, assess the degree of compliance and propose recommendations to bring the national law in line with Kazakhstan's obligations. After providing background information on the role of the agricultural sector in the economy, Kazakhstan's accession to the WTO and providing an overview of the current trade policy, this chapter then provides a closer look at the country's two framework agriculture and trade laws which provide the general structure for state regulation. An examination of the Customs Code and its subsidiary legislation enables an investigation of its compliance with GATT-related concepts such as tariffs, preferential trade arrangements, quantitative restrictions, import and export procedures, customs valuation, VAT, etc. In the following section, agricultural subsidies and market policies are discussed in the context of the Agreement on Agriculture – the degree of state intervention is highlighted in this context, with a special focus on STEs. Thereafter, the primary laws on plant and animal health, food safety and marketing standards relevant to agricultural products are evaluated. The penultimate discussion centres around the technical requirements for food and agricultural products as analysed against the provisions of the TBT Agreement, and finally, Kazakhstan's plant protection laws are scrutinised according to the standards set out in the TRIPS Agreement.

### 1.1 The agricultural sector

Kazakhstan has traditionally been a surplus producer of agricultural goods. It is the ninth largest country in the world in terms of territory, and has approximately 25 million hectares of arable land and 61 million hectares of pastures.<sup>1</sup> Traditionally, nomads used steppe land predominantly for cattle growing, during the 1950s and 1960s large acres of land were used for grain production and supplied large parts of the former Soviet Union.

After independence in 1991, there was a significant reduction in agricultural production as a result of the disruptions to production and trading structures. In 1998, grain production was only 26 percent of 1992 levels,

---

<sup>1</sup> Voronina, S. 2004. *Kazakhstan agribusiness overview* - November 2004. (available at [www.bisnis.doc.gov](http://www.bisnis.doc.gov)) (hereafter Voronina, S. (2004)); Meng, E., Longmire, J. and Moldashev, A. 2000. Kazakhstan's wheat system: priorities, constraints, and future prospects. *Food Policy* 25: 707 (hereafter Meng *et al.* (2000)).

while cattle and sheep herds were only 44 percent and 26 percent respectively, of their 1992 levels.<sup>2</sup> As a result, food security in Kazakhstan was diminished and considerable parts of the population did not have access to adequate nutrition.<sup>3</sup> Since 1998 this trend was reversed and agricultural output increased at an average annual rate of 8 percent, most of which is due to crop production increases averaging 19.5 percent. Currently, agriculture contributes 8–11 percent of Kazakhstan's GDP according to different sources; it employs 17–22 percent of its economically active workforce, and nearly half of the country's households are involved in agriculture in one way or another.<sup>4</sup> After the country's booming mining sector, it is the second most important economic sector. The main products are grain (Kazakhstan is the sixth largest grain producer in the world), milk products and potatoes.<sup>5</sup> Kazakhstan is a net agricultural goods exporter. Main exports in 2002 were in wheat (67.3 percent - Kazakhstan is the eighth largest exporter), cotton lint (12.2 percent) and barley (7 percent). However, there is not much activity with respect to the export of higher-value agricultural products. For sugar, processed foods and oilseeds there is a high import surplus. Following independence, a re-direction of trade flows from the former Soviet Union to Asian and Western countries has occurred. Exports to the Middle East and European countries have increased and the potential to export more to these regions has been identified.<sup>6</sup> For purposes of shipment to these regions, in 2001 a wheat grain terminal on the Caspian Sea was built, and in 2005 another grain terminal in Ventspils/Latvia completed. According to several studies, Kazakhstan's main comparative advantage is its large supply of land, and it is thus able to produce grain at world market prices if it opts for

---

<sup>2</sup> Goletti, F. and Chabot, P. 2000. *Food policy research for improving the reform of agricultural input and output markets in Central Asia*. Food Policy 25: 665.

<sup>3</sup> Babu, S. and Rhoe, V. 2001. Food security in central Asia: economic opportunities, policy constraints, and future challenges. International Food Policy Research Institute, Keynote paper prepared for the *UNCTAD regional workshop on food security and agricultural diversification in Central Asia*. Almaty. (available at [r0.unctad.org](http://r0.unctad.org)); Baydildina *et al.* 2000. Agricultural policy reforms and food security in Kazakhstan and Turkmenistan. *Food Policy* 25: 740; Pandya-Lorch R. and Rosegrant, M.W. 200. Prospects for food demand and supply in Central Asia. *Food Policy* 25: 640.

<sup>4</sup> Voronina (2004a); cf. also *Kazakhstan - agricultural competitiveness project*, World Bank (2005) Project Appraisal Document on a proposed loan, Report No. 31919-KZ. Washington DC (hereafter World Bank (2005)).

<sup>5</sup> FAO. 2002. *Intellectual property rights in plant varieties - international legal regimes and policy options for national governments*. FAO Legislative Study No. 85; International Trade Center. 2002. *Supply and demand survey on food and beverages*, p. 47. Kazakhstan Economic Cooperation Organization. Almaty (hereafter Intracen (2002)).

<sup>6</sup> Intracen (2002).

extensive farming practices.<sup>7</sup> It has the potential of significantly boosting its agricultural production in this sector, but also in other sectors like sunflower seed oil, margarine, uncooked or stuffed pasta, beer, beverages, in which exports are still at a low level.<sup>8</sup> There are significant constraints in exporting activities, namely soaring distribution expenses caused by high transport costs due to the country's size and its remoteness with regard to major markets, difficulties to meet international standards (especially in processed agricultural goods), and the limited access of farmers to information.<sup>9</sup>

**Table 1.1.a**

Major agricultural products (1000 tons)	Major exports in agricultural and processed agricultural goods (percentage share in export value)	Major imports in agricultural and processed agricultural goods (percentage share in import value)	Agricultural goods with export potential (according to Intracen 2002(b))
wheat (12 700) milk products (4 061) meat (297)	wheat (67.3) cotton (12.2) barley (7.0)	sugar (21.6) chocolate products (8.7) food preparations (7.8)	grain sunflower seed oil margarine pasta beverages

Sources: FAO (2004), Intracen (2002(b)), pp. 30–42.

Kazakhstan's agricultural policy entailed a major privatization programme of agricultural land in the 1990s, and as of 1997, almost 97 percent of agricultural production entities are privately owned.<sup>10</sup> As a result, in 2003 about 40 percent of arable land was owned by family farms with an average size of 74 hectares, while 60 percent was in the hands of bigger agricultural enterprises with an average size of 2 649 hectares.<sup>11</sup> After eliminating state

<sup>7</sup> Meng *et al.* (2000), pp. 714 and 715; cf. also World Bank (2005), p. 2.

<sup>8</sup> Intracen (2002b), pp. 30–42.

<sup>9</sup> Meng *et al.* (2000); cf. also World Bank (2005), pp. 18–23.

<sup>10</sup> Suleimenov, M. and Osman, P. 2000. Trends in feed, livestock production, and rangelands during the transition period in three Central Asian countries. *Food Policy* 25: 683 (hereafter Suleimenov and Osman (2000)).

<sup>11</sup> World Bank (2005), p. 4.

intervention almost completely, recent government policies have concentrated on actively rebuilding production and distribution structures in the agricultural sector in order to cope with disruptions caused by economic reforms.<sup>12</sup> The government's strategy focuses on import substitution in the livestock sector, but it also promotes export orientation (e.g. grain and higher value processed goods).

## 1.2 Accession to the WTO

Kazakhstan applied for accession to the WTO in January 1996. It has gone through various steps of the WTO accession procedure, which is largely governed by rules emanating from previous accessions.<sup>13</sup> Article XII of the Agreement establishing the WTO merely disposes that countries may accede on specific terms to be negotiated between WTO members and the applicants. In practice, the procedure consists of multilateral negotiations taking place in a special working party which is open to interested parties, and in bilateral negotiations between the applicant and single WTO members. In the working party, the applicant is required to present a memorandum on its foreign trade regime, on proposed changes to implement WTO commitments, and to answer questions from WTO members. Kazakhstan's Memorandum was presented in September 1996,<sup>14</sup> and responded before the working party to the questions of WTO members in seven sessions so far.<sup>15</sup> Among those questions were some directed at Kazakhstan's import and export procedures, SPS and TBT regimes, as well as its financial support to agriculture. A first draft of the Working Party Report, which summarizes the discussions and contains Kazakhstan's specific commitments, was presented in June 2005.<sup>16</sup> During the course of negotiations, several demands have been made on Kazakhstan to change existing laws or to enact new legislation.<sup>17</sup> By Government Order No. 56 of 12 January 1996, the government adopted a legislative drafting agenda which

<sup>12</sup> Cf. Meng *et al.* (2000), pp. 715 and 716; Suleimenov and Osman (2000), p. 683.

<sup>13</sup> Hoekman, B. and Kostecki, M. 2001. *The political economy of the world trading system – the WTO and beyond*, pp. 65–68 (hereafter Hoekman and Kostecki (2001)). Oxford University Press, second edition; Michalopoulos, C. 1998. *WTO accession for countries in transition*. World Bank Policy Research Working Paper No. 1934, Washington DC.; Langhammer, R. and Luecke, M. 1999. *WTO accession issues*. Kiel Working Paper No. 905. Kiel (hereafter Langhammer and Luecke (1999)).

<sup>14</sup> WTO Document WT/ACC/KAZ/3.

<sup>15</sup> WTO Documents WT/ACC/KAZ/6, WT/ACC/KAZ/11, WT/ACC/KAZ/14, WT/ACC/KAZ/22.

<sup>16</sup> WTO News Item of 8 June 2005.

<sup>17</sup> Cf. WTO Documents WT/ACC/KAZ/3, pp. 26–28; WT/ACC/KAZ/17; WT/ACC/KAZ/34.

provided for the adoption of 25 new laws, the re-drafting of 13 laws and the amendment of seven further laws. In the following years, a substantial number of new laws have been adopted on issues ranging from subsidies, trade safeguards and government procurement, to intellectual property rights and customs, petroleum and natural resources laws. Parallel to working party discussions, from mid-1998 Kazakhstan started negotiating the level of commitments on bound customs tariffs and agricultural support in bilateral negotiations with single WTO members.<sup>18</sup> The main contentious issues concerning agriculture in these negotiations are the level of domestic support, the elimination of export subsidies, and Kazakhstan's wish to bind import tariff rates for a number of sensitive product categories at a level higher than the current applied rate.<sup>19</sup> While market access negotiations are usually conducted only with a few interested WTO members, all members will profit from the resulting commitments due to the Most-Favoured-Nation Principle (GATT, article I). Moreover, market access negotiations with Japan were finalized in June 2005.<sup>20</sup>

The outcome of accession negotiations will be fixed in a protocol of accession, which will include a general commitment by Kazakhstan to abide by WTO rules, a schedule indicating commitments on bound tariffs and agricultural support for single products, and specific commitments on concerns discussed during negotiations. The protocol must be approved by a two-thirds majority of WTO members in the General Council and must be ratified by the applicant. The scope of accession commitments required by incumbent WTO members has increased considerably over the last years.<sup>21</sup> While one could think that an applicant should join under the same terms that current members have accepted, recent applicants like Kyrgyzstan or China were asked to make much more ambitious commitments. For example, they were asked to sign the Agreements on Government Procurement,<sup>22</sup> which as a plurilateral agreement is not part of the WTO's single undertaking and is signed by only about 40 out of 148 current

---

<sup>18</sup> European Union, USA, Japan, Canada, Australia, Poland, Latvia, Switzerland, Bulgaria, Latvia, Georgia, Turkey, Republic of Korea, Brazil, Cuba and Mexico; cf. WTO Document WT/ACC/KAZ/16 of 5 June 1998.

<sup>19</sup> Kasabekova, A.M. 2004. *WTO accession of Kazakhstan: agricultural aspects*, p.2 (available at [www.intracen.org](http://www.intracen.org)) (hereafter Kasabekova (2004)).

<sup>20</sup> Joint Statement on Kazakhstan's Bilateral WTO Accession Negotiations with Japan of 14 June 2005.

<sup>21</sup> Hoekman and Kostecki (2001), pp. 66 and 67.

<sup>22</sup> Report of the Working Party on China's WTO Accession, WTO Document WT/ACC/CHN/49, 1 October 2001, para. 339.



members, to commit themselves to bind all tariffs, eliminate all export subsidies,<sup>23</sup> and to make commitments on issues arguably not covered by existing WTO rules like privatization and private land ownership.<sup>24</sup> Further issues to be determined by negotiators include the duration of the period Kazakhstan is granted to fully implement WTO commitments. Article XIV:2 WTO does not provide for an implementation period. While upon Kyrgyzstan's Accession, no implementation periods were provided for, China did negotiate transitional periods for single commitments.<sup>25</sup> In the case of an overlap of WTO accession commitment and the implementation of new multilateral rules, it will also be an issue for discussion to what extent new members will be bound by the results of multilateral negotiations.

### 1.3 Agricultural trade policy

The framework for Kazakhstan's agricultural trade policy is laid out in two laws - the Law on Trade No. 544 of 19 April 2004 and the recent Development of Agriculture and Rural territories of 12 July 2005 (hereafter the Law on the Regulation of Agriculture). This section will examine whether or not these laws provide a framework for agricultural trade policy that corresponds to WTO requirements.

The Law on Trade establishes the principles and organizational basis for state regulation of trade. Article 3 spells out the objectives of the law, which include Kazakhstan's integration into the world trading system and protection of domestic producers. It also lays out the basic principles for trade, *inter alia*: that the state or any of the public bodies will not interfere with markets or commercial activities, that the state guarantees indiscriminate and equal access to all commercial sectors and, the protection of rights and legitimate interests of all traders. Chapter 4 outlines the basic instruments of government regulation of foreign trade, (i.e. tariffs, non-tariff regulation, quantitative restrictions, tariff quotas, and state trading monopolies). Chapter 6 establishes specific requirements for single commercial activities.

---

<sup>23</sup> Accession Protocol of China, WTO Document WT/L/432, 23 November 2001, para. 10.3.

<sup>24</sup> Lanoszka, A. 2001. The World Trade Organization accession process: negotiating participation in a globalizing economy. *Journal of World Trade* 35 (4); Langhammer and Luecke (1999), p. 7; Hoekman and Kostecki (2001), p. 67.

<sup>25</sup> Accession Protocol of China, WTO Document WT/L/432, 23 November 2001, para. 3(4)(b).

The Law on Trade recognizes the principles of market economy and the objective to facilitate the integration of Kazakhstan into the world economy, which fits well with WTO's objectives. On the face of it, the law keeps in line with the fundamentals of WTO law, particularly non-discrimination. It is rigorously neutral as regards the favours it grants to domestic as opposed to foreign trades. In some parts, the law is explicitly aimed at affording protection to domestic industries and provides for instruments of trade regulation which could be inconsistent with WTO obligations like quantitative import restrictions. This might be explained by the law's nature as a framework law to be implemented by further laws. These laws would spell out conditions and limits of government intervention with regard to single issues more in detail. Yet if the Law on Trade should really function as a comprehensive framework for government regulation of trade, it might be advisable to include more explicit references to WTO rules and to mention the limits of government intervention derived from them in the law itself.

The Law on Regulation of Agriculture establishes the foundations for Kazakhstan's agricultural policy. According to article 3 of the law, state regulation of agriculture aims at developing social and technical infrastructure and favourable living conditions in rural territories, food safety, sustainable economic and social development of agriculture and rural territories, and a competitive agricultural sector. Among the law's principles are conformity to international agreements, transparency, supporting and developing competitive advantages for domestic agriculture, protection from unfair competition, maintaining state support and developing an ideal form of interaction between the subjects of agricultural production. Chapter 3 of the law spells out various measures of agricultural policy including loans, subsidies, market regulation, sanitary and phytosanitary measures, rural development programmes, information and marketing, science and professional training.

The Law on Regulation of Agriculture reflects the new Kazakhstani agricultural policy approach. After a substantial contraction of agricultural production in the 1990s, the government changed its policy and decided that developing the agricultural sector would require a sound regulatory framework, but also a certain amount of state support. The law is drafted in neutral terms and establishes the principle of conformity to international agreements, which would include the WTO. According to its objectives and principles, the law is supportive of agricultural and rural development in Kazakhstan without shielding agricultural producers from international

competition. State action to protect domestic producers is restricted to protection from unfair competition, which can be interpreted to refer to anti-dumping or anti-subsidies measures admissible under the relevant WTO Agreements. The WTO's rules on quantitative regulations, health regulation and agricultural support affect some of the agricultural policy measures spelt out in the law, but none of the measures enumerated by the law *a priori* violate WTO requirements. Again, much will depend on implementation, which will be examined in detail below.

In summary, the Law on Trade and the Law on Regulation of Agriculture do contain some of the principles established by the WTO Agreements, and do not contradict WTO requirements, but they fail to draw implementers' attention on the importance of respecting WTO rules.

## **II. NATIONAL FRAMEWORK: LEGISLATIVE AND INSTITUTIONAL ANALYSIS**

### **2.1 GATT and related concepts**

This section will address several issues concerning Kazakhstan's foreign trade regime which are relevant to agricultural goods. Among the relevant laws are the Law on Trade and the Customs Code of 5 April 2003.

#### **2.1.1 Tariffs, levies and other charges**

Article 16 of the Law on Trade provides for the levying of tariffs in accordance with Kazakhstani laws and international agreements. According to article 12(1)(2) of the Law on Regulation of Agriculture, protection of the domestic markets by customs duties may be used to regulate agricultural markets in order to maintain food security and support domestic commodity producers. Customs duties are levied on the basis of article 292 of the Customs Code. Customs rates are laid down in Government Order No. 1389 of 14 November 1996 on Customs Duties Rates on Imported Goods, as amended by Government Order No. 27 of 27 December 2004. Kazakhstan has a fairly liberal external trade regime. It imposes no export tariffs. Although article 19 of the Law on Trade provides for a power to apply tariff quotas, there are currently no quotas in place.<sup>26</sup> In 1995, import duties were levied on 70–75 percent of the goods imported into Kazakhstan, the overall

---

<sup>26</sup> WTO-Documents WT/ACC/KAZ/3, p. 27.

trade-weighted average import tariff rate dropped from approximately 12 percent in 1995 to 7.9 percent in 2004.<sup>27</sup> Tariffs for single product were brought much further down, for example the trade-weighted average import rate for beverages (Chapter 22 of the HS-Nomenclature) dropped from 185 percent in 1995 to 83 percent in 1996. The average import tariff rate on agricultural products in 2004 was 8 percent, the fourth lowest in the world after Australia, New Zealand and Estonia; revenue from import duties constituted less than 2 percent of total government revenue.<sup>28</sup> Yet the low average import tariffs are due to *inter alia*, the fact that trade with Russia (Kazakhstan's major trade partner) is duty-free. Furthermore, Kazakhstan continues to use customs duties as an instrument to support the development of its domestic agricultural sector. For example, it increased customs duties on poultry imports in February 2003, in order to protect and support domestic producers in the countries' poultry farming sector, in which imports have a significant market share and Kazakhstan pursues a strategy of import substitution.<sup>29</sup>

While the underlying rationale of GATT is that tariff reduction is beneficial to every country, GATT recognizes a members' right to impose customs duties to protect domestic markets, unless they do not exceed the negotiated commitment levels. Therefore, it will depend on the outcome of market access negotiations if current tariffs have to be reduced further, or if Kazakhstan will be able to raise them to higher levels in the future. During accession negotiations in 2001, Kazakhstan offered to reduce more than 80 percent of the tariff nomenclature for agricultural products significantly, and to diminish the number of tariff peaks. This is also in line with the proposal of several countries declaring themselves economies in transition in the current agriculture negotiations who have asked for special flexibility to take account of their specific situation characterized by a high degree of liberalization but large trade deficits.<sup>30</sup> At the same time, it intended to negotiate a number of sensitive product categories such as meat, dairy, sugar, oil at a level higher than the acting tariffs in order to support its strategy of

---

<sup>27</sup> WTO-Document WT/ACC/KAZ/3, p. 3; US Trade Representative (2004), p. 343; Classification of goods for customs purposes is made according to the World Custom Union's Harmonized System HS 96, cf. WTO-Document WT/ACC/KAZ/11, Question 20.

<sup>28</sup> Kasabekova (2004), p. 1.

<sup>29</sup> Chukreyeva, O. 2003. *Poultry duties increased in Kazakhstan*. U.S. Commercial Service Almaty, News Item of 14 February (available at [bisnis.doc.gov](http://bisnis.doc.gov)); cf. also Government Order No. 1548 of 17 October 2000 on the Introduction of Temporary Protective Measures on the Import of Certain Foodstuffs.

<sup>30</sup> UNCTAD (2001), p. 198.

import-substitution for reasons of food security.<sup>31</sup> In May 2004, a Kazakhstani official noted significant progress in bilateral negotiations on agricultural tariffs. Furthermore, a group of transition countries proposed to include special flexibility on tariffs for transition countries in order to recognise their particular situation and the liberalization efforts made by these countries.<sup>32</sup>

### 2.1.2 Preferential trade arrangements

Kazakhstan maintains several preferential trade agreements. It is party to a Customs Union with Russia, Belarus, Kyrgyzstan and Tajikistan covering 100 percent of trade, on which more recently the Agreement on a Eurasian Economic Community (EAEC) signed in October 2000 has been based. However, the customs union is implemented only partially. Duties within the Union were abolished completely on trade with Russia, but Kazakhstan introduced high customs duties on trade with Kyrgyzstan, because it feared that trade was deflected to Kyrgyzstan due to their significant tariff reductions upon WTO accession and weak border controls between the two countries. A common customs tariff for trade with third countries, which would be necessary to abolish controls on the origin of preferential goods and to create a real Customs Union, exists only to a small extent. According to Decision No. 46 of the Counsel of Heads of Governments of 26 February 1999, existing conformity in applied tariff rates between Belarus, Kazakhstan and Russia was approved as a basic list of a Common Customs Tariff. This list includes approximately 60 percent of tariff items.<sup>33</sup> Customs harmonization with Tajikistan and Kyrgyzstan is even less advanced. For example, the level of coincidence of the Customs Tariff of the Kyrgyz Republic with the Customs Tariff of the Russian Federation in 2003 amounts to 2 519 commodity items or 22.5 percent.<sup>34</sup> A further Agreement on a Common Economic Area between Russia, Belarus, Kazakhstan and Ukraine of 19 September 2003 entered into force on 20 May 2004 has not

---

<sup>31</sup> Kasabekova (2004), p. 2. (cf. WTO Document G/AG/NG/W/57, 14 November 2000).

<sup>32</sup> Ibid. cf. WTO Document. G/AG/NG/W/56, 14 November 2000.

<sup>33</sup> According to the CIS Goods Nomenclature of Foreign Economic Activity based on the Harmonized System and the Combined Tariff-Statistical Nomenclature of the European Union.

<sup>34</sup> Cf. WTO-Documents WT/REG71/8, p. 3. Interfax-Kazakhstan news agency, *Kazakhstan set to unify customs tariffs with Russia*. (press release available at [www.gateway2russia.com](http://www.gateway2russia.com) of 18 June 2004).

yet produced any operative results.<sup>35</sup> Kazakhstan also maintains bilateral free trade agreements with all CIS-countries except Turkmenistan.<sup>36</sup>

Customs unions and free trade agreements are in tension with the Most-Favoured-Nation principle enshrined in GATT article I, but GATT article XXIV:4-8 recognizes that such agreements may be conducive to free trade and therefore conditionally permits them.<sup>37</sup> Agreements must cover substantially all trade between the countries concerned, and barriers for trade with third countries must not be on the whole more restrictive than before.<sup>38</sup> With regard to the Customs Union between the EAEC-Countries, it is questionable whether it respects the "substantially all trade"- criterion. GATT does not require 100 percent of trade to be covered by such an agreement,<sup>39</sup> but it would appear that a Common Customs Tariff limited to 60 percent of commodity items is far from constituting substantially all trade according to any possible interpretation. It follows therefore that the agreement's coverage must be extended considerably to meet GATT requirements. The only way to circumvent these requirements is to declare the Union an interim Agreement under GATT, article XXIV:5(c).<sup>40</sup> But this would require the provision of a plan and a schedule for the creation of the Customs Union, neither of which appear to exist up to now. Since the WTO Appellate Body's ruling in the *Turkey-Textiles* case, it is clear that GATT, article XXIV can be enforced by way of dispute settlement procedures, and that it is not subject to agreement in the relevant WTO committee.<sup>41</sup> After WTO accession, Kazakhstan will thus have to bring the EAEC Customs Union in line with WTO requirements.

Another issue relevant to preferential trade agreements are Rules of Origin. The Customs Code's section on rules of origin (section 4, articles 33–52) appears to be in line with the requirements in article 2 of the WTO Agreement

---

<sup>35</sup> *ECO members to set up Common Economic Area by 2015*. Kazinform press release of 14 September 2004 (available at [www.inform.kz](http://www.inform.kz)).

<sup>36</sup> Cf. WTO Document WT/ACC/KAZ/3, p. 58.

<sup>37</sup> Cf. also the GATT Understanding on the Interpretation of article XXIV.

<sup>38</sup> Cf. also Report of the WTO Appellate Body on *Turkey – Textiles*, WT/DS34/AB/R adopted on 19 November 1999 (hereafter *Turkey-Textiles*).

<sup>39</sup> *Ibid.*, para. 48.

<sup>40</sup> Cf. Kyrgyzstan's notification of the Customs Union to the WTO, WTO-Documents WT/REG71/6, p. 2.

<sup>41</sup> Cf. Appellate Body on *Turkey – Textiles*, para. 60.

on Rules of Origin, which provides only for a few basic obligations. Former concerns were apparently accommodated by the new Customs Code.<sup>42</sup>

### 2.1.3 Quantitative restrictions

Article 18 of the Law on Trade provides for the general possibility to prohibit or limit imports and exports of goods. Article 21 of the Law on Trade states that state trading monopolies administered by way of licenses may be introduced for certain goods.

In the field of agricultural and food products, Kazakhstan had in place a system of minimum export prices for certain agricultural products until the mid 1990s. This arrangement was first replaced by a system of export contract registration at the Commodity Exchange and finally completely eliminated by Government Resolution No. 994 of 19 July 1997.<sup>43</sup> However, in recent years, the government considered introducing temporary restrictions on grain exports in order to cope with internal food shortages created by a poor grain harvest.<sup>44</sup> For example, it was claimed that it created an artificial shortage of railway transport capacities in early 2004 in order to ensure that grain would be consumed domestically.<sup>45</sup> Such restrictions would violate GATT article XI, unless they take the form of export duties.

Kazakhstan furthermore upholds a system of import licenses under Government Resolution No. 1031 of 27 June 1997 for wine, ethyl spirit and alcoholic products. Refusal to issue a license, termination of validity, revocation and suspension are regulated by Law No. 2002 on Licensing of 17 April 1995. In parallel, Kazakhstan also runs a system of licensing domestic production and distribution of alcohol under the Law on the State Regulation of Production and Turnover of Ethyl Spirit and Alcoholic Products of 16 July 1999 and Government Regulation No. 1258 of 27 August 1999. This system is intended to increase the quality and competitiveness of domestic products, to collect taxes to a maximum extent and to protect domestic producers of goods. While article 19(3) of the Law on Licensing prohibits denying a license on the grounds of market

---

<sup>42</sup> Cf. WTO-Documents WT/ACC/KAZ/6/Add.2, Question 63

<sup>43</sup> WTO Documents WT/ACC/KAZ/3, p. 171; WT/ACC/KAZ/22, Question 35.

<sup>44</sup> Dow Jones Reuters Business Interactive LLC News release fac\_51 of 20 January 2004.

<sup>45</sup> US Department of Agriculture. 2004. *Kazakhstan - Republic of Grain and Feed*, pp. 2 and 3. Global Agriculture Information Network Report Number KZ 4003, Washington DC (hereafter US Department of Agriculture (2004(a))).

saturation, in practice imports were restricted to 20 percent of annual consumption at least until 1998, and import licenses were distributed giving preference to importers of high quality products investing and creating jobs in Kazakhstan.<sup>46</sup>

GATT article XI:1 prohibits quantitative restrictions on imports. To the extent Kazakhstan limits imports of alcohol to 20 percent of consumption, this is a quantitative import restriction which violates GATT article XI:1. The link to a domestic licensing system could suggest that the entire system comes under article III:4 on non-discrimination rather than under article XI. According to a note ad article III, any law, regulation or requirement which applies to an imported product and to the like domestic product and is enforced in the case of the imported product at the time or point of importation, is subject to the provisions of article III:4. But the licensing of imports and domestic production of alcohol are governed by different provisions and conditions. Therefore, the current system is actually governed by article XI and not by article III:4.<sup>47</sup> But even any import licensing-system as such, which does not provide for an automatic issuance of licenses, restricts trade and can constitute a violation of GATT article XI:1 unless it finds justification under other GATT provisions.<sup>48</sup> It is difficult to see how Kazakhstan's import licensing system on alcohol could be justified under GATT article XI or GATT article XX. According to GATT article XI:2(c)(i), a member may impose import restrictions on agricultural goods in order to enforce a government measure restricting the quantities of marketed products; this is not applicable here. This exception was drafted in order to allow for intervention in case of price diminution due to product surpluses of large harvests. It does not allow however, general import restrictions on agricultural products,<sup>49</sup> as according to the second sentence of subparagraph 2, that restrictions shall not reduce the total of imports relative to the total of domestic production.<sup>50</sup> GATT article XX(b) or (d) applies to measures necessary to protect human health or ensure compliance with laws

---

<sup>46</sup> WTO-Document WT/ACC/KAZ/14, Questions 10, 11 and 46.

<sup>47</sup> Cf. also Panel Report on *EC – Asbestos*, at paras. 8.91 and 8.92.

<sup>48</sup> Cf. Report of the WTO Panel on *India – Quantitative Restrictions*, WT/DS90/R of 6 April 1999, paras. 5.129 and 5.130.

<sup>49</sup> Cf. Report of the GATT Panel on *Japan – Agricultural Products I*/6253–35S/163 adopted on 2 February 1988, para. 3.1.5.

<sup>50</sup> Furthermore according to the interpretative note and article XI restrictions may only be imposed on products in an early stage of processing and still perishable, which is certainly not the case for alcohol, cf. Report of the GATT Panel on *Canada – Import Restrictions on Ice Cream and Yogurt*, paras. 65–72.



not inconsistent with GATT. None of the laws on the Kazakhstani alcohol licensing scheme contain any indication that the scheme is intended to limit alcohol consumption or to clamp down on the marketing of illegal alcohol. Furthermore, it is difficult to see why it would be necessary to discriminate against imported products. This suggests that the licensing system constitutes a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, and is therefore not eligible for justification according to article XX. It must therefore be concluded that the licensing requirement violates GATT article XI:1 and is not eligible for justification.

In addition to GATT article XI, the WTO Agreement on Import Licensing (AIL) establishes specific requirements for import licensing procedures. According to AIL article 2:1, non-automatic licensing procedures such as those of Kazakhstan must not have further restrictive or distortive trade effects on imports beyond those contained in the license. For the reasons mentioned above, Kazakhstan's import licensing system would probably not meet that requirement. In addition, the relevant laws do not provide for any information about the basis for granting and allocating licences, or about the overall amount of licenses granted, which is required under AIL article 3. Conversely, Government Regulation No. 1258 establishes both the processing period of applications (one month - article 17) and the period during which imports must be made (one year - article 12(3)) as required by AIL article 5(5)(g) and (f).

While the import licensing system is still in place today, Kazakhstan intended to adapt it to WTO requirements upon accession.<sup>51</sup> WTO-consistent alternatives could include an automatic licensing system without quantitative limitations, or a system of licensing and quality control which applies both to domestic and imported goods and does not discriminate directly or indirectly against foreign products.

#### 2.1.4 Import and export procedures

According to GATT article VIII:1(c) WTO members recognize the need to minimize the incidence and complexity of import and export formalities and to decrease and simplify import and export documentation requirements.

---

<sup>51</sup> Intracen (2002), pp. 17 and 18; WTO Document WT/ACC/KAZ/14, Questions 10, 11 and 46.

While this is not a binding obligation,<sup>52</sup> Kazakhstan did consider abolishing overly restrictive formalities upon WTO accession, and should continue to do so, in order to profit from it by increasing efficiency of trade-related legal rules. Import and export formalities are laid down in the Customs Code. According to article 382, importers and exporters must provide the following documents: customs cargo declaration, invoices, supply of goods contract, transition passport, shipping documents, customs valuation declaration as well as import licenses, certificate of origin, certificate of conformity, and statement of sanitary inspection if required.<sup>53</sup> In particular the requirement of a transaction passport under Instruction No. 1669 of 9 November 2001 on Organisation of Export and Import Currency Control in the Republic of Kazakhstan, which consists of documentation verifying the pricing of import-export transactions for currency control purposes (diminution of capital outflows, combating money laundering), is seen by traders as an unnecessary barrier to trade.<sup>54</sup> This concerns particularly the maximum financing term for imports of 120 days, which limits long-term financing.<sup>55</sup> Furthermore, the requirement to provide originals of all requested documents falls short of modern customs practice. Finally, article 318 of the Customs Code on voluntary disclosure, which permits companies to be self-regulating and make disclosure to Customs when errors or omissions are discovered without incurring a penalty, is criticized for being rather weak.<sup>56</sup>

#### 2.1.5 Customs valuation

GATT article VII and the WTO Agreement on Customs Valuation (ACV) set out detailed methods to be respected when calculating the value of traded goods for purposes of determining duties and charges related to trade transactions, namely fees for customs services, payments for import or export licenses, and charges for the certificate of origin customs duties. These rules usually require implementation by domestic laws or administrative circulars. While Kazakhstani customs procedures were

---

<sup>52</sup> WTO Document G/C/W/391, p. 4; In the current round of trade negotiations, more explicit and binding rules are discussed in the frame of trade facilitation, cf. overview of negotiation proposals by the WTO Secretariat in WTO Document G/C/W/434 of 15 November 2002.

<sup>53</sup> Cf. section 7.

<sup>54</sup> Cf. WTO Document WT/ACC/KAZ/22, Question 27.

<sup>55</sup> US Trade Representative (2004), p. 344.

<sup>56</sup> Hekala, W. and Creskoff, S. 2005. *Kazakhstan's new Customs Code heralds a new era of openness in lawmaking and modern customs administration*. (available at [www.bisnis.doc.gov](http://www.bisnis.doc.gov)) (hereafter Hekala and Creskoff (2005)).

broadly in line with these provisions even before accession negotiations, there were a number of concerns.<sup>57</sup> The new Customs Code was supposed to adapt procedures to WTO requirements.<sup>58</sup> Chapter 39 (articles 305–321) establishes that valuation should possibly be based on the actual value of imported goods. It incorporates the ACV's provisions about when the actual-value-method is insufficient, and provides for alternative valuation on the basis of the value of identical or similar goods, and of deduction or composition of production costs.

Customs authorities must provide a written justification for the applied customs valuation (article 320), which is subject to judicial review (article 493). If valuation based on the actual value of imported goods is applicable (and customs authorities find that the importer has provided inadequate documentation to establish the actual value of imported goods), article 321 allows them to establish a conditional value on the basis of statistical data that is contained in the customs cargo declaration that is formulated on the basis of reliable, quantifiable and documentarily confirmed information. This value will become definitive if the importer does not provide the required information within 60 days. Provisions on conditional valuation do not seem to be in line with the ACV. While ACM article 13 does allow for a conditional release if the importer provides a sufficient guarantee, this must not affect the methods of customs value determination to be used under the ACM. Rather, if determination of the actual value fails due to a lack of documentation, the fall-back valuation method provided for in the Agreement have to be applied.<sup>59</sup> A further inconsistency arises from article 309.5.2 of the Customs Code, according to which transaction-value-based calculation shall not be used for determining the customs value of goods delivered by a foreign legal person to their branch offices (representative offices) located on Kazakhstan territory, which do not have the features of purchase and sale. This seems to be in violation of the obligation to provide national treatment in GATT article III. Finally, there have been allegations that the private contractor which administers customs audits determines the customs value on a database of world prices,

---

<sup>57</sup> Cf. WTO Document WT/ACC/KAZ/6/Add.2, Question 58.

<sup>58</sup> Hekala and Creskoff (2005).

<sup>59</sup> *WTO Decision Regarding Cases where Customs Administrations have Reasons to Doubt the Truth or Accuracy of the Declared Value.*

and that approximately 20 percent of trade flows is valued higher than WTO rules would allow.<sup>60</sup>

It can be concluded that customs valuation under the new Customs Code is broadly in line with WTO requirements, but that the sections on conditional release of goods and on preferential calculation for importers residing in Kazakhstan violate the ACV.

### Customs fees

According to article 293(2) of the Customs Code, customs fees are calculated on the basis of the costs of the services rendered by customs administrations. Current customs fees are €50 per sheet of customs declaration and €20 for each additional sheet.<sup>61</sup> This is in line with GATT article VIII, according to which customs fees must be calculated on the basis of the costs of the services rendered by customs administrations and shall not represent an indirect protection to domestic products or a taxation of imports or exports for fiscal purposes. Former customs fees were calculated on the basis of the value of goods (0.2 percent of customs value), which has been subject to heavy criticism in the WTO Working Party.<sup>62</sup> An additional issue of compliance with GATT article VIII has arisen with regard to fees for temporary storage.

Temporary storage obligations (articles 87–111 of the Customs Code) were introduced only in the late 1990s to ensure that goods are not marketed until customs formalities have been finished. Warehouses are run by customs authorities or private licensees. Storage fees for public warehouses are collected in accordance with article 296 of the Customs Code. On average, they are reported to amount to about 0.2 percent of customs value and US\$15 for every additional day of storage.<sup>63</sup> At least storage in public warehouses is a service rendered by Customs administrations coming under GATT article VIII,<sup>64</sup> and therefore fees must be based on actual costs. In order to avoid allegations that these obligations are not respected, it could be

---

<sup>60</sup> US Trade Representative. 2005. *National trade estimate report on foreign trade barriers*, p. 434 (available at [www.ustr.gov](http://www.ustr.gov)), Washington DC (hereafter US Trade Representative (2005)).

<sup>61</sup> Voronina, S. 2004. *Customs clearance in Kazakhstan*. Astana. (available at [www.bisnis.doc.gov](http://www.bisnis.doc.gov)) (hereafter Voronina (2004(b))).

<sup>62</sup> WTO-Documents WT/ACC/KAZ/6/Add.2, Question 39; WT/ACC/KAZ/11, Question 22; WT/ACC/KAZ/14, Questions 10 and 16.

<sup>63</sup> Voronina (2004(b)).

<sup>64</sup> Cf. e.g. Panel Report, *US – Customs User Fee*, BISD 35S/245, paras. 69 ssq.

advisable to explicitly require cost-based calculation of storage fees in the Customs Code.<sup>65</sup>

#### 2.1.6 VAT and excise duties

The imposition of Value Added Tax (VAT) and excise duties is governed by the Tax Code (Code on Taxes and Other Mandatory Payments to the Budget of 12 June 2001, N 209-II). The current VAT rate is 15 percent; taxes are in principle charged at the point of destination. However, VAT and excise taxes on products from former CIS countries were charged on the departure points for many years. This was heavily criticized as a violation of the Most-Favoured Nation principle (GATT article I), and from 1 January 2005, Kazakhstan has been charging taxes based on the destination principle. For CIS countries, this will be implemented after ratification of relevant agreements.<sup>66</sup>

Excise taxes are levied on the following agricultural products: alcohol, tobacco, and salmon according to Government Order No. 137 of 28 January 2000. An issue of concern is excise duty rates distinguishing between imported and domestic products. Kazakhstan pledged to adjust excise duty rates for domestic and imported products until WTO accession.<sup>67</sup>

#### 2.1.7 General economic policy issues

Laws relevant to the general policy framework for agricultural activities are article 22 of the Law on Trade and Kazakhstan's Laws on Antidumping,<sup>68</sup> Safeguards,<sup>69</sup> and on Subsidies and Countervailing Measures,<sup>70</sup> which were crafted to implement the relevant WTO agreements.

---

<sup>65</sup> WTO Document WT/ACC/KAZ/22, Question 21.

<sup>66</sup> Kazakh-Russian Agreement on the principles of collecting indirect taxes in mutual trade, signed on 9 October 2000, into force on 1 June 2001 and a further Agreement of 15 September 2004; Kazakh-Kyrgyz agreements On the principles of collecting VAT in the export of goods (services) of 18 February 1997 (came into force from 12 December 1998), and On the principles of collecting excise tax in the export and import of goods of 11 June 1997 (came into force, in accordance with a decree of the Kazakh Government, on 5 February 2001).

<sup>67</sup> WTO-Documents WT/ACC/KAZ/6/Add.1, Question 45; WT/ACC/KAZ/14, pp. 14 and 15.

<sup>68</sup> Law of 11 July 1999 on Antidumping Measures; cf general overview at Intracen (2002).

<sup>69</sup> Law of 28 December 1998 on Measures of Protection of a Home Market at Import of the Goods.

<sup>70</sup> Law of 16 July 1999 on Subsidies and Countervailing Measures.

A major economic policy instrument in former socialist countries was government price control. Article 9 of the Law on Trade states that prices are to be determined by market forces, but it still reserves the right to adopt price controls "in accordance with the law". While price control is not *per se* inconsistent with WTO agreements, depending on its implementation, it may have the effect of affording protection to domestic products. On past accessions, incumbent members required applicants to limit price control to a list of sectors, and to ensure its consistency with WTO commitments.<sup>71</sup> It can be expected that Kazakhstan's accession protocol will contain similar obligations. Currently, price controls are provided for only with respect to certain services and utilities in the Law on Natural Monopolies of 9 July 1998, and with respect to undertakings with a dominant position in the market by the Law on Development of Competition and Restriction of Monopolistic Activity, but not relating to agricultural goods.<sup>72</sup> However, in practice, Kazakhstan also appears to pursue indirect price control strategies in the grain sector.<sup>73</sup>

Another salient issue in Kazakhstan's agricultural reforms is land ownership. The Presidential Decree No. 2717 on Land of 26 December 1995 permitted private land ownership, but until 2003 private persons were not allowed to own agricultural land except household plots. The new Land Code (Law No.442-II ZRK of 2003 of 20 June 2003), which was an object of fierce discussion and court litigation,<sup>74</sup> abolishes restrictions on private landownership for Kazakhs, and establishes that foreign citizens may lease agricultural lands for up to ten years, but may not own land and rights of permanent land use. Legal entities incorporated under the laws of Kazakhstan may own agricultural and forestry land, even if they are owned by foreign persons or entities. With regard to WTO accession, land ownership by foreign entities has been an issue in the Kazakhstan Accession Working Party,<sup>75</sup> but current WTO law does not directly address land ownership.<sup>76</sup> While limitations of foreign as opposed to citizen's land ownership appear to contradict the principle of National Treatment, the

---

<sup>71</sup> WTO Report on the Accession of China, WTO Document WT/ACC/CHN/49 of 1 October 2001, pp. 10 and 11.

<sup>72</sup> WTO Document WT/ACC/KAZ/22, p. 3.

<sup>73</sup> Cf. in detail section 8.8 below.

<sup>74</sup> Cf. e.g. Resolution No. 8 of 10 June 2003 of the Constitutional Council of the Republic of Kazakhstan concerning the Conformity of the Land Code of the Republic of Kazakhstan with the Constitution of the Republic of Kazakhstan (available at [www.constcouncil.kz](http://www.constcouncil.kz)) for a critical appraisal cf. Economist Intelligence Unit. 2005. *Kazakhstan – country profile*, p. 27. London.

<sup>75</sup> WTO-Documents WT/ACC/KAZ/6/Add.1, Questions 10, 13–17.

<sup>76</sup> Hoekman and Koestecki (2001), p. 67.

WTO's scope is limited to trade in goods, intellectual property and trade in services, although it does not extend its application to investment. This is different only if a country makes commitments under GATS in sectors for which land ownership is relevant. Since agriculture is essentially goods production, it appears difficult to imagine a case in which limitations of agricultural land ownership actually restrict services provision. It follows that limitations to foreign-owned agricultural land are not inconsistent with WTO commitments.

## **2.2 The Agreement on Agriculture**

Kazakhstan has considerably increased state intervention in the agricultural sector over the last years. After a substantial reduction of agricultural production in the 1990s, the government changed its policy and decided that developing the agricultural sector would require a sound regulatory framework, but also a certain amount of state support. The WTO Agreements do not rule out proactive agricultural policies, but they establish certain limits to ensure that they do not distort international trade. In this section, Kazakhstan's agricultural policies on subsidies and public corporations engaged in agricultural trade will be examined for their compatibility with GATT and the WTO Agreement on Agriculture (see chapter 3 for a discussion on the drafting history and current developments related to this Agreement).

### **2.2.1 Domestic support measures**

Article 11 of the Law on State Regulation of Agriculture stipulates the basic conditions and main directions of agricultural subsidies. Subsidies shall provide economic incentives to develop agricultural production by producers which are economically efficient and improve the quality and competitiveness of their produce. Subsidies shall be used for the following: to provide loans at reduced interest rates, to preserve and develop a genofund of seeds, farm plants, and animal species, to increase livestock sector efficiency and produce quality, to reduce the cost of fuels used for harvesting purposes, to develop an agricultural markets control system, to develop a livestock breeding sector, to extend permanent crop cultures like grapes, as well as for other purposes provided for by law.

The National Program for Agricultural Production 2003–2005 spells out the main agricultural policy measures applied over the last years.<sup>77</sup> It provides for a rise in the agricultural budget from 30 billion Tenge (ca. US\$ 220 million) in 2002 to 55 billion Tenge (US\$ 407 million) in 2005. In addition, various forms of indirect support (tax breaks, delays of duties, warranties of support) accounted for a further 44 billion Tenge in 2002, but should decline to 44 billion Tenge in 2005. A further increase is provided for by the consecutive Plan of Measures to Realize the Concept of Steady Agricultural Development for 2006–2010.<sup>78</sup> In a bid to alleviate the gap between rural and urban live standards and to combat rural-urban migration, Kazakhstan also adopted the Rural Development Program 2004–2010, which provides for public expenditures of around 50 billion Tenge in 2003.<sup>79</sup> Compared to agricultural subsidies in developed countries, these numbers are still low. Even in 2002, direct state support per agricultural unit in Kazakhstan was US\$ 1 200, while in the USA it amounted to US\$ 45,000. The level of state support per hectare of tillage rose from US\$ 7.5 to US\$ 12.6 from 2002 to 2004, while it was US\$ 115 in the USA and US\$ 855 in the EU.<sup>80</sup> Nevertheless, on accession to the WTO, Kazakhstan's agricultural policies will have to abide by the relevant WTO Agreements, in particular the Agreement on Agriculture (AoA).

Under the AoA, subsidies are divided into several groups;<sup>81</sup> export subsidies have to be cut to the levels negotiated by Kazakhstan upon accession under article 9. In the past, accession countries were asked to cut export subsidies to zero.<sup>82</sup> Domestic support measures have to be cut to the levels negotiated by Kazakhstan upon accession, unless they are exempted from reduction commitments (article 6(1)). SCM article 29, which allows for special

---

<sup>77</sup> Presidential Decree of 5 June 2002 No. 889 on the State Programme on Agricultural Production of the Republic of Kazakhstan for 2003–2005 and Government Order No. 864 of 2 August 2002 About the Plan of Measures for Realization of the State Programme on Agricultural Production of Republic Kazakhstan for 2003–2005.

<sup>78</sup> Government Order of 30 June 2005 No. 654 on a Plan of Measures to Realize the Concept of Steady agricultural Development for 2006–2010.

<sup>79</sup> Presidential Decree No. 1149 of 10 July 2003 on the State Program of Development of Rural Territories of Republic Kazakhstan in 2004–2010 and Governmental Order No. 838 of 20 August 2003 About the Plan of Measures for 2004–2006 on Realization of the State Program of Development of Rural Territories of Republic Kazakhstan for 2004–2010.

<sup>80</sup> National Agricultural Programme 2003–05, No. 5.1.

<sup>81</sup> Desta, M.G. 2002. *The law of international trade in agricultural products – from GATT 1947 to the WTO Agreement on Agriculture*, pp. 371–425. The Netherlands. Kluwer Law International (hereafter Desta (2002)).

<sup>82</sup> Langhammer and Luecke (1999), p. 15.



programmes for economies in transition has expired in 2001, and a similar option was not granted at recent accessions, for example to China. Exemptions apply to: support measures with no or minimal trade-distortive effects (Annex I, the so-called green-box); investment subsidies generally available to agriculture and input subsidies to low-income or resource-poor producers in developing country members (article 6(2)); direct payments under production-limiting programmes (article 6(5)); and finally, a member may uphold support not exceeding 5 percent (for developing countries 10 percent) of agricultural production value (article 6(4)).

Any need to adjust agricultural support measures and the laws they are based upon will thus heavily depend on the reduction commitments negotiated upon accession. Kazakhstan intended to negotiate a level of domestic support which would be above the existing level of support, leaving some space for future action in case of changes in the market. Another objective was to be able to maintain subsidies for the transport of agricultural goods, as Kazakhstan is remote from major agricultural markets and is not well-connected to waterway transport routes. A high-ranking official of the Kazakhstan Ministry of Agriculture recently indicated that negotiations on domestic support levels were heading towards agreement, while export subsidies were still under negotiation.<sup>83</sup> However, it is at least as important to assess which of the current support measures can be maintained and extended without any consideration to support limits, as they meet criteria for exemption; and which measures on the other hand are to be classified as export subsidies and will therefore have to be eliminated in the near or distant future. The most relevant measures of agricultural support used in Kazakhstan will be analysed next.

(a) Input subsidies, tax breaks

The National Programme 2003–2005 and the Rural Development Programme 2004–2010 provide for various forms of input subsidies on mineral fertilizer, seeds, herbicides, and water worth more than 8.5 billion Tenge per year.<sup>84</sup> Furthermore, Kazakhstan imposes a temporary fuel export ban every year during harvesting periods in order to ensure fuel provision at

---

<sup>83</sup> cf. Kasabekova (2004).

<sup>84</sup> National Agricultural Programme 2003–05, No. 6, Programme 045; Rural development programme - Plan of Measures, No. 2.1.1; Government Order of 24 February 2003 No. 191 on Rules of Subsidizing Agricultural Commodity Producers on Purchase of Mineral Fertilizers, Protravitelej Seeds and Herbicides for 2003.

low prices to farmers.<sup>85</sup> Input subsidies constitute domestic support under the AoA and clearly do not qualify for any exemption. They also do not come under the green box, nor could they be exempted under AoA article 6(2), as they are not limited to low-income or resource-poor farmers.

Agricultural support under the AoA does not only include government payments, but also other forms of government action which have the effect of providing financial support to agricultural products. Tax breaks in Kazakhstan available to farmers include VAT, transport, property, income, social, ground taxes and amounted to more than 11 billion Tenge in 2002. More than 40 billion Tenge are earmarked every year for delayed tax payments by farmers.<sup>86</sup> The tax breaks and delays apply specifically to farmers to diminish their costs of production. It follows that they must be characterised as domestic support subject to reduction; no exemption is available under the WTO framework for these tax schemes.

(b) Machinery modernization programmes

Article 10 of the Law on State Regulation of Agriculture provides for a state loan programme to agricultural producers to finance investments in infrastructure and agricultural machinery (article 10(2)(1)–(2)). Article 11(2)(1) declares that the state may subsidise investment loan interest rates. This must be seen in context of Kazakhstan's bid to modernize agricultural production and adapt it to international competition. Through the publicly held company Kazagrofinance and private banks, agricultural producers are offered leasing of agricultural machinery at fixed and favourable terms.<sup>87</sup> Machinery is purchased through the state budget, which provided for 4 billion Tenge in 2002, increasing to 7 billion Tenge in 2005 and to rise further according to the new 2006–2010 programme. Kazagrofinance purchases the machinery in line with public procurement rules (Law of 16 May 2002 No 321-II on State Purchases), and it offers long-term credits for the purchase of agricultural machinery.

---

<sup>85</sup> US Trade Representative. 2005. *National trade estimate report on foreign trade barriers*. Washington DC, pp. 3 and 5. (available at [www.ustr.gov](http://www.ustr.gov))

<sup>86</sup> National Agricultural Programme 2003–05, No. 5.2.

<sup>87</sup> Cf. National Agricultural Programme 2003–05, No. 5.2 and No. 6 Programmes No. 084 and 085; Government Order No. 259 of 18 March 2003 on Rules of Crediting of Maintenance with Agricultural Machinery on a Leasing Basis for 2003 and Compensation of the Rate of Compensation (interest) (available at [www.kazagrofinance.kz](http://www.kazagrofinance.kz)).

These programmes constitute domestic support subject to reduction under AoA article 6(1), if they qualify as a subsidy (cf. AoA Annex 3 No. 1). According to SCM article 1(1), a subsidy is a "financial contribution" conferring a "benefit" on the recipient, as compared with what would have been otherwise available to the recipient in the marketplace. The term "subsidy" in the AoA has to be interpreted in line with the definition of a subsidy in SCM article 1.1<sup>88</sup> Although farmers pay credit or leasing rates to Kazagrofinance, these rates are not determined according to market conditions, but by law. Furthermore, unlike commercial banks, Kazagrofinance does not require securities. For these reasons, the programmes constitute domestic support under the AoA. Yet if Kazakhstan will be allowed to use AoA article 6(2) – and this is an item for negotiation<sup>89</sup> – machinery modernization programmes are exempt from reduction commitments under AoA article 6(2), as they constitute investment subsidies generally available to agriculture in developing countries. In the current negotiations on agricultural trade liberalisation, it was proposed by some economies in transition to exempt investment subsidies and input subsidies generally available to agriculture, interest subsidies to reduce the costs of financing as well as grants to cover debt repayment in transition economies, in order to recognize the special problems faced by them.<sup>90</sup> If, on the other hand, Kazakhstan follows the example of Kyrgyzstan and renounces its developing country status, it will be much more difficult to exempt the programmes under AoA Annex I No. 11 as structural adjustment assistance provided through investment aid. This would require that farmers are eligible for support by reference to clearly-defined criteria in programmes to assist the financial or physical restructuring of a producer's operations in response to objectively demonstrated structural disadvantages. Support shall not be related to future agricultural production or to prices and shall be limited to the expenditure and the time of the realized investment. Kazakhstan's machinery purchase programmes are a response to largely outdated agricultural machinery, which constitutes a structural disadvantage with regard to foreign agricultural producers. Yet the wording of AoA Annex 2 No. 11 suggests that it covers only programmes limited to farmers that are disadvantaged by local

---

<sup>88</sup> Cf. Report of the WTO Appellate Body on *Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products*, WT/DS103/AB/R, WT/DS113/AB/R adopted on 27 October 1999, para. 87.

<sup>89</sup> China committed itself, not to make use of the possibility to exclude payments under AoA article 6.2 from reduction commitments, cf. WT/ACC/CHN/49 of 2 October 2001, para. 235.

<sup>90</sup> Cf. WTO Document G/AG/NG/W/57 of 14 November 2000.

standards. Without such limitations, the privilege conferred to developing countries by article 6(2) would be useless, as any investment programme designed to reduce competitive disadvantages would be exempt anyway under AoA Annex 2 No. 11. As the Kazakhstani programmes are available to all farmers, they cannot at present come under this provision.

It can be concluded that the machinery modernization programmes are subject to reduction commitments, unless Kazakhstan assumes developing-country-status. A way to exempt them regardless would be to introduce certain criteria for eligibility which ensures that only farms with particularly outdated machinery are supported under the programme.

(c) Short-term financial support measures

A major constraint for the activity of agricultural producers is their lack of resources to pre-finance input purchases. Commercial credits are often unavailable to farms, as the risk for such credits is very high and farmers do not have adequate securities. In order to deal with this, Kazakhstan set up a short-term credit programme. According to article 10(2)(3)–(6) of the Law on State Regulation of Agriculture, Kazakhstan provides loans to credit companies who in turn provide loans to farmers, non-agricultural companies in rural areas, and microfinance organizations. Programmes are either executed by Kazagrofinance, which provides loans to farmers at favourable conditions,<sup>91</sup> or by rural credit companies which issue credits adapted to farmers' needs.<sup>92</sup> They are funded from the state budget with 4 billion Tenge in 2002, which rose to 7 billion in 2005 (above).

Credits do not appear to be granted at market conditions and therefore constitute support subject to reduction under AoA article 6. As they are not issued for investment purposes, but in order to deal with current financial shortages, they are not eligible for exemption neither under AoA article 6.2 nor under Annex 2 No. 11.

In order to increase farmers' access to short-term credits, grain receipts for grain stored in warehouses is used as security for farm credits. Kazakhstan introduced such receipts with the Law on Grain of 19 January 2001, which ensures that grain owners enjoy precedence over other creditors in case of

---

<sup>91</sup> National Agricultural Programme 2003–05, No. 6 Programme No. 084.

<sup>92</sup> Government Order No. 259 of 18 March 2003 on Rules of Crediting of an Agricultural Production through System of Rural Credit Companies.

grain storage centre insolvencies. This system in principle does not constitute support under the AoA, although Kazakhstan introduced public guarantees for grain receipts, which would come under the AoA. Nevertheless, grain receipts seem to be a prudent way to increase farmers' access to capital while diminishing state support to agriculture.

(d) Crop insurance

One of the major objectives of Kazakhstani agricultural policy in the last years was the establishment of crop insurance against natural disasters.<sup>93</sup> Law No. 533 – II of 10 March 2004 on Mandatory Crop Insurance introduces a mandatory system of insurance for all crop producers. Insurance is provided by private insurers and agents (articles 15 and 16) and applies in case of crop damage or destruction as a result of adverse natural phenomena causing losses to the insured according to article 6. The law fixes the insurance premium. Insurance payments are calculated on the basis of a producer's loss, defined as the difference between the costs for one hectare of manufacture of the destroyed crop and the income derived usually from that crop, multiplied with the tillage affected by the phenomenon (article 9(2)). A commission composed of state authorities, the insured, insurers and insurance agents establishes the areas affected by the natural phenomenon. In case of natural disasters, the government refunds 50 percent of insurance payments to the insurer (articles 13 and 14).

The AoA recognizes that state support for crop insurance in case of natural disasters may be justified. However, in order to ensure that it does not distort international trade, Annex I No. 8 establishes certain criteria to be met by an insurance program in order to qualify for exemption. Such insurance must only be available in case of natural or like disasters formally recognized as such by a government authority and which lead to production losses exceeding 30 percent of the average of production in the preceding three-year period or a three-year average based on the preceding five year period. Payments may only be made with respect to losses of income and production factors due to the natural disaster in question and must be limited to compensate such losses without requiring any future production. State contribution to crop insurance is not prohibited under the AoA if these requirements are not met, but it will have to be counted as domestic support subject to reduction under AoA article 6. The law's main element which

---

<sup>93</sup> Cf *National Agricultural Programme 2003–05*, No. 5.2.

might raise problems with regard to exemptions is the apparently broad scope of application. The definition of adverse natural phenomenon in article 1(4) is very broad and explicitly includes droughts, frosts, and excessive humidity. This might be considerably broader than the term "natural disaster", which commonly refers to a sudden event bringing great damage, loss, or destruction.<sup>94</sup> Unlike the AoA requires, the law does not link eligibility for insurance payments to a certain amount of production loss either. With these considerations in mind, state support under the crop insurance can only be exempt from reduction commitments if the law's scope is modified accordingly.

(e) General services

Many other measures financed from the state agricultural budget appear to be unproblematic with regard to the AoA. Maintenance of the state agricultural administration would probably not even qualify as support. Expenditure for the services rendered by state veterinary and plant quarantine bodies for research and training, and for marketing and promotion services, are exempted under AoA Annex I No. 2(a), (b) and (c). Furthermore Annex I. No. 2 exempts all kinds of programs providing services or benefits to agriculture or the rural community, provided that they do not involve direct payments to producers or processors. Likewise, most measures provided for in the Rural Development Programme 2004–2010 concerning e.g. social, cultural and telecommunications infrastructure qualify for exemption as general services programs under AoA Annex I. No. 2.<sup>95</sup> This does not seem to apply to measures to stimulate growth of agricultural production and water subsidies.

### 2.2.2 Export subsidies

#### *Transport*

Kazakhstan continues to provide subsidized rail transport facilities for agricultural goods, in a bid to alleviate the costs linked to the fact that Kazakhstan is remote from major agricultural markets and is not well-connected to waterway transport routes. While preferential tariff rates for

<sup>94</sup> Cf. Online Dictionary Merriam Webster.

<sup>95</sup> Cf. Government Order No. 838 of 20 August 2003 on the Plan of Measures for 2004–2006 on Realization of the State Program of Development of Rural Territories of Republic Kazakhstan for 2004–2010.

transportation of agriculture and food products by rail were eliminated on 1 January 1997 according to Resolution No. 7/126 of the State Committee on Pricing and Anti-Monopoly Policy of 25 December 1996,<sup>96</sup> subsidization continues to be provided in other forms. Currently, subsidies are estimated to make up about US\$ 9–15 per ton of agricultural products.<sup>97</sup> Transport subsidization is clearly a kind of support subject to reduction under the AoA. It might even count as an export subsidy, and as such be subject to complete elimination either upon Kazakhstan's accession to the WTO or following a successful conclusion of the current round of trade negotiations. According to AoA article 9, subsidies to reduce the costs of *inter alia* international transport and freight (d) and internal transport and freight charges on export shipments on terms more favourable than for domestic shipments (e) constitute export subsidies. Any subsidization which is granted only to exported products or which covers only international transport costs would clearly come under that definition. Conversely, subsidies on domestic transport provided both for goods transported to domestic and foreign destinations are not covered. A preliminary conclusion would be that the classification of transport subsidies would depend on their destination. An additional restriction is imposed by AoA article 10(1) which states that export subsidies not listed in article 9 shall not be applied in a manner which results in or which threatens to circumvent export subsidy commitments. According to the WTO Appellate Body, this is the case if a member transfers the same economic resources to agricultural producers that it is prohibited from providing through other methods under article 9.1.<sup>98</sup> Subsidies on domestic transport provided both for goods with a local and foreign destination would not violate that provision, as they are substantially different from the kind of subsidies enumerated in article 9, involving a larger amount of payments available to agricultural producers generally; it would not give in any way an incentive to favour export over domestic marketing. It can be concluded, that even if Kazakhstan agrees to eliminate all export subsidies, it may continue to grant transport subsidies for agricultural products, provided that they are limited to cover transport costs up to the border, and are available for both exported and domestically consumed goods.

---

<sup>96</sup> WTO Document WT/ACC/KAZ/6/Add.1 of 7 February 1997, Question 53.

<sup>97</sup> Kazabekova (2004).

<sup>98</sup> WTO Appellate Body Report on *US – Foreign Sales Corporation*, paras. 148–152.

### 2.2.3 Public corporations in agriculture

While the role of the state in Kazakhstani agriculture sharply declined in the 1990s, public corporations still play an important role in trade in agricultural products. As inefficiencies in the distribution of agricultural goods rose after privatization in the 1990s, public trading corporations bounced back and were actively promoted by the government.

Article 21 of the Law on Trade declares that state trading monopolies may be introduced for certain goods. In practice, this power has not been used in the agricultural sector. Article 12 of the Law on State Regulation of Agriculture stipulates that state regulation of agricultural markets has the objective of maintaining food security and supporting domestic agricultural producers; it is implemented by way of purchasing operations and price intervention *inter alia*. Today two major state companies are engaged in agricultural trading - the State Food Contract Corporation (SFCC) in the grain sector, and the Malonimderi-Corporation in the cattle sector. A third company, Kazagroinform, appears to deal exclusively with information and training activities, while Kazagrofinance executes agricultural leasing and loans programmes set up by the government.

#### (a) The State Food Contract Corporation

SFCC was created in 1997,<sup>99</sup> but it is a successor of the National Food Commissariat founded in 1920. It is today the largest grain trader in Kazakhstan and assumes a role both in public food stockholding and market intervention. Its activity is based on Chapter 3 of the Law on Grain, which provides for public grain stockholdings to be maintained by an agent on the basis of a contract (article 12.1). In 1996, SFCC was chosen as an agent to execute Kazakhstan's stockholding programme on the basis of a contract characterised as "state procurement from a single source", and is granted without an open competition. According to article 21 of Law No. II-321 on State Purchases of 16 May 2002, state procurement of goods from a single source may be exceptionally justified by strategic considerations. The Law on Grain distinguishes between grain resources held for purposes of mobilization, food security, fodder provision, seed provision and regulation of the grain market (article 11). According to article 10(4) of the Law on Grain, state grain resources must be maintained by way of purchases at

---

<sup>99</sup> Government Order No. 260 of 24 February 1997 on Reorganization of State Food Contract Corporation; cf. also Government Order No. 309 of 21 March 1995.



market prices. In practice, the government fixes the amount of grain to be purchased for food security purposes and the price to be paid every year by government order. In 2004, SFCC was authorized to buy about 500 000 tons of grain at a minimum price of 11 000 Tenge (US\$ 84) per ton.<sup>100</sup> The government furthermore suggested that the SFCC buy 2 million tons of grain to stabilise the grain market. Prices set by government order for food security purchases tend to be higher than market prices, but this is not necessarily always the case. For example in 2003, the government set a minimum price of about 10 000 Tenge (about US\$ 80) per ton,<sup>101</sup> while farm prices for third class wheat were around US\$ 50 until May but then rose to over US\$ 100 towards the end of the year.<sup>102</sup> Prices for market stabilisation purchases vary; for example, the SFCC procured wheat at a price of US\$ 160 in winter 2003/4 in order to avoid bread shortages caused by rising prices on export markets.<sup>103</sup> Grain reserves are disposed of to a considerable extent by way of government-to-government agreements with the Middle East, North Africa and Europe (the existence of a state trading company is a certain advantage in trade with other Central Asian countries with state trading monopolies<sup>104</sup>), but also at the home market, depending on the market situation. For example, in early 2004, SFCC sold about 900 000 tons of wheat on domestic markets with a fixed price of US\$ 160 to stabilize rising prices in view of poor harvests.<sup>105</sup> A major part of SFCC's grain purchases are already carried out and paid for in spring, in order to provide farmers with financial resources to purchase fertilizer and petroleum. To finance these contracts, which effectively work as an interest-free loan to farmers, SFCC may issue state bonds (it was conferred the status of a first class emitter of bills of the Kazakhstani National Bank) for up to 5 billion Tenge for a period of one year. Grain purchases are carried out according to Government Order No. 371 of 27 March 2004 (as amended by Order No. 522 of 12 May 2004) and No. 318 of 24 March 2005 by way of public bidding. According to these rules, only residents in Kazakhstan are admitted to

---

<sup>100</sup> National Agricultural Programme 2003–05, No. 6, Programme 038, 043; Government Order of 9 March 2004 No. 290 on the State Purchases of Grain in 2004.

<sup>101</sup> Governmental Order No. 205 of 26 February 2003 on some questions of the state purchases of grain of 2003 crop and the statement of Rules of the state purchases of services on storage of the state resources of grain, Rules of the state purchases of services on moving the state resources of grain.

<sup>102</sup> US Department of Agriculture (2004(a)).

<sup>103</sup> US Department of Agriculture. 2004(b). *Kazakhstan - republic of grain and feed*, p. 6. Global Agriculture Information Network Report Number KZ 4002, Washington D.C.

<sup>104</sup> Cf. Intracen (2002), p. 52.

<sup>105</sup> US Department of Agriculture (2004(a)), p. 3.

bidding procedures.<sup>106</sup> The National Agricultural Programme 2003–05 furthermore suggests that purchases should preferably be made from domestic producers.<sup>107</sup> In fact, SFCC seems to purchase only grain produced in Kazakhstan. SFCC is the biggest trader in grain both for the domestic market and for exports. In 2004, SFCC purchased about one-fifth of Kazakhstani grain production which was about 14/15 million tons in 2004. SFCC owns the only operating grain terminal in the seaport Aktay and will also run the planned grain terminals on the Baltic sea, both of which were supported from the state budget in order to improve the access of Kazakhstani grain to export markets. To summarize, purchases and sales by SFCC pursue manifold purposes: they are intended to avoid excessively low grain prices paid to producers, to overcome farmers' capital shortages, to facilitate grain exports, and to ensure sufficient provision of grain at the domestic market.

(b) STEs: SFCC, GATT Article XVII and the 1994 Understanding

WTO rules do not prohibit public enterprises engaging in trade (State Trading Enterprises - STEs). However, their activity is subject to WTO rules. GATT article XVII and the 1994 Understanding on GATT article XVII (1994 Understanding) establish specific rules for STEs. Furthermore, such companies' activities might constitute support subject to reduction under the AoA.

GATT article XVII applies to any state enterprise or non-governmental enterprise enjoying exclusive or special privileges, which in its purchases or sales involves imports or exports - unless these exclusively refer to products for governmental use and not otherwise in commercial use. It is debatable whether SFCC comes under that definition at all. GATT article XVII equates state enterprises with non-governmental enterprises holding exclusive or special privileges, which suggests that state ownership *per se* without any privileged status is not enough to constitute an STE. SFCC does not enjoy a statutory monopoly or a privilege provided for by law - it is awarded contracts on maintaining the state grain resources without open competition, but it could be argued that this is a purely commercial contract which does not involve any advantage other than a private contract party's status. The main advantage granted exclusively is that SFCC is financed by annual subsidies from the state budget at non-market terms. Again, this does

---

<sup>106</sup> Cf. No. 11 of the Order.

<sup>107</sup> National Agricultural Programme 2003–05, Nr. 5.2

not explicitly confer a special power or a legal privilege, but it constitutes an economic benefit enabling SFCC to carry out its activities in supporting agricultural producers. It is therefore necessary to determine if such an economic benefit may constitute a special privilege within the terms of GATT article XVII. A privilege is commonly defined as something granted as a special favour,<sup>108</sup> and the wording does not qualify this to be necessarily a special power conferred by law. This is confirmed by the STE Agreement in which the terms "special rights" and "privileges" are used in the alternative, suggesting that there must be privileges other than special powers conferred by law. This is confirmed by some WTO members' practice as summarized in an illustrative list of STEs adopted by the WTO Working Party on State Trading Enterprises.<sup>109</sup> It corresponds finally to the object and purpose of GATT article XVII, which subjects any public policy to WTO rules, as economic benefits may be even more powerful to achieve a public policy aim than legal privileges. SFCC's power to issue state bonds is a further hint that it is awarded special rights and privileges.<sup>110</sup> It can therefore be concluded that the very fact that SFCC receives annual subsidies from the state budget, which are not granted to any other economic actor, confers them a special privilege according to GATT article XVII. These privileges enable it to be the main trader and exporter of grain products, and as such to influence both the domestic price level and the level of exports. As a final point, it could be argued that STE rules do not apply to SFCC's activities to maintain the state grain resources for food security purposes, as they could instead be intended for governmental use. However, the distinction between grain resources for food security and other purposes brought out well in the Law on Grain, does not seem to be quite as clear in practice. Furthermore, it does not seem to omit the possibility that food security resources are being disposed of on the market at a later stage. Both would be required to come under the notion of governmental use, and it is questionable whether food security stockholdings can be considered a governmental use. It can thus be concluded that SFCC is fully subject to the WTO's STE rules.

---

<sup>108</sup> Cf. Online Dictionary Merriam Webster.

<sup>109</sup> WTO Document G/STR/4 of 30 July 1999, No. III.8(b)(ii).

<sup>110</sup> Cf. Report of the WTO Appellate Body Report on *Canada – Wheat*, WT/DS276/AB/R of 30 August 2004, para. 85.

This implies that SFCC must abide by the WTO principles of non-discrimination, i.e. GATT article I and III.<sup>111</sup> According to GATT article XVII:2, this involves but is not limited to, making purchases or sales solely in accordance with commercial considerations, and affording traders from other members adequate opportunity in accordance with customary business practice, to compete for participation in such purchases or sales. Furthermore, members must notify state enterprises to other WTO members, and ensure transparency in their activities according to the STE Agreement.

So far, it does not seem that SFCC has considered imports at all in its purchases. A major reason for this might be that at least in the grain sector, SFCC purchase prices are well below world market prices, making it unprofitable for importers to compete.<sup>112</sup> Therefore, it seems difficult to see that foreign traders could profitably participate in SFCC's purchases even if they were carried out without any discrimination. SFCC's purchasing system poses several obstacles for foreign traders to bid which would appear to violate GATT article XVII. Firstly, the rules governing bidding competitions for SFCC purchases explicitly require a bidder to be a Kazakhstani resident and to present a land use certificate, both of which disfavour foreign bidders in violation of GATT article XVII. Furthermore, a major objective of SFCC highlighted in the National Agricultural Programme 2003–05 is to support domestic producers and to stabilize domestic markets, which makes it unlikely that importers are effectively granted equal conditions.

It could furthermore be argued that SFCC does not act solely in accordance with commercial considerations, as it offers farmers advance payments and fixed prices, which a private company would probably not offer. Yet acting in accordance with commercial considerations does not mean that SFCC must act like any private company not enjoying special privileges. GATT article XVII does not prevent STE's from using their privileges.<sup>113</sup> Having access to annual state funding, granted under certain conditions including advance payments to farmers at prices fixed by the government is among the special privileges enjoyed by the SFCC. This seems to support the

---

<sup>111</sup> Report of the WTO Panel on *Korea – Various Measures on Beef*, WT/DS161/AB/R and WT/DS169/AB/R of 11 December 2000, para. 753; Report of the Appellate Body on *Canada – Wheat*, WT/DS276/AB/R of 30 August 2004, para. 105.

<sup>112</sup> Cf. Kazakhstan Ministry of Agriculture (2004).

<sup>113</sup> Report of the WTO Appellate Body on *Canada – Wheat*, WT/DS276/AB/R of 30 August 2004, paras. 140, 144 and 147–149.

conclusion that SFCC does not violate GATT article XVII by executing grain purchases at prices and payment modalities fixed by the government.

Upon WTO accession SFCC will furthermore be required to provide information in accordance with the STE Agreement. This requires in particular statistical information on the quantity and value of traded goods, which is as yet not publicly available.

To conclude, it is mainly SFCC's purchasing practice discriminating against imports in several ways, which could raise concerns of compatibility with GATT article XVII and the STE Agreement under changing economic circumstances in the future.

#### *SFCC and subsidies rules*

GATT article XVII and the STE Agreement establish detailed requirements on non-discrimination by state trading enterprises, but they do not indicate any limits for STEs in affecting prices or market conditions of agricultural goods by profiting from their special privileges or market position.<sup>114</sup> However, to the extent that an STE's activities involve subsidies or government support to agricultural producers, they are governed by WTO rules on subsidies, especially the AoA.<sup>115</sup> The AoA applies to SFCC's activities, if they constitute a subsidy or another way to support domestic agricultural producers. According to article 1.1(a)(1)(iv) of the WTO Agreement on Subsidies and Countervailing Measures (SCM), subsidies may arise from either or both public and private bodies, provided the latter are directed by government authorities, would normally be exercised by the government and do not deviate from common governmental practice. It is evident that SFCC comes within that definition. It is 100 percent state-owned, its activity is guided by government orders, and it is financed partially from the state budget. It is debatable whether SFCC's activities involve domestic support under the AoA. Taking into account that SFCC's grain purchases have as one objective the stabilisation of agricultural markets, they could be considered as market price support according to AoA Annex 1.<sup>116</sup> Unlike most countries granting market price support, Kazakhstan does not have in place an officially administered price which SFCC's purchases must

---

<sup>114</sup> Ibid, para. 161.

<sup>115</sup> Ibid, para. 98; Ya Qin, J. 2004. *WTO regulation of subsidies to state-owned enterprises (Soes) - a critical appraisal of the China accession protocol*, No. 26. Journal of International Economic Law (7).

<sup>116</sup> Desta (2002), p. 310.

support; but support could be calculated according to the actual difference between domestic market prices and prices paid by SFCC. Another way to qualify SFCC's activities as support under the AoA is to look at budgetary outlays for payments to SFCC. The major sums SFCC is granted every year for its purchasing activity suggests that these activities involve domestic support at least with respect to these budgetary payments. A third way to assess if SFCC's activity constitutes domestic support under the AoA is to consider if it meets the definition of a subsidy under SCM article 1. This would presume that it involves loans, grants, or purchases of goods which are executed on terms more favourable than those available to normal recipients in the market.<sup>117</sup> There are several reasons to believe that this is the case: advance payments exercised by SFCC effectively constitute interest-free loans to farmers. SFCC is in a position to grant these loans, as it is subsidized from the state budget and it has privileged access to commercial loans. Furthermore, purchase prices both for food security and market stabilization purchases deviate considerably from domestic market prices. It follows from these considerations that SFCC's activities actually meet the definition of domestic support under the AoA. The current food stockholding programme executed by SFCC is also not eligible for exemption under AoA Annex 2 No. 3, according to which expenditures for product stocks forming an integral part of a food security programme identified in national legislation are exempt from reduction commitments. This is on the conditions that the stocks correspond to predetermined targets related solely to food security, purchases are made at current market prices, and activities are financially transparent. The problem with the Kazakhstani food stockholding programme is that it does not distinguish clearly between stockholding and market stabilization targets, and that both purchase prices and conditions as the granting of advance payments for spring grain purchases differ considerably from market terms. It would therefore appear that SFCC's activities involve domestic agricultural support subject to reduction under the AoA. An attempt to calculate the amount of support would probably have to start from budgetary outlays for payments to SFCC, the monetary value of other support instruments like preferential access to private finance, and the differences between domestic market prices and purchasing prices applied by SFCC. In order to exempt at least SFCC's food security activities from support commitments, it would be necessary to clearly separate food security purchases from market

---

<sup>117</sup> Report of the WTO Appellate Body on *Canada – Aircraft*, WT/DS70/AB/R, para. 157.

intervention activities and to ensure that the former are executed at current market prices without interest-free advance payments.

(c) The Malonimderi-Corporation

The publicly owned Malonimderi-Corporation carries out state activities in the cattle-breeding sector playing a core role in Kazakhstan's bid to diminish dependence on meat imports and increase exports.<sup>118</sup> Its activities include information and marketing activities in Kazakhstan and abroad, executing loan programmes for cattle producers, purchase and trade with cattle and meat products, and increasing processing capacities for such products.<sup>119</sup> For example, in 2003 Malonimderi was authorized to carry out purchases of 9 800 tons meat, 48 700 tons of wool, 5 000 cattle and 24 000 tons of canned food with funds from the state budget. It was authorized to export about half of the meat and wool and the entire cattle purchased. Total state funds in 2003 amounted to 1.5 billion Tenge.<sup>120</sup> Purchases are not subject to the public procurement rules as laid down in the Law on State Purchase.<sup>121</sup> An evaluation of Malonimderi under WTO law would lead very much to similar conclusions as drawn above on SFCC, with the distinction that Malonimderi does not carry out food security programmes. Conversely, it implements several grant and discounted loan programmes for farmers, which can be clearly qualified as domestic support under the AoA subject to reduction.

#### 2.2.4 General observations

While the total amount of support to agricultural production granted by Kazakhstan is still low by international standards, Kazakhstan's agricultural policy includes a broad variety of support programmes to farmers, which are subject to reduction under AoA article 6. This does not apply to most rural development measures, support to state agricultural administration, and veterinary and phytosanitary services. Some other subsidies could be re-designed so as to meet conditions for exemption under the WTO Green Box. Transport subsidies will probably qualify as export subsidies, which will

<sup>118</sup> Cf. Strategy for the Manufacture and Marketing of Cattle-breeding Production under Modern Conditions (until 2010), (available at [www.minagri.kz](http://www.minagri.kz))

<sup>119</sup> Cf. information available at [www.minagri.kz](http://www.minagri.kz)

<sup>120</sup> National Agricultural Programme 2003–2005 No. 6, Programme 88; Governmental Order No. 451 of 14 May 2002 on Some Questions of Crediting of the Closed Joint-stock Company Malonimderi.

<sup>121</sup> Government Order No. 318 of 8 April 2005 on Purchases by State Enterprises, Legal Persons Controlled by the State and their Affiliates (except for subjects of natural monopolies).

have to be eliminated at some point. The activities of the State Food Contract Corporation and Malonimderi-Corporation also entail domestic support subject to reduction. The trading activities of SFCC and Malonimderi raise some questions of incompatibility with GATT article XVII on State Trading Enterprises. Generally, the entire range of state activities potentially constituting support to agricultural producers must be carefully weighed when determining domestic support commitments upon WTO accession. A failure to do so might have serious consequences, as support might have to be cut in spite of its relatively low level. As there are considerable uncertainties with regard to the categorisation of measures as domestic support under the AoA, it might also be advisable to provide a certain margin of security in support commitments. A further conclusion is that authorities should be aware of WTO rules on agricultural subsidies and in particular conditions for exemption, as many support programmes might be completely exempt from reduction commitments if their design follows the requirements of AoA Annex 2.

### **2.3 The SPS Agreement**

In the last years, Kazakhstan has renewed most of its legislation on plant and animal health, food safety and marketing standards. The challenge is to enact and implement effective legislation and other safeguards to ensure domestic food safety and quality, while concomitantly abiding by the principles laid down in the WTO's SPS and TBT Agreements, and ensuring that Kazakhstani agricultural products meet internationally accepted standards to improve market access opportunities. This section will review the most important laws on plant and animal health, food safety and marketing standards relevant to agricultural products and assess if they meet WTO requirements.

Article 17(1)(4) of the Law on Trade stipulates that technical, pharmaceutical, sanitary, veterinary, phytosanitary, ecological standards as well as requirements and controls of the quality of imported goods are among the government's means to regulate foreign trade activity. Article 32 requires that any traded good meets certain minimum conditions of safety and quality. Article 18(2) provides the government with a power to impose trade restrictions for purposes of protecting citizen's health, safety and security. Regulation and trade restrictions for such purposes are recognized as legitimate under GATT article XX and under the SPS Agreement, but it is striking that the Law on Trade is silent about the limits imposed by WTO law. It does however refer to



other legal acts, which spell out conditions and limits of state regulatory action to protect plant health, animal health and food safety.

According to article 13 of the Law on State Regulation of Agriculture, the state carries out sanitary and phytosanitary control, animal disease control, diagnostics and liquidation, veterinary action to protect Kazakhstan from the spread of animal and human illnesses, phytosanitary action to combat the spread of harmful plant diseases, and compensation for animals or plants subject to destruction for sanitary or phytosanitary purposes, in accordance with the laws and with a view to ensure conformity of agricultural produce with international quality and safety requirements. Again, these purposes are legitimate under GATT and the SPS Agreement, but the law does not mention the limits to state action under WTO law.

This underlines the importance of sectoral legislation on animal health, plant health and food safety for meeting WTO requirements, which will be examined in the following sections.

### 2.3.1 Food safety and trade in food products

Issues of protection of human health are dealt with by the Law on Sanitary-epidemiological Safety of Population No. 361-II of 4 December 2002. Furthermore, food products are subject to the Law on Food Quality and Safety, No. 534-II ZRK of 2004.

The Law on Sanitary-epidemiological Safety of Population (hereafter the Sanitary-epidemiological Law) deals with the protection of human health in general; measures to protect human health from food-borne risks which come under the SPS Agreement form only a small part of the law's focus.<sup>122</sup> According to article 2(2), international treaties ratified by Kazakhstan shall prevail if they contain rules contrary to the law. Article 3 lists the law's objects and principles which include: the implementation of the rights and obligations of citizens and food operators relating to the protection of health; the creation of favourable conditions for life and sanitary-epidemiological safety; and the provision of scientific justification for the measures securing sanitary-epidemiological safety.

---

<sup>122</sup> Other measures, which go beyond the scope of this chapter, would fall under the TBT-Agreement.

According to article 4 of the law, sanitary-epidemiological tasks are carried out by the authorized body and its territorial departments and border posts, which are supported by sanitary service organizations including national research and scientific organizations. While the government is vested with the power to adopt implementing regulations in article 6, article 7 empowers the authorized body to implement the sanitary-epidemiological policy, approve sanitary rules and normative acts, certify conformity with these rules, make proposals to the government to introduce restrictive measures, and coordinate state and international standards as well as scientific and research activities. Its territorial border departments carry out inspection of imports and exports, and organize and apply border measures. Articles 15 and 17 make lay down specific sanitary legal norms. Article 16 provides that certain types of products and substances having a detrimental effect on human health are subject to prior authorization. This includes any food supplement, colouring agent and any item or material which comes into contact with water and food products. Authorizations shall be issued on the basis of an expert assessment of the hazard for human health and the environment, conformity with existing normative legal acts and the possibility of preventing detrimental effects by special measures. The list of authorized products shall be published.

According to article 18, natural persons have the right to a favourable environment, the factors of which have no detrimental effect on human health and future generations. They have the right to appeal to governmental bodies by way of letter or appeals. Articles 19 and 20 require undertakings to implement product and production controls. Chapter 5 deals with preventive measures. Imported products constituting a threat to human health shall undergo a border inspection and may be refused if they violate sanitary laws or constitute a threat to human health. According to article 14, acts of sanitary-epidemiological inspectors can be appealed in state courts.

The Law on Food Quality and Safety of 2004 (hereafter the Food Law) is a cross-cutting law which governs all issues of food quality and safety, in addition to other requirements established, for example by veterinary, phytosanitary or sanitary-epidemiological legislation (article 2(1)). According to article 2(2), international treaties ratified by Kazakhstan shall prevail if they contain rules different or contrary to those of the law. Article 3 establishes basic requirements for the handling of food. Food products must fulfil all legal requirements, have no explicit signs of bad quality, be accompanied by and correspond to certification documents and comply with

expiry date information. Article 4 vests the responsibility to ensure food quality and safety in the government and in food operators. Article 5 requires food operators to provide complete and adequate information about the quality and safety of foodstuffs to consumers and to the government, which has separate obligations of providing the public with information. Chapter 2 deals with government control over food quality and safety. According to article 6, food safety standards are set by veterinary and sanitary-epidemiological authorities, but also according to general standard setting procedures by the Authorized Organ for Standardization, Metrology and Certification). Article 7 states that food products produced or introduced for the first time to Kazakhstan are subject to prior authorization, and article 8 authorizes the government to subject certain foodstuffs to mandatory certification assessing their conformity with Kazakhstani national laws and standards.<sup>123</sup> According to article 9, state control over food is exercised by the competent veterinary, sanitary-epidemiological and phytosanitary authorities. Article 10 deals with the rights and responsibilities of food processors and marketers, which include the respect of existing legal requirements but also quality control and control programs and information of state authorities in case of problems. Chapter 3 lists legal requirements for food development, production, packaging and marketing, storage and transport, import, production control, and withdrawal. Article 12 specifies the documents by which foodstuff must be accompanied. This includes information on food quality and safety, on production and marketing conditions, on production control programmes, and veterinary and sanitary certificates. Article 13 states that registered harmful additives, growth hormones for animals, pesticides and agro-chemicals may not be used for the production of food for children, dietetic, therapeutic and prophylactic. Article 16 states that foodstuffs not meeting legal requirements cannot be marketed. Article 17 on imports refers to border controls according to veterinary and sanitary-epidemiological laws. It confirms that imported food products must be accompanied by documents certifying their correspondence to Kazakhstani legislation and standards. If they do not correspond to the accompanying documents, importation may be temporarily suspended. Where verification shows that they are dangerous or of poor quality, they must be re-exported or will be destroyed. While these requirements apply to all kinds of food products including genetically modified foods in the same way, in the National Biosafety Framework drawn up in line with the Cartagena Protocol on Biosafety to the Convention on Biodiversity in collaboration with UNEP,

---

<sup>123</sup> Cf. below section 6.5.

Kazakhstan expressed its intention to draw up a Law on State Regulation Genetic Engineering Activities and a document on the necessity of state registration of genetically modified organisms.<sup>124</sup>

A study on the Food Law and the Sanitary-epidemiological Law reveals that WTO requirements have been taken into account, but that the laws do not ensure adequate implementation of all requirements by the SPS Agreement.<sup>125</sup> The government has drawn up a draft law to amend the Sanitary-epidemiological law to adapt it to WTO requirements.<sup>126</sup> The relationship between both laws could be clarified; it would appear that Food Law is a framework law, which for single government powers and competencies, refers to sanitary-epidemiological, veterinary or phytosanitary laws and authorities. In general, it is striking that the Food Law does not provide in any way that food standards must be based on scientific considerations and international standards, nor does it refer to the principles of necessity and least-trade-restrictiveness. If the law is actually construed as a framework law, sanitary-epidemiological, veterinary or phytosanitary laws may ensure that WTO principles are respected. But it would be preferable to refer to some of the basic SPS principles in the Food Law, in order to provide a comprehensive framework for food regulation and to ensure their respect at the implementation level.

The obligation to base measures on scientific reasons and risk assessment contained in SPS articles 2(2), 3(3), 5(2)) is reflected clearly in article 16 of the Sanitary-epidemiological Law on the registration of foodstuff, while it is lacking in article 7 of the Food Law on the same issue. Conversely, article 15 and 17 of the Sanitary-epidemiological Law on standards do not even mention scientific considerations. This could be made up for by the objectives and principles laid down in article 3(5) of the law. But again, any reference to risk assessment and to specific methods is lacking, nor is there any provision on how to proceed in case there is insufficient scientific evidence as required by SPS article 5(7)).

---

<sup>124</sup> Kazakhstan Ministry of Environmental Protection and UNEP. 2004. *Final draft national biosafety framework*. Astana (available at [www.unep.ch](http://www.unep.ch)).

<sup>125</sup> See UNCTAD/WTO. 2005. *Illustrative table: consistency of acting Kazakhstani legislation with the norms of the WTO Agreement on the Application of Sanitary and Phytosanitary Measures*, (hereafter UNCTAD/WTO (2005)).

<sup>126</sup> Ibid.

The objectives and principles laid down in article 3 of the Sanitary-epidemiological Law could be interpreted to implement the principles laid down in SPS article 2(2), 2(3) and 5(6) on necessity, disguised restrictions on trade and least trade restrictiveness. But article 3 of the law does not ensure that measures do not go beyond what is necessary to achieve its aims, and does not incorporate any of the other concepts. It follows that the law does not fully ensure implementation of the said provisions in the SPS Agreement. The draft law amending the Sanitary-epidemiological Law would make up for this deficiency by adding a paragraph on the principle of necessity and on avoiding disguised restrictions of trade among the objectives and principles in article 3 of the law. An issue of necessity is furthermore raised by the requirement that any new category of food products introduced to Kazakhstan is subject to prior registration (article 7 of the Food Law, article 16 of the Sanitary-epidemiological Law). The wording of the Food Law suggests that registration is more or less automatic and occurs to keep authorities informed. This appears entirely legitimate for food safety purposes and does not impose excessive burdens on traders. Conversely, the wording of the Sanitary-epidemiological Law suggests that any new product could be subjected to a risk assessment. This might go beyond what is necessary to protect human health. The same objective might be achieved if the law enables the authorized body to subject single categories of products to prior registration according to the danger they pose for human health.

Although Kazakhstan is a member of Codex Alimentarius, the international food standard-setting organization, the Sanitary-epidemiological Law refers to international standards only by providing a power to coordinate national and international standards, which suggests that both levels are on an equal footing. This is insufficient to meet the requirements of article 3 SPS, which requires national measures to be based on international standards, implying a much stronger position of the latter.

None of the two laws contains wording which explicitly discriminates against products according to their origin. Article 15 of the Sanitary-epidemiological Law even provides that state norms should state uniform requirements. Inspections are carried out on domestic and imported products according to the same rules.<sup>127</sup> Furthermore, the draft law amending the Sanitary-epidemiological Law will add a further principle to article 3 of the law, according to which the application of measures should

---

<sup>127</sup> Order of the Minister of Health No. 841 of 14 November 2003 on Rules of Carrying Out of Sanitary and Epidemiologic Examination.

not entail discrimination on grounds of nationality. Both laws are silent about equivalence in food safety regulation. While it has been seen above that SPS article 4 does not impose an obligation on automatic recognition of equivalence, the laws could state an objective and a power of the government to enter into negotiations on equivalence with other members in articles 3 and 6 of the Sanitary-epidemiological Law.<sup>128</sup>

On the whole, food legislation should be revised with a view to provide a comprehensive framework for Kazakhstani authorities to respect SPS obligations. It is an issue for consideration whether amendments should be made to the Food Law or to the Sanitary-epidemiological Law. At present, administrative competencies and instruments to ensure food safety continue to be regulated in detail in the Sanitary-epidemiological Law (an exception is food registration regulated in parallel in both laws). Unless it is decided to exclude food safety entirely from its scope, it appears more sensible to integrate more detailed amendments in that piece of legislation, while amendment of the Food Law would be limited to a general statement of the SPS principles.

### 2.3.2 Plant health and trade in plant and plant products

Issues of plant health are addressed by the Law No. 344-I of 1999 On Plant Quarantine implemented by Governmental Order No. 773 of 1 August 2003 on Rules on Protection of Territory of Republic Kazakhstan from quarantine objects based on article 5(2) of the law. Chapter 1 of the law spells out general provisions including: plant quarantine activities guidelines (which include the protection of plant resources and products of plant origin from damage and destruction by quarantine pests in order to maintain food and raw material security in Kazakhstan); objective and science-based assessments of the potential impact of quarantined plants on plant resources and products of plant origin - and prevention of potential damage; and international cooperation based on relevant agreements. Chapter 2 establishes the Kazakhstani plant quarantine regulatory system. While the government draws up implementing rules and the list of quarantine objects and especially dangerous harmful organisms,<sup>129</sup> an authorized body and its inspectors are vested with the principal implementing powers in articles 7 and 8, and establishing the list of plant quarantine pests. The authorized

---

<sup>128</sup> Cf. the Codex Alimentarius Guidelines on Equivalence in Food Inspection and Certification Systems, CAC/GL 53-2003.

<sup>129</sup> Article 5(2); cf. Governmental Order No. 1295 of 10 December 2002.

body is supported by state quarantine institution and state enterprises. It shall, jointly with scientific and research organizations, develop quarantine measures based on scientific risk assessment principles with consideration of the requirements set out in international norms and recommendations. Chapter 3 enumerates plant quarantine measures. According to article 13 and the Rules on Quarantine, imports of objects subject to quarantine must be accompanied by a phytosanitary certificate issued by the exporting country and an import permit issued by the authorized body. The latter is issued upon request to be made no later than 30 days before the date of import at the importer's expenses (No. 9 of the Rules). Upon import, which may occur only through phytosanitary border posts, plant quarantine objects are subject to phytosanitary control and samples may be taken. Customs registration can be effectuated only after control by the authorized body (No. 14 and 15). Neither the law nor the rules provide for time schedules for phytosanitary inspection. The import of products infested with quarantine pests and foreign species, soil, live rooted plants in soil and plant disease pathogens is completely forbidden (articles 13.2–1.2–4) - such batches are refused at the border (No. 21). Imported products are furthermore subject to phytosanitary control at their destination. Disputes under the Law On Plant Quarantine are to be settled under the provisions of the Laws of Kazakhstan (article 15). Article 13(1) prohibits disclosure of information provided by the importer without his consent. Article 13(2) stipulates that quarantine measures of other countries shall be recognized provided they ensure the appropriate level of phytosanitary protection applied in Kazakhstan. Chapter 6 deals with international cooperation and states in particular that whenever an international treaty ratified by the Republic of Kazakhstan contains any norms that are different from the ones specified by the law, the international treaty shall prevail. Kazakhstan is a member of the European Plant Protection Organization and has signed, but not yet ratified the International Plant Protection Convention.

Kazakhstan's plant health regime was drawn up in view of WTO requirements, but at some points it still falls short of providing a comprehensive framework for a phytosanitary regulation conforming to WTO obligations.<sup>130</sup> Like the Law on Veterinary, the Law on Plant Quarantine does spell out the objectives of plant protection action, but it does not incorporate the concepts of necessity and least-trade-restrictiveness required by SPS articles 2(2), 2(3) and 5(6). Article 7(1)(8) of the law states

---

<sup>130</sup> For the following analysis cf. also UNCTAD/WTO (2005).

that quarantine measures shall be based on scientific risk assessment (cf. SPS article 5) taking into account international standards. The latter wording is not precisely similar to SPS article 3 requiring measures to be *based on* international standards, but the first half-sentence uses the term *based on*. Given that SPS article 3 does not require a complete harmonization with international standards either, the provision seems to be sufficiently binding to ensure that WTO requirements are fulfilled. The law could be further improved by elaborating more on the techniques of risk assessment,<sup>131</sup> and by providing for a power to adopt measures even if sufficient scientific information is not available (SPS article 5(7)). Furthermore, while article 7(1)(5) ensures that phytosanitary certification of imported and exported goods is to be based *inter alia* on phytosanitary characteristics of the area, place of origin and destination, the criteria to determine pest- and disease-free areas mentioned in SPS article 6 could be spelt out in more detail. On its face, the law itself avoids any discrimination between plant quarantine objects according to their origin. It could be further improved by adding among the obligation not to discriminate in the application of the law. Finally, the reference to equivalence in article 13(2) is very general, and the rules on border control and phytosanitary certificates make no reference at all to considering equivalent measures in the exporting country. A full implementation of the concept of equivalence would require entering into a process of bilateral consultations to achieve agreements with important trading partners.<sup>132</sup> This could be included among the powers vested in the government and the authorized body according to articles 5 and 6.

To conclude, the Law on Plant Quarantine ensures the implementation of WTO requirements quite comprehensively. The only major deficiency is the lack of reference to the principle of necessity. The law could be further improved by adding detailed provisions risk assessment and an explicit prohibition of discrimination towards imported plant quarantine objects.

### 2.3.3 Animal health and trade in animal and animal products

Issues of animal health are dealt with by the Law No. 339-II on Veterinary of 10 July 2002 implemented by Government Order No. 407 of 28 April 2003 on Rules in the Field of Veterinary and the Decision of the Intergovernmental

---

<sup>131</sup> Cf. also the International Plant Protection Commission's Guidelines on Pest Risk Analysis, IPPC (1996).

<sup>132</sup> Cf. also the International Plant Protection Commission's Guidelines on Equivalence, IPPC (2005).



Council for Cooperation in Veterinary of 5 November 2003 on Rules for Veterinary Surveillance of International and Cross-border Shipments of Animal Products.

*The Law on Veterinary*

The Law on Veterinary lays the foundation for animal health protection in Kazakhstan and is aimed at ensuring veterinary and sanitary safety, the safety of animal products and raw materials of animal origin, veterinary medications, fodder and feeding additives, and safeguard against common animal and human diseases. Veterinary is defined in article 1(3) as specific scientific knowledge and practices aimed at research of animal diseases and alimentary intoxication of animals, methods of their prevention, diagnostics, treatment and elimination, as well as the observance of compliance of products with legal veterinary requirements and the protection of human life and health from anthroozoonoses. According to article 2(2), international treaties ratified by Kazakhstan shall be applied if they contain rules different from the Law on Veterinary. Article 3 establishes basic objectives of state activity in the veterinary domain, Chapter 2 deals with state regulation of veterinary practice in general. Article 4 enumerates the objectives of the national veterinary policy which include: the development veterinary rules and norms based on a scientific approach, and in consideration of objective assessments of the epizootic situation and of international veterinary norms; the achievement of a higher level of veterinary measures as compared to international recommendations, provided measures are based on scientific grounds; and, unreasonable restrictions of traded goods during the implementation of veterinary measures. Normative competencies are attributed to the government (article 5), implementing powers to the authorized state veterinary body and its territorial and local units including border inspection units (articles 6 and 7) and subordinate competencies to the state veterinary organizations (article 11). Article 8 stipulates the authorized body's competencies. Chapter 3 spells out the scope of state veterinary supervision, which includes mandatory inspection of goods at border control points. Chapter 4 enumerates measures to prevent and eliminate animal diseases which include veterinary standards, trade restrictions including quarantine and destruction of goods subject to veterinary control. According to article 29, standards shall be established by the state authorized veterinary body based on research works carried out in accordance with the Law on Veterinary.

Some of the language adopted by the law shows that it was drafted with a view to fulfil WTO obligations. However, further amendments might be necessary to complete this process.<sup>133</sup> Article 29 requires standards to be based on research work. However, it lacks any explicit reference to risk assessment and to available scientific evidence as required by SPS article 5(2), and does not stipulate how to proceed if relevant scientific evidence is insufficient (cf. SPS article 5(7)). Neither the definition under article 1(3) nor the objectives enumerated in article 4(5) include such references. In order to ensure that research work for standards is conducted according to recognized risk assessment methods, it would be advisable to include an explicit reference to risk assessment. It would furthermore be useful to expand on the details risk assessment methodology, e.g. in additional implementing rules.

Article 4(3) of the Kazakhstan Constitution according to which international treaties have a priority over the laws and shall be applied directly, except for cases where it follows from the treaty that for its application it is necessary to issue a law. Article 2(2) of the law gives substantial weight to international treaties,<sup>134</sup> but it does not address the implementation of international standards (SPS article 3(1)), which almost never take the form of a treaty. International standards would appear to be referred to by article 4(5), but the term *international norm* is neither generally recognized nor defined by the law. Furthermore, the wording of article 4(5) requiring the consideration of international norms suggests a much greater flexibility than allowed by article 3(1) of the SPS, which establishes an *obligation* for SPS measures to be *based* on international standards.<sup>135</sup> What is more, article 4(5) states an *aim* of similar importance to achieve a higher level of protection than internationally agreed upon. This goes against the rationale of SPS article 3 - to achieve harmonization to the furthest extent possible. Rather, the law should state an objective and a requirement for state veterinary regulation to base veterinary measures on international standards, and the power to adopt measures beyond what is internationally agreed upon should be explicitly excluded unless measures are based on a risk assessment.<sup>136</sup>

---

<sup>133</sup> UNCTAD/WTO (2005).

<sup>134</sup> Also WTO Document WT/ACC/KAZ/14 of 20 February 1998.

<sup>135</sup> According to the WTO Appellate Body, this means that they must incorporate some, albeit not necessarily all elements of the international standard; cf. Report of the WTO Appellate Body on *EC – Hormones*, WT/DS48/AB/R adopted on 13 February 1998, para. 163.

<sup>136</sup> Amendments envisaged according to UNCTAD/WTO (2005).

The Law on Veterinary does not state that veterinary measures should not go beyond what is necessary to protect animal or human health in line with SPS article 2(2), should be no more trade restrictive than required to achieve the level of protection deemed appropriate (SPS article 5(6)), and should not be a disguised restriction on trade (SPS article 2(3)). It could be argued that the aims and objectives of veterinary activities established in articles 3 and 4 of the Law on Veterinary imply that measures based on the law may be directed exclusively at these aims. But it is one thing to require that measures make some kind of contribution to veterinary purposes, and another to ensure that the least trade-disruptive measure to achieve that purpose is chosen. It follows that the Law on Veterinary does not fully implement SPS article 2(2). This could be remedied by adding an additional provision stipulating explicitly that powers to adopt veterinary measures are limited by the principles laid down in SPS articles 2(2), 2(3) and 5(6).<sup>137</sup> It is advisable to include an explicit reference to all three principles, as in spite of their close linkage, they stress different aspects: article 2(2) refers to necessity in general, article 5(6) focuses on available alternatives,<sup>138</sup> and article 2(3) establishes a further test preventing abuse of regulatory rights provided for by the SPS agreement.<sup>139</sup> The relationship between articles 2(2) and 2(3) can be interpreted similarly to the relationship between the single items and the scope of article XX GATT, which state similar requirements and apply cumulatively.

The Law on Veterinary does not recognize the concept of pest or disease free areas required by SPS article 6. The only provision in the law referring to the area in which animal diseases are disseminated is article 1(27) on the definition of epizootic monitoring. This fails to implement the obligation set out in article 6. To implement WTO obligations towards other members, it will be particularly important to provide for the recognition of pest- and disease-free areas as requested by exporting members, but in order to minimize the impact of veterinary measures on Kazakhstani exports, it is also advisable to establish a sound system of regionalisation within Kazakhstan, in order to be able to limit the scope of other members' measures towards Kazakhstani products.

---

<sup>137</sup> Amendments envisaged according to UNCTAD/WTO (2005).

<sup>138</sup> Cf. e.g. Report of the WTO Appellate Body on *Australia – Salmon*, WT/DS18/AB/R adopted on 6 November 1998, para. 194.

<sup>139</sup> Cf. Report of the WTO Appellate Body Report on *US – Shrimps* WT/DS58/AB/R adopted on 21 November 2001, para. 157.

The Law on Veterinary avoids any textual discrimination towards imported animals and animal products. This is in line with SPS article 2(3). Article 4(7) of the law, which explicitly prohibits unreasonable restrictions on imports and exports on the implementation of veterinary measures is also relevant in this context. In order to ensure that non-discrimination is respected upon adoption of veterinary measures, it could be appropriate to include a general provision prohibiting discrimination in the application of the Law on Veterinary.

*The rules on veterinary border surveillance*

The implementation of veterinary rules on imported and exported animals and animal products is ensured by mandatory inspections undertaken by border veterinary control posts according to article 20 of the Law on Veterinary and Governmental Order No. 407 of 28 April 2003 on Rules for Veterinary Surveillance of International and Cross-border Shipments of Animal Products. According to the rules, imported animals and animal products must conform to Kazakhstani standards, and be accompanied by a veterinary certificate of the country of origin as well as a permit by the state veterinary inspector which notes the veterinary situation in the country of export. Depending on the country of export, the general state veterinary inspector may adopt an order to refuse permits for certain countries and certain animal products in general or on a case-by-case basis.<sup>140</sup> Furthermore, the importer must present a certification by a local veterinary authority at the goods' destination to confirm the intended destination within Kazakhstani territory. This confirmation is issued for a category of goods upon request by the importer within a 15 working days, and the permit for importation of the single batch is issued within further five working days. The border post veterinary inspector checks the documents tally with the products and replaces the veterinary certificate with a domestic certificate. The inspector may take a sample of the goods for inspection in a laboratory, which is carried out within the same working day. The rules establish processing periods for each procedure. Article 20(7) of the Law on Veterinary ensures confidentiality for information disclosed to the veterinary inspectors. According to article 35(2) of the Law on Veterinary, fees may be collected for these procedures. The veterinary inspector's actions are subject to appeal in superior state veterinary control bodies or in a court (article 17(2) of the Law on Veterinary).

---

<sup>140</sup> For an overview of the situation in 2002 cf. Intracen (2002), pp. 15 and 16.

This procedure seems to be broadly in line with the requirements of SPS articles 2–5 and SPS Annex C dealing with control, inspection and approval procedures. The procedures seem to be construed to avoid undue delay; similar controls are effectuated on domestically traded goods (cf. articles 17 and 21 of the Law on Veterinary). Information requirements are in line with internationally applied procedures,<sup>141</sup> which suggests that they are adequate. article 35(2) could be amended to establish that fees should be calculated according to the actual cost of the service, but SPS Annex C does not impose this as an obligation. Conversely, the requirement to produce a confirmation by a local Kazakhstani Veterinary Authority of the destination of an imported good, regardless of the veterinary risk involved, might go beyond what is reasonable and necessary, and therefore might violate SPS Annex C No. 1(d). In fact, the OIE standard does not provide for such a measure.<sup>142</sup>

The Law on Veterinary does not provide for the recognition of equivalent veterinary measures by other WTO members. With regard to imported products, the rules require full compliance of imported products with Kazakhstani standards (No. 5.1) and an evaluation by the Kazakhstani veterinary inspector of the veterinary conditions in the exporting country (No. 5.2). It is assumed that equivalence of the export country's measures is taken into consideration in this evaluation, but it is not clear if any exception to compliance with Kazakhstani rules is made. In view of simplifying import procedures, this might be advisable. However, the current law is not in violation of article 4 of the SPS, which explicitly recognizes that equivalence is subject to bilateral or multilateral agreements between concerned members.<sup>143</sup> Kazakhstan has engaged in negotiations on agreements in this sphere: the Agreement on the Cooperation of CIS Member States in the Field of Veterinary of 1994 stipulates that old USSR rules on veterinary shall continue to apply between the parties provided they do not directly contradict more recent legislation. Under the Kazakhstani-Turkish Convention concerning the Collaboration in the Field of Animal Health 1995 the establishment of joint import, export and transit requirements was agreed to. In order to fulfil its obligation under SPS article 4, Kazakhstan might engage in further negotiations to implement these agreements and to initiate negotiations with other important animal trade partners. With regard to exported products,

---

<sup>141</sup> Cf. OIE Terrestrial Animal Health Code 2005, article 1(4)(4).

<sup>142</sup> OIE Terrestrial Animal Health Code 2005, article 1.4.4; cf. also WTO Document WT/ACC/KAZ/22, Question 54.

<sup>143</sup> Cf. also Decision of the SPS Committee on the implementation of article 4, WTO Document G/SPS/19/Rev. 2 of 23 July 2004.

Kazakhstan succeeded to demonstrate that its veterinary supervision on fisheries products is equivalent to EU measures in 2002, which enabled it to export fisheries products for human consumption to EU countries.<sup>144</sup> It might make further efforts to achieve the same for meat products.

In brief, Kazakhstani veterinary legislation implements many requirements laid down in the SPS Agreement, but it fails to fully implement the SPS provisions on risk assessment, necessity, and international standards. Furthermore, the obligation to provide a confirmation of a good's destination by the local veterinary authority appears to be in violation of the SPS Agreement. Other provisions could be expanded or clarified.

## 2.4 The TBT Agreement

General technical requirements for food and agricultural products are laid down in Kazakhstan's food and agricultural standards, which are based to a large extent on former USSR standards. According to the National Agricultural Programme 2003–2005, 72 national standards and 500 inter-state standards based on former USSR documents exist. Upon WTO accession, these standards must respect the TBT Agreement, which applies to standards not primarily directed at the protection of human, animal or plant health from diseases. Furthermore, enhanced market access for Kazakhstani exports requires that they meet internationally accepted standards. In order to meet this challenge, Kazakhstan adopted a major programme to review existing standards.<sup>145</sup>

Standardization is governed by the Law No. 603-II on Technical Regulation of 9 November 2004. The law, which replaces the Laws on Standardization and on Certification, establishes the state system of technical regulation aimed at ensuring the safety of products, services and processes. Article 1(4)(6) clarifies that this excludes sanitary and phytosanitary measures. Article 4 establishes basic objectives and principles of technical regulation. The latter include equality of requirements to domestic and

---

<sup>144</sup> European Commission decision (2002/863/EC) of 29 October 2002 amending Decision 97/296/EC drawing up the list of third countries from which the import of fishery products is authorized for human consumption, with respect to Greenland, New Caledonia, Costa Rica, Papua New Guinea, Suriname, Switzerland, Mozambique, Honduras, Kazakhstan and the Federal Republic of Yugoslavia (OJ L301, 5 November 2002, p. 53); Commission decision (2002/862/EC) of 29 October 2002 laying down specific conditions for imports of fishery products from Kazakhstan (OJ L301, 5 November 2002, p. 48).

<sup>145</sup> Cf. National Agricultural Programme 2003–2005, No. 4.6.

imported products, priority use of achievements of science and technology as well as international and regional standards, and accessibility of information. The law distinguishes between mandatory normative legal acts on technical regulation adopted by the state in chapter 2 and voluntary standards adopted by the authorized body, the Committee on Technical Regulation and Metrology in chapter 3. Normative legal acts, which include acts on the safety of foodstuffs, shall be established irrespective of a product's country of origin, with the exception of SPS measures, which instead shall be based on scientifically substantiated risk. Under article 17, legal acts shall be established only if they can influence the achievement of the law's aims and shall not create obstacles for entrepreneurial activities greater than necessary to achieve these aims. Article 18 establishes further requirements. Voluntary standards are developed by the committee on the basis of a state programme of standardization.<sup>146</sup> According to article 21(4), norms and standards of foreign states and international organizations can be used in full or in part as the basis for Kazakhstani state standards, unless they are ineffective or inappropriate to achieve the law's aims. According to article 21(5), state standards can establish necessary requirements for the safety of products, services and processes.

The Law on Technical Regulation was drafted closely to the provisions under the TBT Agreement. The objectives and principles refer to the core concepts under the Agreement, that is, the principles of non-discrimination (TBT article 2(1) and Annex 3 lit. D), necessity (TBT article 2(2) and Annex 3 lit. E) and international harmonization (TBT article 2(4)– 2(6) and Annex 3 lit. F-G). Article 17 on normative legal acts on technical regulation deals exhaustively with the principles of necessity and non-discrimination, but it does not mention international standards. Article 21 on standards implements TBT article 2(4) comprehensively, but reference to necessity and non-discrimination is only rudimentary. However, all basic concepts of the TBT-Agreement are among the general principles laid down in article 2 of the law, which underlines their importance. Furthermore, there are no provisions contradicting these principles. For these reasons, it seems that they are sufficiently implemented by the Law on Technical Regulation.

Assessment of a products' conformity to laws and standards is dealt with in chapters 4 and 5 of the Law on Technical Regulation. According to articles 27 and 32, the government may subject certain goods to mandatory

---

<sup>146</sup> Cf. Programme on the Development of a National System of Standardization and Certification of the Republic Kazakhstan for 2004–2006.

assessment of their conformity to Kazakhstani laws and standards. This is confirmed by article 6 of the Law on Food, and implemented by Governmental Order of 29 November 2000 No. 1787 on Product Conformity Control. In the domain of food and agricultural products, mandatory certification applies to milk products, flour, coffee, tea, fats and many prepared foodstuffs and beverages. Other products are subject to voluntary certification. Certificates of conformity are issued by accredited conformity assurance bodies. This includes regional state bodies, testing laboratories, state certification bodies of other CIS-countries, and accredited foreign certification bodies.<sup>147</sup> Article 12 states the rights and responsibilities of conformity assessment bodies, which must ensure adequate information on procedures, ensure confidentiality of information, and ensure non-discrimination. Upon importation, importers must present a declaration of conformity for their products on the basis of the certification stipulated in article 31 of the law and article 382(5)(9) of the Customs Code). According to article 33, certificates of conformity of other states are recognized in accordance with international agreements; these are the Protocol of Cooperation with the Turkish Institute of Standards of 6 March 1996 and the Agreement with China on cooperation to provide quality and mutual inspection of import-export goods signed 5 July 1996. The Protocol of Cooperation with Turkey governs information and technical exchange and exchange of standards documents; conducting training programmes; the establishment of testing laboratory in Kazakhstan; implementing a packaging project; and organizing joint cultural and sports events. The Agreement with China stipulates mainly the following: working toward mutual recognition of test laboratories and certification bodies and the establishment of methods of inspection. Chapter 6 deals with the enforcement of mandatory technical regulations which comes under the responsibility of the recognized body and other authorities. According to article 42, enforcement actions are subject to judicial review.

The law's provisions on conformity assessment provide a framework for conformity assessment bodies to implement the requirements of TBT articles 5 and 6. The duties it establishes for conformity assessment bodies also serve to implement TBT article 8, according to which members must take such reasonable measures available to ensure the respect of articles 5 and 6 by non-governmental conformity assessment bodies. Finally, Kazakhstan's negotiations with some states show that it implements its

---

<sup>147</sup> WTO Document WT/ACC/KAZ/6/Add. 2 of 17 February 1999, Question 92.



obligation to work towards mutual recognition of conformity assessment in article 9. TBT article 5(4) recognizes that conformity assessment may be mandatory. However, it may be questioned if Kazakhstan's extensive requirements for mandatory certification impose unnecessary burdens on trade and therefore violate TBT article 5(1)(2).

In the area of food quality and safety, technical regulations on packaging and labelling are of particular importance. According to article 32 of the Law on Trade and Government Order No 1274 of 31 August 1999, labels must contain trade marks, information on the origin and composition, the nourishment value of food products, the date of production, the period of storage and fitness - applicable standards in Kazakhstani and Russian. Article 14(3) of the Food Law makes more specific requirements for food labelling. It states that foodstuffs labels must provide information on the food nourishment value, designation and conditions of application, methods and conditions of use (for concentrates and semi-finished products), conditions and period of storage, production and packaging date, composition including food and biologically active additives and genetically modified substances. It further adds that foodstuffs must be packaged so as to ensure their quality and safety and the retention of vitamins and minerals to the extent provided for by national legislation.

To the extent that food packaging and labelling requirements are directly related to food safety, they are governed by the SPS-Agreement (SPS Annex A No. 1), in other cases they come under the TBT-Agreement (TBT Annex 1, No. 1, article 1(5)).<sup>148</sup> While requirements on food additives, contaminants and toxical substances are unambiguously aimed at protecting human health, this is less clear for other ones. In any way, both Agreements require packaging and labelling requirements to be based on international standards and not to go beyond what it is necessary to achieve a legitimate objective. International standards exist for the labelling of pre-packaged food and for nutrition labelling.<sup>149</sup> The information required by Kazakhstani legislation broadly corresponds to the information required by these

---

<sup>148</sup> Some authors claim that labelling requirements dealing with process and production methods fall outside the scope of the TBT-Agreement, see Marceau, G. and Trachtman, J.P. 2002. The Technical Barriers to Trade Agreement, the Sanitary and Phytosanitary Measures Agreement, and the General Agreement on Tariffs and Trade - A Map of the World Trade Organization Law of Domestic Regulation of Goods. *Journal of World Trade* (36)5: 876-7.

<sup>149</sup> Codex General Standard for the Labelling of Prepackaged Foods, CODEX STAN 1-1985 (Rev. 1 - 1991); Codex Guidelines on Nutrition Labelling CAC/GL 2-1985 (Rev. 1 - 1993).

standards. Although the international standards are much more specific, the Food Law merely provides for minimum requirements and does not prevent food operators to supply food labelled according to Codex standards. Furthermore, implementing legislation provided for in article 14(3) of the Food Law may enact more detailed provisions and Codex standards for single products. Paragraph 8.2 of the Codex General Standard provides for the opportunity to make specific language requirements for labels if otherwise they are not acceptable to consumers. As the Kazakhstani population consists of a considerable amount of both Russian and Kazakh native speakers, the dual language labelling requirements are necessary to provide both of them with acceptable information and therefore is in line with the Codex standard. Problems may arise with regard to some notions like macro- and microcells, which do not appear to correspond to current international terminology. Implementation rules should specify to which of the information required according to the Codex standard this relates. Finally, the requirements on biologically active food additives and genetically modified substances fall squarely within the current discussion on GMO labelling. There has not yet been any authoritative decision on the issues, and while some authors claim that such requirements conform to WTO law, others take the opposite position.<sup>150</sup> With regard to non-packaged food, the law is unclear on its labelling obligations. It is assumed that they do not apply, but this could be clarified.

It can be concluded that the Law on Technical Regulation, which is the basis for food and agricultural standards, and the Food Law provisions on packaging and labelling are mostly in line with requirements under the TBT Agreement. The Law on Technical Regulation is a good basis on which food and agricultural standards should progressively be reviewed and adapted to internationally accepted standards. An issue of compatibility with the TBT Agreement arises from the extensive mandatory certification requirements for agricultural goods and foodstuffs.

## 2.5 General observations

Kazakhstan's legislation on animal and plant health, food safety and food marketing incorporates many of the principles stipulated by WTO law, but needs further elaboration in order to create a comprehensive framework ensuring implementation of all requirements to be applied upon accession.

---

<sup>150</sup> See Covelli, N. and Hohots, V. 2003. The health regulation of biotech foods under the WTO Agreements. *Journal of International Economic Law*. 6(4): 773–795.

Provisions on the principles of necessity and least-trade-restrictiveness under all SPS laws need to be revisited; other major deficiencies include language on risk assessment and international standards. Furthermore, some restrictions imposed upon imported goods, like the requirements on veterinary authority certificates and on mandatory certification seem to go beyond what WTO law permits.

There are several options for further development of the examined laws. The first is to amend the law's provisions on objectives, but this has the disadvantage that statements of objectives are not the strongest way to ensure limitations to public authorities' powers. The Law on Technical Regulation opted to include WTO principles in a single provision on regulatory instruments (cf. article 17), but this might be very burdensome for other laws requiring a mention of a host of different instruments. A sensible option has been chosen in the Law on Plant Quarantine, which includes a separate article on principles. Another – possibly additional - option would be to amend provisions on competencies of the authorized bodies and other authorities; this might be the best way to ensure that principles are actually taken into account by these bodies.

Along with refinement of the legal framework for sanitary and phytosanitary action examined in this section, implementation of sanitary and phytosanitary measures based on science and international standards will also require that authorities make use of up-to-date technical equipment and information, which they lack more often than not.<sup>151</sup>

#### *Regulation and transparency in standards agreements*

For all regulations and standards coming under the SPS and the TBT Agreement, WTO members must ensure transparency. Members must provide information on existing measures and technical regulations to other members and establish an enquiry point for that purpose.<sup>152</sup> Draft measures and regulations which deviate from international standards shall be forwarded to other members through the WTO Secretariat, other members shall be provided the opportunity to comment on them.<sup>153</sup>

---

<sup>151</sup> See National Agricultural Programme 2003-05, No. 4.6.

<sup>152</sup> SPS Annex B, paras. 3 and 10; TBT article 10/Annex 3 para. O.

<sup>153</sup> SPS Annex B, para. 5 and 6; TBT article 2.9-2.11, Annex 3 paras. L-P.

Articles 7(8), 7(10) and 10 of the Law on Technical Regulation provide for an information centre, which was established by Governmental Order of 11 July 2005 No. 718 on Rules for the creation and work of an information centre on technical barriers to trade, and sanitary and phytosanitary measures at the Committee for Standardization and Meteorology. According to No. 3 of the Order, the centre's basic functions are to interact with the WTO Secretariat and other members to provide documents and information about existing and future normative legal acts. To this end, the information centre may request from the interested parties information and materials concerning technical regulation and SPS-measures. Furthermore, the Laws on Veterinary and on Plant Quarantine attribute to the relevant authorized bodies the task to provide interested parties with information on veterinary and plant quarantine measures respectively.<sup>154</sup> The Sanitary-epidemiological Law provides operators and individuals with a right to be timely and truly informed on the sanitary-epidemiological situation. Laws and governmental orders are published on the websites of the Ministry of Agriculture and the Ministry of Health,<sup>155</sup> approved standards (including conformity assessment procedures) are published by the Committee on Standardization and Meteorology. On the whole, the obligation to provide information about existing measures and regulations seems to be implemented comprehensively by these provisions.

With regard to transparency and participation in the adoption of new SPS and TBT measures, article 19 of the Law on Technical Regulation establishes a procedure for the drafting of normative legal acts on technical regulation. The intention to initiate such a procedure must be published one month in advance. If the regulation deviates from international standards or affects the conditions of import, drafts are published at an early stage. The responsible body must organize a public discussion with a duration of no less than 60 days and take into account any comments made by interested parties or third countries. Article 19 establishes a coherent framework for implementing requirements to involve other WTO members in the process of drafting and adopting new regulations. However, it is limited to technical regulation, which according to the definition excludes SPS-measures. While the law is not unambiguous on this point (other articles deal with SPS-measures), article 19 does not provide for a specific definition, nor does it mention SPS-measures. It follows that the general definition must apply. The question arises therefore, whether the sectoral laws on veterinary, plant

---

<sup>154</sup> See article 8(12) of the Law on Veterinary and article 7(2) of the Law on Plant Quarantine.

<sup>155</sup> Available at [www.minagri.kz](http://www.minagri.kz) and [www.dari.kz](http://www.dari.kz).

quarantine and sanitary-epidemiological measures are sufficient to ensure that obligations on prior notification of SPS measures are met. The laws are silent on this issue. However, the tasks of the information centre refer to providing information on future laws. The activities of the centre can therefore ensure that other members are informed about planned SPS-measures. Conversely, the order does not ensure that competent authorities allow for a reasonable period of time for the consultation of other members and to take their comments into account. While general administrative and legislative procedures might ensure this, it would be useful to include provisions similar to article 19 of the Law on Technical Regulation to the Laws on Veterinary, on Plant Quarantine and on Sanitary-epidemiological Welfare of Population.

## **2.6. Intellectual property rights and agriculture**

A state's regulatory system for plant varieties has major implications for the agricultural sector. Protection of plant varieties may foster innovation and be considered a human right. At the same time, farmers' right to save and reuse seeds may be an important cost factor for agricultural production. Furthermore, easy access to genetic resources can stimulate research activities. In its preambular language, the TRIPS Agreement calls on all WTO members to provide "effective and adequate" intellectual property rights (IPRs), and to ensure that IPRs do not amount to trade restrictions in themselves. TRIPS article 27, which establishes an obligation for members to provide for patents on inventions on a non-discriminatory basis, states that members may exclude from patentability plants and animals and essentially biological processes for the production of plants or animals, if they protect plant varieties either by patents or by an effective *sui generis* system or by any combination thereof. Members can therefore choose how to protect plant varieties, provided that protection is effective. It can be derived from the context and purpose of the *TRIPS Agreement*, that a *sui generis* system is required, at the very least, to be an IPR, that is a legally enforceable right to exclude others from certain acts in relation to the protected plant variety, or to obtain remuneration from them; it must permit action against any act of infringement, and comply with the principles of National Treatment and Most-Favoured-Nation.<sup>156</sup> The TRIPS Agreement does not make reference to any specific system, but the main international system of protection of plant varieties is the International Convention for the Protection of New

---

<sup>156</sup> Leskien (1997), p. 27.

Varieties of Plants (UPOV). Some observers conclude that adherence to UPOV is no guarantee to enact an effective system of protection under TRIPS.<sup>157</sup> But considering that UPOV continues to be the main international system of protection of plant varieties, which has been considerably strengthened in 1991, it seems safe to assume that implementation of UPOV 1991 would also ensure conformance to TRIPS article 27(3)(b).<sup>158</sup>

Kazakhstan protects plant varieties under Law No. 422-I on Selection Achievements of 1999. Article 2 defines the "author of a selection achievement" (breeder) "as a natural person who bred or discovered and developed a variety of breed." It also defines a "selection achievement" as a "new variety or animal breed resulting from the creative activity of man for which a patent has been granted. The law creates a state register for all protected plant varieties. Article 3 states that the legal protection available for plant varieties (and all selection achievements) is patents. The term of patents is 25 years from the date of filing. For animal breeds, the patent shall last for 30 years, and for grapevines, ornamental, fruit and forest trees 35 years. Article 4 gives the basic criteria for patentability as being novelty, distinctness, uniformity and stability. Article 5 deals with patent applications; natural persons residing abroad and foreign legal entities are required to act through registered patent agents. Title III lays out the application procedure, while Title IV deals with the author's and the patent owner's rights, where the patent owner is either the author, his successors, or a person designated by him. Article 14 defines the patent owner's rights, which include exclusive rights to use a selection achievement for production or reproduction, conditioning of seeds for the purpose of propagation, offering for sale, selling or other marketing, exporting or importing as well as stocking for any of these purposes. Protection is extended to seeds of varieties, or pedigree material of breeds which are essentially derived from the selection achievement, seeds which are not clearly distinguishable from the selection achievement (propagating material), seeds distinguishable only by variations maintaining the genotype of the initial variety, and seeds of varieties or pedigree material of breeds whose reproduction requires the repeated use of the selection achievement. Article 17 states that any act with private and non-commercial or experimental purposes, and the use of the selection achievement as an initial material for the purpose of breeding other variety or breed except for the cases

---

<sup>157</sup> Id.

<sup>158</sup> Options for countries enumerated in FAO. 2004. *Food and agricultural indicators – Kazakhstan*, p. 70 (available at [www.fao.org](http://www.fao.org)) (hereafter FAO (2004)).

stated in article 14.3 do not infringe the patent-owner's right. Title VI deals with the patent's invalidation, cancellation and expiry.

Through the Law on Selection Achievements, Kazakhstan opted for a system of patent protection over plant varieties. Although the law does not explicitly refer to non-discrimination, it does not stipulate different conditions for protection for domestic or foreign owners, with one exception: application fees used to be higher for foreign compared to domestic applicants. However, Kazakhstan has undertaken to phase out these differences.<sup>159</sup> The conditions for protection stipulated in the law correspond to internationally recognized standards for plant variety protection (cf. UPOV article 5), the term of protection exceeds the term provided for in TRIPS article 33 (20 years), and the scope of protection and the remedies available conform to patent law standards. The law excludes plant varieties from patentability under certain circumstances, but these exceptions are narrow, and it would not appear that they are such as to make plant varieties ineffective in the sense of TRIPS article 27(3)(b). The wording of the non-commercial, research and breeders exceptions is essentially derived from UPOV 1991. In fact, even though Kazakhstan is not a member of UPOV, the UPOV Council held in 2000 that the Law on Selection Achievements is consistent with the UPOV Convention.<sup>160</sup>

Furthermore, in article 42 of the 1999 EU-Kazakhstan Partnership and Cooperation Agreement, Kazakhstan undertakes to join UPOV and ratify the UPOV Convention of 1991. In 2003, Kazakhstan indicated an interest in joining UPOV at a meeting of government officials in Almaty.<sup>161</sup> It would seem that regarding the plant varieties protection obligations in the TRIPS Agreement, Kazakhstan is in compliance with WTO requirements. In a related issue, Kazakhstan could make sure that plant varieties protection takes into account concerns of access to genetic resources intrinsically linked to plant variety protection. Currently, its legislation does not recognize a farmers' right to save, re-use and share seeds. While this might not be an issue for the many Kazakhstani household subsistence farms, which are arguably covered by the exception for non-commercial use of plant varieties

---

<sup>159</sup> WTO Documents WT/ACC/KAZ/10 of 25 July 1997 and WT/ACC/KAZ/11 of 5 August 1997.

<sup>160</sup> Thirty-Fourth Ordinary Session, Geneva, 26 October 2000, Document No. C/34/3.

<sup>161</sup> UPOV Council, Report on activities during the first nine months of 2003, prepared by the Office of the Union, Document C/37/3 of 9 October 2003.

in the Law on Selection Achievements,<sup>162</sup> it might be of relevance to the many medium-size farms created during privatization of agricultural land in the 1990s. Other concerns would be access to genetic resources and benefit-sharing. The Convention on Biodiversity, to which Kazakhstan is a party, requires state parties to apply the principles of prior informed consent and equitable benefit sharing (article 15).<sup>163</sup> The FAO International Treaty on Plant Genetic Resources for Food and Agriculture establishes a multilateral system of access and benefit sharing for genetic resources, which covers a substantial amount of genetic resources relevant to food safety and interdependence, to which facilitated access for the purposes of research, breeding and training for food and agriculture is provided, on the condition that recipients do not claim any intellectual property or other rights that limit the facilitated access to the plant genetic resources for food and agriculture, or their genetic parts or components, in the form received from the Multilateral System (article 12). Kazakhstan might decide to accede to the Plant Genetic Resources Treaty in order to contribute to the access and benefit sharing of genetic resources, in which case the Law on Selection Achievement should be amended to provide for a relevant exception.

### III. CONCLUSION

This paper has shown that there is a broad variety of legal issues in the field of agriculture arising from Kazakhstan's accession to the WTO. With regard to general trade issues relevant to agriculture, Kazakhstan has made considerable steps towards lowering customs tariffs and fulfilling WTO requirements. Among the issues still to be resolved are the alcohol import licensing scheme, the status of the customs union with several CIS-states including Russia, and some details of customs procedure, like conditional release of goods. Kazakhstan's legislation on animal and plant health, food safety and food marketing incorporates many of the principles stipulated by WTO law, but needs further elaboration in order to create a comprehensive framework ensuring implementation of all requirements to be applied upon accession. Provisions on the principles of necessity and least-trade-restrictiveness under all sanitary and phytosanitary laws need to be revisited; other major deficiencies include language on risk assessment and international standards. Some measures restricting trade, such as requirements of veterinary authority certificates and mandatory certification also seem to go beyond what WTO law requires. Legislation on technical

---

<sup>162</sup> For the relevant provision in UPOV 1991 see FAO (2004), p. 28.

<sup>163</sup> See Bonn Guidelines on Access and Benefit Sharing, para. 16.



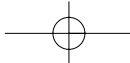
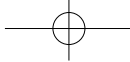
standards and application of transparency measures appear to be implemented nearly comprehensively.

State support to agricultural production in Kazakhstan is still low by international standards, but Kazakhstan's agricultural policy includes a broad variety of support programmes to farmers subject to reduction under the WTO Agreement on Agriculture. This does not apply to most rural development measures, support to state agricultural administration, and to veterinary and phytosanitary services; other subsidies could be re-designed so as to meet conditions for exemption. Transport subsidies will probably qualify as export subsidies and will have to be eliminated sooner or later. The activities of the State Food Contract Corporation and Malonimderi Corporation also include domestic support subject to reduction, and raise questions of incompatibility with GATT article XVII on State Trading Enterprises. While the extent to which domestic support will have to be reduced depends on the outcome of accession negotiations, it is important to consider the entire range of support measures when drawing up commitments, in order to engage in realistic commitments.

Finally, Kazakhstani legislation on plant varieties largely complies with WTO requirements. As Kazakhstan intends to boost agricultural export and to increase self sufficiency in higher value agricultural goods and foodstuffs, WTO requirements and international standards are likely to be a continuous determinant of Kazakhstani agricultural policies. While the ultimate aim will usually be the implementation of an environment which is non-discriminatory and propitious to economic activities in the agricultural sector, a sound legal framework can contribute in various ways to achieve that objective.

## MAIN REFERENCES

- FAO.** 2002. *Intellectual property rights in plant varieties - International legal regimes and policy options for national governments* by Helfer, L., FAO Legislative Study No. 85, Rome.
- Hekala, W. & Creskoff, S.** 2005. *Kazakhstan's new Customs Code heralds a new era of openness in lawmaking and modern customs administration* (available at [www.bisnis.doc.gov](http://www.bisnis.doc.gov)).
- Hoekman, B. & Kostecki, M.** 2001. *The Political Economy of the World Trading System – The WTO and Beyond*. Oxford, Oxford University Press 2nd edition.
- International Trade Center.** 2002. *Supply and Demand Survey on Food and Beverages*. Kazakhstan Economic Cooperation Organization. Almaty.
- Langhammer, R. & Luecke, M.** 1999. *WTO Accession Issues*. Kiel Working Paper No. 905. Kiel.
- Meng, E., Longmire, J. & Moldashev, A.** 2000. Kazakhstan's wheat system: priorities, constraints, and future prospects. *Food Policy* (25).
- Suleimenov, M. & Osman, P.** 2000. Trends in feed, livestock production, and rangelands during the transition period in three Central Asian countries. *Food Policy* (25).
- Voronina, S.** 2004. 2004. *Kazakhstan agribusiness overview* - November 2004. (available at [www.bisnis.doc.gov](http://www.bisnis.doc.gov)).



## KENYA CASE STUDY\*

### *Contents*

I.	INTRODUCTION	325
1.1.	The agricultural sector	325
1.2.	Trade policy reforms	327
1.3.	Kenya's trade arrangements	329
1.4.	Kenya's accession to and participation in the WTO	332
1.5.	Linkage between legal and policy reform	333
II.	LEGAL AND INSTITUTIONAL FRAMEWORK	333
2.1.	GATT and related concepts	333
2.1.1.	Tariffs, levies and other charges	333
2.1.2.	Customs valuation	338
2.1.3.	Anti-dumping, subsidies and countervailing duties	340
2.1.4.	State Trading Enterprises	343
2.2.	The AoA	346
2.2.1.	Market access	346
2.2.2.	Export competition	348
2.2.3.	Domestic support measures	349
2.2.4.	The Marrakesh Decision	352
2.3.	The SPS Agreement	351
2.3.1.	Food safety and trade in food products	359
2.3.2.	Plant health and trade in plant and plant products	361
2.3.3.	Animal health and trade in animal and animal products	365
2.4.	Intellectual property rights and agriculture	371
III.	CONCLUSION	376
	MAIN REFERENCES	379

---

\* This chapter was prepared by Ambra Gobena.



## I. INTRODUCTION

This chapter seeks to assess how far Kenya has adhered to its commitments to WTO disciplines through an analysis of the legal and institutional reforms in the country. It begins with an overview of Kenyan trade policy, and identifies trade arrangements that Kenya is a party to. Next, an analysis of the law and the institutions that enforce the regulations helps determine whether Kenya has attempted to bring itself in line with its commitments and how far it has succeeded in so doing. The areas examined first are GATT-related principles such as tariff measures, customs valuation, anti-dumping, subsidies and countervailing measures, and state trading enterprises. Subsequently, Kenyan laws are analysed with reference to the AoA and SPS Agreements, together with observations on the institutions responsible for the enforcement of those laws. Finally, the intellectual property rights system in the agricultural context is explored with reference to TRIPS Agreement and article 27(3)(b).

### 1.1. The agricultural sector

The agricultural sector is the foremost contributor to Kenya's economy and is considered the primary source of the country's economic growth, employment and export earnings. Seventy-five percent of the Kenyan labour force is dependent on this sector for their livelihood.<sup>1</sup> Empirical research suggests that a 1 percent increase in agricultural Gross Domestic Product (GDP) results in a corresponding 1.6 percent augmentation in national GDP.<sup>2</sup> The products which generate agricultural revenue are mainly tea, coffee and horticultural products (see Table 1.1.a); but the following products also contribute substantially: cereals (such as maize, wheat, and barley), sisal, pyrethrum, cashew nuts, sugar cane, cotton, pineapples, tobacco, fish, livestock and livestock products (hides, skin and honey).<sup>3</sup>

---

<sup>1</sup> ADB. 2005. *Kenya: Country strategy paper 2005 – 2007*. African Development Bank Study – Country Operations Department (hereafter African Development Bank Study (2005)).

<sup>2</sup> Kimenyi, M.S. 2002. *Agriculture, economic growth and poverty reduction*. Occasional Paper No. 3. Kenya Institute for Public Policy Research and Analysis, Nairobi.

<sup>3</sup> Nyoro, J.K. 2002. *Agricultural and Rural Growth in Kenya*. Tegemeo Institute of Agricultural Policy and Development, Egerton University, Kenya. p. 17 (hereafter Nyoro, 2002).

The export sector contributes to 30 percent of the country's GDP,<sup>4</sup> and agricultural exports constitute 60 percent of that figure.<sup>5</sup> Resulting in part from the private sector participation in horticulture, this area has been one of the few to see a significant increase in its contribution to the national GDP figure (US\$180 million yearly for Kenya with flowers contributing 53 percent), whereas the other major crops such as coffee have decreased in export earnings and employment creation.

**Table 1.1.a Value of selected exports, 2000–2005 (Ksh billion)**

ITEM	2000	2001	2002	2003	2004	2005
tea	35.20	34.49	34.38	33.01	36.07	42.29
horticulture	21.22	19.85	28.33	36.49	39.54	44.56
coffee	11.70	7.46	6.54	6.29	6.94	9.70
fish and fish preparations	2.95	3.86	4.21	4.01	4.18	4.61

*Source: CBS; Economic Survey, 2006 as taken from Export Promotion Council (EPC) website<sup>6</sup>*

Although at present the fisheries industry brings in less revenue than other sub-sectors, the government has recognized the potential of this export and seeks to support its expansion. From an annual production of 180 000 tons of combined marine and fresh water fish and fish products, 120 000 tons goes to fish processing establishments.<sup>7</sup> The latter is then responsible for the export of 18 000 tons of fish and fish products which earns the country nearly US\$55 000 000<sup>8</sup> – 92 percent of which is from Lake Victoria.

The foregoing facts underscore the fact that because the agricultural sector is a primary contributor to GDP and an important element of economic growth, international rules and standards governing trade will therefore have important ramifications on Kenyan imports and exports. Set in this context, this study sheds light on the influence of the WTO agreements on agricultural trade policy in Kenya.

<sup>4</sup> Kenya Export Promotion Council Web site. See [www.epckkenya.org](http://www.epckkenya.org).

<sup>5</sup> Nyoro, 2002, p. 17.

<sup>6</sup> Export promotion council Web site: [www.epckkenya.org](http://www.epckkenya.org).

<sup>7</sup> Abila, R. 2003. Food safety in food security and food trade case study: Kenyan fish exports. 2020 *Focus* 10, Brief 8/17. IFPRI. Washington D.C. (hereafter Abila, 2003).

<sup>8</sup> Ibid.

## 1.2 Trade policy reform

Generally, trade policy reform is recognized as being politically and practically problematic, entailing "often painful short-term adjustments, reshuffling resources between winners and losers, e.g. between tradable and non-tradable sectors, urban and rural areas, domestic and foreign investors, and between ethnic groups".<sup>9</sup> The Kenyan trade setting involves a high number of stakeholder groups representing many – sometimes conflicting – interests. In this context, international treaties can play a role in bolstering policy changes and in providing legitimacy for measures that may not be popular among local agricultural producer groups.<sup>10</sup>

It was the weak management of agricultural institutions (largely dominated by government parastatals) and the underperformance in trade of major agricultural commodities that highlighted the need for market reform and liberalization. The restructuring that followed enabled agricultural prices to be more reflective of market forces and tariffs, instead of monopolistic prices and marketing dictated by agricultural boards.<sup>11</sup> Other reforms included the removal of import licensing and foreign exchange controls, price decontrols, reforms of investment incentives, and financial sector reforms.<sup>12</sup>

However, the success of the transition from public to private was tempered by ineffective coordination with other cross-cutting sectors; the abrupt replacement of private for public entities and the latter's inability to step into the government's role; widespread weak institutional capacity; and the disparity between the new policies and the legal framework in place.<sup>13</sup> Local farmers faced fluctuating and volatile prices and increased competition from external industries, as well as from subsidized products; also, the intervention of the numerous commodity boards in the markets did not always result

---

<sup>9</sup> Sally, R. 2002. *Globalisation, Governance and Trade Policy: The WTO in Perspective*, p. 79. In Schüller, Thieme, and Baer eds, *Ordnungsprobleme der Weltwirtschaft*. Schriften zu Ordnungsfragen der Wirtschaft. Volume 71. Lucius & Lucius.

<sup>10</sup> Ibid, p. 79.

<sup>11</sup> FAO. 2000. *Agriculture, trade and food security issues and options in the WTO negotiations from the perspective of developing countries*. Volume II Country Case Studies. FAO Commodities and Trade Division. FAO. Rome (hereafter FAO. 2000).

<sup>12</sup> WTO. 1999a. *Report by the Government WT/TPR/G/64*, Trade Policy Review Kenya.

<sup>13</sup> Nyoro, 2002, p. 17.



favourably for producers.<sup>14</sup> This uncertainty and confusion was particularly evident in the 1994 liberalization of maize marketing: import bans and import tariffs were in place even though the National Cereals and Produce Board (NCPB) continued buying maize at above market prices, resulting in a distortion of grain markets.<sup>15</sup>

The situation was compounded by inadequate institutional structures and inadequate support to farmers, for example through credit or extension services. Further, agricultural legislation was too copious, inconsistent and even contradictory as policy and market reforms were not buttressed by corresponding amendments to the laws that enforced them. The new liberal production, processing and marketing environment was given effect through the old laws which housed a highly regulatory role for the government. Despite this seemingly bleak picture, the outcome has not been all negative, and it should be borne in mind that system overhauls need time to stabilize. The reforms have had some positive impact in sales figures in several industries. Kenya's coffee exports, which were previously limited by an export quota system, had initially increased after this system was replaced in July 1989 and when control over marketing and production moved away from the Coffee Board of Kenya in October 1992; although it should be noted that the sector has recently been in decline.<sup>16</sup> Also, Kenya has one of the most developed dairy industries in Sub-Saharan Africa, with a milk production of approximately 2 billion litres per annum.<sup>17</sup>

Under the policy document entitled "Strategy for Revitalizing Agriculture (SRA) 2004–14" the government envisions changes to the legal and regulatory framework, and identifies areas to be targeted such as research and technology development, efficient extension services, lowering taxes, and devising an agricultural credit and inputs system.<sup>18</sup> This document identifies 131 pieces of legislation which govern the agricultural sector - a figure which includes statutes establishing the supporting regulatory institutions such as the commodity boards and parastatals.

---

<sup>14</sup> Ibid, pp. 38 and 39.

<sup>15</sup> Ibid, p. 17.

<sup>16</sup> Uwechue, R. 1996. *Africa Today*, p. 867. Third edition: Africa Books.

<sup>17</sup> Ibid.

<sup>18</sup> African Development Bank Study (2005).

### 1.3 Kenya's trade arrangements

Kenya is a signatory to several regional economic cooperation arrangements which impact trade and its WTO obligations. The most important of these is the East African Community (EAC) with Uganda and Tanzania which seeks to establish a customs union and then progressively a common market for the East African region. The legal framework for the EAC consists of the Treaty for the Establishment of the EAC, the Protocol on the Establishment of the EAC Customs Union (hereafter the EAC Customs Union Protocol or Protocol) and the EAC Customs Management Act 2004. This legal structure governs trade areas such as rules of origin, anti-dumping subsidies and countervailing duties, dispute settlement mechanisms, and customs cooperation *inter alia*. It also seeks to harmonize trade documentation and procedures, as well as commodity description and coding systems across the three states.

Tariff preferences can be extended to geographically adjacent countries in order to facilitate frontier traffic;<sup>19</sup> some members may enter into agreements of customs unions or free trade areas within which the members eliminate customs duties in order to substantially increase trade among them.<sup>20</sup> In 2005, Kenya adopted the Customs Union (to be established progressively over five years from 2005) seeking to liberalize intra-regional trade through a process of removal of internal tariffs and other similar charges, eliminating non-tariff barriers, customs duties (except for some exports from Kenya to Uganda and Tanzania), and established a three band Common External Tariff (CET) for all imported goods.<sup>21</sup> The Customs Union Protocol stipulates in article 11 that duty is not charged on import items from Tanzania and Uganda to Kenya, while Kenyan exports to these countries are under either category A for duty free treatment or category B for gradual tariff reduction. The progressive phasing out of category B goods specified in Annex II of the protocol is from 10 percent to zero over the following five years. Thus internal tariffs for these specified products cannot exceed the set CET. The current East African Trade and Transport Facilitation Project supported by the World Bank aims to assist the implementation of the East African Customs Union Protocol; increase the efficacy of cross-border operations; and facilitate the development of a regional railway system.

---

<sup>19</sup> GATT, article XXIV.3.a.

<sup>20</sup> Article, XXIV.5.

<sup>21</sup> Article 75 of the EAC Treaty.

As a member of COMESA (Common Market for East and Southern Africa), Kenya benefits from the economic cooperation arrangements which stimulate trade and are designed to establish an integrated market and a monetary union, with the monetary harmonization programme to be gradually implemented by 2025. These arrangements have reduced and seek to completely remove tariff and non-tariff barriers which result in enhanced production in sectors such as agriculture through increases in imports and exports between member states.<sup>22</sup> In its objective to stimulate agricultural trade through the removal of tariff and non-tariff barriers and through harmonized and transparent procedures, COMESA's goals are complementary to those of the WTO.

Under the structure of IGAD (formerly the Intergovernmental Authority on Drought and Desertification) which is the northern sector of COMESA, Kenya participates in the development of harmonized macro-economic policies in trade, customs, transport, and agriculture *inter alia*, which create an environment conducive to foreign and regional trade and investment.<sup>23</sup> Within the Regional Integration Facilitation Forum Kenya seeks to gain from increased economic integration brought about through improved trade and investments between member countries. The Indian Ocean Rim Association for Regional Cooperation (IOR-ARC), of which Kenya is also a member, seeks to enhance cooperation through mechanisms such as the elimination of tariffs and through projects which facilitate trade and promote foreign direct investment. As a coastal country with much potential to become a regional hub, Kenya is also part of the Northern-Corridor Transit Transport Coordination Authority (TTCA). Together with Uganda, Rwanda, Burundi and the Democratic Republic of Congo, the TTCA is intended to increase regional trade flows.

Under the Cotonou Agreement, Kenya has duty free access to the EU market for over 90 percent of its export products, and exports to the EU comprise 36 percent of Kenya's total.<sup>24</sup> The Agreement has as part of its progressive aims, the removal of controls on import prices, and the sale of subsidized EU products to the African and Caribbean states party to the Agreement. Duty-free treatment is accorded to some processed agricultural and fishery products, *inter alia*. These measures are intended to be temporary however, and will be replaced (with a target date of December 2007) by

---

<sup>22</sup> See [www.comesa.int](http://www.comesa.int).

<sup>23</sup> See [www.iss.co.za](http://www.iss.co.za).

<sup>24</sup> Nation newspaper, 23 September 2005.

WTO-compatible reciprocal economic partnership agreements (EPAs). However, certain concerns have been voiced as to the negative effect of such agreements: the European Commission estimates that under reciprocal liberalization Kenya would lose 82 percent of its customs revenue which is 12 percent of the government's income.<sup>25</sup>

Kenya's trade is 70 percent higher than the other EAC countries combined and is the largest trader in the IGAD region. While Kenya is eligible for a number of non-reciprocal trade preferences from developed countries (commonly referred to as the Generalised System of Preferences – GSPs), the agricultural sector has not benefited from these arrangements as most of them specifically exclude certain agricultural goods (particularly processed items) and face MFN tariff peaks.<sup>26</sup> Kenya qualifies for US trade preferences under the African Growth and Opportunity Act (AGOA), part of the Trade and Development Act of 2000, which promotes increased trade and economic cooperation between the two countries. Through this framework Kenya enjoys duty-free and quota free access to the US market for certain agricultural products which is dependent on its establishment of a market based economy, and the removal of discriminatory barriers to US trade and investment, among other stipulations.<sup>27</sup> Kenya has similar schemes in place with Japan, Canada, Switzerland, Australia, and New Zealand, and enjoys bilateral trade agreements with a number of other countries constructed to promote trade and improve economic relations, under which trading partners grant each other MFN status in all matters with respect to their mutual trade relations.<sup>28</sup>

As a member of so many regional and foreign trade agreements, conflicting obligations may frustrate the objectives of the intended arrangements; it is important to ensure that one arrangement does not function to negate another, and to ensure that the rights and benefits contained therein comply with the WTO disciplines. This is particularly evidenced by the EU-ACP relations, and the difficulties faced by ACP states with technical compatibility with the WTO framework. Although trade facilitation and enhanced

---

<sup>25</sup> See report EcoNews Africa and Traidcraft Exchange. 2005. *EPAs: through the lens of Kenya* (available at [www.traidcraft.co.uk](http://www.traidcraft.co.uk)).

<sup>26</sup> WTO. 2006. Secretariat Trade Policy Review EAC 2006–Kenya (WT/TPR/KEN) (hereafter WTO, 2006).

<sup>27</sup> *Kenya trade handbook on importing and exporting in Kenya: final report*. Almaco Management Consultants Ltd. and Emerging Market Economics, August 2005.

<sup>28</sup> Ibid.

economic integration is a primary objective of most of these treaties, on a practical level, progress is slow to translate into tangible improvements to the economy and trade.

#### 1.4 Kenya's accession to and participation in the WTO

The fifteenth of April 1994 saw Kenya's signing of the Final Act of the Uruguay Round and the Marrakesh Agreement establishing the WTO; ratification and accession took place on 23 December 1994, and on 1 January 1995, Kenya became a member of the WTO.<sup>29</sup> Agriculture dominates Kenya's participation in the WTO. Kenya is becoming increasingly vocal in its participation in WTO negotiations, especially as an advocate of the "Africa group" coalition, raising concerns from an African perspective, particularly with regard to intellectual property and sanitary and phytosanitary measures.<sup>30</sup> At the Seattle ministerial conference, Kenya urged the recognition and approval of observer status for regional integration arrangements (such as COMESA and the EAC) to garner the provision of technical support, but especially with a view to overcome the problems identified in the foregoing section of ensuring that regional policies were consistent with each other and developed in line with WTO requirements.<sup>31</sup> Kenya's position could be further consolidated through the establishment of a committee or mechanism that has been provided with sufficient legal, financial and human resources with strong policy analysis capacity, to create an informed and coherent bargaining position in trade negotiations.<sup>32</sup>

Kenya's National Committee for the WTO (NCWTO) is comprised of stakeholders chosen by the Trade Ministry as relevant players, although membership of the sub-committees is far more open. National Enquiry Points which provide information and expertise on relevant technical areas, provide support to these sub-committees. A challenge to the workings of the NCWTO has been co-ordinating the large number of entities involved in

---

<sup>29</sup> WTO. 1999b. Report by the Secretariat - WT/TPR/S/64, *Trade Policy Review Kenya* (hereafter WTO, 1999b).

<sup>30</sup> Blouin, C. & Njoroge, I. 2004. *Evaluation of DFID support to trade-related capacity building: case study of Kenya*. North-South Institute. Ottawa.

<sup>31</sup> FAO, 2000.

<sup>32</sup> Odhiambo, W., Kamau, P. & McCormick, D. 2006. *Managing the challenges of WTO participation: case study 20 - Kenya's participation in the WTO: lessons learned* (available at [www.wto.org](http://www.wto.org) (hereafter Odhiambo, Kamau, & McCormick, 2006).

trade issues.<sup>33</sup> Kenya has never been involved in any dispute cases under the Dispute Settlement mechanism, although it has been a third party in three complaints involving export subsidies on sugar.<sup>34</sup>

### 1.5 Linkage between legal and policy reform

Formulation, coordination and implementation of trade policies are primarily the function of the Ministry of Trade and Industry; these policies are then implemented through laws passed by parliament. At the Ministry of Agriculture, the WTO desk officer assimilates information from the national level with information from Kenya's WTO Geneva office to create a position on behalf of the ministry. This position is screened by the division head, the Director of Agriculture and finally the Permanent Secretary before it is considered the official government position on a particular issue.<sup>35</sup> Ultimately, it is the Ministry of Trade and Industry that bears the overall responsibility for the implementation of the WTO Agreements.

Kenya's dualist approach to international law means that an international bilateral or multilateral agreement ratified by Kenya does not automatically become law until an act of parliament gives it national effect. Under the Judicature Act of Kenya, such international agreements are not sources of law in and of themselves providing obligations and rights which can be enforced by courts to resolve disputes.<sup>36</sup>

## II. LEGAL AND INSTITUTIONAL FRAMEWORK

### 2.1 GATT and related concepts

#### 2.1.1 Tariffs, levies and other charges

*Non-discrimination: MFN and National Treatment (NT) principles*

The cardinal principle of most favoured nation (MFN) implies that the benefits of concessions are "accorded immediately and unconditionally to the

---

<sup>33</sup> Odhiambo, Kamau & McCormick, 2006.

<sup>34</sup> Complaints by Australia (WT/DS265), Brazil (WT/DS266) and Thailand (WT/DS283).

<sup>35</sup> Odhiambo, Kamau, & McCormick, 2006.

<sup>36</sup> Mosoti, V. 2005. Reforming the laws on public procurement in the developing world: the example of Kenya, *International Comparative Law Quarterly* 54: 633.

like product originating in or destined for the territories of all other contracting parties."<sup>37</sup> This rule is duplicated in the EAC Customs Union Protocol, article 15 which stipulates that none of the three member states should discriminate against products originating from partner states either through law or administrative procedure; impose internal taxes in excess of those imposed on similar domestic products; or provide higher tax rebates for like domestic products. The latter in particular brings the protocol in line with GATT article III on internal taxation and regulation. Exceptions to the rule exist, for example through the operation of tariff concessions under the GSP structure, customs unions, geographically adjacent countries, and security reasons *inter alia*. The corollary principle to MFN is national treatment (NT) which requires that foreign products receive no less favourable treatment than like national products. The three main elements of national treatment with which the Kenyan system complies *prima facie* is that: the imported product must not be subject to internal taxes higher than those on a like domestic product; it must be granted the same or no less favourable treatment; and there can be no regulation which mandates that in the use of a product, a certain percentage must be from domestic sources.<sup>38</sup>

### *Tariffs*

Article 12 of the Customs Union Protocol establishes "a three band common external tariff with a minimum rate of 0 per centum, a middle rate of 10 per centum and a maximum rate of 25 per centum in respect of all products imported." Since the adoption of the EAC common external tariff (CET) in January 2005, the average applied MFN rate fell significantly from 16.8 percent in 2004 to 12.9 percent under the CET. While most intra-EAC trade tariffs have been dismantled, some Kenyan exports (880 to Tanzania and 443 to Uganda) still carry tariff rates which will be eventually phased out. The impact of this system depends on whether the Tanzanian and Ugandan export items (20 percent of the total EAC tariff lines) bring in sufficient revenue to shield vulnerable sectors.<sup>39</sup> Individual tariff preference arrangements between EAC countries and other states are on a reciprocal basis and may differ among the states, for example an exemption to the

---

<sup>37</sup> GATT, article I, General Most-Favoured-Nation Treatment.

<sup>38</sup> Das, B.L. 1998. *An introduction to the WTO agreements*, p. 15. Third World Network, Malaysia (hereafter Das, 1998).

<sup>39</sup> Mullei, A. 2005. *Integration experience of East African countries*. Speech at Symposium marking the 30<sup>th</sup> Anniversary of Banco Mozambique (available at [www.centralbank.go.ke](http://www.centralbank.go.ke)) (hereafter Mullei, 2005).

EAC's CET is the arrangement between Kenya and Pakistan where lower tariffs are imposed for rice imports from the latter ending in June 2008. Based on the 2002 version of the HS system (Harmonized Commodity and Coding System for the classification of commodities which Kenya adopted in 1989), tariffs apply on the c.i.f. value of imports at the entry points of the customs union.

Kenya offers at minimum MFN treatment to all trading partners, whether or not they are WTO members. Its MFN tariff structure for 2006 is as follows: 14.9 percent for its bound tariff lines, while its duty-free tariff, non-*ad valorem* tariffs and tariff quota lines are at zero.<sup>40</sup> Under the EAC Customs Union MFN tariff for 2006, the agricultural sector had 729 lines - all of which were used, with a simple average tariff of 19.7 percent in this sector (tariff averages for sub-sectors which exceed this average include dairy products (42.5 percent), grains (28.3 percent), and tobacco (28.0 percent)).<sup>41</sup> Kenya's tariff bindings cover 14.9 percent of its tariff lines. In the Uruguay Round, Kenya bound all agricultural products tariffs at a ceiling rate of 100 percent, while other duties and charges on these products were bound at zero. For fishery products, its bound rates are: 62 percent on fresh, chilled, or frozen fish (excluding fish fillets and other minced fish meat). To give an example of an agricultural input item, its bound rate was 62 percent for mineral or chemical fertilizers (containing potassium, phosphorus and nitrogen). Export duties and taxes collected on agricultural and mineral products were abolished in June 1994, although an export tax on fish is still in place at 0.5 percent.<sup>42</sup>

EAC average tariffs for agricultural goods stands at 19.7 percent.<sup>43</sup> As indicated above, CET rates are set thus: 0 percent as the minimum rate for primary and capital goods, 10 percent as the middle rate for intermediate goods (that is, those that are only partly processed), and 25 percent as the maximum rate applicable to final goods.<sup>44</sup> The latter rate of 25 percent is to be reduced to 20 percent after 5 years and applies to products such as dairy goods, wheat and sugar. According to article 12 of the protocol, the maximum CET rate must be reviewed after January 2010, but up until that time, responsibility rests with the Council of Ministers to assess any negative

---

<sup>40</sup> WTO, 2006.

<sup>41</sup> Ibid.

<sup>42</sup> Ibid.

<sup>43</sup> WTO, 2006.

<sup>44</sup> EAC Customs Union Protocol, article 12.



ramifications of the CET system on any partner state and to apply appropriate remedial measures.

The East African Community Customs Management Act declares in section 111(1) that goods originating from any one of the three states shall be accorded Community tariff treatment in accordance with the Rules of Origin and upon the showing of a valid certificate of origin. Preferential tariff treatment shall be applied to goods imported under the COMESA and SADC arrangements in the member states according to national law, or under such arrangements as shall be approved by the EAC Council. Kenya's preferential tariff treatment is a 70 percent duty reduction on all products and is granted reciprocally to COMESA members which show a valid certificate of origin. Article 64 of the COMESA Treaty provides for the establishment of a CET which was intended to be functional by 2004 but is not yet operational; COMESA's CET bound rates are much lower than Kenya's 100 percent. This provision requires that parties adopt a uniform tariff classification of goods with a common and specific basis of description and interpretation. Under the COMESA framework, Kenya's preferential bands are 0 percent (inputs), 4 percent (intermediate goods), and 6 percent (final goods).<sup>45</sup>

#### *Other charges*

While the EAC tariff system is in the process of implementation and synchronization, national laws still govern individual import duties, tax and concession schemes – duties and charges other than tariffs are bound individually.<sup>46</sup> The Customs and Excise Act Cap 472 provides for the management, assessment and administration of customs and excise duties. Part XI on Duties (sections 117 and 118) stipulates the conditions of the imposition of duty and the relevant rates, arrangements for bilateral relief from the duty, retaliatory imposition of duties, and lays out the situations where rates of duty may have to be varied and at what percentage. These provisions are detailed further in the ten schedules attached to the act and consolidated by relevant provisions of the Finance Act 1999.<sup>47</sup>

Imported goods can be subject to suspended duties (stand-by duties) and a 2.75 percent import declaration fee (which can raise the average rate of

---

<sup>45</sup> WTO, 2006.

<sup>46</sup> Ibid.

<sup>47</sup> WTO, 1999b.

import duties to 20.75 percent). Excise duty and VAT are applied equally to domestic products. Mixed duties apply to 10.5 percent of all tariff lines on items such as wheat, maize, rice, sugar and milk.<sup>48</sup> Suspended duties up to 70 percent are in place on 17 percent of all tariff lines on the most protected sectors which includes agriculture. The Kenyan system of suspended duties leaves the decision of the amount of the surcharge to be decided by the government (within a 70 percent cap) instead of being based on fluctuating world market averages or on domestic reference prices.<sup>49</sup> Although, mixed and suspended duties have been criticized for a lack of transparency, Kenya has defended its position by asserting their necessity as transitional measures during the time it takes to build institutional capacity to resort to conventional WTO safeguards. Nevertheless, the existence of such duties *per se* is not contrary to its WTO commitments provided the total applied tariffs stay under the set bound rates.<sup>50</sup>

The Export Promotion Council (EPC) was instituted in August 1992 with the intention of facilitating export processes through its advisory role, in order to increase the performance and competitiveness of the export sector, and maintains a collaborative network of relevant public and private entities.<sup>51</sup> The EPC concerns itself primarily with providing market information for exporters such as identifying appropriate market entry points, the expansion of product lines, diversification of products and improvement of product quality; assists with sales, missions and exhibitions; and procures trade information crucial to exporting firms. The EPC website is user-friendly and provides important information; for example it has a free downloadable publication detailing the procedures of how to become an exporter in Kenya, including company registration, licensing requirements, product restrictions and other pertinent information a potential exporter in Kenya would find useful. The site also offers strategies to enhance export businesses. Specific services are charged by EPC at a 50 percent discounted rate of related costs, while the other half is borne by the council. The users of EPC's market supply surveys and intervention measures are predominantly small and medium enterprise farmers, who are provided with counselling services on export procedures, information on how to start trade businesses, and who benefit from capacity building programs conducted by the EPC. Larger exporters find private means of doing market research,

---

<sup>48</sup> See [www.unctad.org](http://www.unctad.org).

<sup>49</sup> FAO, 2000.

<sup>50</sup> FAO, 2000.

<sup>51</sup> Details available at [www.epckkenya.org](http://www.epckkenya.org).

assisted by foreign partners and are more able to obtain first hand information for export purposes. Three incentive schemes are available to Kenyan companies producing for export: the Duty Remission Scheme; the Manufacturing-Under-Bond (MUB) Scheme; and the Export Processing Zone (EPZ) Scheme. This is further discussed below in section 2.2.2.

#### 2.1.2. Customs valuation

The Customs Union Protocol in article 4(2)(b) mandates that EAC member states cooperate on adopting "a standard system of valuation of goods based on principles of equity, uniformity and simplicity of application, in accordance with internationally accepted standards and guidelines." Part II of the Fourth Schedule of the EAC Customs Management Act 2004 identifies how the customs value of imported goods is to be determined and sets out in detail the methods in sequential order of application. This Schedule therefore defines the transaction value of similar and identical goods, and the deductive, computed and fall-back values. Kenya has provided notification of its legislation on customs valuation to the WTO<sup>52</sup> which indicates that customs valuation in Kenya has been based on the Agreement on the Implementation of article VII of GATT 1994.<sup>53</sup>

To comply with this Agreement, Kenya is required to draft laws and administrative procedures which show clearly the methods used in customs valuation. Section 127A of the Customs and Excise Act provides for the determination of the value of imported goods and is supplemented by specific details in the Seventh Schedule. The Seventh Schedule to this act lays down how the value of imported goods shall be calculated, what constitutes the transaction value of identical goods and similar goods, the deductive value and how the computed value is the value used for duty. Section 127B stipulates that where the proper officer has reason to believe that the value of the imported goods, goods for export or for re-exportation, is below or above the transaction value, this authorized person shall appraise the goods in accordance with the methods set out in the Seventh Schedule. Upon written request, the importer can request a written explanation as to the method applied in valuing the goods. This provision serves as an important safeguard and transparency mechanism to ensure computation of duty for particular transactions is as per the rules in the schedule.

---

<sup>52</sup> WTO, document G/VAL/N/1/KEN/1.

<sup>53</sup> WTO, 2006.

The national legislation is required to detail whether certain costs are to be included in or excluded from the customs valuation. The costs are as follows: transport to the place of importation, loading, unloading and handling charges and insurance. Section 127(c) sets out in subsection (2) that the value of locally manufactured goods for purposes of levying *ad valorem* excise duty shall be the ex-factory selling price and continues in subsection (3) to indicate that this includes the cost of packaging and other incidental costs to the sale of the product including transportation. It does not however specifically stipulate insurance.

According to GATT article X.3.b, the law should provide for the right of appeal with the initial appeal filed with an administrative authority, with the right of appeal to a judicial authority. Section 127(b)(4) states that where a dispute arises regarding such an appraisal decision, the importer or other person liable for the payment of duty may, within thirty days of the day he is notified of the decision, appeal to the tribunal established under section 127(e). The latter provision details clearly the procedures and processes of such a tribunal. Further under 127(b)(6), a person aggrieved by a decision of the tribunal under subsection (5) may appeal to the High Court within 14 days. Also, under subsection (8) the commissioner shall keep records of all related administrative and judicial decisions, in conformity with the Agreement on Customs Valuation.

The EAC Customs Management Act includes administrative provisions relating to the staff and management structure of the Directorate of Customs and Trade as the responsible entity for the initiation and coordination of policies. This body is tasked with *inter alia* the administration of the CET, enforcement of the customs law, trade facilitation and the application and interfacing of information technology in customs administration, and customs related negotiation.<sup>54</sup> It legislates on prohibited import and export, customs entry, examination and clearance, and warehousing. The EAC Customs Union Protocol also contains provisions on customs administration in part C, specifically on the simplification, standardization and harmonization of trade information and documentation; on the commodity description and coding system; and dealing with offences.

The Customs and Excise Department of the Kenya Revenue Authority (KRA) facilitates trade, collects trade statistics, and safeguards against the

---

<sup>54</sup> Part II, section 4(1).

entry or exit of illicit goods in addition to its fiscal role. These tasks often entail cooperation with other government agencies such as the Kenya Bureau of Standards as well as government ministries (Health, Agriculture, Trade and Industry, etc). It is also responsible for administering the East African Customs Management Act.

### 2.1.3 Anti-dumping, subsidies and countervailing duties

#### (a) Subsidies and countervailing measures

This area is also governed by the EAC Customs Union Management Act, the EAC Customs Union Protocol, and the Customs and Excise Act Cap 472. The protocol covers the area of subsidies in article 17, and the rules governing subsidies are intended to distinguish permissible (non-actionable) from non-permissible (actionable subsidies) offering specific legal definitions and examples for each category. The terms "injury", "nullification or impairment" and "serious prejudice" which are used in the international text are defined and set out in Annex V to the protocol, which also details the types of permissible assistance. Regarding intra-community relations, the committee must receive advance notice of the intention of the partner state concerned to provide the subsidy in question.

In line with its WTO notification obligations, the EAC Trade Committee notifications must include the nature, extent, estimated effect of the subsidy, quantity of the affected product, and why the subsidy is necessary (article 17(1)). Where evidence is found of a negative and possibly irreversible impact on the domestic industry, consultations can still be held to find a mutually acceptable solution even where the subsidies are in fact non-actionable.<sup>55</sup> The committee may direct the subsidizing state to carry out remedial measures for the benefit of the affected partner state. If the former fails to do so, the committee may authorize provisional measures or countervailing measures to be taken by the affected partner state. The committee's investigations must establish the existence of the subsidy, amount, injury caused and the causal link in accordance with the WTO rules. The EAC Customs Protocol article 18(1)(b) indicates that countervailing duties should be equal to the amount of the subsidy determined to have been given to the imported product.

---

<sup>55</sup> Mullei, 2005.

Section 125A of the Customs and Excise Act Cap 472 also stipulates that if a committee finds that a government or a public body outside Kenya has been giving a subsidy to goods imported into Kenya, the minister may impose a countervailing duty. Section 126(2) of the Customs Excise Act defines a subsidy as giving financial contributions at the production or export stage by the government or a public body within the exporting country, in such a manner as to cause injury to the Kenyan industry. It lists the types of contributions such as (a) direct or (b) transfer of funds such as a grant, a loan or equity infusions; (d) fiscal incentives, such as tax credits; (f) any form of income or price support. WTO obligations require members to legislate on procedures for initiating and conducting investigations. Section 125(1) of the Customs and Excise Act calls for the establishment of an advisory committee composed of not more than five persons, to investigate subsidization of goods exported to Kenya. The laws make the necessary qualification that the countervailing duty should not exceed the amount of injury found to exist, requiring that such a duty should only be imposed where the subsidy is such as to "cause or threaten material injury to an established industry in Kenya or is such as to retard materially the establishment of an industry."<sup>56</sup>

Members are required to make notification to the WTO of all subsidies maintained by them, giving information such as the form of subsidy, rate, policy, objective, duration in order to assess the trade effects of the subsidy. Developing country members<sup>57</sup> have to phase out their subsidies in a progressive manner eight years from the entry into force of the WTO Agreements, i.e. 1 January 2003. Some obligations are of immediate effect, for example not increasing the level of their export subsidies; if such a country attains the share of export of a particular product up to 3.25 percent of the world export of that product for two consecutive years, it will have to phase out the export subsidy on that product in two years.<sup>58</sup> Kenya does not currently have any prohibited export subsidies in place.<sup>59</sup>

---

<sup>56</sup> Section 125A(2)(b).

<sup>57</sup> The developing countries originally included in this list (other than LDCs) are Bolivia, Ghana, Guatemala, Guyana, India, Indonesia, Kenya, Morocco, Nicaragua, Nigeria, Pakistan, Philippines, Senegal, Sri Lanka and Zimbabwe.

<sup>58</sup> ASCM, article 27.6, Special and Differential Treatment of Developing Country Members.

<sup>59</sup> WTO. 1999b.

## (b) Anti-dumping

Exporting products at unusually low prices – that is, below the costs of production – is an unfair trade practice which is proscribed against in the WTO Agreements (GATT article VI and the Agreement on Implementation of article VI of GATT – the Anti-Dumping Agreement (ADP)) and is referred to as "dumping". The EAC Customs Union Protocol provides detailed guidance on the handling of investigations and the determination of dumping (including calculating normal value and export price, as well as the comparison of export price and the comparable price), all of which correlate to the Anti-Dumping Agreement. The antidumping measures articulated in Annex IV of the protocol include provisional measures, price undertakings (voluntary agreement by the exporter to cease dumping), and collection of anti-dumping duties.<sup>60</sup> The Protocol also stipulates the provisions for cooperation between the EAC partner states in the investigation of dumping, subsidies and safeguard measures in article 20 and provides for the review of such anti-dumping measures after a certain period of time. It should be noted that under the EAC Customs Union Protocol, all interested parties receive notification of the initiation of investigations as this was not specifically provided for in the Customs and Excise Act. The latter's provisions on anti-dumping (and subsidies) are less clearly stated and much less detailed than in the EAC Protocol, but nevertheless set out some of the requisite elements.

The act defines dumping, sets out in Schedule 3 how to calculate dumping duty, and indicates how to determine the value of imported and exported goods (in sections 126 and 127, supplemented by the Seventh Schedule). Under section 125A(1)(a) and (b) a duty may be imposed upon the findings of the investigative committee and upon satisfaction of the minister that the imported goods qualify as having been dumped (that the effect of the dumping will cause or threaten material injury, or will retard materially the establishment of an industry); and under subsection (2)(a) the rate of such duty shall not exceed the dumping margin. The law does not seem to incorporate article 2(5) of the ADP which requires the state to take into account in the calculation of normal value, the situation where goods pass through an intermediary state.<sup>61</sup> The minister's order to impose anti-dumping duties must specify the description of the goods by reference to the

---

<sup>60</sup> Mullei, 2005.

<sup>61</sup> WTO document G/ADP/Q1/KEN/2 – G/SCM/Q1/KEN/2, 11 October 1996.

particular producers. The statute also notes that where the exporter offers to increase the price of the goods concerned to the extent of the dumping margin, the Minister may accept this offer.

Kenya has never applied anti-dumping, countervailing or safeguard measures.<sup>62</sup>

Among the responsibilities of the EAC Committee on Trade Remedies (established under article 24 of the EAC Customs Union Protocol) are: the initiation of investigations, recommending provisional measures, undertaking and facilitating consultations, providing advisory opinions, issuing public notices and undertaking reviews. It administers and manages the dispute settlement mechanism, the decisions of which are final. The committee is competent to address any matters pertaining to: rules of origin, anti-dumping measures, subsidies and countervailing measures, safeguard measures, dispute settlement and any other matter referred to the committee by the council. At national level, the competent Kenyan authority dealing with anti-dumping, subsidies and countervailing measures is the Permanent Secretary of the Ministry of Finance. Industries potentially affected by dumping contact the Finance Ministry with evidence of the nature and source of the dumped imports, as well as proof of injury – i.e. that there has been a negative impact caused by the dumped products on their industry. The Customs and Excise Act provides for the possibility of an ad hoc advisory committee comprising not more than five persons, to investigate cases of dumping or subsidization with the authority to impose provisional measures. Based on complete information provided, the Treasury will determine the amount of duties to be imposed, with the processes and duties approved by the Finance Minister. Thereafter a notice is issued in the Government Gazette by the Attorney General's Chambers.<sup>63</sup>

#### 2.1.4. State Trading Enterprises

The operation of State Trading Enterprises (STEs) is governed by article XVII of GATT 1994 and further expounded in the Understanding on the Interpretation of Article XVII of GATT 1994 (see chapter 5). Such enterprises which include marketing boards are granted exclusive privileges, including statutory or constitutional powers, and can influence the level or

---

<sup>62</sup> WTO, 2006.

<sup>63</sup> WTO document G/ADP/N/1/KEN/1 – G/SCM/N/1/KEN/1, 22 May 1996.



direction of imports or exports of the commodity for which they are responsible.<sup>64</sup> Under GATT provisions, any entity that is granted exclusive or special privileges must act consistently with the tenet of non-discrimination in its import and export transactions, and its purchases and sales must be taken solely on the basis of commercial considerations.

The Agricultural Produce Marketing Act Cap 320 controls and regulates the marketing of agricultural produce. It empowers the various marketing boards to market the goods within their spheres of responsibility; and also provides for the powers and functions of the boards regarding *inter alia* movement, storage, production, processing and marketing of any regulated produce. Boards can acquire and sell certain quantities, carry out or enter into contracts to this end and also import or export any of the commodities it oversees. The boards may additionally impose a levy on any regulated produce. On the face of the statute, nothing implies inconsistency with the obligation not to discriminate in purchases or sales in exports and imports.

STEs are required to make transactions solely on the basis of commercial considerations and should enable foreign enterprises the opportunity to compete for participation in purchases and sales. In the Agricultural Produce Marketing Act, no specific provision addresses external enterprises, and no indication is given as to the transparency of the decision making process, for example with respect to levying products. It does not stipulate the types of commercial considerations that would be acceptable, but perhaps this exclusion was to ensure flexibility of the instrument and to allow the boards discretion to function properly. However, the act in many instances requires the approval of the Minister of Agriculture, and specifically stipulates in section 14 that the boards must furnish the minister with a yearly report on their work and operations, including a complete financial balance sheet of revenue expenditure and audited activities.

The Coffee Act Cap 9 of 2001 legislates for the development, regulation and promotion of the coffee industry through the parastatal Coffee Board of Kenya (CBK). The conduct and regulation of the business and affairs of the board is provided in the schedule attached to the act. The only mention of foreign entities concerns licenses under section 17 and does not provide for external enterprises to compete for participation in the purchase and sale of coffee, although private firms are able to compete for its marketing functions

---

<sup>64</sup> Das, 1998. p. 105.

following the abolition of its monopoly structure in 1999.<sup>65</sup> Following a re-shuffling of the sector, the pooling system was replaced by a more transparent pricing system of coffee grades where the quality of the latter determines the sale price.<sup>66</sup>

The National Cereals and Produce Board Act Cap 338, regulates and controls the marketing and processing of maize, wheat and scheduled agricultural produce. It outlines in section 4(1)(a) the functions of the board to regulate the "collection, movement, storage, sale, purchase, transportation, marketing, processing, distribution, importation, exportation, disposal and supply of maize, wheat and scheduled agricultural produce." The board also controls the importation and exportation of maize (the main food security commodity) and other produce as directed by the minister, issues licenses and is required to produce its accounts and annual report. Agricultural prices are predominantly market-driven. However, the NCPB is undergoing a shake-up to include management of the National Strategic Food Reserve as one of its functions and thus intervenes as a market-price stabilizer.<sup>67</sup> The success of this reorganization has been limited by a combination of infrastructure limitations, poor marketing skills and weak bargaining power of farmers in the sub-sector.<sup>68</sup>

Most of the crop statutes are similar in structure and purpose to the main Agricultural Marketing Board Act, only altering with respect to commodity. There are no specific regulations outlawing discriminatory treatment, nor provisions mandating that they should take into account solely commercial considerations.

All the above mentioned boards still demonstrate monopolistic tendencies and hold exclusive rights. The Restrictive Trade Practices, Monopolies and Price Control Act (1988) Cap 504, encourages competition by prohibiting predatory trade practices (which is defined as an act that reduces opportunities to compete at, or to acquire goods at fair market prices), such as collusive auction bidding and tendering (see sections 6–12). The law in section 5 specifically exempts from its remit those commercial activities "directly and necessarily" associated with exclusive trading privileges recognized by law such as parastatals. The complaint procedure set up in the

---

<sup>65</sup> WTO, 1999b.

<sup>66</sup> Ibid.

<sup>67</sup> Ibid.

<sup>68</sup> Ibid.

statute enables aggrieved persons to submit objections to the Minister of Finance through the Monopolies and Price Commission, with appeals lodged first before the Restrictive Trade Practices Tribunal within 28 days, and thereafter for a final hearing before the High Court within a further 30 days. The lack of prosecutorial powers of the commission and unclear enforcement provisions are criticized as being the statute's major flaws.<sup>69</sup> Kenya has provided notification to the WTO body that it does not currently have any prohibited STEs within the meaning of article XVII:4(a) of GATT 1994.<sup>70</sup>

## 2.2 Agreement on agriculture<sup>71</sup>

### 2.2.1 Market access

Market access restrictions comprise tariff and non-tariff measures; the latter (which includes border measures such as quantitative restrictions, import levies, minimum import prices, discretionary import licensing, measures maintained through state trading enterprises, voluntary export restraints) must be replaced with equivalent tariffs.<sup>72</sup> Countries must notify the WTO on the products subject to tariffication and current minimum access conditions, where minimum access is defined as 3 percent of average annual domestic consumption of a particular product that existed during the 1986–88 base period. This was to increase to 5 percent by 2004 for developing countries through access opportunities granted on a MFN basis.

As noted above in section 2.1.1, Kenya bound all its agricultural tariff lines at 100 percent, with all other duties or charges bound at zero. In practice however, Kenya's binding ceiling has never gone beyond 35 percent and frequently fails to protect industries such as sugar and cereals.<sup>73</sup> Kenya's major exporting products such as coffee, tea and leather in their unprocessed

---

<sup>69</sup> WTO, 2006.

<sup>70</sup> WTO document G/STR/N/11/KEN.

<sup>71</sup> For a discussion on this Agreement and its negotiation and drafting history, see chapter 3.

<sup>72</sup> Das, 1998. p. 70.

<sup>73</sup> Gitu, K. 2004. *Agricultural development and food security in Kenya: building a case for more support*. FAO, Rome.

forms sometimes face import difficulties such as tariff escalation.<sup>74</sup> Horticultural products have been found to have the most market access problems, for example fruit and vegetables are exported to the EU during off-season as there is no system of quota allocations in place between the two parties on these products.<sup>75</sup>

A Special Safeguard Measure subject to certain preconditions protects agricultural products that have been tariffed. Kenya has not taken any actions under GATT article XIX on safeguards in the agricultural sector; neither did it reserve its right to invoke the special safeguard clause in article 5 of the WTO Agreement on Agriculture.<sup>76</sup> As it did not commit itself on other specific market access mechanisms such as tariff rate quotas, and having chosen the bound ceiling alternative to tariffication, Kenya does not have recourse to the special safeguard provisions of the AoA.<sup>77</sup> Kenya uses the tariff instrument to protect its agriculture industry against dumping. It applies safeguard measures on an ad hoc basis.<sup>78</sup>

Kenya has complained that while it has made significant progressive reductions in its protective measures for local industries, its exports still face high tariff barriers and tariff escalation.<sup>79</sup> It has also noted the incongruous position of expecting a significant lowering of MFN tariff rates for its exports, while at the same time being apprehensive over the benefits that are lost from the reduction of tariff preferences caused by the lowering of MFN rates.<sup>80</sup> Indeed, Kenya's voice is increasingly heard in the context of the tariff reduction formula, where it is among the advocates of a special tier for developing countries. On the basis of the latter's rejection of tariffication in favour of the option to be bound at high ceiling rates in the Uruguay Round, developing countries have narrow tariff ranges as part of special and

---

<sup>74</sup> Nyangito, H. 2003. *Agricultural trade reforms in Kenya under the World Trade Organization framework*. Kenya Institute for Public Policy (KIPPRA) Discussion Paper No. 25. Kenya (hereafter Nyangito, 2003).

<sup>75</sup> FAO, 2000.

<sup>76</sup> WTO document G/AG/NG/W/136 Committee on Agriculture Special Committee, March 2001.

<sup>77</sup> FAO, 2000.

<sup>78</sup> WTO document G/SG/N/1/KEN/1.

<sup>79</sup> WTO document G/AG/NG/W/136.

<sup>80</sup> WTO document G/AG/NG/W/136.

differential treatment; requiring them to make steep reductions at this stage would be penalizing that choice.<sup>81</sup>

Similar to other developing countries Kenya has had to either increase or decrease applied tariffs in reaction to unanticipated domestic and external causes.<sup>82</sup> In April 1998, grain shortages due to poor cereal harvests the previous year forced the authorities to issue a waiver on maize import duty to encourage commercial imports to meet the deficit. In 2004, VAT and other duties were eliminated on a limited quantity of imported maize to address food shortages. Aside from instances similar to this Kenya has on the whole complied with its AoA commitments relating to market access ensuring that all tariffs are bound, and its applied rates are below the bound rates. Market access has also been affected by non-tariff measures such as those concerned with sanitary and phytosanitary control measures, which are further discussed below.

### 2.2.2 Export competition

The Schedules of the member states contain their respective commitments regarding the reduction of export subsidies using 1986–1988 as the base period from which subsidies must be reduced by 24 percent for developing countries over an eight-year period. Article 9 of the AoA lists the types of export subsidies included in the reduction commitments as: subsidies contingent on export performance; sale or disposal for export at prices lower than those of the domestic market; government programmes levying all production of a commodity which then subsidizes the export of a certain amount of that production; and subsidies contingent on the incorporation of the product into other exported items. The special and differential treatment provision for developing countries means that Kenya can maintain subsidies relating to marketing and internal transport during the implementation period, but cannot implement any new ones. Previously export subsidies in Kenya have been underused comparative to what is allowed, which is also true for most developing countries.<sup>83</sup> In the WTO, Kenya has consistently called for the complete removal of trade distorting export subsidies,

---

<sup>81</sup> ICTSD. 2005. Busy agriculture week focuses on market access. *Bridges Weekly Trade News Digest*. 9:20.

<sup>82</sup> Ibid.

<sup>83</sup> Nyangito, 2003.

advocating instead the development of export credit rules that address the special needs of Net Food Importing Developing Countries (NFIDCs).<sup>84</sup>

At EAC level, the export assistance regime is yet to be synchronized fully. Kenya's three main schemes for export promotion are:<sup>85</sup> the Duty Remission Scheme, the Manufacturing Under Bond (MUB) scheme, and the Export Processing Zone (EPZ) scheme. Articles 27–29 of the EAC Customs Protocol stipulate that these schemes have been set up in order to "accelerate development, promote and facilitate export oriented investments, produce export competitive goods, develop an enabling environment for export promotion schemes and attract foreign direct investment." The protocol also notes that the EAC Council may endorse the establishment of similar export promotion schemes. It should be noted that these schemes have little correlation with agricultural production but are relevant to agro-processing and agribusinesses. In particular, it is perceived that various areas could benefit from agricultural output directed towards these schemes such as food processing (canning, milling and confectionary).<sup>86</sup>

### 2.2.3. Domestic support measures

Domestic support reduction commitments are contained in the fourth part of Member State Schedules. These refer to subsidies in the form of market price support or direct pay by government provided to the domestic agricultural producers, and is quantified through the total Aggregate Measurement of Support (AMS) and "Annual and Final Bound Commitment Levels."<sup>87</sup> According to the AoA, domestic support measures should be reduced over the implementation period - i.e. to the end of 2004 for Kenya. The exception to reduction commitments are those available as part of agricultural and rural development programs for developing countries, such as investment subsidies and input subsidies generally available to low-income or resource-poor producers. The types of domestic support also excluded are product-specific (10 percent of the value of the commodity for that year) and non-product specific (10 percent of the total agricultural production for that year). Also exempted from reduction commitments are direct payments under production-limiting programs subject to certain maximum restrictions,

---

<sup>84</sup> Ibid.

<sup>85</sup> See also Customs and Excise Act remission of duty for exportation purposes, section 140.

<sup>86</sup> Mutunga, J.K. 2006. *Personal correspondence*. Export Promotion Council.

<sup>87</sup> AoA, article 6.

government-service programs such as research, pest and disease control, training, and infrastructure services.<sup>88</sup> These would not be included in Kenya's total AMS, and are not actionable through countervailing duties or the dispute settlement procedure.

Kenya's official position is that all its domestic support measures either fall under the permitted exceptions or, for the trade-distorting support measures, are within the *de minimis* levels following the trade reforms.<sup>89</sup> Thus Kenya put forward detailed commitments for the green box (non-trade distorting) on domestic support measures, but not under the amber (prohibited trade distorting support measures) and blue box (payments provided under production-limiting programmes), nor was it able to give schedules for Aggregate Measures. Periodic expenditure accounts for about 60 percent of the agricultural budget spent largely on salaries with the remaining 40 percent allocated for agricultural development, such as research and market information, crop protection, animal health, mechanization services, farm planning and seed inspection.<sup>90</sup>

The potential created by measures such as marketing, promotion services, direct payments, and investment aids which are allowed under domestic support, has not been utilized fully by Kenya. Structural adjustment programs (SAPs) have further reduced funding since the 1980s, as part of efforts to reduce fiscal deficits. Finally, budget constraints have meant that direct support in the form of funding or measures such as farm planning, veterinary services, and equipment hiring (permissible under the special and differential clause for developing countries) has not been offered to stimulate local production, and thus farmers have faced high input costs.<sup>91</sup>

Kenya's proposals in this discipline have been to provide developing countries with solutions to some of the implementation problems they have faced and to level the playing field between developing and developed countries. Some of these suggestions entail the creation of a development

---

<sup>88</sup> AoA, Annex II.

<sup>89</sup> Ibid.

<sup>90</sup> Nyangito, 2003. These figures vary however. For the 1996–97 period, Kenya's estimation of its domestic support was at KSh3,791 million going towards general services (agricultural education represented 29.7 percent), public stockholding for food security purposes and strategic reserve operations (all Green Box measures). See also: WTO document WT/TPR/S/171/Rev.1.

<sup>91</sup> Ibid.

box (which takes into consideration the effect of SAPs on government expenditure), or flexibility within the green box to allow greater leeway in domestic support measures for developing countries.<sup>92</sup> Together with Egypt and seven other African states, Kenya has urged consensus on the level and structure of reduction commitments within the tiered reduction formulae for AMS and overall trade-distorting domestic support.<sup>93</sup> It urges not only review and clarification of the green box to prevent box-shifting, but stricter criteria to ensure fulfillment of reduction commitments.

#### 2.2.4 The Marrakesh Decision

Kenya has been among the NFIDCs disappointed with the inadequate implementation of the Marrakesh Decision on Measures Concerning the Possible Negative Effects of the Reform Programme on Least-Developed and Net Food-Importing Developing Countries which provides a framework to limit the adverse effects of WTO rules on food imports and aid for LDCs and NFIDCs.<sup>94</sup> For Kenya, the recommended percentage reduction levels have not resulted in a substantial lowering of tariff levels as anticipated by developing countries.<sup>95</sup>

Reduced food export subsidies could cause a rise in import bills but on the other hand, this rise could increase domestic incentive for local producers. However, in effect this increase in the level of food imports is potentially a contributing factor to the decline in food production, which has led to calls for the elimination of export subsidies, despite the argument that elimination of subsidies could in fact harm NFIDCs. Although Kenya's spending on food *import* has increased (by approximately 20 percent since the implementation of the AoA), food *aid* levels have significantly decreased, creating greater dependency on commercial food imports. It has been noted that a combination of decreasing export earnings, a strained and fragile balance of trade, and reduced foreign development aid flows have diminished the capacity of the country to import food.<sup>96</sup> The ramifications of these considerations on food security issues are particularly important to

---

<sup>92</sup> WTO Committee on Agriculture, Special Session document G/AG/NG/W/136, 2001.

<sup>93</sup> WTO document WT/L/626, 8 November 2005.

<sup>94</sup> WTO document G/AG/NG/W/136.

<sup>95</sup> General Council: Preparations for the 1999 Ministerial Conference (Contribution to the Preparatory Process) Communication from Kenya. WTO document WT/GC/W/233.

<sup>96</sup> Nyangito, 2003.



Kenya, which has a large rural population and generally relies to a large degree on food imports.

### 2.3 The SPS Agreement

Arguably, one of the most important non-tariff measures affecting Kenyan agriculture trade are those disciplined by the SPS Agreement. The Agreement sets out the rights and obligations of members in relation to food safety, plant and animal health to prevent restriction of international trade. There have been instances where Kenya's exports to developed country markets have been barred by what were perceived to be arbitrary bans for certain horticulture and fisheries products. Conversely, substandard goods have also found their way onto the Kenyan domestic market. Restricted market access can translate into substantial losses of revenue for African countries; for example the stringent requirement of low aflatoxin levels by the EU (which is a higher standard than espoused by the Codex Alimentarius Commission (CAC)) produces a revenue of approximately US\$400 million for cereals, dried and preserved fruits and nuts which would increase by nearly US\$700 million if CAC guidelines standards were used instead.<sup>97</sup>

The SPS framework encourages broad participation in the setting of standards. Kenyan product standards are formulated according to international criteria, accomplished through the occasional participation of Kenyan technical staff in meetings held by CAC, International Plant Protection Convention (IPPC) and International Office of Epizootics (OIE) when they have been able to attend unconstrained by budget considerations, or otherwise by using the guidelines issued by them. Although recently Kenya has been taking a more participatory and advocacy role in the international arena with respect to SPS measures, it has been largely a "standards taker"<sup>98</sup> as its constrained participation prevents institutional development and capacity building. This is complicated by "simultaneous exposure to divergent, multiple standards imposed by various trading partners", for example, exporters have had to comply with two certification systems (EurepGAP and HACCP).<sup>99</sup> Notwithstanding, the Kenyan standards

---

<sup>97</sup> Otsuki, T., Wilson, J.S. & Sewadeh, M. 2001. *A race to the top? A case study of food standards in Africa and African exports*. World Bank Discussion Paper Development Research Group. Washington D.C.

<sup>98</sup> Wilson, J.S. & Abiola, V. 2003. *Standards and global trade: a voice for Africa*. International Bank for Reconstruction and Development/World Bank.

<sup>99</sup> Ibid.

process includes the participation of technical committees, producers, research organizations, testing organizations etc, with draft standards published in the KEBS Standards Work Programme Bulletin available for interested persons to contribute written comments.<sup>100</sup> This has led to the elaboration of glossaries, dimensional standards, measurement standards, performance standards, codes of practice and standard methods of test.<sup>101</sup>

Developments concerning the elaboration of standards and regulations are published in the Gazette or by Legal Notice. Legal Notice No. 227 (June 1995) by the Minister for Commerce and Industry authorized the quality inspection of imports starting in July 1995. Subsequent legal notices have been issued by the government to ensure that products entering the country meet either Kenya Standards or any other standards approved by KEBS; Legal Notice No. 66 (June 1999) declares that all items failing to meet these criteria are prohibited from entry.<sup>102</sup> This was formulated to address the problem of the dumping of substandard goods on the local market.<sup>103</sup> Products subject to technical regulations such as certain foodstuffs and tobacco *inter alia* must be inspected in their country of origin by one of the two pre-shipment inspection companies SGS or Intertek - the failure of which results in a 15 percent of the customs value penalty.<sup>104</sup> Fertilizers must meet technical standards, as per the Fertilizers and Animal Foodstuffs Act amended in 1977, and agricultural chemicals must be authorized prior to import by the Pest Control Products Board (PCPB). Persons involved in the manufacture, packaging, labelling, and distribution of agricultural chemicals must sign a Code of Conduct, based on the FAO Code of Conduct on the Regulation, Distribution and Use of Pesticides.

At EAC level, the East African Standards Committee (the three national offices and private sector representatives) is responsible for the harmonization of existing standards and the formulation of new joint ones; by September 2005, 566 joint standards had been adopted by the committee.<sup>105</sup> These are then adopted by the Council of Ministers. Kenya itself has approximately 4 000 standards as at April 2006, half of which are equivalent to International Organization for Standardisation (ISO) standards,

---

<sup>100</sup> WTO, 2006.

<sup>101</sup> Ibid.

<sup>102</sup> See [www.kebs.org](http://www.kebs.org).

<sup>103</sup> Ibid.

<sup>104</sup> WTO, 2006.

<sup>105</sup> Ibid.

and is in the process of making many of these voluntary.<sup>106</sup> It has concluded mutual recognition agreements with the other EAC states as well as Egypt and Sudan.

Laws with a general scope can serve to reinforce the importance of maintaining safe standards for export across the board. This can be seen with the Agricultural Export Produce Act Cap 319 which regulates the sanitary and phytosanitary standards of exports, prohibiting sub-standard or unsafe items to be exported. Section 3 prohibits export of agricultural produce that has not been inspected (or branded), in the prescribed manner and is consolidated by the subsequent sections prohibiting export of unsound produce. Sections 5–8 refer to the inspection of factories, slaughterhouses and other places for the processing of agricultural products. These provisions overlap with section 29 of the Food Drugs and Chemical Substances Act which mandates the inspection of animals by authorized officers.

Also overseeing this area, the Kenya Meat Commission Act established the administrative and functionary powers of its implementing body. Section 9 of the Agricultural Export Produce Act empowers the minister to prescribe the specific standards required by way of notices in the Gazette – for example the percentage of impurity the maximum amount of moisture, preservatives etc. Legislation subsidiary to this act as well as relevant Schedules addresses issues of inspection, packaging, and certification pertaining to specific agricultural items such as wheat, chillies, castor seeds, beans, potatoes and other horticultural products. The Food Drugs and Chemical Substances (Food Hygiene) Regulations address good public health practice with respect to food. These provisions are consolidated and read together with the Public Health Act which legislates on the areas of clean water supply, seizure of unwholesome food and food safety.<sup>107</sup> The enforcement of this statute falls upon the respective municipal councils. In addition, the Pest Control Products Act and Regulations prohibits the import or export of products to control pests without the appropriate labelling and control of authorities. The board relies on FAO guidelines for importation standards and refers to the Codex standards for tolerance levels.<sup>108</sup>

---

<sup>106</sup> Ibid.

<sup>107</sup> Public Health Act, sections 157, 130–134.

<sup>108</sup> Osongo, M. 2004. Kenya food and agricultural import regulations and standards. Kenya FAIRS Report. *GAIn Report* Number: KE4009 (hereafter Osongo, 2004).

The role of national enquiry points that should provide information requested by member states, in compliance with SPS Agreement Annex B provision 3 is delegated to the Kenya Bureau of Standards (KEBS) established by section 3 of the Standards Act, although in practice other authorities have also taken on this role. By fulfilling its notification obligations through KEBS, Kenya adheres to the principle of transparency in the multilateral trading system. In the period 2000–2006 Kenya made notifications of 27 emergency measures to the Committee on Sanitary and Phytosanitary Measures,<sup>109</sup> most of which related to the import of domestic and wild birds, eggs, and bird meat products.<sup>110</sup> The National Notification Authority is the Trade Ministry while the Enquiry Point is operated by two divisions in the Ministry of Agriculture (animal and plant health), together with the Ministry of Health. However, it is KEBS which is primarily responsible for WTO notifications and monitoring international regulations under development, which are then disseminated to interested bodies for feedback. It responds to technical enquires by other WTO members regarding domestic regulations, submits comments by local stakeholders to the WTO Secretariat and maintains a reference collection of Kenyan and foreign standards in print and electronic form.<sup>111</sup> KEBS also carries out an information dissemination function to the general public (producers, exporters, importers) through the Kenya Gazette, in electronic form or through the Standards Information Resource Centre (which also monitors standards development at international level). Although the feedback on the utility of these mechanisms has been rather tepid, efforts are underway to repackage information products and sensitize stakeholders on the importance of their participation at all stages of standards development.<sup>112</sup>

In addition to the National WTO Committee KEPHIS (Kenya Plant Health Inspectorate) serves as a further point of inquiry for information on plant health and plant products standards for both the WTO and the International Plant Protection Convention (IPPC) frameworks. The Department of Veterinary Services under the Ministry of Agriculture and Rural Development supplies information on animal health and animal products, as well as guidelines of the Office International des Epizootes (OIE). The Ministry of Health serves as an enquiry point for both CAC and OIE on

---

<sup>109</sup> WTO documents G/SPS/N/KEN/2-28, 26 April 2001 to 1 May 2006.

<sup>110</sup> WTO, 2006.

<sup>111</sup> Aleke, M.P.W. 2006. *Personal correspondence*, Standards Development Division, February 2006 (hereafter Aleke, 2006).

<sup>112</sup> Ibid.

food safety issues. Kenya is a member of both the International Organization for Standardization (ISO) and the African Regional Organization for Standardization (ARSO) (responsible for the promotion of standardization activities in Africa, and the elaboration and harmonization of regional standards).

The work of KEBS is supplemented by other organizations assisting with the development of standards through committees co-ordinated by KEBS. These technical committees are comprised of experts representing private and public sphere entities such as producers, consumers, technology specialists, research and testing organizations.<sup>113</sup> In the past, KEBS has highlighted the following areas as requiring assistance: ways of monitoring pesticide residues in agriculture for MRLs compliance, including survey and monitoring tools, computers and related equipment; the creation of monitoring committees on pesticide residue standards and database generation; and capacity building.<sup>114</sup> Currently it notes the following areas as needing attention: a harmonization of regulations in the area of food control and safety as well as related organizations; the enhancement of its market monitoring capabilities; screening kits for identification of high risk consignments; and the need to augment participation and awareness among stakeholders on standardization and food safety.<sup>115</sup>

KEBS is entrusted with the tasks of preparing codes of practice and standards, making arrangements or providing facilities for the examination and testing of commodities, and undertaking and encouraging educational and research work on areas within this discipline. Legally, this body is given a broad mandate by which it may competently carry out its work. For example, the Standards Act provides inspectors with food, plant or animal health safety control, broad powers to enter upon premises, inspect and take samples of any commodity or any material or substance used. Section 7 charges the National Standards Council with supervising and controlling the administration and financial management of the bureau. Compulsory standards are applicable to both imports and locally produced goods, although exemptions from compliance may be granted by the Minister of Industrial Development on a case-by-case basis.<sup>116</sup> Standards Orders give

---

<sup>113</sup> See [www.kebs.org](http://www.kebs.org) – Development of Kenya Standards.

<sup>114</sup> WTO Committee on Sanitary and Phytosanitary Measures G/SPS/GEN/295/Add. 21. 16 July 2002. Technical Assistance, Submission by Kenya.

<sup>115</sup> Aleke, 2006.

<sup>116</sup> Section 9(iii) of the Standards Act as revised in 1981.

specific methods and procedures for the standardization of specified commodities. KEBS reviews its standards that are ten or more years old.<sup>117</sup> All national standardizing bodies in member countries are expected to comply with the "Code of Good Practice for the Preparation, Adoption and Application of Standards" as contained in Annex 3 of the TBT Agreement. The code requires all standardizing bodies that have accepted its terms to publish their work programs at least every six months. The standards work program should give details of new standards that are under preparation and those that were adopted in the preceding period.

KEBS also gives third party assurance for both product and system certification through the following schemes: Diamond Mark of Quality (for products that have consistently excelled in meeting the required product standards); Hazard Analysis and Critical Control Points (HACCP) certification (assures consumers and importers who demand HACCP that the food is safe and meets the requirements, hence enhancing market demand for their products); ISO 9001:2000 Quality Management Systems (QMS) (specifies requirements for a quality management system); and ISO 14000: Environmental Management Systems (EMS) (consumers and governments are becoming increasingly conscious of the need to preserve the environment to maintain its sustainability in terms of production).

KEBS tests and inspects products through random import checks to ensure conformity to national standards and issues certificates of compliance. This conforms to the SPS rules which require the use of scientific risk assessment to inform regulatory decisions.<sup>118</sup> Imports from trading partners that do not have mutual recognition agreements in place must be inspected by KEBS, as are locally produced items through periodic monitoring visits.<sup>119</sup> It has been noted that the internationally recommended sampling methods involve high costs for importers, exporters as well as producers because of the excessive numbers of recommended samples required.<sup>120</sup> KEBS has identified the main practical and institutional impediments to controlling imports and exports as: the duplication of regulatory functions by government agencies; the use of old testing technologies resulting in a low turn-around time for

---

<sup>117</sup> WTO, 1999b.

<sup>118</sup> Roberts, D. & Krissoff, B. 2004. *Regulatory barriers in international horticultural markets*. Economic Research Service Reports. United States Department of Agriculture Report WRS-04-01 (available at [www.ers.usda.gov](http://www.ers.usda.gov)).

<sup>119</sup> WTO, 2006.

<sup>120</sup> Aleke, 2006.

some products; the lack of know-how and/or equipment to test some products; and inadequate screening kits for high risk products.<sup>121</sup> Some of these challenges are overcome through a program underway to upgrade capacity and procure modern equipment. Further, the introduction of a pre-export verification of conformity to standards programme, PVoC (see further below) was designed to ensure that products have a certificate of conformity prior to export. KEBS receives external grants to finance these programs.<sup>122</sup>

Certified products are identified with a KES mark. Breach of the Standards Act provisions may lead to either a confiscation of goods or ban from manufacturing them and offenders liable to a fine, imprisonment or both. The penalties in place are according to the severity of the breach and include warnings if the failure is non-critical, destruction of the item, reshipment at the cost of the owner or prosecution for severe offences. The act also contains safeguards for producers against arbitrary decisions, with appeals mechanisms available. Section 11 provides an appeals avenue for aggrieved persons who were denied issuance of an import permit or in order to challenge any condition attached to a permit.

The introduction of the ISO 9000 Quality Management System is hoped to be one way to overcome the slow internal systems of KEBS by enhancing the consistency of measures and economic efficiency with fewer mistakes and less reproduction of work. Such modifications to its structure and working methods should also ultimately result in increased competitiveness and profits, wider market opportunities and better communication.<sup>123</sup> The KEBS website has also recently included download guidelines for exporters and importers. Its new PVoC system seeks to speed up the release of imports, reduce importation costs and facilitate trade by carrying out verification at the country of origin certified by a Certificate of Conformity.<sup>124</sup> The testing equipment of laboratories in Nairobi, Mombasa, and Kisumu has been set up and KEBS hopes to have its laboratory internationally accredited by the United Kingdom Accreditation Service (UKAS).<sup>125</sup> Risk management software is also being implemented for product analysis and performance profiles using data from exporters. KEBS

---

<sup>121</sup> Ibid.

<sup>122</sup> Ibid.

<sup>123</sup> See [www.kebs.org](http://www.kebs.org) – ISO 9000 Certification.

<sup>124</sup> See [www.kebs.org](http://www.kebs.org) – PVoC Guidelines.

<sup>125</sup> Study of administrative barriers and other impediments to trade in Kenya (2005).

is also increasing its training services activities; its 2006 seminars addressed the following subjects *inter alia* application of HACCP in the food industry, metrology and lab testing and standardization for quality management. KEBS has noted that more than 75 percent of firms are compliant with the requisite standards.<sup>126</sup>

### 2.3.1 Food safety and trade in food products

Kenya's main food laws are distributed across five legislative acts: Food Drugs and Chemical Substances Act Cap. 254, Radiation Protection Act Cap. 243, Public Health Act Cap. 242, Dairy Industry Act Cap. 336, Meat Control Act Cap. 356. Other laws which also touch upon food safety issues include the Agriculture Act Cap 318, Plant Protection Act Cap 324, Animal Diseases Act Cap 364, and the Standards Act Cap 496. KEBS has formulated approximately 350 food safety standards with Codex guidelines used as reference documents in their elaboration.<sup>127</sup> Food additives and pesticides regulations have taken into account international standards, national rules, approval procedures and toxicological facilities.<sup>128</sup> Areas identified for possible technical assistance include pesticide and veterinary residue control in foods, technical capacity building, harmonization of existing regulations and the assessment, testing and approval of genetically modified foods.<sup>129</sup>

The workings of the Meat Control Act Cap 356 can be used to illustrate the framework in which standards are monitored within any given industry. As empowered by section 3, the Minister for Agriculture put forward the Meat Control (Importation of Meat and Meat Products) Regulations 2001. One of the important mechanisms of monitoring trade standards in Kenya is through the use of permits. In this context, a valid import permit issued by the inspecting authority upon satisfaction that all import conditions have been met and is mandatory for all types of meat or meat product. Kenya informed the Codex Coordinating Committee<sup>130</sup> that food standards have been harmonized based on Codex Alimentarius, and form part of the East

---

<sup>126</sup> Aleke, 2006.

<sup>127</sup> Osongo, 2004.

<sup>128</sup> WHO. *Food safety country profile: Kenya* (available at [www.afro.who.int](http://www.afro.who.int)) (hereafter WHO. Food Safety Country Profile).

<sup>129</sup> Extract from the Report of the Codex Co-ordinating Committee for Africa (14<sup>th</sup> Session, November 2000) (available at [www.foodlaw.rdg.ac.uk](http://www.foodlaw.rdg.ac.uk)).

<sup>130</sup> Ibid.



African Standards discussed above. As of November 2005, KEBS was in the process of harmonizing Kenya's food regulations to be in line with EAC objectives.<sup>131</sup>

*Marking, labelling, and packaging*

This area of law is governed by a number of laws and standards - the Food, Drugs and Chemical Substances Act (FDSCSA) and Food Labelling Additives and Standard Regulations are two main sources. A board is established to assist with implementing regulations to prevent the consumer or purchaser from being misled as to its "quality, quantity, character, value, composition, effect [...] or safety", as well as stipulating guidelines which mandate respecting the method of preparing, preserving, packing, storing, conveying and carrying of such goods.<sup>132</sup> The Weights and Measures Act requires items to be labelled with metric measurements and packaged in even units. All consumables must be labelled in English or Kiswahili, with the trademark name, date of manufacture, origin and expiry date clearly labelled by manufacturers.

Clear rules are laid down for packaging, for example, banana leaves, maize, rice, sorghum or wheat straw, and bags containing traces of malt, soil or plant mould must not be used as packing material; and only plant residues that are certified to be free of seeds, pathogens, and insects can be used for packing material.<sup>133</sup> Where the size of the container impedes inclusion of all relevant information required, the outer package detailing the smaller components shall be labelled accordingly, available for consumer inspection if necessary.<sup>134</sup> Despite the detailed manner in which food safety laws are elaborated, in a survey<sup>135</sup> conducted as to food safety problems encountered most frequently, those most frequently cited are: expired foods, poor labelling, use of foreign languages, and an inadequate capacity to inspect. However, penalties imposed are often considered to be too lenient.

Like the laws on food safety, the agencies in Kenya responsible for enforcing food safety rules are many, spread across the Ministries of Agriculture, Health, Livestock and Fisheries, KEBS, and to a lesser extent KEPHIS.

---

<sup>131</sup> Available at [foodsafetyinfo.org](http://foodsafetyinfo.org).

<sup>132</sup> Food Drugs and Chemical Substances Act, section 28.

<sup>133</sup> WTO, 1999b.

<sup>134</sup> Onsongo, 2004.

<sup>135</sup> WHO, Food Safety Country Profile.

These agencies are involved in the development and implementation of Codes of Hygiene and Agricultural Practices and also ensure the dissemination of standards information to stakeholders throughout the food production process. These agencies are responsible for among other things, the inspection and monitoring of food and premises for catering and manufacturing, abattoirs, fish landing sites, imports and exports of foods and planting material.<sup>136</sup> The National Codex Committee consists of government ministries, industries, consumers, Kenya Bureau of Standards, and other stakeholders, but the coordination aspect of this arrangement needs strengthening.<sup>137</sup> This committee also seeks to play a larger role in the fish, horticulture and coffee sectors.<sup>138</sup> Consumer organizations are represented in the National Codex Committee through the Consumer Information Network. These entities assist with the formulation of policies, participating as Consumers International delegates (but not the Kenya national delegation) to some of the Codex Committee Meetings; while their local role is to create consumer awareness, protect consumer rights, conduct consumer-based research, and assist with standards development.<sup>139</sup> These undertakings are limited by the availability of funds.

### 2.3.2 Plant health and trade in plant and plant products

Statutory rules to protect plant health and prevent the spread of pests in Kenya can be found in the Plant Protection Act, the Suppression of Noxious Weeds Act Cap 325, and the Agricultural Produce Export Act Cap 319. The rules contained in the latter are a useful starting point for analysis purposes as they outline the measures that must be taken by local producers which then facilitates an assessment of whether these measures are sufficient to ensure quality exports, and are not too restrictive in terms of imports.

Importing plant materials (which is inclusive of seeds, cuttings, budwood, plantlets, fresh fruit, flowers and timber) is subject to a permit issued by the Kenyan Department of Agriculture prior to shipment from the country of origin. An original copy of the permit must be presented to the corresponding authority in the country of origin specifying Kenya's requirements and prohibitions with regard to pre-shipment treatment.<sup>140</sup>

---

<sup>136</sup> Ibid.

<sup>137</sup> See [www.foodlaw.rdg.ac.uk](http://www.foodlaw.rdg.ac.uk).

<sup>138</sup> Ibid.

<sup>139</sup> WHO, Food Safety Country Profile.

<sup>140</sup> WTO, 1999b.

Imports brought through designated entry points and plants may be detained in quarantine or in special nurseries should the need arise. Seeds that have been imported must first show an ISTA (International Seed Testing Association) certificate, which guarantees that it has been produced under internationally accepted standards. It is necessary for seeds to be certified before sale and this is said to take up to four years.<sup>141</sup>

The purpose of the Plant Protection Act is the prevention of the introduction and spread of disease destructive to plants; it empowers the responsible Minister to make rules in this regard – specifically to prohibit, restrict or regulate the importation and exportation of any plants and soil, likely to infect any plant with any pest or disease *inter alia*. This power accorded to the ministry is broad and confers a wide scope of discretion. The Plant Protection Rules also allow inspectors wide discretion and powers for the disinfection, fumigation and treatment of any building, vehicle, aircraft or vessel suspected of being or having been used for the storage or conveyance of anything likely to infect any plant with disease or pests.<sup>142</sup>

(a) Horticulture

The horticulture industry is characterized by less minimal State intervention and more private sector participation. One reason for this is that cooperative services for the collection and storage of crops offered by the government to control marketing, was not conducive to quickly perishing products like fruits, vegetables, and flowers.<sup>143</sup> Further, the large number of floriculture investments in the country, which contribute to foreign exchange earnings and offer employment has left the government reluctant to extensively intervene in this industry.<sup>144</sup> Although not part of formal policy, recent exemptions for the horticultural industry facilitated the free flow of resources, technology and skilled labour into Kenya, which produced a favourable investment environment and relatively cheap labour costs.<sup>145</sup>

---

<sup>141</sup> Ibid.

<sup>142</sup> Rule 3(a).

<sup>143</sup> Whitaker, M. & Kolavalli, S. 2004. *Floriculture in Kenya*. Programme of Advisory Support Services for Rural Livelihoods Department for International Development – Technical Output (available at [passlivelihoods.org.uk](http://passlivelihoods.org.uk)).

<sup>144</sup> Ibid.

<sup>145</sup> Ibid.

In 1997, small-scale producers contributed to roughly 70 percent of Kenya's horticultural export earnings, but by 2000 this figure dwindled to 30 percent, and in 2002, 1 600 of these producers had lost their contracts.<sup>146</sup> This decline is attributed to food safety concerns voiced both in the EU and the US.<sup>147</sup> Major European supermarkets have developed their own codes, with a collective model Eurep-GAP (European Retailers Protocol for Good Agricultural Practice) which mandates "equivalence of system", which is more stringent than that of the SPS Agreement instructing "equivalence of risk outcome". Article 4, of the SPS Agreement defines equivalence thus: "even if these measures differ from their own or from those used by other members trading in the same product, if the exporting member objectively demonstrates to the importing member that its measures achieve the importing member's appropriate level of sanitary or phytosanitary protection", then members shall accept those measures as equivalent. The Eurep-GAP "equivalence of system" is not viewed by all to be necessarily more effective, nor has it been economically conducive or even practical to replicate in countries like Kenya, particularly for SMEs with entirely different farming structures. Expensive auditing processes and traceability requirements compound practical problems such as the inadequate knowledge and skills in adhering to the use of recommended pesticides levels.<sup>148</sup>

The Horticultural Crop Development Authority (HCDA) is the main regulatory body of the horticultural sub-sector – a parastatal established under the Agriculture Act Cap 318 by the original order (1967), with the amended 1995 (L.N. No. 230) as the most recent with the aim of revitalizing the horticultural industry.<sup>149</sup> Its original mandate included the authority to fix prices, regulate trade, operate processing facilities and market horticultural goods.<sup>150</sup>

---

<sup>146</sup> See [www.new-agri.co.uk](http://www.new-agri.co.uk).

<sup>147</sup> Ibid.

<sup>148</sup> Okado, M. 2001. *Background paper on Kenya off-season and speciality fresh vegetables and fruits: lessons of experience from the Kenya horticultural industry*. UNCTAD (available at [www.unctad.org](http://www.unctad.org)).

<sup>149</sup> See [www.kenyaweb.com](http://www.kenyaweb.com).

<sup>150</sup> Muendo, M. & Tschirley, D. 2004. *Improving Kenya's domestic horticultural production and marketing system: current competitiveness, forces of change, and challenges for the future. Volume III: horticultural research and input sector regulation in Kenya and Tanzania*. Tegemeo Institute of Agricultural Policy and Development Draft for Review-Working Paper No. 08C/2004. Kenya (hereafter Muendo & Tschirley, 2004).

Presently, the board is run by mix of public and private actors and draws revenue from levies and fees charged on horticultural produce.<sup>151</sup>

The Kenya Plant Health Inspectorate Service (KEPHIS) is responsible for all matters relating to plant crop pests and disease control. Among its functions, it advises the Director of Agriculture on the appropriate quality of seeds and planting material for export and import, it undertakes inspection, grading, testing, certification and quarantine control at the ports of entry and exit and establishes convenient posts for such. It also formulates and implements standards on domestically produced and imported seeds.<sup>152</sup>

Through the Seed and Plant Varieties Act of 1991, KEPHIS is in charge of administering the legal framework, developing and implementing standards on imported and locally produced seeds, and is responsible for vegetable seed production and distribution.<sup>153</sup> A large proportion of KEPHIS workload is the enforcement of the detailed seed-related laws of Kenya, although it has been criticized for over regulation of the private sector in this regard to the exclusion of farmer stakeholders from industry decision making and participation.<sup>154</sup> The KEPHIS laboratory facilities are mainly used for the testing of residues in fruits and vegetables, and it operates on its own budget derived from the revenue generated by its sampling and testing activities. Upon a visit in 1999 by the EU Commission for Health and Consumer Protection Directorate General Office, the laboratory gave an overall positive impression; and with the exception of minor flaws related to documentation no substantive deficiencies were found.<sup>155</sup>

The Kenya Standing Technical Committee for Imports and Exports (KSTCIE) provides technical counsel on quarantine regulations to the Director of KEPHIS and the Ministry of Agriculture.<sup>156</sup> KSTCIE is responsible for: ensuring that rules on plant quarantine conform to

---

<sup>151</sup> WTO, 1999a.

<sup>152</sup> See [www.kephis.org](http://www.kephis.org).

<sup>153</sup> Muendo & Tschirley, 2004.

<sup>154</sup> Ibid.

<sup>155</sup> European Commission Health and Consumer Protection Directorate General Directorate D – Food and Veterinary Office DG (SANCO)/1127/1999 – MR Final Report of a Mission Carried out in Kenya 16–18 August 1999 for the Purpose of the Assessment of Control of Pesticide Residues in Fish Coming from Lake Victoria (available at [europa.eu.int](http://europa.eu.int)).

<sup>156</sup> WTO, 2006.

contemporary technical developments; ascertaining pre-clearance and inspection of sources of materials; providing assistance with the pre-treatment of products before shipment in compliance with import permits the importation of restricted and new materials; processing applications which are not otherwise eligible for importation under the Plant Protection Act (for example certain plants and biological control organisms).<sup>157</sup> The Pest Control Products Board (PCPB) authorizes the importation of agricultural chemicals, inspecting and issuing licenses for all premises involved in the production, distribution, and sale of agricultural chemicals, and registers the importation and distribution of agricultural chemicals.<sup>158</sup>

The strategic plan of 2001–2006 produced by KEPHIS underscores the challenges facing the organization pertaining to its quality of services and its impact in trade transactions.<sup>159</sup> These problems are noted to be inadequacy of infrastructure such as physical facilities and equipment, few technically qualified staff, and insufficient instruction manuals for quality assurance. Thus the strategic plan prioritizes the improvement of the regulatory framework, and increases staff capacity and access to information. Changes to facilities at the ports of entry and exit have been effected albeit slowly to better assist the organization to ensure that agricultural produce conforms to quality standards.

### 2.3.3 Animal health and trade in animal and animal products

The Terrestrial Animal Health Code of the OIE is acknowledged by the SPS Agreement as providing appropriate guidelines relating to sanitary standards for trade in animals and animal products, and is supplemented by the Manual of Standards for Diagnostic Tests and Vaccines. This lists diagnostic tests in "prescribed" and "alternative" categories assisting the determination of the health status of animals. While the Codex Alimentarius discussed above focuses on *human* health protection through monitoring trade in animal products, the Animal Code protects *animal* health outlining the diseases in terms of risk mitigation procedures to facilitate trade. For each disease the Code describes aspects such as the incubation period of diseases for

---

<sup>157</sup> Ibid.

<sup>158</sup> Ibid.

<sup>159</sup> Study of administrative barriers and other impediments to trade in Kenya (2005).

quarantine, the criteria for recognizing the presence of disease and/or infection, and the recognition of disease-free zones, among other factors.<sup>160</sup>

The legal framework for livestock health control is found primarily in the following acts: the Animal Diseases Act Cap 364, Pig Industry Act Cap 361, the Kenya Meat Commission Act Cap 363, Veterinary Vaccine Act Cap, and the Hide Skin and Leather Trade Act Cap 359. The Meat Control Act (section 2.3.1 on Food Safety), provides standards for the most part on food safety, that is, for the storage and transportation of meat, and the manufacture of meat products), but also covers live animals intended for slaughter. The Standards Act and Dairy Act also cover safety standards for foods of animal origin. The Veterinary Vaccine Act requires that any provider of medicines or vaccines needs to have a registered license, and must keep account of the distribution and sales of veterinary products. A reliable supply of quality drugs is crucial to providing animal health care and this statute furthers this end by ensuring that vaccines and treatment are provided by those qualified to dispense drugs used for animal health.

The Animal Diseases Act also covers the care and processing of animals but addresses additional species such as pigs (in recent years Kenya has been exporting more pork products than beef, mutton and goat meat combined<sup>161</sup>), enlarging the scope of the regulatory framework which previously focused predominantly on cattle, sheep, and goats, which are the mainstay of the livestock sector.<sup>162</sup> Through this law the Veterinary Director is given the authority to declare infected zones, search for, detain and (if necessary) dispose of infected animals and prohibit imports (incorporating Rules L.N.106/1965). The subsidiary legislation to this statute includes the Animal Disease Rules which provide for the importation of animals and animal products, the movement of animals, infected areas, provisions to

---

<sup>160</sup> Brückner, G. 2004. *An evaluation of the alternatives and possibilities for countries in Sub-Saharan Africa to meet the sanitary standards for entry into the international trade in animals and animal products*. AU-IBAR (available at [community.eldis.org](http://community.eldis.org))

<sup>161</sup> Meat Production in Kenya (2005) Export Processing Zones Authority (available at [www.epzakenya.com](http://www.epzakenya.com)).

<sup>162</sup> Eshiwani, G.S. 2003. *Policy issues that impact pastoral producers in north-eastern Kenya*. In Aboud, a., Gebru, G., Desta, S. & Coppock, D.L. eds. 2004. *Pastoralism in Kenya and the policy environment: linking research, development actors and decision-makers*. Summary of Proceedings for a Meeting Held 8 August 2003, at the International Livestock Research Institute (ILRI). Addis Ababa. Report produced by the Pastoral Risk Management (PARIMA) Project of the Global Livestock Collaborative Research Support Program (GL-CRSP). Utah State University, USA. (hereafter Eshiwani, 2003).

prevent the spread of disease and penalties for failure to comply with the rules. The subsidiary legislation provides rules specifically related to bird diseases, foot-and-mouth disease and vaccination, and the control of pig diseases. (Additionally the Pig Industry Act Cap 361 empowers the Pig Industry Board to license and control exports of pigs and pork products).

The Animal Diseases Act and its related legislation make provision for the examination of imported animals, relevant certificates testing and quarantine procedures. Animals can only be imported with valid licenses issued in writing by the Veterinary Director through the seaports of Mombasa or Lamu or through Kisumu, Nairobi and Mombasa airports. Import permits are mandatory, and are issued by the Agriculture Ministry and the Department of Veterinary Services and the corresponding foreign authority prior to shipment from the country of origin.<sup>163</sup> Animals are held for 21 days in approved quarantine facilities with regular veterinary inspection,<sup>164</sup> followed by a health clearance certificate affirming the tests, clinical examinations and treatment undertaken during quarantine. The importer bears the associated costs of health clearance such as post-arrival selection, testing, treatment, transport, and quarantine.<sup>165</sup>

The Animal Diseases Act has been criticized for the sections regarding "movement permits" for the movement of livestock and cattle from high-risk areas to terminal markets; particularly cumbersome are the many police check-points in place along livestock trekking routes.<sup>166</sup> Movements are only permitted during the day requiring overnight stays which delay movement and raise transaction costs. The act also inserts new provisions on branding to assist with animal identification and thus contributes to disease control. Other amendments have been put forward for the government to construct diagnostic laboratories at divisional level for animal diseases, employ veterinary scouts, and revive the Kenya Meat Commission.<sup>167</sup> These are of course subject to the availability of resources. The act does not include within this remit the veterinary procedures governing livestock exports which are instead subject to the standards imposed by the import countries;

---

<sup>163</sup> WTO, 2006.

<sup>164</sup> Ibid.

<sup>165</sup> WTO, 1999b.

<sup>166</sup> Eshiwani, 2003.

<sup>167</sup> See [www.kenyaconstitution.org](http://www.kenyaconstitution.org).



although it does make provision for livestock inspection for up to 100 days which is considered to be too excessive to be competitive.<sup>168</sup>

The Veterinary Act (repealing the obsolete Veterinary Practitioners Act) legislates for the inclusion of more health service providers such the Community-based Animal Health Workers (CAHW) working under the auspices of the Kenyan Veterinary Board (KVB). The board is responsible for ensuring the requisite qualification of CAHW after an initial training period by NGOs, making sure that the skills are maintained and upgraded periodically, and providing regular briefings and advisory meetings for the government on the progress of CAHW.<sup>169</sup> This approach was previously controversial among the more traditional veterinary elements but has since proliferated and been regarded as highly successful,<sup>170</sup> particularly since CAHW cover remote and marginal areas.

The Hide Skin and Leather Trade Act controls quality standards by requiring a license for all persons who buy hide, skin or leather for any purpose including export, unless he is in possession of a buyer's licence and has thereby fulfilled the necessary criteria. Importers and exporters are required to have an additional license for such, and goods must be transported through prescribed channels so that monitoring and evaluation can take place. Section 20 empowers the minister to formulate rules which aim at improving the quality of hides, skins, and leather goods for domestic or export purposes, by enforcing methods which regulate production and defining the grades for classification of the products.

An example of the effects of an import prohibition in effect is illustrated by Kenya's ban on Mauritian chicks based on concern regarding the spread of the *Avian encephalomyelitis* disease which was, according to claims by the Mauritian government, not based on any scientific testing or risk assessment as mandated by the SPS Agreement, nor was a notification made to the

---

<sup>168</sup> Aklilu, Y. 2002. *An audit of the livestock marketing status in Kenya, Ethiopia and Sudan Volume II, issues and proposed measures*. Community-Based Animal Health and Participatory Epidemiology Unit/Pan African Programme for the Control of Epizootics. Organization of African Unity/Interafrican Bureau for Animal Resources (available at [www.unsudanig.org](http://www.unsudanig.org)) (hereafter Aklilu, 2002).

<sup>169</sup> Eshiwani. 2003.

<sup>170</sup> Young, J., Kajume J. & Wanyama, J. 2003. *Animal health care in Kenya: the road to community-based animal health service delivery*. Working Paper 214, available at [www.odi.org.uk](http://www.odi.org.uk). (hereafter Young, Kajume & Wanyama, 2003).

WTO of the measure. This matter was settled privately by the two countries resulting in Kenya withdrawing the ban.<sup>171</sup>

(a) Fisheries

The susceptibility of fish to contamination gives rise to safety concerns throughout the production process: unhygienic handling during and after fish harvest, inadequate refrigeration, and poor processing and packaging.<sup>172</sup> The consequences of unsafe fish products apart from the obvious health risks include loss of potential profits, detention and recalls of products in export markets and loss of reputation. Although cognizant of the obvious need for good quality, overly restrictive standards nevertheless have a considerable negative effect on the industry. Such was the case in 1997 when Spain and Italy banned Kenyan fish exports over salmonella concerns despite other EU member states continuing to import fish as per bilateral agreements.<sup>173</sup> Reports of a cholera outbreak in 1998 and a report claiming the use of pesticides in Lake Victoria in 1999 also similarly damaged the fish industry. In the latter case, after a year of imposing the ban it was discovered that no Lake Victoria fish samples collected in the EU markets (tested in laboratories in South Africa and the EU) showed the presence of pesticide residues.<sup>174</sup> The World Health Organization opined that embargoes on importation of "food such as seafood, fresh water fish and vegetables is not an appropriate cause of action to prevent the international spread of cholera, and can represent an additional burden on the economy of the affected countries."<sup>175</sup> These actions by the EU were seen to be in contravention of article 2(2) of the SPS Agreement, where measures are "...based on scientific principles and ... not maintained without sufficient scientific evidence..."

A number of initiatives have been taken to meet the requirements of the European Commission. Legislative changes have been introduced as has

---

<sup>171</sup> Gujadhur, S. 2003. *Influencing market standards a voice for developing countries*. International Trade Forum Issue 2 (available at [www.intracen.org](http://www.intracen.org)).

<sup>172</sup> Abila, 2003.

<sup>173</sup> Ibid.

<sup>174</sup> Mosha, C. & Magoma, R. 2002. *Reduction of foodborne hazards, including microbiological and others, with emphasis on emerging hazards*. FAO/WHO Global Forum of Food Safety Regulators, Marrakech.

<sup>175</sup> WHO Press Release. 1998. *Director General says food bans are in appropriate for fighting cholera*. WHO/24 (available at [www.who.int](http://www.who.int)); Press Release FAO 98/21 (available at [www.fao.org](http://www.fao.org)).

reform of the procedures required for export approval and the issuance of certificates of health. The Fisheries Act Cap 378 gives the Fisheries Department the task of controlling fish quality and is implemented through the Fish Quality Assurance Regulations 2000. The Fisheries Act provides a detailed framework for fisheries management (sections 4 and 5), limitation on fishing and licenses (sections 6–16), and permits for import and export of fish (section 26). Hygiene standards of handling and processing are contained in the FQA Regulations. Through the KEBS Code of Hygiene Practice for the handling, processing, and storage of fish, which is mandatory for fish production for export as well as the domestic market, Kenyan hygiene requirements for fish have thus been harmonized with those of the EU.<sup>176</sup> These requirements are laid down in EU Directives 91/493/EEC and 98/83/EEC and enforced through the Kenyan Fisheries Department with periodic audits by EU inspectors. Based on HACCP principles, these instruments indicate the methods to be used in fish production, processing, handling, packaging and transportation.<sup>177</sup> Directive 91/493/EEC also lays down standards regarding general hygiene conditions for staff, general conditions relating to for example, the premises structure and layout, equipment, purification tanks and storage tanks intended for holding fish prior to export, on-site laboratories, and monitoring of production conditions. Consequently institutional changes requiring significant infrastructure costs were needed throughout the entire production chain. These include an association for processors and exporters to enable self-monitoring on matters of fish quality, fishermen to invest in cleaner boats and preservation facilities, while fish transporters require refrigerated trucks.

The Ministry of Livestock and Fisheries Development (MLFD) has been the source of policy guidance and technical control in the livestock sub-sector, with recent restructuring into three technical departments: Veterinary Services (DVS), Livestock Production (DLP), and Fisheries Development (DFD). The DVS, for example prepares circulars for field staff to implement a particular policy, who then distribute information to livestock farmers and the public. Attempts to elaborate animal health policies and strategies have been criticized for their lack of significant success.<sup>178</sup>

---

<sup>176</sup> Noor, H. 1998. Sanitary and phytosanitary measures and their impact on Kenya. *EcoNews Africa* (available at [hdl.handle.net](http://hdl.handle.net)).

<sup>177</sup> Abila, 2003.

<sup>178</sup> Young, Kajume & Wanyama, 2003.

Following a decrease in live animal export figures, and its withdrawal from operating in the domestic markets, the Livestock Ministry's role in livestock marketing has been reduced considerably,<sup>179</sup> signifying that some joint operations with the DVS (such as joint administrations of the quarantine stations) are no longer active. Nevertheless, the potential for collaboration still exists if the export market is revived.<sup>180</sup> Livestock marketing activities, such as the rehabilitation of local infrastructure and the collection of market data, are occasionally undertaken by NGOs and other projects outside of the Ministry.

## 2.4 Intellectual property rights and agriculture

Kenya has signed the 1978 International Convention for the Protection of New Varieties of Plants (UPOV), and given the treaty domestic effect through the Statute Miscellaneous Amendment Bill 2000; but is not a signatory to the 1991 UPOV Convention. UPOV aims to recognize the achievements of breeders of new plant varieties by granting an exclusive property right on the basis of a set of uniform and clearly defined principles. In the Kenyan context, this agreement has been criticized for failing to include adequate protection for farmers' and community rights to plant varieties that have been developed through customary means over generations.<sup>181</sup>

Most of the developing countries that were required to have plant variety protection in place by 1 January 2000 have been unable to complete the legal drafting and implementation process with most having missed the deadline.<sup>182</sup> Largely as a result of its decision in April 1999 to become a member of UPOV, and its Seeds and Plant Varieties Act Cap 326 (SPVA) in place since 1972, Kenya has been an exception, with a fairly well developed system of plant variety protection already in place. This statute regulates the import (Part III) production, testing and certification of plant varieties (Part II), as well as introducing plant breeders' rights (Part V).<sup>183</sup> The import control provisions of sections 15 and 16 give the minister the discretionary power to restrict imports of potentially harmful seeds. In addition to the regulatory function of sections 14 and 15 of the SPVA, a further control and monitoring

---

<sup>179</sup> Aklilu, 2002.

<sup>180</sup> Ibid.

<sup>181</sup> Muendo & Tschirley. 2004.

<sup>182</sup> Cullet, P. 2001. Plant variety protection in Africa: towards compliance with the TRIPS Agreement *Journal of African Law*, 45(1): 104 (hereafter Cullet, 2001).

<sup>183</sup> Fourth Schedule, Seeds and Plant Varieties Act, Laws of Kenya, Cap. 326.

provision is found in the Eighth Schedule to the Customs and Excise Act. Section 185 contains provisions for dealing with offences relating to the importation of restricted and prohibited goods. Although the legal framework is detailed, mechanisms to enforce the regulations need consolidation through financial and technical capacity building assistance.<sup>184</sup> The SPVA is under review to further strengthen the enforcement provisions and its compliance with other international agreements.<sup>185</sup> As relates to its impact on trade, more than half of the 136 applications filed and tested since 1997 were rose-varieties while a majority of the remainder comprised of cash crops.<sup>186</sup>

Often biodiversity laws which protect property rights over biological resources and related knowledge cover actors other than formal breeders who are the primary concern of most plant variety protection laws.<sup>187</sup> Section 50 of the Kenyan Environmental Management and Coordination Act 1999 (relating specifically to biodiversity) requires the authorities to protect the indigenous property rights of local communities. Section 43 specifically addresses indigenous knowledge and interests, stipulating that the minister may classify the traditional interests of local communities customarily resident within or around a lake shore, wetland, coastal zone or river bank as a protected interest.

Kenya's *sui generis* system is based on the UPOV criteria as regards plant varieties found in the Industrial Property Act and the SPVA. Section 17 of the SPVA outlines the conditions for the grant of rights and must be fulfilled as regards both the applicant for plant breeder's rights and the plant variety to which the application relates. Subsection (2) stipulates that an "applicant for plant breeder's rights must be the person who bred or discovered the plant variety concerned", and the priority issues between two or more persons who have independently bred and discovered a plant variety is addressed in the provisions of Part I of the Fourth Schedule. These latter provisions stipulate the requirements which must be met for plant breeders to be granted rights to new plant varieties: distinctiveness, uniformity and stability (DUS). The Industrial Property Act describes the requirements for protection as: Novelty (section 8): an invention is new if it is not anticipated

---

<sup>184</sup> Council for Trade-Related Aspects of Intellectual Property Rights. Review of Legislation – Kenya – WTO/Doc/ 04-2020- IP/Q/KEN/1.

<sup>185</sup> Ibid.

<sup>186</sup> See WTO document. IP/C/W/175, and GRAIN.1999. Plant variety protection to feed Africa. *Seedling* 2 (16)4.

<sup>187</sup> Cullet, 2001.

by a prior art which is defined as everything made available to the public by means of written or oral disclosure, use or exhibition. This must be before the date of filing of the application or, the validly claimed priority.<sup>188</sup> Inventiveness (section 9): considered to be such if at the date of filing or at the validly claimed priority, the invention could not have been obvious to a person skilled in the art. Industrial Applications (section 10): an invention is industrially applicable if it can be made or be used in any kind of industry, including agriculture, fishery and services.

The Agreement does not indicate the scope of coverage of the law but it does not circumscribe limitations to the provision, which could by implication suggest that all genera and species can be included.<sup>189</sup> The SPA covers all seeds and plant types and establishes a register for protected varieties. Section 21 addresses protected plant varieties and authorizes the minister to provide for the selection of names for plant varieties which are the subject of applications for plant breeder's rights and for the keeping of a register of the names of plant varieties for which a grant has been made or is under consideration. In the Seeds and Plant Varieties, Plant Breeder's Rights Regulations 1994, sections 22 and 23 detail what is to be included in such a register, and section 25 permits the inspection of such a register. Section 21 also details what is included within the scope of property rights as intended by the statute.

Kenya's Industrial Property Act Cap 3 (amended in 2002 in an effort to make the act compliant with its obligations under TRIPS), bans patents for plant varieties and for inventions that have a detrimental effect on public order, morality, public health or the environment as laid down in articles 2 and 3 of TRIPS. The statute goes beyond the latter's provisions, by specifically declaring that "...uses of any molecules or other substance...used for the prevention or treatment of any disease which ... may be designated as a serious health hazard or as a life threatening disease," are not to be patentable inventions. Section 26(a) of this statute instructs that plant varieties as provided for in the SPVA are excluded from patentability, but products of biotechnological processes and naturally occurring micro-

---

<sup>188</sup> Council for Trade-Related Aspects of Intellectual Property Rights. Review of Legislation – Kenya – WTO/Doc/ 04-2020- IP/Q/KEN/1.

<sup>189</sup> Mangeni, F. 2001. *Technical issues on protecting plant varieties by effective sui generis systems*. South Centre, Centre for International Environmental Law (CIEL). Washington D.C.

organisms can still be patented if they meet the requisite criteria.<sup>190</sup> Temporary exclusion from patentability for periods not exceeding ten years is possible under the act.

The duration of the right must also be specified by national laws.<sup>191</sup> Section 19(1) of the SPVA declares that a scheme shall prescribe the period, not exceeding twenty-five years, for which plant breeder's rights are to be exercisable; with the later subsections providing time variations for fruit or forest trees and other plant types. This section also details provisions for possible extensions of the time period and surrender of rights before the expiration date. Kenya has previously proposed that a five year extension of the transition period for patenting (life forms and biological processes) was needed to allow time for harmonization of TRIPS compliant legislation with the Convention on Biodiversity, and also, to further develop its *sui generis* system. Kenya has sought to expand the scope of 27(3)(b) to include the protection of indigenous knowledge and farmers' rights.<sup>192</sup>

In addition, WTO members are required to ensure that their laws permit effective redress for the infringement of intellectual property rights covered by the agreement. Section 36 of the SPVA enables rights holders to prevent the protected invention from exploitation by making, importing, stocking, offering for sale, selling or using the patented product. Detailed requirements in the TRIPS agreement in articles 42–50 cover the civil and administrative procedures, which have to be taken into account in the formulation of laws, regulations, and administrative procedures. The SPVA provides for civil and criminal penalties for infringement of rights, which include the rights of appeal.

The mandatory principles of national treatment and non-discrimination are not provided for in the statutes but seem to be in place in practice. In Kenya, between 1997 and 1999, 91 percent of the applications for plant variety

---

<sup>190</sup> Otieno-Odek, J. 2001. *Towards TRIPS compliance, Kenya's experience and legislative reforms*. Paper presented at the Eastern and Southern Africa Multi-stakeholder Dialogue on Trade, Intellectual Property Rights and Biological Resources in Eastern and Southern Africa. Nairobi (hereafter Otieno-Odek, 2001).

<sup>191</sup> Rangnekar, D. 2002. *Access to genetic resources, gene-based inventions and agriculture*. Study Paper 3a. UK Commission on Intellectual Property Rights.

<sup>192</sup> See [www.grain.org](http://www.grain.org).

protection came from foreign institutions.<sup>193</sup> One of the roles of the Environmental Management Authority established in the Environmental Management and Coordination Act 1999 is to issue guidelines and prescribe measures which outline suitable structures for access to genetic resources by non-citizens, including the issue of licences and fees to be paid for that access and also rules on the sharing of benefits derived from genetic resources.<sup>194</sup>

The Kenya Plant Health Inspectorate Service (KEPHIS) administers the Plant Breeders Rights Office which was established in 1997, after the implementing regulations for the Plant Breeders Rights were published in 1995. KEPHIS noted that for the period 2005–2006 the number of plant breeders' rights granted rose from 7 (for the 2004–2005 period) to 44 whereas the number of applications fell from 100 to 58.<sup>195</sup>

The Seed and Plant Varieties Regulations 1994 outline the functions of the Plant Breeders' Rights Committee as being to *inter alia* develop plant breeder's rights policy, review regulations and standards, moderate cases of appeal by aggrieved persons, and review and recommend appropriate plant breeder's rights.

The Seeds and Plants Tribunal which enforces the provisions contained in the Sixth Schedule, is established in section 29 and allows persons aggrieved by any decision - in connection with the granting of plant breeder's rights, and within the applicable period for those rights, or in connection with the sale of seeds on unindexed plant varieties – to appeal to the tribunal against that decision.

The Kenya Intellectual Property Office (KIPO) attempted to fill the lacunae in publicly available information on the importance of IPR protection by launching an outreach program to create awareness on the role of the IPR

---

<sup>193</sup> Plant Variety Protection in Developing Countries (1997) Compiled by GRAIN from the WIPO Industrial Property Statistics IP/STAT/1997/A; Kenya Plant Health Inspectorate Service's public notice of 3 May 1999; Mexico SN/CS. Pers. Comm. 29 September 1999.

<sup>194</sup> Otieno-Odek, 2001.

<sup>195</sup> Annual Report and Financial Statement, July 2005 – June 2006 (KEPHIS).



system in the development of trade.<sup>196</sup> This dissemination function is also supported by an information and documentation centre (IPDOC). The program entails collaboration and information exchange with industries, research institutes, universities, and the media, as well as organizing seminars and workshops with stakeholders and has greatly benefited the public who regularly consult the KIPO office for IPR related queries.<sup>197</sup>

### III. CONCLUSION

It can be seen from the number of laws discussed in the foregoing sections that the agricultural sector is in need of a comprehensive law which would go far in removing institutional and administrative overlaps, create consistency between policy and law and overcome some of the existing criticisms of the laws in place. The concept of this single agricultural law has been put forward in many of the government's policy papers. The continuously changing legislation is an indication of constant shifts of government emphasis between a regulatory and controlling role, to one of auditing and monitoring. Even in the latter situations, the government has retained a controlling influence in certain sub-sectors arousing criticism for excessive intervention. Also, many laws in Kenya grant significant discretionary powers to the administrative entities which are either the responsible ministers or the regulating bodies. Such discretionary powers have significantly increased the degree of uncertainty in the law, creating an opaque business environment and can create a setting conducive to corruptive practices.

Nonetheless, the legal framework for the most part attempts to comply with WTO obligations; certain laws are still a work in progress to achieve full compliance. That flaws and problems are not always rectified during the review process reflects the various other challenges Kenya faces between the planning and effecting stages. Kenya has highlighted trade policy formulation and analysis as an area for technical assistance, as well as harmonization and coordination of laws across the three EAC states while complying with their WTO commitments.

---

<sup>196</sup> Mbeva, J. 2001. *Experiences and lessons learned regarding the use of existing intellectual property rights instruments for the protection of traditional knowledge*. UNCTAD Expert Meeting on Systems and National Experiences for Protecting Traditional Knowledge, Innovations and Practices, Geneva.

<sup>197</sup> Ibid.

Constant amendments to laws have in certain areas left a maze of rules difficult for consumers, producers, regulators and stakeholders to effectively use or adhere to. In many of the disciplines discussed, a complete set of coherent and transparent laws falling under clear rubrics would facilitate compliance with rules, and clarify procedures to be followed.

Certain issues can be addressed through the formulation of subsidiary or administrative regulations which need not go through the lengthy legal reform process; this will assist government agencies and institutions toward a more cost effective method of implementing, enforcing and monitoring existing laws. For example, many of the sub-sectors analysed are regulated through the use of licences. However, in many cases, regulating bodies do not always have sufficient resources to monitor enforcement and compliance with the licensing requirements even if such licenses are mandatory under law. Addressing this deficiency and coming up with a cost-efficient and functioning remedy would also facilitate the assessment of what laws function as they should and what needs review.

It has been seen that many institutions are involved in implementing legal standards and it is not clear that all these institutions are necessary to do this; for those that are necessary for trade coordination is essential for the system to work efficiently. Streamlining the roles of public agencies by allowing greater roles for cooperatives and private sector participants creates better focal points of responsibility and concentrates sparse resources on monitoring compliance. While Kenya should be commended for its attempts to engage all stakeholders, including a greater participation of civil society organizations and a spectrum of livelihood groups in decision-making processes, the lack of coordination and consultation between them has undermined the success of such collaboration.

Most sub-sectors lack the personnel, financial resources and technical know-how necessary to undertake comprehensive change to comply with obligations that the government has assumed. A prevalent problem which can be addressed without the need for significant funding amongst institutions is the lack of information available to those seeking information on standards and WTO related information. This problem is present both in government, semi-government and private institutions. The information received is slow to come in, and in many cases vague or unreliable.

Ultimately, the inexorable fact that Kenya as a developing country is challenged the most by a restricted budget for development is exacerbated by poor accountability in public resources management. This can be considered the most salient obstacle to compliance with its international agricultural trade obligations.

## MAIN REFERENCES

- Abila, R.** 2003. *Food Safety in Food Security and Food Trade Case Study: Kenyan Fish Exports*. 2020 Focus 10, Brief 8/17. IFPRI. Washington D.C.
- Aklilu, Y.** 2002. *An audit of the livestock marketing status in Kenya, Ethiopia and Sudan Volume II, issues and proposed measures*. Community-Based Animal Health and Participatory Epidemiology Unit/Pan African Programme for the Control of Epizootics. Organization of African Unity/Interafrican Bureau for Animal Resources (available at [www.unsudanig.org](http://www.unsudanig.org))
- FAO.** 2003. *Agricultural Trade Reforms in Kenya Under the World Trade Organization Framework*. Kenya Institute for Public Policy (KIPPRA) Discussion Paper No. 25, Kenya.
- FAO.** 2000. *Agriculture, Trade and Food Security Issues and Options in the WTO Negotiations from the Perspective of Developing Countries*. Volume II, Country Case Studies. FAO Commodities and Trade Division, FAO, Rome.
- Kenya Revenue Authority.** 2005. *Study of Administrative Barriers and Other Impediments to Trade in Kenya*. Trade Facilitation Project in Kenya. Final Report prepared by Emerging Market Economics and Almaco Management Consultants Ltd., available at [www.kra.go.ke](http://www.kra.go.ke).
- Kenya Trade Handbook on Importing and Exporting in Kenya:** 2005. *Final Report*. Almaco Management Consultants Ltd and Emerging Market Economics, Kenya.
- Muendo, M. & Tschirley, D.** 2004. *Improving Kenya's Domestic Horticultural Production and Marketing System: Current Competitiveness, Forces of Change, and Challenges for the Future Volume III: Horticultural Research and Input Sector Regulation in Kenya and Tanzania*. Tegemeo Institute of Agricultural Policy and Development Draft for Review-Working Paper No. 08C/2004. Kenya.
- Nyoro, J.K.** 2002. *Agricultural and Rural Growth in Kenya*. Tegemeo Institute of Agricultural Policy and Development, Egerton University, Kenya.
- Odhiambo, W., Kamau, P. and McCormick, D.** 2006. *Managing the Challenges of WTO Participation: Case Study 20 – Kenya's Participation in the WTO: Lessons Learned* (available at [www.wto.org](http://www.wto.org))

**Osongo, M.** 2004. Kenya Food and Agricultural Import Regulations and Standards. Kenya FAIRS Report. *GAIN Report* Number: KE4009.

**WHO.** *Food Safety Country Profile: Kenya* (available at [www.afro.who.int](http://www.afro.who.int)).

**Wilson, J.S. and Abiola, V.** 2003. *Standards and Global Trade: a Voice for Africa*, International Bank for Reconstruction and Development/World Bank.

**WTO.** 2006. Secretariat Trade Policy Review EAC 2006–Kenya (WT/TPR/KEN).

**WTO.** 1999a. Trade Policy Review Kenya 1999: Report by the Government WT/TPR/G/64.

**WTO.** 1999b. Trade Policy Review Kenya 1999: Report by the Secretariat-WT/TPR/S/64.

## NEPAL CASE STUDY\*

### *Contents*

I.	INTRODUCTION	383
1.1.	Trade policy reforms	383
1.2.	Nepal's trade arrangements	386
1.3.	Nepal's accession to the WTO	393
1.3.1.	Participation in the WTO as a least developed country	394
1.4.	Overview of the legal system	396
II.	LEGAL AND INSTITUTIONAL FRAMEWORK	397
2.1.	GATT and related concepts	397
2.1.1.	Tariffs, levies and other charges	397
2.1.2.	Customs valuation	401
2.1.3.	Anti-dumping, subsidies and countervailing duties	402
2.1.4.	State Trading Enterprises	403
2.2.	Agreement on Agriculture	404
2.2.1.	Market Access	404
2.2.2.	Export competition	404
2.2.3.	Domestic support measures	405
2.2.4.	The Marrakesh Decision	406
2.3.	The SPS Agreement	407
2.3.1.	Food safety and trade in food products	407
2.3.2.	Plant health and trade in plant and plant products	409
2.3.3.	Animal health and trade in animal and animal products	415
2.4.	The TBT Agreement	418
2.5.	Intellectual property rights and agriculture	419
III.	CONCLUSION	421
	MAIN REFERENCES	423

---

\* This chapter was prepared by Charlotta Jull.



## I. INTRODUCTION

This chapter reviews Nepal's agricultural reform commitments under the terms of its accession to the WTO. The opening section is a background on some of the key factors influencing Nepal's potential for agricultural trade. In the second section, recent trade policies, as well as some of Nepal's important bilateral and multilateral trading arrangements are explored. The third and fourth sections focus on the national framework through an analysis of Nepal's legal institutions and domestic legislation.

### 1.1 Trade policy reforms

Nepal has been pursuing an open trading regime since the 1950s. However, over the thirty year period of single-party rule that lasted until the mid-1980s, there was a very high level of state intervention in all spheres of the Nepalese economy. During this time, economic distortions and inefficiencies fuelled high fiscal and external sector deficits and inflation. Structural adjustment programs were introduced to target these problems and to open up the Nepalese economy to market driven reforms. When the multi-party majority was restored in 1991, Nepal embarked on a more comprehensive policy of trade liberalization. The reforms were designed to accelerate the process of economic and social development by promoting a more efficient system of national production and improved access to foreign markets.<sup>1</sup>

Many of the market-based initiatives in Nepal since 1991 have focused on the areas of trade, industry, finance and taxes. Although most of these policies have not been targeted towards the agricultural sector, each has the potential to contribute to agricultural development.<sup>2</sup> For example, Nepal introduced the Foreign Investment and One Window Policy in 1992,<sup>3</sup> to generate income and employment by encouraging broader participation of the private sector and improved productivity in domestic markets. The policy is also designed to encourage the import of foreign capital, modern technology, management and technical skills to increase the competitiveness of Nepalese industries in international markets. To implement the policy, the

---

<sup>1</sup> UNDP. 2004. Barriers to Empowerment, p. 37. In *Human Development Report* (available at [www.undp.org.np](http://www.undp.org.np)).

<sup>2</sup> FAO Review, p. 15.

<sup>3</sup> Foreign Investment and One Window Policy (1992), (available at [www.nepalchamber.org](http://www.nepalchamber.org)).



Foreign Investment and Technology Transfer Act of 1992<sup>4</sup> was also introduced. It contains specific provisions aimed at attracting foreign investment in the form of equity participation, direct investment in domestic production, reinvestment of earnings derived from these investments, and the transfer of technology. The Foreign Investment and One Window Policy and accompanying legislation do not provide for the opening up of the agricultural sector to foreign direct investment. However, they have provided an important framework to encourage agricultural growth. Notably, by encouraging foreign participation in the banking sector, Nepal increased the potential to improve the supply of available agricultural credit for farmers.<sup>5</sup> Nonetheless, net foreign direct investment in Nepal has remained negligible, as a result of poor infrastructure, rigid labour markets and a weak business climate.<sup>6</sup>

The Industrial Policy of 1992<sup>7</sup> introduced another key area of market-based reform that has important implications for the agricultural sector. The policy is targeted towards increasing the contribution of industrial sector to the national economy by encouraging industrial production and productivity. The emphasis is on the development of export-oriented industries and those that use local resources, but an important element of the policy is the goal of reducing unemployment and under employment in the agriculture sector. The Industrial Enterprises Act 1992<sup>8</sup> was implemented under the Industrial policy and amended in 1997 to balance the regional development of the country by encouraging labour intensive industries in areas of low agricultural output. Article 15 of the act has provisions to allow for subsidies to certain priority industries. These include tax reductions and excise duty rebates of up to 35 percent for industries established for export, undeveloped and underdeveloped areas, as well as for export-oriented products.<sup>9</sup> Although the industrial sector was an area of considerable growth for Nepal in the 1990s, reduced foreign demand, increased competition among trading countries and an adverse shift in the policies in the countries that import Nepalese goods, have been some of the factors limiting its export performance in recent years.<sup>10</sup> In addition, the implementation of the

---

<sup>4</sup> Foreign Investment and Technology Transfer Act 1992, (available at [www.yomari.com](http://www.yomari.com)).

<sup>5</sup> FAO Review, p. 14.

<sup>6</sup> IMF. 2006. *Nepal: selected issues and statistics*, p. 19. Country Report No. 06/45 (available at [www.imf.org](http://www.imf.org)).

<sup>7</sup> Industrial Policy, 1992 (available at [www.tpcnepal.org.np](http://www.tpcnepal.org.np)).

<sup>8</sup> Industrial Enterprises Act, 1992 (available at [www.supremecourt.gov.np](http://www.supremecourt.gov.np)).

<sup>9</sup> Industrial Enterprises Act, 1997, article 15.

<sup>10</sup> Trade and Competitiveness, p. 2.

Industrial Policy has been hampered by weak institutions, trading infrastructure and supply-side constraints arising from the Maoist insurgency.

Reforms in the agricultural sector have been primarily implemented under the 1995 Agriculture Perspective Plan (APP). This plan was developed in conjunction with the Asian Development Bank to provide a framework to encourage agricultural growth, stimulate the economy and reduce poverty over a 20 year period. The primary objective is to improve the diversity of agricultural products and to develop commercial agriculture by enhancing cereal production in the plains (the *Terai* region) and the production of fruits as well as high value crops and livestock in the hills and mountain regions. It also sought to increase investments in irrigation, rural roads, fertilizer and technology. However, due to lack of resources, central coordination and monitoring, implementation of the APP has progressed on a piecemeal basis.<sup>11</sup>

In 2002, the Government of Nepal introduced the Tenth Plan of its Poverty Reduction Strategy Paper, to be implemented over a five year period. The original goal was to reduce poverty from 38 percent in 2001 to 30 percent in 2007 on the basis of a four pillared development approach. The strategy was designed to encourage broad-based and sustained economic growth, to improve infrastructure, social and economic services in rural areas, to reduce social and economic exclusion from disadvantaged groups and to improve governance strategies for transparency, efficiency and accountability. Under the Tenth Plan, agricultural reform strategies included mobilizing the private sector and NGO service providers, promoting cooperative/contractual farming, adopting commodity policies to create favourable investment climates for private entrepreneurs, devolving local agricultural programs to local bodies and strengthening agricultural farms/stations as resource centres to ensure the supply of quality seeds and planting/breeding materials for multiplication.<sup>12</sup> It also included land reform packages and the development of sustainable irrigation facilities as envisaged under the Agriculture Perspective Plan. Nonetheless, a result of conflicts in many of the rural areas, the budget for the Tenth Plan was substantially reduced, and Nepal continues to struggle with implementation measures.<sup>13</sup>

The 2005 IMF Progress Report on the Tenth Plan suggests that Nepal's growth in trade was successful in fuelling a considerable increase in

---

<sup>11</sup> FAO Review, pp. 69 and 70.

<sup>12</sup> FAO Review, p. 24.

<sup>13</sup> IFPRI, 2005, p. 26.

per capita growth of up to 5 percent in the 1990s, compared to the less than 1 percent growth rate for most of the country's prior economic history. However, the Progress Report noted that growth in recent years has been seriously reduced by political turmoil and conflict, averaging at only 2 percent during the period of 2000–2004. In addition, it has been acknowledged that economic gains from liberalization policies have been uneven among the three major geographical regions, the mountains, hills and plains. The concentration of economic activity, the manufacturing base, the level of agricultural production, and access to markets are varied. The *Terai* has the highest tier of development in all of these areas, and the mountains have the lowest.<sup>14</sup> In conclusion, although studies suggest that the Nepalese economy responded well to market-based reforms in the 1990s, weak institutions and a lack of resources continue to undermine the poverty reduction strategy process, as well the full transition to a competitive trading economy.<sup>15</sup>

## 1.2 Nepal's trade arrangements

The WTO provisions on Most-Favoured Nation (MFN) treatment status allow for countries to take advantage of bilateral and multilateral trade agreements outside of the WTO system, as long as they do not discriminate among member states. The principle of Most-Favoured Nation treatment is set out under article 1 of the GATT. It provides that the benefits of concessions among member states must be "immediately and unconditionally granted to the like product originating in or destined for the territories of all other Contracting Parties." The principle has been incorporated into many of the bilateral and multilateral trading agreements to which Nepal is a party. Prior to its accession to the WTO, Nepal had signed bilateral trade treaties with 17 trading partners.<sup>16</sup> Since its accession to the WTO, Nepal has been actively pursuing further trade diversification and membership in other regional trade regimes in Asia, such as BIMSTEC and SAFTA. A review of some of Nepal's important bilateral and multilateral agreements and their implications under the WTO Most Favored Nation treatment principle are set out below.

---

<sup>14</sup> Roy, D. 2005. Liberalization in Nepal: bridging the geographical hierarchy. *Trade Insight* 4.

<sup>15</sup> Trade and Competitiveness Study, p. 2.

<sup>16</sup> The full texts of the Bilateral Trade Agreements are available on the Nepal Trade Promotion Centre (available at [www.tpcnepal.org.np](http://www.tpcnepal.org.np)).

*Trade with India*

India is Nepal's most important trading partner. It is by far the greatest source of imports to Nepal, as well as its primary country of export.<sup>17</sup> Nepal has generally had stable trading relations with India since the first trade and transit agreement, the Treaty of Trade and Commerce of 1950, recognized Nepal's right to import and export commodities through Indian territory and ports without customs levies. However, security concerns over Nepal's relationship with China in 1989 led in India to freeze trade relations with Nepal for 15 months, with devastating effects on the Nepalese economy. After trading relations with India were restored, the India-Nepal Agreement of Co-operation,<sup>18</sup> was established in 1991 to ensure the free movement of capital, labour and payments between the two countries. The India-Nepal Treaty that was implemented under this Agreement was recently renewed on 5 March 2007.<sup>19</sup>

The treaty has specific provisions for trade facilitation and expansion of trade between the two countries. Article II states that "The Contracting Parties shall endeavour to grant maximum facilities and to undertake all necessary measures for the free and unhampered flow of goods, needed by one country from the other, to and from their respective territories." Article IV of the Nepal grants duty free access to the Indian market without quantitative restrictions and on a reciprocal basis for all primary products, with the exception of some manufactured goods, which are specified in the protocol to the treaty. Nepal benefited greatly from this trading arrangement in the late 1990s by obtaining privileged access to trade in India's booming market. However, the 2002 renewal of the Nepal India Trade Treaty introduced more restrictions on the amount of high quality items that can be exported from Nepal, and included further safeguard measures to protect

---

<sup>17</sup> In 2004, India accounted for 57 percent of Nepal's total exports, and 59 percent of the total amount of Nepal's imports. More can be found on Nepal Trade Promotion statistics 2005 (available at [www.tpcnepal.org.np](http://www.tpcnepal.org.np)).

<sup>18</sup> Agreement of Cooperation between His Majesty's Government of Nepal and the Government of India, (available at [www.tpcnepal.org.np](http://www.tpcnepal.org.np)).

<sup>19</sup> 2002 Treaty of Trade between His Majesty's Government of Nepal and the Government of India, (available at [www.tpcnepal.org.np](http://www.tpcnepal.org.np)).

domestic industries in India. As a result, Nepal has amassed a large trade deficit with India, amounting to US\$66 893 500 in 2002–2003.<sup>20</sup>

The India-Nepal Trade Treaty has elements of both a free trade agreement and a preferential trade agreement, as the two are characterized under the WTO rules. On the one hand, article III of the treaty grants unconditional MFN treatment to each other, suggesting that the arrangement is a free trade agreement. Free trade agreements may be compatible with WTO rules as long as the effect of the agreement does not lead to an increase in trade barriers to third parties and substantially all trade is between the parties to the agreement. The treaty appears to be WTO compliant in this respect as it covers the majority of primary products, including unprocessed agriculture, horticulture, forest produce and minerals and does not impose additional barriers to trade for third parties. However, article V and its protocol grants preferential market access for the export of Nepalese manufactured products to India. This provision for non-reciprocity on industrial goods would suggest that the arrangement is closer to a preferential trade agreement, in contradiction with the WTO MFN treatment principle. In order to justify such an agreement under WTO rules, India would be required to grant similar preferential treatment to other least developed countries. In South East Asia alone, there are two other least developed countries, Bangladesh and Bhutan which do not have preferential trading arrangements with India.<sup>21</sup> In light of India and Nepal's commitments to ensure compatibility WTO, the treaty is currently under review.

#### *Trade with China*

Nepal has had stable trading relations with China since the first bilateral trade treaties were signed with the Government of the People's Republic of China in the 1950s. A Peace and Friendship Treaty was signed in April 1960, followed by a Boundary Treaty in October 1961. The 1981 Trade and Payment Agreement<sup>22</sup> is the basis for China and Nepal's current preferential

---

<sup>20</sup> 2004. *Ensuring food security in Nepal, facing threats and seizing opportunities at WTO accession*, p. 29. Workshop Report submitted to Multilateral Trade Integration and Human Development in Nepal Program. Columbia University, New York (available at [www.multitrade.org.np](http://www.multitrade.org.np)).

<sup>21</sup> FAO/UNDP. 2004. *Implications of the WTO Membership on Nepalese agriculture*, p. 183. Kathmandu (hereafter *Implications of WTO Membership*).

<sup>22</sup> 1981 Trade and Payment Agreement between the Republic of China and His Majesty's Government of Nepal, (available at [www.tpcnepal.org.np](http://www.tpcnepal.org.np)).

trading regime. The Agreement focuses on developing trade overseas and overland, and further consolidation of traditional trade between Nepal and the Tibet Autonomous Region of People's Republic of China. Article 3 of the Agreement also provides for a list of products to be exchanged and the trading points along the frontier of the two countries. Article 7 provides for "most favoured nation treatment in all matters relating to customs duties and other taxes, fees and charges to be levied on exportation and importation of commodities and to the rules, formalities and charges of customs management". Finally, article 8 of the Agreement allows for the border inhabitants of the two countries, within an area of 30 kilometers to carry out the traditional trade on barter basis. Despite China's long history of providing Foreign Aid to Nepal, bilateral trade between the two countries has remained low in comparison to India-Nepal trade.<sup>23</sup> In addition, with India and China's rapid economic growth in recent years, there has been a renewed interest in developing further trading relations, and in particular, in developing Nepal as a trade transit corridor between China and India.<sup>24</sup>

#### *Trade with Bangladesh*

In 1976, Nepal and Bangladesh signed the Trade and Payment Agreement with its protocol as well as the Transit Agreement with Protocol<sup>25</sup>. Under the Trade and Payment Agreements, Nepal and Bangladesh agree to grant most favoured nation (MFN) treatment to each other with respect to licenses, customs formalities, customs duties and other taxes, storage and handling charges, fees and other charges of any kind levied on exports and imports of goods to be exchanged between them.<sup>26</sup> Schedule A of the Trade and Payment Agreement lists certain Nepalese primary commodities, semi-manufactured and manufactured good for export into Bangladesh. There are no specific requirements for documentary evidence for export. The protocol establishes that points of entry, exit procedures and storage and other related facilities should be the same as applied by the Transit Agreement. All

---

<sup>23</sup> In 2004, China accounted for only 3.9 percent of Nepal's imports.

<sup>24</sup> See Dahal, T. 2005. *Nepal as a transit state: emerging possibilities*. Nepal Institute of Foreign Affairs (available at [www.ifa.org.np](http://www.ifa.org.np)).

<sup>25</sup> Trade and Transit Agreements between His Majesty's Government of Nepal and the Government of the People's Republic of Bangladesh, (available at [www.tpcnepal.org.np](http://www.tpcnepal.org.np)).

<sup>26</sup> UNESCAP. 2004. *Trader's Manual for Least Developed Countries: Nepal*, p. 26 (hereafter Traders Manual).

payments in connection to bilateral trade between Nepal and Bangladesh shall be effected in any convertible currency unless otherwise agreed upon.<sup>27</sup>

*Trade with the EU: The Everything But Arms Initiative*

Nepal is a beneficiary of preferential trade treatment with the European Union under the Everything But Arms (EBA) Regulation, which was adopted by the EU Council in February 2001. This regulation grants duty-free access to imports of all products from least developed countries without any quantitative restrictions, except for arms and munitions. The only import items that were not immediately released from duty free tariff quotas were fresh bananas, rice and sugar. The regulation provides for the gradual release of duties on those products, with duty free access granted for bananas in January 2006, for sugar in July 2009 and for rice in September 2009. The EBA Regulation does not have a restricted time frame for these special arrangements for Least Developed Countries and is not subject to the periodic renewal of the EU framework of generalized trading preferences.<sup>28</sup> This agreement provides Nepal with opportunities to increase export growth, however, the EBA is not a clear guarantee of market access preferences for Nepal, because it is a unilateral and conditional arrangement.<sup>29</sup> Unlike bound MFN tariffs under the WTO system, the EBA trading arrangement can be withdrawn at any time by the EU without the need to provide justification to Nepal.

*SAARC and SAFTA*

Nepal has been actively involved in negotiations to establish the South Asian Association for regional Co-operation (SAARC) which includes Bangladesh, Bhutan, India, Maldives, Nepal, Pakistan and Sri Lanka and is now the host of the SAARC secretariat. Nepal was a contracting state of SAPTA (SAPTA), the South Asian Preferential Trade Agreement which entered into force on 7 December 1995. It is now a signatory of SAPTA's successor agreement, the South Asian Free Trade Area Agreement (SAFTA), which came into force on 1 January 2006.<sup>30</sup> This agreement for trade in goods,

---

<sup>27</sup> Traders' Manual, p. 26.

<sup>28</sup> Everything But Arms Regulation (EC) 416/2001.

<sup>29</sup> UNESCAP. *Case study: Nepal and the Doha Development Agenda: perspectives from the ESCAP Region*. UNESCAP Document ST/ESCAP/2278 (available at [www.unescap.org](http://www.unescap.org)) (hereafter UNESCAP Case Study).

<sup>30</sup> Agreement on South Asian Free Trade Area (available at [www.saarc-sec.org](http://www.saarc-sec.org)).

services, investment liberalization and improvement of competitiveness was signed at the 2004 SAARC Summit in Islamabad. It provides a framework to fulfill commitments designed to address tariffs, para-tariffs, non-tariff and direct trade measures by 2016. Provisions for sensitive lists of products, rules of origin, technical assistance, as well as a mechanism for compensating revenue loss for Least Developed Member States are still under negotiation.

Unlike its predecessor agreement, SAPTA, the SAFTA Agreement has specific provisions referring to member state commitments under GATT and the WTO. Article 5, states that "each contracting state shall accord national treatment to the products of other contracting states in accordance with the provisions of article III of GATT 1994."<sup>31</sup> In addition, article 16 provides that "All investigation procedures for resorting to safeguard measures under this article shall be consistent with article XIX of GATT 1994 and WTO Agreement on Safeguards."<sup>32</sup>

The Trade Liberalization Program under in article 7 of the SAFTA Agreement commits members to progressively reduce customs duties on products from the region. The tariff reduction by the Non-Least Developed Contracting States from existing tariff rates to 20 percent is scheduled to occur within a time frame of two years, from the date of the coming into force of the Agreement. If actual tariff rates after the coming into force of the Agreement are below 20 percent, there is a provision for an annual reduction on a Margin of Preference basis of 10 percent on actual tariff rates for each of the two years. The tariff reduction by the Least Developed Contracting States to 30 percent from existing tariff rates is scheduled within the time frame of two years from the date of the coming into force of the Agreement. If actual tariff rates on the date of coming into force of the Agreement are below 30 percent, the Agreement provides for an annual reduction on a Margin of Preference basis of 5 percent on actual tariff rates for each of the two years. The subsequent tariff reduction by Non-Least Developed Contracting States from 20 percent or below to 0–5 percent is scheduled to occur within a second time frame of five years, beginning from the third year from the date of coming into force of the Agreement. The subsequent tariff reduction by the Least Developed Contracting States from 30 percent or below to 0–5 percent shall be done within a second time frame of eight years beginning from the third year from the date of coming into

---

<sup>31</sup> Agreement on South Asian Free Trade Area, article 5.

<sup>32</sup> Ibid, article 16.



force of the Agreement. There is an additional reference to multi-lateral commitments where it states that "contracting parties shall eliminate all quantitative restrictions, except otherwise permitted under GATT 1994, in respect of products included in the Trade Liberalization Program."<sup>33</sup>

Nepal, Bhutan and the Maldives entered SAFTA as Least Developed Countries, and as such, they are expected to benefit from additional special and differential treatment measures under article 11 of the Agreement. These may include special regard to the situation of the Least Developed Contracting States when considering the application of anti-dumping and/or countervailing measures, greater flexibility in applying quantitative or other restrictions on imports. It will also require special consideration of direct trade measures to enhance sustainable exports from Least Developed Contracting States, such as long and medium-term contracts containing import and supply commitments in respect of specific products, buy-back arrangements, state trading operations, and government and public procurement. In addition, contracting states commit to give special consideration to requests from Least Developed Contracting States for technical assistance and cooperation arrangements designed to assist them in expanding their trade with other contracting States and in taking advantage of the potential benefits of SAFTA. Finally, until alternative domestic arrangements are formulated to address the potential loss of customs revenue of LDC by implementing the Agreement, contracting states agree to establish an appropriate mechanism to compensate the Least Developed Contracting States for their loss of customs revenue. Full implementation of the Agreement for LDCs is anticipated for 2017, with tariffs to be eliminated from "fast track" products by 2011.<sup>34</sup>

### *BIMSTEC*

In July 2004, Nepal joined the Bay of Bengal Initiative for Multi-Sectoral Technical and Economic Co-operation (BIMSTEC), which also includes Thailand, Myanmar, India, Bhutan, Bangladesh and Sri Lanka. The organization was established in 1997 and is designed to promote economic and trade relations between member states in South Asia and South East Asia. Nepal is also a party to the BIMSTEC Free Trade Agreement (FTA) that is scheduled to enter into force for trade in goods in July 2006. In the

---

<sup>33</sup> Ibid, article 7.

<sup>34</sup> Nag, B. 2005. Trade cooperation and performance in East and South Asia: towards a future integration. *Asia Pacific Development Journal*, 12: 1 (available at [www.unescap.org](http://www.unescap.org)).

preamble, the Agreement makes specific reference to the "rights, obligations and undertakings of respective Parties under the World Trade Organization (WTO) and other multi-lateral, regional and bi-lateral agreements and arrangements" and acknowledges that "least developed countries in the region need to be accorded special treatment commensurate with their development needs."<sup>35</sup> Under the Agreement, trade in goods will be liberalized by eliminating tariff and non-tariff barriers in two phases, with products to be identified as either fast-track or normal track. Non-LDCs commit to eliminate fast track product tariffs for LDCs by 30 June 2007, and among themselves by 30 June 2009. LDCs commit to do so for non-LDCs by 30 June 2011 and among themselves by 30 June 2009. For normal track products, non-LDCs agree to eliminate tariffs for LDC by 30 June 2010, but among themselves by 30 June 2012. The LDCs have agreed to eliminate tariffs of normal track products for non-LDC by 2017 and among themselves by 30 June 2015.<sup>36</sup> Agreements on services and investment that are scheduled to enter into force on 1 January 2008.

### 1.3 Nepal's accession to the WTO

Nepal's accession to the WTO was the result of a long and complicated process of negotiations at multilateral, bilateral and domestic level that lasted over fourteen years. A working party was established to examine Nepal's application for accession to the GATT in June 1989. Nepal obtained observer status in 1993 and became an observer to the World Trade Organization after it succeeded the GATT in January 1995. In 1997, Nepal converted its application for accession to the GATT to an application for membership to the WTO. In 1998, in accordance with WTO accession procedures, Nepal submitted a Memorandum of Foreign Trade Regime for circulation to all of the member states. A direct question and answer period between member states and the Nepalese Government followed until 1999. After this time, the WTO working party to Nepal's Accession, formed from the original GATT working party, was established and convened regularly over the course of 2000–2003 to consider the application and to make recommendations. Nepal was finally approved for membership in September 2003 along with Cambodia, another LDC, during the fourth WTO Ministerial in Cancun, Mexico. On 24 March 2004, Nepal notified the WTO that the process of ratification and acceptance of the Protocol of

---

<sup>35</sup> Preamble to the BIMSTEC Framework Agreement (available at [www.mofa.gov.bd](http://www.mofa.gov.bd)).

<sup>36</sup> BIMSTEC Framework Agreement Protocol, p. 2. (available at [www.mofa.gov.bd](http://www.mofa.gov.bd)).

Accession were completed by Royal Ordinance as there was no parliament in session.<sup>37</sup> On 23 April 2004 the protocol entered into force and Nepal became the one hundred and forty seventh member of the WTO.

Nepal undertook 25 systemic commitments under the terms of its accession to WTO, but many challenges remain for full compliance. Nepal must not only create the legal and policy environment for WTO reforms, it must also create effective enforcement mechanisms. It must increase its capacity to compete internationally while ensuring compliance with the technically demanding provisions of the agreements it has signed.

### 1.3.1 Participation in the WTO as an LDC

The acute challenges for Least Developed Countries (LDCs) in opening up their economies to world trade were formally acknowledged by the WTO in Doha Ministerial Declaration of 2001. The declaration commits member states to encourage and accelerate negotiations for LDC's to accede to the WTO. On 10 December 2002, the WTO General Council adopted a Decision on the Accession of LDCs to introduce guidelines for streamlined procedural requirements, as well as eligibility criteria for special and differential treatment provisions in existing WTO agreements. In addition, the Decision advocates restraint on behalf of existing members seeking concessions in market access negotiations, so as to favour LDCs. Under the Decision, member states agreed that accession commitments should be commensurate with the level of development of the LDCs and that technical and financial assistance should be provided in their accessions process. Currently, Nepal is one of 50 LDC members of the WTO. As an LDC member, Nepal was granted a transition period until 1 January 2007 for implementing TRIPS, the Agreement on Customs Valuation, the SPS and the TBT. In addition, Nepal, along with the other LDCs, has been seeking further provisions for preferential treatment under the Agreement on Agriculture over the course of the WTO's Doha Round of WTO trade negotiations.

Nepal participated in the December 2005 Hong Kong Sixth Ministerial Meeting for the first time as a member of the WTO, and played an important role in advancing the position of LDCs. The ministerial was held to discuss Doha Round issues taken up by the July Package, which was

---

<sup>37</sup> IFPRI, 2005. p. 55.

adopted by WTO members in August 2004. The five key issues for negotiations under the July Package were agriculture, non-agricultural market access (NAMA), services, trade facilitation and development. Of all of these priorities, agriculture was the primary concern for least developed countries.

During a meeting held in Livingstone, Zambia in June 2006, Nepal adopted a common position with the other LDC countries on all five issues to project a stronger negotiating voice at the Hong Kong Ministerial. LDCs asked for binding commitments from WTO member states on duty-free and quota-free market access for all their products to be granted and implemented immediately, on a secure, long-term and predictable basis, without introducing restrictive measures.<sup>38</sup> For agriculture negotiations, they called for the elimination of all forms of export subsidies and a significant reduction of all forms of trade distorting domestic support.<sup>39</sup> At the same time, the LDCs argued that Special and Differential Treatment provisions and transitional measures were necessary to offset the negative, short-term effects of removing subsidies or removing LDCs' preferential margins into the markets of developed countries.<sup>40</sup> They sought a substantive increase in resources for "Aid for Trade" measures as well as a strengthening of the Integrated Framework which was designed to provide technical assistance.<sup>41</sup>

The LDCs argued that the Integrated Framework is important not only to build up their supply-side capacity, and technological and physical infrastructure but also to support them to diversify their production and export base.<sup>42</sup> Likewise, they called for binding commitments on targeted and substantive technical assistance programs to enhance their capacity to meet sanitary and phytosanitary measures, standards requirements, rules of origin and other non-tariff measures in the importing countries.<sup>43</sup> They also reaffirmed the need to implement the flexible conditions for LDCs that were agreed in the Modalities for Negotiations on Trade Facilitation.<sup>44</sup> Under this arrangement, LDC members will only be required to undertake commitments to the extent consistent with their individual development, financial and trade needs or their administrative and institutional capabilities.

---

<sup>38</sup> Article 1, Livingstone Declaration (available at [www.integratedframework.org](http://www.integratedframework.org)).

<sup>39</sup> Ibid, article 3.

<sup>40</sup> Ibid, article 5.

<sup>41</sup> Ibid, article 8.

<sup>42</sup> Ibid, article 7.

<sup>43</sup> Ibid, article 14.

<sup>44</sup> Ibid, article 37.

In a statement at the Hong Kong Ministerial Meeting, Nepal emphasized that LDCs were seeking commitments from member states not only to increase market access opportunities but also in order to help strengthen supply side capabilities in LDC countries.<sup>45</sup> At the Hong Kong Ministerial, the LDCs were successful in obtaining a pledge from all member states to provide duty-free and quota-free market access for 97 percent of LDC goods for export by 2008.<sup>46</sup> Member states also reaffirmed that LDCs would only be required to undertake commitments and concessions to the extent that they are consistent with their level of development, financial or trade needs, or administrative and institutional capacities.<sup>47</sup> In addition, member states pledged to institute an Aid for Trade program, acknowledging for the first time that market access alone does not necessarily lead to development for the poorest countries facing acute supply-side constraints to trade.<sup>48</sup>

#### **1.4 Overview of the legal system**

In 1990, a party-less system of government that had presided in Nepal for almost three decades was replaced by a multi-party system within the framework of a constitutional monarchy. The Constitution of the Kingdom of Nepal 2047 (1990)<sup>49</sup> established well-defined and separated executive, legislative and judicial powers. It also guaranteed the protection of fundamental human rights, equality rights and property rights. Within the constitutional context, Nepal is guided by the principles of a democratic welfare state. It strives to promote an equitable distribution of productive resources and the benefits of development.

The Constitution upholds the principles of promoting justice and moral values, and encourages public participation in state affairs through a policy of decentralization. Under the Constitution, there is a three-tiered, independent judicial system. The highest court is the Supreme Court of the Kingdom of Nepal based in Kathmandu, followed by the Court of Appeal and then the District Courts. The Chief Justice of the Supreme Court of Nepal is

---

<sup>45</sup> Statement by Honourable Buddi Man Tamang, Minister of Industry, Commerce and Supplies at the Hong Kong Ministerial Conference 17 December 2005.

<sup>46</sup> Article 36, Annex F Special and Differential Treatment Hong Kong Ministerial Declaration 18 December 2005.

<sup>47</sup> Article 38, Annex F Special and Differential Treatment Hong Kong Ministerial Declaration 18 December 2005.

<sup>48</sup> Article 57, Ministerial Declaration 18 December 2005.

<sup>49</sup> Constitution of Nepal 1990 (available at [www.supremecourt.gov.np](http://www.supremecourt.gov.np)).

appointed by the King on recommendation of the Constitutional Council, which is comprised of the Prime Minister, the Chief Justice, the Speaker of the House of Representatives, the Chairman of the National Assembly and the Leader of the Opposition in the House of Representatives.<sup>50</sup>

Articles 44–67 of the Constitution establish the powers of the Legislature under the bicameral parliamentary system of Nepal. Articles 68–72 empower parliament to enact laws by passing bills through both houses of parliament before they may obtain the Royal Assent required for bill to become an act. The government may also provide for rules and regulations under an act of parliament delegating legislative powers. As provided under article 35 and 41 of the Constitution, four ministries are designated with the responsibility for making and enforcing policies that affect foreign trade in goods and services. These include the Ministry of Industry, Commerce and Supplies, the Ministry of Finance, the Ministry of Culture, Tourism and Civil Aviation, the Ministry of Labour and Transport Management and the Ministry of Agriculture and Cooperatives.<sup>51</sup>

## **II. NATIONAL FRAMEWORK: LEGISLATIVE AND INSTITUTIONAL ANALYSIS**

### **2.1 GATT and related concepts**

#### **2.1.1 Tariffs, levies and other charges**

The General Agreement on Tariffs and Trade (GATT) established the precedent for prohibiting quantitative restrictions and limiting the rights of member states to impose tariffs. This principle was extended to Most Favoured Nation treatment for trade in goods under the WTO. Nepal's tariff binding commitments under the WTO are designed to stabilize and provide security for the country's import and export regime. By securing market access, the commitments are designed to encourage Nepalese export industries to invest in domestic markets under greater conditions of certainty, allowing for expansion and diversification of their production base with a greater export orientation. In addition, the WTO rules on binding tariffs should give security to importers and domestic industries, by ensuring stable prices of imported raw materials. This should help to facilitate price

---

<sup>50</sup> Report of the Working Party on Nepal's WTO Accession. WTO document WT/ACC/NPL/16 of 28 August 2003, at p.8 (hereafter Working Party Report).

<sup>51</sup> Working Party Report, p. 9.

determination for Nepalese industries. The WTO provisions requiring reductions to tariff barriers should also guarantee that importers and domestic industries will be able to import materials without delay and at the most competitive prices. In terms of trade in agricultural goods, entry into the WTO provides increased opportunities for market access of farm products.

However, the benefits of WTO tariff reductions on Nepalese agricultural exports have been marginal given that Nepal has been an inefficient producer and has become a net food importing country in recent years. Agricultural products currently do not play a significant role in its export trade.<sup>52</sup> In addition, Most Favoured Nation provisions have played a relatively small role in influencing trade and determining the level of protection to import competing sectors in Nepal. This is because of Nepal's heavy reliance on bilateral trade with India. The India-Nepal agreement already covers such a large proportion of Nepal's agricultural trade and provides duty free access for most goods. However, given that the India-Nepal trade treaty may be renegotiated for compliance with the WTO, Nepal should maintain higher bound tariffs so that it can match India's applied rates if and when trade with India begins to occur on a MFN basis. If it does not do so, India's applied tariffs may end up being higher than Nepal's, to the disadvantage of Nepal's agricultural sector.<sup>53</sup>

At the time of Nepal's accession to the WTO, the prevailing basic customs tariff rates were fixed at 5, 10, 15, 25, 40, 80 and 130 percent, and many of the tariff lines were already set to zero.<sup>54</sup> Most items fell within the range of 10-20 percent and the highest tariff rates that were applied to vehicles were set to be reduced in subsequent years. The average bound tariff rate for agricultural goods was 51 percent, and was scheduled to go down to 42 percent after three years. The bound rate was significantly higher than the average applied tariff rate for agricultural products (11 percent).<sup>55</sup> In addition, very few products were subject to specific duties. These included motor fuels, kerosene oils, gas and fuel oils, cement, liquor, and tobacco.<sup>56</sup> The Customs Tariff provides for certain tariff exemptions and reductions, in

---

<sup>52</sup> UNESCAP Case Study.

<sup>53</sup> Implications of WTO Membership, p. 54.

<sup>54</sup> Working Party Report, p. 13.

<sup>55</sup> Sauvé, P. 2005. Economic impact and social adjustment costs of accession to the World Trade Organization: Cambodia and Nepal, p. 31. *Asia-Pacific Trade and Investment Review* (1)1 (hereafter Economic Impact and Social Adjustment).

<sup>56</sup> Working Party Report, p. 13.

order to facilitate the import of specific goods on a provisional basis. The list of exemptions and tariff reductions is published in the Customs Tariff.<sup>57</sup>

Nepal did not have any import quotas at the time of accession, and very few products were banned from import, domestic production and sale under the Export Import (Control Act, 1957), the Narcotics Drug Control Act, and the Country Code (Muluki Ain).<sup>58</sup> These include Narcotics such as opium and morphine, liquor with more than 60 percent alcohol, beef and beef products. Products restricted for import and domestic production include arms and ammunition, wireless audio communications, and valuable metals and precious stones that have not been manufactured into jewellery.<sup>59</sup>

Although article II 1(b) of the GATT allows member countries to maintain other duties and charges (ODCs) as long as they are bound at the prevailing level, given that all acceding countries had bound them to zero, Nepal also committed to eliminate all of its ODCs.<sup>60</sup> At the time of accession, Nepal still had a significant number of ODCs, such as the local development fee of 1.5 percent charged on the value of imports, 11.5 percent levied on the import of industrial goods, and 2.5 percent to 14.5 percent on the value of imported agricultural goods.<sup>61</sup> These charges, in addition to charges for local and agricultural development, special fees, cigarettes and alcohol fees were not incorporated into the customs tariff rates. Under the terms of Accession, Nepal was granted a transition period of two to ten years to eliminate all of these other duties and charges, and committed not to introduce new ODCs.<sup>62</sup>

There is an automatic licensing system in Nepal for both the import and export of all non-restricted goods for information purposes.<sup>63</sup> Licensing is regulated under the Export Import (Control) Act 1957 and Export-Import Rules, 1978, Customs Act 1962 and Customs Regulation 1969, as well as the Annual Finance Act and the order made by the Ministry of Commerce

---

<sup>57</sup> Ibid, at p. 13.

<sup>58</sup> Ibid, at p. 14.

<sup>59</sup> Ibid, at p. 14.

<sup>60</sup> Ratnakar, A. & Navin, D. 2004. *LDCs' accession to the WTO: learning from the Cambodia and Vanuatu Cases of Nepal*, p. 8. South Asia Watch on Trade, Economics and Environment (SAWTEE). Kathmandu. (available at [www.un-ngls.org](http://www.un-ngls.org)).

<sup>61</sup> Working Party Report, p. 13.

<sup>62</sup> Ibid, p. 13.

<sup>63</sup> Ibid, p. 15.



pursuant to the Export and Import (Control) Act, 1957 and Rules, 1978.<sup>64</sup> The Department of Commerce is empowered to issue licenses, in accordance with WTO requirements. However, the Working Party to Nepal's Accession noted that section 3 of the Export-Import Control Act 1957 is not compatible with WTO non-discrimination requirements, because it was designed to control or prohibit the export or import of restricted items. It also has very little information on the process of registering export-import agencies, export promotion, sharing information, finance, export incentives, institutional arrangements and dispute settlement.<sup>65</sup>

Under its terms of accession, Nepal was granted a period of delay for the full implementation of tariffs cuts until 2006. Nepal committed to codify the substance of the WTO Agreement on Import Licensing Procedures and to bring its licensing provisions for valuable metals and precious stones into conformity with WTO by applying automatic licensing to these products. It also committed to eliminating and not introducing, re-introducing or applying quantitative restrictions on imports or other non-tariff measures that are not justifiable under the WTO Agreement. Nepal obtained a ten year transition period for full implementation of the provisions to bind at zero all other duties and charges on agricultural and industrial goods.<sup>66</sup>

Nepal had made considerable progress in reducing tariff barriers before accession to the WTO, and has continued to implement reductions under the Tariff Schedule. By 2004–2005, prevailing customs duty rates had been reduced to 5, 10, 15, 25 and 40 percent. Some exceptions were still provided under special provisions to promote the development of key areas of the economy. Import rates had also gradually declined in accordance with WTO commitments.<sup>67</sup> However, the potential impact of Nepal's market access commitments have been estimated to include a revenue loss of about US\$55 million as a result of the elimination of customs duties and charges, particularly on imports of rice and tariffs on motor vehicles.<sup>68</sup> Estimates of overall trade creation would be equivalent to US\$89 million, in the same sectors where customs revenue losses would be the highest.<sup>69</sup>

---

<sup>64</sup> Id.

<sup>65</sup> Pant, B. 2002. A study on trade in goods submitted to Nepal's accession to the WTO project. UNCTAD/UNDP/HMG 2002, p.67 (available at [www.multitrade.org.np](http://www.multitrade.org.np)).

<sup>66</sup> UNCTAD. 2004. *The Least Developed Countries Report*, Chapter 3.

<sup>67</sup> Nepal Customs Tariffs (available at [www.customs.gov.np](http://www.customs.gov.np)).

<sup>68</sup> Economic Impact and Social Adjustment, p. 31.

<sup>69</sup> Id.

### 2.1.2 Customs valuation

WTO rules on customs valuation commit members to adhere to a fair, uniform and neutral system for the valuation of goods for customs purposes, in conformity with commercial realities. The provisions prohibit the use of arbitrary or fictitious customs values by requiring customs officials to use a systematic method for assessing the value of products to determine the amount of customs duties that may be imposed.

Customs tariff policy in Nepal is regulated by the Customs Act 1962 and its 1997 amendments.<sup>70</sup> The Customs Tariff Schedule, based on the International Convention on the Harmonized Commodity Description and Coding System (HS) has been in effect since 1992. An updated tariff schedule for 2005/2006 is available on the website of the Department of Customs.<sup>71</sup>

Article 13 of the Customs Act as amended in 1997, provides for the valuation of goods on the basis of the invoice price shown in the invoice document provided by the importer. If there is a concern over the price actually paid for the goods, then the customs officer would refer to the value of similar goods imported into Nepal. If this information is not available, customs officers may refer to suggested manufactures price-lists, local or the international market prices or available data or information or the suggestion of expert, related organization or body as basis in determining the value of goods. However, it was noted in the Report of the Working Party to Nepal's Accession that these provisions did not apply article 5 and 6 of the Agreement on the Implementation of article VII of the GATT 1994 regarding imputed or computed valuation.<sup>72</sup>

Nepal committed to incorporate all of the provisions of the WTO Agreement on Customs Valuation into the Customs Act (1962) and the Customs Regulation (1969). As part of this commitment, article 2 of a final ordinance enacted in 2003 expressly states that customs valuations must adhere to WTO principles for the assessment of customs duties on the basis of the transaction value.<sup>73</sup> Nepal had until January 2007 to implement the

---

<sup>70</sup> Customs Act 1962 (available at [www.nrn.org.np](http://www.nrn.org.np)).

<sup>71</sup> Customs Duties, and Tariff Schedule 2005/2006 [www.customs.gov.np](http://www.customs.gov.np); Nepalese Custom Bulletin 2006 sets out current customs policies (available at [www.customs.gov.np](http://www.customs.gov.np)).

<sup>72</sup> Working Party Report, p. 17.

<sup>73</sup> Customs Valuation Act 1962 and Final Ordinance 2003 (available at [www.customs.gov.np](http://www.customs.gov.np)).

Customs Valuation Agreement. However, it continues to face major challenges related to the use of reference prices.<sup>74</sup>

### 2.1.3 Anti-dumping, subsidies and countervailing duties

Nepal did not have an antidumping and countervailing duty regime at the time of Accession, nor does it have access to the Special Safeguards mechanism of the Agreement on Agriculture. Section 3 of the Export Import (Control) Act 1957 authorizes the government to restrict imports. At the time of accession, Nepal intended to amend this act to authorize trade restrictions for trade remedies and for balance of payment purposes only in the cases specified under the WTO Agreements.<sup>75</sup> The gap between bound and applied rates in Nepal was expected to provide an adequate margin of flexibility to ensure that sudden increases in imports may be addressed by increases in applied duties, without the need for contingency protection measures.<sup>76</sup> Under the WTO rules, Nepal is permitted to increase tariffs up to the bound rates for this purpose.<sup>77</sup> Although other accession commitments may need to be given more priority attention, Nepal has prepared draft Anti-dumping and Countervailing Duties Act.<sup>78</sup>

Nepal provides subsidies in the form of exemptions from income tax, sales tax, excise duties and customs duties under the Industrial Enterprise Act 1992. For example, national priority industries, including agro-industries, are entitled to a 50 percent reduction on income tax from the time they begin operations.<sup>79</sup> Subsidies for seeds, plants, irrigation pipes and pumping are also provided directly to producer farmers.<sup>80</sup> However, as discussed further in the domestic support section below, the total subsidies on agricultural inputs have always been considered very low.<sup>81</sup> Other subsidizes, such as those provided to the Agriculture Input Corporation for fertilizers were removed in 1999, well before accession to the WTO.<sup>82</sup> In addition, Nepal is

---

<sup>74</sup> Economic Impact and Social Adjustment, p. 33.

<sup>75</sup> Working Party Report, p. 23.

<sup>76</sup> Economic Impact and Social Adjustment, p. 35.

<sup>77</sup> Implications of WTO Membership, p. 56.

<sup>78</sup> Bhansali, S & Ghimire, JK. 2004. Antidumping and countervailing duties legislation for Nepal. *Multilateral Trade Integration and Human Development in Nepal* (available at [www.multitrade.org.np](http://www.multitrade.org.np)).

<sup>79</sup> Working Party Report, p. 27.

<sup>80</sup> Ibid, p. 28.

<sup>81</sup> Implications of WTO Membership, p. 27.

<sup>82</sup> Ibid, p. 28.

entitled to benefit from article 27 of the Agreement on Subsidies that allows for special and differential treatment for LDCs.<sup>83</sup> This provision exempts LDC countries from the general prohibition on the use of subsidies under the Agreement.

#### 2.1.4 State Trading Enterprises

Relevant WTO rules provide that state trading enterprises must follow the principles of non-discrimination and that for decisions on imports and exports, they must be guided by commercial considerations only. The WTO Understanding on the Interpretation of article XVII sets out the definition of state trading enterprises, which are defined as governmental and non-governmental enterprises, including marketing boards, which deal with goods for export and/or import. Under the GATT 1994 Agreement, member states must notify the WTO of their state trading enterprises annually. While the WTO does not seek to discourage or prohibit the use of state trading enterprises, it seeks to ensure that they are not applied in a manner that is inconsistent with WTO principles, as they have the potential to distort the trading regime.

In the Report of the Working Party to Nepal's Accession, the representative of Nepal indicated that the state-owned enterprises in Nepal were established essentially with the objective of ensuring an adequate supply of raw materials and essential goods.<sup>84</sup> He noted that because they operate based on commercial considerations and provide equal opportunities for all suppliers, they would be considered compliant with article XVII of the GATT 1994. However, the WTO working party was notified of two state trading enterprises in Nepal that may not be WTO compliant because they enjoy exclusive rights and special privileges. The Nepal Oil Corporation has exclusive rights for the import of petroleum products, although it does not have exclusive rights over the import of lubricants. The Salt Trading Corporation has special privileges for the import of salt and sugar. Nepal agreed to notify the WTO and provide information on the activities of these organizations, although Nepal did not make any commitments to ensure the transparency of its privatization program and to make periodic progress reports on economic and trading reforms.<sup>85</sup> Nonetheless, to date no notifications are available on WTO website.

---

<sup>83</sup> Working Party Report, p. 28.

<sup>84</sup> Working Party Report, p. 37.

<sup>85</sup> UNCTAD. 2004. *The Least Developed Countries Report* Part 1, chapter 3, section 5.

## **2.2 Agreement on Agriculture**

### **2.2.1 Market access**

The provisions for market access under the AoA address the rules and commitments related to the import of goods. The goal is to encourage growth in trade by binding and reducing tariffs as well as by preventing non-tariff barriers. In addition, the market access provisions address the use of Tariff Rate Quotas (TRQs) and Special Safeguards (SSG) as trade remedy measures. The main provisions of the AoA referring to market access are found under article 4, article 5 and the Schedules. Article 4(2) of the AoA sets out prohibited measures, such as quantitative trade restrictions, variable import levies, minimum import prices, discretionary import licensing, non-tariff measures maintained by state trading enterprises, voluntary export restraints and similar border measures other than ordinary customs duties.

As Nepal does not have any TRQ commitments, nor does it have access to SSGs, the key market access instrument for Nepal is the applied tariffs to be set within the limits of Nepal's WTO bound rates. Under the terms of Accession to the WTO, Nepal committed to bind all agricultural tariffs without exception. The simple average of bound rates for agricultural products were set to an initial 51 percent, and then designed to be reduced to 42 percent by 2006. 80 percent of bound tariffs concentrated in the 30-50 percent range, with tariff on 90 percent of the tariff lines being at least 30 percent.<sup>86</sup>

Nepal's tariff structure is regulated by the 1996 Financial Act, which empowers the government to apply and modify tariffs. Nepal further reduced customs tariffs under a Finance Ordinance issued in January 2006. With the latest adjustments, the average customs rate has been lowered from 9.6 percent to 8 percent, mainly for third country imports of manufactured goods so as not to adversely affect the competitiveness of domestic industries.<sup>87</sup>

### **2.2.2 Export competition**

Articles 8–12 of the AoA focus on the regulation of direct and indirect forms of subsidies as a means to enhance export competition. Article 12

---

<sup>86</sup> Implications of the WTO Membership, p. 44.

<sup>87</sup> Nepal to Cut Tariffs on 125 Items (available at [english.people.com.cn](http://english.people.com.cn)).

addresses export prohibitions and restrictions, by referring to GATT article XI. This provision requires member states to take into consideration the food security concerns of importing countries while instituting new prohibitions or restrictions on food products. However, developing countries such as Nepal who are not regular food exporters are exempt from the article 12 provisions.<sup>88</sup> Unlike Cambodia and Vanuatu, who also joined the WTO under LDC terms, Nepal did not make any commitments to bind export subsidies for agriculture under the terms of its accession to the WTO.<sup>89</sup> Nonetheless, the government asserted at the time of accession that it did not provide subsidies on agricultural exports.<sup>90</sup> Agricultural producers in Nepal are however, assisted by government support programs, as discussed in the following section.

### 2.2.3 Domestic support measures

Although agriculture is the most significant sector of the economy in terms of GDP, employment and trade, it has been given relatively low priority in Nepal's market reform policies of the past two decades. The share of agriculture in total government expenditures fell steadily from about 15 percent in 1995 to around 10 percent in 2001, although there were notable budget increases for improving the infrastructure of irrigation.<sup>91</sup> Nepal currently does not take advantage of all of the green box measures that are exempt from WTO scrutiny, such as food security stocks, and direct payments to producers for income insurance.<sup>92</sup> Agricultural research has concentrated on improving technologies, soil fertility maintenance and disease prevention for crops, livestock and horticulture, as prioritized under the APP. However, actual expenditures on research were only about 2.5 to 5.5 percent of the total expenditure on agriculture, which is very low by international standards.<sup>93</sup> Improving the infrastructure of agricultural roads in Nepal was also priority under the APP and has resulted in a considerable share of agriculture expenditures.<sup>94</sup>

---

<sup>88</sup> Implications of WTO Membership, p. 66.

<sup>89</sup> UNCTAD. 2004. *The Least Developed Countries Report* part 1, chapter 3, section 4.

<sup>90</sup> Working Party Report, p. 39.

<sup>91</sup> Implications of WTO Membership, p. 23.

<sup>92</sup> Ibid, p. 23.

<sup>93</sup> Ibid, p. 24.

<sup>94</sup> Ibid, p. 25.

The Ministry of Agriculture and Commerce provides for annual expenditures on agricultural extension and related support services for crops, livestock, cooperative development and food technology and quality control services.<sup>95</sup> It also provides for domestic food aid programs implemented by Nepal Food Corporation for the distribution of food grain to remote areas.<sup>96</sup> Nonetheless, there is no limit on these activities under the AoA, Nepal is simply obliged to notify the WTO periodically of its expenditures in this area. The Blue Box exemptions for limits on area production under the AoA do not apply to Nepal, where there is a currently a general lack of agricultural production rather than excess of production.

Compared to the 10 percent allowable limit under the AoA, actual subsidies in Nepal have been very low. Nepal does not have any program for crop-specific direct payments, and abandoned minimum price support programs for paddy and wheat in 2001. Inputs such as fertilizers, irrigation, credit and seeds have been subsidized at very low levels, averaging 0.5 percent of the total value of agricultural production over the 1996–2001 period.<sup>97</sup> Given that the average farm size is only about one hectare and is used largely for subsistence purposes, almost all farmers in Nepal fall under the low-income and resource poor category. As a result, they are exempt from limitations on government subsidies under article 6.2. Thus, there is ample room for Nepal to increase agricultural support measures as Nepal is not constrained by the domestic support restrictions under the AoA.<sup>98</sup>

#### 2.2.4 The Marrakesh Decision

Nepal was not classified as a net-food importing country at the time of the Marrakesh Decision. Although it used to have a national surplus of food supplies, stagnant productivity in Nepal's agricultural sector in recent years has led to a reliance on cheaper food imports from India.<sup>99</sup> As a net-food importing country, Nepal is entitled to receive special considerations for the provision of food aid, financial and technical assistance, and differential terms in respect of export credits and short term assistance from international institutions in financing imports.<sup>100</sup>

---

<sup>95</sup> Ibid, p. 24.

<sup>96</sup> Ibid, p. 25.

<sup>97</sup> Ibid, p. 30.

<sup>98</sup> FAO Review, p. 5.

<sup>99</sup> IFPRI. 2005. p. 60.

<sup>100</sup> Ibid, p. 58.

## 2.3 The SPS Agreement

Nepal committed to implement the SPS Agreement by 1 January 2007. The transition phase was permitted to allow Nepal to acquire technical assistance. During the period, Nepal committed to apply existing measures on a non-discriminatory basis, such as providing for national treatment and MFN treatment to all imports.<sup>101</sup> It committed to establish an enquiry point by 1 January 2004, and to acquire equipment and provide training for SPS enquiry point personnel by 1 January 2005. By 1 July 2005, Nepal also committed to review an authority responsible for making notifications to the WTO and to ensure the transparency of obligations. Notifications to the WTO were scheduled to begin before 1 January 2006. In addition, Nepal committed to review regulations to ensure they were based on risk assessments and sufficient evidence, to upgrade human resources in SPS areas, and to provide reporting on pest or disease free areas prior to 1 July 2005. Nepal pledged to develop SPS guidelines before 1 July 2006. Finally, Nepal stated that the quality control, laboratories, quarantine systems and field veterinary systems would be upgraded, and standards, guidelines and recommendations harmonized by 1 January 2007.<sup>102</sup> The following sections analyse Nepal's framework for the implementation of human and animal health and phytosanitary standards.

### 2.3.1 Food safety and trade in food products

The Food Act 2023 (1966)<sup>103</sup> and Food Rules 2027 (1970) are the primary legal instruments governing Nepal's trade regime in food products. The act and regulation have been subject to several amendments in 1973, 1975, 1991 and 1998. Together, they were designed to regulate the provision of safe food to consumers through the involvement of food inspection, oversight and enforcement authorities.

Several provisions of the act refer to food safety issues that are also addressed under the SPS Agreement. Article 3 bans production, sale, and distribution of substandard, contaminated or hazardous food items. Article 4 regulates the misbranding of sales by false statement. Provisions for the detention of food products are set out under article 4a and the licensing of food establishments under 4b. Enforcement, penalty and penalty provisions

---

<sup>101</sup> Working Party Report, p. 35.

<sup>102</sup> Ibid, p. 36.

<sup>103</sup> Food Act 2023 and Food Rules 2027 (available at [faolex.fao.org](http://faolex.fao.org)).



are set out under articles 5–12. Article 13 provides for research and analysis laboratories. Section 7.2 of the Food Act designates the Department of Drug Administration at the Ministry of Health and the Department of Food Technology and Quality Control at the Ministry of Agriculture as responsible for verifying the import of health and food products comply with the minimum standards or specifications under the Food Act and Regulation. The latter was also established as the SPS Enquiry Point for Nepal.

However, the current act does not set out a comprehensive food safety regime, nor does it provide minimum mandatory food standards that are harmonized with the Codex system.<sup>104</sup> It also does not establish a preventative approach with basic food safety procedures for producers, processors and food handlers. FAO studies indicate that the harmonization of food standards among SAARC countries, including Nepal, has made slow progress and that there is still a long way to go in harmonizing standards with Codex standards.<sup>105</sup> While there are Codex standards for many of the major food commodities traded between Nepal and India for example, including honey, orange juice, tomato paste, wheat flour, lentils and sugar, food standards have often been applied differently in each country with respect to Codex standards.<sup>106</sup> In addition, Codex standards are lacking for many other food commodities traded within the SAARC region, such as vanaspati ghee, ghee, tea, coffee and spices. India and Nepal have harmonized some standards in these products, but differences in minimum food standards with other countries may not be WTO compatible.<sup>107</sup>

Nepal has often experienced difficulties exporting food commodities as a result of quality issues, particularly with the export of vegetable ghee to India. Since Nepal entered the WTO, it has encountered SPS-related difficulties with the export of honey to Norway, and the export of orthodox tea to Europe as a result of non-compliance with pesticide residue levels. In addition, the Chinese authorities restricted imports of butter from Nepal because they were concerned about quality control procedures over milk processing.<sup>108</sup>

The Food Act is in the process of amendment. There are proposals to formulate more enforceable guidelines on food inspection, analysis and

---

<sup>104</sup> Implications of WTO Membership, p. 88.

<sup>105</sup> Id.

<sup>106</sup> Id.

<sup>107</sup> Id.

<sup>108</sup> Ibid, p. 101.

production and to harmonize the Food Act with the Consumer Protection Act, The Nepal Standard Symbol Act, Standard Measurement Act, Black Marketing and Social Crime and Punishment Act to ensure that penalty provisions are comparable.<sup>109</sup>

### 2.3.2 Plant health and trade in plant and plant products

Nepal has long been committed to the international regulation of trade in plants and plant products. Nepal joined the Asia Pacific Plant Protection Commission in 1965, which is a regional plant organization that operates within the framework of the International Plant Protection Convention (IPPC). Nepal is not yet a member of the IPPC but it had initiated the process for ratification of the Convention at the time of accession.<sup>110</sup> A proposal to ratify the IPPC was submitted to the Parliamentary Secretariat, but parliament was dissolved before the bill was tabled. Nepal also adheres to the FAO Plant Protection Agreement for the Asia and Pacific Region, and is a member of the OIE and Codex Alimentarius.<sup>111</sup>

Despite the operation of plant protection legislation in Nepal since the 1970's, until recently, agricultural products have crossed the border between India and Nepal without any quarantine checks. However, in 2000, India enforced new regulations, increased quarantine inspection fees and required mandatory testing from its central laboratory. The additional costs and time constraints of these measures have made it more difficult for Nepal to export agricultural products and compete in agricultural exports. In addition, China has also begun to require quarantine regulations formalities on plants and plant products.<sup>112</sup>

The Plant Protection Act 2029 (1972)<sup>113</sup> and the Plant Protection Rules are the primary legislation governing Nepal's trade in Plants and Plant Products. The Plant Protection Rules 2031 (1972)<sup>114</sup> provide for import restrictions on 19 plants and plant products from specific countries, and empowers Plant Protection Officers to confiscate infected plant and plant products and

---

<sup>109</sup> FAO Review, p. 83.

<sup>110</sup> FAO Review, p. 72.

<sup>111</sup> Working Party Report, p. 35.

<sup>112</sup> Implications of WTO Membership, p. 115.

<sup>113</sup> Plant Protection Act 2029 (1972) (available at [faolex.fao.org](http://faolex.fao.org)).

<sup>114</sup> Plant Protection Rules 2031 (1972) (available at [faolex.fao.org](http://faolex.fao.org)).

impose fines for non compliance with the legislation.<sup>115</sup> The act also establishes the National Plant Quarantine Committee for the protection of plants from pests, diseases and infections. The body in charge of implementing phytosanitary measures is the central office of plant quarantine, under the administrative supervision of the Plant Protection Directorate in the Department of Agriculture.<sup>116</sup>

Several shortcomings to the now 30 year old regulatory framework under the Plant Protection Act 2029 need to be addressed for compliance with the SPS Agreement. The act makes no reference to the objective of trade facilitation, and does not define several key concepts such as germplasm, infectious diseases, pests, parasites, bio-agents, predators, micro-organisms, quarantine pests and PRA, that are set out under the SPS Agreement. For example, there is no definition under the current act. In addition, the act does not address import, export, transit and re-export measures for phytosanitary risks, and does not address land border plant quarantine issues. Finally, there are no guidelines under the act on the role of the private sector, quarantine fees and recovery of service charges.<sup>117</sup>

The implementation of the act has also not been very effective. Despite the enforcement provisions under section 8 of the act, there have been no recorded charges of violations of the Plant Protection Act 1972, nor legal challenges to quarantine check post actions, suggesting that there has been "a culture of compromise" among traders, customs clearing agents and PQ check posts.<sup>118</sup> Moreover, although the law requires that each consignment is inspected, regardless of its size or the purpose of import, most checkpoints focused only on the trading aspects of the bulk transfer of goods, rather than issues of personal consumption.<sup>119</sup>

A major overhaul of the Plant Protection Act and Regulation was introduced in bill form in 2002. The Plant Protection Act, 2059 (2002)<sup>120</sup> is designed to prevent and control the spread of diseases in exported and imported plants and plant products and establishes a more comprehensive National Plant Quarantine Check Post. The act establishes the requirement that all imports

---

<sup>115</sup> Implications of WTO Membership, p. 114.

<sup>116</sup> Working Party Report, p. 32.

<sup>117</sup> Implications of WTO Membership, p. 116.

<sup>118</sup> FAO Review, p. 43.

<sup>119</sup> Id.

<sup>120</sup> Plant Protection Act (2059) 2002 (available at [faolex.fao.org](http://faolex.fao.org)).

and exports of plants, seeds and related items be licensed by the Plant Quarantine Check Post. Under the act, the powers of the Plant Quarantine Check Post are to be determined by the government by notification in the Nepal Gazette. However, the act has yet to be passed through parliament.

Additional measures have been taken recently to strengthen the plant protection regime in Nepal within the framework of the WTO. The Ministry of Agriculture and Cooperatives, Department of Agriculture submitted a notification to the WTO on 15 July 2005<sup>121</sup> of a compulsory provision for importers to submit Phytosanitary Certificate and Declaration for plant and plant products at the entry point of the Kingdom of Nepal. The notification also extends the National Plant Quarantine Program at Nepal's border check posts with India and China and establishes a Plant Quarantine check post at Tribhuwan International Airport, Kathmandu. Finally, the notification advises that as part of its accession obligations, the Plant Protection Directorate (one of the Program Directorates under the Department of Agriculture), was assigned as the "National Plant Protection Organization (NPPO)". The measures for the protection of plants, animals, humans and the environment from pests and diseases were expected to be adopted on 10 September 2005.

In addition to the Plant Protection Act regime, two other important regulatory regimes affecting trade in plant and plant products in Nepal: the Pesticide Act and the Seed Act are in the process of reform to ensure compliance with WTO commitments.

The Pesticide Act 2048 (1991)<sup>122</sup> and Pesticides Rules 2050 (1994)<sup>123</sup> regulate the export and import of pesticides. The legislation has specific provisions for the protection of the environment and health, and establishes sanitary measures that have direct application to the SPS Agreement. Sections 7 and 8 of the act establish a Pesticides Registration Office for the registration of pesticides and the issuance of certificates for all pesticides intended for production, use, import and export. Section 8 also empowers the Pesticides Registration office to develop criteria for the use of pesticides. Sections 13 and 14 authorize the government to appoint pesticides inspectors and outline their duties and functions. The procedures for registration and licensing are provided under the Pesticide Rules. Section 4 of the Rules

---

<sup>121</sup> Notification on WTO website.

<sup>122</sup> Pesticides Act 2048 (1991) (available at [faolex.fao.org](http://faolex.fao.org)).

<sup>123</sup> Pesticides Rules 2050 (1994) (available at [faolex.fao.org](http://faolex.fao.org)).

provides for a five year validity period for pesticide registration certificates, while the following section establishes a two year validity period for licenses for the production and use of pesticides. While the act and rules contain specific provisions to empower the Ministry of Agriculture and Cooperatives to prohibit or restrict any pesticides that are potentially hazardous to the health of "human beings, animals, birds or the environment",<sup>124</sup> the legislation does not provide sufficient detail or reference to the procedural requirements set out under the SPS agreement. Specifically, the Pesticides Act does not provide for the disposal of outdate/confiscated pesticides, nor does it provide for import prohibitions on seeds improperly treated with the wrong pesticides, or the regulation of registered brand name pesticides.<sup>125</sup> It also does not implement sufficient penalties for compliance with the act, nor does it provide for sufficient inspectors or preventative mechanisms for the excessive use of pesticides.<sup>126</sup> The legislation is currently under review to address these shortcomings.<sup>127</sup>

The Seed Act, 2045 (1998)<sup>128</sup> was designed to ensure timely seed supply for different crops. Two important objectives of the legislation are applicable to SPS measures. The act and regulation are designed to promote export of seeds, while protecting genetic material rights.<sup>129</sup> The act also provides for the establishment of the National Seed Board under section 4 and requires publication of notified varieties or species of crop in the Nepal Gazette. However the act has been considered ineffective and practically unimplemented to date. There have been no official notifications of crop varieties to date and the National Seed Board has yet to be established.<sup>130</sup> Amendments to the act to address many of the legal shortcomings and implementation issues have been tabled and forwarded to parliament. These include the provision of a seed quality control agency to serve as the Secretariat of the National Seed board, and specific provisions for WTO compliance, such as certification, labelling, registration and licensing provision for breeders, sellers, exporters and importers of seeds.<sup>131</sup>

---

<sup>124</sup> Pesticides Rules (2050) 1994 s.5.

<sup>125</sup> FAO Review, p. 86.

<sup>126</sup> Id.

<sup>127</sup> Implications of WTO Membership, p. 104.

<sup>128</sup> Seed Act 2045. 1988 (available at [faolex.fao.org](http://faolex.fao.org)).

<sup>129</sup> FAO Review, p. 31.

<sup>130</sup> Ibid, p. 75.

<sup>131</sup> Id.

*Quarantine inspection licence and fee issues between India and Nepal*

Nepal and India have often resolved trade disputes over agricultural products under the terms of the Nepal India Trade Treaty. Since the accession of both countries to the WTO, there have been increased concerns over agricultural trade between India and Nepal in light of their respective WTO commitments. For example, in order to comply with its SPS commitments under the WTO, the Government of India began requiring Nepalese traders to abide by new provisions under the Indian Plant Quarantine Order, 2003. The Order became effective on January 1, 2004 and overhauled the existing phytosanitary regime under the Plant, Fruits and Seeds (Regulation of Import into India) Order, 1989 and other related import regulations. The 2003 Order is a comprehensive framework that applies the standards for international phytosanitary measures under the International Plant Protection Convention, to which Nepal is not yet a signatory. Since the Indian Order was enacted, Nepal has encountered increased difficulties in exporting certain Nepalese agricultural commodities to India. In particular, the export of Nepalese ginger has been restricted due to licensing requirements and high inspection fees imposed at Indian quarantine check points. The Agro Enterprise Centre (AEC) of Nepal has regularly taken up the issue with the concerned ministries in Nepal and India.

Chapter II (General conditions for import), number 3 clause 7 of the Indian Plant Quarantine Order 2003 states that "No import permits shall be issued for consignments other than those listed in Schedule – V, VI and VII, unless the pest risk analysis (PRA) is carried out in accordance with the guidelines issued by the Plant Protection Advisor (PPA) based on international standards". Since fresh ginger was not included in Schedules – V, VI and VII, the AEC was concerned that the export of ginger to India would be restricted over the peak ginger production season, unless the Ministry of Agriculture and Cooperatives (MOAC) of Nepal provided timely information of the existing pest conditions in ginger growing areas to the Indian Directorate of Plant Protection, Quarantine and Storage. At the instigation of the Agro-Enterprise Centre, the MOAC was able to gather and present the relevant information to the Indian Government, but this was only until after the order had come into effect and trade in ginger had been restricted for several months.

On 10 October 2004, the Government of India released a circular allowing Nepalese ginger rhizome to be imported into India under Schedule VI of the

Plant Quarantine Order, 2003 without the requirement for additional certificates. However, the Nepalese Chamber of Commerce and Industry noted continued difficulties with the import of ginger to India because it remained among the restricted commodities for import from Nepal under India's 2004–2009 Foreign Trade Policy. Certain border checkpoints, including Bhairahawa-Sunauli, Kakarvitta-Panitanki, Nepalgunj-Rupedia refused to allow for the import of Nepalese ginger into India altogether. To address the issue, the AEC lobbied the Embassy of India as well as the Ministry of Agriculture and Cooperatives, requesting that the import of ginger into India be permitted according to the amendment of 10 October 2004 of the Plant Quarantine Order 2003. In a press release issued 22 June 2005, the Embassy of India clarified that although import of fresh ginger into India is restricted and requires an import permit, the Government of India had decided that the import of fresh ginger from Nepal would be allowed freely, without an import permit.

In addition to the increased licensing requirements, the AEC raised the issue of high inspection fees being collected by the Plant Quarantine Offices of the Government of India at different border points. Under the Plant Quarantine Order 2003, inspection fees were charged on the basis of each trade transaction. As Nepalese exports of ginger and other agricultural products to India generally occur in small volumes, the percentage of the inspection fee to the wholesale price of the commodity on the Nepalese market ranged from 22 percent for 500 kg of ginger to 102 percent for 50 kg of radish seed, depending on the quantity and the seasonal price. As a result of the high inspection fees, small traders had almost stopped exporting to India and even when they exported, the export was done usually at the discretion of the plant quarantine officer at the plant quarantine office. At the initiative of the Federation of Nepalese Chambers of Commerce, the Government of Nepal approached the Government of India to seek a reduction in the current inspection fee of plant quarantine by at least 50 percent. In response, the Government of India agreed to give for Nepalese exports of farm products a concession of 50 percent on fees charged for quarantine checks in India in February 2005. These concessions were made exclusively for Nepal and were designed to benefit Nepalese farmers. However, there is a concern that they may not be compatible with India's WTO commitments.

### 2.3.3 Animal health and trade in animal and animal products

There is very little trade in livestock and animal products in Nepal. The livestock sector accounts for only approximately 11 percent of agricultural imports and 6 percent of total agricultural imports, and about 31 percent of the agricultural GDP.<sup>132</sup> Nonetheless, the percentage of agricultural GDP is expected to increase under the APP to 45 percent by 2015.<sup>133</sup> Nepal has not encountered difficulties in relation to SPS measures in recent years when exporting animals, animal products, animal feed and ingredients to India. However, there have been issues with the export of butter to China and the export of honey to Norway, as discussed in the previous section.

The OIE Terrestrial Animal Health Code defines animal health standards for compliance by WTO members when trading live animals and products of animal origin. In Nepal, the following institutions govern SPS issues related to animal health, animal production, production of feeds, products of animal origin and veterinary aspects: the Department of Livestock Services, the Department of Food Technology and Quality Control, the Department of Drug Administration, the Nepal Bureau of Standards and Metrology and local bodies such as Municipalities and District Development Committees.<sup>134</sup> The animal health information system meets OIE standards and requirements, as it provides for appropriate disease report formats. The Central Epidemiology Unit maintains a computerized national database for field information, and quarterly and annual reports on the status of animal diseases in Nepal are circulated among livestock and veterinary related institutions. The Unit has also been designated as the office responsible for reporting the status of animal diseases to the OIE in accordance with Nepal's WTO commitments.<sup>135</sup> Although the Central Epidemiology Unit meets the requirements of the SPS, the Department of Livestock Services will have to play a more important role in enforcing legislation, formulating and applying international standards for quality control, animal production input and animal products, as well as the control of animal diseases.<sup>136</sup>

In recent years, Nepal has adopted and amended several laws to govern the production, marketing and trade of livestock and animal products. Of these,

---

<sup>132</sup> Implications of WTO Membership, p. 99.

<sup>133</sup> Ibid, p. 100.

<sup>134</sup> Implications of WTO Membership, pp. 105–107.

<sup>135</sup> Ibid, p. 106.

<sup>136</sup> Ibid, p. 109.



the most relevant in the context of SPS related issues are the Animal Health and Livestock Services Act 2055 and Regulation 2056, the Drugs Act, the Pesticide Act 1991, the Animal Feed Act 1976 and Regulation 2041, and the Nepal Standards (Certification Mark) Act.<sup>137</sup> With the exception of the Pesticide Act 1991 and the Nepal Standards Certification Mark Act which are discussed in other sections, these acts are outlined below, with specific reference to the need for further reforms to comply with the SPS agreement.

The Animal Health and Livestock Services Act, 2055 (1998)<sup>138</sup> and Animal Health and Livestock Services Regulation, 2056 (2000)<sup>139</sup> were enacted to develop the livestock industry in Nepal. The legislation is designed to provide for the healthy production, sale, distribution, import and export of animals, animal products and animal production inputs. Section 3 of the act sets out the rules for the establishment and management of animal quarantine. Section 8 permits the government to draft rules prescribing the terms and conditions to be followed by traders in exporting and importing animals, animal production input and animal products. Under Section 11, a quarantine officer may prohibit entry of an animal, an animal production input or an animal product if the importer fails to submit the prescribed certificate, or if there is information to suggest that the animal, animal products or production input have been brought from a contagious disease outbreak area or have been affected by a contagious disease. In this case, sections 12–14 authorize the issuance of orders to return such products to the country of origin or to auction remove or destroy the animal or goods.<sup>140</sup> The Animal Health and Services Regulation implements the act, by providing details of the requirements for establishing animal quarantine and inspections, standard setting, recommendation and licensing procedures.<sup>141</sup> It also establishes the powers and duties of quarantine officers and veterinary inspections. FAO has proposed amendments to the Animal Health and Livestock Services Act and Regulation to provide greater detail on the functions, duties and rights of veterinary services as well as other animal health institutions in accordance with OIE guidelines under the International Animal Health Code. In addition, there is a need to provide definitions of terms under the act and regulations that are consistent with those in the OIE

---

<sup>137</sup> Ibid, p. 104.

<sup>138</sup> Full text available at [faolex.fao.org](http://faolex.fao.org).

<sup>139</sup> Ibid.

<sup>140</sup> FAO Review, p. 101.

<sup>141</sup> Implications of WTO Membership, p. 102.

Code. Finally, the act should include provisions for bees, bee products and production inputs to address Norway's SPS concerns.<sup>142</sup>

The Drugs Act 2035 (1978) prohibits misuse of drugs or false or misleading information about drug efficacy and use. It also controls the "production, import/export, storage, distribution and use of drugs which are not safe for use by people, efficacious and of standard quality"<sup>143</sup> Although the Drugs Act defines drugs widely to include drugs used on humans as well as animals, most references under the act are to physicians and patients, rather than veterinarians and animals, suggesting that the main purpose of the act is to address human drugs.<sup>144</sup> FAO has called for a new Veterinary Drug Act to complement the Drugs Act, with particular application to biological products, to legislate further quality control programs and safeguards against the introduction of animal disease from imported veterinary biological products.<sup>145</sup>

The Animal Feed Act 1976<sup>146</sup> and Regulation 2041 were enacted to control the production, handling and marketing of feed for animals. It was designed to prevent the adulteration of feed materials and animal feeds as well as to maintain quality standards. Section 3 of the act provides that no person shall produce, sell, supply, export, import or store defective animal feeds. Section 4 prohibits the fraudulent sale and distribution of sub-standard feed materials. Section 6 permits the seizure and impounding of sub-standard feed materials, and section 7 sets out the requirement for a license for the manufacture, sale, distribution, and storage of feed materials. Section 8 outlines penalties for violations of the act. Sections 10 and 12 grant powers to the government to establish the quality and standard for feed materials, as well as to form a feed standardization committee. Sections 14–6 provide for court enforcement under the act. Procedural steps are addressed under the regulation. However, the Animal Feed Act and Regulation cover only finished animal feeds, and does not establish a sufficiently collaborative and preventative approach to regulation. The regulatory framework also lacks provisions to address the risk of harm to animals and humans due to the misuse of pesticides on animal feeds.<sup>147</sup> FAO has called for revisions to the Animal Feed Act and Regulation to govern the manufacturing, storage,

---

<sup>142</sup> Ibid, p. 109.

<sup>143</sup> Ibid, p. 103.

<sup>144</sup> Implications of WTO Membership, p. 104.

<sup>145</sup> Ibid, p. 109.

<sup>146</sup> Animal Feed Act 1976, (available at [faolex.fao.org](http://faolex.fao.org)).

<sup>147</sup> Implications of WTO Membership, p. 105.

transportation and selling of animal feeds and feed ingredients in a manner that is consistent with Codex or OIE standards.

## **2.4 The TBT Agreement**

The Nepal Standards (Certification Mark) Act 1980<sup>148</sup> and Standard Weights and Measures Act 1968<sup>149</sup> establish standards, regulations, certifications and licenses for all kinds of goods, processing and services in Nepal.<sup>150</sup> Article 5 of the Nepal Standards (Certification Mark) Act sets out the powers of the Nepal Bureau of Standards and Metrology. It is empowered to prepare all standards and technical regulations, with the exception of health and food products and it oversees all mandatory certification activities, following international standards.<sup>151</sup> These are submitted to the Nepal Council of Standards (NCS) for approval. Technical regulations are published in the Nepal Gazette and Standards are published in booklet form.<sup>152</sup> The Department of Food Technology and Quality Control under the Ministry of Agriculture and the Department of Drug Administration, under the Ministry of Health are responsible for formulating standards and technical regulations based on international standards, to ensure the protection of health and food products.<sup>153</sup> Given the provisions for transparency, laboratory testing and judicial review, this legislation has been considered compliant with Nepal's MFN and national treatment obligations to the WTO.<sup>154</sup>

Nepal agreed to implement the Agreement on Technical Barriers to Trade, as well as the Code of Good Practice by January 1, 2007.<sup>155</sup> Legislative amendments have been proposed to Nepal Standards Act and Regulations to comply fully with WTO. The Nepal Bureau of Standards and Metrology (NBSM) was established as the TBT enquiry point in June 2003. Amendments were being prepared in 2004 and September 2005 and were expected to be endorsed and adopted by the council of ministers by the end of 2005.

---

<sup>148</sup> Nepal Standards (Certification Mark Act), (full text available at [www.nbsm.gov.np](http://www.nbsm.gov.np)).

<sup>149</sup> Full text available at [www.nbsm.gov.np](http://www.nbsm.gov.np).

<sup>150</sup> Working Party Report, p. 29.

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

<sup>155</sup> *Ibid*, p. 31.

## 2.5 Intellectual property rights and agriculture

Under the WTO Accession Protocol, Nepal committed to enact an Industrial Property Protection Act to incorporate the substantive provisions of section 2 through 7 of Part II of TRIPS Agreement by December 2005.<sup>156</sup> It also committed to provide national treatment and MFN treatment from the date of accession and to ensure full application of the TRIPS Agreement by 1 January 2007.<sup>157</sup> It has sought technical assistance to provide enforcement mechanisms that conform with TRIPS, such as the provision of training to customs officials, police, judges and lawyers in intellectual property law.

As part of its commitment to establish a WTO-compliant intellectual property regime, Nepal has joined several international organizations in recent years. Nepal has been a member of WIPO since February 1997 and the Paris Convention for the Protection of Industrial Property since 2001. It also committed to join the Rome Convention and Treaty on Intellectual Property Rights by December 2006.<sup>158</sup> Nepal has been a party to the Convention on Biological Diversity since 1992. This convention is designed to protect biodiversity and contradicts the TRIPS Agreement to the extent that it does not prioritize exclusive IP rights over community rights to genetic resources.<sup>159</sup> Nepal has not yet joined the FAO International Treaty on Plant Genetic Resources for Food and Agriculture 2001, which also provides a model for *sui generis* systems to protect farmer's innovations against patenting and encourages the sharing of agricultural benefits. During Accession negotiations, Nepal was asked to commit to join International Union for the Protection of New Plant Varieties (UPOV) Convention 1991. UPOV regulates Plant Breeder's Rights at international Level and proposes a *sui generis* model for the protection of plant rights, although it has been criticized as protecting breeder's rights at the expense of farmer's rights.<sup>160</sup> As a result of lobbying pressure from Nepalese NGOs such as SAWTEE and Action Aid Nepal, the commitment was reduced.<sup>161</sup> Nepal committed

---

<sup>156</sup> Working Party Report, p. 40.

<sup>157</sup> Id.

<sup>158</sup> Id.

<sup>159</sup> Implications of WTO Membership, p. 131.

<sup>160</sup> Implications of WTO Membership, p. 134.

<sup>161</sup> Ratnakar, A & Navin, D. 2004. *LDCs' accession to the WTO: learning from the Cambodia and Vanuatu Cases of Nepal*, p. 8. South Asia Watch on Trade, Economics & Environment (SAWTEE). Kathmandu (available at [www.un-ngls.org](http://www.un-ngls.org)).

only to explore the possibility of joining other WIPO and IP related conventions, including the UPOV Convention 1991, while taking into account national interests.<sup>162</sup>

In Nepal, the Patent, Design and Trade Mark Act 1965<sup>163</sup> is the primary instrument governing intellectual property rights as they relate to the agricultural sector. The act was amended in 1989 and 1990, however, it has not been updated for compliance with the TRIPS provisions on plant protection or geographical indications.<sup>164</sup> Several amendments to the act are necessary to ensure compliance with the TRIPS Agreement, both in terms of harmonizing procedural measures as well as establishing substantive rights. For example, section 23(a) prohibits the registration of industrial property outside Nepal without prior registration in Nepal, contrary to international intellectual property law, including TRIPS. Section 21 (c) states that patents, designs and trade-marks registered in foreign countries may be registered in Nepal upon presentation of a foreign registration certificate and without further enquiries. This does not adequately address the registration requirements under TRIPS. In addition, non-patentable subjects, the rights of patent holders and the terms of protection are not clearly defined under the 1965 Act.<sup>165</sup> The circumstances in which patents cannot be registered are set out under article 6. While there is an exclusion of patentability for patents likely to adversely affect public health, conduct, morality or national interests<sup>166</sup>, there is no reference to specific protections for plant varieties. A new draft Patent, Design and Trade Mark Act was prepared in 2004 to include provisions requiring application and registration to protect industrial property rights, with the exception of geographical indications. It also has clearly defined enforcement provisions.<sup>167</sup>

According to the Working Party Report, a new Plant Protection Act was also in the drafting process to address protections for plant varieties and would be promulgated by December 2005.<sup>168</sup> As Nepalese agriculture is largely

---

<sup>162</sup> Working Party Report, p. 40.

<sup>163</sup> Patent, Design and Trade-Mark Act of Nepal 1965 (available at [www.vakilno1.com](http://www.vakilno1.com)).

<sup>164</sup> Bhandari, S. 2004. *Draft report on TRIPS related legislation multilateral trade integration and human development in Nepal*, p. 24. Prepared for Multilateral Trade Integration and Human Development Nepal.

<sup>165</sup> Bhandari, S. 2004, p. 27.

<sup>166</sup> Patent, Design and Trade-Mark Act of Nepal 1965, article 6(c).

<sup>167</sup> Bhandari, S. 2004, p. 25.

<sup>168</sup> Working Party Report, p. 42.

subsistence-based; it is highly dependent on the use of traditional seeds. It is therefore in the context of seeds that the TRIPS agreement is most relevant. Not only is the share of total seeds supplied by the commercial sector very small for most crops, but there is also a concern over the conservation of indigenous varieties and the culture of traditional seed exchange among farmers.<sup>169</sup> There are currently no comprehensive legal mechanisms in Nepal to provide for farmers rights relating to genetic resources, and the protection of traditional knowledge. However, there are several laws containing provisions for the protection of indigenous knowledge and natural resources. These include the Constitution of Nepal 1990, the Local Self-Governance Act 1999, the Lands Act of 1964, the Water Resources Act 1992, the Aquatic Life Protection Act 1961, the Forest Act 1993, the Environment Protection Act 1996, the Pesticides Act 1991, the Food Act 1967, the Plant Protection Act 1972, the Animal Health and Services Act 1998, the Nepal Agricultural Research Council Act 1991, the Industrial Enterprises Act 1992, the Cooperatives Act 1991, and the Seed Act 1988.<sup>170</sup>

### III. CONCLUSION

Nepal joined the WTO with the conviction that global integration of the economy through WTO membership was needed to expand its trade opportunities and facilitate competition. It also sought to acquire trade-related knowledge, create opportunities for growth and pursue overall development goals. It committed to following a rules-based trading regime in order to ensure domestic policy stability and enhance institutional capabilities that in turn help increase productivity, foreign direct investment and exposure to new technologies.

Although Nepal's economic and trading policies were already very liberal at the time of Accession and go beyond many of the basic requirements of the WTO, the country still lacks the trading infrastructure needed to benefit from entrance into the WTO trading regime. Nepal's WTO commitments were aimed at expanding trade through market access that is predictable, secure and transparent. However, Nepal's membership in the rules-based trading regime will only be beneficial to the country if proper plans are implemented nationally to assist in the liberalization process. Factors such as internal and external institutions and social and policy preconditions will

---

<sup>169</sup> Implications of WTO Membership, p. 136.

<sup>170</sup> Ibid, p. 138.

largely determine to what extent Nepal and the Nepalese people will benefit from trade. To make the WTO pro-poor and growth-friendly, Nepal needs further domestic policy reforms to protect vulnerable groups and improve infrastructure for agricultural development. As a least developed country, Nepal also needs to be a participant in WTO negotiations to apply the Marrakesh decision and ensure that market access is effective and fair. An in-depth analysis of Nepal's trade potential, while comparing the opportunities from market access commitments of other member states, as well as the countries currently in the WTO accession process will help pave the way for future reforms.<sup>171</sup>

---

<sup>171</sup> [www.multitrade.org.np](http://www.multitrade.org.np).

## MAIN REFERENCES

**Adhikari, R. & Dahal, N.** *LDCs' Accession to the WTO: Learning from the Cases of Nepal, Cambodia and Vanuatu*, South Asia Watch on Trade, Economics and Environment (SAWTEE), p. 8, Kathmandu. (available at [www.un-ngls.org](http://www.un-ngls.org)).

**Bhandari, S.** 2004. *Draft Report on TRIPS Related Legislation Multilateral Trade Integration and Human Development in Nepal*. Prepared for Multilateral Trade Integration and Human Development. Nepal.

**FAO.** 2004. *A Review of the Agricultural Policies and Legal Regime in Nepal*. Legal Office. Rome.

**FAO/UNDP.** 2004. *Implications of the WTO Membership on the Nepalese Agriculture*. Kathmandu.

**Integrated Framework for Trade Related Technical Assistance.** 2003. Nepal Trade and Competitiveness Study (available at [www.integratedframework.org](http://www.integratedframework.org)).

**Pyakuryal, B., Thapa, Y.B. & Roy, D.** 2005. *Trade Liberalization and Food Security in Nepal*. International Food Policy Research Institute. MTID Discussion Papers No. 88. Washington D.C.

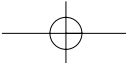
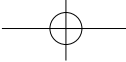
**Sauvé, P.** 2005. *Economic Impact and Social Adjustment Costs of Accession to the World Trade Organization: Cambodia and Nepal*. *Asia-Pacific Trade and Investment Review* (1)1.

**The Economist.** 2005. *Nepal Country Report*.

**UNESCAP.** *Case Study: Nepal The Doha Development Agenda: Perspectives from the ESCAP Region*. UNESCAP document ST/ESCAP/2278 (available at [www.unescap.org](http://www.unescap.org)).

**WTO.** Report of the Working Party on Nepal's WTO Accession, WTO document WT/ACC/NPL/16 of 28 August 2003.





## CONCLUSIONS

This study has a pronounced developing country focus and references to country practices are intended to be illustrative of general trends but are by no means typical across the board. A separate but related point is that the interests and implementation experiences of developing countries vary greatly and cannot legitimately be characterized as a homogenous. Although there are various groupings such as ACP, LDCs, NFIDCs, G-77, G-33, land-locked states, Small Island Developing States, and others, all of which are formed to promote similar interests, asymmetry remains a major feature of the international trading system.

The larger economies of India and Brazil cannot for instance be at par with lesser robust which are often structured very differently. This large divergence has created conflicts of interest between the developing countries, with some adversely affected by the blanket application of special and differential treatment that does not take into account the particular exigencies of national contexts. Certain similarities remain however, and it is these which inform comparison and lesson learning.

An issue that has been highlighted in this legislative study, particularly by the Kenya and Nepal case studies is the importance of building the technical capacity of developing countries to effectively participate within WTO negotiations and to defend their interests. Steps need to be taken that build on current efforts to provide funding and technical assistance to ensure that appropriate and tailored assistance is provided in the manner it is most needed.

Country level assessments of the legal and institutional frameworks were done in a following a similar methodology for comparison but without losing site of the peculiarities in each country. Gaps, discrepancies or loopholes in the laws were highlighted with the end goal being to draw attention to the possible need for technical assistance. The institutional analysis was derived to a large extent from the information provided by the institutions themselves or compilations of secondary sources. In some instances, documentation was difficult to acquire from institutions where they failed to reply to requests for information. Obtaining current and updated information was a major challenge throughout the process, partly because the reform processes were quite rapid.

As highlighted in the study, many developing countries were already carrying out agricultural reforms and on the path towards liberalised trade regimes as

required under the World Bank and IMF structural adjustment programmes, even prior to WTO-inspired legal and institutional reforms. Consequently, the private sector already had a greater role to play in many developing countries by the time real WTO-related reforms begun. As evidenced by the Kenya case study, the shift in some developing countries from public to private did not see the latter moving in successfully to provide services following the withdrawal of the state. These changes were also characterized by a lack of coherence between the legislation, the institutions and economic reforms. What has transpired in the last ten years is a remarkable acknowledgment across the world of the central importance of the private sector but in addition, a greater emphasis on the concomitant oversight role of government.

The case studies highlight the challenges for implementation in developing countries. The Kenya case study demonstrates that the most problematic compliance issues are related to those that are resource-intensive, not just for the government in terms of putting in place supporting infrastructure and functioning institutions, but also as regards supply side constraints, for example the ability of agricultural producers and traders to comply with SPS measures. This in turn means that an enabling legal and policy framework has to be in place, to ensure that government to be able to take bold remedial steps, whether those steps mean providing resources from the fiscal budget or undertaking institutional restructuring.

The Nepal case study is an illustration of the struggle to implement extensive commitments by an LDC. Under its terms of accession to the WTO Nepal undertook 25 specific systemic commitments. Many challenges however remain as explained in the case study. The challenge of enhancing its competitiveness and to diversify the export base, including through a supportive and firm legal and policy framework remains.

The Kazakhstan case study paints the picture of an economy in transition, and which is at the same time in the throes of WTO accession negotiations, with the attendant legal and policy reforms that this entails. It is also unique because of its status as a landlocked country, in addition to the fact that it has enjoyed significant economic growth since 2000, partly due to its large oil, gas, and mineral reserves. The significant state support in place and envisioned for the agricultural sector may be explained by the unique challenges of transporting farm inputs and produce in a landlocked country, and the ability of government to provide such support from collected

revenues. Substantial amounts of the state budget have been allocated to the purchase of machinery, loans and credit to augment production.

The foregoing case studies highlight the problematic issue of data and information collection. Updates are not always received in a timely fashion, and particularly in countries where trade-related legislation is constantly under amendment and in flux, the danger of predicated strategies on redundant information is greater. In this regard, information dissemination and collection efficiency is also a key factor in the adequate functioning of institutions. Trade information networks with a variety of stakeholders are essential to collect and disseminate information not only in terms of regulations and standards, but also to create a sufficient feedback loop from producers in order to design appropriate policies and strategies that take into account the agricultural production realities.

A central theme in the experience of the FAO Legal Office's legal assistance to countries around the world is the importance of a participatory approach to law-making. Such an approach augments the degree of synergy and coherence between laws, policies and prevailing administrative practice. In the end, it results in significantly better quality legal frameworks and increased legitimacy in the eyes of the stakeholders and producers. It also facilitates smoother implementation.

### **...in the context of food security**

Food security is a logical inclusion in the stated objectives of national agricultural policies worldwide; while it may not be the driving force of the policy goals, this purpose can also be distilled from the numerous trade measures in place designed to enhance agricultural trade. Although there is an inextricable nexus between food security and sound agricultural trade practices, this link should not be made tenuous by oversimplifying the connection. This nexus is not immediately apparent in all countries, and indeed some argue as to the impact of liberalization of trade on food security as the latter is dependent on a number of variables such as the effectiveness of policies, productions support and infrastructure, and income. Agricultural trade liberalization also impacts employment and livelihood, nutrition; in many developing countries, the economy is largely dependent on agriculture production for subsistence and trade. This latter fact is more so in African countries, while Latin American economies for example, may be less dependent on agriculture. Food security within a

given population depends among other things on the two critical factors of adequate supply and distribution which are affected by trade.

Increased production and a resultant increase in trade can stem from the use of agro-biotechnology for increasing agricultural yields. A sound IPR system in general can also benefit developing countries by encouraging innovation, increasing the amount of foreign direct investment into the country and the corollary transfers of technology and technical assistance. The much debated issue of farmer's rights with respect to rights over plant varieties has raised concerns over the impact of protected resources on agricultural biodiversity and on the access of small-scale subsistence farmers to such resources. Thus national legislation often has to strike a balance between the trade related issues concerning intellectual property rights, and farmer's interests in using these resources and saving them for future generations.

Many areas regulated by the WTO touch upon food security, ranging from the regulation of private investment flows to the more directly relevant Marrakesh Decision. In reflecting upon the significance of trade agreements for food security, the AoA is also of central importance. While the major objectives of the AoA were to discipline agricultural trade, curb overproduction and prevent trade distorting support, these problems were more symptomatic of developed countries, while underproduction and minimal support to the agricultural sector characterized developing countries. While developing countries provide little or no support to agriculture, and often tax it heavily, developed countries on the other hand are on the opposite end, with over-production creating artificially low commodity prices and import surges. Regular tariffs are often inadequate to deal with these situations and while they can be raised and bound at high levels, many developing countries also do not have the adequate resources and infrastructure in place to institute special safeguard procedures. It has been suggested that compromises regarding increasing food security and possible distorting effects on markets should be deliberately skewed towards the former.

The Marrakesh Decision's four pronged approach to the possible harm of LDCs and NFIDCs as a result of reduced subsidized foods available on the world market included mechanisms on food aid, financing commercial imports in the short term, providing agricultural export credits and assistance, both technical and financial, to increase productivity in the agricultural sector. These strategies were envisioned to counter the concern

of an increase in food prices—and many have attributed this concern as a major reason for the failure to reach a consensus on an agriculture agreement during the Doha Round. The two groups targeted by the Marrakesh Decision (LDCs and NFIDCs), although having principally subsistence agricultural producers, to a large extent, have agricultural policy strategies for the commercial sector that focus on the production of agricultural commodities for export, and opt instead to import their required quantities of food items.

For those developing countries that have the resources to be competitive as a result of their market, legal and institutional structures and sufficiently high production levels, the liberalised trading arrangements offered by the WTO framework can be advantageous. Those that are less well placed to benefit from liberalised measures might even be adversely affected by the international trading schemes. In this regard, developing countries need to take advantage of whatever special and differential treatment rules there may be.

Of necessity, one of the barometers of measuring the success of WTO-inspired legal, policy and economic reforms should be the extent to which these reforms strengthen economies, reduce poverty and contribute to overall food security. It is hoped that this study will provoke further discussion on the impact of trade rules on the agricultural sector of developing countries, particularly given the direct influence of the international trading system on global food security—through setting rules on exports and imports—and on national food production and distribution. Of fundamental importance in this process is the assessment of the extent to which national laws and institutions are conducive to, and apply, international standards.



## FAO LEGISLATIVE STUDIES

1. Wildlife and national park legislation in Asia, 1971 (E\*)
2. Wildlife and national park legislation in Latin America, 1971 (E\* S\*)
3. Vicuña conservation legislation, 1971 (E\* S\*)
4. Legal systems for environment protection: Japan, Sweden, United States, 1973 (E\*)
5. Agrarian law and judicial systems, 1975 (E\* F\* S\*)
6. Agricultural credit legislation in selected developing countries, 1974 (E\*)
7. An outline of food law, 1983 (E\* F S\*)
8. Legislación de aguas en América Central, Caribe y México – Vol. I, 1983 (S)
9. A legal and institutional framework for natural resources management, 1983 (E S)
10. Water law in selected European countries (Belgium, England and Wales, France, Israel, Italy, Spain, Turkey) – Vol. I, 1979 (E\* F S\*)
11. Fundamentos teóricos para una legislación tributaria en el sector agropecuario, 1976 (S\*)
12. International food standards and national laws, 1976 (E F\*)
13. Derecho agrario y desarrollo agrícola: estado actual y perspectivas en América Latina, 1978 (S\*)
14. Legal and institutional responses to growing water demand, 1977 (E\* F\* S\*)
15. Systematic index of international water resources treaties, declarations, acts and cases by basin – Vol. I, 1978 (E/F/S\*)
16. Seed legislation, 1980 (E F\* S)
17. Water law in selected African countries, 1980 (E\* F S)
18. Reforma agraria y desarrollo rural integrado, 1979 (S\*)
19. Water legislation in South American countries, 1983 (E\* F S\*)
20. Legislation on wildlife, hunting and protected areas in some European countries, 1980 (E\* F\* S\*)
21. Coastal state requirements for foreign fishing has been replaced by the FISHLEX database available at <http://faolex.fao.org/fishery>
22. Agricultural insurance legislation, 1981 (E\* S\*)
23. The law of international water resources, 1980 (E\* F S)
24. Irrigation users' organizations in the legislation and administration of certain Latin American countries, 1983 (E S)
25. Legislation on wildlife and protected areas in Africa, 1984 (E F)
26. The UN Convention on the Law of the Sea: impacts on tuna regulation, 1982 (E F)
27. Regional compendium of fisheries legislation – West Africa (CECAF Region), 1983 (E/F\*)
28. Plant protection legislation, 1984 (E\* F S)
29. Legislation on foods for infants and small children, 1983 (E\*)
30. Water law in selected European countries (Cyprus, Finland, the Netherlands, Union of Soviet Socialist Republics, Yugoslavia) – Vol. II, 1983 (E)
31. The role of legislation in land use planning for developing countries, 1985 (E)
32. Agricultural census legislation, 1984 (E\*)
33. Legislation on productivity in agriculture: a comparative outline, 1985 (E F S)
34. Systematic index of international water resources treaties, declarations, acts and cases by basin – Vol. II, 1984 (E/F/S\*)
35. Regional compendium of fisheries legislation (Western Pacific Region) – Vols. I and II, 1984 (E)



36. Legislation controlling the international beef and veal trade, 1985 (E\* F S)
37. La législation forestière au Cap-Vert, en Ethiopie, en Gambie, au Mali et en Mauritanie, au Niger, au Rwanda et au Sénégal, 1986 (F)
38. The environmental impact of economic incentives for agricultural production: a comparative law study, 1990 (E F S)
39. Propiedad, tenencia y redistribución de tierras en la legislación de América Central y México, 1986 (S)
40. International groundwater resources law, 1986 (E F S)
41. Land tenure systems and forest policy, 1987 (E F)
42. Regional compendium of fisheries legislation (Indian Ocean Region) – Vols I and II, 1987 (E)
43. Pesticide labelling legislation, 1988 (E F S)
44. La réforme du droit de la terre dans certains pays d'Afrique francophone, 1987 (F)
45. Legal aspects of international joint ventures in agriculture, 1990 (E)
46. The freshwater-maritime interface: legal and institutional aspects, 1990 (E)
47. The regulation of driftnet fishing on the high seas: legal issues, 1991 (E F)
48. Les périmètres irrigués en droit comparé africain (Madagascar, Maroc, Niger, Sénégal, Tunisie), 1992 (F)
49. Analyse préliminaire de certains textes législatifs régissant l'aquaculture, 1993 (F S)
50. Treaties concerning the non-navigational uses of international watercourses – Europe, 1993 (E/F/S)
51. Pesticide registration legislation, 1995 (E F)
52. Preparing national regulations for water resources management, 1994 (E)
53. Evaluation des impacts sur l'environnement pour un développement rural durable: étude juridique, 1994 (F)
54. Legislation governing food control and quality certification – The authorities and procedures, 1995 (E F)
55. Treaties concerning the non-navigational uses of international watercourses – Asia, 1995 (E/F)
56. Tendances d'évolution des législations agrofroncières en Afrique francophone, 1996 (F)
57. Coastal state requirements for foreign fishing has been replaced by the FISHLEX database available at <http://faolex.fao.org/fishery>
58. Readings in African customary water law, 1996 (E/F)
59. Cadre juridique de la sécurité alimentaire, 1996 (F)
60. Le foncier-environnement – Fondements juridico-institutionnels pour une gestion viable des ressources naturelles renouvelables au Sahel, 1997 (F)
61. Treaties concerning the non-navigational uses of international watercourses – Africa, 1997 (E/F)
62. New principles of phytosanitary legislation, 1999 (E F S)
63. The burden of proof in natural resources legislation – Some critical issues for fisheries law, 1998 (E)
64. Política y legislación de aguas en el Istmo centroamericano – El Salvador, Guatemala, Honduras, 1998 (S)
65. Sources of international water law, 1998 (E)

66. Trends in Forestry Law in America and Asia, 1998 (E F S)
67. Issues in water law reform, 1999 (E)
68. Extracts from international and regional instruments and declarations, and other authoritative texts addressing the right to food, 1999 (E/F/S)
69. Élaboration des réglementations nationales de gestion des ressources en eau – Principes et pratiques, 1999 (F)
70. Water rights administration – Experience, issues and guidelines, 2001 (E)
71. Fisheries enforcement – Related legal and institutional issues: national, subregional or regional perspectives, 2001 (E)
72. Trends in forestry law in Europe and Africa, 2003 (E F)
73. Law and sustainable development since Rio – Legal trends in agriculture and natural resource management, 2002 (E)
74. Legal trends in wildlife management, 2002 (E S)
75. Mountains and the law – Emerging trends, 2003 (E F S)
75. Rev. 1 Mountains and the law – Emerging trends, 2006 (E F S)
76. Gender and law – Women's rights in agriculture, 2002 (E)
76. Rev. 1 Gender and law – Women's rights in agriculture, 2006 (E F S)
77. The right to adequate food in emergencies, 2003 (E)
78. Law and modern biotechnology – Selected issues of relevance to food and agriculture, 2003 (E)
79. Legislation on water users' organizations – A comparative analysis, 2003 (E)
80. Preparing national regulations for water resources management – Principles and practice, 2003 (E)
81. Administración de derechos de agua, 2003 (S)
82. Administrative sanctions in fisheries law, 2003 (E)
83. Legislating for property rights in fisheries, 2004 (E)
84. Land and water – The rights interface, 2004 (E)
85. Intellectual property rights in plant varieties – International legal regimes and policy options for national governments, 2004 (E F S)
86. Groundwater in international law – Compilation of treaties and other legal instruments, 2005 (E)
87. Perspectives and guidelines on food legislation, with a new model food law, 2005 (E)
88. Legal and institutional aspects of urban and peri-urban forestry and greening, 2005 (E)
89. The legal framework for the management of animal genetic resources, 2005 (E)
90. Marco analítico para el desarrollo de un sistema legal de la seguridad de la biotecnología moderna (bioseguridad), 2006 (S)
91. Directrices en materia de legislación alimentaria (nuevo modelo de ley de alimentos para países de tradición jurídica romano-germánica), 2006 (S)
92. Modern water rights – Theory and practice, 2006 (E)
93. Integrated coastal management law – Establishing and strengthening national legal frameworks for integrated coastal management, 2006 (E)
94. Perspectives et directives de législation alimentaire et nouveau modèle de loi alimentaire, 2007 (F)
95. Recent trends in the law and policy of bioenergy production, promotion and use, 2007 (E)

96. Development of an analytical tool to assess national *Biosecurity* legislation, 2007 (E)
97. Designing national pesticide legislation, 2007 (E)
98. International trade rules and the agriculture sector – Selected implementation issues, 2007 (E)

#### ANNUAL PUBLICATION

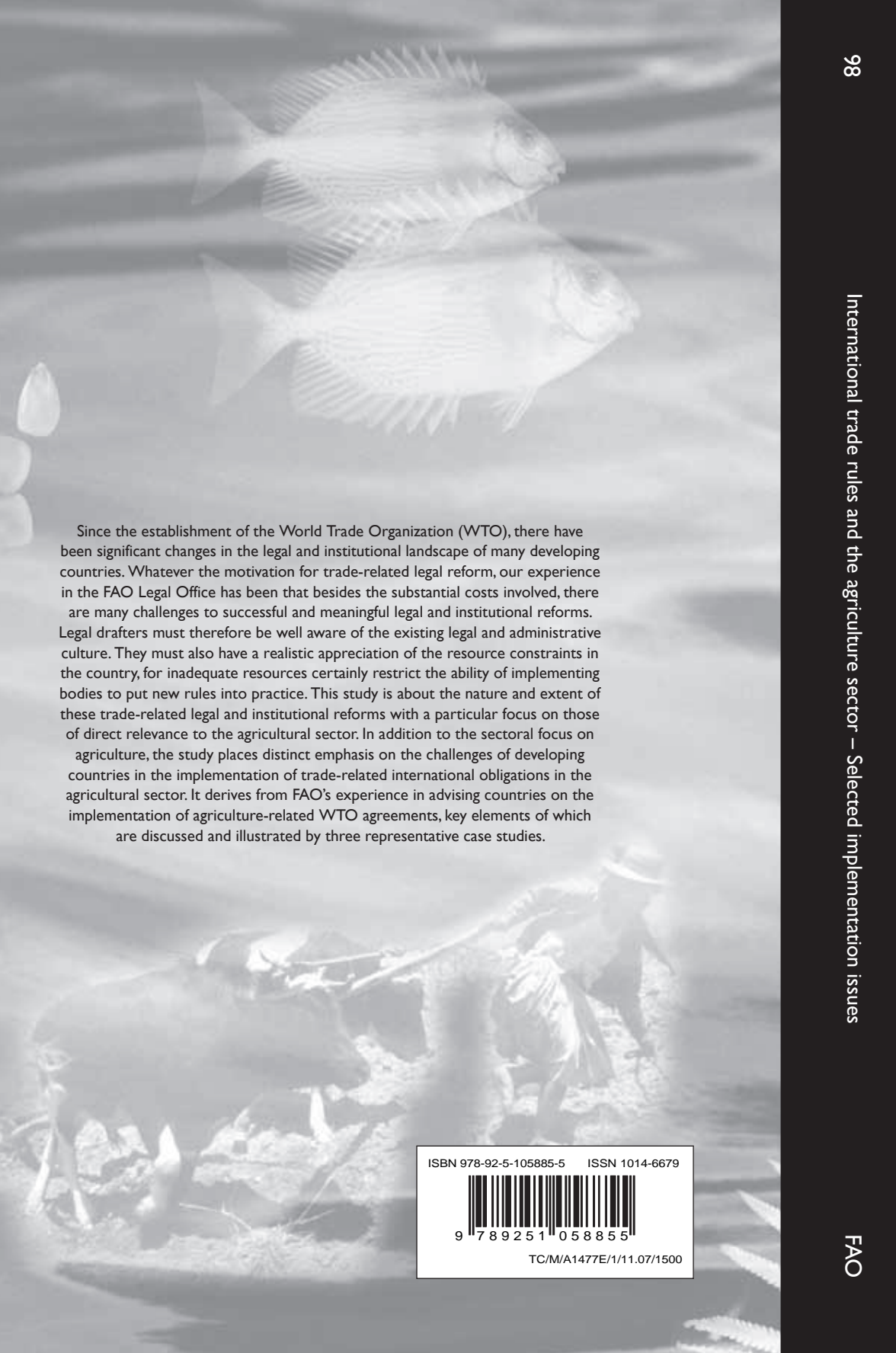
A selection of significant and illustrative laws and regulations governing food and agriculture in FAO Member Nations has been replaced by the FAOLEX database available at <http://faolex.fao.org/faolex>

Availability: November 2007

Ar – Arabic	Multil– Multilingual
C – Chinese	* Out of print
E – English	** In preparation
F – French	
S – Spanish	

*The FAO Technical Papers are available through the authorized FAO Sales Agents or directly from Sales and Marketing Group, FAO, Viale delle Terme di Caracalla, 00153 Rome, Italy.*





Since the establishment of the World Trade Organization (WTO), there have been significant changes in the legal and institutional landscape of many developing countries. Whatever the motivation for trade-related legal reform, our experience in the FAO Legal Office has been that besides the substantial costs involved, there are many challenges to successful and meaningful legal and institutional reforms. Legal drafters must therefore be well aware of the existing legal and administrative culture. They must also have a realistic appreciation of the resource constraints in the country, for inadequate resources certainly restrict the ability of implementing bodies to put new rules into practice. This study is about the nature and extent of these trade-related legal and institutional reforms with a particular focus on those of direct relevance to the agricultural sector. In addition to the sectoral focus on agriculture, the study places distinct emphasis on the challenges of developing countries in the implementation of trade-related international obligations in the agricultural sector. It derives from FAO's experience in advising countries on the implementation of agriculture-related WTO agreements, key elements of which are discussed and illustrated by three representative case studies.

ISBN 978-92-5-105885-5

ISSN 1014-6679



9 789251 058855

TC/M/A1477E/1/11.07/1500