

A Transatlantic Trade and Investment Partnership Agreement: Implications for Swiss Agriculture

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* Book Chapter in Masahiko Gemma and Masanori Hayashi (eds), *Agriculture and Food at the Age of Post 'Trade Liberalization': An Analysis of Trade Rules and Economic Impact Assessments*. Waseda University, Tokyo, 2015, pp.193-228

1 Introduction and summary

To say that regionalism is gaining momentum has become an understatement. To mourn the lack of progress in multilateral trade rule-making is both a commonplace in political speeches and by “know-what-to-do” academics. The real problem, as this paper tries to show, is not a useless debate whether the Doha Round is clinically dead (it might well be), or whether regionalism pre-empts multilateralism (it does not). Nor should we lament the absence of third countries in the present negotiations for “mega-regionals” (the most-favoured nation clause MFN in the agreements of the World Trade Organization WTO reduces rules fragmentation). The real problem is the uneven level-playing field resulting from increasing differences of rules and obligations. For instance, the Transpacific Partnership Agreement (TPPA) could result in the world’s largest duty-free area, and this is undoubtedly the biggest immediate challenge for the Japanese economy. But it is unlikely to achieve tariff- and quota-freedom, and even less likely to harmonise production standards over and above the ones existing in WTO and the “3 sisters” (Codex alimentarius, IPPC and OIE). The Transatlantic Trade and Investment Partnership Agreement (TTIP) is an even more ambitious intergovernmental negotiation, and the implications for Japan (and for Switzerland) might be potentially bigger. But even the combined market power of the two TTIP participants – the European Union (EU) and the United States of America (USA) – will not blow away the differences impairing the regulatory framework for agriculture.

Such differences will remain in three areas which, incidentally, are also vital for a global response to the food security challenge to feed 9 billion people before the year 2050. First, market access: while I very much doubt that TTIP (and TPPA) will ensure tariff- and quota-free trade soon, this is certainly the area where regional trade agreements (RTA) can make the biggest inroads in the still high tariff walls resulting from the Uruguay Round, especially in in the EU and in Japan. Secondly, non-tariff barriers (NTB): whereas the WTO Agreements on sanitary and phytosanitary and on technical barriers to trade (SPS and TBT Agreements) prohibit all “more restrictive than necessary” trade barriers, the number of SPS and TBT dispute settlement cases in the WTO is still rising. It will be very interesting to see whether RTA can make progress in this area. A pragmatic approach in regulatory cooperation could yield substantial results and ‘lay the foundation for a broader effort in the future.’¹ I would add to this

¹ Simon Lester and Inu Barbee, The Challenge of Cooperation: Regulatory Trade Barriers in the Transatlantic Trade and Investment Partnership. 16 (2013) *Journal of International Economic Law* 847–867. Their examination of the problem of regulatory barriers, and assessment of what can be achieved, shows some claims of potential benefits are overstated, but facilitating regulatory cooperation is nevertheless very much worth undertaking.

that the negotiations here will be made easier by the MFN exception clause in GATT-Article XXIV which protects, in principle, mutual recognition of standards from challenges by third countries. Nonetheless, TTIP negotiations e.g. on biotech products, chlorine-treated chicken and geographical indications already raised a storm of protest in various circles. Thirdly, agricultural subsidies. Many RTA prohibit *export subsidies* among treaty partners (but do not prevent competition with such subsidies on third country markets). However, the main problem is the trade-distorting impact of many *domestic support* programmes. These subsidies are WTO-compatible, within limits. But even though they are on the increase in most countries – whether notified under the Amber or Green Boxes – there is not a single RTA which further disciplines this “race of finance ministers”. TPPA and TTIP are no exception here. This means that without multilateral progress these “mega-regionals”, if successfully concluded, will exacerbate rather than lessen trade distortions. While this makes farmers in rich countries safer from competition, competitive production in all countries will be hampered. Consequently, and notwithstanding the many affirmations to the contrary, farm policies worldwide will continue to only address *farmer security* without increasing *global food security*.

What are the implications of the TTIP on Swiss agriculture? This article starts by examining the negotiation history on record at the beginning of 2015. Section 3 then summarises the threefold challenges which a non-reforming Swiss agricultural framework faces at the WTO, the EU, and the US. The failure to achieve further reforms – actually, a number of areas where earlier reforms have been reversed – is now presenting Switzerland (Section 4) and Swiss agriculture (Section 5), and perhaps in a similar way Japan, with a terrible dilemma in the eventuality of a successful conclusion of the TTIP. The conclusions are that if Swiss farm production is to survive for more than another generation, continuous reform efforts are required, and over-reliance on the traditional instruments of border protection and product support is to be avoided. Without a substantial TTIP these efforts will remain extremely fragile.

2 History and state of the negotiation

The transatlantic project had a bumpy start, even though the circumstances were auspicious. The idea was first launched not by governments (eager to negotiate in order to hide the embarrassment of the failed Doha Round) but by the potential beneficiaries on both sides of the Atlantic. This was certainly a welcome change, immediately applauded by economists quickly calculating how much economic growth could result from a further dismantling not only of tariffs (especially in the EU) but also of other trade barriers. Indeed, regulatory and standards

differences are now an often bigger trade impediment than tariffs. In addition, government procurement limitations and other trade-related measures can also be a formidable market access problem especially in sub-federal America. However, the economic impact calculation of harmonised standards is a very difficult enterprise. Nonetheless, some pundits went as far as to predict potential welfare gains as high as 13% of GDP.² Even OECD as a more sober think tank added up the gains to a whopping 1 trillion US dollars – “if successfully concluded”.³ Who could resist such a call, especially in the midst of yet another financial crisis and slowed down trade growth? It might be added that the emerging contours of the TPPA threatened to isolate Europe from access to that part of the world. On its part, the US Government might aim at a “parallel sale” of its last remaining tariffs in both negotiations.

At that stage, official enthusiasm by government leaders started to boil over. Strong TTIP support came not only from the European Commission, always eager to liberalise trade (and to increase community competence) and through such a package approach to overcome obstacles which at least some of its member states would otherwise loth to give up. European heads of governments like Angela Merkel and David Cameron joined the chorus of enthusiasts without reservations, and even a normally more prudent François Hollande came out in support of an ambitious negotiation, claiming that “speed is not a problem, it's of the essence.”⁴ US-President Barack Obama, not hitherto known as a strong advocate of free trade, said that “[A]s part of broader growth strategies in both our economies, [the TTIP] would support hundreds of thousands of jobs on both sides of the ocean.”⁵

The terms of reference were drafted with very high ambitions. Tariff elimination was only one agenda point. The problems of sensitive sectors like agriculture could and would be solved at the political level. Regulatory differences in all fields would be dealt with in a conclusive manner, wherever possible in the agreement. Yet the most far-reaching objective – and this is where TTIP innovates in respect of any other RTA – was finding a common road map committing the TTIP Parties to solve even future regulatory differences.

² Quoted by Ken Ash, in *EU-US trade and investment talks: Why they matter*. OECD Observer No 297 Q4 2013 p.12-13

³ OECD Trade and Agriculture Directorate (TAD), *The Transatlantic Trade and Investment Partnership (TTIP): Why does it matter?* 2013, Paris. Located at *Investment Partnership: Why Does It Matter?* (2013, Paris). (<http://www.oecd.org/regreform/facilitation/TTIP.pdf> accessed on 25 March 2014)

⁴ Joint News Conference at the White House with US President Barack Obama, 12 February 2014 (<http://www.euractiv.com/trade/hollande-obama-agree-ttip-fast-news-533441> accessed on 25 March 2014)

⁵ The White House, Office of the Press Secretary, press release 17 June 2013 (<http://www.whitehouse.gov/the-press-office/2013/06/17/remarks-president-obama-uk-prime-minister-cameron-european-commission-pr>) accessed on 23 March 2014.

Negotiations throughout 2014, according to official information on record, followed different tracks. In the USA, all interest groups presented their expectations and demands in Washington. In the absence of a formal Trade Promotion Authority (TPA) allowing a “take it or leave it” submission of a negotiation “package” to Congress, the US Trade Representative (USTR) as the lead agency for the US Government could only take note of these requests and decide to lead a number of consultations to further clarify and understand the issues. So far there are no draft texts formally proposed by the USTR to the EC. In January 2015 the new (Republican) parliamentary majority made a new attempt, together with the USTR, to push for TPA and even for a conclusion of TPPA and TTIP by mid-year (chiefly because thereafter the next US presidential campaign will prevent US negotiators from making substantial progress before 2017). In the EU the Commission, Parliament and member states had an intensive series of consultations with a large number of stakeholders showing sometimes wide divergences right up to heads of governments taking side before any results became available even in draft form. For instance, the same Madame Merkel who had enthusiastically greeted the launching of the negotiation repeatedly assured her public that chlorine-treated chicken would never reach German cuisines.

On both sides actual negotiation news were mainly leaked rather than formally communicated. Only in January 2015 a series of draft texts with negotiating positions was finally published by the European Commission.⁶ Even so, for the three topics mainly relevant for this study, precious little is available other than political statements. This presumably indicates that agriculture, SPS and TBT matters will continue to be negotiated secretly and with a sizeable portion of back-loading on the agenda towards the famous “night of the long knives” to be eventually held at the highest negotiating levels.

3 Swiss agriculture facing the challenges of the WTO, the EU and the US

Good trade governance includes meeting the challenges of globalisation and including them in policy formulation and reforms. This obviously goes for all countries benefitting from international trade and investment. The most successful approach, in my opinion, is a skilful process of interaction between domestic and international files. I consider that good agricultural policy is best made at home and in democratically decided reform steps. But serious reforms are difficult, and often impossible without an international dimension.

⁶ Press Release “European Commission publishes TTIP legal texts as part of transparency initiative” dated 7 January 2015. Downloaded at <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1231>.

Swiss agriculture has come a long way from its insular orientation resulting from two world wars with closed borders. As late as 1972 when the first Free Trade Agreement with the European Communities was concluded the Government assured farmers that all their products would always be bought at good prices. Even so, food self-sufficiency was never attained (except, occasionally, for some products such as pork and potatoes). Besides high tariffs and import quotas and prohibitions, numerous domestic measures such as milk and sugar beet production quotas, a large gamut of subsidy tools, and land use limitations, ensured that the prevailing market prices procured a “comparable income” for all farmers. Free trade remained limited to non-agricultural products. Besides, as a matter of political convenience “structural reform” (i.e. farm closures) remained limited to the generational transition (i.e. not more than 3% in any given year).

The first step away from the post-war planned agricultural economy took place in 1987. Remarkably, the push came not from the government but from the Swiss voters, in a referendum toppling a governmental and parliamentary decision for yet more support to the domestic sugar industry, regardless of a structural surplus production.

Serious reforms became only possible in the wake of the Uruguay Round conclusion and the new WTO rules for market access and subsidies. In 1996, a new constitutional article defining the role of state in support to agriculture obtained a large majority of voters and of cantons. This Article 104 recognises the multifunctional role of agriculture in three ways: contributing to a secure food supply, conserving natural resources and taking care of the landscape, and encouraging decentralised settlement. On this basis the policy instruments to reach these objectives were completely reformulated. Price and sales guarantees were abolished, and price support was somewhat reduced. In exchange, direct payments as remuneration for specific services of public and common interest were greatly increased – within the limits of the new WTO rules and disciplines. However, until today more than half of these direct payments remained directly production-related (i.e. in the Amber Box).

This short story shows the merits and limits of national reform attempts, and of international developments shaping policy developments in such sensitive areas as agriculture. Switzerland never had a WTO case brought against its agricultural policy. But like other countries it more or less followed the rules for its various reform steps at parliamentary and governmental levels.

Switzerland's reliance on international trade for its economic growth has always determined to a large extent its domestic policies. Moreover, like in other countries, Swiss policy makers often use international developments to induce reforms at home which otherwise would not have succeeded.

Conversely, the failure of the Doha Round also torpedoed Swiss Government attempts to conclude agriculture-inclusive RTA with the US (2007) and the EU (2012). This in turn contributed to a backlash against further domestic reform proposals, the latest case being the 2013 revision of the Federal Law on Agriculture. Not surprisingly, many reform-minded Swiss politicians – even some agricultural opinion leaders, but not the large farmer associations – are now hoping for a success of the TTIP. They see such agreements as their best available chance for a return to agricultural policy reforms in Switzerland.

The following sub-sections summarise the reform steps made in Switzerland as a result of three external developments: the Uruguay Round negotiations and the establishment of the WTO, the 1999 Swiss-EU Agriculture Agreement (and the now stalled negotiations for a comprehensive agriculture and food RTA with the EU), and the pre-negotiations for a RTA with the USA.⁷

3.1 Uruguay Round and the WTO

The main changes brought about by the WTO, requiring like in other countries substantial legislative and other regulatory modifications, can be described along the three pillars of the Agreement on Agriculture (AoA), namely market access, domestic support and export competition (3.1.1-3.1.3). The sub-section concludes with a review of other, only partly WTO-regulated promotional instruments used in Switzerland (3.1.4) and with my views on the general WTO-compatibility of Mutual Recognition Agreements MRA (3.1.5).

3.1.1 Market access

The main feature of the AoA for the first pillar is the virtually full *tariffication* and the corresponding re-orientation of all forms of *border protection*. The new rules apply to all WTO Members, whereas different formulae and negotiations determined the resulting tariff levels in each country. For Swiss agriculture this was a particularly difficult challenge because Swit-

⁷ This Section is based on my presentation on 1 March 2012 at Waseda University, Tokyo, in the Seminar on Switzerland's Agricultural Trade Policy: Triple Challenges with the WTO, EU and US. Proceedings of the Conferences on Japanese External Relations in Agriculture, Waseda University, Tokyo, 1 March 2012 (pp.423-493). Also available in Japanese.

zerland had for decades managed imports at its own total discretion. Its GATT accession in 1966 was negotiated on the basis of a *carte blanche* for agriculture, in exchange for accepting the lowest industrial tariffs of all GATT Contracting Parties. It has been argued that thanks to these *negotiated accession modalities*, Swiss manufacturers are today highly competitive even in sensitive areas like textiles, whereas agriculture until 1995 never had to reform as a result of international developments.

Tariffication was made easier by the fact that (i) our main trading partner, the EU, refused to talk with Switzerland throughout the Uruguay Round and (ii) the time for the verification of the new WTO schedules was so short that quite naturally attention focused on bigger economies, simply for lack of human resources available in the three months before the adoption of the WTO Agreement in March 1994. Besides, and contrarily to what many exporters and some scholars now say, so-called “dirty tariffication” was part of a deal called “(almost) full tariffication vs high tariffs”. In fact, for the most important products in the most important markets the resulting MFN tariffs had been negotiated with the most important suppliers in a classic, non-formula based manner.

Like others, Switzerland made ample use of high tariffs e.g. when converting former import prohibitions and quantitative restrictions into scheduled tariffs. Nevertheless, border protection by tariffs only is systemically very different from GATT times when Switzerland could basically decide when to import what, and how much. Today there are considerable out-of-quota imports (despite out-of-quota tariff rates of over 500% e.g. for certain pork and dairy products). In addition, in-quota tariff rate imports of fresh fruits and vegetables are still managed by releasing tariff-rate quotas (TRQ) at very short notice (outside a short minimum period scheduled for each tariff line). In 2013, the WTO-incompatible “*prise en charge*” system was reintroduced for certain meat imports, whereby in-quota tariff rate imports are subject to the purchase of like products on the domestic market. Furthermore, Switzerland has the record of tariff lines subject to the Special Safeguard (SGS Art.5 AoA).⁸ Similarly, the duty-free quota-free (DFQF) preferences recommended at the WTO Hong Kong Ministerial in 2005 for Least Developed Countries (LDC) had by 2009 been fully implemented – but with an autonomous safeguard allowing the Minister of Economy to suspend or withdraw this preference in case of serious prejudice to Swiss producer interests.

⁸ It actually used this right only once, for pork meat (and even that was “too little too late”, because the Trade Directorate in the Ministry of Economy had for a long time opposed the proposal made by the Agriculture Directorate in the same Ministry.

A conclusion of the Doha Round negotiations on agriculture anywhere near the reduction formulae envisaged in the so-called “modalities” in December 2008 would clearly pose an altogether different and much more serious threat of increased competition from abroad. A tariff “capping” at a maximum of 100% for all products is a perhaps far-fetched possibility. Nevertheless, both government and parliament conveniently neglect such “worst-case” scenarios when they debate further reform steps, pretending to increase competitiveness without reducing border protection.

3.1.2 Domestic support

Direct payments constitute a key element in Swiss agricultural policy and make it possible for price policy to be separated from incomes policy. In the official Swiss view they represent compensation for services provided by farmers for the common good.

Besides allowing the ratification of the WTO agreements, this new policy instrument dating back to 1992 has helped acceptance of two major reform steps: progressively free trade in cheese with the EU as from 2002 under the Swiss-EU RTA of 1999, and the total abolition of milk production quotas by May 2009. Repeated requests for a reintroduction of production limitations have so far been refused by the Government, but many producer groups manage supplies in order to better negotiate with large dairies and cheese makers. Similar production quota schemes operate for sugar and tobacco.

Direct payments are to ensure the appropriate use and care of all agricultural land. The more difficult farming conditions in hilly and mountainous regions receive additional payments for steep terrain and for keeping animals under difficult conditions.⁹ With the exception of payments for summer pasturing, direct payments are conditional upon proof of ecological performance (PEP).¹⁰

⁹ On this topic and for further information please consult the website of the Agriculture Division, in English or, more complete, in French (Federal Office for Agriculture FOAG): <http://www.blw.admin.ch/index.html?lang=en> accessed on 21 March 2014. A series of official publications in English is also available at http://www.blw.admin.ch/suchen/index.html?keywords=Swiss+agriculture+on+the+move&go_search=search&lang=en&site_mode=intern&nsb_mode=yes&search_mode=AND#volltextsuche (accessed 14 January 2015)

¹⁰ Compensation for special performance with regard to the environment and livestock is provided for ecological and ethological practices. Eco-quality, summering and water protection payments are an incentive for achieving levels beyond PEP stipulations. The declared objectives are to promote biodiversity in agricultural areas, to reduce the level of nitrates and phosphates in rivers and lakes and the use of fertilisers and pesticides as well as to promote especially animal-friendly conditions for livestock, and to ensure the sustainable use of summer pastures.

The further development of the direct payment system (and other support policies) is taking place through periodic reviews in the Swiss Parliament. After heated debates, the 2013 revision of the Federal Law on Agriculture brought about an abolition of the headage payments by animal. This “double payment” (on top of the acreage payments) was compensated by new direct income support payments for the *food security role of Swiss agriculture*. In addition, the notion of *food sovereignty* was inserted in the law, without anyone proposing concrete policy changes besides this new subsidy of the Amber Box type which in 2014 absorbed over half of all direct payments, with slightly more than 1 billion Swiss Francs.¹¹ In other words nobody demanded tariff increases or price support beyond the WTO limits. Nonetheless, here again a Doha Round conclusion would probably curtail this sort of income support introduced with a view to increasing domestic market shares even for products without a competitive position, such as for feedstuffs. Regrettably, in my opinion, OECD standards, WTO perspectives and Swiss development policies seemed to matter little in these decisions.

Constitutional Amendments on Food Security

Since 1996 the above-mentioned Article 104 of the Federal Constitution lays down the objectives of Swiss agricultural policy and the support role of the state. Implementing legislation as well as policy and financial support tools are being periodically modified. In the wake of international and national food security and food sovereignty debates, three “people’s initiatives” calling for a constitutional amendment with the objective of increasing Swiss food security have recently been proposed. Any such amendment will require a double majority of votes by the people and the cantons.

On 14 January 2015 the Federal Council (Government) proposed its own version of such a food security amendment by way of a counter-proposal to the first of these initiatives. It foresees a multipronged approach aiming at (i) maintaining the agricultural production surface (ii) production efficiency (iii) competitiveness of the whole food chain (iv) access to and from international markets and (v) sustainable consumption.¹² At the latest by January 2017 the Parliament will have to decide whether it wants to put this or another version to a national vote as a counter-project to the people’s initiative(s).

¹¹ Christian Häberli, Swiss Policies for more Food Security. NCCR Working Paper No 2014/23 ([http://www.wti.org/search/?tx_indexedsearch\[sword\]=Working+Paper+No+2014%2F23](http://www.wti.org/search/?tx_indexedsearch[sword]=Working+Paper+No+2014%2F23))

¹² See Draft Amendment of the Federal Council at <http://www.news.admin.ch/NSBSubscriber/message/attachments/37919.pdf> accessed 15 January 2015 (accessed 15 January 2015), and comments by Markus Hoffmann in Neue Zürcher Zeitung dated 15 January 2015, p.9.

These developments primarily reflect domestic food security concerns. 2015 being a federal election year, the political background might also explain why the Government tries to prevent a policy backslide with potentially protectionist measures. This being, international developments (WTO, EU, TTIP and other RTA) obliging Switzerland to reduce its border protection and certain forms of producer support would present considerable external challenges. My own view is that the present constitutional provisions would be amply sufficient to operate the necessary adaptations for most foreseeable eventualities. Among the four proposed amendments, only the one drafted by the Government would seem to allow for the then necessary reforms. However, I share the opinion of several opinion leaders, including two agricultural think-tanks that the present constitutional provisions could well accommodate the necessary policy adjustments for more national food security.¹³

3.1.3 Export competition

Like all WTO Members having subsidised agricultural exports in the base period 1986-90, Switzerland had to reduce the volumes and financial outlays for these subsidies by 21% and 36%, respectively. No WTO Member is allowed to exceed the scheduled quantities and volumes, or to introduce new subsidies for other products.¹⁴ This new discipline prevents certain product developments in Switzerland but it also promotes sustainability and contributes to more transparency and efficiency in agricultural trade.

As a matter of fact, in the context of the so-called “Politique agricole 2011” Switzerland went beyond its WTO obligations and phased out all export subsidies by 2009, except for processed agricultural products which remain export-subsidised at over 100 million Swiss francs per year. Export subsidies for butter (against Switzerland’s WTO commitments) have been provided in 2012 on a privately-organised basis but with the governmental approval of mandatory milk producer contributions which in turn finance such exports. Requests for a reintroduc-

¹³ Cf. (i) Alliance agricole, Press Release “Cartes sur table!” dated 15 January <http://www.agrarallianz.ch/Aktuell.1+M52087573ab0.0.html> downloaded 20 January 2015 (ii) Vision Landwirtschaft, Newsletter and Press Release both dated 14 January 2015, downloaded at http://www.visionlandwirtschaft.ch/vision/newsletter/newsletter-emaki_10.html and http://www.visionlandwirtschaft.ch/downloads/MM_14_1_15_Vision_Landwirtschaft_Gegenentwurf_BR_Ernehrungsinitiative-1.pdf

¹⁴ It should nevertheless be recalled that the term “export competition” (Part V AoA) is larger than export subsidies and also includes export credits, export-oriented state trading enterprises, and international food aid. All these areas were addressed in the Doha Round negotiations (as well as export prohibitions and restraints). Without agreed results, the conditions of competition for agricultural trade remain distorted, and the term “export competition” in the AoA remains a misnomer.

tion of livestock export subsidies were refused at governmental and parliamentary levels but have been sporadically granted by certain cantons as yet another WTO-incompatible measure.

3.1.4 Other promotional instruments used in Switzerland: TTIP impact?

Even under the WTO/AoA framework there are numerous ways of protecting and promoting farm products based on quality specifications. An interesting example for (WTO-compatible) export promotion is practised by the Italian Ministry of Agriculture which certifies Italian restaurants in Switzerland – even in a little pizzeria in Geneva. As for Japanese “Kobe” beef, registered trademarks exist in the USA and Canada, designating high quality meat. But this does not always indicate that the meat is of Japanese origin: in Brussels I have eaten ‘Kobe Beef’ made in Belgium. Finally, as Japanese experts know very well after the ‘Shochu’ case in the WTO, tariff discrimination for ‘like products’ is not allowed.¹⁵

Four promotional instruments used in Switzerland, based on the constitutional mandate described above, are described here; there are others.

3.1.4.1 Geographical Indications

Switzerland has introduced legislation for the protection of geographical indications in the 1997, along with and similar to the system established by the EU.¹⁶ By January 2015, 31 products were protected under Swiss law (11 cheeses, 10 meat products, 4 spirits, 5 others and 1 foreign product: Café de Colombia).¹⁷

With the EU a modified MRA has entered into force on 9 April 2014 as Annex 12 to the bilateral Agreement on Agriculture of 1999 (see above), after a protracted and emotional multi-year negotiation, for instance about Swiss Gruyère and Emmental cheeses and their imitators in the EU.¹⁸

In many Free Trade Agreements (FTA) concluded by Switzerland, all or some of these GIs are also recognised, including in the bilateral FTA with Japan: Annex X protects 4 names for

¹⁵ Cf. http://www.wto.org/english/tratop_e/dispu_e/cases_e/1pagesum_e/ds10sum_e.pdf accessed 15 January 2015.

¹⁶ Legal base: Agriculture Act, Art. 16b(1) Protection of labels of origin and geographical indications outside Switzerland (http://www.admin.ch/ch/e/rs/910_1/a16b.html) accessed 16 January 2015.

¹⁷ See <http://www.blw.admin.ch/themen/00013/00085/00094/index.html?lang=fr> accessed on 14 January 2015.

¹⁸ Accord entre la Confédération suisse et la Communauté européenne relatif aux échanges de produits agricoles. Conclu le 21 juin 1999. Annexe 12 Relative à la protection des appellations d’origine et des indications géographiques des produits agricoles et des denrées alimentaires. Introduite par l’annexe à l’Ac. du 17 mai 2011 entre la Suisse et l’UE relatif à la protection des appellations d’origine et des indications géographiques pour les produits agricoles et les denrées alimentaires (RO 2011 5149 6075). Mise à jour selon l’art. 1 de la D no 1/2014 du Comité mixte de l’agriculture du 9 avril 2014, en vigueur depuis le 9 avril 2014 (RO 2014 1057).

Japanese spirits, and Sake, whereas for Switzerland there is a list of 13 cheese names, 2 meat-based products, 5 pastries, 5 spirits, producer names of origin for 9 wines, for 4 watchmaker regions, and for 3 textile and 2 chemical products.¹⁹

Other intellectual property instruments, some of which are also used in Switzerland and involving upstream agricultural production, are collective trademarks and brands. Similar tools exist for instance in the USA and in Canada. They have similar economic effects as GI, but the legal bases are quite different.²⁰ This also makes protection between countries with different systems difficult. This problem has also become evident in the TPPA negotiations. The TTIP negotiations have not yet clarified whether and how the strong differences between the US and the EU in this domain are going to be solved. However, the EU with its *sui generis* system for GI protection always made it clear that a TTIP would have to accept all such protection systems, as recognised in the WTO/TRIPS Agreement. It had no problem negotiating such a RTA with South Korea (even though this was later heavily criticised by the US). Similarly, the Comprehensive Trade and Economic Agreement (CETA) between Canada and the EU protects both trademarks and GIs. As it is likely to serve as a blueprint for the EU in its TTIP negotiations, the pragmatic solutions found in this (still to be ratified) agreement are of interest. For instance, Canada agreed to varying ways of addressing EU requests regarding 179 terms covering foods and beer, but it also preserved policy space for Canadian trademark holders and for users of commonly used English and French names for food products such as Parmesan and Black Forest ham (but not the corresponding German language term for Schwarzwälder Schinken). For Budweiser beer – the subject of a well-known WTO dispute between the USA, Australia and the EU²¹ – Canada will not protect the GI “Budejovicke” thereby avoiding a potential conflict with the Budweiser trademark.²²

As shown, for instance, in a number of WTI publications the added value and the effectiveness of the GI protection of names are debatable and that they depend on a whole lot of conditions and circumstances.²³ In my opinion legal protection alone – even in international agree-

¹⁹ <http://www.seco.admin.ch/themen/00513/02655/02731/02970/index.html?lang=en>

²⁰ Crina Viju, May T. Yeung and William A. Kerr, Geographical Indications, Conflicted Preferential Agreements, and Market Access. 16/2 (2013) *Journal of International Economic Law* 409–437.

²¹ See http://www.wto.org/english/tratop_e/dispu_e/cases_e/1pagesum_e/ds174sum_e.pdf accessed on 15 January 2015. Also see Michael Blakeney, Geographical Indications and TRIPS. University of Western Australia-Faculty of Law Research Paper No. 2012-09, p.21.

²² See the (Canadian) Technical Summary of Final Negotiated Outcomes as of October 18, 2013, pp.20-21 (<http://www.actionplan.gc.ca/sites/default/files/pdfs/ceta-technicalsummary.pdf> accessed on 15 January 2015)

²³ For WTI research on the matter see, *inter alia*,

ments – is clearly insufficient. Close producer-processor-retailer cooperation, strict controls of quality and commodity origin, and important joint marketing efforts with or without the support of the state are essential ingredients and the same is true for enforcement (possibilities) in cases of usurpation.²⁴ Basically, in my view the most important function of a GI is to protect a name whose market value has been and must continuously be promoted (and defended) by publicity and marketing, all along the food chain benefiting from this value. Moreover, huge commercial successes like French Champagne, South African Roibos and Mexican Tequila have to make huge efforts to protect their names, whether as GIs or as trademarks. Some of them also face limits for recognition in international treaties, and limits for the protection of locally added value such as local processing and bottling. For tequila, the Government succeeded in prescribing the production, bottling, marketing, information, and business practices as well as the regions within Mexico which are allowed to label their Tequila “NOM” (Norma Oficial Mexicana vs. ‘agave-based’ for spirits from all other regions). But in 2006 the US successfully opposed attempts – supposedly for reasons of quality guarantees – requiring tequila to be bottled in Mexico.²⁵

As indicated a TTIP is unlikely without a pragmatic solution for GI. Having found one in their MRA on wines and spirits, the EU and the US are likely to succeed here as well, eventually (the wine agreement negotiation took 20 years...). In that case, the TTIP implications for Switzerland would not be too difficult.

3.1.4.2 Organic agriculture

Organic agriculture has reached a record 10% of total food consumption in Switzerland. This is unlikely to further increase. Obviously, “organic” does not mean domestic and thus cannot automatically protect or promote Swiss products. A MRA on organic agriculture has been included in the 1999 Agreement on Agriculture with the EU. It allows inspection-free entry of

(i) Dannie Jost, A Practical Guide to Working with TRIPS: What TRIPS is and what it is not. 7/3 (2011) *Oxford Journal of Intellectual Property Law & Practice* 220-222

(ii) On the potentially discriminatory nature of GIs see Thomas Cottier and Matthias Oesch, Direct and Indirect Discrimination in WTO Law and EU Law. *NCCR Working Paper No 2011/16* (April 2011).

(iii) On the choice of forum issue related to GIs see Thomas Cottier and Marina Foltea, Global Governance in Intellectual Property Protection: Does the Decision-Making Forum Matter? *NCCR Working Paper 2011/45* (June 2011)

(iv) On the development dimensions of GI protection see Arno Hold and Bryan Mercurio, A Second Extension of the Transition Period: Can the WTO Better Integrate LDCs into TRIPS? in Mercurio, Bryan and Ni, Kuei-Jung (eds.), *Science and Technology in International Economic Law: Balancing Competing Interests* (Routledge, 2014)

²⁴ Tim Josling, What’s in a Name? The economics, law and politics of Geographical Indications for foods and beverages. *IIIS Discussion Paper No. 109* (Dublin, November 2005)

²⁵ See the Wikipedia entry for Tequila as of 9 January 2015 (<http://en.wikipedia.org/wiki/Tequila> accessed 14 January 2015). Also see The Economist, Storm in a tequila bottle (3 October 2003, available online).

all Swiss and EU organic products on the respective markets. Nevertheless, in line with consumer preferences, a substantial share of organic products on the Swiss market is still of national or even local origin.

Just like for GI the MRA on organic food between the EU and the US concluded in 2012 should make this file un-problematic for TTIP.

3.1.4.3 Labelling

As most other countries, Switzerland today has a wide array of labels for consumer information. Of special interest here are those between purely private labels and the governmental prescriptions for specific products, devices and equipment. The regulations and MRA applying to labels for organic food have already been mentioned. Others, also containing prescriptions for production and processing methods (PPM) present potential problems in a WTO and/or TTIP context.

For instance, an “Ordinance on the labelling of agricultural products obtained using methods which are banned in Switzerland” has been adopted as a result of the Parliament’s demand to protect domestic interests subject to production cost-increasing prescriptions (such as the prohibition of growth hormones for beef) without infringing WTO obligations. It stipulates that all imports e.g. of hormone-treated beef meat, and eggs from caged laying-hens, must be labelled at retail and restaurant levels. The Federal Government is responsible for the recognition of equivalent production methods (legislation and private-law agreements) and of foreign certification authorities which then allow not to label such imports at points of sale. These regulations are implemented by cantonal health authorities (food inspection).

3.1.4.4 Technical Regulations and “Swiss Made” Provisions

Another example is the placing on the market in Switzerland of specified products which conform to the technical regulations of the EU, the European Economic Area (EEA) Member States, and Canada. The Federal Law on Technical Barriers to Trade (LTBT dated 6 October 1995) foresees the possibility of MRA for conformity assessments in the product sectors covered by these agreements. Since 2010 it also provides that products which are legally on the market in the EU or EEA but are not covered by one of these international agreements benefit from an autonomous application of the so-called “Cassis de Dijon” principle i.e. can be placed on the Swiss market without authorisation. Exceptions apply to foodstuffs that do not fully comply with Swiss legislation. A special regulation provides for the authorisation of such

products when first placed on the Swiss market. The “Cassis-de-Dijon” free circulation principle does not apply to large number of both food and non-food products.²⁶

3.1.5 WTO-compatibility of MRA

From a global trade liberalisation perspective the MRA in mega-regionals might well become the template or the precursors of world-wide production and processing standards – not only in agriculture. TTIP (and TPPA) will include a number of MRA especially for NTB. This raises the question of third party rights under the WTO agreements where similar market access problems are at stake – and discrimination looms.

Third countries can in principle force accession to stand-alone MRAs based on the MFN and the National Treatment obligations of the contracting parties. This however is no longer the case for agreements as a part of a RTA, because Article XXIV of the GATT shields the RTA from automatic MFN rights. This means that after the conclusion of TTIP Switzerland (and Japan) can only request access e.g. for their organic products or their GI. On the other side, the non-discrimination obligations in the TBT Agreement might coerce TTIP partners to grant accession requests to third parties meeting such technical standards with equivalent regulations. A final answer to this question will have to be found at the conclusion of the TTIP. At this point in time, third parties are well-advised to remain vigilant.

3.2 European Union

3.2.1 Political and economic importance for Switzerland

The EU is by far Switzerland's most important trading partner. Inversely, Switzerland is the EU's second export destination and fourth supplier of merchandise. This is due not only to the EU's political and economic weight, but also to Switzerland's close geographical and cultural proximity to EU member states. The Swiss economy is heavily outward-oriented, with almost half its GDP earned through international goods and services trade, including tourism.

Nonetheless, in 1992 Switzerland refused to join the EEA. Today, EU accession remains a remote prospect. On 15 January 2015 the Swiss National Bank lifted its 3.5 years old lower peg of the Swiss franc to the Euro, thereby completely decoupling Swiss monetary policy from the EU. In one word, Switzerland remains fiercely independent – to the dismay of some and the liking of a majority of its citizens.

²⁶ For further information on facilitated market access under international agreements or the “Cassis de Dijon” principle in Switzerland please consult the website of the State Secretariat for Economic Affairs SECO (<http://www.seco.admin.ch/themen/00513/04219/04220/index.html?lang=en>) accessed 15 January 2015.

Switzerland conducts its relations with the EU on the basis of a large number of bilateral agreements with the EU and with its member states. Specific questions and issues are solved via a series of treaties in clearly defined areas. Swiss-EU relations have developed and deepened over the decades. Since 1972 a FTA regulates all trade in industrial goods and for processed agricultural products (but not for basic commodities or for cheese). Since then, an ever denser network of agreements has been developed in several steps. In 1999, Switzerland and the EU concluded seven agreements covering specific areas: the free movement of persons, the elimination of technical barriers to trade, public procurement markets, civil aviation, overland transport, research and agriculture (“Bilaterals I”). Another eight agreements and one exchange of letters extending cooperation between Switzerland and the EU beyond economic affairs to important new political areas were concluded in 2004: Schengen/Dublin, Taxation of savings income, Combating fraud, Processed agricultural products (revision), Environment²⁷, Statistics, Media²⁸, Pensions²⁹, and Education (“Bilaterals II”). Taken together, these and several other agreements build “common market-like” conditions for operators and migrant workers, similar to the EEA but without a judiciary component. Referendum votes in 2002 and 2005 confirmed the preference by the Swiss people given to this bilateral approach in handling relations with the EU.

Institutional questions that have arisen in the framework of the bilateral agreements are being reviewed with a view to finding solutions that will facilitate the application of the agreements while ensuring respect for the sovereignty of the two parties and the smooth functioning of their institutions. Moreover, a “horizontal” agreement is being contemplated for the administration of the present and the development of further agreements in line with evolving EU law and jurisprudence, the interpretation of the agreements and the settlement of disputes. However, after the rejection by the Swiss voters of the free movement of persons’ principle on 9 February 2014, these institutional development discussions have been shelved.

²⁷ Switzerland’s accession to the European Environment Agency

²⁸ Full and equal access to EU promotional programmes of Swiss filmmakers

²⁹ Retired EU officials living in Switzerland no longer subject to double taxation

3.2.2 The Swiss – EU Agriculture Agreement of 1999

The EU is also Switzerland's most important trading partner in agricultural products, with approximately 62 % of Swiss agricultural exports going to EU-Member States in 2012, while in Switzerland about 73 % of agricultural imports come from the EU.³⁰

The Agreement on Agriculture as part of the “Bilaterals I” is the legal base for Swiss-EU preferential trade in agriculture. A closer look shows a both bold and very careful design with a view to progressively increasing reciprocal market access, and the establishment of a quasi-common market. It simplifies trade in agricultural products through the dismantling of tariffs (free trade only for cheese since 1st of June 2007, reduced tariffs and TRQ for some other agricultural products). It also eliminates a number of NTB (for instance, different product regulations and admission requirements) through the mutual recognition of the equivalence of specific regulations. The products concerned include wine and spirits, organic agriculture, animal health, pest control and crop protection, including by way of border controls and plant quarantine, feedstuffs and seeds. At the end of 2006 the equivalence of regulations in the veterinary sector was recognised for trade in all foodstuffs of animal origin, animal by-products and animal health. Reciprocal veterinary borders controls were fully eliminated at the beginning of 2009.

Processed agricultural products

The Agreement on processed agricultural products of 2004 (“Bilaterals II”) is based on an earlier MRA concluded as part of the 1972 FTA. It governs trade between Switzerland and the EU in processed agricultural products such as chocolate, coffee, beverages, biscuits, pasta, etc.

Since 2005, the EU no longer imposes duties on imports or subsidised its exports in this product category with Switzerland, although exceptions are possible in connection with the development of raw materials' prices. Switzerland in return reduces its duties and export subsidies, without having to abolish them altogether. In addition, the scope has been extended to new products, thus taking into account developments in the food industry.

The Agreement facilitates reciprocal market access despite different policies and producer prices for raw materials. Companies in the Swiss food industry can export a wide range of

³⁰ For details please start at <http://www.europa.admin.ch/themen/00500/00506/00560/index.html?lang=en> accessed on 24 March 2014

products to the EU market duty-free. The increased competitiveness of the food processing industry also creates additional sales opportunities for Swiss farmers supplying agricultural raw materials. Increased competition also tends to keep down consumer prices.

3.2.3 Swiss-EU FTA for agriculture, food safety, product safety and public health?

In order to secure closer links with the European Union (EU) along the food value chain, the Swiss Government had launched an initiative for a comprehensive free trade agreement in the areas of agriculture, food safety, product safety and public health. Studies had shown that the national economy would see a positive effect on growth with a long-term rise in GDP of 0.5% or CHF 2 billion per year.³¹ Several comprehensive rounds of talks took place, with different regulatory agencies on both sides. In 2013 they came to a halt largely due to opposition in Swiss domestic politics to an opening up of the agricultural sector. Nonetheless, further trade liberalisation impact studies were undertaken, for instance in the dairy sector.³² Talks with the EU on technical issues in the existing agreements continue.

The agreement envisaged by the Federal Council would progressively liberalise all levels of the food production and processing chain. This includes:

- the so-called upstream level, which refers to production equipment and investment goods (e.g. fertilisers, seeds, machines);
- agriculture per se, i.e. the production of raw materials (e.g. milk, fruit, cereals, live-stock);
- the so-called downstream level, i.e. the processing of agricultural products. This comprises initial processing (such as milk and cheese production, meat processing and milling) as well as second-level processing (products such as biscuits, pasta and chocolate).

Full access to the agricultural and food markets means that there will be no more customs duties on the import or export of agricultural goods, no export subsidies and no quotas.

Alongside the dismantling of these tariff barriers, NTB would also be eliminated, i.e. various

³¹ See the Technical Note dated March 2014 of the Directorate for European Affairs DEA, available at <http://www.blw.admin.ch/themen/00005/00298/index.html?lang=en> accessed 15 January 2015.

³² Based on these studies published on 14 May 2014, the Government considers that a full reciprocal opening of dairy markets with the EU could reduce Swiss producer prices by 17–25 % to 0.47 Swiss francs/kg. Without support measures to the tune of 310 million Swiss francs the production volume fall by 6% below the level envisaged for 2017. But overall welfare gains, especially for consumers, would amount to 150–200 million Swiss francs. See <http://www.blw.admin.ch/dokumentation/00018/00201/01831/index.html?lang=fr> accessed 15 January 2015.

production-related regulations (e.g. with regard to the use of additives), specifications (e.g. fruit content in yoghurt) or the certification of products (e.g. pesticides).

In view of a future opening up of the borders, the strategy currently being developed is on ensuring high quality standards in Swiss agricultural and food processing. Adequately designed compensatory payments to farmers are expected to make these changes socially tolerable.

Presently, such an ambitious agreement appears as a realistic scenario only if other market openings also become a reality. Otherwise there is hardly any political will for such ambitious, autonomous agrarian reforms. Without concrete perspectives for further WTO disciplines for market access and domestic support, a successful TTIP conclusion seems to be the only scenario leading Swiss farmers out of the present domestic impasse.

3.3 United States of America

Economic relations between Switzerland and the USA are important and enjoy a longstanding tradition, even though it is not, and has hardly ever been, a history untainted by political problems.

The idea of a Free Trade Agreement (FTA) with the USA came up after 2002, in a politically difficult context (Bank secrecy, WWII holocaust accounts etc.). From inception it was clear that only a comprehensive agreement covering all sectors including agriculture would stand a chance in the US Congress.

Exploratory talks commenced on a substantial level in 2004. They involved the lead agency (Trade Directorate in the Ministry of Economy) and every line agency with a stake in the matter (including the Agriculture Directorate in the same ministry). Stakeholders from the private sector, political parties, trade unions and NGOs were regularly consulted. A Report commissioned by the Swiss Government on the shape of a FTA with the US was conducted in 2005 by the Institute for International Economics in Washington DC. This report also dealt with agricultural market access issues (tariffs and TRQ, safeguards, Antidumping and Countervailing Measures), Domestic Support and Export Subsidies), in comparison with other US and

Swiss trade agreements. It found that the annual GDP gains to each partner from expanded trade could be on the order of \$1.1 billion.³³

Numerous internal studies were also conducted, followed by meetings and videoconferences with US counterpart agencies, during more than one year. Somewhat to its surprise the Swiss side was informed that certain NTB were beyond the negotiating mandate of the USTR and in the realm of Congress – apparently even for wrist watch leather armbands. Another little “non-negotiable” glitch was on the “yarn forward” rules of origin advocated by the US textile industry – quite unacceptable for the Swiss textiles which systematically incorporate non-Swiss basic products (but still on the table for TPPA). A similarly bad experience made under the NAFTA rules of origin for Swiss car parts surfaced again. The perhaps most significant consequence of a Swiss-US FTA became apparent for intellectual property where, according to the competent Swiss agency, Switzerland would have been obliged to leave the European Patent Convention.

Most of these issues did not concern agricultural trade. But when the various export interests in Switzerland were informed of the possible gains of such an agreement, and of the limits to what could be achieved, political support dwindled rapidly. The fact that the actual duty rates in the US were not very high, were also considered in this context. In sum, the unsustainable obstacles threatened to exceed the foreseeable overall gains. Nevertheless, based on these talks and on the reactions from different stakeholders, the Minister of Economy then made a proposal for a formal negotiating mandate from the Federal Council (Swiss Government, consisting of 7 Ministers including the Prime Minister). This proposal was rejected by 6:1 votes. The matter has not been raised again since – and the Swiss farm lobby could lean back. Yet it may well come back to haunt us in the new clothes of a TTIP.

Considering the TTIP impact question, it should be pointed out that US trade policy for many years has no longer looked like following the “Grand Design” it had had after the launch of the Uruguay Round in Punta del Este (1986). Mostly treaties with relatively small economies were concluded after 1995 (e.g. with Peru, Colombia and Panama). The conclusion of a TPPA (38% of 2012 World GDP including Japan) and the TTIP (61%) would be an altogether different matter in size and impact.

³³ Gary Clyde Hufbauer and Richard Baldwin, Assisted by Agustin Cornejo, Victoria Courmes, Dean DeRosa, John Gilbert, Claire Owen and Yee Wong. The Shape of a Free Trade Agreement between Switzerland and the United States. A Report by the Institute for International Economics, Washington DC, October 2005. Published in February 2006 (see <http://bookstore.petersoninstitute.org/book-store/3853.html> accessed 21 January 2015).

In the short Section of its Annual Trade and Investment Barriers Report relating on the US the European Commission has a long list of SPS barriers faced by EU exporters to the United States, for instance for dairy and meat processing regulations. The report also makes a link to the TTIP negotiations where solutions to such problems of equivalence could be found.³⁴

In my opinion, a “deep” TTIP would compel Switzerland to demand accession to the US market on equivalent terms to the one enjoyed by its European competitors. Whether or not the US would then be interested in extending a TTIP to countries such as Switzerland, is of course yet another matter. The demandeur country, at any rate, would not seem to be the US. As pointed out, in the pre-negotiations for a bilateral FTA with the US, agricultural tariffs were a big difficulty. In a negotiation to “catch up with the TTIP”, there could be more difficulties for NTB. At this stage, and given the very limited negotiating power Switzerland will have in such a process, we can only hope that the EU will be able to find solutions not only for its defensive files such as biotech and hormone beef (or more recently, ractopamine³⁵) but also for its own market access problems to the US market. Finally, it goes without saying that the big question – including for the Swiss chances to join at a later stage – will be whether and how many exceptions from DFQF principle will be sought, and obtained, by either side in the EU-US agricultural tariff negotiations. Fortunately for Switzerland, the European Commission, for its part, has already made it clear that full liberalisation will not be possible. But since Swiss MFN tariffs are the world’s highest this fact alone will hardly save Switzerland from making concessions it has never made before.

4 What is at stake for Switzerland (and others)?

TTIP implications are far from being clear today. What is clear is that TTIP, if concluded, will have a very strong impact on the Swiss economy (see 4.2 below). The same goes for Japan, but also for most other countries, including the other member states of the European Free Trade Association EFTA (Norway, Iceland, Liechtenstein). In economic terms much, or all, depends on the depth of concessions and regulatory modifications. Even more importantly, the international and national political dimensions of the TTIP will only begin to appear more clearly towards the end of the negotiation. It is therefore too soon to speculate on the relative

³⁴ EU Trade Report Targets U.S. SPS Rules, Says TTIP Provides New Forum. World Trade Online posted 21 March 2014

³⁵ Ractopamine is a growth promoter belonging to the family of beta-agonists: it has an anabolic effect which significantly increases muscle mass while decreasing the fat content of carcasses. In a very unusual vote, with an even more unusual 69:67 result, this product was admitted in July 2012 by the Codex Alimentarius Commission as a promoter in muscle mass growth, against the positions of the EU, Japan and China and other countries where ractopamine is prohibited and which all have heavily criticised the majority decision.

merits of the different adjustment scenarios which policy-makers, stakeholders and scientists are only starting to discuss.

4.1 Scope and extent of liberalisation

As for the scope of liberalisation, preliminary studies placed them highest for transportation, followed (in the US) for insurance and (in the EU) for distribution services. Others saw the potential benefits as only moderate for professional services, and absent for tourism, financial services (in the EU) and distribution (in the US).³⁶ It also appears that the EU will demand substantial improvements in market access to government procurement at sub-federal levels in the US.

Of course, an early TPPA conclusion will also impact on the TTIP negotiations. This certainly goes for the extent of tariff concessions. Whether NTB removals will be numerous in that agreement is still a very open question in view of the sensitivities of many issues. As for the EU it appears quite clearly in their January 2015 submissions that their template is the CETA. Finally, the services negotiations in the WTO (TISA) might also play a role as a common reference point for both TTIP parties.

For Switzerland, and besides the tariff reductions and government procurement improvements it is the outcome of the TTIP negotiations in terms of MRA and the harmonisation of technical standards which would matter most for a final impact assessment for Switzerland. As a matter of fact, many such technical standards differ fundamentally between Europe and America, not only in the field of agriculture. For instance, considerable preparatory work is underway between trade associations in Europe (CEN and CENELEC) and in America (ANSI, monitoring standards development in dozens of US industry bodies) in order to help harmonising standards under the TTIP.³⁷

Yet, mutual recognition or harmonisation is but one of the many issues here. A report to the European Parliament detailed the various sectors where transatlantic regulatory and standard differences arise at the legislative level and which would need to be addressed in the negotiation.³⁸ The ultra-liberal think tank Heritage Foundation already advised negotiators to simply

³⁶ Cf. OECD *op.cit. supra* FN3.

³⁷ CEN-CENELEC, ANSI Negotiate Deal That Could Aid TTIP Regulatory Effort (World Trade Online dated 8 October 2013)

³⁸ Alberto Alemanno, The Transatlantic Trade and Investment Partnership and the Parliamentary Dimension of Regulatory Cooperation. Report to the European Parliament's Delegation for Relations with the US (Chair

recognise each other's standards rather than strive for harmonisation, otherwise fearing a "Trojan horse for increased regulation and the importation of the EU's managed market into the U.S.". ³⁹

According to the EU Trade Commissioner, there are three key elements to the regulatory aspect of the TTIP: cooperation on future regulations in order to avoid the creation of new trade barriers; making existing regulations more compatible; and supporting this work with the "right institutions" (i.e. a *Regulatory Cooperation Council* for all aspects ranging from food safety to financial services). ⁴⁰ On the other side, USTR Froman called for "procedural improvements that would allow more public input on EU rules, including from foreign companies", namely a "public comment procedure in its rule-making that would be very similar to the notice and comment process in the Federal Register". ⁴¹

A particular difficulty here is the insistence by both parties not to lower the level of consumer protection afforded by either side's regulations. Furthermore, the EU which has just decided to let member states opt out of biotech marketing approvals by the European Commission, the *precautionary principle* (as enshrined in its Lisbon Treaty) will continue to guide risk management, allowing regulators to impose trade restrictions even in the absence of proof of harmfulness – even at member state levels and as a breach of common market disciplines. Can TTIP under these circumstances provide a final solution for the long-standing and still only temporarily resolved beef hormones dispute, or for biotech? And if it does, what are the options open for third countries like Switzerland or Japan? Can they then hope for MRA, or would only autonomous equivalence measures be available in order to avoid dislocations of their concerned operators?

In short, it is by far too early to predict with any degree of certainty the outcome, let alone the impact, of the TTIP, and this for all sensitive issues including investment, finance, and dispute settlement. What is clear, however, is that it will take considerable pragmatism and statesmanship on both sides if this ambitious negotiation is to be concluded in any foreseeable timeframe.

Dr Christian Ehler) via the Committee on Foreign Affairs (Chair Mr Elmar Brok). April 2014. Available at <http://www.europarl.europa.eu/activities/committees/studies.do?language=EN> accessed 21 January 2015.

³⁹ Ted R. Bromund, PhD, Rea S. Hederman Jr., Bryan Riley, and Luke Coffey, Transatlantic Trade and Investment Partnership (TTIP): Pitfalls and Promises. Issue Brief No. 4100, 5 December 2013.

⁴⁰ *De Gucht Proposal For TTIP Regulatory Effort Contrasts With Froman's* (World Trade Online posted 9 October 2013).

⁴¹ Inside U.S. Trade, Oct. 4

4.2 Initial reactions in Switzerland

In Switzerland, reactions to the TTIP negotiations are as expected. Trade buff politicians and economists see here a promise for tighter alliances between liberal democracies, more security for trade and investment, a new leadership of “the West” and a global template for advanced global production and trading standards. Third countries, even emerging giants such as Brazil, would no longer be able to stay aloof and to posit non-reciprocity.

Even assuming only a half-way successful conclusion of the TTIP in the short term, the Swiss economy will demand to benefit as much as possible from the new free-trade area. To the least, it will want to limit the disadvantages of not being able to directly join the TTIP.

WTI Impact Study

In 2012, the Swiss Government commissioned a study from the World Trade Institute (WTI). A multidisciplinary and empirical analysis of the regulatory structure and of the scope of liberalisation on both sides of the Atlantic yielded different results depending on a “shallow” or a “deep” integration formula, but all were overall positive. Under a shallow integration model (removing transatlantic trade barriers), the net benefits were less strong as they could lead to both trade creation (displacing less efficient domestic goods) and trade diversion (changing supply sources from more efficient non-TTIP countries to less efficient producers in TTIP countries). Most importantly, however, the potential for transatlantic value chains with Swiss participation was thought to be greatest. The reason for this qualitative finding in the impact study was that the global division of labour today no longer follows the fault lines of the traditional preferential zones and treaties. Under this view, TTIP bystanders would inevitably suffer from trade diversion, even when they had comparatively “shallow” treaties. Such loss of market shares could then only be prevented, if at all, with an extension of the benefits of ambitious regional treaties to the multilateral trading system as a whole. The econometric calculations made in that study show that a TTIP would at any rate have very important consequences for Switzerland: depending on the “depth” of such an agreement (assuming all industrial and 50% of agricultural tariffs would be abolished and with more or less NTB removals) and on the subsequent trade policy adjustments in Switzerland, the impact as measured in variations of its GDP could range from -0.5% to +2.9%.⁴²

⁴² Cf. Scenario Table in the Annex

For any adjustment to a successful TTIP, agriculture is likely to again become a crucial issue. True, in 1994 a small fraction of Swiss farming interests had unsuccessfully tried to block the accession of Switzerland to the WTO in 1995. The only consequence of the necessary referendum process (collection of signatures etc) was that this accession took only place on 1st of July 1995, i.e. six months after the entry into force of the WTO Agreement. A future choice between splendid isolation (rejecting TTIP accession) and losing farm revenues to EU and US competitors will not necessarily yield the same result. It is at any rate futile to speculate how the Swiss voters will react to a proposal to accept TTIP tariffs and disciplines in exchange for free access to the EU and US markets of Swiss merchandise, both agricultural and industrial.

Nonetheless, a few issues and some technical aspects of a specific interest to agriculture are already clear.

5 What is at stake for Swiss agriculture?

For the purposes of this section we (unrealistically) assume that the TTIP is concluded, signed and ratified, and that it enters into force as early as 2017.

Agriculture is likely to present particular difficulties within the still ambitious TTIP negotiations. Even so, Switzerland will face serious problems facing up to any results because it had only very partially liberalised its agricultural trade after the Uruguay Round and with the EU (in the 1999 Agriculture Agreement). The TTIP impact will therefore be felt in a number of ways – besides the tariff reductions modifying market access conditions – not least in the area of regulatory and standard harmonisation.

5.1 Market access

For tariffs, all depends how ambitious the TTIP will reduce them between the US and the EU. In particular, the question of tariff-rate quotas (TRQ) will matter enormously: will there be any such quotas? How big will they be? As in other cases, the concessions negotiated within the TTIP will allow more or less intermediate products originating in Switzerland to benefit automatically. Incidentally, the rules of origin might matter less here than for manufactured goods. On the other side, Switzerland having already very low non-agricultural tariffs, US demands for market access improvements (in exchange for TTIP benefits) are likely to be made, in particular, for agricultural products.

For NTB, the challenge might be less difficult for Switzerland, simply because agricultural trade is already regulated in the bilateral treaties, in particular the 1999 Agreement on Agri-

culture and its appendices for technical standards as well as sanitary and phytosanitary regulations. The situation today is thus comparable, at least to some extent and apart from all remaining tariffs and TRQ, to the functioning of an internal market. Of course, the suspension of the above-described substantive negotiations with the EU on an ambitious free agriculture and food trade agreement prevents the further development and achievement of a fully comprehensive internal market under any Swiss – TTIP extension agreement. On the other hand, Swiss sensitivities, for instance for biotech products and on geographical indications, are very similar to the ones prevailing in many EU member states. Presuming solutions to these and other sensitivities can be found in the TTIP, political acceptance of the extension to Switzerland might be less difficult to obtain than it was at the time of its FTA pre-negotiations with the US.

A possible solution in a TTIP for the considerable transatlantic regulatory divergences for agricultural trade might be found along the existing EU-US MRA (a) on wines and spirits (including some GI!) and (b) on organic agriculture. It will then be necessary to first analyse the relevant WTO rules, in particular in the TBT Agreement, as both a mandatory regulatory framework for the EU and the US and as an opportunity for third countries such as Switzerland to reduce trade diversion and to prevent new technical trade barriers. Furthermore, the implications of tariff rate quotas (TRQ) for trade with Switzerland raise a number of legal questions to be addressed not only under Article XXIV but also Article XIII of the GATT 1994. Finally, in case of a preferential agreement on domestic and export subsidies limitations the relevant WTO provisions in the Agriculture and in the Subsidy Agreements will be of interest.

The best way for Switzerland would thus be to offer reciprocity, as much as possible, to both TTIP partners. For NTB, the default solution would probably have to be acceptance of whatever arrangements the two TTIP partners would have agreed upon in as many MRA. Incidentally, even in its relations with the EU, Switzerland might have to follow this course of action wherever the EU's own regulations are changed as a result of the TTIP.

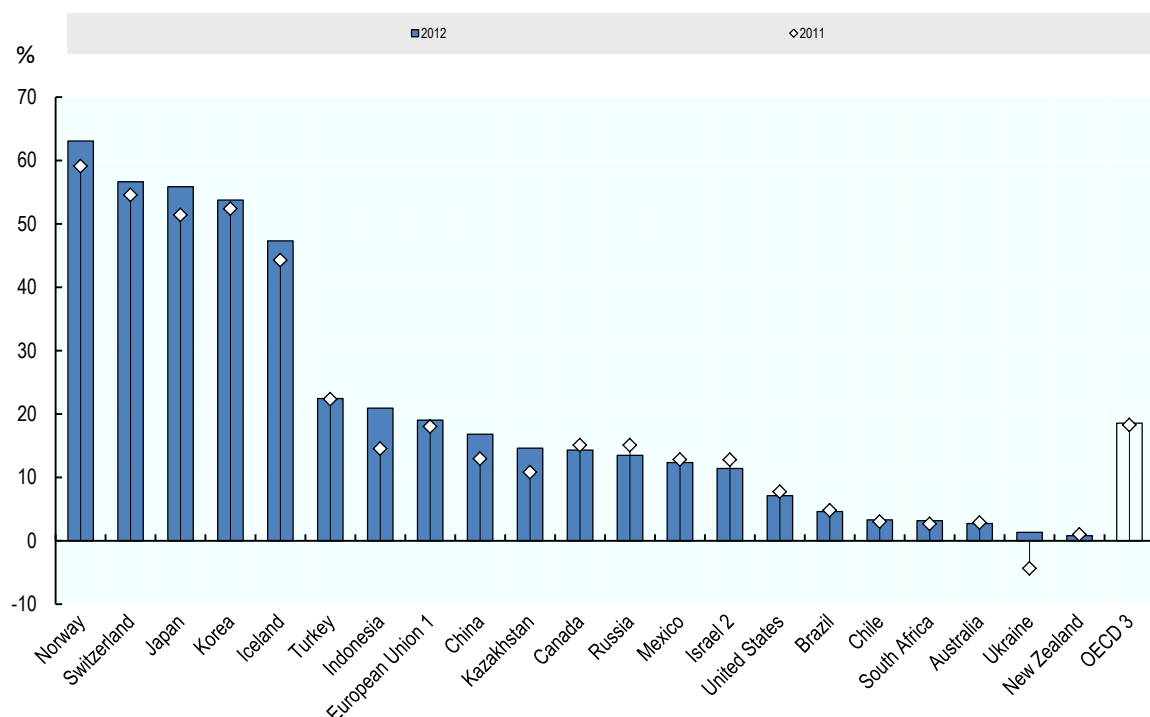
As already indicated, in view of its many existing bilateral agreements with the EU, Switzerland would “only” have to accept the EU's new commitments under the TTIP in order to gain access also to the US market for agricultural products. That may however be more difficult than it looks at first sight. For instance, why would the US accept to protect geographical indications from Switzerland when it has the greatest reservations in respect of this way of pro-

protecting a market, and no names of its own which it cannot protect as a collective trademark under the present legal system in Switzerland? The same goes for technical standards and production methods different from those in the EU which may come into the purview of the TTIP, including the above-described Swiss particularities for handling the Cassis-de-Dijon principle. A certain number of sectoral agreements which might not presently be covered in a Swiss-EU treaty might also be involved. However, the institutional questions are likely to be even more controversial: consultation or association in preparing and in acceptance of new rules (“comitology”), dispute settlement mechanisms and the implementation in Switzerland of such judiciary rulings. This latter point is extremely important because these questions are perceived in Switzerland as sovereignty issues. As a matter of fact, this latter issue had prevented the acceptance of the EEA and thereafter repeatedly marred deeper integration of Switzerland in the EU common market.

5.2 Domestic support

The good news, in a perspective of a TTIP extension to Switzerland, is the high probability that like for all other RTAs there will be no disciplines or limits to internal subsidies and, in particular, to measures with a price support effect. This is of crucial importance, even though according to OECD, the potentially most production and trade distorting forms of support have been reduced everywhere – driven by international market prices rather by explicit policy changes. As shown in Figure 1, even after several reform steps Switzerland (and Japan) still belong to the group of countries with the highest border protection and internal subsidies expressed in percentages of gross farm receipts.

Figure 1: Producer Support Estimates by country, 2011 and 2012
(Percentage of gross farm receipts)



Source: Agricultural Policy Monitoring and Evaluation 2013: OECD Countries and Emerging Economies © OECD 2013

The Producer Support Estimate (PSE) expressing the combination of these two types of support would of course be reduced by substantive tariff concessions under a TTIP extension. But Switzerland would remain free, within its WTO commitments, to provide its farmers with plenty of accompanying measures helping to absorb the shock of open borders. The experience of Austria after joining the EU in 1995 would be of interest in this respect. Their increasing dairy and wine exports had already been duly noted in Swiss farming circles, and it will undoubtedly be examined again if such a situation arises.

A “WTO Plus” Scenario for Swiss Agriculture

The type of support provided to Swiss farmers – a combination of border protection and a wide array of subsidy programmes – impacts on farm incomes, size and production. In 2010 we conducted a study under the assumption that in the long run Swiss agriculture will have to completely forfeit border protection, while domestic support will be restricted to fully Green

Box-compatible direct payments.⁴³ We used the normative mathematical programming model “S_INTAGRAL” (consisting of a ‘livestock farming’ and a ‘plant cultivation’ module, as is the practice of Swiss Government calculations) to illustrate possible effects for agricultural production and the corresponding agricultural income in the medium term (2012–2018) under such a “beyond WTO” scenario. We discussed the results with respect to the provision of the public goods stated in Art.104 of the Swiss constitution (see above). The potential effects for agricultural production in Switzerland are considerable. The agricultural sector in the low-lands would be especially affected, with dairy farming remaining the most viable sector. In order to survive commercially, a further drastic reduction in production costs would be unavoidable, and efforts to realise prime premiums would have to be intensified. Nonetheless, we also found that under a strictly ecological perspective, the effects are positive. An ecologically beneficial extensification can be anticipated. In particular, the extent of extensively used grass-land increases considerably, thereby also improving biodiversity. Moreover, the whole present agricultural surface will still be cultivated, chiefly because the high general direct payments per area of farmland prevent the abandonment of agricultural land. This last point is also important under a food security perspective because the whole production potential remains intact and allows Swiss farmers to contribute to national food security.

5.3 Regulatory matters and harmonised standards

As for the regulatory adjustments possibly required for a Swiss “accession” to TTIP, it is too early to gauge the extent of the additional effort Swiss agriculture would have to make within as well as in addition to the areas already covered in the many MRA contained in the Swiss-EU Agriculture Agreement 1999. For instance, production standards e.g. for wines and spirits, animal health, organic products and GI have been mutually agreed, and this will make such adjustments easier (see above at 3.1.4). But TTIP may foresee different standards and modalities in order to create a “common transatlantic agricultural market without common agricultural policies”.

A “deep” TTIP with a large number of harmonised EU and US production standards could therefore constitute a considerable, additional challenge – and a corresponding policy space reduction – on the assumption that Switzerland would try to benefit from the resulting common market conditions and cost reductions for Swiss producers and consumers.

⁴³ Robert Huber and Christian Häberli, A ‘Beyond WTO’ Scenario for Swiss Agriculture: Consequences for Income Generation and the Provision of Public Goods. in *Yearbook of Socioeconomics in Agriculture*, Swiss Society for Agricultural Economics and Rural Sociology, 2010, pp. 361-400. Methodology described on p.369. Accessible at <http://www.sagw.ch/en/agrarwirtschaft/Jahrbuch/Ausgaben/2010.html>

6 Conclusions

This study has been finalised in January 2015 i.e. at a time when the US, without TPA, was still camping on maximalist positions, and when the EU had detailed its objectives but also some of the intrinsic limits for such a negotiation – and the issues still subject to further consultation such as investor-state dispute settlement (ISDS – equally contentious in the TPPA).⁴⁴ Business as usual: these are the negotiation methods and a normal state of affairs two years after inception of this still very ambitious negotiation. Nonetheless, the chances for a successful conclusion are still totally open.

According to the WTI study of July 2014 the impact of the TTIP on Switzerland and on Swiss agriculture would at any rate be very strong. Depending on the “deep” or “shallow” extent especially in terms of regulatory harmonisation, and on the many possible and widely different adjustment scenarios open for Switzerland, both in contractual terms and by way of domestic policy adjustment and support measures, this study estimates that the variations of Switzerland’s GDP could range from -0.5% to +2.9% (see above at 4.2).

Political awareness of this important negotiation is starting to grow. While the Government seeks to maintain all options open and to pursue various reform programmes, today most stakeholders “wait and see”. Some industries have started working with their European industry associations e.g. for EU-US standard harmonisation projects.

My conclusions are based on the assumption that Switzerland will want to maximise the benefits available for third countries under the TTIP and to reduce its negative impact. This means that Swiss agriculture will have to be a key component in the various adjustment scenarios.

For agriculture the foreseeable TTIP implications can be detailed along the three WTO/AoA pillars and to some extent for regulatory matters. For the latter they remain rather tentative despite the fact that a number of MRA in the Swiss-EU Agriculture Agreement have already lifted many NTB.

⁴⁴ See the EC Commission Staff Report dated 13 January 2015 on its „Online public consultation on investment protection and investor-to-state dispute settlement (ISDS) in the Transatlantic Trade and Investment Partnership Agreement“. It summarises 150’000 submissions and foresees further consultations on the key question whether the TTIP can find the right balance between protecting investors and safeguarding the EU’s right and ability to regulate in the public interest (http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153044.pdf accessed 19 January 2015). According to Commissioner Malström a policy recommendation would follow in spring 2015. This recommendation, probably on the basis of the text of the Canada-EU-Trade Agreement (CETA) would then build the basis for the EU proposal on ISDS in the TTIP.

First and foremost, market access. It is already clear that even without a full tariff and quota liberalisation, the reductions in border protection will be substantial. In the absence of a WTO negotiation result the reductions in Switzerland will be preferential or autonomous but not MFN. Even so, overall political, economic and especially development policy considerations might then lead to an extension of the market access improvements to most if not all other countries. This can be negotiated in RTA or granted by way of an extension of non-reciprocal tariff preferences to developing countries (GSP) other than the LDC which already benefit from tariff-free quota-free access. The tariff reductions and, probably, constraints in import management possibilities alone will require a re-instrumentation of the present protection against competition from abroad. This is so because the Uruguay Round negotiations brought only moderate tariff reductions for the most important products. Moreover, Switzerland (as many others) made good use of what has come to be called “dirty tariffication”, and it continues to micro-manage imports of perishable products like fruits and vegetables, not to mention the reintroduced coupling of import quotas with domestic purchase (“prise en charge”). In my opinion TTIP adjustments in Switzerland, in other words, would require very substantial accompanying measures on the assumption that the agricultural surface and a highly qualified and motivated farm work force (i.e. Switzerland’s production potential under a national food security perspective) were to be maintained.

Second – and this is actually good news – domestic support. As explained above, TTIP will not deal with domestic farm support, even of the Amber Box type. Some Swiss “specialities” with a clear market-distorting impact might be questioned in the talks preceding any form of TTIP association formula and/or in the institutional arrangements found therein. Of course, a successful Doha Round conclusion – or a successful challenge to some of the Swiss price support measures – might change this side of the Swiss farm support system.

The third consequence will be the likely obligation to completely phase out export subsidies also for processed agricultural products, a convenient tool which has so far passed under the WTO radar. The Swiss commodities included in those products will no longer benefit from subsidies and therefore be substituted by imported raw materials, unless of course Swiss farmers are able to offer them at world market prices. For example, Swiss chocolate exports may then no longer contain a single domestic component except manufacturing knowhow. This not unlikely scenario already starts to be visible for dairy where the biggest Swiss producer starts using foreign inputs for its products “made in Switzerland” but sold outside Switzerland.

Finally, and here lies perhaps the greatest difficulty in assessing the TTIP impact, regulation and standards. Even though the Swiss-EU Agriculture Agreement of 1999 has come quite close to creating common market conditions for operators, differences remain. Some are, especially for practice realities, very large. TTIP might thus be an additional challenge, even where the EU succeeds in maintaining the substance of its regulatory framework (and its geographical indications). But TTIP might also bring some good news here as well, albeit at a price. For other reasons but with a similar effect the different definitions of “organic” production presently oblige Swiss organic chocolate producers to import milk-powder from the US when they want to export the end-product to America. Perhaps TTIP will allow an extension of the present bilateral EU-US MRA for organic products (and of the single certification window) to Swiss producers? Anyway, whether harmonised or not between the TTIP partners, the regulatory differences will be part of the “accession” negotiations with Switzerland (but not with the other EFTA countries members of the EEA). The Swiss Government will then be well-advised to negotiate the solutions – and later the differences – in full knowledge of regulations and practices on either side of the Atlantic (including at EU member state levels).

The present state of the TTIP negotiations and the next phases will require continuous attention for Swiss Government officials and stakeholders. There are different possibilities to observe, but also to cooperate within the consultation and information processes underway in both Washington and Bruxelles. Besides, sectorial industrial interests are best addressed through the all-European professional associations. The same goes for the pursuance of the interests of numerous non-governmental organisations (NGO) with a stake in the TTIP negotiation. Because of the frequent referenda in Switzerland our NGO often play a key role in political debates and reform decisions. This is also the case for the mostly defensive interests in the agriculture sector. While it is probably too early to envisage adjustment measures and voice financial compensation claims, a continuous review and monitoring of the Swiss agricultural production and policy framework needs to add a TTIP perspective as and with the information becoming available from the various negotiating fronts.

On the political chances for a successful transition, my assessment is cautiously optimistic. On the one side, the main Swiss farmer association (which had successfully brought Parliament to oppose governmental efforts to negotiate free farm and food trade with the EU) now refers to TTIP as one justification for its constitutional amendment proposal for more food

security which will be subject to a national vote in 2017 or 2018.⁴⁵ On the other side, the implicit discrimination potential of a “deep” TTIP for Swiss exporters of goods and services would constitute a very powerful argument in the political debate on whether to join an agreement which guarantees access to the world’s largest market albeit at the price of a very substantial agricultural border protection and regulatory policy space.

In conclusion, pro-active policy changes and new farm support tools may not be the best way forward – even though this worked quite well towards the end of the Uruguay Round, both for Switzerland and for the EU. I am not advocating change for change sake, or pretending that free trade is always best. Nonetheless, it seems quite clear to me that the TTIP has a sufficient success probability that these negotiations warrant close attention and support. Besides – and this is my very personal opinion – the political will required to “free” Swiss farmers can only be mustered with international nudging.

⁴⁵ *Neue Zürcher Zeitung* dated 15 January 2015, p.9.

Annex: Possible Scenarios for TTIP and Switzerland

	1. Tariffs only		2. Tariffs and Modest NTB agreement (A shallow NTB agreement)			3. Tariffs and Ambitious NTBs (A deep NTB agreement)		
	1.1 EU-US Agreement	1.2 EU-US and EFTA-US Agreement	2.1 EU-US Agreement	2.2 EU-US and EU-EFTA Agreement	2.3 EU-US and EU-EFTA Agreement (not tariffs)	3.1 EU-US Agreement	3.2 EU-US and EU-EFTA Agreement	3.3 EU-US and EU-EFTA Agreement (not tariffs)
EU-US agreement on tariffs	X	X	X	X	X	X	X	X
EFTA-US agreement on tariffs		X		X			X	
EU-US modest agreement on NTBs			X	X	X			
EFTA-US modest agreement NTBs				X	X			
EU-US deep agreement on NTBs						X	X	X
EFTA-US deep agreement NTBs							X	X
3 rd country Spillovers from NTB reductions						X	X	X

Source: World Trade Institute, Potential Impacts of a EU-US Free Trade Agreement on the Swiss Economy and External Economic Relations. SECO-commissioned study, published 14 July 2014, p.5. Main authors: Thomas Cottier (WTI), Joseph Francois (WTI, CEPR), Peter Egger (University of Zurich, CESifo), Miriam Manchin (UCL), Anirudh Shingal (WTI), Charlotte Sieber-Gasser (WTI). Located at [http://www.wti.org/research/publication/?tx_nccr_pi1\[show\]=753&cHash=1b1050b4cf9dea65e54e5abb16fe889d](http://www.wti.org/research/publication/?tx_nccr_pi1[show]=753&cHash=1b1050b4cf9dea65e54e5abb16fe889d) (accessed 15 January 2015)

List of Acronyms

AoA	Agreement on Agriculture (here: WTO)
CETA	Comprehensive Trade and Economic Agreement (between Canada and the EU)
DFQF	Duties-Free Quota-Free (tariff treatment)
EC	European Commission
EEA	European Economic Area (Agreement)
EU	European Union
FOAG	Federal Office for Agriculture
GATT	General Agreement on Tariffs and Trade
GDP	Gross Domestic Product
GI	Geographical Indications
GSP	Generalized System of Preferences (GATT)
ISDS	Investor-State Dispute Settlement
MFN	Most-Favoured Nation principle
MRA	Mutual Recognition Agreement
NCCR	National Centre of Competence in Research on Trade Regulation, based at the World Trade Institute of Bern University, Switzerland, under a grant of the Swiss National Science Foundation
NGO	Non-Governmental Organisations
NTB	Non-Tariff Barriers
OECD	Organisation for Economic Co-operation and Development
PEP	Proof of Ecological Performance (Switzerland)
PSE	Producer Support Estimate (OECD)
RTA	Regional Trade Agreements (here used synonymously with free trade agreements FTA)
SGS	Special Safeguard Clause (WTO)
USA	United States of America
USTR	United States Trade Representative
TISA	Trade in Services Agreement (under negotiation in the WTO)
TPA	Trade Promotion Authority
TPPA	Transpacific Partnership Agreement
TRQ	Tariff-Rate Quotas
TTIP	Transatlantic Trade and Investment Partnership Agreement
WTO	World Trade Organization