



WTO Public Forum 2012

Rebuilding the WTO Agreement on Agriculture on food sovereignty to solve the crisis of multilateralism

Jacques Berthelot (jacques.berthelot4@wanadoo.fr),
Solidarité (www.solidarite.asso.fr), 22 September 2012

OUTLINE

- I – The WTO main drawbacks to regulate trade, particularly on agricultural products
- II – The questions raised by the possible exit of WTO from agriculture
- III – Questions to the possible new international institution regulating agricultural trade
- IV – It is much more realistic to rebuild the AoA on food sovereignty within the WTO
- V – The strategy to follow to rebuild the AoA on food sovereignty

I – The WTO main drawbacks to regulate trade, particularly on agricultural products

1- The dispute settlement procedure does not comply with the normal judicial rules: the report of the three panelists is always confirmed by the Dispute Settlement Body (DSB) since a negative consensus is required to reject it. And the DSB Appellate Body is not really one since, as in the French Court of Cassation, it does not rule on the substance of the case but only on the right enforcement of the WTO rules in the panel report. There is no public prosecutor to represent the general interest as there is no trial but only an experts' report confirmed by the DSB.

2- The WTO judges on the sole basis of the commercial rules of its different agreements but does not recognize the primacy of the international Agreements on human rights, the ILO basic social rights and the rules of the international Agreements on the environment.

3- The WTO periodic reports on the trade policy review of its Members, which are its second mission, are prepared on the basis of the only pieces of information that Members are willing to release to the WTO Secretariat so that these reports are always laudatory.

4- As the WTO multilateral trade negotiations form a "single undertaking", agriculture is only a bargaining chip in the comprehensive negotiations and the content of the AoA, negotiated at length between Members, particularly those linked to food security, may be profoundly modified in the last hours of the Round to find a final consensus.

5- The DSB rulings do not have a value of precedent: although the panel reports and Appellate Body reports rely largely on former rulings to justify their analyses, the WTO Secretariat states that "*a panel is not obliged to follow previous Appellate Body reports... Nor is the Appellate Body obliged to maintain the legal interpretations it has developed in past cases*". Thus the Chair of the Special Committee on agriculture in the Doha negotiations has avoided to remind Members that the Appellate Body has ruled four times since 2001 that domestic subsidies benefitting to exported agricultural products should be taken into account in assessing dumping.

6- The WTO does not check the veracity of its Members' notifications of agricultural subsidies, which has allowed the EU and US to cheat on a huge scale, notifying in the blue or green boxes of authorized subsidies many of those which should have been notified in the amber box subjected to reductions.

7- The Chair of the Special Committee on Agriculture is not only a *de facto* accomplice of the EU and US cheatings – claiming not to be allowed to reveal them to the other Members – but has written false interpretations of the AoA rules in the Revised draft of agricultural modalities of 6 December 2008, on at least two issues: the definition of the product-specific *de minimis* support, and the fact that the Aggregate Measurement of Support ("amber box") linked to administered prices is a fake market price support not implying actual subsidies.

8- Above all there is a series of fundamental reasons:

- the fault to promote the liberalization of agricultural trade, ignoring the specificity of agricultural markets which cannot self-regulate because of the inelasticity of food demand and supply;
- the AoA rules are iniquitous for developing countries (DCs), particularly through the biased definitions of dumping and of the authorized subsidies;
- the AoA has been put to the service of the agri-food companies to secure the reduction of agricultural prices but the WTO does not care about their oligopolistic practices. Instead it condemns the state trading companies which, even if they are often in a monopolistic position, are servicing the general interest.

9- Let us add that the fishing rules are not in the AoA nor negotiated within the committee on agriculture but within the committee on non-agricultural market access (NAMA), although fish is clearly a basic food. Therefore taking agriculture out of the WTO would not be enough to impose food sovereignty if we do not take out fishing also.

II – The questions raised by the possible exit of WTO from agriculture

It is unrealistic to think that the exit of the WTO from agriculture, or of agriculture from the WTO, would sign its death because its domains of actions have been all embracing. Besides, despite its huge drawbacks, the DCs want to keep it.

1) The WTO is the only international institution to avail of a dispute settlement body (DSB) which has proved its efficiency to apply an international trade law: even if its rules are clearly unfair and unbalanced in favour of its wealthiest Members and multinationals, it has demonstrated its ability to allow DCs Members to condemn the EU in the sugar case in April 2005 and the US in the cotton case in March 2005 and again in August 2009.

Thus the WTO differs profoundly from the GATT period where, on the 146 panel conclusions, only 100 have been implemented by the losing Members, which has allowed the EU and US to continue their agricultural dumping. Before 1995 the conclusions of most panels dealing with agriculture were not implemented, a noteworthy exception being the two panels having condemned the EU to modify its common market organization on oilseeds, in 1990 and 1992, because we were in the final phase of the Uruguay Round.

The WTO is therefore the only international Organization with such a power, contrary not only to IMF and the World Bank – which are the armed arm of the developed countries which control the majority of their capital and their management – but also to the UN where three of them dominate the Security Council through their veto right. At the WTO DCs have been able to make the developed countries give in and they do not want to lose that power.

DCs have been more often plaintiff than defendant at the DSB from January 2005 to April 2011, in 55 cases over 99, and some DCs have been more often plaintiffs than defendants since the WTO creation in 1995 and many times more against other DCs than against developed countries.

That is why DCs do not question the WTO legitimacy because they fear much more, with good reasons, bilateral agreements imposed on them by developed countries: a good example being the EPAs between the EU and ACP countries. Besides, since the WTO Ministerial of September 2003 in Cancun, the "Quad" – US, EU, Japan, Canada –, which had the leadership of the WTO agenda, has been replaced by the G-4 where Brazil and India have evicted Japan and Canada and the DCs groups – G-20, G-33 and G-90, centered around agriculture – have largely influenced the agricultural negotiations, even though they have continued to be taken in by the developed countries, with the complicity of the WTO Secretariat.

2- The DCs are all the less willing to withdraw agriculture from the WTO (or the WTO from agriculture) that it is a key sector of their economies – given its weight in employment, GDP and trade – but also the Achilles' heel and the bargaining chip of the developed countries in the WTO Rounds. 29% of the 206 panels implemented at the WTO from 1995 to March 2008 have focused on agriculture, and this despite the "peace clause" (article 13 of the AsA) having limited largely the proceedings against agricultural subsidies up to December 2003.

Therefore maintaining agriculture in the WTO (or the WTO in agriculture) allows the DCs to refuse to liberalize their markets of non-agricultural products and services. This has been overwhelmingly demonstrated during these 10 years of Doha Round negotiations where the DCs, particularly the 'emerging' ones, have always fought the pressures of the developed countries in the NAMA negotiations to open their markets of industrial products and services by opposing the reluctance of the EU and US to lower their agricultural subsidies and tariffs. This sole reason is enough to justify not to take agriculture out of the WTO.

Besides, the DCs have begun to realize that the developed countries will never give up their agriculture but will continue to lie on the trade-distorting nature of their subsidies, to maintain high level of import protection on their "sensitive" products and to use, if necessary, non-agricultural subsidies – for instance on transport infrastructures as the US is doing on its waterways to transport grains – to keep a sufficient competitiveness of their agriculture and a minimal food sovereignty.

3) WTO rulings, at the level of panels as of the Appellate Body, are mobilizing all the rules of its twenty multilateral agreements, and not only the rules of the main Agreement concerned by the specific issue, including in agricultural cases. And they mobilize also the case law of the GATT and WTO, which is considerable as it has concerned 270 cases (150 during the GATT period and 120 panels concluded from 1995 to March 2008), without counting the 51 panels still in progress in early April 2008.

For Gabrielle Marceau, of Pascal Lamy's cabinet, "*Agriculture related disputes have been rich in providing useful jurisprudence and principles that are relevant to all disputes*"¹. On the other hand, although insufficiently, those rulings have begun to call upon general principles of law which question the strictly commercial rules of WTO Agreements. Among the headway of recent rulings which go somehow in the sense of food sovereignty, there are

¹ Gabrielle Marceau, *Agriculture and World Trade Organization Dispute Settlement*, 2006
www2.law.howard.edu/worldfoodlaw/word_docs/2006_lecture.doc

those alluded to above of the Appellate Body of December 2001 and December 2002 in the "Dairy Products of Canada" case, confirmed in the sugar case of March 2005 and the cotton case of April 2005, that dumping must, beyond export refunds, take into account all domestic subsidies benefitting to agricultural exports.

4- Furthermore the cases opposing DCs are more and more numerous – we have shown it above –, including on agricultural products, one of the reasons why they do not want to take agriculture out of the WTO.

5- Finally we do not see how the withdrawal of agriculture from the WTO (or of the WTO from agriculture) would suffice to question the very existence of the WTO, given its overwhelming extension to most human issues and given the numerous current proceedings on non-agricultural issues or that Members want to continue to introduce to fight the non-agricultural dumping. This withdrawal would therefore be refused by most DCs which are the main target of proceedings on non-agricultural products initiated mostly by developed countries but also more and more by other DCs.

III – Questions to the possible new international institution regulating agricultural trade

It would not be enough to proclaim the right of every country to food sovereignty if the new Institution regulating agricultural trade – a UN *sui generis* institution placed under the High Commissioner for Human Rights, as is also the case of the Special Rapporteur on the Right to Food, or under the joint authority of FAO and UNCTAD, or of the new Committee on world food security (CFS) – would not avail of the power to compel Member States and even agribusiness multinationals.

Precisely, if it is desirable to entrust this new Institution in charge of regulating agricultural trade with larger objectives than the disputes settlement ensured by the WTO – particularly the settling of minimal agricultural prices for tropical products and, to that end, the capacity to impose production quotas, and the imposition of minimal cereals stocks to the main exporting countries – it will need also a Dispute Settlement Body, without which this Institution will be inefficient, availing of larger powers than the GATT before 1995, to compel its Members. And, to judge the new disputes without an already existing case law, it will need to rely on enough detailed and explicit legal texts to justify the judges' rulings. Among these texts there will be not only the new Agreement on agriculture based on food sovereignty but also the texts defining the objectives and means of the new Institution, of its DSB and of the equivalent of the WTO "*Understanding on rules and procedures governing the settlement of disputes*". The new Institution will need also to identify precisely the rules of international trade law that it intends to apply, subjecting them to a hierarchy of norms, i.e. to human rights, basic social rights and rights defined by the international conventions on environment. But where will we find the men or women in a million as judges, experts at the same time in international trade law, agricultural law and laws on human, social and environmental rights? Since the task will be to judge agricultural trade conflicts, the temptation will be great for these judges to apply in fact the law and case law of the GATT and WTO, allegedly with a touch of basic human, social and environmental rights.

And where will we find the finance for this new Institution and its DSB, given that many States, including from the developed countries, would be reluctant to additional contributions, particularly in this time of huge budget deficits, as there is no reason that the WTO budget would diminish significantly after the withdrawal of agriculture?

IV – It is much more realistic to rebuild the AoA on food sovereignty within the WTO

Independently of the reluctance of most DCs to take agriculture out of WTO (or WTO out of agriculture), such a withdrawal would not guarantee the possibility to rebuild agricultural policies on food sovereignty. This would need to reform first:

- the conditionalities of the IMF and World Bank – the armed arm of the developed countries – imposed to DCs since the 80s to liberalize and deregulate their agricultural policies;
- the even more drastic liberalization of DCs' agricultural markets imposed by the developed countries in their bilateral free-trade agreements, particularly in the EU-ACPs EPAs;
- the reluctance of the large net food exporting DCs of the G-20 to allow the net food importing DCs to protect more efficiently their domestic market through the "special products" and the "special safeguard mechanism" discussed in the Doha Round negotiations, even if these tools are far from granting the total freedom that each country should avail for its needed protection level.

Indeed some of these G-20 countries, particularly Brazil, are already exporting more food products to DCs than to Western countries, and this proportion will clearly increase as the Western countries population is stagnating and ageing whereas that of DCs will continue to increase greatly. Already the 5 net exporting DCs of the South Cone – Argentina, Brazil, Chile, Paraguay, Uruguay – have declared the 1st April 2011 that they are opposed to measures intended to limit agricultural prices increases that they view as necessary to foster agricultural production worldwide, underlying that they are themselves the most competitive to feed the world, a message clearly sent to the G-20² meeting on agriculture of June 2011.

Precisely, among the 4 measures recommended by the report on the volatility of commodities prices, and particularly of food prices, handed over the 3 May 2011 to Nicolas Sarkozy, who chairs the G-20, by 10 international institutions – FAO, World Bank, IMF, OECD, WFP, IFAD, UNCTAD, IFPRI, the UN High level task force on world food security –, the first is to conclude quickly the Doha Round.

It is therefore illusory to think that a majority of DCs would agree to take agriculture out of the WTO (or the WTO out of agriculture) as they would not escape for that matter from the IMF and World Bank conditionalities, from the bilateral trade agreements with the developed countries, and from the pressures of the net agricultural trade exporting DCs. The more so as agriculture is the weak link of the developed countries that the DC can prosecute at the WTO to resist the pressures that they will continue to endure on the opening of their markets of non-agricultural products and services.

Thank God, the present economic circumstances are favourable to a radical challenge of the AoA rules within the WTO: the brain-dead Doha Round; the food prices explosion having generated food riots in 2007-08, followed by a sharp drop in 2009, a new explosion in 2010-11 and again in 2012 following the US drought, with new food riots likely, and attesting the uncontrolled volatility of food prices, increased by the high volatility of exchange rates that the *ad valorem* tariffs promoted by the WTO cannot fight. More broadly the paradigm of economic liberalism and of the Washington consensus have been profoundly questioned by the worldwide recession in 2007-08 when the Western countries have denied what they had worshipped for a long time. They did not worry of violating largely the GATS rules on the free movement and deregulation of capital markets, the Agreement on anti-dumping and the Agreement on subsidies and countervailing measures given the massive subsidies to their

² This last G-20 is not the WTO grouping of DCs but the G-20 of the major economies created at the level of finance ministers in 1999 and which has been convened annually at the level of heads of State since 2008, as an extension of the G-8 to emerging economies.

financial institutions and industrial companies. A recent WTO report underlines the large rise of protectionist measures from October 2010 to April 2011, 14.9% of which relate to agriculture, particularly meats³.

All this underlines that the challenge to be overcome to impose food sovereignty in agricultural policies and trade exceeds largely the institution in charge of their regulation: the WTO or another one. In the present context of contestation of economic liberalism, rebuilding the AoA on food sovereignty will no longer be perceived as a revolution. Moreover the on-going debates in the EU – particularly in France – and the US to prepare the next CAP and Farm Bill show clearly that these two powerful WTO Members will never sacrifice their agriculture. These internal debates have never made the least hint to the commitments they have taken in considering the Revised draft on agricultural modalities of 6 December 2008 as a good basis to continue the Doha Round negotiations. Yet this draft foresees that the developed countries will have to reduce by 54% their average agricultural tariffs and by 70% (US) and 80% (EU) their agricultural overall trade distorting domestic supports, in relation of their allowed levels in the 1995-2000 period. Rebuilding all agricultural policies of food sovereignty would be all the less a revolution that agriculture had enjoyed large exemptions to the GATT rules up to 1995 as there was no limit to import protection measures: no limit to applied tariffs and possibility to use import quotas and variable levies. Admittedly the GATT tolerated also export refunds but on this issue all WTO Members have agreed to get rid of them if the Doha Round is concluded, although the impact of this removal would clearly be minimal as long as the domestic subsidies to the exported products would not be forbidden.

V – The strategy to rebuild the AoA on food sovereignty

The AoA could not be rebuilt on food sovereignty unless its most powerful Members – the US and EU – agree to rebuild the Farm Bill and the CAP on the same principle but they will do it only if they are absolutely constrained after a condemnation at the WTO. Let us repeat that the WTO is the sole international institution able to make the US and EU give in as we have seen on the EU sugar dumping and the US cotton dumping.

Therefore the sole possible strategy is to use the WTO for a short while so as to condemn the US and EU massive under-notifications of their agricultural trade-distorting domestic subsidies (AMS or amber box)⁴, which would reduce them by respectively 70% and 80% in relation to their allowed levels of 1995-2000, as they are the reduction percentages agreed in the Doha Round negotiations if they end up signing its conclusion. In other words if they are satisfied with the opening of the DCs markets of non-agricultural products and services. Those condemnations would oblige the US and EU, under the pressures of their farmers whose incomes would collapse, to take agriculture out of the WTO and to rebuild these incomes on remunerative prices, that is on food sovereignty without dumping, implying to raise substantially their import protection, an objective reverse to that of the WTO.

³ WTO, *Report on G20 trade measures (mid-October 2010 to April 2011)*, http://www.wto.org/french/news_f/news11_f/igo_24may11_f.htm

⁴ See: J. Berthelot, *Why the WTO text on agriculture of 21 April 2011 could not show any progress*, Solidarité, April 25th, 2011, <http://www.solidarite.asso.fr/Papers-2011.html>; J. Berthelot, *The CAP subsidies are incompatible with the WTO Agreement on agriculture*, Collectif Stratégies Alimentaires and Plate-Forme Souveraineté Alimentaire, Can the CAP manage without market regulation after 2013? 31 March and 1st April 2010, http://www.solidarite.asso.fr/Papers-2010.html?debut_documents_joints=10#pagination_documents_joints; J. Berthelot, *The US cannot cut its agricultural supports in the Doha Round*, Solidarité, 1st August 2009, <http://www.solidarite.asso.fr/Papers-2009.html>.

As they are the States which are the WTO Members and the only ones allowed to launch proceedings at the DSB to denounce the US and EU subsidies contradicting the WTO rules, it is absolutely necessary that the civil societies of the North and South launch a media campaign on these massive US and EU under-notifications, not to say outright cheatings. Beyond these, we have first to denounce the amazing inconsistency of some AoA rules. The Revised draft on agricultural modalities of 6 December 2008 is so complex and full of inconsistencies that there is hardly a single Member which could understand them, with the exception of the two most powerful Members, the US and the EU, and clearly of the WTO Secretariat which has manipulated some rules on their behalf (see the first reference in the footnote 1).

However the Northern farmers' unions, including the small farmers unions linked to Via Campesina, and the NGOs of the alter-globalization movements which are supporting them, are reluctant to use the WTO even momentarily as, they say, this would confer to the WTO a legitimacy rendering impossible any change in its rules. One can understand easily that the EU farmers' unions do not want to take the risk to denounce the subsidies which are making the core of their incomes – and which are even larger than their net incomes for cereals, bovine meat and milk – as long as there are not sure to rebuild immediately the CAP on remunerative prices. Yet all the EU farmers would prefer by far to get their income from remunerative and stable prices and not from massive handouts which are humiliating and presenting them as scroungers, the more so as they know that these subsidies will be reduced after 2013.

Another worry is the risk that the EU consumers would not accept a minimal increase in food prices, particularly in the present crisis period, with rising unemployment and lower purchasing power of the poorest citizens. Actually the impact of higher food prices should be limited in level and time. Indeed, on the one hand the weight of agricultural prices in the households budget of the EU-27 is only of 3% – as the average share of their income devoted to food is of 15% and the average share of agricultural prices in the food prices is only of 20% – and, on the other hand, the resumption in the middle run of an annual increase of the per capita GDP of about 1.5% - after 2% on average from 2000 to 2005 – would allow to cushion rapidly an increase in the agricultural prices of around 30% over the average prices levels of the 2000-05 period, then of food prices of 6%, spread over 5 to 6 years.

One can already observed that the large rise in the farm prices from March 2010 to March 2011 has had a very low incidence on the food prices in the EU and France. According to Eurostat, whereas the price of cereals has doubled in the EU, the price of bread and other cereals products has only risen by 3.6%. And, according to INSEE, whereas the prices of meats at the farm level has increased in France by 8% for bovine meat, 15% for pig meat and 26% for poultry meat, the average retail price of meats has risen by only 1.7%.

The impact of agricultural prices increases is clearly very different in DCs. Indeed, if the weight of food in the households budget is only of 10% in the US and 15% in the EU-27, it is of 53% on average in DCs and of 60% in Subsaharan Africa. Moreover the weight of agricultural prices in the food prices is of 20% in the North, and likely of around 75% in the LDCs as they are consuming essentially unprocessed products. However, as the agricultural population remains the majority in most DCs, it will benefit in the long run from higher agricultural prices: even if those who are suffering the most from hunger are Southern small farmers and agricultural workers who are not producing enough for their own needs, this can be explained first by the dumping and correlative low prices they have been enduring. To the contrary higher prices would prompt them to produce.

Therefore the civil society organizations, from North and South, must take the initiative of that media campaign and the farmers' organizations would end by following suit. If that campaign is well relayed by the media worldwide, this could be enough to destabilize the US and EU political Authorities, without the necessity to engage formal proceedings at the WTO, explicit threats from Southern WTO Members being sufficient.

Such a campaign would give weapons to the DCs which refuse to open their markets to the US and EU exports of non-agricultural products and services, which would put an end to the Doha Round as agriculture is the sole compensation they can offer to DCs: lower agricultural tariffs and subsidies. This would shake also the bilateral negotiations, particularly the EPAs, as the ACP countries will get weapons to denounce the EU agricultural subsidies, an issue that the EU has refused to include in the EPA negotiations and texts, arguing that they can only be dealt with at the WTO.

However, it would not be sufficient that the net agricultural importing DCs of the G-33 and G-90 would be convinced of the necessity and possibility to rebuild their agricultural policies on food sovereignty and that the US and EU would be constrained to do it after a condemnation to eliminate the majority of their agricultural subsidies: it remains to convince the net food exporting DCs of the G-20 which are also in the Cairns group, with Australia, Canada and New-Zealand. Thus 5 of the 23 Members of the G-20 – Argentina, Brazil, Chile, Thailand and Malaysia (not formally in the G-20) – have been net exporters of \$91 billion of agricultural products in 2007 and of \$65 billion of food products (fish excluded), an increased share, often the majority, being directed to other DCs.

Nevertheless these G-20 countries have more to gain in taking over the EU agricultural market shares in the rest of the world than to continue to export to the EU, which would be possible if the EU agrees not to export any longer its subsidized agricultural products in exchange of the right to protect efficiently its domestic market. Indeed the survival of the EU-27 farmers is clearly linked to their domestic market which has absorbed, from 2006 to 2008, 84.5% of the unprocessed agricultural products used as food and it is also the case for the EU agri-food industries which have sold 75.1% of their processed food products on the EU market.

Let us notice also that the WTO public forum of September 2011 – with the title "*Seeking answers to global trade challenges*" – underlined well that, after almost 10 years of brain-dead Doha Round, the WTO does not know which way to turn: "*The 2011 Public Forum will provide an opportunity for the public at large to identify the principal trade challenges at the global level that impact on the multilateral trading system and identify solutions to ensure the WTO effectively adapts and responds to our fast changing world. The discussion will encompass four core themes that will structure the analysis of the main issues focusing on the future of the multilateral trading system and how the WTO can promote coherence at the international level to better address world problems and contribute towards improved global governance. Discussions will take place under the following sub-themes: 1. Food Security; 2. Trade in Natural Resources; 3. Made in the World and Value-Added Trade; 4. What Next for the Trading System?*". As no progress was made and as the 2012 WTO Public Forum puts again Food Security as one of the main 21st-century issues and an area in need of new regulations, this paper could clarify the way forward.