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ASSESSING THE WTO'S NAIROBI PACKAGE (MC10)

This paper provides an overview of the Decisions that came out of the 10th WTO Ministerial Conference (MC) in Nairobi taking into account the interests and concerns of developing countries.

The Nairobi package includes Decisions on

- Special Safeguard Mechanism for Developing Country Members (SSM)
- Public Stockholding for Food Security Purposes (PSH)
- Export Competition
- Cotton
- Preferential Rules of Origin for Least Developed Countries
- Implementation of Preferential Treatment in Favour of Services and Service Suppliers of Least Developed Countries and Increasing LDC Participation in Services Trade.

May 2016
Geneva, Switzerland

Contents

INTRODUCTION

This Note assesses the Nairobi Package which consists of 6 Ministerial Decisions:

Issue		WTO document reference
Agriculture	Special Safeguard Mechanism for Developing Country Members (SSM)	WT/MIN(15)/43 – WT/L/978
	Public Stockholding for Food Security Purposes (PSH)	WT/MIN(15)/44 – WT/L/979
	Export Competition	WT/MIN(15)/45 – WT/L/980
Cotton		WT/MIN(15)/46 – WT/L/981
LDC issues	Preferential Rules of Origin for Least Developed Countries	WT/MIN(15)/47 – WT/L/917/Add.1
	Implementation of Preferential Treatment in Favour of Services and Service Suppliers of Least Developed Countries and Increasing LDC Participation in Services Trade	WT/MIN(15)/48 – WT/L/982

On Special Safeguard Mechanism for Developing Country Members (SSM) and Public Stockholding for Food Security Purposes (PSH), negotiation mandates were agreed upon but there were no concrete outcomes.

These Ministerial Decisions did not amend the WTO Agreement (in accordance with Article X). As such, they are political. They can be used in a DSU case to provide 'context' but will not carry the same legal weight as WTO Agreements.

SPECIAL SAFEGUARD MECHANISM FOR DEVELOPING COUNTRY MEMBERS (SSM)

Prior to the Nairobi Ministerial Conference, the G-33 showed significant flexibility on the SSM. It submitted two proposals on the SSM. The proposal submitted in November 2015 was the basis for subsequent consultations in Geneva.[1] The document for consideration by Ministers transmitted to Nairobi was based on this G-33's submission and included a number of square bracketed text-based suggestions. It was noted that 'the text as a whole should also be considered as in square brackets. It is without prejudice to the position of any Member and to the content/nature/format of any final outcome at MC10.' [2]

According to this G-33 proposal, a Nairobi Ministerial Decision would insert a new Article 5bis titled 'Special Safeguard Mechanism for Developing Country Members'. It would enter into force in accordance with Article X:3 of the WTO Agreement. Pending entry into force, developing country Members can use the SSM and Members shall not challenge through the WTO Dispute Settlement Mechanism the compliance of a developing country Member with its obligations under Articles 4 and 5 of the Agreement on Agriculture with respect to any use by that Member of the SSM.

This G-33 proposal was based on Rev.4 but in some areas reduced significantly the level of ambition compared with Rev.4:

- **Reduced availability**. The principle that the SSM can be invoked for all tariff lines (Rev.4) was relinquished. Instead developing countries are to indicate in their Schedule of commitments the products for which they would like to apply the SSM in the future.

[1] WTO document WT/MIN(15)/W/19; JOB/AG/49 of 18 November 2015, 'Special Safeguard Mechanism for Developing Country Members - Ministerial Decision of 18 December 2015, Nairobi, Kenya', Submission by the G-33

[2] WTO document JOB/AG/61 of 8 December 2015

- **Volume crosscheck on price-based SSM** – developing countries may not take recourse to the price-based SSM where the volume of imports of the products concerned in the current year is manifestly declining, or is at a manifestly negligible level incapable of undermining the domestic price level. In Rev.4 this obligation was less binding ('shall not normally' instead of 'may not').

The proposal also had an interesting feature:
- **Exemption of SSM to imports from certain Members**, in particular LDCs, SVEs and other Members listed in an Annex.

The G-33 proposal also aimed to fix some problems of Rev.4:
- As compared to Rev.4, it gave the **possibility to use the SSM on non-Most Favoured Nation (MFN)/preferential trade**, depending on what a regional trade agreement stipulates about possible application of SSM.

- As compared to Rev.4, the G33 proposal **allowed the price-based SSM to be applied to en-route shipments.** The Rev.4 text prohibits the use of SSM when shipments have been contracted for and are 'en route' (i.e. 'after completion of custom clearance procedures in the exporting country'[3]). If this would be applied, Members would effectively not be able to operationalize Rev.4's price-based SSM at all, since the price-based SSM is applied on a shipment-by-basis and each shipment arriving at the port is an 'en route' shipment. The G33 proposal corrected this inconsistency.

Even though the G33 revised and lowered the ambition prior to MC10, yet some agricultural exporting Members were still unwilling to engage. In response, on 9 December 2015, the G33 made a subsequent submission[4] asking for an alternative solution by way of a simple addition of some Special and Differential Treatment (S&D) paragraphs to the existing SSG (Article 5). The main change from the existing SSG (Article 5) is that the reference price used for the price-based SSG would be the most recent 3-year period (hence updating the SSG). Without this update, the price-based SSG, linked to 1986-88 reference prices would, in most circumstances, not be operable. Similar to the SSM proposal, the SSG proposal also exempted LDC and SVE exports from SSG application.

In the end, Ministers did not reach a resolution on the matter. They agreed to adopt a Decision on the Special Safeguard Mechanism for Developing Country Members (SSM) as follows: [5]

Having regard to paragraph 1 of Article IX of the Marrakesh Agreement Establishing the World Trade Organization;
In the context of addressing outstanding agricultural issues; and
Taking note of the proposals made by Members in this regard;
Decides as follows:

1. The developing country Members will have the right to have recourse to a special safeguard mechanism (SSM) as envisaged under paragraph 7 of the Hong Kong Ministerial Declaration.
2. To pursue negotiations on an SSM for developing country Members in dedicated sessions of the Committee on Agriculture in Special Session ("CoA SS").
3. The General Council shall regularly review progress in these negotiations.

3 Para 139 of 'Rev.4' (TN/AG/W/4/Rev.4)
4 WTO document WT/MIN(15)/W/34; JOB/AG/65 of 9 December 2015, 'Special Safeguard Mechanism for Developing Country Members – Draft Ministerial Decision of 18 December 2015, Nairobi, Kenya', Submission by the G-33
5 WTO document WT/MIN(15)/43; WT/L/978 of 21 December 2015

While this decision does not yield any substantive outcome, it has some advantages:

1) **Agreement by the Membership to have an SSM for all developing countries.** In the negotiations, there has been some unwillingness from some Members to engage with the G-33, as they were of the opinion that developing countries do not have a right to a special safeguard (even though some of these SSM opponents could themselves avail of the Special Agricultural Safeguard (or SSG) created in the Uruguay Round and contained in Article 5 of the Agreement on Agriculture). With this decision, there cannot be a question about the legitimacy of the SSM.

2) **Signal for all Members to engage on SSM.** This decision does not specify that a result has to be achieved within a certain timeframe. Nonetheless, it signals a political readiness to work in earnest on this issue.

3) **The basis for further negotiations remains Rev.4**. There is no direct reference to the 2008 draft agriculture modalities text (Rev.4). Rev.4 captures the 'balance' that has been established in the agriculture negotiations during 7 years of negotiations. Nonetheless, the preambular part of the decision "Taking note of the proposals made by Members in this regard;" encompasses the G-33 proposals which are based on Rev.4. Even though the latest proposals submitted by G-33 on SSM had a reduced ambition, with a view to achieving an outcome at MC10, these proposals were without prejudice to earlier submissions.

4) **The SSM: link or no link to market access?**

   The Nairobi SSM Decision para 1 says that *'developing country Members have a right to have recourse to a SSM as envisaged under para 7 of the Hong Kong Ministerial Declaration'*.

   Para 7 of the Hong Kong Ministerial Declaration says that *'Developing country Members will also have the right to have recourse to a Special Safeguard Mechanism based on import quantity and price triggers.'* (See the Hong Kong language in the box below).

   What is 'envisaged under para 7' can arguably be the *'right to have recourse to a SSM'*. However, those opposing the SSM say that the reference to para 7 (market access) of the Hong Kong Declaration in para 1 of the Nairobi Decision means that the SSM can only be harvested when tariff cuts have also been negotiated.

   If the SSM has to be linked to other parts of the agriculture negotiations, then it is not just market access, but all issues in agriculture which must also be dealt with. The last sentence of para 7 (Hong Kong) notes, the SSM *'shall be an integral part of the modalities and the outcome of negotiations in agriculture'*. Similarly, the preamble of the Nairobi Decision speaks of the SSM *'in the context of addressing outstanding agricultural issues'.*

   Nonetheless, these references to *'modalities'*, *'outcome of negotiations in agriculture'*, *'in the context of outstanding agricultural issues'*, do not preclude the possibility that as all these negotiations are taking place, the SSM can be harvested early as a stand-alone, in the same way the Trade Facilitation Agreement was early harvested, even though it was within the context of the DDA's single undertaking.

Hong Kong Ministerial Declaration

5. On domestic support, 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 … .

6. We agree to ensure the parallel elimination of all forms of export subsidies and disciplines on all export measures with equivalent effect to be completed by the end of 2013 …

7. On market access, we note the progress made on ad valorem equivalents. 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. We recognize the need to agree on treatment of sensitive products, taking into account all elements involved. We also note that there have been some recent movements on the designation and treatment of Special Products and elements of the Special Safeguard Mechanism. Developing country Members will have the flexibility 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. Developing country Members will also have the right to have recourse to a Special Safeguard Mechanism based on import quantity and price triggers, with precise arrangements to be further defined. Special Products and the Special Safeguard Mechanism shall be an integral part of the modalities and the outcome of negotiations in agriculture.

Source: Hong Kong Ministerial Conference Declaration (WT/MIN(05)/DEC, 22 December 2005

PUBLIC STOCKHOLDING FOR FOOD SECURITY PURPOSES (PSH)

The Ministerial Decision on Public Stockholding essentially reaffirms the General Council Decision of 27 November 2014. The 2014 decision was already a decision by the highest decision-making body in the WTO since the General Council carries out the functions of the Ministerial Conference in the intervals between Ministerial Conferences. Reaffirmation of the 2014 General Council decision by the Nairobi Ministerial Decision therefore does not have additional normative value.

The table on next page compares the General Council decision of 2014 with the Nairobi Ministerial Decision, showing minimal textual changes.

The main rationale for this Decision is that the 2014 General Council decision contained a date by which Members should strive to adopt a permanent solution on PSH: *"Members shall engage constructively to negotiate and make all concerted efforts to agree and adopt a permanent solution on the issue of public stockholding for food security purposes by 31 December 2015."* Technically speaking the obligation to make all concerted efforts would not have expired in the absence of agreement on PSH by 31 December 2015. Nonetheless, the Nairobi Ministerial Decision clarifies that Members have a permanent obligation to *'engage constructively to negotiate and make all concerted efforts to agree and adopt a permanent solution'* on PSH.

It also continues to stress that a permanent solution is to be reached in the Special Session of the Committee on Agriculture (COA-SS), in dedicated sessions, separate from the DDA.

An interesting feature of the Nairobi Decision on PSH is that it makes reference to the agriculture negotiations under the DDA (para 2), which is an affirmation of the continuation of the DDA negotiations.

Table – comparison 2015 Nairobi Ministerial Decision and 2014 General Council decision on PSH

Public Stockholding for Food Security Purposes – Ministerial Decision of 19 December 2015 (WT/L/979)	**Public Stockholding for Food Security Purposes – General Council Decision of 27 November 2014 (WT/L/939) (corresponding provisions)**
The *Ministerial Conference*, *Having regard to* paragraph 1 of Article IX of the Marrakesh Agreement Establishing the World Trade Organization; and *Taking note* of the progress made so far; *Decides* as follows:	The General Council, Having regard to paragraph 1 of Article IX of the Marrakesh Agreement Establishing the World Trade Organization (the "WTO Agreement"); Conducting the functions of the Ministerial Conference in the interval between meetings pursuant to paragraph 2 of Article IV of the WTO Agreement; Recognizing the importance of public stockholding for food security purposes for developing countries;
1. Members note the Ministerial Decision of 7 December 2013 (WT/MIN(13)/38 and WT/L/913) and reaffirm the General Council Decision of 27 November 2014 (WT/L/939).	Noting the Ministerial Decision of 7 December 2013 on Public Stockholding for Food Security Purposes (WT/MIN(13)/38-WT/L/913) dated 11 December 2013 (hereinafter referred to as the "Bali Decision"); Decides that: (*note: noting of Bali Decision is in the preamble of the General Council Decision, and it is in operational part of the Nairobi Decision*)
2. Members shall engage constructively to negotiate and make all concerted efforts to agree and adopt a permanent solution on the issue of public stockholding for food security purposes. In order to achieve such permanent solution, the negotiations on this subject shall be held in the Committee on Agriculture in Special Session ("CoA SS"), in dedicated sessions and in an accelerated time-frame, distinct from the agriculture negotiations under the Doha Development Agenda ("DDA").	4. Members shall engage constructively to negotiate and make all concerted efforts to agree and adopt a permanent solution on the issue of public stockholding for food security purposes by **31 December 2015**. In order to achieve such permanent solution, the negotiations on this subject shall be held in the Committee on Agriculture in Special Session ("CoA SS"), in dedicated sessions and in an accelerated time-frame, distinct from the agriculture negotiations under the Doha Development Agenda ("DDA"). **The three pillars of the agriculture negotiations, pursuant to the DDA, will continue to progress in the CoA SS.**
3. The General Council shall regularly review the progress.	5. The **TNC**/General Council shall regularly review the progress of these dedicated sessions

EXPORT COMPETITION

The Export Competition Ministerial Decision of 19 December 2015 has four elements – export subsidies, export financing support, agricultural exporting state trading enterprises (STEs) and international food aid.

Taking the last Doha agriculture draft modalities text (TN/AG/W/4/Rev.4 of 6 December 2008, usually known as 'Rev.4') as a benchmark, of these four areas in the Export Competition Ministerial Decision, the export subsidy disciplines are closest to the Rev.4.

In contrast, disciplines on export financing support, are extremely weak and diverge significantly from Rev.4. Furthermore, there are no ceiling levels that are put on the amount of export financing that can be provided. No 'hard' commitments apply to agricultural exporting STEs. Several key areas in food aid remain problematic or unclear (including re-exports, monetisation, needs assessment and the review clause).

The succeeding sections discuss the various parts of the Nairobi Decision on Export Competition.

General Provisions

The rationale of Paragraph 2 of the General Provisions is a bit unclear. The first sentence states that *"Nothing in this Decision can be construed to give any Member the right to provide, directly or indirectly, export subsidies in excess of the commitments specified in Members' Schedules, or to otherwise detract from the obligations of Article 8 of the Agreement on Agriculture."*

Article 8 of the Agreement on Agriculture states that *"Each Member undertakes not to provide export subsidies otherwise than in conformity with this Agreement and with the commitments as specified in that Member's Schedule."* Taken together, this appears to mean that each Member continues to have the right to provide export subsidies in accordance with the commitment as specified in its Schedule. Yet, subsequently in the Ministerial Decision (paragraphs 6 and 7), WTO Members agree to eliminate all of their export subsidy entitlements within different timeframes.

Members can and should go ahead to implement the Nairobi Decision. However, for all elements of the Decision to have a strong legally binding effect and for the contradictions between the Nairobi Decision, the provisions of the Agreement on Agriculture (AoA), and Members' schedules to be ironed out, at some point in the future, an amendment of schedules and the Agreement on Agriculture would be required. Changes to Members' Schedules in relation to export subsidy as proposed by some after the Nairobi Miisterial without an amendment procedure raises legal questions. Such a solution also does not take into consideration many other elements in the Nairobi Decision that do not currently sit comfortably with some of the AoA provisions.

The work on export competition is not over yet (**Paragraph 5 of the General Provisions).** Ministers gave a mandate to the regular sessions of the Committee on Agriculture to *"review every three years the disciplines contained in this Decision, with the aim of enhancing disciplines to ensure that no circumvention threatens export subsidy elimination commitments and to prevent non-commercial transactions from being used to circumvent such commitments".*

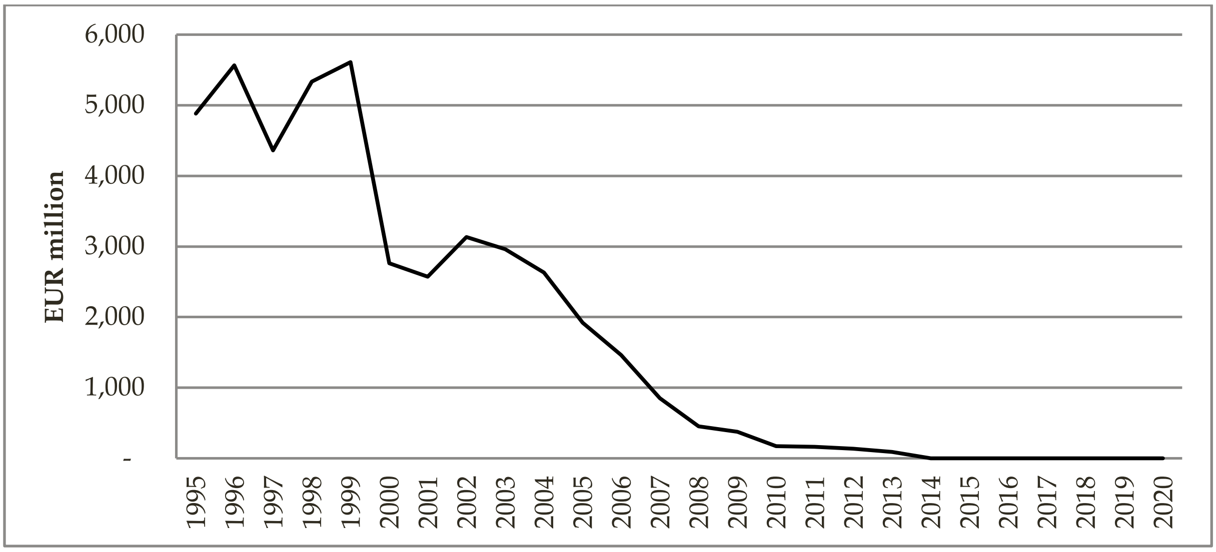
Para 31 of the Nairobi Ministerial Declaration says that there is a strong commitment of all Members to advance negotiations on the remaining Doha issues. This includes advancing work in all three pillars of agriculture, namely domestic support, market access and export competition etc. Since returning to Geneva, this work is now continuing in the COA-SS.

Export subsidies

Only a handful of countries utilize export subsidies (notably Canada, the EU, Norway and Switzerland) and in relatively small amounts. As of 2011, Norway's export subsidies amounted to about USD 34 million; Switzerland's export subsidies are less than 100 million Swiss Francs; Canada's are about 90 million Canadian dollars. Elimination of export subsidy entitlements will therefore not yield direct economic benefits as compared to the status quo, except that it prevents possible future use of export subsidies.

The EU, the Member with the largest scheduled export subsidy entitlements in the Agreement on Agriculture, and which in the past also provided the most export subsidies, hence distorting markets in developing countries, is now applying **zero export subsidies**. This is in accordance with the EU Common Agricultural Policy 2014-2020. However, their export subsidies are not bound at zero. Hence binding export subsidies at zero would provide some benefit but it is not a really major benefit for all countries. For Africa for example, EU has already taken the commitment not to provide export subsidies in the context of the Economic Partnership Agreements (EPAs) and African countries have paid a high price for this.

Diagram: EU's Applied Export Subsidies are nil from 2014 onwards



Source: EU WTO notifications; EU Common Agricultural Policy 2014-2020

The aim of the export subsidy disciplines as reflected in the Export Competition Decision in Nairobi (WT/MIN(15)/45) is to eliminate export subsidies completely. Three main observations could be made. First, compared with Rev.4, the staging periods for elimination are similar. Second, important exceptions, however, apply. These exceptions mean that for some developed countries (Canada, Norway, Switzerland), a significant amount of their export subsidies would continue till 2020. Third, the Special and Differential Treatment (S&D) that was contained in Rev.4 with respect to Article 9.4 subsidies (Art 9.4 allows developing countries under the Uruguay Round to provide export subsidies in the area of marketing and internal transport and freight charges) has been reduced in the Ministerial Decision on Export Competition.

1) The staging period of export subsidy elimination is similar to the Rev.4

- Developed countries with export subsidy entitlements: elimination to take place immediately, i.e. end of 2015
- Developing countries with export subsidy entitlements: elimination by the end of 2018
- Article 9.4 subsidies for developing countries: elimination by the end of 2023

In addition, LDCs and NFIDCs can make use of Article 9.4 subsidies for another 7 years until 2030 (not in Rev.4). Prior to MC10, Tunisia proposed unlimited access to these subsidies for LDCs and NFIDCS.

2) Important exceptions if applied would postpone elimination of most export subsidies of some developed country Members to 2020. For processed products, dairy products, and swine meat, scheduled export subsidies shall be eliminated by the end of 2020 (not immediately), under the following conditions:

- As of 1 January 2016, all export subsidies on products destined for least developed countries are eliminated.
- Export subsidies for such products or categories of products were notified in one of its three latest export subsidy notifications examined by the Committee on Agriculture before the date of adoption of this Decision.
- Two standstill clauses apply:
    - Export subsidy quantity levels cannot exceed the actual average of quantity levels of the 2003-05 base period. This standstill clause does not apply to processed products (sometimes also referred to as 'incorporated products'[6]) because processed products are only subject to budgetary outlay commitments.
    - No export subsidies shall be applied either to new markets or to new products.

The following two tables show the policy space afforded to Switzerland and Canada until 2020.

Table – Until the end of 2020, Switzerland can continue to use and increase export subsidies from 70 million to 114.9 million on processed products

Figures in Millions of Swiss Francs

Year	**Cattle for breeding and horses**	**Fruit**	**Potatoes**	**Dairy produce**	**Processed products**	**Total export subsidies (CHF million)**
2007	5.62	4	1.2	12.85	79	102.67
2008	5.5	16.1	1	6.59	75	104.19
2009	6.85	16.7	0.88	3.2	93	120.63
2010	0.06	0	0	0	76.7	76.76
2011	0.094	0	0	0	76.3	76.394
2012	0.088	0	0	0	64.2	64.288
2013	0.088	0	0	0	70	70.088
Average 2011-2013	0.09	0	0	0	70.17	70.26
Average last 5 years (best endeavour standstill of para 10)	1.44	3.34	0.18	0.64	76.04	
Possible provision of export subsidies until end of 2020	0 (product category not exempted)	0	0	0	114.9[a]	114.9 (possible maximum)

[a] - bound export subsidy entitlement

[6] The word 'processed products' is not used in the Agreement on Agriculture in the context of export subsidies, rather the word 'incorporated products'. See Article 11 of the Agreement on Agreements ('Incorporated Products'): 'In no case may the per-unit subsidy paid on an incorporated agricultural primary product exceed the per-unit export subsidy that would be payable on exports of the primary product as such.'

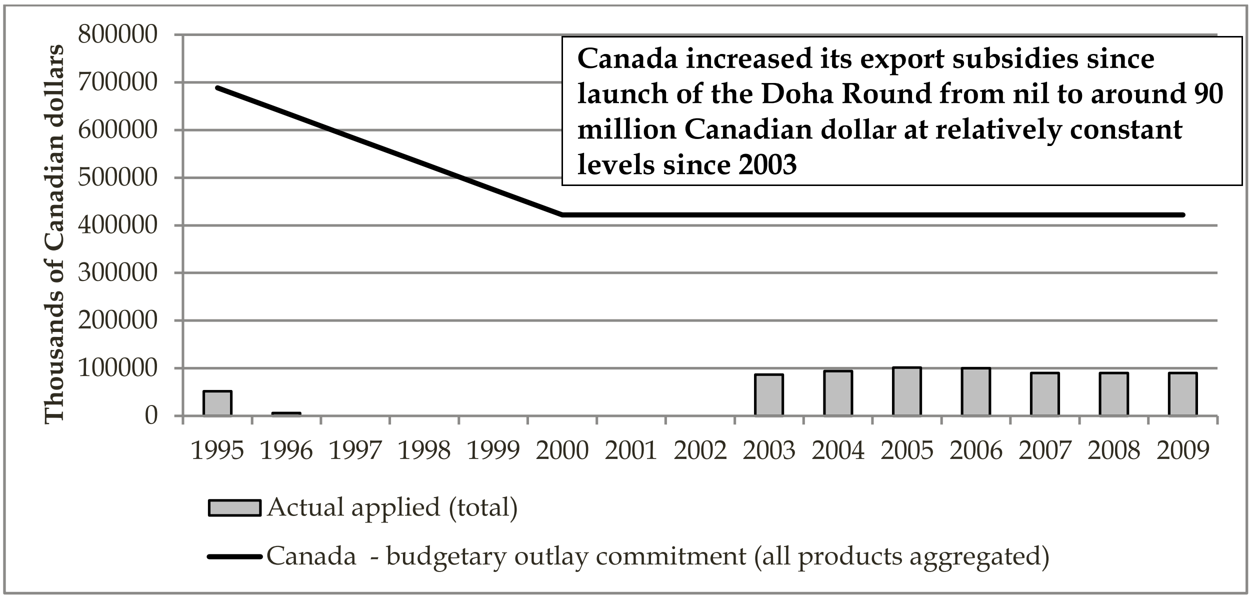
Table - Canada only provides export subsidies to dairy products and processed products and can continue to do so until 2020 (except for butter)

Figures in Millions of Canadian dollars

Year	Butter	Cheese	Incorporated Products	Other milk products	Skim Milk Powder	Other products	Grand Total
2007	0	15.93	20.27	22.50	31.15	0	89.85
2008	0	16.23	20.27	22.38	31.15	0	90.02
2009	2.32	14.00	20.28	22.51	31.15	0	90.25
2010	0.52	13.75	20.28	22.51	31.15	0	88.20
2011	0	14.38	20.28	22.47	31.15	0	88.28
2012	0	16.14	20.27	22.50	31.15	0	90.06
2013	0	15.43	18.08	18.06	31.04	0	82.61
Average 2011-2013	0	15.32	19.54	21.01	31.11	0	86.99
Average last 5 years (best endeavour standstill of para 10)	0.57	14.74	19.84	21.61	31.13	0	
Possible provision of export subsidies until the end of 2020	0 (0 in the last 3 years)	16.2[a]	20.3[a]	22.5[a]	31.15[a]	0	90.15

[a] - bound export subsidy entitlement
Sources: Switzerland's Canada's WTO schedules and their notifications to the WTO

The special flexibility afforded to Canada is remarkable as it did not provide export subsidies in 2001, when the Doha Round was launched. Canada started providing export subsidies in 2003. This is probably the reason why the standstill (of paragraph 4) has been set with reference to the 2003-2005 base period.



Source: Notifications to WTO by Canada

3) Article 9.4 export subsidies for developing countries: no additional flexibilities (like in other areas) and tighter disciplines compared to Rev.4. Article 9.4 subsidies are subsidies to cover or reduce the costs for marketing and inland transport.[7] Initially, developing countries would have to terminate the use of such subsidies at the end of the Uruguay Round implementation period, i.e. the end of 2004. Implementing this would have accentuated the Uruguay Round imbalance in agriculture as developed countries continued with their export subsidies. Hence in 2005, the Hong Kong Ministerial Declaration provided a mandate to continue the provision of 'Article 9.4' and made its expiry dependent on the 'end date for elimination of all forms of export subsidies': "*Developing country Members will continue to benefit from the provisions of Article 9.4 of the Agreement on Agriculture for five years after the end-date for elimination of all forms of export subsidies* (paragraph 6 of 2005 HK declaration).

i) Additional time for elimination of some export subsidies compared to Rev.4 but no additional time for Art 9.4 subsidies compared with Rev.4.

Developing countries are to eliminate all their export subsidy entitlements by the end of 2018, or 2022 for (groups of) products for which it has notified export subsidies in one of its three latest export subsidy notifications examined by the Committee on Agriculture before the date of adoption of the Ministerial Decision (paragraph 7 and footnote 5). Consequently, 'five years after the end-date for elimination of all forms of export subsidies' should start by the end of 2027. However, paragraph 8 of the Ministerial Decision defines 'the end of 2023' as 'five years after the end-date for elimination of all other forms of export subsidies', i.e. 5 years after the end of 2018. However by the end of 2018 developing countries would only have partially eliminated their export subsidies.

The Nairobi Decision also gave developed countries a longer timeframe (compared to Rev.4) to eliminate all export subsidies (up to 2020) on some products as noted above. Hence the timeframe for Art 9.4 subsidies should also have been lengthened (as compared to Rev.4).

ii) Article 9.4 subsidies are to be eliminated by 1 January 2017 for cotton

Paragraph 12 of the Nairobi Ministerial Decision states that "with regard to cotton, the disciplines and commitments contained in this Decision shall be immediately implemented as of the date of adoption of this Decision by developed countries, and not later than 1 January 2017 by developing country Members". This is more ambitious than Rev.4 where the cotton-specific paragraphs in export competition do not cover Article 9.4 subsidies.

iii) A standstill clause applies to all export subsidies, including Article 9.4 subsidies.

Paragraph 10 stipulates that "Members shall not seek to raise their export subsidies beyond the average level of the past five years on a product basis". Rev.4 contained commitments for gradual reduction of budgetary outlay commitment in the transition period in order to avoid backloading (i.e. phasing out of export subsidies is pushed to the end). Backloading is now allowed for processed products, dairy products and swine meat in the case of developed countries. Rev.4 did not contain commitments for reduction or standstill of Article 9.4 subsidies in the transition period. Thus, S&D has been increased for developed countries and reduced for developing countries.

[7] More precisely, these are the subsidies listed in Article 9, paragraph 1(d) and (e) of the Agreement on Agriculture:
d) the provision of subsidies to reduce the costs of marketing exports of agricultural products (other than widely available export promotion and advisory services) including handling, upgrading and other processing costs, and the costs of international transport and freight;
(e) internal transport and freight charges on export shipments, provided or mandated by governments, on terms more favourable than for domestic shipments;

Export financing support

In the area of export financing support (export credits, export credit guarantees or insurance programmes), the Ministerial Decision on Export Competition has a significantly lower level of ambition than what was envisaged in Rev.4:

- The 'maximum repayment term' of 180 days has been increased to 18 months (i.e. 540 days) and the requirement for export financing support to be 'self-financing' has been diluted, both to meet US concerns.
- The type of entities covered by export financing support disciplines has been reduced to governments or any public body, as is the case in the Agreement on Subsidies and Countervailing Measures
- The carve-out from the disciplines for working capital financing to suppliers excludes a programme maintained by the US, with a maximum repayment term of 36 months.
- There is no commitment to minimize the trade-distorting effects of export financing support

These disciplines have effectively been re-written (compared to Rev.4) in order to fit the programmes of the existing developed countries i.e. rather than disciplining these programmes, the rules in this Decision have legitimised practices that have an export subsidising effect.

First, the **two terms and conditions that were part of Rev.4, a 'maximum repayment term' of 180 days and the requirement for export financing support to be 'self-financing' have been diluted to meet US concerns.** Prior to MC10, US proposed[8] to water down these terms:

- Instead of a repayment period of 180 days (6 months), US wanted to extend this to 24 months or 720 days. In their export credit guarantee programmes (GSM 102), the repayment period is up to 18 months (540 days). The final result in Nairobi was 18 months. This agreement effectively legalises the export dumping effect of this programme.
- US wanted to remove the limit of the 4-year rolling period under the item of 'self-financing' in Rev.4 and revert back to the language already provided in the ASCM's Annex 1(k), that premiums and /or interest rates provided by governments 'shall be adequate to cover long term operating costs and losses'. The US achieved this with the Nairobi Decision on Export Competition.

Second, **the disciplines exclude working capital financing to suppliers**. Footnote 7 states that "The export credits defined in this paragraph do not include working capital financing to the suppliers." The rationale for this exclusion according to some observers is that working capital financing is not always directly linked to specific export transactions, and hence should be excluded from disciplines on export financing support.

Working capital are the funds (quickly) available to a business for its day-to-day trading operations, calculated as the current assets minus the current liabilities. 'Current' assets include inventory (stocks of a product which can be readily be sold) and accounts receivable (money due from customers) and 'current' labilities mainly include accounts payable (money to be paid to suppliers) and other short term loans. 'Short-term' or 'current' is commonly defined as less than 12 months.

The Small Business Administration (SBA), a United States agency, maintains a programme that seems to fall within the scope of footnote 7, the Export Working Capital Program (EWCP). It provides advances for up to USD 5 million to fund export transactions from purchase order to collections. This loan has a low guaranty fee and quick processing time. [9]. The maximum maturity of an EWCP loan is 36 months.

[8] WTO document JOB/AG/63 of 8 December 2015.
[9] For more information, please refer to https://www.sba.gov/content/export-working-capital-program

US Small Business Administration (SBA) Export Working Capital Program (EWCP)

1. Types of EWCP Loans

There are three variations of the EWCP loan. (See SOP 5010 5(F), Subpart B, Chapter 3, Paragraph III.F.2.)

Single Transaction-Specific Loan is a non-revolving loan that supports a specifically identified single export transaction. While the term of a Transaction-Specific Loan generally should not exceed one year, SBA may, on a case-by-case basis, approve a longer loan term (up to 36 months) to allow for an extended production cycle.

Transaction Based - Revolving Line of Credit supports either multiple export transactions or a specifically identified export transaction on a continuous basis during the term of the loan. The term of a Revolving Line of Credit generally does not exceed one year. However, a revolving line of credit can have a maturity of up to 36 months with annual renewals within that timeframe.

Asset Based Loans (ABL) are revolving lines of credit supported by a monthly Borrowing Base Certificate which reports levels of assets, normally accounts receivable and inventory, supporting the loan amount. ABLs are typically committed for 12 months and re-issued annually. Because a re-issuance of a loan is a new loan, an additional guaranty fee (1/4 of 1%) is due each time the loan is re-issued. (See SOP 50 10 5(F), Subpart B, Chapter 3, Paragraph V for a discussion of guaranty fees.) ABLs, however, can have up to a 36 month maturity with annual renewals. The lender must supply to SBA updated financial statements on the borrower annually.

Source: Export Working Capital Program – Lender Training Manual, Small Business Administration (SBA), effective date 1 January 2014
https://www.sba.gov/sites/default/files/files/EWCPTraining.pdf

The Export Working Capital Program (EWCP) supports three types of loans (see excerpt above). The 'transaction based-revolving line of credit' and 'single transaction-specific loan' are directly linked to export transactions. 'Asset based loans' (ABL) which do not (always) directly relate to export transactions.[10]

Third, **the type of entities covered by export financing support disciplines has been aligned with the entities covered by subsidy disciplines in Agreement on Subsidies and Countervailing Measures.** In Rev.4, the scope of disciplines was quite broad.

[10] A question is whether all the loans provided under the Export Working Capital Program constitute working capital financing. If this is not the case, these loans should comply with the 18 month repayment period agreed to in the Nairobi Decision, rather than the maximum 36 months that might be allowed under the EWCP.

Export financing entities in Rev.4 vs Ministerial Decision on Export Competition (MD on EC)

Annex J of Rev.4	**Ministerial Decision on Export Competition**
2. The provisions of this Article shall apply to export financing support provided by or on behalf of the following entities, hereinafter referred to as "export financing entities", whether such entities are established at the national or at the sub-national level: (a) government departments, agencies, or statutory bodies; (b) any financial institution or entity engaged in export financing in which there is governmental participation by way of equity, provision of funds, loans or underwriting of losses; (c) agricultural export state trading enterprises; and (d) any bank or other private financial, credit insurance or guarantee institution which acts on behalf of or at the direction of governments or their agencies.	14. The provisions of this Decision shall apply to export financing support as defined in paragraph 13 provided by a government or any public body as referred to in Article 1.1(a)1 of the Agreement on Subsidies and Countervailing Measures.

The entities covered by the Agreement on Subsidies and Countervailing Measures (ASCM), are government and 'any public body'. Appellate Body has defined a public body as *"an entity that possesses, exercises or is vested with governmental authority"*.[11] Further, *"whether the conduct of an entity is that of a public body must in each case be determined on its own merits, with due regard being had to the core characteristics and functions of the relevant entity, its relationship with the government, and the legal and economic environment prevailing in the country in which the investigated entity operates."* [12]

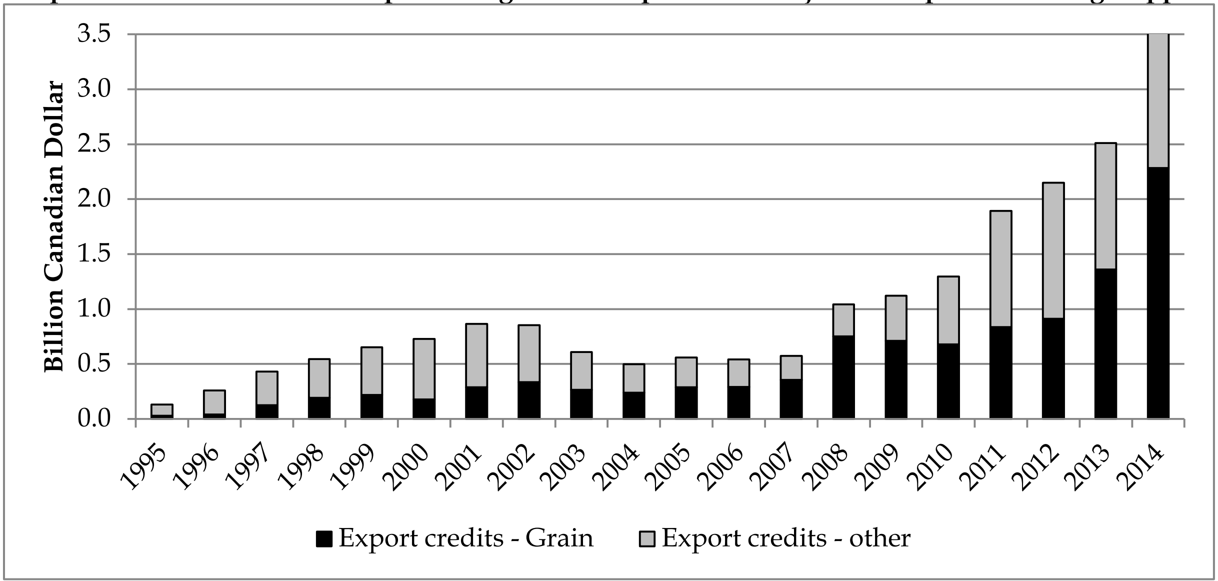
Usually the entities referred to in paragraphs 2(a), 2(c) and 2(d) of Rev.4's Annex J (reproduced in table above) would be considered a public body, but for entities under 2(b), i.e. entities in which a government has a (small) equity stake, or makes available (some) funds or loans to, this may not necessarily be the case.

For export financing support, there is no commitment to minimize trade-distorting effects Provision of export financing support in large amounts to a particular products can have trade effects. The different types of export competition (export subsidies, export financing support, agricultural exporting state trading enterprises and food aid) are to some extent interchangeable: the curtailment of one type of export competition policy could be compensated by the increase of another type.

This is what appeared to have happened in the case of Canada. The increase in Canada's export credit programmes occurred at the same time when reforms to the Canadian Wheat Board, an agricultural exporting state trading enterprise with a monopoly on exports of wheat, were implemented in 2012.

[11] United States — Definitive Anti-Dumping and Countervailing Duties on Certain Products from China (DS379), United States — Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India (DS436),
[12] Para 4.29 of WT/DS436/AB/R

Graph – Canada: Value of export of agricultural products subject to export financing support



Source: Annual examination export competition exercise (WTO notifications).

Essentially, WTO Members can give as much export financing support as they consider appropriate, with almost no limitations (aside from the very generous maximum repayment period of not more than 18 months and the 'long-term' 'self-financing' requirement where 'long-term' is not defined).

Interestingly, the level of commitment to minimize trade-distorting effects and not to have impact of third country exports varies across export competition disciplines (see table below). For agricultural state trading STEs this is a best endeavour commitment, while for export subsidies it is a 'hard' commitment. In the area of food aid, WTO Members "shall refrain from providing in-kind international food aid in situations where this would be reasonably foreseen to cause an adverse effect on local or regional production of the same or substitute products" and "Members shall ensure that international food aid does not unduly impact established, functioning commercial markets of agricultural commodities", which might include impacts on third-party exporters. <u>A similar commitment does not apply to export financing support, which can be regarded as a serious gap in the current disciplines</u>.

Table – Export financing support: no commitment to minimize trade-distorting effects on other WTO Members

Export competition discipline	**Commitment to minimize trade-distorting effects and/or impact on third-party exports?**
Export subsidies	'Hard' commitment: "Members shall ensure that any export subsidies have at most minimal trade distorting effects and do not displace or impede the exports of another Member. (..)" (para 11)
Export financing support	**No commitment**
Agricultural state trading STEs	Best-endeavour commitment: "Members shall make their best efforts to ensure that the use of export monopoly powers by agricultural exporting state trading enterprises is exercised in a manner that minimizes trade distorting effects and does not result in displacing or impeding the exports of another Member." (para 20)
International food aid	Some form of Best-endeavour commitment: "Members shall refrain from providing in-kind international food aid in situations where this would be reasonably foreseen to cause an adverse effect on local or regional production of the same or substitute products. In addition, Members shall ensure that international food aid does not unduly impact established, functioning commercial markets of agricultural commodities.

Agricultural exporting STEs

The Ministerial Decision on Export Competition devotes four paragraphs to agricultural exporting state trading enterprises (STEs).

Paragraph 19 deals with the definition of agricultural exporting STE, which is almost the same as Rev.4's definition. The Ministerial Decision adds that an STE which meets the working definition provided for in the Understanding on the Interpretation of the GATT 1994 and has to be 'engaged in exports listed in Annex 1 of the Agreement on Agriculture' (i.e. agricultural products). A footnote clarifies that "this matter of imports is not per se a matter falling under the disciplines of this Decision which relates, rather, solely to the matter of exports under that working definition."

The main disciplines are:

- Members shall ensure that agricultural exporting state trading enterprises do not operate in a manner that circumvents any other disciplines contained in this Decision (paragraph 20).
- Members shall make their best efforts to ensure that the use of export monopoly powers by agricultural exporting state trading enterprises is exercised in a manner that minimizes trade distorting effects and does not result in displacing or impeding the exports of another Member (paragraph 21).

Paragraph 20 recognizes that agricultural exporting STEs could be a possible way to circumvent export subsidy commitments. The current Article 10 of the Agreement on Agriculture, "Prevention of Circumvention of Export Subsidy Commitments", does not explicitly mention agricultural exporting STEs as a possible way to circumvent export subsidy commitments, in contrast to export financing support (Article 10.2) and food aid (Article 10.4).

The wording of paragraph 21 implies that export monopoly powers of agricultural exporting STEs as such are permitted (in contrast to Rev.4), but subject to disciplines – a best endeavour commitment – to minimize trade distortion and to avoid the effects of displacing or impeding exports of other Members.

Food aid

The African Group and the LDC Group have been proponents to further develop disciplines on food aid. Sub Saharan Africa accounts consistently for around 60-65% of food aid flows.[13] In 2012, the top 8 recipient countries accounting for 49 percent of food aid deliveries were Ethiopia (16 percent), the Democratic People's Republic of Korea (8 percent), Yemen (5 percent) and Bangladesh, Kenya, Pakistan, Somalia and Sudan (each 4 percent). The bulk of international food aid consists of cereals such as wheat and maize flour (86% in 2012 according the figures from the World Food Programme). In 2012, the United States of America, Japan, Brazil, Canada and China provided 70 percent of food aid deliveries.

The main concern to be addressed by food aid disciplines is the potential for food aid to displace domestic and regional production. Food aid increases the amount of cheap foods in recipient countries, which can lead to reduction of domestic prices of agricultural products and the income of farmers in those countries. This not only decreases agricultural incomes but also increases income inequality between urban and rural workers. Studies have shown that the depression of domestic prices have had negative impacts on countries' capacity to develop.

According to a 2014 report by FAO's Committee on Commodity Problems, the Rev.4 text on food aid achieved a balance.:
(..) policy developments under the Doha Round have been successful in clarifying several issues and in providing reassurance on displacement and disincentive risks in the provision of food aid. The negotiated texts on food aid were among the first to be "stabilized" within the overall modalities texts on agriculture. The compromises struck at the WTO were fairly close to the balance achievable between the humanitarian imperative of food aid and the need to avoid market displacement, reflecting a good measure of practicality and proportionality by the negotiating parties on the concerns surrounding food aid. This was also reflected in discussions in the CSSD (Subcommittee on Surplus Disposal) and the FAC (Food Assistance Convention) where the WTO negotiations were seen as an opportunity to achieve policy coherence in this area. [14]

Despite this, the Ministerial Decision is a significantly watered down version of Rev.4, mainly driven by US proposals. The final text has some key problematic areas:

- **Re-exportation is allowed in many circumstances**:
  - First, '<u>where the agricultural products were not permitted entry into the recipient country</u>'. (This was not in Rev.4). The rationale for this exception is unclear. Why provide food aid if the country does not want the (type of) food? Also re-exports of products to another country that might not have a need for food aid could lead to commercial displacement.
  - Second, '<u>the agricultural products were determined inappropriate or no longer needed for the purpose for which they were received in the recipient country</u>' (not in Rev.4). This exception is very broad. What is 'inappropriate' or 'no longer needed'? Who determines this? Which safeguards are put in place to 'eliminate commercial displacement'? This could give rise to unintended consequences. For instance, , food (aid) could be shipped in unlimited amounts to Country X and when Country X does not need it anymore, it could be re-exported to Country Y which may be a neighbouring country. Alternatively, food (aid) ultimately destined to Country X could be shipped in large quantities to an intermediate warehouse located in Country Y. When the food situation in Country X improves, the remaining food could be offloaded in Country Y or another (neighbouring) country.

[13] World Food Programme report on Food Aid Flows 2012, page 8, https://www.wfp.org/content/food-aid-flows-2012-report
[14] 'Role of the Consultative Sub-Committee on Surplus Disposal (CSSD) in the context of WTO commitments and the way forward', Commodity on Commodity Problems, 70th Session, 7-9 October 2014. http://www.fao.org/3/a-mk965e.pdf

- Third, '<u>for logistical reasons to expedite the provision of food aid for another country in an emergency situation</u>' (broader exception compared to Rev.4). In Rev.4, the 'logistical reason' exception is subject to the proviso that *"such re-exportation occurs as an integral part of an emergency food aid transaction that is itself otherwise in conformity with the provisions of this Article."* Deletion of such proviso will give rise to unintended consequences. In fact any exception should be subject to this proviso, in order to ensure that the re-export in itself does not potentially lead to commercial displacement.

- **The food aid suppliers can essentially determine on their own, a recipient country's need for food aid**. In Rev.4, there was the requirement for a 'targeted assessment of need whether carried out by an international or regional intergovernmental organization, including the UN' (for non-emergency food aid). In the run-up to MC10, the US proposed more lenient language on this issue: "Members shall strive to ensure that international food aid will be directed toward countries or regions that are objectively verified to have instances of severe poverty, hunger, food insecurity and/or long term food assistance development needs." In Nairobi, there is no needs assessment language – there is only a local or regional market analysis which can be undertaken by the donor.

- **Monetisation and tied food aid**. Monetisation is the sale of food often by, for instance, US NGOs in food aid recipient countries. Often this sale is not targeted to the needed recipients and this has led to the crowding out of local producers or the dampening of domestic prices. The elements on monetisation in the Nairobi Decision are very much watered down as compared to Rev.4. Again this is in part because the requirement of Rev.4 that it has to be *"based on a targeted assessment of need carried out by an international or regional intergovernmental organisation....by a donor government or a humanitarian non-governmental organisation of recognised standing, working in partnership with a recipient country government"* has been removed.

- **Overly broad exception- para 30**

  Furthermore, Para 30 in the Nairobi Decision has very broad language that *"Members commit to allowing maximum flexibility to provide for all types of international food aid in order to maintain needed levels while making efforts to move toward more untied cash-based international food aid in accordance with the Food Assistance Convention."*

  With *'maximum flexibility'*, food aid donors who have already distorted local markets could continue their undesirable practices.

- **Review clause**. The triennial review of the export competition disciplines mandated by paragraph 5 of the Ministerial Decision on Export Competition, with to aim to enhance the export competition disciplines, also covers food aid. Yet, (only) food aid has a specific review clause which reads as follows: *"Members agree to review the provisions on international food aid contained in the preceding paragraphs <u>within the regular Committee on Agriculture monitoring</u> of the implementation of the Marrakesh Ministerial Decision of April 1994 on Measures Concerning the Possible Negative Effects of the Reform Programme on Least-developed and net food-importing developing countries."* (paragraph 32).

  The review clause in paragraph 32 raises a few questions:

1) **What does regular Committee on Agriculture monitoring of the implementation of LDC/NFIDC decision entail and does the Nairobi Decision change this?**

Paragraph 6 of the Marrakesh LDC/NFIDC decision gives the mandate to COA to monitor its follow-up: "*The provisions of this Decision will be subject to regular review by the Ministerial Conference, and the follow-up to this Decision shall be monitored, as appropriate, by the Committee on Agriculture.*" Article 16.2

Agreement on Agriculture repeats the same language "*The Committee on Agriculture shall monitor, as appropriate, the follow-up to this Decision*."

In the area of food aid, the Marrakesh Decision has three elements:
(1) the commitment of WTO Members to 'initiate negotiations in the appropriate forum to establish a level of food aid commitments',
(2) the commitment of WTO Members 'to adopt guidelines to ensure that an increasing proportion of basic foodstuffs is provided to LDCs and NFIDCs in fully grant form and/or on appropriate concessional term' and
(3) the commitment 'to give full consideration in the context of their aid programmes to requests for the provision of technical and financial assistance to LDCs and NFIDCs to improve their agricultural productivity and infrastructure' (paragraph 3 of the Marrakesh LDC/NFIDC decision).

In practice, most of the COA monitoring work consists of the annual consideration of a WTO Secretariat report that compiles WTO Members' notifications on food aid provision and technical/financial assistance to the agricultural sectors of LDCs and NFIDCs.

Since the Ministerial Decision on Export Competition does not change the Marrakesh LDC/NFIDC decision, the COA monitoring work would remain the same. Paragraph 32 essentially affirms the status quo. It equates review of the Nairobi food aid disciplines to the COA monitoring of the Marrakesh LDC/NFIDC decision which has not changed.

2) **Does the Ministerial Decision on Export Competition downgrade the commitment of the Ministerial Conference to regularly review the Marrakesh LDC/NFIDC decision, including its provisions on food aid?**

According to the Marrakesh LDC/NFIDC decision itself, it is the task of the Ministerial Conference to regularly review the provisions of this decision, including the provisions on food aid in this decision. It is not explicitly stated that this review should result in changes to the provisions of the Marrakesh decision. Nonetheless, the context of paragraph 6 of the Marrakesh LDC/NFIDC Decision suggests that the 'regular review' (by Ministerial Conference) is more than simply monitoring follow-up (by Committee on Agriculture).

It would have been more consistent with the Marrakesh Decision, if the Ministerial Conference would have been accorded the task to review the Nairobi food aid disciplines, rather than giving such a task to the Committee on Agriculture (COA), and specifically, the COA's review of the Marrakesh Decision.

3) **Are food aid disciplines an issue for LDCs and NFIDCs only?**

Paragraph 32 suggests that there a link between food aid and LDC/NFIDCs. Such a link surely exists – LDCs and NIFIDCs are likely to be hit relatively more often with food shortages than other countries. Nonetheless, food aid disciplines are not solely relevant for LDCs and NFIDCs. Non-LDC/NFIDC developing countries can also face food shortages due to variability of the weather patterns, climate change or other events, or they are neighbouring or transit countries and can be possibly impacted by possible leakages (e.g. through re-exports). Furthermore, large agricultural exporters can face competition if other Members offload their agricultural surpluses in third countries through food aid. While specific LDC/NFIDC concerns have to be taken into account (e.g. concessionality of food aid), it would be more logical to review food aid disciplines in a broader context beyond the Marrakesh LDC/NFIDC Decision, to include all developing countries impacted by food aid transactions directly or indirectly.

4) **The general review clause of the Nairobi Export Competition Decision also applies to food aid**

Despite the above questions regarding the review clause contained in paragraph 32 of the Nairobi Decision on Export Competition, the General Provisions of the Nairobi Decision on Export Competition also contains a review clause (para 5). This review clause covers *'the disciplines contained in this Decision'* i.e. it encompasses food aid disciplines too. Paragraph 5 and paragraph 32 should be read side-by-side.

COTTON

The cotton issue is traditionally divided between 'trade-related' aspects (market access, domestic support, export competition) and the development dimension (i.e. technical assistance in the cotton sector). With respect to the trade-related aspects, no real advances have been made. Export subsidies are eliminated in an accelerated time frame for cotton, (immediately for developed countries, by 1 January 2017 for developing countries) but the essential and real issue in cotton is domestic supports and this remains unresolved.

On domestic supports, M. Aziz Mahamat Saleh. Ministry of Economy, Trade and Tourism of Chad, noted at MC10 that "The cotton issue is our utmost concern, as it is for the countries of the C-4 Group. The cotton trade is instrumental in reducing poverty, preserving rural employment and empowerment of women in our States. I would like to recall the consequences that the policy of subsidies causes to our countries. Millions of families are reduced to living in squalor and idleness at a time when thousands of young people are leaving in increasing numbers, lack of employment opportunities, go from the African land to risk their lives in search of better life in Europe and elsewhere in the world."[15]

In the Ministerial Decision**, a solution on cotton domestic supports remains elusive**:
7. We acknowledge the efforts made by some Members to reform their domestic cotton policies and which may contribute to the objective of reduction of the trade distorting domestic subsidies for cotton production.
8. We emphasize however that some more efforts remain to be made and that these positive
steps are not a substitute for the attainment of our objective. In doing so, Members shall ensure that necessary transparency is provided through regular notifications and the subsequent review process in the Committee on Agriculture.

With respect to cotton market access, "*Developed country Members, and developing country Members declaring themselves in a position to do so, shall grant, to the extent provided for in their respective preferential trade arrangements in favour of LDCs, as from 1 January 2016, duty-free and quota-free market access for cotton produced and exported by LDCs.*" In legal terms, **if Members decide not to provide for duty free access in their schemes then they are not bound to provide duty free quota free access.**

The decision recognizes that the work on cotton is not finished. The bi-annual dedicated discussions on cotton, mandated by the Bali Ministerial Decision on Cotton remain in place, 'to examine relevant trade-related developments across the three pillars of Market Access, Domestic Support, and Export Competition in relation to cotton.'

[15] Original text in French : D'abord la question du coton nous préoccupe au plus haut point avec les autres pays du Groupe C-4. Le commerce du coton joue un rôle déterminant dans la réduction de la pauvreté, la préservation de l'emploi rural et l'autonomisation des femmes dans nos Etats. Je voudrais rappeler les conséquences que la politique des subventions cause à nos pays. Des millions de familles en sont réduites à vivre dans la misère et le désœuvrement au moment même où des milliers de jeunes en nombre croissant quittent, faute d'opportunités d'emploi, les terres africaines pour aller au péril de leur vie, à la recherche du mieux-être en Europe et partout ailleurs dans le monde

Besides these dedicated discussions, the Subcommittee on Cotton formally continues to exist. Its Terms of Reference are

"Taking into account the need of coherence between trade and development aspects of the cotton issue and in accordance with the agreement under paragraph 1.b and paragraphs 4 and 5 of Annex A of the Decision adopted by the General Council on 1 August 2004 (WT/L/579 refers) to address cotton ambitiously, expeditiously, and specifically, within the agriculture negotiations, to work on all trade-distorting policies affecting the sector in all three pillars of market access, domestic support, and export competition, as specified in the Doha text and the Framework text.".[16]

PREFERENTIAL RULES OF ORIGIN FOR LEAST DEVELOPED COUNTRIES

The Ministerial Decision on Preferential Rules of Origin for Least Developed Countries contains several detailed guidelines on how preference granting countries should design their rules of origin. It is a genuine attempt to simplify and harmonize some aspects of rules of origin. Nonetheless, most provisions provide a lot of leeway in implementation. Also some provisions are of a best-endeavour nature e.g. 'to the extent possible'; 'Preference-granting Members applying another method may continue to use it'; 'Introduce, where appropriate, a tolerance allowance'; or 'to the extent provided for in their respective non-reciprocal preferential trade arrangements'.

Whether this Decision will actually lead to more harmonized rules of origin or whether they will be adjusted in the way the Ministerial Decision suggests is not entirely clear. This may be ascertained through the course of 2016-2017 when Members notify their (adjusted) Rules of Origin to the Committee on Rules of Origin. The Decision could be used as a basis to demand specific changes to rules of origin.

IMPLEMENTATION OF PREFERENTIAL TREATMENT IN FAVOUR OF SERVICES AND SERVICE SUPPLIERS OF LEAST DEVELOPED COUNTRIES AND INCREASING LDC PARTICIPATION IN SERVICES TRADE

The main effect of this Ministerial Decision is to keep the implementation of LDC Service Waiver as well as LDC interests in services negotiation a 'hot issue' encouraging WTO Members to implement the LDC Services Waiver in their jurisdictions and notify the WTO accordingly.

It extends the LDC Services Waiver[17] with an additional 4 years to 31 December 2030, "due to the extended period between the adoption of the Waiver in December 2011 and the notification of preferences in 2015".

Furthermore, the Council for Trade in Services is given a mandate for further work (para 1.5 and 1.6) to

- maintain a standing agenda item to review and promote the operationalization of the Waiver;
- Expeditiously consider approval of notified preferences relating to measures other than those described in GATS Article XVI, in accordance with the Waiver;
- With a view to furthering the objectives of GATS Article IV, facilitate an exchange of information by Members on technical assistance measures undertaken to promote the increasing participation of LDCs in world services trade;

[16] WTO document TN/AG/13 of 26 November 2004
[17] Preferential Treatment to Services and Service Suppliers of Least-Developed Countries", Decision of 17 December 2011, WT/L/847

- Initiate a process to review the operation of notified preferences, on the basis of information provided by Members. In support of that process, Members may request WTO Secretariat inputs, as appropriate; and
- Further discuss any issues that may facilitate benefits provided under the notified preferences
- The Council for Trade in Services may make recommendations on steps that could be taken towards enhancing the operationalization of the Waiver (para 1.6).

The question arises as to the value of this Decision. Essentially, this decision recognizes that the LDC Services Waiver adopted in 2011 has not (yet) resulted in tangible results for the LDCs, the grounds for extending the waiver by 4 years. This Decision gives some reassurance that the LDC Service Waiver will be operationalised and implemented by WTO Members at some point in time, backed up by a standing agenda item in the Council for Trade in Services. However, this reassurance is based on best-endeavour language not rooted in strong legal commitments.