

**THE IMPACT OF
AGRICULTURE-RELATED
WTO AGREEMENTS ON THE
DOMESTIC LEGAL
FRAMEWORK OF THE
REPUBLIC OF KAZAKHSTAN**

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EXECUTIVE SUMMARY

Kazakhstan is about to complete negotiations to accede to the World Trade Organization (WTO). The accession process is leading to a number of significant changes in the agricultural sector. Among other things, accession requires major changes to the legal framework for agriculture. This paper analyses the implementation of WTO requirements in Kazakhstani laws affecting trade in agricultural goods, and assesses the scope for further improvement.

Kazakhstan's *Laws On Trade and On Regulation of Agriculture* provide the general framework for state regulation of the agricultural sector. These laws are not in conflict with WTO requirements, but they could do more to draw the implementers' attention to the relevance of WTO rules for state regulation of agriculture.

An examination of the *Customs Code*, the *Law On Land*, and related implementing legislation leads to the conclusion that Kazakhstan has made considerable steps towards lowering customs tariffs and fulfilling WTO requirements with regard to its general regulatory framework relevant to agriculture. Among the issues still to be resolved are an alcohol import licensing scheme, the status of the customs union with several CIS-states including Russia, and some customs procedure details.

Kazakhstan's legislation on animal and plant health, and food safety incorporates many of the principles stipulated by the WTO's *Agreement on Sanitary and Phytosanitary Measures*, but needs further elaboration in order to create a comprehensive framework ensuring implementation of all requirements. Provisions on the principles of necessity and least-trade-restrictiveness under all laws need to be revisited; other major deficiencies include language on risk assessment and international standards. Furthermore, some restrictions imposed upon imported goods seem to go beyond what is necessary to exercise effective sanitary and phytosanitary control. Legislation on technical standards and implementation of regulative transparency appear to implement the WTO's *Agreement on Technical Barriers to Trade* quite comprehensively.

Kazakhstan has considerably increased state intervention in the agricultural sector over the last years. While the total amount of support to agricultural production is still low by international standards, Kazakhstani agricultural policy includes a broad variety of support programmes to farmers, which are subject to reduction under the WTO's *Agreement on Agriculture*. This applies for example to tax breaks, input subsidies, machinery modernization, short term liquidity support, crop insurance support, and transport subsidies. The activities of the *State Food Contract Corporation* and *Malonimderi-Corporation* also include domestic support subject to reduction. SFCC's and *Malonimderi's* trading activities further raise some issues of incompatibility with GATT Art. XVII, on State Trading Enterprises. It is important to consider the entire range of support measures when drawing up WTO support reduction commitments, in order to engage in realistic commitments. Furthermore, several support programmes could be re-designed so as to meet conditions for exemption from reduction commitments under the WTO Green Box.

Kazakhstan's *Law On Selection Achievements* seems to be in compliance with the WTO's *Agreement on Trade-Related Aspects of Intellectual Property*, but Kazakhstan might want to take into account further, concerns of access to genetic resources intrinsically linked to plant variety protection.

As Kazakhstan intends to boost agricultural export and to increase self sufficiency in higher value agricultural goods and foodstuffs, WTO requirements and international standards are likely to be a continuous determinant of Kazakhstani agricultural policies. While the ultimate aim will usually be the implementation of an environment which is non-discriminatory and propitious to economic activities in the agricultural sector, a sound legal framework can contribute in various ways to achieve that objective.

1 INTRODUCTION

1.1 The agricultural sector in Kazakhstan economy

This section will give an overview of the agricultural sector in Kazakhstan. Kazakhstan has traditionally been a surplus producer of agricultural goods. It is the 9th largest country in the world in terms of territory, and has approximately 25 Mio hectares of arable land and 61 million hectares of pastures.¹ Traditionally, nomads used steppe land predominantly for cattle growing, during the 1950s and 1960s large acreages of land were brought into grain production and supplied large parts of the Soviet Union.

After independence in 1991, there was a significant contraction in agricultural production due to disruptions in production and trading structures. In 1998, grain production was only 26 % of 1992 levels, cattle and sheep herds were only 44 respectively 26 % of their 1992 levels.² As a result, food security in Kazakhstan was weakened, and considerable parts of the population do not have access to adequate nutrition.³ Since 1998 this trend reversed and agricultural output increased at an average annual rate of 8 %, most of which is due to crop production increases averaging 19.5 %. Today, agriculture contributes 8-11 % of Kazakhstan's GDP according to different sources; it employs 17-22 % of its economically active workforce, and on the whole nearly half of the country's households are involved in agriculture in one way or another.⁴ After the country's booming extractive sector, it is the second most important economic sector. The main products are grain—Kazakhstan is now the sixth largest grain producer in the world—milk products and potatoes.⁵ Kazakhstan is a net agricultural goods exporter. Main exports in 2002 were in wheat (67,3 %)—Kazakhstan is the 8th largest wheat exporter in the world—cotton lint (12,2 %) and barley (7 %). The export of higher-value agricultural products is, however, insignificant. For sugar, processed foods and oilseeds there is a high import surplus. Independence has led to a re-sourcing of trade flows from the former Soviet Union to Asian and Western countries.

Exports to Middle East and European countries have increased and the potential to export more to these regions has been identified.⁶ For purposes of shipment to these regions, in 2001 a wheat grain terminal on the Caspian Sea was built, and in 2005 another grain terminal in Ventspils/Latvia should be completed.

According to several studies, Kazakhstan's main comparative advantage is its large supply with land, and it is able to produce grain at world market prices if it opts for extensive farming practices.⁷ It has the potential of significantly boosting its agricultural production in this sector, but also in other sectors like sunflower seed oil, margarine, uncooked or stuffed pasta, beer, beverages, in which exports are still at a low level.⁸ Significant restraints for exporting activities are high distribution costs caused by inefficiencies and by high transport costs due to the country's size and its remoteness with regard to major markets, difficulties to meet international standards, especially in processed agricultural goods, and limited access of farmers to knowledge.⁹

¹ Vorondina (2004a); Meng et al (2000) p. 707.

² Goletti and Chabaud (2000) p. 665.

³ Babu/Rhoe (2001); Baydildina et al. (2000) pp. 738-740; Pandya-Lorch (2000) p. 640.

⁴ Voronina (2004a); cf. also Worldbank (2005).

⁵ FAO (2004); Intracen (2002b) p. 47.

⁶ Intracen (2002b).

⁷ Meng et al. (2000) pp. 714, 715; cf. also Worldbank (2005) p. 2.

⁸ Intracen (2002b) pp. 30-42.

⁹ Meng (2000); cf. also Worldbank (2005) pp. 18-23

Major agricultural products (1000 tons)	Major exports in agricultural and processed agricultural goods (share in export value)	Major imports in agricultural and processed agricultural goods (share in import value)	Agricultural goods with export potential (according to Intracen 2002b)
Wheat (12,700) Milk products (4,061) Meat (297)	Wheat (67.3 %) Cotton (12.2 %) Barley (7.0 %)	Sugar (21.6 %) Chocolate Products (8.7 %) Food Preparations (7.8 %)	Grain Sunflower seed oil Margarine Pasta Beverages

Sources: FAO (2004), Intracen (2002b) pp. 30-42

Kazakhstan's agricultural policy engaged in a major privatization programme of agricultural land in the 1990s, and as of 1997, almost 97 % of agricultural production entities were privately owned.¹⁰ As a result, in 2003 about 40 % of arable land was owned by family farms with an average size of 74 hectares, while 60 % was in the hand of bigger agricultural enterprises with an average size of 2,649 hectares.¹¹ After eliminating most state intervention, more recent government policies have concentrated on efforts to actively rebuild production and distribution structures in the agricultural sector in order to cope with disruptions caused by economic reforms.¹² The government's strategy focuses on import substitution in the livestock sector, but it also promotes export orientation (e.g. grain and higher value processed goods).

1.2 Kazakhstan's accession to the WTO

Kazakhstan applied for accession to the WTO in January 1996. It has gone through various steps of the WTO accession procedure, which is largely governed by rules emanated from previous accessions.¹³ Art. XII of the *Agreement establishing the WTO* merely disposes that countries may accede on specific terms to be negotiated between WTO Members and the applicants. In practice, the procedure consists of multilateral negotiations taking place in a special working party which is

open to interested parties, and in bilateral negotiations between the applicant and single WTO Members. In the working party, the applicant is required to present a memorandum on its foreign trade regime, on proposed changes to implement WTO commitments, and to answer questions from WTO Members. Kazakhstan's Memorandum was presented in September 1996,¹⁴ and the Working Party the questions of WTO Members in seven sessions so far.¹⁵ Among those questions, some were aimed at Kazakhstan's import and export procedures, SPS and TBT regimes, as well as its financial support to agriculture. A first draft of the Working Party Report, which summarizes the discussions and contains Kazakhstan's specific commitments, was presented in June 2005.¹⁶ In the course of negotiations, several demands have been made on Kazakhstan to change existing laws or to enact new legislation.¹⁷ By Government Order No. 56 of 12 January 1996, the Government adopted a legislative drafting agenda which provided for the adoption of 25 new laws, the re-drafting of 13 laws and the amendment of seven further laws. In the following years, a substantial number of new laws have been adopted on issues ranging from subsidies, trade safeguards, government procurement to intellectual property rights and customs, petroleum and natural resources laws. In parallel to Working Party discussions, from mid- 1998 Kazakhstan started negotiating

¹⁰ Suleimenov/Osam (2000), p. 683.

¹¹ Worldbank (2005), p. 4.

¹² cf. e.g. analyses and advices by Meng et al. (2000) pp. 715-6; Suleimenov/Osam (2000) p. 683

¹³ Hoekman/Kostecki (2001), pp. 65-68; Michalopoulos (1998); Langhammer/Luecke (1999).

¹⁴ WTO Document WT/ACC/KAZ/3.

¹⁵ WTO Documents WT/ACC/KAZ/6, WT/ACC/KAZ/11, WT/ACC/KAZ/14, WT/ACC/KAZ/22.

¹⁶ WTO News Item of 8 June 2005.

¹⁷ cf. WTO Documents WT/ACC/KAZ/3, pp. 26-28; WT/ACC/KAZ/17; WT/ACC/KAZ/34.

about the level of commitments on bound customs tariffs and agricultural support in bilateral negotiations with single WTO Members.¹⁸ The main contentious issues concerning agriculture in these negotiations are the level of domestic support, the elimination of export subsidies, and Kazakhstan's wish to bind import tariff rates for a number of sensitive product categories at a level higher than the current applied rate.¹⁹ While market access negotiations are usually conducted only with a few interested WTO Members, all Members will profit from the resulting commitments due to the Most-Favoured-Nation Principle (GATT Art. I). Moreover, market access negotiations with Japan have been finalized in June 2005.²⁰

The outcome of accession negotiations will be fixed in a protocol of accession, which will include a general commitment by Kazakhstan to abide by WTO rules, a schedule indicating commitments on bound tariffs and agricultural support for single products, and specific commitments on concerns discussed during negotiations. The protocol must be approved by a 2/3 majority of WTO Members in the General Council and must be ratified by the applicant. The scope of accession commitments required by incumbent WTO Members has increased considerably over the last years.²¹ While one could think that an applicant should join under the same terms that current Members have accepted, recent applicants like Kyrgyzstan or China were asked to make much more ambitious commitments. For example, they were asked to sign the *Agreements on Government Procurement*,²² which as a plurilateral agreement is not part of the WTO's single undertaking and is signed only by ca. 40 out of 148 current Members, to commit themselves to bind all tariffs and to eliminate all export subsidies,²³ and to make commitments on issues arguably not covered by existing WTO rules like privatization and private land

ownership.²⁴ Further issues to be determined by negotiators include the duration of the period Kazakhstan is granted to fully implement WTO commitments.²⁵ In case WTO accession and the implementation of new multilateral rules will overlap, it will also be an issue for discussion, to what extent new Members will be bound by the results of multilateral negotiations.

1.3 Kazakhstan's framework for agricultural trade policy

The framework for Kazakhstan's agricultural trade policy is laid out in two Laws—the *Law On Trade* No. 544 of 19 April 2004 and the recent *Law On State Regulation of development of agriculture* of 12 July 2005. In this section, it will be examined if these laws provide a framework for agricultural trade policy corresponding to WTO requirements.

The *Law on Trade* establishes the principles and organizational basis for state regulation of trade. Art. 3 spells out the objectives of the law, which include Kazakhstan's integration into the world trading system (Art. 3.1(iv)) and protection of domestic producers (Art. 3.1(v)). It also lays out the basic principles for trade, among them, that the state or any of the public bodies will not interfere with markets or commercial activities (Art.3.2 (ii)), that the state guarantees indiscriminate and equal access to all commercial sectors and, the protection of rights and legitimate interests of all traders (Art.3.2 (i) and (viii)). Chapter 4 outlines the basic instruments of government regulation of foreign trade, (i.e. tariffs, non-tariff regulation, quantitative restrictions, tariff quotas, and state trading monopolies). Chapter 6 establishes specific requirements for single commercial activities.

The *Law On Trade* recognizes the principles of market economy and the objective to facilitate the integration of Kazakhstan into the world economy, which fits well with WTO's objectives. On the face of it, the law is keeping with the fundamentals of WTO law, particularly non-discrimination. It is rigorously neutral as regards the favours it grants to domestic as

¹⁸ European Union, USA, Japan, Canada, Australia, Poland, Latvia, Switzerland, Bulgaria, Latvia, Georgia, Turkey, Republic of Korea, Brazil, Cuba and Mexico; cf. WTO Document WT/ACC/KAZ/16 of 5 June 1998.

¹⁹ Kasabekova (2004), p. 2.

²⁰ Joint Statement on Kazakhstan's Bilateral WTO Accession Negotiations with Japan of 14 June 2005.

²¹ Hoekman/Kostecki (2001), pp. 66-67

²² *Report of the Working Party on China's WTO Accession*, WTO Document WT/ACC/CHN/49 of 1 October 2001, para. 339.

²³ e.g. *Accession Protocol of China*, WTO Document WT/L/432 of 23 November 2001, para. 10.3

²⁴ Lanoszka (2001); Langhammer/Luecke 1999), p. 7; Hoekman/Kostecki (2001), p. 67

²⁵ Art. XIV:2 WTO does not provide for an implementation period. While upon Kyrgyzstan's Accession, no implementation periods were provided for, China did negotiate transitional periods for single commitments, cf. e.g. *Accession Protocol of China*, para. 13.4.b

opposed to foreign trades. In some parts, the law is explicitly aimed at affording protection to domestic industries and provides for instruments of trade regulation which could be inconsistent with WTO obligations like quantitative import restrictions. This might be explained by the Law's nature as a framework law to be implemented by further laws. These laws would spell out conditions and limits of Government intervention with regard to single issues more in detail. Yet if the *Law On Trade* should really function as a comprehensive framework for government regulation of trade, it might be advisable to include more explicit references to WTO rules and to mention the limits of government intervention derived from them in the Law itself.

The *Law On the State regulation of Development of agriculture and rural territories* of 12 July 2005 (the *Law On regulation of agriculture*) establishes the foundations for Kazakhstan's agricultural policy. According to Art. 3 of the Law, state regulation of agriculture aims at developing social and technical infrastructure and favourable living conditions in rural territories, food safety, sustainable economic and social development of agriculture and rural territories, and a competitive agricultural sector. Among the Law's principles are conformity to international agreements, transparency, supporting and developing competitive advantages for domestic agriculture, protection from unfair competition, maintaining state support and developing an ideal form of interaction between the subjects of agricultural production. Chapter 3 of the Law spells out various measures of agricultural policy including loans, subsidies, market regulation, sanitary and phytosanitary measures, rural development programmes, information and marketing, science and professional training.

The *Law On the State regulation of Development of agriculture and rural territories* reflects the new Kazakhstani agricultural policy approach. After a substantial contraction of agricultural production in the 1990s, the Government changed its policy and decided that developing the agricultural sector would require a sound regulatory framework, but also a certain amount of state support. The Law is drafted in neutral terms and establishes the principle of conformity to international agreements, which would include the WTO. According to its objectives and principles, the Law is supportive to agriculture and rural development and competitiveness in

Kazakhstan without shielding agricultural producers from international competition. State action to protect domestic producers restricted to protection from unfair competition, which can be interpreted to refer to anti-dumping or anti-subsidies measures admissible under the relevant WTO Agreements. The WTO's rules on quantitative regulations, health regulation and agricultural support affect some of the agricultural policy measures spelt out in the Law, but none of the measures enumerated by the Law which *a priori* violates WTO requirements. Again, much will depend on implementation, which will be examined in detail below.

To sum up, the *Law On Trade* and the *Law On regulation of agriculture* do contain some of the principles established by the WTO Agreements, and do not contradict WTO requirements, but they fail to draw implementers' attention on the importance of respecting WTO rules.

2 INTERNATIONAL FRAMEWORK

2.1 Overview of the Nature and Scope of WTO Obligations relevant to Agriculture

Although the WTO is not an agricultural organization a number of WTO agreements affect in one way or another trade in agricultural products. These agreements include: the *General Agreement on Tariffs and Trade*, the *Agreement on Sanitary and Phytosanitary Measures*, the *Agreement on Technical Barriers to Trade*; the *Agreement on Agriculture*; the *Agreement on Subsidies and Countervailing Duties*, the *Agreement on Antidumping*, the *Agreement on Safeguards*. Collectively, these agreements reflect the binding commitments of WTO Members. In this section, an outline of these obligations will be given.

Tariffs, quotas and other border measures

The *General Agreement on Tariffs and Trade* (GATT) prohibits quantitative restrictions and limits Members' right to impose tariffs. According to Art. XI, Members have to eliminate all kinds of quantitative restrictions. The effect of this is that export and import quotas or restrictions, and other measures that could be employed to limit trade flows and trade volumes are not permitted. According to Art. II, Members must not impose tariffs on

imports and exports exceeding the tariff levels established in the schedules annexed to the agreement. For each product, these schedules reflect the tariff commitments negotiated between Members.

The initial commitment undertaken by all Members with regard to tariffs, but also other trade barriers is to grant most favoured nation treatment to goods from all WTO Members (Art. I). This means that they are required to accord the same advantages, favours, privileges or immunities to any "like products" regardless of their country of origin. Art. I requires that this should be fulfilled immediately and unconditionally. Essentially, no WTO Member is allowed to discriminate between products originating from different WTO Members.²⁶

As most tariffs are based on the value of an imported product, GATT Art. VII and the *Understanding on Customs Valuation* establish detailed requirements for the method of calculating this value which Members have to implement in their customs legislation, GATT Art. VIII contains some basic rules for customs fees and formalities.

Domestic regulation

Along with tariffs and quotas, internal regulation and taxation of goods can also be an important barrier to trade. Accordingly, GATT Art. III establishes that WTO Members must grant national treatment on internal taxation and regulation. They are required to accord imported goods "treatment no less favorable than that accorded to like products of national origin". This refers to all laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of imported goods (Art. III:4). In addition, WTO Members must not impose on imported products any internal taxes or other internal charges of any kind in excess of those applied directly or indirectly to like domestic products (Art. III:2).

In the field of trade in agricultural goods, government action to ensure food safety and to protect animal or plant health from diseases has a particular potential to disrupt trade. It is subject to specific requirements established by the **Agreement on Sanitary and**

Phytosanitary Measures (SPS Agreement).

Examples of SPS measures may include requirements that a particular product, for example animals or plants for food purposes, should come from a disease free area, requirements that a particular product be inspected, or be subjected to specific method of processing or treatment prior to release to the market or prior to export, for example banning smoked fish; the requirement to maintain pesticide residues only at certain allowed levels, as well as requirements that only certain additives may be used in processing or preservation; and the quality and safety of exported products. The SPS-Agreement recognises the right of every Member to adopt such measures (Art. 2.1) and to establish their appropriate level of protection (Art. 5.4). However, the SPS-Agreement establishes a number of requirements for such measures:

- Members should play part in international coordinative work on standards (Art. 3.4); and national sanitary and phytosanitary measures should be based on relevant international standards (Art. 3.1); in this regard, standards set by the *World Animal Health Organization* (OIE), the *International Plant Protection Commission* (IPPC), and the *Codex Alimentarius* are particularly relevant.
- If SPS measures are not based on international standards, they should be based on scientific evidence or appropriate risk assessment (Art. 2.2, 3.3, 5) should not arbitrarily or unjustifiably discriminate (Art. 2.3), should not go beyond what is necessary to protect human, animal or plant life or health (Art. 2.2), and should be not more trade-restrictive than required to achieve the level of protection established by a Member nor be a disguised restriction on trade (Art. 5.6);
- According to the equivalence principle, the importing country should accept the standards in the exporting country as equivalent for health protection even though they may be different (Art. 4);

²⁶ Exceptions notified by incumbent Members upon new Members' accession may nevertheless exist according to WTO Art. XIII:3.

- Members must ensure that all SPS-regulations are published; before the adoption of new regulations they must provide an opportunity for consultations (Art. 7, Annex B);
- control, inspection and approval procedures must abide by certain due process requirements (Art. 8, Annex C)

Another important field of state interference with international trade in agricultural products are requirements on product quality and labelling. Such issues are dealt with by the **Agreement on Technical Barriers to Trade (TBT Agreement)**, which refers to international standards and the principle of equivalence, and states that technical regulations must not be more trade restrictive than necessary to fulfil a legitimate objective. In addition, the TBT reiterates a strict standard of non-discrimination.

Agricultural support and market policies

In order to reduce trade-distortive effects of **agricultural subsidies**, the *Agreement on Agriculture (AoA)* limits a Member's right to grant export subsidies and domestic support for agriculture to the volume bound in each Member's schedules as annexed to the Agreement. Only certain subsidies, which are recognized to have no or at most minimal trade distorting effects (so called *Green Box*-subsidies) may be granted without limitation. Domestic subsidies are furthermore actionable subsidies according to the *Agreement on Subsidies and Countervailing Measures*, if they cause serious prejudice to the interests of another Member, e.g. if they have certain defined substantial trade-distortive effects. The **Agreements on Antidumping, on Safeguards and on Subsidies and Countervailing Measures (SCM Agreement)** establish detailed requirements which WTO Members must respect when they intend to introduce temporary duties or restrictions on imports which they consider to be dumped or subsidized in a way that affects their domestic industries.

GATT Art. XVII establishes special rules to ensure that **State Trading Enterprises** act in a manner consistent with GATT obligations on non-discrimination. According to Art. XVII 1(b), such enterprises are required to make purchases or sales only on the basis of commercial considerations.

Intellectual Property

The **Agreement on Trade-Related Aspects of Intellectual Property (TRIPS)** establishes obligations with regard to Members' systems of protecting intellectual property in their territory. Agriculture is particularly affected by Art. 27.3(b) of the TRIPS, which makes it mandatory for WTO Members to provide for a system of plant variety protection.

The WTO Agreements are subject to changes as agreed upon by Members in multilateral trade negotiation rounds. In the Doha Development Round, Members are discussing e.g. reductions of tariffs and subsidies on agricultural goods. New WTO Members will be bound by the negotiation outcome as any current Member.

2.2 The role of domestic laws in implementing WTO commitments

The WTO is commonly characterized as a rules-based international trading system. Nevertheless, WTO Members must not necessarily implement their commitments by way of legally binding domestic laws. With regard to the implementation of WTO commitments on agriculture, the role of domestic laws varies considerably.

- It is fairly limited for tariff reduction commitments. As an example, following trade negotiations during the Uruguay Round, tariff reduction commitments for industrial products in most countries were not effected through legislative changes. Reductions or increases below the bound rates were simply reflected in annual appropriations bills or budget laws.
- The implementation of WTO principles such as most-favoured-nation (MFN) and national treatment (NT) is usually also left to daily administrative procedures or policies of customs authorities and other government departments. Taking into account these principles in relevant legislation (for example in tax laws) would usually take the form of rigorously neutral phrases, in order to avoid their interpretation as some kind of advantage to products or producers from one country over others.

- WTO Agreements establishing more detailed rules for national policies on a specific issue, like the *SPS*- and *TBT Agreement*, usually require more extensive changes to domestic laws. Most national legislation that has been drafted by WTO Members or other acceding countries since 1994 and that has any impact on the agricultural sector, especially in the area of food safety, plant and animal health, has drawn inspiration from the desire to comply with the *SPS Agreement* and international standards it refers to. Another example of specific multilateral commitments of this nature in the agricultural sector would be TRIPS Art. 27.3(b), which makes it mandatory for WTO Members to provide for a system of plant variety protection. Finally, substantial reform of legal rules is required with regard to customs valuation, anti-dumping and anti-subsidies action.
- Transparency obligations, which require Members to make trade regulations accessible for business operators and other Members, have implications for Members' practice of public access to legal documents.

But beyond law amendments strictly required by WTO Agreements, domestic legal reform in the process of accession may also be supportive to the broader goals linked to WTO accession, i.e. the promotion of economic development in several ways.²⁷ An important effect of WTO agreements is that they enshrine Members' policies with regard to market access and other trade and economic policies into legally binding commitments and thereby provide for a sort of lock-in for the future, which enhances credibility of government policies and creates a more secure business environment. While this occurs primarily by way of internationally binding rules enforceable under the WTO's dispute settlement body, a transposition of international commitments into domestic laws can reinforce these effects by ensuring that commitments are respected by national administrations and policy-makers. Reform of sectoral legislation may furthermore contribute to create new rules and institutions which are

supportive to private business activities and economic growth. For example, the requirements enshrined in the *SPS*- and *TBT Agreements* to base domestic regulation on international standards provide an opportunity to induce the adaptation of domestic production patterns to international standards, which in turn improves access of domestic goods to foreign markets. Finally, implementing WTO requirements by way of domestic law reform may increase regulatory environment transparency for business operators. These considerations show that even where WTO commitments do not strictly require implementation by way of legal reform, this may nevertheless be a preferable option.

On the other hand, experience has shown that there are several limits and pitfalls to legal reform.²⁸ Mere changes of legal texts are unlikely to automatically induce respective changes in administrative practice, and drafters must be well aware of existing legal and administrative culture. Furthermore, a lack of resources and technical equipment often severely restricts implementing bodies' capability to put new rules into practice. Finally, the adaptation of domestic laws involves substantial costs. As an example, drafting the necessary laws and developing enforcement capability in Tanzania to implement the TRIPS agreement has caused estimated costs of around US\$ 1.5 Million until 1996.²⁹ Argentina spent over US\$80 million to achieve higher levels of plant and animal sanitation. According to a Worldbank Study, Hungary spent over US\$40 million to upgrade the level of slaughterhouses sanitation, Mexico spent over US\$30 million to upgrade intellectual property laws and enforcement, and customs reform projects can easily cost \$20 million.³⁰ This shows that the drafting of new laws or the revision of existing ones is an expensive exercise for affected countries, although it can often be undertaken with the expert assistance of competent international organizations or through bilateral assistance from trading partners.

It can be concluded that WTO rules require legal reform to a varying extent and that legal reform may be propitious to a country's economic development, but may also encounter considerable difficulties. This article focuses on an analysis of Kazakhstan's laws,

²⁷ cf. on WTO Accession benefits Langhammer/Luecke (1999) pp. 25-31; Drabek (2004) p. 1030; Michalopoulos (1998) pp. 2-5; UNCTAD (2001), p. 195.

²⁸ cf. Holmes (1999); DeLisle (1999); Gupta/Kleinfeld/Salinas (2002)

²⁹ UNCTAD (1996) p. 21.

³⁰ Finger/Schuller (1998) p. 25.

and proceeds on the assumption that incompatibilities between domestic laws and WTO requirements are usually a strong indicator for a similar issue in their practical application. But it is important to stress that the creation of a regulatory framework promoting economic development and respecting WTO rules requires much more than some changes on the page.

3 NATIONAL FRAMEWORK: LEGISLATIVE & INSTITUTIONAL ANALYSIS

3.1 Foreign Trade laws relevant to Agriculture

This section will address several issues concerning Kazakhstan's foreign trade regime which are relevant to agricultural goods. Among the relevant laws are the *Law On Trade* and the *Customs Code* of 5 April 2003.

3.1.1 Customs duties

Art. 16 of the *Law On Trade* provides for the levying of tariffs in accordance with Kazakhstani laws and international agreements. According to Art. 12.1.2 of the *Law On Regulation of Agriculture*, protection of the domestic markets by customs duties may be used to regulate agricultural markets in order to maintain food security and support domestic commodity producers. Customs duties are levied on the basis of Art. 292 of the *Customs Code*. Customs rates are laid down in Government Order No. 1389 of 14 November 1996 *On customs duties rates on imported goods*, as amended by Government Order No. 27 of 27 December 2004. Kazakhstan has a fairly liberal external trade regime.

It imposes no export tariffs. Although Art. 19 of the *Law on Trade* provides for a power to apply tariff quotas, there are currently no quotas in place.³¹ In 1995, import duties were levied on 70-75 % of the goods imported into Kazakhstan, the overall trade-weighted average import tariff rate dropped from approximately 12 % in 1995 to 7.9 % in 2004.³² Tariffs for single product were brought much further down, e.g. the trade-weighted average import rate for beverages (Chapter 22 of the HS-Nomenclature) dropped from 185 % in 1995 to 83 % in 1996. The average import tariff rate on agricultural products in 2004 was 8 %, the 4th lowest in the world after Australia, New Zealand and Estonia, revenue from import duties constituted less than 2 % of total government revenue.³³ Yet the low average import tariffs are due *inter alia* to the fact that trade with Russia - Kazakhstan's major trade partner -- is duty-free (see below). Furthermore, Kazakhstan continues to use customs duties as an instrument to support the development of its domestic agricultural sector. For example, it increased customs duties on poultry imports in February 2003, in order to protect and support domestic producers in the countries' poultry farming sector, in which imports have a significant market share and Kazakhstan pursues a strategy of import substitution.³⁴

³¹ WTO-Documents WT/ACC/KAZ/3, p. 27.

³² WTO-Documents WT/ACC/KAZ/3, p. 3; US Trade Representative (2004), p. 343; Classification of goods for customs purposes is made according to the World Customs Union's Harmonized System HS 96, cf. WTO-Documents WT/ACC/KAZ/11, Question 20.

³³ Kasabekova (2004), p. 1.

³⁴ Chukreyeva (2003), cf. also Government Order No. 1548 of 17 October 2000 *On the introduction of temporary protective measures on the import of certain foodstuffs*.

<i>HS Chapter</i>	<i>Average Import Tariff Rates (1996)</i>	<i>Basic MFN-rate</i>
Chapter 1 (live animals)	5.00%	5
Chapter 2 (meat, edible meat offal)	27.72%	15 (many higher)
Chapter 3 (fish and crustaceans, molluscs and other aquatic invertebrates)	10.12%	10%
Chapter 4 (dairy produce; birds' eggs, natural honey, edible products of animal origin, not elsewhere specified or included)	15.50%	15%
Chapter 5 (Products of animal origin not elsewhere specified or included)	15.00%	10%
Chapter 6 (live trees & other plants; bulbs, roots & the like; cut flowers & ornamental foliage)	3.41%	5% (many higher)
Chapter 7 (edible vegetables and certain roots and tubers)	15.00%	15%
Chapter 8 (edible fruit and nuts; peel of citrus fruits or melons)	11.87%	10% (many lower)
Chapter 9 (coffee, tea, mace and spices)	9.28%	5%
Chapter 10 (cereals)	5.40%	5%
Chapter 11 (milling products; malt; starches; inulin; wheat gluten)	10.04%	10%
Chapter 12 (oil seeds & oleaginous fruits; miscellaneous grains; seeds and fruit; industrial or medicinal plants; straw & fodder)	0.00%	0%

<i>HS Chapter</i>	<i>Average Import Tariff Rates (1996)</i>	<i>Basic MFN-rate</i>
Chapter 13 (lac; gums, resins and other vegetable saps & extracts)	5.00%	5%
Chapter 14 (vegetable plaiting materials; vegetable products not elsewhere specified or included)	15.00%	15%
Chapter 15 (animal or vegetable fats and oils and their cleavage products; prepared edible fats; animal or vegetable waxes)	11.28%	20% (many lower)
Chapter 16 (preparations of meat, of fish or of crustaceans, molluscs or other aquatic invertebrates)	19.03%	15% (many higher)
Chapter 17 (sugars and sugar confectionery)	14.19%	0-30%
Chapter 18 (cocoa and cocoa preparations)	20.45%	5%
Chapter 19 (preparation of cereals, flour, starch or milk; pastry cooks' products)	23.90%	15%
Chapter 20 (preparations of vegetables, fruit, nuts or other parts of plants)	17.01%	15% (many lower)
Chapter 21 (miscellaneous edible preparations)	12.14%	15%
Chapter 22 (beverages, spirits and vinegar)	83.06%	0-25%, many volume-based
Chapter 23 (residues & waste from food industries; prepared animal fodder)	16.06%	5%
Chapter 24 (tobacco & manufactured tobacco sub)	19.91%	5-30%

*Trade-Weighted Average Import Tariff Rates (1996), WTO-Document WT/ACC/KAZ/3
MFN-Rates according to Government Order No. 1389 of 14 November 1996 as changed
by Order No 27 of 2005 (exceptions not mentioned)*

While the underlying rationale of GATT is that tariff reduction is beneficial to every country, GATT recognizes a Members' right to impose customs duties to protect domestic markets, unless they do not exceed the negotiated commitment levels. Therefore, it will depend on the outcome of market access negotiations if

current tariffs have to be reduced further, or if Kazakhstan will be able to raise them to higher levels in the future. During accession negotiations in 2001, Kazakhstan offered to reduce more than 80 % of the tariff nomenclature for agricultural products significantly, and to diminish the number of tariff

peaks.³⁵ At the same time, it intended to negotiate a number of sensitive product categories such as meat, dairy, sugar, oil at a level higher than the acting tariffs in order to support its strategy of import-substitution for reasons of food security.³⁶ In May 2004, a Kazakhstani official noted a significant progress in bilateral negotiations on agricultural tariffs.³⁷

3.1.2 Preferential trade arrangements

Kazakhstan maintains several preferential trade agreements. It is party to a Customs Union with Russia, Belarus, Kyrgyzstan and Tajikistan covering 100 % of trade, on which more recently the *Agreement on a Eurasian Economic Community* (EAEC) signed in October 2000 has been based.³⁸ However, the customs union is implemented only partially. Duties within the Union were abolished completely on trade with Russia, but Kazakhstan introduced high customs duties on trade with Kyrgyzstan, because it feared that trade was deflected to Kyrgyzstan due to strong Kyrgyz tariff reductions upon WTO accession and weak border controls between both countries. A common customs tariff for trade with third countries, which would be necessary to abolish controls on the origin of preferential goods and to create a real Customs Union, exists only to a small extent. According to Decision No. 46 of the Counsel of Heads of Governments of 26 February 1999,

existing conformity in applied tariff rates between Belarus, Kazakhstan and Russia was approved as a basic list of a Common Customs Tariff. This list includes approximately 60 % of tariff items.³⁹ Customs harmonization with Tajikistan and Kyrgyzstan is even less advanced.⁴⁰ A further *Agreement on a Common Economic Area* between Russia, Belarus, Kazakhstan and Ukraine of 19 September 2003 entered into force on 20 May 2004 has not yet produced any operative results.⁴¹ Kazakhstan also maintains bilateral free trade agreements with all CIS-countries except Turkmenistan.⁴²

Customs unions and free trade agreements are in tension with the Most-favoured-nation principle enshrined in GATT Art. I, but GATT Art. XXIV:4-8 recognizes that such agreements may be supportive to free trade and therefore conditionally admits them.⁴³ Agreements must cover substantially all trade between the countries concerned, and barriers for trade with third countries must not be on the whole more restrictive than before.⁴⁴ With regard to the Customs Union between the EAEC-Countries, it is questionable whether it respects the "substantially all trade"-criterion. GATT does not require 100 % of trade to be covered by such an agreement,⁴⁵ but it would appear that a Common Customs Tariff limited to 60 % of commodity items is far from constituting substantially all trade according to

³⁵ UNCTAD (2001), p. 198.

³⁶ Kasabekova (2004) p. 2. This is also in line with the proposal of several countries declaring themselves economies in transition in the current agriculture negotiations who have asked for special flexibility to take account of their specific situation characterized by a high degree of liberalization but large trade deficits (cf. WTO Document G/AG/NG/W/57 of 14 November 2000).

³⁷ *ibid.* Furthermore, a group of transition countries proposed to include special flexibility on tariffs for transition countries in order to recognise their particular situation and the liberalisation efforts made by these countries, cf. WTO Document. G/AG/NG/W/56 of 14 November 2000.

³⁸ The *Agreement on establishing a Customs Union between the Russian Federation, Belarus and the Republic of Kazakhstan* (Moscow; 20 January 1995) extending the *Agreement on Customs Union* between Russia and Belarus of 6 January 1995 (both reproduced in WT/REG71/1) was finalized by the *Agreement on Customs Union and Common Economic Area between Belarus, Kazakhstan, Kyrgyzstan, the Russian Federation and Tajikistan* of 26 February 1999 (reproduced in WT/REG71/4) and the *Agreement on Common Customs Tariff of the Customs Union Member States* signed on 17 February 2000, apparently not yet entered into force (reproduced in WTO Document WT/REG71/6).

³⁹ According to the CIS Goods Nomenclature of Foreign Economic Activity based on the Harmonized System and the Combined Tariff-Statistical Nomenclature of the European Union.

⁴⁰ For example, the level of coincidence of the Customs Tariff of the Kyrgyz Republic with the Customs Tariff of the Russian Federation in 2003 amounts to 2519 commodity items or 22.5% (cf. WTO-Documents WT/REG71/8, p. 3). Interfax-Kazakhstan news agency, Kazakhstan set to unify customs tariffs with Russia, Belarus - president, Press Release on www.gateway2russia.com of 18 June 2004.

⁴¹ Kazinform Press Release of 14/9/2004, *ECO members to set up Common Economic Area by 2015*, <<http://www.inform.kz>>.

⁴² cf. WTO Document WT/ACC/KAZ/3 p. 58; e.g. *Agreement between the Republic of Armenia and the Republic of Kazakhstan on free trade* of 2 September 1999 entered into force on 3 January 2002; *Agreement between the Republic of Kazakhstan and the Republic of Moldova on Free Trade* signed on 22 June 1995, come into force on 11 November 1995, cf. WTO-Documents WT/REG81/1 and WT/REG81/3.

⁴³ cf. also the GATT *Understanding on the Interpretation of Art. XXIV*.

⁴⁴ cf. also Report of the WTO Appellate Body on *Turkey – Textiles*, WT/DS34/AB/R adopted on 19 November 1999.

⁴⁵ *ibid.*, para. 48.

any possible interpretation. It would therefore appear that the agreement's coverage must be extended considerably to meet GATT requirements. The only way to circumvent these requirements is to declare the Union an interim Agreement under GATT Art.

XXIV:5(c).⁴⁶ But this would require the provision of a plan and a schedule for the creation of the Customs Union, neither of which appear to exist up to now. Since the WTO Appellate Body's ruling in *Turkey – Textiles*, it is furthermore clear that GATT Art. XXIV can be enforced by way of dispute settlement procedures, and that it is not subject to agreement in the relevant WTO committee.⁴⁷ After WTO accession, Kazakhstan will thus have to bring the EAEC Customs Union in line with WTO requirements. Another issue relevant to preferential trade agreements are Rules of Origin. The *Customs Code's* Section on Rules of Origin (Section 4, Art. 33-52) appears to be in line with the requirements in Art. 2 of the WTO Agreement on Rules of Origin, which provides only for a few basic obligations.⁴⁸

3.1.3 Quantitative restrictions

Art. 18 of the Law *On Trade* provides for the general possibility to prohibit or limit imports and exports of goods. Art. 21 of the Law *On Trade* states that state trading monopolies administered by way of licenses may be introduced for certain goods.

In the field of agricultural and food products, Kazakhstan had in place a system of minimum export prices for certain agricultural products until the mid 1990s. This system was first replaced by a system of export contract registration at the Commodity Exchange and finally completely eliminated by Government Resolution No. 994 of 19 July 1997.⁴⁹ However, in recent years, the Government considered to introduce temporary restrictions on grain exports in order to cope with internal food shortages created by a poor grain harvest.⁵⁰ For example, it was claimed that it created an artificial shortage of railway transport

capacities in early 2004 in order to ensure that grain would preferably be consumed domestically.⁵¹ Such restrictions would violate GATT Art. XI, unless they take the form of export duties.

Kazakhstan furthermore upholds a system of import licenses under Government Resolution No. 1031 of 27 June 1997 for wine, ethyl spirit and alcoholic products. Refusal to issue a license, termination of validity, revocation and suspension are regulated by the Law No. 2002 *On licensing* of 17 April 1995. In parallel, Kazakhstan also runs a system of licensing of domestic production and distribution of alcohol under Law of 16 July 1999 *On the State regulation of production and turnover of ethyl spirit and alcoholic products* and Government Regulation No. 1258 of 27 August 1999. This system is intended to increase the quality and competitiveness of domestic products, to collect taxes to a maximum extent and to protect domestic producers of goods. While Art. 19(3) of the Law *On Licensing* prohibits to refuse the issuance of a license because of market saturation, in practice imports were restricted to 20 % of annual consumption at least until 1998, and import licenses were distributed preferably to importers of high quality products investing and creating jobs in Kazakhstan.⁵²

GATT Art. XI:1 prohibits quantitative restrictions on imports. To the extent Kazakhstan limited imports of alcohol limited to 20 % of consumption, this is a quantitative import restricting which violates GATT Art. XI:1.⁵³ But even any import licensing-system as such, which does not provide for an automatic issuance of licenses, restricts trade and can constitute a violation of GATT Art. XI:1 unless it is not justified under other GATT provisions.⁵⁴ It is difficult to see how

⁵¹ US Department of Agriculture (2004a) p. 2-3;

⁵² WTO-Documents WT/ACC/KAZ/14, Questions 10-11, 46.

⁵³ The link to a domestic licensing system could suggest that the entire system comes under Art. III:4 on non-discrimination rather than under Art. XI (According to a note ad Art. III, any law, regulation or requirement which applies to an imported product and to the like domestic product and is enforced in the case of the imported product at the time or point of importation, is subject to the provisions of Art. III:4. Cf. also Panel Report on *EC – Asbestos*, paras. 8.91-8.92). But the licensing of imports and domestic production of alcohol are governed by different provisions and conditions. Therefore, the current system is actually governed by Art. XI and not by Art. III:4.

⁵⁴ cf. Report of the WTO Panel on *India – Quantitative Restrictions*, WT/DS90/R of 6 April 1999, paras. 5.129-5.130.

⁴⁶ cf. Kyrgyzstan's notification of the Customs Union to the WTO, WTO-Documents WT/REG71/6, p. 2.

⁴⁷ cf. Appellate Body on *Turkey – Textiles*, *supra*, para. 60.

⁴⁸ Former concerns (cf. e.g. WTO-Documents WT/ACC/KAZ/6/Add.2, Question 63) apparently were accommodated with the new Customs Code.

⁴⁹ WTO Documents WT/ACC/KAZ/3, p. 171; WT/ACC/KAZ/22, Question 35.

⁵⁰ Dow Jones Reuters Business Interactive LLC News release fac_51 of 20 January 2004.

Kazakhstan's import licensing system on alcohol could be justified under GATT Art. XI or GATT Art. XX. According to GATT Art. XI:2(c)(i), a Member may impose import restrictions on agricultural goods in order to enforce a government measure restricting the quantities of marketed product, does not apply. This exception was drafted in order to allow for intervention in case of price diminution due to product surpluses in case of large harvests, but it does not allow for general import restrictions on agricultural products,⁵⁵ as according to subpara. 2 sentence 2, restrictions shall not reduce the total of imports relative to the total of domestic production.⁵⁶ GATT Art. XX(b) or (d) applies to measures necessary to protect human health or ensure compliance with laws not inconsistent with GATT. None of the laws on the Kazakhstani alcohol licensing scheme contains any indication that the scheme is intended to limit alcohol consumption or to clamp down on the marketing of illegal alcohol. Furthermore, it is difficult to see why it would be necessary to discriminate against imported products. This suggests that the licensing system constitutes a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, and is therefore not eligible for justification according to the Chapeau of Art. XX. It must therefore be concluded that the licensing requirement violates GATT Art. XI:1 and is not eligible for justification.

In addition to GATT Art. XI, the WTO *Agreement on Import Licensing* (AIL) establishes specific requirements for import licensing procedures. According to AIL Art. 2:1, non-automatic licensing procedures as the Kazakhstani scheme must not have trade-restrictive or -distortive effects on imports additional to those caused by the restriction which they are intended to implement. For the reasons mentioned above, Kazakhstan's import licensing system would probably not meet that requirement. In addition, the relevant Laws do not provide for any information about the basis for granting and allocating licences or about the overall amount of licenses granted,

which is required under AIL Art. 3. Conversely, Government Regulation No. 1258 establishes both the processing period of applications (Art. 17: 1 Month) and the period during which imports must be made (Art. 12(3): 1 year) as required by AIL Art. 5(5)(g) and (f).

While the import licensing system is still in place today, Kazakhstan intended to adapt it to WTO requirements upon accession.⁵⁷ WTO-consistent alternatives could include an automatic licensing system without quantitative limitations, or a system of licensing and quality control which applies both to domestic and imported goods and does not discriminate directly or indirectly against foreign products.

3.1.4 Import and export procedures

According to GATT Art. VIII:1(c) WTO Members recognize the need to minimize the incidence and complexity of import and export formalities and to decrease and simplify import and export documentation requirements. While this is not a binding obligation,⁵⁸ Kazakhstan did consider to abolish overly restrictive formalities upon WTO accession and should continue to do so, in order to profit from it by increasing efficiency of trade-related legal rules. Import and export formalities are laid down in the *Customs Code*. According to Art. 382, importers and exporters must provide the following documents: customs cargo declaration, invoices, supply of goods contract, transition passport, shipping documents, customs valuation declaration as well as import licenses, certificate of origin, certificate of conformity, statement of sanitary inspection if required.⁵⁹ In particular the requirement of a transaction passport under Instruction No. 1669 of 9 November 2001 *On Organisation of Export and Import Currency Control in the Republic of Kazakhstan*, which consists of documentation verifying the pricing of import-export transactions for currency control purposes (diminution of capital outflows, combating money laundering) is seen by traders as an unnecessary barrier to trade.⁶⁰ This concerns particularly the maximum

⁵⁵ cf. Report of the GATT Panel on *Japan – Agricultural Products* L/6253 - 35S/163 adopted on 2 February 1988, para. 3.1.5.

⁵⁶ Furthermore according to the interpretative note ad Art. XI restrictions may only be imposed on products in an early stage of processing and still perishable, which is certainly not the case for alcohol, cf. Report of the GATT Panel on *Canada – Import Restrictions on Ice Cream and Yogurt*, paras. 65-72.

⁵⁷ Intracen (2002b), p. 17-18; WTO Document WT/ACC/KAZ/14, Questions 10-11, 46.

⁵⁸ WTO Document G/C/W/391, p. 4; In the current round of trade negotiations, more explicit and binding rules are discussed in the frame of trade facilitation, cf. overview of negotiation proposals by the WTO Secretariat in WTO Document G/C/W/434 of 15 November 2002.

⁵⁹ cf. Section 7.

⁶⁰ Cf. WTO Document WT/ACC/KAZ/22, Question 27.

financing term for imports of 120 days, which limits long-term financing.⁶¹ Furthermore, the requirement to provide originals of all requested documents falls short of modern customs practice. Finally, it is criticised that Art. 318 of the Customs Code on voluntary disclosure, which permits companies to be self-regulating and make disclosure to Customs when errors or omissions are discovered without incurring a penalty, are rather weak.⁶²

3.1.5 Customs valuation

GATT Art. VII and the WTO *Agreement on Customs Valuation* (ACV) set out detailed methods to be respected when calculating the value of traded goods for purposes of determining duties and charges related to trade transactions, like fees for customs services, payments for import or export licenses, and charges for the certificate of origin customs duties. These rules usually require implementation by domestic laws or administrative circulars. While Kazakhstani customs procedures were broadly in line with these provisions even before accession negotiations, there were a number of concerns.⁶³ The new *Customs Code* was supposed to adapt procedures to WTO requirements.⁶⁴ Chapter 39 (Art. 305-321) establishes that valuation should possibly be based on the actual value of imported goods. It incorporates the ACV's provisions about when the actual-value-method is insufficient, and provides for alternative valuation on the basis of the value of identical or similar goods, and of deduction or composition of production costs. Customs authorities must provide a written justification for the applied customs valuation (Art. 320), which is subject to judicial review (Art. 493). If valuation based on the actual value of imported goods is applicable, and Customs authorities find that the importer has provided inadequate documentation to establish the actual value of imported goods, Art. 321 allows them to establish a conditional value on the basis of statistical data that is contained in the customs cargo declaration, which was formulated on the basis of reliable, quantifiable and documentarily confirmed information. This value will become definitive if the importer does not provide the required information within 60 days. Provisions on

conditional valuation do not seem to be in line with the ACV. While ACM Art. 13 does allow for a conditional release if the importer provides a sufficient guarantee, this must not affect the methods of customs value determination to be used under the ACM. Rather, if determination of the actual value fails due to a lack of documentation, the fall-back valuation methods provided for in the Agreement have to be applied.⁶⁵ A further issue of WTO inconsistency arises from Art. 309.5.2 of the *Customs Code*, according to which transaction-value-based calculation shall not be used for determining the customs value of goods in case of a delivery of goods by a foreign legal person to their branch offices (representative offices) located on the territory of the Republic of Kazakhstan, which do not have the features of purchase and sale. This seems to be in violation of the obligation to provide national treatment in GATT Art. III. Finally, there have been allegations that the private contractor which administers customs audits determines the customs value on a database of world prices, and that ca. 20 % of trade flows is valued higher than WTO rules would allow.⁶⁶

It can be concluded that customs valuation under the new *Customs Code* is broadly in line with WTO requirements, but that the sections on conditional release of goods and on preferential calculation for importers residing in Kazakhstan violate the ACV.

Customs fees

According to Art. 293(2) of the *Customs Code*, customs fees are calculated on the basis of the costs of the services rendered by Customs administrations. Current customs fees are 50 € per one sheet of customs declaration and 20 € per each additional sheet.⁶⁷ This is in line with GATT Art. VIII, according to which customs fees must be calculated on the basis of the costs of the services rendered by Customs administrations and shall not represent an indirect protection to domestic products or a taxation of imports or exports for fiscal purposes. Former customs fees were calculated on the basis of the value of goods (0.2 % of customs value), which has been subject to heavy criticism in the WTO Working

⁶¹ US Trade Representative (2004), p. 344.

⁶² Hekala/Creskov (2004).

⁶³ cf. WTO Document WT/ACC/KAZ/6/Add.2, Question 58

⁶⁴ Hekala/Creskoff (2004).

⁶⁵ WTO *Decision Regarding Cases where Customs Administrations have Reasons to Doubt the Truth or Accuracy of the Declared Value*.

⁶⁶ US Trade Representative (2004) p. 434.

⁶⁷ Voronina (2004).

Party.⁶⁸ An additional issue of compliance with GATT Art. VIII has arisen with regard to fees for temporary storage. Temporary storage obligations (Art. 87-111 of the *Customs Code*) were introduced only in the late 1990s to ensure that goods are not marketed until customs formalities have been finished. Warehouses are run by customs authorities or private licensees. Storage fees for public warehouses are collected in accordance with Art. 296 of the *Customs Code*. On average, they are reported to amount to about 0.2 % of customs value and \$ 15 for every additional day of storage.⁶⁹ At least storage in public warehouses is a service rendered by Customs administrations coming under GATT Art. VIII,⁷⁰ and therefore fees must be based on actual costs. In order to avoid allegations that these obligations are not respected, it could be advisable to explicitly require cost-based calculation of storage fees in the *Customs Code*.⁷¹

3.1.6 VAT and Excise duties

The imposition of Value Added Tax (VAT) and excise duties is governed by the *Tax Code (Code On Taxes and Other Mandatory Payments to the Budget* of 12 June 2001, N 209-II). The current VAT rate is 15 %, taxes are in principle charged on the point of destination. However, VAT and excise taxes on products from former CIS countries were charged on the departure points for many years. This was heavily criticized as a violation of the Most-favoured nation principle (GATT Art. I), and from 1 January 2005, Kazakhstan has been charging taxes based on the destination principle. For CIS countries, this will be implemented after ratification of relevant agreements with other CIS states.⁷²

Excise taxes are levied on the following agricultural products: alcohol, tobacco, and salmon according to Government Order No. 137 of 28 January 2000. An issue of concern are excise duty rates distinguishing between imported and domestic products. Kazakhstan pledged to adjust excise duty rates for domestic and imported products until WTO accession.⁷³

3.1.7 General economic policy issues

Laws relevant to the general policy framework for agricultural activities are Art. 22 of the Law *On Trade* and Kazakhstan's Laws on Antidumping,⁷⁴ Safeguards,⁷⁵ and on Subsidies and Countervailing Measures,⁷⁶ which were crafted to implement the relevant WTO agreements.

A major economic policy instrument in former socialist countries was government price control. Art. 9 of the Law *On Trade* states that prices are to be determined by market forces, but it still reserves the right to adopt price controls "in accordance with the law". While price control is not per se inconsistent with WTO agreements, depending on its implementation, it may have the effect to afford protection to domestic products. On past accessions, incumbent Members required applicants to limit price control to a list of sectors, and to ensure its consistency with WTO commitments.⁷⁷ It can be expected that Kazakhstan's accession protocol will contain similar obligations. Currently, price controls are provided for only with respect to certain services and utilities in the Law *On Natural Monopolies* of 9 July 1998, and with respect to undertakings with a dominant position in the market by the Law *On Development of Competition and Restriction of Monopolistic Activity*, but not with respect to agricultural goods.⁷⁸ However, in practice, Kazakhstan also appears to pursue indirect price control strategies in the grain sector.⁷⁹

⁶⁸ WTO-Documents WT/ACC/KAZ/6/Add.2, Question 39; WT/ACC/KAZ/11, Question 22; WT/ACC/KAZ/14, Question 10, 16.

⁶⁹ Voronina (2004).

⁷⁰ cf. e.g. Panel Report, *US – Customs User Fee*, BISD 35S/245, paras. 69 ssq.

⁷¹ WTO Document WT/ACC/KAZ/22, Question 21.

⁷² Kazakh-Russian agreement *On the principles of collecting indirect taxes in mutual trade*, signed on 9 October 2000, into force on 1 June 2001 and a further Agreement of 15 September 2004; Kazakh-Kyrgyz agreements *On the principles of collecting VAT in the export of goods (services)* of 18 February 1997 (came into force from 12 December 1998), and *On the principles of collecting excise tax in the export and import of goods* of 11 June 1997 (came into force, in accordance with a decree of the Kazakh Government, on 5 February 2001).

⁷³ WTO-Documents WT/ACC/KAZ/6/Add.1, Question 45; WT/ACC/KAZ/14 pp. 14-15.

⁷⁴ Law of 11 July 1999 *On Antidumping Measures*; cf. general overview at Intracen (2002).

⁷⁵ Law of 28 December 1998 *On measures of protection of a home market at import of the goods*.

⁷⁶ Law of 16 July 1999 *On Subsidies and Countervailing Measures*.

⁷⁷ WTO Report on the Accession of China, WTO Document WT/ACC/CHN/49 of 1 October 2001, pp. 10-11.

⁷⁸ WTO Document WT/ACC/KAZ/22 p. 3.

⁷⁹ cf. in detail section 8.8 below.

Another salient issue in Kazakhstan's agricultural reforms is land ownership. The Presidential Decree No. 2717 *On Land* of 26 December 1995 permitted private land ownership, but until 2003 private persons were not allowed to own agricultural land except household plots. The new *Land Code* (Law No.442-II ZRK of 2003 of 20 June 2003), which was an object of fierce discussion and court litigation,⁸⁰ abolishes restrictions on private landownership for Kazakhs, and establishes that foreign citizens may lease agricultural lands for up to ten years, but may not own land and rights of permanent land use. Legal entities incorporated under the laws of Kazakhstan may own agricultural and forestry land, even if they are owned by foreign persons or entities. With regard to WTO accession, land ownership by foreign entities has been an issue in the Kazakhstan Accession Working Party,⁸¹ but current WTO law does not directly address land ownership.⁸² While limitations of foreign as opposed to citizen's land ownership appear to contradict the principle of National Treatment, the WTO's scope is limited to trade in goods, intellectual property and trade in services, but does not extend its application to investment. This is different only if a country makes commitments under GATS in sectors for which land ownership is relevant. Since agriculture is essentially goods production, it appears difficult to imagine a case in which limitations of agricultural land ownership actually restrict services provision. It follows that limitations to foreign-owned agricultural land are not inconsistent with WTO commitments.

3.2 The Agreement on Agriculture: agricultural subsidies and market policies

Kazakhstan has considerably increased state intervention in the agricultural sector over the last years. After a substantial contraction of agricultural production in the 1990s, the Government changed its policy and decided that developing the agricultural sector would require a sound regulatory framework, but also a certain amount of state support. The WTO

Agreements do not rule out proactive agricultural policies, but they establish certain limits to ensure that they do not distort international trade. In this section, Kazakhstan's agricultural policies on subsidies and public corporations engaged in agricultural trade will be examined for their compatibility with GATT and the *WTO Agreement on Agriculture*.

3.2.1 State support to agriculture in Kazakhstan

Art. 11 of the *Law On State regulation of agriculture* stipulates the basic conditions and main directions of agricultural subsidies. Subsidies shall provide economic incentives to develop agricultural production by producers which are economically efficient and improve the quality and competitiveness of their produce. Subsidies shall be used to provide loans at reduced interest rates, to preserve and develop a genofund of seeds, farm plants, and animal species, to increase livestock sector efficiency and produce quality, to reduce the cost of fuels used for harvesting purposes, to develop an agricultural markets control system, to develop a livestock breeding sector, to extend permanent crop cultures like grapes, as well as for other purposes provided for by law. The *National Program for Agricultural Production 2003-2005* spells out the main agricultural policy measures applied over the last years.⁸³ It provides for a rise in the agricultural budget from 30 Bn Tenge (ca. US\$ 220 Mio) in 2002 to 55 Bn Tenge (US\$ 407 Mio) in 2005.⁸⁴ In addition, various forms of indirect support (tax breaks, delays of duties, warranties of support) accounted for a further 44 Billion Tenge in 2002, but should decline to 44 Billion Tenge in 2005. A further increase is provided for by the consecutive *Plan of measures to realize the concept of steady agricultural development for 2006-2010*.⁸⁵ In a bid to alleviate the gap between rural and urban live standards and to combat rural-urban migration, Kazakhstan also adopted the *Rural Development Program 2004-2010*, which provides for public expenditures of around 50

⁸⁰ cf. e.g. Resolution No. 8 of 10th June 2003 of the Constitutional Council of the Republic of Kazakhstan *Concerning the Conformity of the Land Code of the Republic of Kazakhstan with the Constitution of the Republic of Kazakhstan* <http://www.constcouncil.kz/eng/decisions/lowconsider/index.shtml?id_new=3>; for a critical appraisal cf. *Economist* (2005) p. 27.

⁸¹ WTO-Document WT/ACC/KAZ/6/Add.1, Questions 10, 13-17.

⁸² Hoekman/Koestecki (2001) p. 67.

⁸³ Presidential Decree of 5 June 2002 No. 889 *On the State programme on agricultural production of Republic Kazakhstan for 2003-2005* and Government Order No. 864 of 2 August 2002 *About the Plan of measures for realization of the State programme on agricultural production of Republic Kazakhstan for 2003-2005*.

⁸⁴ 1 US\$ = 135 Tenge on 2 September 2005.

⁸⁵ Government Order of 30 June 2005 No. 654 *On a Plan of measures to realize the concept of steady agricultural development for 2006-2010*.

Bn Tenge in 2003.⁸⁶ Compared to agricultural subsidies in developed countries, these numbers are still low. Even in 2002, direct state support per agricultural unit in Kazakhstan was US\$ 1200, while in the USA it amounted to US\$ 45,000. The level of state support per hectare of tillage rose from US\$ 7.5 to US\$ 12.6 from 2002 to 2004, while it is US\$ 115 in the USA and US\$ 855 in the EU.⁸⁷ Nevertheless, on accession to the WTO, Kazakhstan's agricultural policies will have to abide by the relevant WTO Agreements, in particular the *Agreement on Agriculture* (AoA). Under the AoA, subsidies are divided into several groups.⁸⁸ Export subsidies have to be cut to the levels negotiated by Kazakhstan upon accession under Art. 9. On past accessions, accession countries were asked to cut export subsidies to zero.⁸⁹ Domestic support measures have to be cut to the levels negotiated by Kazakhstan upon accession, unless they are exempted from reduction commitments (Art. 6.1).⁹⁰ Exemptions apply to:

- Support measures with no or minimal trade-distortive effects (Annex I, so called Green-box)
- Investment subsidies generally available to agriculture and input subsidies to low-income or resource-poor producers in developing country Members (Art. 6.2).
- Direct payments under production-limiting programmes (Art. 6.5).
- Finally a Member may uphold support not exceeding 5 % (for developing countries 10 %) of agricultural production value (Art. 6.4).

Any need to adjust agricultural support measures and the laws they are based upon will thus heavily depend on the reduction

commitments negotiated upon accession.⁹¹ But it is at least as important to assess which of the current support measures can be maintained and extended without any consideration to support limits, as they meet criteria for exemption; and which measures on the other hand are to be classified as export subsidies and will therefore have to be eliminated in the near or far future. The most relevant measures of agricultural support used in Kazakhstan will be analysed hereunder as to their classification under WTO rules.

3.2.2 Input subsidies, tax breaks

The *National Programme 2003-2005* and the *Rural Development Programme 2004-2010* provide for various forms of input subsidies on mineral fertilizer, seeds, herbicides, and water worth more than 8.5 Bn Tenge per year.⁹² Furthermore, Kazakhstan imposes a temporary fuel export ban every year during harvesting periods in order to ensure fuel provision at low prices to farmers.⁹³ Input subsidies constitute domestic support under the AoA and clearly do not qualify for any exemption. Neither do they come under the Green Box, nor could they be exempted under AoA Art. 6.2, as they are not limited to low-income or resource-poor farmers.

Agricultural support under the AoA does not only include government payments, but also other forms of government action which have the effect of providing financial support to agricultural products. Tax breaks in Kazakhstan available to farmers include VAT, transport, property, income, social, ground taxes and amounted to more than 11 Bn Tenge in 2002. More than 40 Bn Tenge are earmarked every year for tax delayed tax

⁸⁶ Presidential Decree No. 1149 of 10 July 2003 *On the State program of development of rural territories of Republic Kazakhstan in 2004 – 2010* and Governmental Order No. 838 of 20 August 2003 *About the Plan of measures for 2004-2006 on realization of the State program of development of rural territories of Republic Kazakhstan for 2004-2010*.

⁸⁷ *National Agricultural Programme 2003-05*, No. 5.1.

⁸⁸ cf. Desta (2002), pp. 371-425.

⁸⁹ Langhammer/Luecke (1999), p. 15

⁹⁰ SCM Art. 29, which allows for special programmes for economies in transition has expired in 2001, and a similar option was not granted at recent accessions, e.g. to China.

⁹¹ Kazakhstan intended to negotiate a level of domestic support which would be above the existing level of support, leaving some space for future action in case of changes in the market. Another objective was to be able to maintain subsidies for the transport of agricultural goods, as Kazakhstan is remote from major agricultural markets and is not well-connected to waterway transport routes. A high official of the Kazakh Ministry of Agriculture recently indicated that negotiations on domestic support levels were heading towards agreement, while export subsidies were still under negotiation, cf. Kasabekova (2004).

⁹² *National Agricultural Programme 2003-05*, No. 6, Programme 045; Rural development programme - *Plan of measures*, No. 2.1.1; Government Order of 24 February 2003 No. 191 On Rules of subsidizing agricultural commodity producers on purchase of mineral fertilizers, protravitelej seeds and herbicides for 2003.

⁹³ US Department of Agriculture (2005) pp. 3, 5.

payments by farmers.⁹⁴ The tax breaks and delays apply specifically to farmers to diminish their costs of production. It follows that they must be qualified as domestic support subject to reduction. No exemption is available for them.

3.2.3 Machinery modernization programmes

Art. 10 of the Law *On State regulation of agriculture* provides for a state loan programme to agricultural producers to finance investments in infrastructure and agricultural machinery (Art. 10.2.1-2). Art. 11.2.1 states that the state subsidizes investment loan interest rates. This must be seen in context of Kazakhstan's bid to modernize agricultural production and adapt it to international competition. Via the publicly held company *Kazagrofinance* and via private banks, agricultural producers are offered leasing of agricultural machinery at fixed and favourable terms.⁹⁵ Machinery is purchased at the expenses of the state budget, which provided for 4 Bn Tenge in 2002, which was supposed to go up to 7 Bn Tenge in 2005 and rise further according to the new 2006-2010 programme. *Kazagrofinance* purchases the machinery according to public procurement rules (Law of 16 May 2002 No 321-II *On state purchases*). *Kazagrofinance* furthermore offers long-term credits for the purchase of agricultural machinery.

These programmes constitute domestic support subject to reduction under AoA Art. 6.1, if they qualify as a subsidy (cf. AoA Annex 3 No. 1). According to SCM Art. 1.1, a subsidy is a "financial contribution" conferring a "benefit" on the recipient, as compared with what would have been otherwise available to the recipient in the marketplace.⁹⁶ Although farmers pay credit or leasing rates to *Kazagrofinance*, these rates are not determined according to market conditions, but

by law. Furthermore, unlike commercial banks, *Kazagrofinance* does not require securities. For these reasons, the programmes constitute domestic support under the AoA. Yet if Kazakhstan will be allowed to use AoA Art. 6.2 – this is matter for negotiation –,⁹⁷ machinery modernization programmes are exempt from reduction commitments under AoA Art. 6.2., as they constitute investment subsidies generally available to agriculture in developing countries.⁹⁸ If, on the other hand, Kazakhstan follows the example of Kyrgyzstan and renounces to developing country status, it will be much more difficult to exempt the programmes under AoA Annex I No. 11 as structural adjustment assistance provided through investment aid. This would require that farmers are eligible for support by reference to clearly-defined criteria in programmes to assist the financial or physical restructuring of a producer's operations in response to objectively demonstrated structural disadvantages. Support shall not be related to future agricultural production or to prices and shall be limited to the expenditure and the time of the investment realized. Kazakhstan's machinery purchase programmes are a response to largely outdated agricultural machinery, which constitutes a structural disadvantage with regard to foreign agricultural producers. Yet the wording of AoA Annex 2 No. 11 suggests that it covers only programmes limited to farmers disadvantaged even by domestic Kazakhstani standards. Without such limitation, the privilege conferred to developing countries by Art. 6.2 would be useless, as any investment programme designed to reduce competitive disadvantages would be exempt anyway under AoA Annex 2 No. 11. As the Kazakhstani programmes are available to all farmers, they cannot at present come under this provision.

It can be concluded that the machinery modernization programmes are subject to reduction commitments, unless Kazakhstan assumes developing-country-status. A way to

⁹⁴ *National Agricultural Programme 2003-05*, No. 5.2.

⁹⁵ cf. *National Agricultural Programme 2003-05*, No. 5.2 and No. 6 Programmes No. 084, 085; Government Order No. 259 of 18 March 2003 *On Rules of crediting of maintenance with agricultural machinery on a leasing basis for 2003 and compensation of the rate of compensation (interest)*;

<<http://www.kazagrofinance.kz>> (24 September 2005).

⁹⁶ The term "subsidy" in the AoA has to be interpreted in line with the definition of a subsidy in SCM Art. 1.1, cf. Report of the WTO Appellate Body on *Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products*, WT/DS103/AB/R, WT/DS113/AB/R adopted on 27 October 1999, para. 87.

⁹⁷ China committed itself, not to make use of the possibility to exclude payments under AoA Art. 6.2 from reduction commitments, cf. WT/ACC/CHN/49 of 2 October 2001, para. 235.

⁹⁸ In the current negotiations on agricultural trade liberalisation, it was proposed by some economies in transition to exempt investment subsidies and input subsidies generally available to agriculture, interest subsidies to reduce the costs of financing as well as grants to cover debt repayment in transition economies, in order to recognize the special problems faced by them, cf. WTO Document G/AG/NG/W/57 of 14 November 2000.

exempt them even in this case would be to introduce certain criteria for eligibility which ensure that only farms featuring a particularly outdated machinery benefit are supported under the programme.

3.2.4 Short-term financial support measures

A major constraint for the activity of agricultural producers is their lack of resources to pre-finance input purchases. Commercial credits are often unavailable to farms, as risk for such credits is very high and farmers do not have adequate securities. In order to deal with that problem, Kazakhstan set up a short-term credit programme. According to Art. 10.2.3-6 of the Law *On State regulation of Agriculture*, Kazakhstan provides loans to credit companies issuing loans to farmers, to non-agricultural companies in rural areas, and to microfinance organizations. Programmes are either executed by *Kazagrofinance*, which provides loans to farmers at favourable conditions,⁹⁹ or by rural credit companies which issue credits adapted to farmers' needs.¹⁰⁰ They are funded from the state budget with 4 Bn Tenge in 2002, which was supposed to rise to 7 Bn in 2005.

Credits do not appear to be granted at market conditions and therefore constitute support subject to reduction under AoA Art. 6. As they are not issued for investment purposes, but in order to deal with current financial shortages, they are not eligible for exemption neither under AoA Art. 6.2 nor under Annex 2 No. 11.

In order to increase farmers' access to short-term credits is the use of grain receipts for grain stored in warehouses as security for farm credits. Kazakhstan introduced such receipts with the Law *On Grain* of 19 January 2001, which ensures that grain owners enjoy precedence over other creditors in case of grain storage centre insolvencies. This system in principle does not constitute support under the AoA, although Kazakhstan introduced public guarantees for grain receipts, which would come under the AoA. Nevertheless, grain receipts seem to be a sensible way to increase farmers' access to capital while diminishing state support to agriculture.

3.2.5 Crop insurance

One of the major objectives of Kazakhstani agricultural policy in the last years was the establishment of crop insurance against natural disasters.¹⁰¹ Law No. 533 – II of 10 March 2004 *On mandatory crop insurance* introduces a mandatory system of insurance for all crop producers. Insurance is provided by private insurers and agents (Art. 15, 16) and applies in case of crop damage or destruction as a result of adverse natural phenomena causing losses to the insurant (Art. 6). The Law fixes the insurance premium (Art. 8). Insurance payments are calculated on the basis of a producer's loss, defined as the difference between the costs for one hectare of manufacture of the destroyed crop and the income derived usually from that crop, multiplied with the tillage affected by the phenomenon (Art. 9.2). A commission composed by state authorities, insurant, insurer and insurance agent establishes the areas affected by the natural phenomenon. In case of natural disasters, the Government refunds 50 % of insurance payments to the insurer (Art. 13, 14).

The AoA recognizes that state support for crop insurance in case of natural disasters may be justified. However, in order to ensure that it does not distort international trade, Annex I No. 8 establishes certain criteria to be met by an insurance program in order to qualify for exemption. Such insurance must only be available in case of natural or like disasters formally recognized as such by a government authority and which lead to production losses exceeding 30 % of the average of production in the preceding three-year period or a three-year average based on the preceding five year period.

Payments may only be made in respect of losses of income and production factors due to the natural disaster in question and must be limited to compensate such losses without requiring any future production. State contribution to crop insurance is not prohibited under the AoA if these requirements are not met, but it will have to be counted as domestic support subject to reduction under AoA Art. 6. The Law's main element which might raise problems with regard to exemption is the apparently broad scope of application. The definition of adverse natural phenomenon (Art.

⁹⁹ *National Agricultural Programme 2003-05*, No. 6 Programme No. 084.

¹⁰⁰ Government Order No. 259 of 18 March 2003 *On Rules of crediting of an agricultural production through system of rural credit companies*.

¹⁰¹ cf. e.g. *National Agricultural Programme 2003-05*, No. 5.2.

1.4) is very broad and explicitly includes droughts, frosts, and excessive humidity. This might be considerably broader than the term “natural disaster”, which commonly refers to a sudden event bringing great damage, loss, or destruction.¹⁰² Unlike the AoA requires, the Law does not link eligibility for insurance payments to a certain amount of production loss either. If Kazakhstan ever wanted to ensure that state support under the crop insurance are exempt from reduction commitments, they Law’s scope should be clarified.

3.2.6 General services

Many other measures financed from the state agricultural budget appear to be unproblematic with regard to the AoA. Maintenance of the state agricultural administration would probably not even qualify as support. Expenditure for the services rendered by state veterinary and plant quarantine bodies, for research and training and for marketing and promotion services are exempted under AoA Annex I No. 2(a), (b) and (c). Annex I. No. 2 furthermore exempts all kinds of programmes providing services or benefits to agriculture or the rural community, provided that they do not involve direct payments to producers or processors. Likewise, most measures provided for in the *Rural Development Programme 2004-2010* concerning e.g. social, cultural and telecommunications infrastructure qualify for exemption as general services programmes under AoA Annex I. No. 2.¹⁰³

3.2.7 Export subsidies – the issue of transport

Kazakhstan continues to provide subsidized rail transport facilities for agricultural goods, in a bid to alleviate the costs linked to the fact that Kazakhstan is remote from major agricultural markets and is not well-connected to waterway transport routes. While preferential tariff rates for transportation of agriculture and food products by rail were eliminated on 1 January 1997 according to Resolution No. 7/126 of the State Committee on Pricing and

Anti-Monopoly Policy of 25 December 1996,¹⁰⁴ subsidization continues to be provided in other forms. Currently, subsidies are estimated to make up about US\$ 9-15 per ton of agricultural products.¹⁰⁵ Transport subsidization is clearly a kind of support subject to reduction under the AoA. It might even account as an export subsidy, and as such be subject to complete elimination either upon Kazakhstan’s accession to the WTO or in case of a successful conclusion of the current round of trade negotiations.

According to AoA Art. 9, subsidies to reduce the costs of *inter alia* international transport and freight (d) and internal transport and freight charges on export shipments on terms more favourable than for domestic shipments (e) constitute export subsidies. Any subsidization which is granted only to exported products or which covers only international transport costs would clearly come under that definition. Conversely, subsidies on domestic transport provided both for goods transported to domestic and foreign destinations are not covered. A preliminary conclusion would be that the classification of transport subsidies would depend on their precise coverage. An additional restriction is imposed by AoA Art. 10.1 which states that export subsidies not listed in Art. 9 shall not be applied in a manner which results in or which threatens to circumvent export subsidy commitments. According to the WTO Appellate Body, this is the case if a Member transfers the same economic resources to agricultural producers that it is prohibited from providing through other methods under Art. 9.1.¹⁰⁶ Subsidies on domestic transport provided both for goods with an internal and with an external destination would not violate that provision, as they are substantially different from the kind of subsidies enumerated in Art. 9 and involve a larger amount of payments which is available much more general to agricultural producers, and would not give in any way an incentive to favour export over domestic marketing. It can be concluded, that even if Kazakhstan agrees to eliminate all export subsidies, it may continue to grant transport subsidies for agricultural products, provided that they are limited to cover transport costs up to the border, and are available for both exported and domestically consumed goods.

¹⁰² cf. Online Dictionary Merian Webster
<<http://www.m-w.com>> (24 September 2005).

¹⁰³ cf. Government Order No. 838 of 20 August 2003
*On the Plan of measures for 2004-2006 on realization
of the State program of development of rural territories
of Republic Kazakhstan for 2004-2010*. This does not
seem to apply to measures to stimulate growth of
agricultural production (No. 1) and water subsidies (No.
2.1.1)

¹⁰⁴ WTO Document WT/ACC/KAZ/6/Add.1 of 7
February 1997, Question 53.

¹⁰⁵ Kazabekova (2004).

¹⁰⁶ WTO Appellate Body Report on *US – Foreign Sales
Corporation*, paras. 148-152.

3.2.8 Public corporations in the Kazakhstani agricultural system

While the role of the state in Kazakhstani agriculture sharply declined in the 1990s, public corporations still play an important role in trade in agricultural products. As inefficiencies in distribution of agricultural goods rose after privatization in the 1990s, public trading corporations bounced back and were actively promoted by the government.

Art. 21 of the Law *On Trade* states that state trading monopolies may be introduced for certain goods. In practice, this power has not been used in the agricultural sector. Art. 12 of the Law *On state regulation of agriculture* stipulates that state regulation of agricultural markets has the objective to maintain food security and to support domestic agricultural producers, and is carried out, among other things, by way of purchasing operations and price intervention. Today two major state companies are engaged in agricultural trading. The *State Food Contract Corporation* (SFCC)¹⁰⁷ in the grain sector, and the *Malonimderi-Corporation*¹⁰⁸ in the cattle sector. A third company, *Kazagroinform*, appears to deal exclusively with information and training activities, while *Kazagrofinance* executes agricultural leasing and loans programmes set up by the Government.

The State Food Contract Corporation

SFCC was created in 1997,¹⁰⁹ but it is a successor of the National Food Commissariat¹¹⁰ founded in 1920. It is today the largest grain trader in Kazakhstan and assumes a role both in public food stockholding and market intervention. Its activity is based on Chapter 3 of the Law *On Grain*, which provides for public grain stockholdings to be maintained by an agent on the basis of a contract (Art. 12.1). In 1996, SFCC was chosen as an agent to execute Kazakhstan's stockholding programme on the basis of a contract characterised as 'state procurement from a single source' and is granted without an open competition. According to Art. 21 of the Law No. II-321 *On*

State Purchases of 16 May 2002, state procurement of goods from a single source may be exceptionally justified by strategic reasons. The Law *On Grain* distinguishes between grain resources held for purposes of mobilization, food security, fodder provision, seed provision and regulation of the grain market (Art. 11). According to Art. 10.4 of the Law *On Grain*, state grain resources must be maintained by way of purchases at market prizes. In practice, the Government fixes the amount of grain to be purchased for food security purposes and the price to be paid every year by Government Order. In 2004, SFCC was authorized to buy about 500,000 tons of grain at a minimum price of 11,000 Tenge (US\$ 84) per ton.¹¹¹ The Government furthermore suggested SFCC to buy 2 million tons of grain for stabilization of the grain market. Prices set by Government Order for food security purchases tend to be higher than market prices, but this is not necessarily the case. For example in 2003, the Government set a minimum price of about 10,000 Tenge (about US\$ 80) per ton,¹¹² while farm prices for 3rd class wheat were around US\$ 50 until May but then rose to over US\$ 100 towards the end of the year.¹¹³ Prices for market stabilization purchases vary. For example, the SFCC procured wheat at a price of US\$ 160 in Winter 2003/4 in order to avoid bread shortages caused by rising prices on export markets.¹¹⁴ Grain reserves are disposed of to a considerable extent by way of government-to-government agreements with the Middle East, North Africa and Europe,¹¹⁵ but also at the home market, depending on the market situation. For example, in early 2004, SFCC sold about 900,000 Tons of wheat on domestic markets with a fixed price of US\$ 160 to stabilize rising prices in view of poor harvests.¹¹⁶ A major part of SFCC's grain purchases are already carried out and paid for

¹⁰⁷ in Russian: Продовольственная контрактная корпорация, cf. <<http://www.foodcorp.kz>>.

¹⁰⁸ in Russian: Мал онимдері корпорациясы.

¹⁰⁹ Government Order No. 260 of 24 February 1997 *On Reorganization of State Food Contract Corporation*; cf. also Government Order No. 309 of 21 March 1995.

¹¹⁰ in Russian: Народный Комиссариат продовольствия

¹¹¹ *National Agricultural Programme 2003-05*, No. 6, Programme 038, 043; Government Order of 9 March 2004 No. 290 *On the state purchases of grain in 2004*.

¹¹² Governmental Order No. 205 of 26 February 2003 *On some questions of the state purchases of grain of a crop of 2003 and the statement of Rules of the state purchases of services on storage of the state resources of grain, Rules of the state purchases of services on moving the state resources of grain*.

¹¹³ cf. US Department of Agriculture (2004a), p. 3; Kazakhstan Ministry of Agriculture (2003); US Department of Agriculture (2005a), p. 2.

¹¹⁴ US Department of Agriculture (2004), p. 6.

¹¹⁵ The existence of a state trading company is a certain advantage in trade with other Central Asian countries with state trading monopolies, cf. Intracen (2002b), p. 52.

¹¹⁶ US Department of Agriculture (2004a), p. 3.

in spring, in order to provide farmers with financial resources to purchase fertilizer and petroleum. To finance these contracts, which effectively work as an interest-free loan to farmers, SFCC may issue state bonds (it was conferred the status of a first class emitter of bills of the Kazakhstani National Bank) for up to 5,0 Billion tenge for the period of 1 year. Grain purchases are carried out according to Government Order No. 371 of 27 March 2004 as amended by Order No. 522 of 12 May 2004 and No. 318 of 24 March 2005 by way of public bidding. According to these rules, only residents in Kazakhstan are admitted to bidding procedures.¹¹⁷ The *National Agricultural Programme 2003-05* furthermore suggests that purchases should be made preferably from domestic producers.¹¹⁸ In fact, SFCC seems to purchase only grain produced in Kazakhstan. SFCC is the biggest trader in grain both for the domestic market and for exports. In 2004, SFCC purchased about 1/5 of Kazakhstani grain production which was about 14/15 million tons in 2004. SFCC is the owner of the only operating grain terminal in the seaport Aktau and will also run the planned grain terminals on the Baltic sea, both of which were supported from the state budget in order to improve access of Kazakhstani grain to export markets. To summarize, purchases and sales by SFCC pursue manifold purposes: they are intended to avoid excessively low grain prices paid to producers, to overcome farmers' capital shortages, to facilitate grain exports, and to ensure sufficient provision of grain at the domestic market.

State Trading Enterprises: SFCC, GATT Art. XVII and the 1994 Understanding

WTO rules do not prohibit public enterprises engaging in trade (State Trading Enterprises, STE). However, their activity is subject to WTO rules. GATT Art. XVII and the 1994 *Understanding on GATT Art. XVII (1994 Understanding)* establish specific rules for STE. Furthermore, such companies' activities might constitute support subject to reduction under the AoA.

GATT Art. XVII applies to any State enterprise or non-governmental enterprise enjoying exclusive or special privileges, which in its purchases or sales involves imports or exports, unless these exclusively refer to products for governmental use and not otherwise in

commercial use. It is a matter for discussion if SFCC comes under that definition at all. GATT Art. XVII equates state enterprises with non-governmental enterprises holding exclusive or special privileges, which suggests that state ownership *per se* without any privileged status is not enough to constitute an STE. SFCC does not enjoy a statutory monopoly or a privilege provided for by law - it is awarded contracts on maintaining the state grain resources without open competition, but it could be argued that this is a purely commercial contract which does not involve any advantage other than a private contract party's status. The main advantage granted exclusively is that SFCC is financed by annual subsidies from the state budget at non-market terms. This does not explicitly confer a special power or a legal privilege, but it constitutes an economic benefit enabling SFCC to carry out its activities in supporting agricultural producers. It is therefore necessary to determine if such an economic benefit may constitute a special privilege in the terms of GATT Art. XVII. A privilege is commonly defined as something granted as a special favour,¹¹⁹ and the wording does not qualify this to be necessarily a special power conferred by law. This is confirmed by the *STE Agreement* as relevant context, in which the terms "special rights" and "privileges" are used in the alternative, suggesting that there must be privileges other than special powers conferred by law. It is furthermore confirmed by some WTO Members' practice as summarized in an illustrative list of STEs adopted by the *WTO Working Party on State Trading Enterprises*.¹²⁰ It corresponds finally to the object and purpose of GATT Art. XVII, which is to subject any public policy to WTO rules, as economic benefits may be even more powerful to achieve a public policy aim than legal privileges.¹²¹ It can therefore be concluded that the very fact that SFCC receives annual subsidies from the state budget, which are not granted to any other economic actor, confers them a special privilege according to GATT Art. XVII. These privileges enable it to be the main trader and exporter of grain products, and as such to influence both the domestic price

¹¹⁷ cf. No. 11 of the Order.

¹¹⁸ *National Agricultural Programme 2003-05*, Nr. 5.2

¹¹⁹ cf. Online Dictionary Merian Webster
<<http://www.m-w.com>>.

¹²⁰ WTO Document G/STR/4 of 30 July 1999, No. III.8(b)(ii).

¹²¹ cf. Report of the WTO Appellate Body Report on *Canada – Wheat*, WT/DS276/AB/R of 30 August 2004, para. 85. SFCC's power to issue state bonds is a further hint that it is awarded special rights and privileges.

level and the level of exports. It could be finally argued that STE rules do not apply to SFCC's activities to maintain the state grain resources for food security purposes, as they could be qualified to be intended for governmental use. However, the distinction between grain resources for food security and other purposes, distinguished quite well in the Law *On Grain*, does not seem to be as clear in practice. Furthermore, it does not seem to be excluded that food security resources are being disposed of on the market at a later stage. Both would have to be ensured to come under the notion of governmental use.¹²² It can be concluded that SFCC is fully subject to the WTO's STE rules.

This implies that SFCC must abide by the WTO principles of non-discrimination, i.e. GATT Art. I and III.¹²³ According to GATT Art. XVII:2, this involves but is not limited to making purchases or sales solely in accordance with commercial considerations, and affording traders from other Members adequate opportunity in accordance with customary business practice to compete for participation in such purchases or sales. Furthermore, Members must notify state enterprises to other WTO Members, and ensure transparency in their activities according to the *STE Agreement*.¹²⁴

So far, it does not seem that SFCC has considered imports at all in its purchases. A major reason for this might be that at least in the grain sector, SFCC purchase prices are well below world market prices, making it unprofitable for importers to compete.¹²⁵ Therefore, it seems difficult to see that foreign could profitably participate in SFCC's purchases even if they were carried out without any discrimination. However, this might change in the future, and in this case SFCC's purchasing system poses several obstacles for

foreign traders to bid which would appear to violate GATT Art. XVII. The Rules governing bidding competitions for SFCC purchases explicitly require a bidder to be a Kazakhstani resident and to present a land use certificate, both of which disfavors foreign bidders in violation of GATT Art. XVII. Furthermore, a major objective of SFCC highlighted in the *National Agricultural Programme 2003-05* is to support domestic producers and to stabilize domestic markets, which makes it unlikely that importers are effectively granted equal conditions.

It could furthermore be argued that SFCC does not act solely in accordance with commercial considerations, as it offers farmers advance payments and fixed prices, which a private company would probably not offer. Yet acting in accordance with commercial considerations does not mean that SFCC must act like any private company not enjoying special privileges. GATT Art. XVII does not prevent STE's to use their privileges.¹²⁶ It is among the special privileges SFCC enjoys to have access to annual state funding, which is granted by the government for certain purposes and under certain conditions including advance payments to farmers at prices fixed by the government. This seems to support the conclusion that SFCC does not violate GATT Art. XVII by executing grain purchases at prices and payment modalities fixed by the government.

Upon WTO accession SFCC will furthermore be subject to notification in accordance with the *STE Agreement*. This requires in particular statistical information on quantity and value of traded goods, which so far is publicly unavailable.

To conclude, it is mainly SFCC's purchasing practice discriminating against imports in several ways, which could raise concerns of compatibility with GATT Art. XVII and the *STE Agreement* under changing economic circumstances in the future.

SFCC and subsidies rules

GATT Art. XVII and the *STE Agreement* establish detailed requirements on non-discrimination by state trading enterprises, but they do not provide for any limits for STEs to

¹²² It might furthermore be questioned if food security stockholdings are at all a governmental use.

¹²³ Report of the WTO Panel on *Korea – Various Measures on Beef*, WT/DS161/AB/R and WT/DS169/AB/R of 11 December 2000, para. 753; Report of the Appellate Body on *Canada – Wheat*, WT/DS276/AB/R of 30 August 2004, para. 105.

¹²⁴ cf. also Footnote 1 to Art. 4.2 of the *Agreement on Agriculture* sets forth that "any measures of the kind which have been required to be converted into ordinary customary duties" under that Agreement, include "quantitative import restrictions, variable import levies, minimum import prices, discretionary import licensing, non-tariff measures maintained through state-trading enterprises ...

¹²⁵ cf. Kazakhstan Ministry of Agriculture (2004).

¹²⁶ Report of the WTO Appellate Body on *Canada – Wheat*, WT/DS276/AB/R of 30 August 2004, paras. 140, 144, 147-149.

affect prices or market conditions of agricultural goods by profiting from special privileges or market position.¹²⁷ However, to the extent that an STE's activities involve subsidies or government support to agricultural producers, they are governed by WTO rules on subsidies, especially the AoA.¹²⁸ The AoA applies to SFCC's activities, if they constitute a subsidy or another way to support domestic agricultural producers. According to Art. 1.1(a)(1)(iv) of the *WTO Agreement on Subsidies and Countervailing Measures* (SCM), subsidies may be constituted both by public and private bodies' actions, provided that the latter are entrusted or directed by government authorities, would normally be exercised by the government and do not differ from common governmental practice. It seems quite clear that SFCC is caught by that definition. It is 100 % state-owned, its activity is guided by Government Orders, and it is financed partially from the state budget. It is however up for discussion, if SFCC's activities involve domestic support in the terms of the AoA. Taking into account that SFCC's grain purchases have among other things the objective to stabilize agricultural markets, they could be considered as market price support according to AoA Annex 1.¹²⁹

Unlike most countries granting market price support, Kazakhstan does not have in place an officially administered price which SFCC's purchases must support; but support could be calculated according to the actual difference between domestic market prices and prices paid by SFCC. Another way to qualify SFCC's activities as support under the AoA is to look at budgetary outlays for payments to SFCC. The major sums SFCC is granted every year for its purchasing activity suggest that these activities involve domestic support at least at the level of these budgetary payments. A third way to assess if SFCC's activity constitutes domestic support under the AoA is to consider if it meets the definition of a subsidy under SCM Art. 1. This would presume that it involves loans, grants, or purchases of goods which are executed on terms more favourable than those available to normal recipients in the market.¹³⁰ There are several reasons to believe that this is the case: advance payments exercised by SFCC effectively constitute interest-free loans to farmers. SFCC is in a position to grant these

loans, as it is subsidized from the state budget and it has privileged access to commercial loans. Furthermore, unlike provided for in the *Law On Grain*, purchase prices both for food security and market stabilization purchases considerably deviate from domestic market prices. It follows from these considerations that SFCC's activities actually meets the definition of domestic support under the AoA. The current food stockholding programme executed by SFCC is not either eligible for exemption under AoA Annex 2 No. 3, according to which expenditures for product stocks forming an integral part of a food security programme identified in national legislation are exempted from reduction commitments, provided that the stocks correspond to predetermined targets related solely to food security, purchases are made at current market prices, and activities are financially transparent. The problem with the Kazakhstani food stockholding programme is that it does not distinguish clearly between stockholding and market stabilization targets, and that both purchase prices and conditions as the granting of advance payments for spring grain purchases differ considerably from market terms. It would therefore appear that SFCC's activities involve domestic agricultural support subject to reduction under the AoA. An attempt to calculate the amount of support would probably have to start from budgetary outlays for payments to SFCC, the monetary value of other support instruments like preferential access to private finance, and the differences between domestic market prices and purchasing prices applied by SFCC. In order to exempt at least SFCC's food security activities from support commitments, it would be necessary to clearly separate food security purchases from market intervention activities and to ensure that the former are executed at current market prices and without interest-free advance payments.

The Malonimderi-Corporation

The publicly owned *Malonimderi*-Corporation carries out state activities in the cattle-breeding sector and plays a core role in Kazakhstan's bid to diminish dependence on meat imports and to increase exports.¹³¹ Its activities include information and marketing activities in Kazakhstan and abroad, executing loan programmes for cattle producers, purchase and trade with cattle and meat products, and

¹²⁷ *ibid*, para. 161.

¹²⁸ *ibid*, para. 98; Ya Qin (2004) at N. 26.

¹²⁹ cf. e.g. Desta (2002), p.310.

¹³⁰ Report of the WTO Appellate Body on *Canada – Aircraft*, WT/DS70/AB/R, para. 157.

¹³¹ cf. *Strategy for manufacture and marketing of cattle-breeding production under modern conditions (until 2010)*, <<http://www.minagri.kz>> (24 September 2005).

increasing processing capacities for such products.¹³² For example, in 2003 *Malonimderi* was authorized to carry out purchases of 9,800 tons meat, 48,700 tons of wool, 5000 pieces of cattle and 24,000 tons of canned food on funds from the state budget. It was authorized to export about half of the meat and wool and the entire cattle purchased. Total state funds in 2003 amounted to 1,5 Bn Tenge.¹³³ Purchases are not carried out under public procurement rules as laid down in the Law *On State Purchase*.¹³⁴

An evaluation of *Malonimderi* under WTO law would lead very much to similar conclusions as drawn above on SFCC. At the difference of SFCC, *Malonimderi* does not carry out food security programmes. Conversely, it implements several grant and discounted loan programmes for farmers, which can be clearly qualified as domestic support under the AoA which are subject to reduction.

3.2.9 Conclusion

While the total amount of support to agricultural production granted by Kazakhstan is still low by international standards, Kazakhstani agricultural policy includes a broad variety of support programmes to farmers, which are subject to reduction under AoA Art. 6. This does not apply to most rural development measures, support to state agricultural administration, and veterinary and phytosanitary services. Some other subsidies could be re-designed so as to meet conditions for exemption under the WTO Green Box. Transport subsidies will probably qualify as export subsidies, which will have to be eliminated sooner or later. The activities of the *State Food Contract Corporation* and *Malonimderi*-Corporation also include domestic support subject to reduction. SFCC's and *Malonimderi*'s trading activities furthermore raise some issues of incompatibility with GATT Art. XVII on State Trading Enterprises. Generally, the entire range of state activities possibly constituting support to agricultural producers must be taken into account very

carefully when drawing up domestic support commitments upon WTO accession. A failure to do so might have serious consequences, as support might have to be cut in spite of its relatively low level. As there are considerable uncertainties with regard to the qualification of support measures as support under the AoA, it might also be advisable to provide a certain margin of security in support commitments. A further conclusion is that authorities should be aware of WTO rules on agricultural subsidies and in particular conditions for exemption, as many support programmes might be completely exempt from reduction commitments if their design follows the requirements of AoA Annex 2.

3.3 The Agreement on Sanitary and Phytosanitary Measures and other regulations of agricultural trade

In the last years, Kazakhstan has renewed most of its legislation on plant and animal health, food safety and marketing standards. The challenge is to enact and implement effective legislation and other safeguards to ensure domestic food safety and quality, while concomitantly abiding by the principles laid down in the WTO's SPS- and TBT-Agreements, and ensuring that Kazakhstani agricultural products meet internationally accepted standards to improve market access opportunities. This section will review the most important laws on plant and animal health, food safety and marketing standards relevant to agricultural products and assess if they meet WTO requirements.

3.3.1 General Laws

Art. 17.1.4 of the Law *On Trade* stipulates that technical, pharmaceutical, sanitary, veterinary, phytosanitary, ecological standards as well as requirements and controls of the quality of imported goods are among the Government's means to regulate foreign trade activity. Art. 32 requires that any traded good meets certain minimum conditions of safety and quality. Art. 18.2 provides the Government with a power to impose trade restrictions for purposes of protecting citizen's health, safety and security. Regulation and trade restrictions for such purposes are recognized as legitimate under GATT Art. XX and under the *SPS Agreement*, but it is striking that the Law *On Trade* is silent about the limits imposed by WTO law. It does however refer to other legal acts, which spell out conditions and limits of state regulatory

¹³² cf. information available at <http://www.minagri.kz/lowerOrg/index.jsp?param=rus&type=JSC&org=Malonimderi> (24 September 2005).

¹³³ National Agricultural Programme 2003-2005 No. 6, Programme 88; Governmental Order No. 451 of 14 May 2002 *On some questions of crediting of the closed joint-stock company Malonimderi*.

¹³⁴ Government Order No. 318 of 8 April 2005 *On purchases by state enterprises, legal persons controlled by the state and their affiliates (except for subjects of natural monopolies)*.

action to protect plant health, animal health and food safety.

According to Art. 13 of the Law *On State regulation of agriculture*, the State carries out sanitary and phytosanitary control, animal disease control, diagnostics and liquidation, veterinary action to protect Kazakhstan from the spread of animal and human illnesses, phytosanitary action to combat the spread of harmful plant diseases, and compensation for animals or plants subject to destruction for sanitary or phytosanitary purposes, according to the Laws and with a view to ensure conformity of agricultural produce with international quality and safety requirements. Again, every single of these purposes is legitimate under GATT and the *SPS Agreement*, but the Law does not mention the limits to state action under WTO law.

This underlines the importance of sectoral legislation on animal health, plant health and food safety for meeting WTO requirements, which will be examined in the following sections.

3.3.2 Food safety

Issues of protection of **human health** are dealt with by the Law *On Sanitary-epidemiological Safety of Population* No. 361-II of 4 December 2002. Furthermore, food products are subject to the Law *On Food Quality and Safety*, No. 534-II ZRK of 2004.

The Law *on Sanitary epidemiological Safety of Population* (the *Sanitary-epidemiological Law*) deals with the protection of human health in general; measures to protect human health from food-borne risks which come under the *SPS Agreement* are only a small part of measures to be based on the Law.¹³⁵ According to Art. 2.2, international treaties ratified by Kazakhstan shall prevail if they contain rules deviating from the Law. Art. 3 lists the Law's objects and principles which include to implement citizen's and food operators' rights and obligations relating to the protection of health, to create favourable conditions for life and sanitary-epidemiological safety (Art. 3.1), and to provide scientific evidence to the measures securing sanitary-epidemiological safety (Art. 3.5).¹³⁶ According

to Art. 4 of the Law, sanitary-epidemiological tasks are carried out by the Authorized Body and its territorial departments and border posts, which are supported by sanitary service organizations including national research and scientific organisations. While the government is vested with the power to adopt implementing regulations (Art. 6), the Authorized Body implements the sanitary-epidemiological policy (Art. 7), approves sanitary rules and normative acts (Art. 7.10), certifies conformity with these rules (Art. 7.5), makes proposals to the Government to introduce restrictive measures (Art. 7.7), and coordinates state and international standards (Art. 7.26)¹³⁷ as well as scientific and research activities (Art. 7.27).¹³⁸ Its territorial border departments carry out inspection of imports and exports, and organize and apply border measures (Art. 7-1.1, 4, 5). These tasks are exercised by officers (Art. 11). Art. 15 and 17 make specific provisions on sanitary normative legal acts. Art. 16 provides that certain types of products and substances having detrimental effect on human health are subject to prior authorization.¹³⁹ This includes any food

states: научно-практическая обоснованность мероприятий, обеспечивающих санитарно-эпидемиологическое благополучие населения.

¹³⁷ Art. 7.26, which provides that among the Authorized Body's competencies is the ability to coordinate state and international standards, states: согласовывает государственные и международные стандарты на продукцию, товары процессы и услуги, нормы проектирования.

¹³⁸ Art. 7.27, which provides that scientific and research activities are among the Authorized Body's competencies, states: координирует деятельность научно-исследовательских и иных организаций осуществляющих деятельность в области санитарно-эпидемиологического благополучия населения по разработке научно-исследовательских и научно-практических тематик участвует в их выполнении, внедряет научные достижения в практическую деятельность.

¹³⁹ Art. 16, which provides that certain types of products and substances having detrimental effect on human health are subject to prior authorization, states:

1. Отдельные виды продукции и веществ, оказывающие вредное воздействие на здоровье человека, подлежат государственной регистрации в государственных органах санитарно-эпидемиологической службы:

1) впервые внедряемые в производство и ранее не использовавшиеся вещества и изготавливаемые на их основе материалы и препараты (далее - вещества), представляющие потенциальную опасность для населения;

2) пищевые добавки, красители, изделия и материалы, контактирующие с водой и продуктами питания, впервые ввозимые на территорию Республики Казахстан.

2. Государственная регистрация указанных в пункте 1 настоящей статьи веществ и отдельных видов

¹³⁵ Other measures, which go beyond the scope of this paper, would fall under the TBT-Agreement.

¹³⁶ Art. 3.5, which establishes that among the Law's objectives is to provide scientific evidence to the measures securing sanitary-epidemiological safety,

supplement, colouring agent and any item or material which comes into contact with water and food products (Art. 16.1.2). Authorizations shall be issued on the basis of an expert assessment of the hazard for human health and the environment, conformity with existing normative legal acts and the possibility to prevent detrimental effects by special measures. The list of authorized products shall be published.

According to Art. 18, natural persons have the right to a favourable environment, the factors of which have no detrimental effect on human health and future generations. They have the right to appeal to governmental bodies by way of letter or appeals. Art. 19 and 20 require undertakings to implement product and production controls. Chapter 5 (Art. 24-30) deals with preventive measures. Imported products constituting a threat to human health shall undergo a border inspection and may be refused if they violate sanitary laws or constitute a threat to human health (Art. 25). According to Art. 14, acts of sanitary-epidemiological inspectors can be appealed in state courts.

The *Law on Food Quality and Safety* of 2004 (the *Food Law*) is a cross-cutting law which governs all issues of food quality and safety, in addition to other requirements established e.g. by veterinary, phytosanitary or sanitary-epidemiological legislation (Art. 2.1). According to Art. 2.2, international treaties ratified by Kazakhstan shall prevail if they contain rules deviating from the Law. Art. 3, establishes basic requirements for the handling of food. Food which must fulfil all legal requirements, have no explicit signs of bad quality, be

продукции проводится на основании:

- 1) экспертной оценки опасности веществ и отдельных видов продукции для населения и среды обитания;
- 2) установления соответствия санитарным правилам и гигиеническим нормативам содержания веществ, отдельных компонентов продукции;
- 3) разработки специальных мер, в том числе условий утилизации и уничтожения веществ и отдельных видов продукции, по предотвращению их вредного воздействия на население и среду обитания.
3. Государственная регистрация указанных в пункте 1 настоящей статьи веществ и отдельных видов продукции проводится в порядке, установленном уполномоченным органом в области санитарно-эпидемиологического благополучия населения.
4. Реестр веществ и продукции, разрешенных к применению в Республике Казахстан, подлежит опубликованию в периодических печатных изданиях.

accompanied by and correspond to certification documents and by information on the expiry date. Art. 4 vests the responsibility to ensure food quality and safety in the government and in food operators. Art. 5 requires food operators to provide complete and adequate information about the quality and safety of foodstuffs to consumers and to the government, which has a separate obligations of public information. Chapter 2 deals with government control over food quality and safety. According to Art. 6, food safety standards are set by veterinary and sanitary-epidemiological authorities, but also according to general standard setting procedures by the Authorized Organ for Standardization, Metrology and Certification). Art. 7 states that food products produced or introduced for the first time to Kazakhstan are subject to prior authorization,¹⁴⁰ and Art. 8 authorizes the Government to subject certain foodstuffs to mandatory certification assessing their conformity with Kazakhstani national laws and standards.¹⁴¹ According to Art. 9, state control over food is exercised by the competent veterinary, sanitary-epidemiological and

¹⁴⁰ Art. 7, which provides that food products produced or introduced for the first time to Kazakhstan are subject to prior authorization, reads:

1. Государственной регистрации подлежат впервые внедряемые в производство и ввозимые на территорию Республики Казахстан пищевые и биологически активные добавки, генетически модифицированные источники, продукты детского питания, красители, материалы и изделия, контактирующие с водой и продуктами питания.
2. Государственная регистрация впервые внедряемых в производство и ввозимых на территорию Республики Казахстан продуктов детского питания, пищевых и биологически активных добавок должна проводиться в порядке, установленном уполномоченным органом в области санитарно-эпидемиологического благополучия населения.
3. Государственная регистрация включает в себя:
 - 1) экспертизу документов, которые представляются изготовителем (поставщиком) и подтверждают соответствие пищевых продуктов, материалов и изделий требованиям нормативных документов, условиям изготовления или поставок, а также результаты проводимых испытаний;
 - 2) внесение в Государственный реестр веществ и продукции, разрешенных к применению на территории Республики Казахстан, информации о них, их изготовителях (поставщиках).
4. Не допускаются государственная регистрация нескольких видов пищевых продуктов, материалов, изделий под одним наименованием, а также многократная регистрация одного и того же вида пищевых продуктов, материалов и изделий под одним наименованием или под различными наименованиями, за исключением случаев, когда они изготовлены различными производителями.

¹⁴¹ cf. below Section 6.5.

phytosanitary authorities. Art 10 deals with the rights and responsibilities of food processors and marketers, which include the respect of existing legal requirements but also quality control and control programs (Art. 10.2) and information of state authorities in case of problems (Art. 10.8). Chapter 3 lists legal requirements for food development, production, packaging and marketing, storage and transport, import, production control, and withdrawal. Art. 12 specifies the documents by which foodstuff must be accompanied. This includes information on food quality and safety, on production and marketing conditions, on production control programmes, and veterinary and sanitary certificates. Art. 13 states that only registered harmful additives,¹⁴² growth hormones for animals, pesticides and agro-chemicals may be used, and none of such ingredients may be used for the production of children, dietetic, therapeutic and prophylactic food. Art. 16 states that foodstuffs not meeting legal requirements may not be marketed. Art. 17 on imports refers to border controls according to veterinary and sanitary-epidemiological laws. It confirms that imported food products must be accompanied by documents certifying their correspondence to Kazakhstani legislation and standards. If they do not correspond to the accompanying documents, it may be decided to temporarily suspend importation. In case a verification shows that they are dangerous or of poor quality, they must be re-exported or will be destroyed. While these requirements apply to all kinds of food products including genetically modified foods in the same way, in the National Biosafety Framework drawn up in line with the *Cartagena Protocol on Biosafety to the Convention on Biodiversity* in collaboration with UNEP, Kazakhstan expressed its intention to draw up a *Law On State Regulation Genetic Engineering Activities* and a document on the necessity of state registration of the genetically modified organisms.¹⁴³

An analysis of the *Food Law* and the *Sanitary-epidemiological Law* reveals that WTO requirements have been taken into account, but that the Laws do not ensure adequate implementation of all requirements by the SPS agreement.¹⁴⁴ The Government has drawn up a draft law to amend the *Sanitary-epidemiological Law* to adapt it to WTO

requirements.¹⁴⁵ The relationship between both Laws could be clarified; it would appear that *Food Law* is a framework law, which for single government powers and competencies, refers to sanitary-epidemiological, veterinary or phytosanitary laws and authorities. In general, it is striking that the *Food Law* does not provide in any way that food standards must be based on scientific considerations and international standards, nor does it refer to the principles of necessity and least-trade-restrictiveness. If the Law is actually construed as a framework law, sanitary-epidemiological, veterinary or phytosanitary laws may ensure that WTO principles are respected. But it would be preferable to refer to some of the basic SPS principles in the *Food Law*, in order to provide a comprehensive framework for food regulation and to ensure their respect at the implementation level.

The obligation to base measures on scientific reasons and risk assessment (SPS Art. 2.2, 3.3, 5.2) is reflected clearly in Art. 16 of the *Sanitary-epidemiological Law* on the registration of foodstuff, while it is lacking in Art. 7 of the *Food Law* on the same matter. Conversely, Art. 15 and 17 of the *Sanitary-epidemiological Law* on standards do not even mention scientific considerations. This could be made up for by the objectives and principles laid down in Art. 3.5. But again, any reference to risk assessment and to specific methods is lacking. Neither is there any provision on how to proceed in case there is insufficient scientific evidence (SPS Art. 5.7).

The objectives and principles laid down in Art. 3 of the *Sanitary-epidemiological Law* could be interpreted to implement the principles laid down in SPS Art. 2.2, 2.3 and 5.6 on necessity, disguised restrictions on trade and least trade restrictiveness. But Art. 3 does not ensure that measures do not go beyond what is necessary to achieve the Law's aims, and does not incorporate any of the other concepts. It follows that the Law does not fully ensure implementation of the said provisions in the SPS Agreement. The draft law amending the *Sanitary-Epidemiological Law* would make up for this deficit by adding a paragraph on the principle of necessity and on avoiding disguised restrictions of trade among the objectives and principles in Art. 3 of the Law. An issue of necessity is furthermore raised by the requirement that any new category of food products introduced to Kazakhstan is subject

¹⁴² in Russian: использование кормовых добавок.

¹⁴³ Kazakhstan Ministry of Environmental Protection/ UNEP (2004).

¹⁴⁴ For the following analysis cf. also UNCTAD/WTO (2005).

¹⁴⁵ UNCTAD/WTO (2005).

to prior registration (Art. 7 of the *Food Law*, Art. 16 of the *Sanitary-epidemiological Law*). This could go beyond what is necessary to achieve sanitary-epidemiological well-being. In this regard, it seems useful to distinguish both Laws. The wording of the *Food Law* suggests that registration is more or less automatic and occurs to keep authorities informed. This appears entirely legitimate for food safety purposes and does not impose excessive burdens on traders. Conversely, the wording of the *Sanitary-epidemiological Law* suggests that any new product could be submitted to a risk assessment. This might go beyond what is necessary to protect human health. The same objective might be achieved if the Law enables the Authorized Body to subject single categories of products to prior registration according to the danger they pose for human health.

Although Kazakhstan is a Member of *Codex Alimentarius*, the international food standard-setting organization, the *Sanitary-epidemiological Law* refers to international standards only by providing a power to coordinate national and international standards, which suggests that both levels are on an equal footing. This is insufficient to meet the requirements of Art. 3 SPS, which requires national measures to be based on international standards, implying a much stronger position of the latter.

None of the two laws contains wording which explicitly discriminates against products according to their origin. Art. 15 of the *Sanitary-epidemiological Law* even provides that state norms should state uniform requirements. Inspections are carried out on domestic and imported products according to the same rules.¹⁴⁶ Furthermore, the draft law amending the *Sanitary-epidemiological Law* will add a further principle to Art. 3 of the Law, according to which the application of measures should not entail discrimination on grounds of nationality.

Both laws are silent about equivalence in food safety regulation. While it has been seen above that SPS Art. 4 does not impose an obligation on automatic recognition of equivalence, the Laws could state an objective and a power of the government to enter into negotiations on equivalence with other

Members in Art. 3 and 6 of the *Sanitary-Epidemiological Law*.¹⁴⁷

On the whole, food legislation should be amended further to provide a comprehensive framework for Kazakhstani authorities to respect SPS obligations. It is an issue for consideration if amendments should be made to the *Food Law* or to the *Sanitary-Epidemiological Law*. At present, administrative competencies and instruments to ensure food safety continue to be regulated in detail in the *Sanitary-Epidemiological Law* (an exception is food registration regulated in parallel in both laws). Unless it is decided to exclude food safety entirely from its scope, it appears more sensible to integrate more detailed amendments in that piece of legislation, while amendment of the *Food Law* would be limited to a general statement of the SPS principles.

3.3.3 Plant health legislation

Issues of plant health are addressed by the Law No. 344-I of 1999 *On Plant Quarantine* implemented by Governmental Order No. 773 of 1 August 2003 *On Rules on protection of territory of Republic Kazakhstan from quarantine objects* based on Art. 5.2 of the Law. Chapter 1 of the Law spells out general provisions including plant quarantine activities guidelines, which include the protection of plant resources and products of plant origin from damage and destruction by quarantine pests in order to maintain food and raw material security in Kazakhstan, objective and scientifically justified assessment of quarantine pests' potential impact on plant resources and products of plant origin, and prevention of potential damage that they may cause and international cooperation based on relevant agreements. Chapter 2 establishes the Kazakhstani plant quarantine regulatory system. While the Government draws up implementing rules and the list of quarantine objects and especially dangerous harmful organisms (Art. 5.2; cf. Governmental Order No. 1295 of 10 December 2002), an Authorized Body and its inspectors are vested with the principal implementing powers (Art. 7, 8) and establish the list of plant quarantine pests. The Authorized Body is supported by state quarantine institution and state enterprises (Art. 7-1). It shall, among others,

¹⁴⁶ Order of the Minister of Health No. 841 of 14 November 2003 *On Rules of carrying out of sanitary and epidemiological examination*.

¹⁴⁷ cf. the *Codex Alimentarius Guidelines on Equivalence in Food Inspection and Certification Systems*, CAC/GL 53-2003.

jointly with scientific and research organizations develop quarantine measures based on scientific risk assessment principles with consideration of the requirements set out in international norms and recommendations (Art. 7.1.8).¹⁴⁸ Chapter 3 enumerates plant quarantine measures. According to Art. 13 and the *Rules On Quarantine*, imports of objects subject to quarantine must be accompanied by a phytosanitary certificate issued by the exporting country and an import permit issued by the authorized body (Art. 13.2-1.1, Rules No. 6). The latter is issued upon request to be made no later than 30 days before the date of import at the importer's expenses (No. 9 of the Rules). Upon import, which may occur only through phytosanitary border posts, plant quarantine objects are subject to phytosanitary control and samples may be taken. Customs registration can be effectuated only after control by the Authorized Body (No. 14, 15). Neither the Law nor the Rules provide for time schedules for phytosanitary inspection. The import of products infested with quarantine pests and foreign species, soil, live rooted plants in soil and plant disease pathogens is completely forbidden (Art. 13.2-1.2-4), such batches are refused at the border (No. 21). Imported products are furthermore subject to phytosanitary control at their destination. Disputes under the *Law On Plant Quarantine* are to be settled under the provisions of the Laws of Kazakhstan (Art. 15). Art. 13.1 prohibits disclosure of information provided by the importer without his consent. Art. 13.2 stipulates that quarantine measures of other countries shall be recognized provided they ensure the appropriate level of phytosanitary protection applied in Kazakhstan. Chapter 6 deals with international cooperation and states in particular that whenever an international treaty ratified by the Republic of Kazakhstan contains any norms that are different from the ones specified by the Law, the international treaty shall prevail (Art. 21). Kazakhstan is a Member of the *European Plant Protection Organization* and has signed, but not yet

¹⁴⁸ Art. 7.1.8, which provides that it is among the Authorized Body's competencies is the ability to develop quarantine measures jointly with scientific and research organizations based on scientific risk assessment principles with consideration of the requirements set out in international norms and recommendations, reads: разрабатывает совместно с научно-исследовательскими организациями карантинные меры на основе научных принципов оценки фитосанитарного риска с учетом требований международных норм и рекомендаций и осуществляет контроль за их выполнением физическими и юридическими лицами

ratified the *International Plant Protection Convention*.

Kazakhstan's plant health regime was drawn up in view of WTO requirements, but at some points it falls still short from providing a comprehensive framework for a phytosanitary regulation conforming to WTO obligations.¹⁴⁹

Like the *Law On Veterinary*, the *Law On Plant Quarantine* does spell out the objectives of plant protection action, but it does not incorporate the concepts of necessity and least-trade-restrictiveness required by SPS Art. 2.2, 2.3 and 5.6. Art. 7.1.8 of the Law states that quarantine measures shall be based on scientific risk assessment (cf. SPS Art. 5) taking into account international standards. The latter wording is not precisely similar to SPS Art. 3 requiring measures to be *based on* international standards, but the first half-sentence uses the term *based on*. Given that SPS Art. 3 does not require a complete harmonization with international standards either, the provision seems to be sufficiently binding to ensure that WTO requirements are fulfilled. The Law could be further improved by elaborating more in detail on the techniques of risk assessment,¹⁵⁰ and by providing for a power to adopt measures even if sufficient scientific information is not available (SPS Art. 5.7). Furthermore, while Art. 7.1.5 ensures that phytosanitary certification of imported and exported goods is to be based *inter alia* on phytosanitary characteristics of the area, place of origin and destination,¹⁵¹ the criteria to determine pest- and disease-free areas mentioned in SPS Art. 6 could be spelt out in more detail.

On its face, the Law itself avoids any discrimination between plant quarantine objects according to their origin. It could be further improved by adding among the Law's objectives to avoid any discrimination in the

¹⁴⁹ For the following analysis cf. also UNCTAD/WTO (2005).

¹⁵⁰ Cf. also the International Plant Protection Commission's Guidelines on Pest Risk Analysis, IPPC (1996).

¹⁵¹ Art. 7.1.5, which requires that phytosanitary certification of imported and exported goods is to be based *inter alia* on phytosanitary characteristics of the area, place of origin and destination, reads: проводит карантинный досмотр, лабораторную экспертизу и фитосанитарную сертификацию ввозимой и вывозимой подкарантинной продукции с учетом фитосанитарной характеристики территории и места ее происхождения, а также пункта назначения

application of the Law. Finally, the reference to equivalence in Art. 13.2 is very general, and the rules on border control and phytosanitary certificates make no reference at all to considering equivalent measures in the exporting country. A full implementation of the concept of equivalence would require to enter into a process of bilateral consultations to achieve agreements with important trading partners.¹⁵² This could be included among the powers vested in the Government and the Authorized body according to Art. 5 and 6.

To conclude, the Law On Plant Quarantine ensure implementation of WTO requirements quite comprehensively. The only major deficit is the lack of reference to the principle of necessity. The Law could be further improved by adding detailed provisions risk assessment and an explicit prohibition of discrimination towards imported plant quarantine objects.

3.3.4 Animal health legislation

Issues of animal health are dealt with by the Law No. 339-II *On Veterinary* of 10 July 2002 implemented by Government Order No. 407 of 28 April 2003 *On rules in the field of Veterinary* and the Decision of the Intergovernmental Council for Cooperation in Veterinary of 5 November 2003 *On Rules for veterinary surveillance of international and cross-border shipments of animal products*.

The Law On Veterinary

The Law *On Veterinary* lays the foundation for animal health protection in Kazakhstan and is aimed at ensuring veterinary and sanitary safety, safety of animal products and raw materials of animal origin, veterinary medications, fodder and feeding additives, and at population safeguard against common animal and human diseases. Veterinary is defined in Art. 1.3 as specific scientific knowledge and practices aimed at research of animal diseases and alimentary intoxication of animals, methods of their prevention, diagnostics, treatment and elimination, as well as the observance of compliance of products with legal veterinary requirements and the protection of human life and health from anthrozooses. According to Art. 2.2, international treaties ratified by Kazakhstan shall be applied if they contain rules different from the Law *On Veterinary*. Art. 3 establishes

basic objectives of state activity in the veterinary domain, Chapter 2 (Art. 4-13) deals with state regulation of Veterinary in general. Art. 4 enumerates the objectives of national veterinary policy, which include to develop veterinary rules and norms based on a scientific approach, and in consideration of objective assessments of the epizootic situation and of international veterinary norms (Art. 4.5),¹⁵³ to achieve a higher level of veterinary measures as compared to international recommendations, provided that measures are based on scientific grounds (Art. 4.6),¹⁵⁴ and not to admit unreasonable restrictions of traded goods during the implementation of veterinary measures (Art. 4.7).¹⁵⁵ Normative competencies are attributed to the Government (Art. 5), implementing powers to the Authorized State Veterinary Body and its territorial and local units including border inspection units (Art. 6, 7) and subordinate competencies to the State Veterinary Organizations (Art. 11). Art. 8 stipulates the Authorized Body's competencies. Chapter 3 (Art. 14-24) spells out the scope of state veterinary supervision, which includes mandatory inspection of goods at border control points (Art. 20). Chapter 4 (Art. 25-33) enumerates measures to prevent and eliminate animal diseases which include veterinary standards (Art. 29), trade restrictions including quarantine (Art. 27) and destruction

¹⁵³ Art. 4.5, which establishes that it is among the objectives of national veterinary policy to develop veterinary rules and norms based on a scientific approach, and in consideration of objective assessments of the epizootic situation and of international veterinary norms, reads: разработку ветеринарных правил и нормативов на научной основе с учетом объективной оценки эпизоотической ситуации и международных норм в области ветеринарии; International veterinary standards are developed mainly by the International Animal Health Organization OIE, of which Kazakhstan is a Member since 1993.

¹⁵⁴ Art. 4.6, which establishes that it is among the objectives of national veterinary policy to achieve a higher level of veterinary measures as compared to international recommendations, provided that measures are based on scientific grounds, reads: достижение более высокого уровня проведения ветеринарных мероприятий, чем предусмотрено международными рекомендациями, при наличии их научного обоснования.

¹⁵⁵ Art. 4.7, which establishes that it is among the objectives of national veterinary policy to not to admit unreasonable restrictions of traded goods during the implementation of veterinary measures, reads: недопущение необоснованных ограничений в реализации подконтрольных государственному ветеринарному надзору грузов при осуществлении ветеринарных мероприятий с целью обеспечения ветеринарно-санитарного благополучия.

¹⁵² Cf. also the International Plant Protection Commission's Guidelines on equivalence, IPPC (2005).

of goods subject to veterinary control (Art. 30). According to Art. 29, standards shall be established by the State Authorized Veterinary Body (Art. 29.4) based on research works carried out in accordance with the Law *On Veterinary* (Art. 29.2).¹⁵⁶

Some of the language adopted by the Law shows that it was drafted with a view to fulfil WTO obligations. However, further amendments might be necessary to complete this process.¹⁵⁷ Art. 29 requires standards to be based on research work. However, it lacks any explicit reference to risk assessment and to available scientific evidence as required by SPS Art. 5.2, and does not stipulate how to proceed if relevant scientific evidence is insufficient (cf. SPS Art. 5.7). Neither the definition under Art. 1.3 nor the objectives enumerates in Art. 4.5 include such references. In order to ensure that research work for standards is conducted according to recognized risk assessment methods, it would be advisable to include an explicit reference to risk assessment. It would furthermore be useful to expand on the details risk assessment methodology, e.g. in additional implementing rules.

Art. 2.2 of the Law gives substantial weight to international treaties,¹⁵⁸ but it does not address the implementation of international standards (SPS Art. 3.1), which almost never take the form of a treaty. International standards would appear to be referred to by Art. 4.5, but the term *international norm* is neither generally recognized nor defined by the Law. Furthermore, the wording of Art. 4.5 requiring the consideration of international norms suggests a much greater flexibility than allowed by Art. 3.1 SPS, which establishes an *obligation* for SPS measures to be *based on* international standards.¹⁵⁹ What is more, Art.

4.5 states an *aim* of similar importance to achieve a higher level of protection than internationally agreed upon. This turns the rationale of SPS Art. 3 - to achieve harmonization to the furthest extent possible - upside down and is not in line with WTO requirements. Rather, the Law should state an objective and a requirement for state veterinary regulation to base veterinary measures on international standards, and the power to adopt measures beyond what is internationally agreed upon should be explicitly excluded unless measures are based on a risk assessment.¹⁶⁰

The Law *On Veterinary* does not establish that veterinary measures should not go beyond what is necessary to protect animal or human health (SPS Art. 2.2), should be no more trade restrictive than required to achieve the level of protection deemed appropriate (SPS Art. 5.6), and should not be a disguised restriction on trade (SPS Art. 2.3). It could be argued that the aims and objectives of veterinary activities established in Art. 3 and 4 of the Law *On Veterinary* imply that measures based on the Law may be directed exclusively at these aims. But it is one thing to require that measures make some kind of contribution to veterinary purposes, and another to ensure that the least trade-disruptive measure to achieve that purpose is chosen. It follows that the Law *On Veterinary* does not fully implement SPS Art. 2.2. This could be remedied by adding an additional provision stipulating explicitly that powers to adopt veterinary measures are limited by the principles laid down in SPS Art. 2.2, 2.3 and 5.6.¹⁶¹ It is advisable to include an explicit reference to all three principles, as in spite of their close linkage, they stress different aspects: Art. 2.2 refers to necessity in general, Art. 5.6 focuses on available alternatives,¹⁶² and Art. 2.3 establishes a further test preventing abuse of regulatory rights provided for by the SPS agreement.¹⁶³

¹⁵⁶ Art. 29.2, which requires standards to be based on research works carried out in accordance with the Law *On Veterinary*, reads: Ветеринарные нормативы устанавливаются на основе исследований, проводимых в соответствии с законодательством Республики Казахстан в области ветеринарии.

¹⁵⁷ For the following analysis cf. also UNCTAD/WTO 2005.

¹⁵⁸ cf. also Art. 4 (3) of the Kazakh Constitution according to which international treaties have a priority over the laws and shall be applied directly, except for cases where it follows from the treaty, that for its application, it is necessary to issue a law; cf. WTO Document WT/ACC/KAZ/14 of 20 February 1998.

¹⁵⁹ According to the WTO Appellate Body, this means that they must incorporate some, albeit not necessarily all elements of the international standard; cf. Report of the WTO Appellate Body on *EC – Hormones*,

WT/DS48/AB/R adopted on 13 February 1998, para. 163.

¹⁶⁰ Amendments envisaged according to UNCTAD/WTO 2005.

¹⁶¹ Amendments envisaged according to UNCTAD/WTO 2005.

¹⁶² cf. e.g. Report of the WTO Appellate Body on *Australia – Salmon*, WT/DS18/AB/R adopted on 6 November 1998, para. 194.

¹⁶³ The relationship between Art. 2.2 and 2.3 can be interpreted similarly to the relationship between the single items and the Chapeau of Art. XX GATT, which state similar requirements and apply cumulatively; cf. Report of the WTO Appellate Body Report on *US –*

The Law *On Veterinary* does not recognize the concept of pest or disease free areas required by SPS Art. 6. The only provision in the Law referring to the area in which animal diseases are disseminated is Art. 1.27 on the definition of epizootic monitoring. This fails to implement the obligation set out in Art. 6. To implement WTO obligations towards other Members, it will be particularly important to provide for the recognition of pest- and disease-free areas as requested by exporting Members, but in order to minimize impact of veterinary measures on Kazakhstani exports, it is also advisable to establish a sound system of regionalisation within Kazakhstan, in order to be able to limit the scope of other Members' measures towards Kazakhstani products.

The Law *On Veterinary* avoids any textual discrimination towards imported animals and animal products. This is in line with SPS Art. 2.3. Art. 4.7 of the Law, which explicitly prohibits unreasonable restrictions on imports and exports on the implementation of veterinary measures is also relevant in this context. In order to ensure that non-discrimination is also respected upon adoption of veterinary measures, it could be appropriate to include a general provision prohibiting discrimination in the application of the Law on Veterinary.

The Rules on veterinary border surveillance

The implementation of veterinary rules on imported and exported animals and animal products is ensured by mandatory inspections undertaken by border veterinary control posts according to Art. 20 of the Law *On Veterinary* and Governmental Order No. 407 of 28 April 2003 *On Rules for veterinary surveillance of international and cross-border shipments of animal products*. According to the *Rules*, imported animals and animal products must conform to Kazakhstani standards, be accompanied by a veterinary certificate of the country of origin and by a permit by the State Veterinary Inspector issued according to the veterinary situation in the country of export. Depending on the country of export, the General State Veterinary Inspector may adopt an Order to refuse permits for certain countries and certain animal products in general or on a case-by-case basis.¹⁶⁴ Furthermore, the importer must present a certification by a local

veterinary authority at the good's destination to confirm the intended destination within Kazakhstani territory. This confirmation is issued for a category of goods upon request by the importer within 15 working days (*Rules*, No. 4.5-4.8), and the permit for importation of the single batch is issued within further 5 working days. The border post veterinary inspector checks the documents and their accordance with the products, and replaces the veterinary certificate with a domestic certificate (*Rules*, No. 4.9, cf. also Art. 17 of the Law *On Veterinary*). He may take a sample of the goods for inspection in a laboratory, which is carried out within the same working day (*Rules*, No. 4.10, Art. 17 of the Law *On Veterinary*). The *Rules* establish processing periods for each procedure. Art. 20(7) of the Law *On Veterinary* ensures confidentiality for information disclosed to the veterinary inspectors. According to Art. 35.2 of the Law *On Veterinary*, fees may be collected for these procedures. The veterinary inspector's actions are subject to appeal in superior state veterinary control bodies or in a court (Art. 17.2 of the Law *On Veterinary*).

This procedure seems to be broadly in line with the requirements of SPS Art. 2-5 and SPS Annex C dealing with control, inspection and approval procedures. The procedures seem to be construed to avoid undue delay; similar controls are effectuated on domestically traded goods (cf. Art. 17, 21 of the Law *On Veterinary*). Information requirements are in line with internationally applied procedures,¹⁶⁵ which suggests that they are adequate. Art. 35.2 could be amended to establish that fees should be calculated according to the actual cost of the service, but SPS Annex C does not impose this as an obligation. Conversely, the requirement to produce a confirmation by a local Kazakhstani Veterinary Authority of an imported good's destination, regardless of the veterinary risk involved, might go beyond what is reasonable and necessary and therefore might violate SPS Annex C No. 1(d). In fact, the OIE standard does not provide for such a measure.¹⁶⁶

The Law *On Veterinary* does not provide for the recognition of equivalent veterinary measures by other WTO Members. With regard to imported products, the *Rules* require full compliance of imported products with

Shrimps WT/DS58/AB/R adopted on 21 November 2001, para. 157.

¹⁶⁴ For an overview of the situation in 2002 cf. Intracen (2002)b, p. 15-6.

¹⁶⁵ cf. OIE Terrestrial animal health code 2005, Art. 1.4.4.

¹⁶⁶ OIE Terrestrial animal health code 2005, Art. 1.4.4; cf. also WTO Document WT/ACC/KAZ/22 Question 54.

Kazakhstani standards (No. 5.1) and an evaluation by the Kazakhstani Veterinary Inspector of the veterinary conditions in the exporting country (No. 5.2). It is assumed that equivalence of the export country's measures is taken into consideration in this evaluation, but it is not clear if any exception to compliance with Kazakhstani rules is made. In view of simplifying import procedures, this might be advisable. However, the current law is not in violation of Art. 4 SPS, which explicitly recognizes that equivalence is subject to bilateral or multilateral agreements between concerned Members.¹⁶⁷ Kazakhstan has engaged in negotiations on agreements in this sphere: the *Agreement on cooperation of CIS Member States in the sphere of veterinary* of 1994 stipulates that USSR rules on veterinary shall continue to apply between the Parties provided they do not contradict openly more recent legislation. Under the Kazakhstani-Turkish *Convention concerning the Collaboration in the animal health area* of 1995 it is agreed to establish joint import, export and transit requirements. In order to fulfil its obligation under SPS Art. 4, Kazakhstan might engage in further negotiations to implement these agreements and to initiate negotiations with other important animal trade partners. With regard to exported products, Kazakhstan succeeded to demonstrate that its veterinary supervision on fisheries products is equivalent to EU measures in 2002, which enabled it to export fisheries products for human consumption to EU countries.¹⁶⁸ It might make further efforts to achieve the same for meat products.

To sum up, Kazakhstani veterinary legislation implements many requirements laid down in the SPS Agreement, but it fails to fully implement the SPS provisions on risk assessment, necessity, and international standards. Furthermore, the obligation to provide a confirmation of a good's destination

by the local Veterinary Authority appears to be in violation of the SPS Agreement. Other provisions could be expanded or clarified.

3.3.5 Food and agricultural standards formulation

General technical requirements for food and agricultural products are laid down in Kazakhstan's food and agricultural standards, which are based to a large extent on former USSR standards. According to the *National Agricultural Programme 2003-2005*, 72 national standards and 500 inter-state standards based on former USSR documents exist. Upon WTO accession, these standards must respect the *TBT Agreement*, which applies to standards not primarily directed at the protection of human animal or plant health from diseases. Furthermore, enhanced market access for Kazakhstani exports requires that they meet internationally accepted standards. In order to meet this challenge, Kazakhstan adopted a major programme to review existing standards.¹⁶⁹

Standardization is governed by the Law No. 603-II *On Technical Regulation* of 9 November 2004. The Law, which replaces the Laws *On Standardization* and *On Certification*, establishes the state system of technical regulation aimed at ensuring safety of products, services and processes. Art. 1.46 clarifies that this excludes sanitary and phytosanitary measures. Art. 4 establishes basic objectives and principles of technical regulation. The latter include equality of requirements to domestic and imported products, priority use of achievements of science and technology as well as international and regional standards, and accessibility of information. The Law distinguishes between mandatory normative legal acts on technical regulation adopted by the State (Chapter 2, Art. 17-19) and voluntary standards adopted by the authorized body, the *Committee on Technical Regulation and Meterology* (Chapter 3, Art. 20-25, cf. Art. 21). Normative legal acts, which include acts on the safety of foodstuffs (Art. 17.8.13), shall be established irrespective of a product's country of origin, with the exception of SPS measures, for which instead shall be based on scientifically substantiated risk (Art. 17.3). Legal acts shall be established only if they can influence the achievement of the Law's aims (Art. 17.4) and shall not create

¹⁶⁷ Cf. also *Decision of the SPS Committee on the implementation of Art. 4*, WTO Document G/SPS/19/Rev.2 of 23 July 2004.

¹⁶⁸ European Commission decision (2002/863/EC) of 29 October 2002 amending Decision 97/296/EC drawing up the list of third countries from which the import of fishery products is authorized for human consumption, with respect to Greenland, New Caledonia, Costa Rica, Papua New Guinea, Suriname, Switzerland, Mozambique, Honduras, Kazakhstan and the Federal Republic of Yugoslavia (OJ L301, 5.11.2002, page 53); Commission decision (2002/862/EC) of 29 October 2002 laying down specific conditions for imports of fishery products from Kazakhstan (OJ L301, 5.11.2002, page 48).

¹⁶⁹ cf. *National Agricultural Programme 2003-2005*, No. 4.6.

obstacles for entrepreneurial activities in a larger degree than it is necessary to achieve these aims (Art. 17.5). Art. 18 establishes further requirements. Standards, compliance to which is voluntary (Art. 21.6), are developed by the *Committee* on the basis of a state programme of standardization (Art. 25).¹⁷⁰ According to Art. 21.4, norms and standards of foreign states and international organizations can be used in full or in part as the basis for Kazakhstani state standards, unless they are ineffective or inappropriate to achieve the Law's aims. According to Art. 21.5, state standards can establish necessary requirements for the safety of products, services and processes.

The *Law On Technical Regulation* was crafted with a close view to the requirements under the *TBT Agreement*. The objectives and principles refers to the core concepts under the Agreement, i.e. the principles of non-discrimination (TBT Art. 2.1 and Annex 3 lit. D), necessity (TBT Art. 2.2 and Annex 3 lit. E) and international harmonization (TBT Art. 2.4-2.6 and Annex 3 lit. F-G). Art. 17 on normative legal acts on technical regulation deals exhaustively with the principles of necessity and non-discrimination, but it does not mention international standards. Art. 21 on standards implements TBT Art. 2.4 comprehensively, but reference to necessity and non-discrimination is only rudimentary. However, all basic concepts of the TBT-Agreement are among the general principles laid down in Art. 2 of the Law, which underlines their importance and inspires the Law's application. Furthermore, there are no provisions contradicting these principles. For these reasons, it seems that they are sufficiently implemented by the *Law On Technical Regulation*.

Assessment of a products' conformity to laws and standards is dealt with in Chapter 4 and 5 (Art. 26-36) of the *Law on Technical Regulation*. According to Art. 27 and 32, the Government may subject certain goods to mandatory assessment of their conformity to Kazakhstani laws and standards. This is confirmed by Art. 6 of the *Law on Food*, and implemented by Governmental Order of 29 November 2000 No. 1787 *On product conformity control*. In the domain of food and agricultural products, mandatory certification applies to milk products, flour, coffee, tea, fats

and many prepared foodstuffs and beverages. Other products are subject to voluntary certification (Art. 34). Certificates of conformity are issued by accredited conformity assurance bodies (Art. 29, 35). This includes regional state bodies, testing laboratories, state certification bodies of other CIS-countries, and accredited foreign certification bodies.¹⁷¹ Art. 12 states the rights and responsibilities of conformity assessment bodies, which must ensure adequate information on procedures, ensure confidentiality of information, and ensure non-discrimination. Upon importation, importers must present a declaration of conformity for their products on the basis of the certification (Art. 31 of the Law; Art. 382.5.9 of the *Customs Code*). According to Art. 33, certificates of conformity of other states are recognized in accordance with international agreements.¹⁷² Chapter 6 (Art. 37-45) deals with enforcement of mandatory technical regulations, which comes under the responsibility of the recognized body and other authorities. According to Art. 42, enforcement actions are subject to judicial review.

The Law's provisions on conformity assessment provide a framework for conformity assessment bodies to implement the requirements of TBT Art. 5 and 6. The duties it establishes for conformity assessment bodies also implement TBT Art. 8, according to which Members must take such reasonable measures available to ensure the respect of Art. 5 and 6 by non-governmental conformity assessment bodies. Finally, Kazakhstan's negotiations with some countries shows that it implements its obligation to work towards

¹⁷¹ In 1997, five foreign companies were accredited by GosStandard to issue certificate of conformity: Gas de France, France; MertControl, Hungary; Societe Generale de Surveillance (SGS), Switzerland; Turkish Institute of Standards, Turkey; Tuf Reinland Holding (Germany); cf. According to the CIS InterState Agreement on Standards, Metrology, and Certification cf. WTO Document WT/ACC/KAZ/6/Add.2 of 17 February 1999, Question 92.

¹⁷² cf. *Protocol of Cooperation with the Turkish Institute of Standards* of 6 March 1996 and Agreement with China *On cooperation to provide quality and mutual inspection of import-export goods* signed on 5 July 1996. The *Protocol of Cooperation* with Turkey stipulates the following: information and technical exchange and exchange of standards documents; conducting training programmes; establishment of testing laboratory in Kazakhstan; implementing a packaging project; and organizing joint cultural and sports events. The *Agreement* with China stipulates mainly the following: work toward mutual recognition of test laboratories and certification bodies and establishment of methods of inspection.

¹⁷⁰ cf. Programme *On the Development of a national system of standardization and certification of the Republic Kazakhstan* for 2004-2006.

mutual recognition of conformity assessment (Art. 9). TBT Art. 5.4 recognizes that conformity assessment may be mandatory. However, it may be questioned if Kazakhstan's extensive requirements for mandatory certification impose unnecessary burdens on trade and therefore violate TBT Art. 5.1.2.

In the area of food quality and safety, technical regulations on packaging and labelling are of particular importance. According to Art. 32 of the *Law On Trade* and Government Order No 1274 of 31 August 1999, labels must contain trade marks, information on the origin and composition, the nourishment value of food products, the date of production, the period of storage and fitness, applicable standards in Kazakhstani and Russian language. Art. 14.3 of the *Food Law* makes more specific requirements for food labelling. It states that foodstuffs labels must provide information on the food nourishment value (i.e. on calories, proteins, fats, carbohydrates, vitamins, macro- and microcells), designation and conditions of application, methods and conditions of use (for concentrates and semi-finished products), conditions and period of storage and fitness, date of production and date of packaging, composition including food and biologically active additives and genetically modified substances. It adds that foodstuffs must be packaged so as to ensure their quality and safety and the retention of vitamins and minerals to the extent provided for by national legislation (Art. 14.1, 14.4).¹⁷³

To the extent that food packaging and labelling requirements are directly related to food safety, they are governed by the SPS-Agreement (SPS Annex A No. 1), in other cases they come under the TBT-Agreement (TBT Annex 1, No. 1, Art. 1.5).¹⁷⁴ While requirements on food additives, contaminants and toxical substances are unambiguously aimed at protecting human health, this is less clear for other ones. In any way, both Agreements require packaging and labelling requirements to be based on international standards and not to go beyond what it is necessary to achieve a

legitimate aim pursued. International standards exist for the labelling of pre-packaged food and for nutrition labelling.¹⁷⁵ The information required by Kazakhstani legislation broadly corresponds to the information required by these standards. Although the international standards are much more specific, the *Food Law* merely provides for minimum requirements and does not prevent food operators to supply food labelled according to Codex standards. Furthermore, implementing legislation provided for in Art. 14.3 of the *Food Law* may enact more detailed provisions and Codex standards for single products. Para. 8.2 of the Codex General Standard provides for the opportunity to make specific language requirements for labels if otherwise they are not acceptable to consumers. As Kazakhstani population consists of a considerable amount of both Russian and Kazakh native speakers, the dual language labelling requirements are necessary to provide both of them with acceptable information and therefore is in line with the Codex standard. Problems may arise with regard to some notions like macro- and microcells, which do not appear to correspond to current international terminology. Implementation rules should specify to which of the information required according to the Codex standard this relates. Finally, the requirements on biologically active food additives and genetically modified substances fall squarely within the current discussion on GMO labelling. There has not yet been any authoritative decision on the issues, and while some authors claim that such requirements conform to WTO law, others take the opposite position.¹⁷⁶ With regard to non-packaged food, the Law is unclear on its labelling obligations. It is assumed that they do not apply, but this could be clarified.

It can be concluded that the *Law On Technical Regulation*, which is the basis for food and agricultural standards, and the *Food Law* provisions on packaging and labelling are mostly in line with requirements under the TBT Agreement. The *Law On Technical Regulation* is a good basis on which food and agricultural standards should progressively be reviewed and adapted to internationally accepted standards. An issue of compatibility with the TBT Agreement arises from the extensive

¹⁷³ Art. 14, which requires foodstuffs to be packaged so as to ensure their quality and safety and the retention of vitamins and minerals to the extent provided for by national legislation, provides: Упаковка фортифицированных пищевых продуктов должна обеспечивать сохранение содержания в них витаминно-минерального комплекса в количествах, предусмотренных нормативными документами

¹⁷⁴ Some authors claim that labelling requirements dealing with process and production methods fall outside the scope of the TBT-Agreement, cf. Marceau/Trachtman (2002), pp. 876-7.

¹⁷⁵ *Codex General Standard for the Labelling of pre-packaged foods*, CODEX STAN 1-1985 (Rev. 1-1991); *Codex Guidelines on nutrition labelling* CAC/GL 2-1985 (Rev. 1 - 1993).

¹⁷⁶ cf. e.g. Covelli/Hohots (2003); Zedalis (2001); Morgan/Goh (2004).

mandatory certification requirements for agricultural goods and foodstuffs.

3.3.6 Regulation and Transparency

For all regulations and standards coming under the SPS and the TBT Agreement, WTO Members must ensure transparency. Members must provide information on existing measures and technical regulations to other Members and establish an enquiry point for that purpose (SPS Annex B paras. 3, 10; TBT Art. 10/Annex 3 para. O). Draft measures and regulations which deviate from international standards shall be forwarded to other Members through the WTO Secretariat, other Members shall be provided the opportunity to comment on them (SPS Annex B para. 5, 6; TBT Art. 2.9-2.11, Annex 3 paras. L-P).

Art. 7.8, 7.10, 10 of the *Law On Technical Regulation* provide for an information centre, which was established by Governmental Order of 11 July 2005 No. 718 *On Rules for the creation and work of an Information centre on technical barriers to trade, and sanitary and phytosanitary measures at the Committee for Standardization and Meteorology*. According to No. 3 of the Order, the Centre's basic functions are to interact with the WTO Secretariat and other Members to provide documents and information about existing and future normative legal acts. To this end, the Centre may request from the interested parties information and materials concerning technical regulation and SPS-measures. Furthermore, the *Laws On Veterinary* and *On Plant Quarantine* attribute to the relevant Authorized Bodies the task to provide interested parties with information on veterinary respectively plant quarantine measures (cf. Art. 8.12 of the *Law on Veterinary*, Art. 7.2 of the *Law on Plant Quarantine*). The *Sanitary-epidemiological Law* (Art. 19.1.1) provides operators and individuals with a right to be timely and truly informed on the sanitary-epidemiological situation in accordance with the laws. Laws and Governmental Orders are published on the websites of the Ministry of Agriculture and the Ministry of Health,¹⁷⁷ approved standards (including conformity assessment procedures) are published by the *Committee on Standardization and Meteorology*. On the whole, the obligation to provide information about existing measures and regulations seems

to be implemented comprehensively by these provisions.

With regard to transparency and participation in the adoption of new SPS- and TBT measures, Art. 19 of the *Law On Technical Regulation* establishes a procedure for the drafting of normative legal acts on technical regulation. The intention to initiate such a procedure must be published one month in advance. If the regulation deviates from international standards or affects the conditions of import, drafts are published at an early stage. The responsible body must organize a public discussion of a duration of no less than 60 days and take into account any comments made by interested parties or third countries. Art. 19 establishes a coherent framework for implementing requirements to involve other WTO-Members in the process of drafting and adopting new regulations. However, it is limited to technical regulation, which according to the definition in Art. 1.46 excludes SPS-measures.¹⁷⁸ The question arises therefore, whether the sectoral laws on veterinary, plant quarantine and sanitary-epidemiological measures are sufficient to ensure that obligations on prior notification of SPS-measures are met. The single laws are silent about that issue. However, the tasks of the Information Centre refer to providing information on future laws. The activities of the Centre can therefore ensure that other Members are informed about planned SPS-measures. Conversely, the Order does not ensure that competent authorities allow for a reasonable period of time for consultation of other Members and take their comments into account. While general administrative and legislative procedures might ensure this, it would be useful to include provisions similar to Art. 19 of the *Law On Technical Regulation* to the *Laws On Veterinary*, *On Plant Quarantine* and *On sanitary-epidemiological welfare of Population*.

3.3.7 Conclusion

Kazakhstan's legislation on animal and plant health, food safety and food marketing incorporates many of the principles stipulated by WTO law, but needs further elaboration in order to create a comprehensive framework ensuring implementation of all requirements to

¹⁷⁷ available at <<http://www.minagri.kz>> and <<http://www.dari.kz>> (24 September 2005).

¹⁷⁸ While the Law is not unambiguous at that point (other articles deal with SPS-measures), Art. 19 does not provide for a specific definition, nor does it mention SPS-measures. It follows that the general definition must apply.

be applied upon accession. Provisions on the principles of necessity and least-trade-restrictiveness under all SPS Laws need to be revisited; other major deficiencies include language on risk assessment and international standards. Furthermore, some restrictions imposed upon imported goods, like the requirements on veterinary authority certificates and on mandatory certification seem to go beyond what WTO law permits. Legislation on technical standards and implementation of regulative transparency appear to implement WTO requirements nearly comprehensively.

There are several options for further development of the examined laws. The first is to amend the law's provisions on objectives, but this has the pitfall that statements of objectives are not particularly appropriate to ensure limitations to public authorities' powers. The *Law On Technical Regulation* opted to include WTO principles in single provision on regulatory instruments (cf. Art. 17), but this might be very burdensome for other laws providing for a host of different instruments. A sensible option has been chosen in the *Law On Plant Quarantine*, which includes a separate article on principles (Art. 4). Another – possibly additional - option would be to amend provisions on competencies of the Authorized Bodies and other authorities. This might be the best way to ensure that principles are actually taken into account by these bodies.

Along with refinement of the legal framework for sanitary and phytosanitary action examined in this section, implementation of sanitary and phytosanitary measures based on science and international standards will also require that authorities dispose of up-to-date technical equipment and know-how, which they lack more often than not.¹⁷⁹

3.4 Intellectual Property Rights and Agriculture

3.4.1 Protection of Plant Varieties

A state's regulatory system for plant varieties has major implications for the agricultural sector. Protection of plant varieties may foster innovation and be considered a human right. At the same time, farmers' right to save and reuse seeds may be an important cost factor

for agricultural production. Furthermore, easy access to genetic resources can stimulate research activities. In its preambular language, the *TRIPS Agreement* calls on all WTO Members to provide "effective and adequate" intellectual property rights (IPRs), and to ensure that IPRs do not amount to trade restrictions in themselves. TRIPS Art. 27, which establishes an obligation for Members to provide for patents on inventions on a non-discriminatory basis, states that Members may exclude from patentability plants and animals and essentially biological processes for the production of plants or animals, if they protect plant varieties either by patents or by an effective *sui generis* system or by any combination thereof. Members can therefore choose how to protect plant varieties, provided that protection is effective. It can be derived from the context and purpose of the *TRIPS Agreement*, that a *sui generis* system is required, at the very least, to be an IPR, i.e. a legally enforceable right to exclude others from certain acts in relation to the protected plant variety, or to obtain a remuneration from them, which permits action against any act of infringement, and complies with the principles of National Treatment and Most-Favoured-Nation Treatment.¹⁸⁰ The TRIPS does not make reference to any specific system, but the main international system of protection of plant varieties is the *International Convention for the Protection of New Varieties of Plants* (UPOV). Some observers conclude that adherence to UPOV is no guarantee to enact an effective system of protection under TRIPS.¹⁸¹ But considering that UPOV continues to be the main international system of protection of plant varieties, which has been considerably strengthened in 1991, it seems safe to assume that implementation of UPOV 1991 would also ensure conformance to TRIPS Art. 27.3.b.¹⁸²

Kazakhstan protects plant varieties under the Law No. 422-I *On Selection Achievements* of 1999. Art. 2 defines the "author of a selection achievement" ("breeder") "as a natural person who bred or discovered and developed a variety of breed." It also defines a "selection achievement" as a "new variety or animal breed resulting from the creative activity of man for which a patent has been granted. The law creates a state register for all protected plant varieties. Art. 3 states that the legal protection available for plant varieties (and all

¹⁷⁹ cf. e.g. *National Agricultural Programme 2003-05*, No. 4.6.

¹⁸⁰ Leskien (1997), p. 27.

¹⁸¹ Leskien (1997), p. 27.

¹⁸² cf. options for countries enumerated in FAO (2004a), p. 70.

selection achievements) is patents. The term of patents is 25 years from the date of filing. For animal breeds, the patent shall last for 30 years, and for grapevines, ornamental, fruit and forest trees 35 years. Art. 4 gives the basic criteria for patentability as being novelty, distinctness, uniformity and stability. Art. 5 deals with patent applications. Art. 5.2 states that natural persons residing abroad and foreign legal entities are required to act through registered patent agents. Title III (Art. 8-10) lays out the application procedure. Title IV (Art. 11-17) deals with the author's and the patent owner's rights, where the patent owner is either the author, his successors, or a person designated by him (Art. 13). Art. 14 defines the patent owner's rights, which include exclusive rights to use a selection achievement for production or reproduction, conditioning of seeds for the purpose of propagation, offering for sale, selling or other marketing, exporting or importing as well as stocking for any of these purposes. Art. 14.3 extends protection to seeds of varieties or pedigree material of breeds which are essentially derived from the selection achievement, seeds which are not clearly distinguishable from the selection achievement, seeds distinguishable only by variations maintaining the genotype of the initial variety, and seeds of varieties or pedigree material of breeds whose reproduction requires the repeated use of the selection achievement. Art. 17 states that any act with private and non-commercial or experimental purposes, and the use of the selection achievement as an initial material for the purpose of breeding other variety or breed except for the cases stated in Art. 14.3 do not infringe the patent-owner's right. Title VI (Art. 21-22) deals with the patent's invalidation, cancellation and expiry.

With the *Law On Selection Achievements*, Kazakhstan opted for a system of patent protection over plant varieties. Although the Law does not explicitly refer to non-discrimination, it does not stipulate different conditions for protection for domestic or foreign owners, with one exception: Application fees used to be higher for foreign compared to domestic applicants. However, Kazakhstan has undertaken to phase out these differences.¹⁸³ The conditions for protection stipulated in the Law correspond to internationally recognized standards for plant

variety protection (cf. UPOV Art. 5), the term of protection exceeds the term provided for in TRIPS Art. 33 (20 years), and the scope of protection and the remedies available conform to patent law standards. The Law excludes plant varieties from patentability under certain circumstances, but these exceptions are narrow, and it would not appear that they are such to make plant varieties ineffective in the sense of TRIPS Art. 27.3.b. The wording of the non-commercial, research and breeders exceptions is essentially derived from UPOV 1991 (cf. Art. 14, 15). In fact, even if Kazakhstan is not a member of UPOV, the UPOV Council held in 2000 that the *Law On Selection Achievements* is consistent with the *UPOV Convention*.¹⁸⁴

Furthermore, in Art. 42 of the 1999 *EU-Kazakhstan Partnership and Cooperation Agreement*, Kazakhstan undertakes to join UPOV and ratify the *UPOV Convention* of 1991. In 2003, Kazakhstan indicated an interest in joining UPOV at a meeting of government officials in Almaty.¹⁸⁵ It would seem that regarding the plant varieties protection obligations in the *TRIPS Agreement*, Kazakhstan is in compliance with WTO requirements. In a related issue, Kazakhstan could make sure that plant varieties protection takes into account concerns of access to genetic resources intrinsically linked to plant variety protection. Currently, its legislation does not recognize a Farmers' right to save, re-use and share seeds. While this might not be an issue for the many Kazakhstani household subsistence farms, which are arguably covered by the exception for non-commercial use of plant varieties in the *Law On Selection Achievements*,¹⁸⁶ it might be of relevance to the many medium-size farms created during privatization of agricultural land in the 1990s. Other concerns would be access to genetic resources and benefit-sharing. The *Convention on Biodiversity*, to which Kazakhstan is a party, requires States Parties to apply the principles of prior informed consent and equitable benefit sharing (Art. 15).¹⁸⁷ The *FAO International Treaty on Plant Genetic Resources for Food and Agriculture*

¹⁸³ WTO Documents WT/ACC/KAZ/10 of 25 July 1997 and WT/ACC/KAZ/11 of 5 August 1997.

¹⁸⁴ Thirty-Fourth Ordinary Session, Geneva, 26 October 2000, Document No. C/34/3.

¹⁸⁵ UPOV Council, Report on activities during the first nine months of 2003, prepared by the Office of the Union, Document C/37/3 of 9 October 2003.

¹⁸⁶ For the relevant provision in UPOV 1991 cf. FAO (2004a), p. 28.

¹⁸⁷ cf. Bonn Guidelines on Access and Benefit Sharing, para. 16.

establishes a multilateral system of access and benefit sharing for genetic resources, which covers a substantial amount of genetic resources relevant to food safety and interdependence, to which facilitated access for purposes of research, breeding and training for food and agriculture is provided, on the condition that recipients do not claim any intellectual property or other rights that limit the facilitated access to the plant genetic resources for food and agriculture, or their genetic parts or components, in the form received from the Multilateral System (Art. 12). Kazakhstan might decide to accede to the *Plant Genetic Resources Treaty* in order to contribute to access and benefit sharing of genetic resources, in which case the Law on Selection Achievement should be amended to provide for a relevant exception.

4 CONCLUSION

This paper has shown that there is a broad variety of legal issues in the field of agriculture arising from Kazakhstan's accession to the WTO.

With regard to general trade issues relevant to agriculture, Kazakhstan has made considerable steps towards lowering customs tariffs and fulfilling WTO requirements. Among the issues still to be resolved are the alcohol import licensing scheme, the status of the customs union with several CIS-states including Russia, and some details of customs procedure, like conditional release of goods. Kazakhstan's legislation on animal and plant health, food safety and food marketing incorporates many of the principles stipulated by WTO law, but needs further elaboration in order to create a comprehensive framework ensuring implementation of all requirements to be applied upon accession. Provisions on the principles of necessity and least-trade-restrictiveness under all sanitary and phytosanitary laws need to be revisited; other major deficiencies include language on risk assessment and international standards. Some measures restricting trade like requirements of veterinary authority certificates and mandatory certification also seem to go beyond what WTO law permits. Legislation on technical standards and implementation of regulative transparency appear to be implemented nearly comprehensively.

State support to agricultural production in Kazakhstan is still low by international standards, but Kazakhstan's agricultural policy includes a broad variety of support programmes to farmers subject to reduction under the *WTO Agreement on Agriculture*. This does not apply to most rural development measures, to support to state agricultural administration, and to veterinary and phytosanitary services; other subsidies could be re-designed so as to meet conditions for exemption. Transport subsidies will probably qualify as export subsidies, which will have to be eliminated sooner or later. The activities of the *State Food Contract Corporation* and *Malonimderi-Corporation* also include domestic support subject to reduction, and raise issues of incompatibility with GATT Art. XVII on State Trading Enterprises. While the extent to which domestic support will have to be reduced will depend on the outcome of accession negotiations, it is important to consider the entire range of support measures when drawing up commitments, in order to engage in realistic commitments.

Finally, Kazakhstani legislation on plant varieties largely complies with WTO requirements.

As Kazakhstan intends to boost agricultural export and to increase self sufficiency in higher value agricultural goods and foodstuffs, WTO requirements and international standards are likely to be a continuous determinant of Kazakhstani agricultural policies. While the ultimate aim will usually be the implementation of an environment which is non-discriminatory and propitious to economic activities in the agricultural sector, a sound legal framework can contribute in various ways to achieve that objective.

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