



SUBSIDIES AND FOOD SECURITY IN WTO: A PERMANENT SOLUTION IS STILL PENDING

SYNOPSIS

The current WTO rules applicable to public stockholding for food security purposes illustrate the imbalances present in the WTO rules on agriculture. The calculation of the level of subsidies on the basis of outdated fixed reference prices is a flaw that needs to be corrected. Moreover, the rigid limits imposed in the calculation of the AMS ironically penalize developing countries that did not subsidize agricultural production at the time the Uruguay Round was concluded, rather than those with a history of heavy subsidization.

Despite the support of food security policies that developed countries have voiced at the UN and WTO, the compromise reached in Bali shows no real willingness of those countries to solve a problem of vital importance for all countries, particularly those with a large poor population. The implementation of public stockholding for food security purposes can support local food systems and be instrumental to the realization of the human right to food.

Though highly imperfect, the Bali compromise on this issue was a step in the right direction. However, given the limitations and the provisional nature of the 'peace clause' negotiated at the Bali WTO Conference and the uncertainty about the possibility of reaching a satisfactory permanent solution in four years, it has been legitimate to question, as India and other developing countries have done, whether the price demanded by developed countries for the Bali compromise (notably the acceptance of the TFA) was warranted. As already suggested after the Bali Conference, new concessions are likely to be sought, namely in terms of industrial tariffs and services, to give consensus to a definitive solution for stockholding programs implemented in developing countries. Countries seeking a permanent solution to the issue of public stockholding for food security would need, hence, to build up strong alliances to amend the current WTO rules, without being forced to admit new disciplines limiting their policy space to apply measures that are important to achieve their development objectives.

November 2014
Geneva, Switzerland

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I. Introduction

1. Some developing countries implement programs for the acquisition of stocks of foodstuff with the purpose of both supporting low-income producers and feeding the poor. These programs, which may be crucial to ensure food security, can entail the grant of subsidies subject to WTO rules.
2. This was one of the controversial issues discussed at the 9th WTO Ministerial Conference held in Bali on December 3-7, 2014, in response to the demand of a group of developing countries, the Group of 33 (G-33)¹, led by India. An agreement on a provisional solution was eventually reached.
3. This paper briefly examines, first, the treatment of food security issues in the context of the UN system and the WTO; second, the importance for developing countries of programs for the acquisition of stocks of foodstuff; third, the rules applicable to such programs under the WTO Agreement on Agriculture; and fourth, the outcome of the negotiations on the subject conducted at the Bali Conference and after the Bali Conference.

II. Food security in the UN and WTO

4. Concerns regarding food security were addressed in the UN system since 1974 with the establishment of the Committee on World Food Security (CFS). Its objective was to serve as a forum for the review and monitoring of policies concerning world food security. In 1996, the Food and Agriculture Organization (FAO) issued the 'Rome Declaration on World Food Security' which reaffirmed 'the right of everyone to have access to safe and nutritious food, consistent with the right to adequate food and the fundamental right of everyone to be free from hunger'.² In April 2008, a UN System High Level Task Force was set up to ensure a coherent system-wide response to the global food security crisis and enhance the efforts of the UN system and

¹ The Group includes in fact 46 countries: Antigua and Barbuda, Barbados, Belize, Benin, Bolivia, Plurinational State of, Botswana, Côte d'Ivoire, China, Congo, Cuba, Dominica, Dominican Republic, El Salvador, Grenada, Guatemala, Guyana, Haiti, Honduras, India, Indonesia, Jamaica, Kenya, Korea, Republic of, Madagascar, Mauritius, Mongolia, Mozambique, Nicaragua, Nigeria, Pakistan, Panama, Peru, Philippines, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Senegal, Sri Lanka, Suriname, Tanzania, Trinidad and Tobago, Turkey, Uganda, Venezuela, Bolivarian Republic of, Zambia, Zimbabwe

² Available at <http://www.fao.org/docrep/003/w3613e/w3613e00.HTM>.



international financial institutions³. The High Level Task Force defined 'food security' as:

- Production and availability of food
- Access to food and nutrition
- People's use of food and nutrition to lead their lives to the full potential
- Stability of supply

5. More recently, a report by the United Nations Special Rapporteur on the Right to Food indicates that public procurement policies may contribute to the realization of the right to food:

Many national and sub-national administrations have established public purchasing policies that seek to support local producers, linking them with local consumers. Public procurement approaches of this sort can certainly make an important contribution to strengthening local food systems and therefore, ... to the realization of the right to food. However, public procurement approaches can also contribute to the right to food by linking producers to consumers across borders, as in fair trade schemes that support livelihoods of small-scale food producers in developing countries (De Schutter, 2014, p. 6-7).

6. The UN work on food security is likely to have influenced the consideration of trade issues in the Uruguay Round, and later, in the context of the WTO. Food security was recognized as a 'non-trade concern' in the preamble to the WTO Agreement on Agriculture:

Noting that commitments under the reform programme should be made in an equitable way among all Members, having regard to non-trade concerns, *including food security* and the need to protect the environment; having regard to the agreement that special and differential treatment for developing countries is an integral element of the negotiations, and taking into account the possible negative effects of the implementation of the reform programme on least-developed and net food-importing developing countries' (emphasis added).

7. Although characterized as a 'non-trade concern', food security became a central issue in the post-Marrakesh discussions on trade in agricultural products⁴, particularly in relation to the Decision on Measures Concerning the Possible Negative Effects of the Reform Program on Least-Developed and Net-Food-Importing Developing Countries (NFDIC) (McMahon, 2006, p. 176-184). Paragraph 13 of the Doha Ministerial Declaration stated:

³ The Task Force is chaired by the UN Secretary, with FAO Director General as vice-chair; it comprises representatives of 22 international organizations, including the WTO.

⁴ The referred to Rome Declaration has often been invoked by developing countries in these discussions.



We agree that special and differential treatment for developing countries shall be an integral part of all elements of the negotiations and shall be embodied in the schedules of concessions and commitments and as appropriate in the rules and disciplines to be negotiated, so as to be operationally effective and to enable developing countries to effectively take account of their development needs, including *food security* and rural development. We take note of the non-trade concerns reflected in the negotiating proposals submitted by Members and confirm that non-trade concerns will be taken into account in the negotiations as provided for in the Agreement on Agriculture (emphasis added).⁵

8. In addition, the Decision on Implementation-related Issues and Concerns, also adopted at the Doha Ministerial Conference, urged

...members to exercise restraint in challenging measures notified under the green box by developing countries to promote rural development and adequately address food security concerns (paragraph 2.1).

9. Food security was also mentioned in the Hong Kong Ministerial Declaration in relation the flexibility that developing country Members should have 'to self-designate an appropriate number of tariff lines as Special Products guided by indicators based on the criteria of food security, livelihood security and rural development' (paragraph 7).⁶ The Revised Draft Modalities for Agriculture Text also referred to several issues relevant to food security, including governmental stockholding programs⁷.
10. A group of developing countries have attempted to equate food security to 'national security' issues that may be invoked under article XXI of the GATT to justify non-compliance with WTO members' obligations (G/AG/NG/W/28).⁸
11. In summary, the need to implement policies required to ensure food security have become an important element in WTO debates on measures that could be adopted to circumscribe the applicability of certain WTO rules. Both developed and developing countries seem to agree on the importance of such policies, but disagree on the ways to apply or adapt the WTO rules that may affect them.

⁵ See http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm.

⁶ Available at http://www.wto.org/english/thewto_e/minist_e/min05_e/final_text_e.htm. See also Annex D, recital 9.

⁷ See TN/AG/W/4/Rev.4, Annex B.

⁸ See G/AG/NG/W/28.



III. Importance of the acquisition of stocks of foodstuff for developing countries

12. Food prices drastically increased since the time the WTO Agreement on Agriculture entered into force. Between 2000 and 2012, the World Bank global food price index increased 104.5 percent, at an average annual rate of 6.5 percent (Wenzlau, 2013); price volatility, although typical in agricultural markets, also increased due, *inter alia*, to 'climate change, policies promoting the use of biofuels, rising energy and fertilizer prices, poor harvests, national export restrictions, rising global food demand, and low food stocks'.⁹
13. While food price increases causes hunger and malnutrition among the poor and undermine the development prospects of many countries, the extreme price volatility, in the absence of grain reserves, deprive million of small farmers of fair prices and affect the supply of food. As a result of the lack of adequate policies, millions of dollars need to be devoted by the international community to emergency assistance.
14. The acquisition of food stocks by governments has been used by many developed countries during their development process (South Centre, 2013). It has become an instrument of particular importance in many developing countries in the context of food security policies.
15. The acquisition of stocks of foodstuff is one of the measures that governments may take in developing countries in order to ensure the food security of their people and realize the fundamental right to food as recognized in article 11 of the International Covenant on Economic, Social and Cultural Rights (Olivier De Schutter, 2009, p. 4)¹⁰. Such measures can play another significant role by supporting farmers through administered prices that increase or stabilize their income: 'Government purchase (and stockholding) of rice, wheat and other foods is important in many developing countries. Such schemes assist poor farmers by giving them more certainty of sales at certain price levels. It also promotes national food security' (Khor, 2013). There are, hence, several social and economic reasons to implement such purchasing and stockholding programs, as summarized in Box 1.

⁹ Id.

¹⁰ The Covenant imposes on States three levels of obligations in the realization of such right: to respect existing access to adequate food, to protect and to fulfill the right to food; they 'must facilitate it by proactively strengthening people's access to and utilization of resources and means to ensure their livelihood, including food security. See Olivier DE SCHUTTER, ,2009, p. 4.



Box 1. Why is the acquisition of stocks of foodstuff important in developing countries

- (1) In the face of volatility of food stocks on the global market today and fluctuations in global food prices, building national reserves has been widely acknowledged to be a critical part of developing countries' food security strategy. Today's global food market is structurally different from the market when the Uruguay Round was completed. In the 1990s and early 2000s, food on the global market was cheap and stocks were plentiful. It is no longer so.
- (2) Acquiring surpluses from some regions of the country and sending these supplies to other regions of the country that are food deficit has been and remains an important food security instrument for developing countries.
- (3) Many developing countries continue to struggle with widespread rural poverty. At least 1.5 billion individuals depend on small-scale farming for their livelihoods. This remains a major issue especially when the share of the population engaged in agriculture continues to be significant and the industrial or services sectors cannot provide sufficient employment. For broad-based development to take place, countries must ensure that the living standards and purchasing power of the majority can be increased. Governments' programmes acquiring foodstuffs at administered prices are therefore an important avenue whereby resource poor farmers' incomes can be stabilised and even guaranteed.

Source: South Centre (2013), "The WTO's Bali Ministerial and Food Security for Developing Countries: Need for Equity and Justice in the Rules on Agricultural Subsidies", available at <http://www.southcentre.int/south-centre-report-14-november-2013/>.

16. In the case of India, the main proponent of changes to the WTO rules applicable to the subject, public stockholding for food security purposes is one component of the National Food Security Act. Its implementation can be threatened by the WTO rules described below, as it is estimated that 62 million tonnes of food grains per year will be necessary to implement the law (The Economic Times, 2013).

IV. WTO rules

17. Public stockholding for food security purposes is allowed under several conditions specified by the Agreement on Agriculture, as set out in its Annexes 2 and 3:
 - Expenditures (or revenue foregone) must form an integral part of a food security program identified in national legislation, including government aid to private storage of products.
 - The volume and accumulation of stocks shall correspond to predetermined targets related solely to food security.
 - The process of stock accumulation and disposal shall be financially transparent.
 - Food purchases by the government shall be made at current market prices.
 - Sales from food security stocks shall be made at no less than the current domestic market price for the product and quality in question.



- The difference between the acquisition price and the external reference price is accounted for in the 'Aggregate Measurement of Support' (AMS).
 - Market price support is calculated using the gap between a fixed external reference price and the applied administered price multiplied by the quantity of production eligible to receive the applied administered price.
 - Budgetary payments made to maintain the referred to gap, such as buying-in or storage costs, shall not be included in the AMS.
 - The fixed external reference price shall be based on the years 1986 to 1988 and shall generally be the average f.o.b. unit value for the basic agricultural product concerned in a net exporting country and the average c.i.f. unit value for the basic agricultural product concerned in a net importing country in the base period.
 - The fixed reference price may be adjusted for quality differences as necessary.
18. Some elements of these conditions generate a significant imbalance with regard to the situation of developed countries in the WTO system.
19. First, the support given through public stockholding for food security purposes is included in the so-called 'Green Box', that is, the category of subsidies that are deemed to be minimally or non-trade distorting. The Green Box has been extensively used by developed countries to grant subsidies to their farmers which are not accounted for in the AMS¹¹. Significantly, 'only in the case of the Public Stockholding for Food Security Purposes does the Agriculture Agreement place the condition that the difference between the acquisition price and the external reference price should be accounted for in the AMS' (South Centre, 2013). Such difference is, hence, a component of the 'Amber Box' which includes AMS supports categorized as trade-distorting.
20. Second, the levels of commitment of AMS were fixed at the end of the negotiation of the Uruguay Round based on the historical data submitted by participating countries¹². Most developing countries (61 out of 71) bound themselves at zero AMS. Others declared only small amounts, in sharp contrast to the high levels of domestic support given by developed countries. As a result, developing countries effectively bound themselves not to provide domestic support computable under the AMS methodology, except for a *de minimis* amount of 10% of the value of production on a specific product. This means that developing countries that implement programs of public stockholding for food security purposes are more likely to be found in

¹¹ Since there are no limitations to the Green Box subsidies, those countries have moved most of their subsidies to the Green Box, despite the fact that they may be trade distorting. According to WTO data, the total domestic support of the United States grew from US\$61 billion in 1995 to US\$130 billion in 2010, while the European Union's domestic support went down from 90 billion Euro in 1995 to 75 billion euro in 2002 and then went up again to 90 billion in 2006 and 79 billion in 2009. See KHOR, MARTIN, 'New Threat to Economic Role of the State', *SouthViews*, South Centre, No. 101, 8 January 2014.

¹² Developing countries that acceded later to the WTO were also required to accept AMS limitations.



violation of the WTO rules (DTB Associates, LLP, 2011)¹³ than developed countries that benefit from higher levels of admissible AMS. Effectively, the rules adopted by the Agreement on Agriculture meant that countries which had subsidized at high levels were allowed to continue their support with only minor reductions, whilst those that did not subsidize were bound at zero AMS, with the exception of their *de minimis* allowance.

21. Third, in accordance with the existing WTO rules the level of support provided through public stockholding for food security purposes should not be calculated on the basis of the effective government outlays, but on the difference between the support price and the *fixed external reference price*, multiplied by the quantity of the 'eligible' production. One major problem with this methodology is that the reference prices were fixed more than 25 years ago¹⁴ and, as noted above, there has been a significant increase in the prices for agricultural products. Hence, the difference computable for the AMS calculation is artificially inflated.
22. Fourth, as indicated, the price differential is multiplied by the quantity of the 'eligible' production, on the assumption that support prices benefit all producers of a given crop, and not only those that actually obtain such prices for their products. In *Korea- Measures Affecting Imports of Fresh, Chilled and Frozen Beef* the Appellate Body stated:

We share the Panel's view that the words "production *eligible* to receive the applied administered price" in paragraph 8 of Annex 3 have a different meaning in ordinary usage from "production *actually purchased*". The ordinary meaning of "eligible" is "fit or *entitled* to be chosen". [*The Concise Oxford English Dictionary*, (Clarendon Press, 1995), p. 438.] Thus, "production eligible" refers to production that is "fit or entitled" to be purchased rather than production that was actually purchased. In establishing its program for future market price support, a government is able to define and to limit "eligible" production. Production actually purchased may often be less than eligible production (para. 120)¹⁵.

¹³ In accordance with a report, since the end of the Uruguay Round negotiations, 'there has been a major increase in subsidization among advanced developing countries'. See DTB ASSOCIATES, LLP, *Domestic Support and WTO Obligations in Key Developing Countries*, 2011, available at www.usarice.com/doclib/193/186/5652.pd.

¹⁴ In *Korea- Measures Affecting Imports of Fresh, Chilled and Frozen Beef (Korea - Beef)*, the Appellate Body confirmed that the reference prices to be used are those of 1986-1988, as provided for in Annex 3 of the Agreement on Agriculture. It rejected Korea's calculation based on prices on 1997-1998 (para. 118), available at

https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S006.aspx?Query=%28@Symbol=%20wt/ds161/ab/r*%20not%20rw*%29&Language=ENGLISH&Context=FomerScriptedSearch&languageUIChanged=true#.

¹⁵ WT/DS161/R, available at

https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S006.aspx?Query=%28@Symbol=%20wt/ds161/ab/r*%20not%20rw*%29&Language=ENGLISH&Context=FomerScriptedSearch&languageUIChanged=true#.



23. As a result of this methodology, 'the amount of subsidy attributed to the government is not what that government has actually provided as subsidy, but a much bigger, inflated figure. With these rules, it is almost inevitable that developing countries will surpass their allowed 10% product-specific *de minimis*, even if they procure only very small volumes of a product' (South Centre, 2013).
24. In view of the implications of these rules and methodology, the G-33 proposed an amendment to the Agreement on Agriculture regarding governmental stockholding programs, among other provisions.¹⁶ They proposed to modify the existing footnote 5 of Annex 2 of Agreement on Agriculture in order to establish that the 'acquisition of stocks of foodstuffs by developing country Members with the objective of supporting low-income or resource-poor producers shall not be required to be accounted for in the AMS'.¹⁷ That is, these subsidies would be counted as part of the Green Box (as is the case for the majority of developed countries' subsidies).
25. This straightforward amendment, if adopted, would allow WTO members to provide that kind of support without the limitation imposed by the AMS calculation. The G33 did also suggest a more modest proposal focused on one of the most questionable aspects of the current WTO rules (the application of outdated 1986-1988 reference prices to calculate the level of subsidies grant). As noted by a commentator, the use of the 1986-88 reference price 'makes any administered price today seem like a massive subsidy. Because of that artificially low price, a barely above-market price of Rs 1,250 per tonne for rice would look like a Rs 986 subsidy when compared to the outdated Rs 264/tonne reference price. The actual subsidy was barely above market prices. This more modest suggestion would entail updating the reference price for inflation' (Wise, 2014). However, in a new submission of 16 July 2014, the G33 insisted on a modification of footnote 5 of Annex 2 of Agreement on Agriculture as the way forward to find a 'permanent solution' on the matter.¹⁸

V. The Bali outcome

26. The demand of a permanent solution to the problem posed by public food stockholding programs, as articulated by G-33, encountered stiff opposition from the

¹⁶ See G-33 Proposal on Some Elements of TN/AG/W/4/Rev.4 for Early Agreement to Address Food Security Issues, JOB/AG/22, Committee on Agriculture, Special Session, 13 November 2012. The proposal reproduces a part of the last version of the WTO's Doha agriculture modalities text of 6 December 2008 (TN/AG/W/4/Rev.4, Annex B), included by the Chair of the Agriculture negotiations without square brackets.

¹⁷ Paragraph 6 A(ii).

¹⁸ See JOB/AG/27 of 16 July 2014. The USA also made a submission (G/AG/W/134) on 'Elements for a work programme on food security' on 14 July 2014 where it proposed the evaluation of 'the implementation of the Bali Decision', of 'Members' experience with food security' and of 'food security policies' as a basis for the 'development of best practices and recommendations'.



USA¹⁹ and other countries (Ching and Khor, 2013, p. 16)²⁰. However, opponents finally consented to grant an exemption, but as an interim measure--a “peace clause” (McMahon, 2006, p. 146-147).²¹

27. Under the agreed upon temporary solution²² WTO members bind themselves to exercise due restraint in the initiation of complaints to challenge, through the WTO Dispute Settlement Mechanism, compliance of a developing Member with its obligations under Articles 6.3 and 7.2 (b) of the Agreement on Agriculture in relation to public stockholding programs for food security purposes.²³ The clause only benefits developing countries and applies in relation to ‘traditional staple food crops’ defined as ‘primary agricultural products that are predominant staples in the traditional diet of a developing Member’.²⁴

The Bali compromise is far from solving the problem articulated by the G-33.

28. One limitation of the Bali solution is that it only applies to the Agreement on Agriculture. This may leave the door open for challenges under the WTO dispute settlement mechanism based on the Agreement on Subsidies and Countervailing Measures (SCM Agreement).²⁵

¹⁹ With regard to the US opposition, Wise noted that ‘[I]t was not lost on delegates that the country objecting to this proposal now has a remarkable \$120 billion of its annual \$130 billion farm and food subsidy bill protected in the Green Box. The vast majority is for food programmes for the poor in the United States, but some is for farm subsidies to corn, wheat, soybean, and rice farmers. How could U.S. delegates call India’s programme, which distributes food within India, trade-distorting when their own Green Box subsidies go to crops that are heavily exported? Nor was it lost on the Indian delegation that the foundations of U.S. farm policy coming out of the Great Depression in the 1930s used precisely the measures India is now pursuing: supported farm prices, public stock holding, managed domestic markets, and public support for food purchases’, Wise, Timothy, 2014, op. cit. Some 38 civil society organisations and other groups from the United States sent a letter to USTR Mike Froman and US WTO Ambassador Michael Punke, expressing dismay at the US opposition to proposals made by developing countries at the WTO to address their food security objectives, including reducing volatility in food prices and supplies. See TWN Info Service on WTO and Trade Issues (DEC13/03), ‘US groups urge USTR to support food security proposal’, available at <http://www.twinside.org.sg/title2/wto.info/2013/twninfo131203.htm>.

²⁰ Some developing countries, such as Pakistan, did not support the G-33 demands. In fact, developing countries’ positions often differ on agricultural issues, given their differences in production systems and export interests. See Li Ching, Lim and Khor, Martin, *The Importance of International Trade Reform in Making Agriculture Truly Sustainable*, TWN, Penang, 2013, p. 16.

²¹ A ‘peace clause’ was an important element in the outcome of the Uruguay Round on agriculture (see article 13 ‘Due Restraint’, of the Agreement on Agriculture) and McMahon, op. cit. p. 146-147.

²² See the text of the Ministerial Decision in the Annex.

²³ See WT/MIN(13)/38, WT/L/913, 11 December 2013, available at <https://mc9.wto.org/draft-bali-ministerial-declaration>, para.2.

²⁴ Id., para. 2 and fn. 2.

²⁵ It has been argued, however, that, as noted by the Appellate Body (Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products: Recourse To Article 21.5 of the DSU by New Zealand and the United States AB-2001-6. Report of the Appellate Body WT/DS103/AB/RW, WT/DS113/AB/RW. December, 1999). the WTO-consistency of an agricultural subsidy has to be examined, in the first place, under the Agreement on Agriculture and that this agreement is a kind of *lex specialis* that takes precedence over the SCM Agreement (particularly in the



29. A second important limitation is that the peace clause applies only to 'existing programmes'. This means that countries, such as India can continue with their programs, while others that do not have them yet in place, will be able to establish these programs, but they would not benefit from the interim mechanism. This creates an asymmetric situation that may block or undermine policies aimed at ensuring food security in other developing countries. This discriminatory treatment should be corrected in the context of the permanent solution.²⁶
30. Third, the 'peace clause' is subject to a number of conditions. The agreed interim solution puts the onus to prove that stockholding programs are not 'trade distorting' on the countries implementing them²⁷. Specific information as well as notifications need to be given to the Committee on Agriculture.²⁸ A detailed 'Template' with information on the stockholding programs has to be filled in and notified.²⁹ Moreover, para. 3.a of the Bali Ministerial Decision requires Members to notify the Committee on Agriculture 'that it is exceeding or is at risk of exceeding either or both of its Aggregate Measurement of Support (AMS) limits (the Member's Bound Total AMS or the *de minimis* level) as result of its programmes mentioned above'. This means that for the peace clause to be applicable, the concerned Member should have previously admitted that it was violating or was about to violate the Agreement on Agriculture. Howse has noted in this regard that 'if it [India] invokes the clause, then in four years time its effective admission that it has violated the Agreement on Agriculture will make India a sitting target for a complaint in dispute settlement—that's the Trojan horse part' (Howse, 2013). The notifications under the Bali Ministerial Decision may also be used as evidence for challenges under the SCM Agreement, which may be deemed as not excluded under the 'peace clause'.
31. Fourth, and most importantly, while India and its allies sought a permanent solution, the 'peace clause' negotiated in Bali³⁰ is temporary. According to the adopted Ministerial Decision,

Members agree to put in place an interim mechanism as set out below, and to negotiate on an agreement for a permanent solution, for the issue of public

light of the explicit carve-out from the disciplines of the SCM Agreement contained in its article 3.1(b)) (McMahon, 2006, p. 158).

²⁶ In accordance to fn. 1 to para. 1.1 of the referred to Ministerial Decision, '[T]he permanent solution will be applicable to all developing Members'.

²⁷ 'Any developing Member seeking coverage of programmes under paragraph 2 shall ensure that stocks procured under such programmes do not distort trade or adversely affect the food security of other Members' (WT/MIN(13)/38, WT/L/913, para. 4).

²⁸ See WT/MIN(13)/38, WT/L/913, para. 3.

²⁹ See WT/MIN(13)/38, WT/L/913, Annex.

³⁰ Over 270 civil society organizations representing a broad range of civil society groups and global union federations had urged WTO member states to adopt a final solution. See <http://www.twinside.org.sg/title2/latestwto/agriculture/ngo.statements/G%2033%20Press%20Release%20-%20Nov%2020.htm>.



stockholding for food security purposes for adoption by the 11th Ministerial Conference (para.1).

32. However, in accordance to paragraph 2 'until a permanent solution is found' Members shall refrain from challenging Members applying the covered programs through the WTO Dispute Settlement Mechanism. This can be interpreted as meaning that the interim solution will last indefinitely even if a permanent solution is not finally agreed upon before or at the 11th WTO Ministerial Conference in 2017. The wording in paragraph 2 of said Decision '[I]n the interim, until a permanent solution is found, ...') was understood by the Indian Minister of Commerce and Industry as providing a shield against complaints under the WTO rules beyond 2017 if a permanent solution were not found by that time. The Minister was reported to inform the Indian Parliament that

[I]n accordance with the decision of the Cabinet, in my plenary statement, I made it clear that the issue of food security was non-negotiable for India as it directly relates to the livelihood concerns of millions of subsistence farmers and food security of the poor and vulnerable sections of the society....A few hours before the [WTO Ministerial] Conference was scheduled to end, a revised draft text was placed before the membership, which addressed our core concerns. It provides for an interim mechanism to be put in place and to negotiate for an agreement for a permanent solution for adoption by the 11th Ministerial Conference of the WTO. In the interim, until a permanent solution is found, Members will be protected against challenge in the WTO under the Agreement on Agriculture in respect of public stockholding programmes for food security purposes. It unambiguously stated that the interim solution shall continue until a permanent solution is found..." (Puri, 2014).

33. The compromise reached on the temporal applicability of the 'peace clause', may be thus deemed a partial victory for the G33, as it creates a shield against possible complaints in WTO. However, since Bali, it has been argued that the text of paragraph 2 of the Ministerial Decision could be read differently, as stipulating that the peace clause would only last during the interim period, that is, until the 11th WTO Ministerial Conference is held (Hardeep Puri, 2014). In accordance with this interpretation, if an agreement were not reached by then, any WTO Member could thereafter initiate dispute settlement procedures under the WTO rules against India and other countries implementing food stockpiling policies.
34. In fact, paragraph 1 of the Bali decision only obliges WTO Members 'to negotiate on an agreement for a permanent solution' but does not guarantee that such a solution will be reached within the prescribed term, nor that it will satisfy the interests of developing countries demanding it. The resistance of India and other supporters of the G-33 proposal to accept this limited compromise is, hence, understandable. The interim measure only defers a decision for rebalancing the Agreement on Agriculture in this respect.



35. Significantly, the Bali compromise on the issue of public food stockholding programs was not obtained by the *demandeurs* for free. India and the G-33 paid a high price for the modest outcome they achieved. Despite the reservations of many of those and other developing countries regarding an agreement on trade facilitation, the agreement was concluded at the Bali Ministerial Conference as part of the 'Bali package'. The Trade Facilitation Agreement (TFA) is likely to primarily benefit developed countries –its main proponents. It may serve mainly to facilitate *imports* by developing countries, 'as an expansion of exports require a different type of facilitation involving improving supply capacity and access to developed countries' markets' (South Centre, 2013). Developing countries may, in fact, incur significant direct and opportunity costs, as well as lose jobs as a result of an increase in imports that displace local production.³¹ The TFA does not include binding rules on the provision by developed countries of technical and financial assistance to LDCs and developing countries; several provisions in the agreement will create significant administrative and institutional burdens on LDCs and other developing countries, and involve important costs in human resources, equipment, information-technology systems and other infrastructure (South Centre, 2013). In addition, the US and EU eluded again in Bali to give effect to the commitment they made at the Hong Kong Ministerial Conference to eliminate export subsidies, a crucial issue for developing countries with export capacity in the agricultural sector.
36. As a result of the perceived ambiguity of paragraph 2 of the Bali Ministerial Decision on food stockpiling on the duration of the 'interim' solution, the government of India did not support the adoption of a Protocol of Amendment to incorporate the TFA into Annex 1A of the Marrakesh agreement within the deadline of July 31, 2014 contemplated in the Bali Decision on the TFA (The Wall Street Journal-India, 2014). On 25 July 2014, India made a statement at the WTO General Council conveying, *inter alia*, that the adoption of the TF Protocol must be postponed till a permanent solution on public stockholding for food security is found, while other developing countries (including South Africa, Bolivia, Cuba, Venezuela, Zimbabwe, and the Solomon Islands) emphasized that the entry into force of the TFA should be conditional upon the conclusion of the 'single undertaking' as agreed upon in paragraph 47 of the Doha Ministerial Declaration (Raghavan, 2014).
37. Since then, India and the US have been negotiating. One possible outcome is that there would be a General Council decision clarifying that the Peace Clause would be applicable until a permanent solution has been found, including if this is beyond 2017.

³¹ Estimates by OECD and the International Chamber of Commerce on the potential benefits of a Trade Facilitation Agreement are based on arbitrary assumptions and a flawed methodology. See Capaldo, Jeronim, *The Uncertain Gains from Trade Facilitation*, GDAE, Tufts University, 2013, available at <http://ase.tufts.edu/gdae/Pubs/rp/PB13-02UncertainGains.pdf>.



VI. Concluding remarks

38. The current WTO rules applicable to public stockholding for food security purposes illustrate the imbalances present in the WTO rules on agriculture. The calculation of the level of subsidies on the basis of outdated fixed reference prices is a flaw that needs to be corrected. Moreover, the rigid limits imposed in the calculation of the AMS ironically penalize developing countries that did not subsidize agricultural production at the time the Uruguay Round was concluded, rather than those with a history of heavy subsidization.
39. Despite the support of food security policies that developed countries have voiced at the UN and WTO, the compromise reached in Bali shows no real willingness of those countries to solve a problem of vital importance for all countries, particularly those with a large poor population. The implementation of public stockholding for food security purposes can support local food systems and be instrumental to the realization of the human right to food.
40. Though highly imperfect, the Bali compromise on this issue was a step in the right direction. However, given the limitations and the provisional nature of the 'peace clause' negotiated at the Bali WTO Conference and the uncertainty about the possibility of reaching a satisfactory permanent solution in four years, it has been legitimate to question, as India and other developing countries have done, whether the price demanded by developed countries for the Bali compromise (notably the acceptance of the TFA) was warranted. As already suggested by the US Ambassador after the Bali Conference, new concessions are likely to be sought, namely in terms of industrial tariffs and services, to give consensus to a definitive solution for non-trade distorting stockholding programs implemented in developing countries (RAJA, 2013). Countries seeking a permanent solution to the issue of public stockholding for food security would need, hence, to build up strong alliances to amend the current WTO rules, without being forced to admit new disciplines limiting their policy space to apply measures that are important to achieve their development objectives.



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G/AG/NG/W/28

JOB/AG/27, 16 July 2014

G/AG/W/134, 14 July 2014



ANNEX

PUBLIC STOCKHOLDING FOR FOOD SECURITY PURPOSES WTO MINISTERIAL DECISION OF 7 DECEMBER 2013

The Ministerial Conference,

Having regard to paragraph 1 of Article IX of the Marrakesh Agreement Establishing the World Trade Organization;

Decides as follows:

1. Members agree to put in place an interim mechanism as set out below, and to negotiate on an agreement for a permanent solution³², for the issue of public stockholding for food security purposes for adoption by the 11th Ministerial Conference.
2. In the interim, until a permanent solution is found, and provided that the conditions set out below are met, Members shall refrain from challenging through the WTO Dispute Settlement Mechanism, compliance of a developing Member with its obligations under Articles 6.3 and 7.2 (b) of the Agreement on Agriculture (AoA) in relation to support provided for traditional staple food crops³³ in pursuance of public stockholding programmes for food security purposes existing as of the date of this Decision, that are consistent with the criteria of paragraph 3, footnote 5, and footnote 5&6 of Annex 2 to the AoA when the developing Member complies with the terms of this Decision.³⁴

NOTIFICATION AND TRANSPARENCY

3. A developing Member benefiting from this Decision must:

- a. have notified the Committee on Agriculture that it is exceeding or is at risk of exceeding either or both of its Aggregate Measurement of Support (AMS) limits (the Member's Bound Total AMS or the *de minimis* level) as result of its programmes mentioned above;
- b. have fulfilled and continue to fulfil its domestic support notification requirements under the AoA in accordance with document G/AG/2 of 30 June 1995, as specified in the Annex;
- c. have provided, and continue to provide on an annual basis, additional information by completing the template contained in the Annex, for each public stockholding programme that it maintains for food security purposes; and
- d. provide any additional relevant statistical information described in the Statistical Appendix to the Annex as soon as possible after it becomes available, as well as any information updating or correcting any information earlier submitted.

ANTI-CIRCUMVENTION/SAFEGUARDS

4. Any developing Member seeking coverage of programmes under paragraph 2 shall

³² The permanent solution will be applicable to all developing Members.

³³ This term refers to primary agricultural products that are predominant staples in the traditional diet of a developing Member.

³⁴ This Decision does not preclude developing Members from introducing programmes of public stockholding for food security purposes in accordance with the relevant provisions of the Agreement on Agriculture.



ensure that stocks procured under such programmes do not distort trade or adversely affect the food security of other Members.

5. This Decision shall not be used in a manner that results in an increase of the support subject to the Member's Bound Total AMS or the *de minimis* limits provided under programmes other than those notified under paragraph 3.a.

CONSULTATIONS

6. A developing Member benefiting from this Decision shall upon request hold consultations with other Members on the operation of its public stockholding programmes notified under paragraph 3.a.

MONITORING

7. The Committee on Agriculture shall monitor the information submitted under this Decision.

WORK PROGRAMME

8. Members agree to establish a work programme to be undertaken in the Committee on Agriculture to pursue this issue with the aim of making recommendations for a permanent solution. This work programme shall take into account Members' existing and future submissions.

9. In the context of the broader post-Bali agenda, Members commit to the work programme mentioned in the previous paragraph with the aim of concluding it no later than the 11th Ministerial Conference.

10. The General Council shall report to the 10th Ministerial Conference for an evaluation of the operation of this Decision, particularly on the progress made on the work programme.



**READERSHIP SURVEY QUESTIONNAIRE
South Centre Analytical Note**

SUBSIDIES AND FOOD SECURITY IN WTO: A PERMANENT SOLUTION IS STILL PENDING

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