

The US allowed OTDS in the base period cannot be cut by more than 51.6%

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According to Martin Khor of the Third World Network, "*The Indian Commerce Minister Mr. Kamal Nath has indicated that a proper offer by the United States on overall trade-distorting domestic support (OTDS) during the forthcoming WTO mini-Ministerial would be around US\$7 billion, in contrast to the range of \$13-16.4 billion which is contained in the May text of the Chair of the agriculture negotiations.*"¹.

After the last Chair Crawford Falconer's Revised Draft Modalities for Agriculture of 10 July 2008 and taking into account the 2008 Farm Bill, we will show that this Kamal Nath's request is far away from reality. Even if US agricultural prices were to remain high in the future so that there would not be any marketing loan or countercyclical payment, nevertheless 3 components of the US AMS would still be there: market price supports to dairy and sugar, crop insurance subsidies and fixed direct payments. Besides the allowed product-specific *de minimis* support (PSdm) is much lower than the allowed non product-specific *de minimis* support (NPSdm) and the applied NPS AMS would remain substantial. And because there would not be any countercyclical payment, the applied blue box would remain nil.

The present analysis does not claim to cover all the new Revised Draft but will concentrate only on this narrow, albeit crucial, issue of the margin of maneuver to cut the allowed US OTDS.

A – The applied total AMS will reach at least \$16.6 billion, even without marketing loan benefits and countercyclical payments

1) **The market price supports to dairy and sugar**: according to David Blandford² the dairy MPS would still be \$5.5 billion and the sugar MPS \$1.1 billion up to 2015. This market price support is not a subsidy and consequently does not show up in USDA expenditures but it has to be notified in the PS AMS.

2) **Crop insurance subsidies**: the subsidies to crop insurance are also often forgotten by the media because they are not included in the two main USDA's sources on agricultural subsidies: the Economic Research Service (ERS) on Farm Income³ and the Farm Service Agency (FSA) for payments by the Commodity Credit Corporation⁴, but the crop insurance subsidies are published by the Risk Management Agency (RMA).

According to Bruce Babcock, "*More than \$5 billion is now being spent on providing crop insurance to program crop producers, an amount that is about equal to the annual direct payments that the same producers receive.*"⁵. Although the 2008 Farm Bill has decided to lower some reimbursement rates to the insurance companies, the fact that they have approved the bill indicates it will improve their present situation. Indeed, for Babcock, "*One industry that is also enjoying the higher crop prices is the crop insurance industry. It benefits from*

¹ SUNS #6514 dated 10 July 2008

² www.agritrade.org/events/documents/Blandford_Washington_May_2008.pdf

³ USDA-ERS, Direct government payments by program: United States, 1996-2006, <http://www.ers.usda.gov/data/FarmIncome/finfidmxmls.htm#payments>

⁴ USDA-FSA, Table 35—CCC Net Outlays by Commodity and Function, <http://www.fsa.usda.gov/FSA/webapp?area=about&subject=landing&topic=bap-bu-ce>

⁵ Bruce Babcock, *How to Save Billions in Farm Spending*, Iowa Ag Review on line, Fall 2007, Vol 13 n°4.

*higher prices because the formulas used to determine industry revenue automatically generate higher expected subsidies as crop prices rise. Actual subsidies depend in part on crop losses, but administrative and operating subsidies are directly tied to crop prices... Revenues could rise by another 25 percent in 2008 if crop losses are similar to those in 2007."*⁶ Actually USDA budget for FY2009 "estimates that \$6.3 billion of budget authority will be needed, up significantly from \$4.1 billion estimated for FY2008 given an expectation of greater crop losses than last year's record low."⁷ And the White House foresees average subsidies on crop insurance of \$5.1 billion from 2008 to 2013⁸.

Furthermore we should add the additional \$3.85 billion over five years (\$963 million a year) in the permanent agriculture disaster program adopted in the 2008 Farm Bill which, according to ICTSD, "will also conflict with US reduction commitments at the WTO. The programme, which will also be classified as an amber box activity, will allow farmers who suffer crop losses due to weather-related production problems to collect payments for both crop insurance and disaster aid."⁹

3) The fixed direct payments: around \$5.0 billion per year because they have been of \$5.2 billion in 2008 and the 2008 Farm Bill will reduce them by \$200 million a year.

a) The Appellate Body (AB) ruled the 10 February 2005 in the cotton case as follows: "Upholds the Panel's finding, in paragraphs 7.388, 7.413, 7.414, and 8.1(b) of the Panel Report, that production flexibility contract payments and direct payments are not green box measures that fully conform to paragraph 6(b) of Annex 2 of the Agreement on Agriculture."

b) Furthermore the AB ruled that direct payments are specific subsidies when it "Upholds the Panel's finding, in paragraphs 7.518 and 7.520 of the Panel Report, that... production flexibility contract payments, market loss assistance payments, direct payments, counter-cyclical payments, crop insurance payments... granted "support to a specific commodity", namely, upland cotton".

c) Now granting "support to a specific commodity" contradicts the criterion b of the AoA Annex II, paragraph 6 for a "decoupled income support" to be in the green box: "The amount of such payments in any given year shall not be related to, or based on, the type or volume of production (including livestock units) undertaken by the producer in any year after the base period."

d) According to the Congressional Research Service's report of 25 October 2006: "A key element of the [cotton] panel's determination regarding the Peace Clause was that U.S. Production Flexibility Contract (PFC) payments made under the 1996 farm bill and Direct Payments (DP) made under the 2002 farm bill failed to fully meet the Green Box conditions for decoupled income support. Disqualification arises because of planting restrictions on fruits, vegetables, and wild rice... Although the panel did not declare that PFC and DP payments should be notified as amber box payments, the panel implied as much. This particular finding... establishes a precedent for interpreting the notification status of U.S. direct payments. As such, the ruling represents an obvious vulnerability should another

⁶ Bruce Babcock, *Boom times for crop insurance*,
http://www.card.iastate.edu/iowa_ag_review/spring_08/article5.aspx

⁷ Jim Monke, *The FY2009 Budget Request for the U.S. Department of Agriculture*, Congressional Research Service, March 17, 2008.

⁸ http://www.whitehouse.gov/omb/budget/fy2009/pdf/ap_cd_rom/25_14.pdf

⁹ <http://www.ictsd.org/weekly/08-05-28/story5.htm>

country choose to specifically challenge the notification status of PFC and DP payments. Such a DSU challenge, if successful, would have important implications for the United States' ability to meet its domestic support commitments. What would happen if PFC and DP payments are included as amber box rather than green box? Two economic analyses conclude that the United States would have violated its AMS limit of \$19.1 billion during the years 1998, 1999, 2000, 2001, and 2006. New legislation would be necessary to make these direct payments green box compliant"¹⁰. When the CRS says that "Although the panel did not declare that PFC and DP payments should be notified as amber box payments, the panel implied as much", this is quite obvious as they have to be somewhere: if they are not in the green box nor in the blue box – because the US did not notify any blue box payments since 1996 and because they do not meet the blue box conditions – they can only be in the amber box!

e) The USDA's 2007 Farm Bill proposals of 31 January 2007 underlined the necessity to consolidate the "green" status of direct payments by getting rid of the interdiction to grow fruits, vegetables and wild rice: "To ensure that direct payments will be considered to be non-trade distorting green box assistance, the Administration proposes that the provision of the 2002 farm bill that limits planting flexibility on base acres to exclude fruits, vegetables, and wild rice, should be eliminated."

Yet, despite the permanent pressures put on Congress till the end, the interdiction has remained in the 2008 Farm Bill. USDA's recurrent warnings that unless Congress would grant a full production flexibility to the fixed direct payments receivers in order to be notified in the green box gives already a powerful evidence that could be used in a WTO action against the US.

4) Partial conclusion: even if there would not be any marketing loan benefit and countercyclical payment in the future, the minimal total AMS would be of \$16.6 billion. Furthermore we do not take into account the \$963 million in possible permanent agriculture disaster program and the increased bioenergy payments.

Which means already that the US cannot cut by 60% (article 13 of the Revised Draft) at the end of the Doha Round implementation period its Final Bound Total AMS of \$19.103 billion, to \$7.641 billion, but only by 13.1%!

B – The applied non-product specific *de minimis* would be of \$4.1 billion

These subsidies are related to agricultural loans (\$610 million notified each year to OECD), agricultural fuels (\$2.385 notified each year to OECD), irrigation (a conservative estimate of \$1.0 billion) and grazing on public lands (\$123 million according to a GAO report) for an average of \$4.1 billion per year¹¹.

C – The applied product-specific *de minimis* would be of at least \$500 million

We have at least \$500 million for milk-income loss contract, a product-specific AMS subsidy which has been increased in the 2008 Farm Bill.

¹⁰ Randy Schnepf and Jasper Womach, *Potential Challenges to U.S. Farm Subsidies in the WTO*, CRS Report for Congress, Updated April 26, 2007, p. 22, <http://www.nationalaglawcenter.org/assets/crs/RL33697.pdf>

¹¹ J. Berthelot, *The huge lies in the US notification of its agricultural trade-distorting domestic supports from 2002 to 2005*, Solidarité, 3 January 2008 (ask for a copy as Solidarité's webmaster has still not be replaced).

Partial conclusion: the applied OTDS at the end of the Doha Round implementation period would be at least of \$20.750 billion, even if there would not be any marketing loan benefit or countercyclical payment as a consequence of permanent high agricultural prices.

D – The allowed OTDS for the base period is only of \$42.875 billion and that allowed at the end of the implementation period would be \$14.578 billion or \$11.576 billion

1) Article 30 of The Revised Draft Modalities for Agriculture of 10 July 2008 claims that its definition of product-specific de minimis (PSdm) abide by the AoA rules: "*The de minimis levels referred to in Article 6.4(a) of the Uruguay Round Agreement on Agriculture for developed country Members (i.e. 5 per cent of a Member's total value of production of a basic agricultural product in the case of product-specific de minimis and 5 per cent of the value of a Member's total agricultural production in the case of non-product-specific de minimis)*".

2) The Chair Crawford Falconer should change its glasses because the full definition of PSdm in the AoA (Article 6.4) reads: "*A Member shall not be required to include in the calculation of its Current Total AMS and shall not be required to reduce: (a) product-specific domestic support which would otherwise be required to be included in a Member's calculation of its Current AMS where such support does not exceed 5 per cent of that Member's total value of production of a basic agricultural product during the relevant year*" (not underlined in the text). In other words, as soon as a product-specific (PS) support reaches 5% of the production value of the product, it loses its PS *de minimis* and gets a PS AMS which is added to the applied total AMS and the production value of that product is added to the production value of all products with PS AMSs.

H. de Gorter and J.D. Cook confirm this interpretation: "*Product-specific de minimis ceiling is less than 5 percent of the total value of production because support for some products are over five percent of the value of production and so is included in the AMS*". They show that, for the US, the allowed PS *de minimis* is of \$5.773 billion against \$9.621 billion for the NPS *de minimis*¹².

Ivan Roberts confirms also that "*Where a commodity's support is counted toward a member's AMS, the country would not be eligible for product specific de minimis exemption for that commodity*"¹³.

3) Therefore the definition of PSdm given in Article 1 of the Draft contradicts the AoA rule to which Falconer claims to comply with: "*The base level for reductions in Overall Trade-Distorting Domestic Support (hereafter "Base OTDS") shall be the sum of:*
(a) *the Final Bound Total AMS specified in Part IV of a Member's Schedule; plus*
(b) *for developed country Members, 10 per cent of the average total value of agricultural production in the 1995-2000 base period (this being composed of 5 per cent of the average total value of production for product-specific and non-product-specific AMS respectively)...*"

¹² Harry de Gorter and J. Daniel Cook, 2006. *Domestic Support in Agriculture: The Struggle for Meaningful Disciplines*, in "Trade, Doha and Development: a window into the issues", http://siteresources.worldbank.org/INTRANETTRADE/Resources/239054-1126812419270/7.DomesticSupport_updated_on12Dec05.pdf

¹³ Ivan Roberts, *WTO Agreement on agriculture. The blue box in the July framework agreement*, ABARE, March 2005, <http://abareonlineshop.com/product.asp?prodid=12989>

4) Article 25 of the Draft adds to the contradiction: "25. *In cases where the product-specific AMS support for each year during the base period specified in paragraphs 22 and 23 above was below the de minimis level provided for under Article 6.4 of the Uruguay Round Agreement on Agriculture and the Member concerned is not in the situation covered by paragraph 24 above, the product-specific AMS limit specified in the Schedule for the product concerned may be that de minimis level, expressed in monetary terms.*"

5) Let us summarize the profound contradictions, not only with the AoA rules on PSdm but also those between different articles (1, 25 and 30) of the Draft:

a) If the sum of all the allowed PS *de minimis* is 5% of the value of the whole agricultural production (VOP), at least during the base period, this can only happen if each agricultural product had an allowed PS *de minimis*, even if it had already a PS AMS, i.e. a PS support above *de minimis*.

b) Article 25 of the Draft adds that each agricultural product had an allowed a PS AMS at least at this *de minimis* level.

c) If all products had a PS AMS during the base period, the production value of products without a PS AMS was nil. With the present AoA rules – with which article 30 of the Draft claims to comply – the allowed PS *de minimis* would have been nil also since it is equal to 5% of the production value of products without PS AMSs.

d) Therefore this is totally incompatible with the opposite statement that the allowed PS *de minimis* is 5% of the VOP.

e) Consequently the allowed OTDS would fall significantly, being only composed of the FBTA (Final Bound Total AMS) + the allowed non product-specific *de minimis* (NPSdm) + the allowed blue box!

f) To conclude, this draft on revised modalities has constructed a profound legal contradiction and the best way to go beyond it is to eliminate altogether this loophole *de minimis* concept. It is what the EU had proposed in February 2003 for developed countries because it had mainly be used by the US, particularly for its non-product specific (NPS) *de minimis*: "*Experience has shown that the de minimis exception allowing Members not to include certain expenditure in the calculation of Current Total AMS has been used by some Members as an important loophole in disciplining trade-distorting support. This provision, foreseen in Article 6(4)(a) of the AoA should be eliminated for developed countries.*"¹⁴

6) For the time being, we have to accommodate with it but we should go beyond the calculus made by de Gorter and Cook because they do not take into account the huge cheatings made by the US (not to speak of the EU here) in its PS AMS notifications, particularly the feed subsidies.

The AoA Article 6.2 states: "*Investment subsidies which are generally available to agriculture in developing country Members and agricultural input subsidies generally available to low-income or resource poor producers in developing country Members shall be exempt from domestic support reduction commitments that would otherwise be applicable to such measures*". Which means that, conversely, input subsidies granted to rich countries'

¹⁴ European Communities, *A Proposal for Modalities in the WTO Agriculture Negotiations*, Specific Drafting Input: EC, 5 February 2003, JOB(03)/12, http://ec.europa.eu/trade/issues/sectoral/agri_fish/legis/index_en.htm

farmers (and to large farmers in middle-income developing countries) have to be included in the AMS.

For OECD "*Input subsidies are typically explicit or implicit payments reducing the price paid by farmers for variable inputs (for example, fertilisers, feed, seeds, energy, water, transportation, insurance), which are provided to farmers through policy instruments, including interest concessions, tax rebates and budgetary transfers to input industries to provide lower input prices paid by farmers*"¹⁵. And, in its manual on national accounts for agriculture, OECD specifies as part of the "total intermediate consumption of farm origin": "*Animal feeding stuffs... supplied by other agricultural holdings*" or "*purchased from outside the agricultural sector*" or "*produced and consumed by the same holding*".

The US notifies already some feed subsidies – subsidies to grazing on federal lands – but has cheated in not notifying by far the most important feed subsidies, those to feed grains which have reached an annual average of \$4.372 billion in the 1995-00 period. As feed is the most important input of all animal products, feed subsidies are conferring PS AMSs to them. The only impact of incorporating the PS AMSs of meats – the milk had already a PS AMS in the form of a market price support – is to lower the allowed OTDS through the reduction of the allowed PSdm. This has no impact either on the applied OTDS or on the applied total AMS but reduces the possible cut in the allowed OTDS without changing the possible cut in the FBTA.

Therefore the production value of products with PS AMSs rise from \$49.734 billion (production value of the products notified with PS AMSs) to \$106.987 billion (once added the production value of \$57.075 billion for all meats) so that the production value of products without PS AMSs falls to \$87.152 billion and the allowed PSdm in the base period falls to \$4.372 billion¹⁶. Therefore the allowed OTDS in the base period falls from \$48.224 billion to \$42.875 billion. Applying the cuts of 66% or 73% proposed in article 3.b of the present Draft would bring the allowed OTDS at the end of the Doha Round implementation period at \$14.578 billion (-66%) or \$11.576 billion (-73%).

Conclusion

The comparison of this allowed OTDS at the end of the implementation period with the foreseeable applied OTDS of \$20.750 billion calculated above – in the highly restrictive case where there would not be any marketing loan and countercyclical payment because the agricultural prices would stay at a high level – confirms that it is impossible for the US to cut its allowed OTDS of \$42.875 billion by more than 51.6%. Therefore not only the US OTDS cannot fall to the \$7 billion requested by Kamal Nath but it cannot either fall to the \$13-16.4 billion margin the US is supposed to have been considering.

The moral of this story is that, as long as the big players will go on cheating and the so-called rules-based WTO Secretariat will stay in an accomplice silent position, the poor will have a lot to worry about.

¹⁵ OECD, *Methodology for the measurement of support and use in policy evaluation*, 2002

¹⁶ J. Berthelot, *Simulations of the possible cuts in the US agricultural trade-distorting domestic supports*, Solidarité, <http://solidarite.asso.fr>, 21 June 2007.