
Issues Linked to Agriculture

Sanitary and phytosanitary (SPS) and geographical indication (GI) issues are both closely related to agricultural trade. Though SPS and GI measures reflect nontrade-related objectives—notably, ensuring animal and human health, and safeguarding know-how and high standards of product quality—at times, they are viewed as behind-the-border or nontariff barriers. The United States and Switzerland have searched for common ground on SPS and GI issues, both in the framework of the World Trade Organization (WTO), other international organizations (e.g., World Organization for Animal Health, known in French as Office International des Epizooties [OIE]) and with their bilateral partners in free trade agreements (FTAs). However, both countries have well-established doctrines, and their differing stances are buttressed by commercial interests and entrenched bureaucracies.

These differences have led, on a few occasions, to disputes between Switzerland and the United States. This chapter illuminates regulatory differences and examines US and Swiss approaches to SPS and GI issues. We address SPS measures first and then focus on GI issues, offering recommendations at the end of each section.

Sanitary and Phytosanitary Measures

As mentioned above, SPS measures are sometimes viewed as behind-the-border trade barriers. The WTO *Trade Policy Review* (WTO 2004c) on the United States cites “actions targeted to safeguard consumer health one of the most frequent reasons behind most US quantitative restrictions and controls on trade.” Likewise, some countries, including the United States, have voiced concerns about certain Swiss SPS measures.

Modern FTAs have typically addressed SPS matters, and if the Swiss-US FTA is to be a forward-looking agreement, it will also have to tackle this topic. In the following sections, we present each country's approach to dealing with SPS matters in past trade agreements. Then we discuss current SPS, labeling, and standards issues that affect agricultural trade. Finally, we offer recommendations for addressing these matters in the Swiss-US FTA. Unlike the section on GIs, we do not describe the SPS regimes of each country, as this has been done already and in detail by the WTO in its *Trade Policy Reviews* for both countries.

SPS Measures in US Trade Agreements

The United States has addressed SPS matters through various approaches that, on top of WTO multilateral agreements, include bilateral FTAs, veterinary agreements, memoranda of understanding (MoUs), and institutionalized dialogue. Appendix B deals with the fine print of the SPS chapters of selected examples of those documents. Here, we present a general overview of the US negotiating stance on SPS matters.

The SPS chapter in the North American Free Trade Agreement (NAFTA) constitutes the most comprehensive set of commitments that the United States has agreed to on a bilateral basis. NAFTA's SPS provisions encourage equivalent SPS measures and the use of international or North American standards for risk assessment, establish rules regarding pest-free areas, and require transparency in adopting and modifying SPS measures. At the same time, NAFTA reaffirms each party's right to adopt the level of SPS protection that it considers necessary. However, measures must be based on scientific principles and proper risk assessment, be applied only to the extent necessary to secure the desired level of protection, and should not result in unfair discrimination.

Recent US bilateral FTAs are generally less ambitious in their treatment of SPS questions, though they differ from one another. Regarding agriculture matters in FTA negotiations, the United States has been primarily interested in reducing traditional tariff and quota barriers, while SPS issues have received secondary attention. When the United States does attend to them, it has concentrated on outstanding SPS issues rather than raising new issues of possible future concern. The US Animal and Plant Health Inspection Service (APHIS) concludes that SPS issues typically raised by US partners "exceed the number of issues that APHIS can realistically deal with given other priorities" (US APHIS 2004, 2). By contrast, US partners often put a higher priority on SPS issues.

Reflecting the US negotiating stance, US bilateral FTAs generally reaffirm the parties' obligations under the WTO SPS Agreement, and establish the WTO dispute settlement mechanism as the appropriate body for bilateral SPS disputes. Since SPS chapters in recent US bilateral FTAs create no

new SPS rights or obligations, US officials believe that there is no need for a bilateral dispute settlement mechanism.

In most negotiations, the United States and its negotiating partner instead established an ad hoc special group to focus on outstanding SPS issues.¹ These special groups worked to find technical solutions to specific SPS measures prior to congressional ratification of the FTA. Some of these groups made considerable progress.²

The United States views the actual existence of irritating SPS measures as a prerequisite to establishing ad hoc bodies.³ As pointed out later in this section, such irritants appear in bilateral trade relations between the United States and Switzerland. Examples of concrete SPS issues addressed by previous SPS bodies include recognition of equivalence of regulatory requirements for specific products, mutual recognition of inspection systems, recognition of pest-free status, and acceptance of product inspection in the exporting country.⁴

The SPS chapters in US bilateral FTAs often establish bodies, named SPS Committees, to create a shared understanding of regulatory procedures and resolve outstanding bilateral SPS issues. These bodies continue the efforts of the ad hoc working groups formed during FTA negotiations; such committees have formed for the Central American–Dominican Republic Free Trade Agreement (CAFTA-DR) as well as the US-Chile and US-Australia FTAs. The US-Morocco FTA did not establish an SPS committee due to the relatively small volume of bilateral agricultural trade and low frequency of bilateral SPS issues.

Though SPS Committees are not decision making bodies, they are expected to “provide a forum for the parties to engage at the earliest appropriate time in each other’s regulatory processes on and to cooperate in developing science-based measures that facilitate trade between them” (US APHIS 2004, 3). The US-Australia FTA contains some of the strongest language on the attributes of an SPS Committee, mandating it to review progress and resolve specific SPS matters.

US authorities sometimes cite different levels of SPS infrastructure in partner countries as an impediment to progress in dealing with outstanding SPS issues, arguing that countries without strong SPS infrastructure cannot meet the requirements of US SPS regulations or fully implement the WTO agreement.⁵ This is evidently not the situation with Switzerland. But

1. For the most part, ad hoc SPS groups were not considered negotiating groups, though they held meetings in the same time frame as negotiating groups did.

2. For example, the ad hoc special group on SPS matters established for the US-Chile negotiations resolved several outstanding issues (see appendix B).

3. The “lack of substantive issues” was cited as the reason for the US reluctance to establish formal mechanisms to address SPS measures with Morocco (US APHIS 2004, 8).

4. Appendix B gives more information.

5. Negotiations with countries that have a relatively poor SPS infrastructure often involve some commitment of US aid to upgrade the local SPS regime.

it is worth noting that FTA negotiations with countries that enjoy stronger SPS infrastructure, such as Chile and Australia, delivered comparatively better results.

The US-EU Veterinary Agreement also establishes a committee to oversee SPS matters. However, the scope of this committee reflects the more limited nature of the agreement, which is largely confined to trade in certain live animals and bovine and swine meat. For these products, the agreement recognizes the equivalence of regulatory requirements and the health status of regions as determined by the exporting country.⁶ The United States and European Union have also addressed outstanding SPS matters on products not covered by the agreement in the Positive Economic Agenda Initiative.

The United States has also dealt bilaterally with SPS issues through MoUs. Some memoranda establish consultative committees on agriculture, with mandates to resolve trade issues and increase cooperation in a number of areas, including sanitary and phytosanitary measures.

SPS Measures in Swiss Trade Agreements

Switzerland has dealt with SPS matters at the multilateral, regional, and bilateral level. At the multilateral level, Switzerland has implemented the SPS Agreement under the WTO Agreement. At the regional level, it has made substantial progress in harmonizing its SPS regime with the European Union's. And at the bilateral level, as a member of the European Free Trade Association (EFTA), Switzerland has reaffirmed its commitments under the WTO.

Switzerland's decision to harmonize aspects of its SPS regime with the European Union's has to be seen as an important component of the broader context of special relations.

The European Union is the principal source of Swiss imports and destination for Swiss exports, and though Switzerland has fostered economic integration with its neighbors, it has stopped short of full EU membership.⁷ Formal links between the European Union and Switzerland are governed by a large number of agreements; indeed, no other third country has as many agreements with the European Union as Switzerland does.⁸ In addition to facilitating trade, harmonizing SPS regimes in Europe has promoted

6. The recognition of the health status of regions as determined by the exporting country is limited to the list of diseases included in Annex III. Bovine spongiform encephalopathy (BSE) is not listed in that annex. Nevertheless, the European Commission (2004a, 36) argues that, "the United States has failed repeatedly to apply the regionalisation provisions of the Veterinary Agreement."

7. In 2004, the European Union was the destination for more than 60 percent of Swiss exports and the source of nearly 80 percent of Swiss imports.

8. The Web site of the Swiss Integration Office provides a vast selection of official documents and a brief explanation of Switzerland's European policy, available at www.europa.admin.ch.

the adoption of international standards. There are very few regional phytosanitary standards left in Europe that differ from the International Plant Protection Convention (IPPC) standards and procedures.

Annexes 4 and 6 (on plant health and seeds) and Annex 11 (veterinary) in the Swiss-EU Agreement on Trade in Agricultural Products regulate trade in certain plants, seeds, live animals, animal products, foods of animal origin, and animal waste. Both annexes recognize the equivalence of SPS protection levels resulting from the parties' domestic legislation for many of these products, notably dairy items. Additionally, Annex 5 (on feed products) aims to recognize legislative equivalence to facilitate trade in feed products. This annex, however, is still under negotiation.

The veterinary annex eliminates border checks. Controls other than mere inspection of accompanying certificates will now be conducted within the country. The annex on plant health also limits the scope of border checks to low percentages of consignments. Plants designated under Annex 4 will obtain a "plant passport," certifying conformity with domestic legislation.

When the agreement entered into force in June 2002, the recognition of equivalence of legislation did not apply to all of the products covered under the agreement. Milk and dairy products were the only foods of animal origin for which the European Union recognized the equivalence of Swiss legislation. Progress in recognizing equivalence of SPS legislation for a number of products required adapting certain aspects of Swiss legislation to the format and substance of EU legislation (WTO 2004b).

Joint committees will oversee the application and functioning of Annexes 4, 6, and 11 of the agreement. A working group on bovine spongiform encephalopathy (BSE) was established by the Joint Committee under the Veterinary Annex to analyze alternatives to the EU ban on Swiss exports of cattle. At the end of 2003, the EU Council of Agricultural Ministers recognized the equivalence of Swiss regulations regarding BSE.

Recent bilateral FTAs negotiated by EFTA include, for the most part, much weaker approaches to tackling SPS matters. SPS provisions in many EFTA agreements involve reaffirmation of the WTO agreement, commitments to apply SPS regulations in a nondiscriminatory fashion, and pledges not to introduce new measures that may have the effect of "unduly obstructing trade" (EFTA 2002a). The EFTA approach to SPS matters probably reflects the absence of outstanding SPS issues and the small volume of bilateral agricultural trade between EFTA and its partners. Also, agricultural liberalization has not been a high concern for Switzerland in its bilateral FTAs through EFTA, as evidenced by the low wedge between applied preferential and MFN tariff rates. (Appendix B gives more detail on the bilateral EFTA agreements.)

The EFTA-Chile FTA goes beyond other EFTA bilateral FTAs, as parties pledge to strengthen their cooperation in the field of SPS measures with a view toward increasing mutual understanding of their respective systems. The EFTA-Chile FTA also establishes an ad hoc mechanism to review SPS measures that parties believe have an effect on market access. Still, the

text establishing that mechanism is weaker than similar mechanisms established in US bilateral FTAs.

Summing up, the US and Swiss approach to SPS matters on bilateral FTAs share a number of important similarities. Leaving aside the Swiss relation with the European Union, both countries have avoided introducing new SPS-related rights and obligations in bilateral agreements, as they both believe that the WTO remains the central forum for discussing SPS issues and settling SPS disputes. The United States, however, favors SPS chapters that reflect a stronger commitment to dealing with outstanding bilateral SPS issues. In this respect, it is worth highlighting the EFTA-Chile FTA as an important precedent for EFTA efforts to address SPS measures. The Swiss-US FTA should include similar commitments. With that objective in mind, we turn now to a review of issues that need to be tackled.

Outstanding SPS Issues on the Bilateral Swiss-US Agenda

Given that the United States and Switzerland both view the WTO as the central forum for discussing SPS matters, it is important to recognize that many outstanding SPS issues on the bilateral agenda are already being addressed. In the WTO, both countries are currently engaged in reaching common approaches on hormone-treated beef, genetically modified organisms (GMOs), and process and production methods (PPM).

FTA negotiations between Switzerland and the United States could search for common ground on these topics. It is unrealistic to expect that the FTA itself can resolve these issues, but recognizing this need not devalue the SPS chapter in the Swiss-US FTA. We first review the most relevant SPS issues on the bilateral agenda, then recommend ways to address them.

Some US products derived from biotechnology face case-by-case Swiss approval, requiring detailed information on the process for creating biotech products. Swiss certificates for approval of agricultural biotechnology products are valid for five years, and then must be renewed. Under this system, some US firms, such as those in the animal feed industry, have enjoyed market access for bioengineered products, while others, such as those in the creation of biotech crops, face difficult approval hurdles.⁹

The United States considers that Swiss regulations on meat from animals treated with hormones, antibiotics, and similar products are not

9. Even so, the most significant barriers for biotechnology products in Switzerland stem from the attitudes of highly skeptical consumers, farmers, and food retailers—not the Swiss government. In recent years, a coalition of environmental groups, consumers, and farmers has actively petitioned for a five-year moratorium on genetically modified (GM) crops in Switzerland. The Swiss Parliament has rejected this petition twice on grounds that the existing legislation adequately protects humans, animals, and the environment. However, the initiative was put to popular vote in November 27, 2005, and almost 56 percent of voters supported the interdiction. Swiss farmers will not be allowed to grow GMO crops until 2010. For more information see www.lemonde.fr.

based on sound science or proper risk assessment. Moreover, the United States argues that, since tougher requirements are applied to out-of-quota meat imported under the tariff rate quota (TRQ), there is a question mark on the validity of the public health objective (WTO 2004a, 2005b).

Some US producers complain that the Swiss Veterinary Agency refuses to list new US meatpacking facilities as eligible to export beef to Switzerland. The United States Trade Representative (USTR 2005b) mentions that “despite repeated requests, has not produced science-based reasons for this position. Swiss inaction has blocked three plants that the United States requested be listed since early 2002.”

A potential source of disagreement might result from Switzerland’s sympathy for the precautionary principle as a legitimate risk management approach to protect human, animal, and plant health.¹⁰ Powerful players in the US private sector¹¹ are highly skeptical of the precautionary principle, and the US government “has often charged against its implementation” (Graham 2003). However, no bilateral SPS issues have resulted from Swiss SPS measures based on it. In fact, Switzerland has not invoked the precautionary principle in its own SPS system, and though the possibility is not foreclosed, differences regarding the application of this principle should not stand in the way of successful negotiations. Both Switzerland and the United States have avoided discussion of the rights and obligations raised by the precautionary principle in their previous FTA negotiations.

Meanwhile, Switzerland objects to US import restrictions on meat and meat products. Following the BSE outbreak in Switzerland, the United States banned imports of Swiss meat and meat products (WTO 2002b). The Swiss government questions many elements of that measure: the disregard of international standards, the application of a double inspection procedure, and the US failures to recognize Switzerland’s low incidence of BSE

10. The Swiss Agricultural Act revised as part of the 2007 Agricultural Policy defines the precautionary principle as follows:

Precautionary measures may be adopted if it appears plausible that a farming product or plant material, which can be a carrier of particularly dangerous pests, can have an unacceptable side-effect for human, animal or plant health or the environment, and the likelihood of occurrence is assessed as considerable or the corresponding consequences are far-reaching yet the scientific information for a comprehensive risk assessment of the agricultural product or plant material is insufficient (Swiss Federal Office of Public Health 2003, 9).

11. The US Chamber of Commerce’s strategy is to “oppose the domestic and international adoption of the precautionary principle as a basis for regulatory decision making” (US Chamber of Commerce 2004).

12. Switzerland is not the only country to voice concerns regarding BSE-related measures in the United States. The European Union largely shares Swiss views, while Canadian authorities have criticized the United States for slow rule-making to resume trade in live cattle (USDA 2005a).

and to stick to the agreed road map.¹² The Swiss government also believes that the US measure is unwarranted now that original circumstances have changed and homegrown cases of BSE have been discovered in the United States. It notes that nowadays, Switzerland and the United States share the same OIE category regarding BSE risk.

In previous FTAs, such as the US-Australia FTA, the United States has agreed to work towards common solutions on BSE risk to food safety and animal health in Codex and other forums. More recently, the United States has recognized Canada as a “minimum-risk country.” The recent discovery of the first homegrown case of BSE in the United States should advance the effort to find common ground on BSE quarantine measures.

The WTO Secretariat reports that “bilateral consultations had clarified some of the questions raised by Switzerland. The United States noted that there was a further complication pertaining to the foot and mouth disease status of certain countries providing meat to Switzerland for processing and subsequent export to the United States” (WTO 2005b, 129).

Another Swiss concern relates to the tighter US food safety requirements under the Bioterrorism Act of 2002.¹³ A number of Swiss exporters have been affected by measures related to its implementation. The Switzerland Ministry of Economy (2004) notes difficulties in both the process of approving Swiss food consignments to the United States and the treatment of confidential records regarding exported products.¹⁴

Despite differences, these various SPS issues on the bilateral agenda do not appear to pose a major obstacle to an FTA between Switzerland and the United States. The Agricultural Attaché of the US Mission to the WTO reports that “there are some US concerns with SPS relative to Swiss market access, but generally these concerns have been at a much lower level compared with other neighboring European country policies.”¹⁵ Swiss authorities have also been more accommodating than neighboring European countries have: They have allowed access for US beef with growth promoter treatment and US poultry products packed under current US water treatment methods.

13. The act introduces new requirements, including registration of food manufacturing facilities; prior notice to FDA of all food consignments; maintenance of records regarding distribution of food; and permission to detain any food that is suspected of posing a threat to the health of humans or animals. See US FDA (2002) for additional information.

14. The report states: “*Les programmes de lutte contre le bioterrorisme (formalités pour les importations de produits alimentaires), l’initiative des conteneurs (annonce 24 heures à l’avance pour le fret maritime) et l’application de nouvelles procédures pour entrer aux Etats-Unis ont eu des répercussions en Suisse. Des difficultés sont apparues dans l’expédition des denrées alimentaires et dans le traitement des données confidentielles transmises par les cargos*” (Switzerland Ministry of Economy 2004, 88).

15. Information gathered through exchange of e-mails with Gregg Young, USDA Agricultural Attaché to the United Nations in Geneva.

Labeling and Equivalent Standards

Switzerland and the United States disagree as to the adequate scope of labeling requirements for certain agricultural products.¹⁶ While Switzerland favors a consumer “right-to-know” rationale for labeling, the United States believes that labels are only justified for safety-related issues. The positions of both governments reflect the attitudes of domestic constituencies. A large and visible segment of the Swiss public supports strong regulation, including labeling requirements, particularly for products derived from biotechnology. By contrast, consumer research in the United States shows that while a substantial majority of American consumers want more information about their food (including genetically engineered products), biotechnology labeling is rarely mentioned unless consumers are specifically asked (USDA 2005e). Meanwhile, agricultural firms fear that additional labeling requirements will be effectively turned into campaigns against their products. The basic disagreement on the proper content of labels has affected market access. US agricultural producers have found it increasingly difficult to access the Swiss market, and the US government has raised concerns over specific Swiss mandatory labeling requirements.¹⁷

The United States has questioned Swiss labeling requirements for foodstuffs not produced according to certain Swiss standards. Special labeling requirements apply to beef, pork, and eggs, when production includes the use of growth hormones, antibiotics, certain other substances in the raising of beef and pork, or in the case of eggs, the manner of caging.¹⁸ Swiss authorities, however, claim that the United States has failed to pursue the bilateral consultations that took place on the issue of foodstuff PPM.

Switzerland and the United States have addressed labeling issues in the WTO Doha Round and other international forums, but their positions continue to differ. Their respective positions in the WTO illustrate the divide. In the Doha Round of agricultural negotiations, Switzerland has questioned whether the current technical barriers to trade (TBT) agreement sufficiently addresses consumer needs. Switzerland backs more stringent

16. While we address standards and technical barriers more generally in chapter 4 on manufactures trade, this section presents two standards and TBT issues that are intimately related to trade in agricultural products, and could be examined in the context of a Swiss-US FTA—namely, labeling measures and the mutual recognition of standards for organic products.

17. For a discussion of the impact of labeling and standards on trade, see chapter 6 of Josling, Roberts, and Orden (2004, 127–46).

18. In the Doha Round, Switzerland has advocated stronger labeling requirements. The Swiss proposal would increase consumer information to encompass production methods, food safety, and animal protection. Switzerland believes that consumers need more information so they can make choices based on ethical and moral convictions, as well as taste. It argues that these information needs extend to the identification of GMOs, respect for the environment, and animal welfare. All this would entail a revision of the SPS Agreement (WTO 2000b).

labeling requirements on production methods—particularly regarding the presence of GMOs—and respect for the environment and animal welfare. In the Swiss view, proper labeling allows consumers to make informed choices based on their own preferences and ethical and moral convictions.

The United States does not object to a “right to know” policy per se, but it does object to labeling requirements independent of product risk assessments or scientific justification. The United States believes that labeling requirements designed solely in response to moral and ethical concerns will impose additional costs and risks for the food and feed supply chain, and may sharply limit the world market for US agriculture. It is unclear whether US and Swiss FTA negotiators will be able to find common ground amid their countries’ divergent views on these issues.

A more tractable and somewhat related issue—one that could be tackled in FTA talks—is the equivalence of standards for organic products. In previous US FTA pacts, parties have agreed to give positive consideration to accepting, as equivalent, each other’s technical regulations, provided that they adequately fulfill the objectives of domestic regulations. However, imported organic agricultural produce may only be sold, labeled, or represented in the United States as organic when it is certified by a US Department of Agriculture (USDA) accredited certifying agent, when the USDA recognizes the ability of a foreign government to assess and accredit certifying agents as meeting the requirements of the USDA National Organic Program (NOP), or when the USDA has determined a foreign government’s organic certification program to be equivalent to the NOP. Currently, two USDA-accredited certifying agents operate in Switzerland.

Likewise, imported organic products must meet the minimum requirements laid down in the Swiss Federal Ordinance on Organic Farming and the Labeling of Organically Produced Products and Foodstuffs to be labeled “organic” in Switzerland. Organic imports originating in countries with regulations not recognized as equivalent to Swiss legislation need to be registered with an approved Swiss certification or inspection body to demonstrate their compliance with Swiss legislation. Switzerland does not recognize the NOP as equivalent, but it has granted import permits for a few US organic products on an individual basis.

Trade in organic products would be facilitated if both countries could, within the context of the FTA, establish equivalent standards for organic products. Moreover, it could level the playing field with third countries that already have established equivalence of organic standards with Switzerland or the United States. The United States has already recognized conformity assessment systems in Denmark, Israel, Japan, New Zealand, the United Kingdom, and two Canadian provinces, Quebec and British Columbia; it is working towards recognizing Spain and the rest of Canada. It is also working towards establishing the equivalence of organic standards with Australia, Japan, India, and the European Union. Switzerland

has established equivalence of the production rules and inspection systems for certain organic products from Argentina, Australia, Costa Rica, all members of the European Union, Israel, and New Zealand (Confoederatio Helvetica 1997).

Recommendations for SPS and Related Issues

Given current US and Swiss regulations and attitudes toward SPS and related issues, we offer the following suggestions:

- Negotiators should recognize that, while some outstanding issues may be addressed in the context of a Swiss-US FTA, others are best left to the WTO. This is particularly true for issues that engage core principles in each country's approach toward SPS.
- Switzerland and the United States both have veterinary agreements with the European Union, and Switzerland has plant health and seed agreements. Given the central role of the European Union in SPS matters, for both the United States and Switzerland, it makes sense for the Swiss-US FTA to borrow heavily from the best parts of their respective EU agreements. In particular, both countries could build on their prior recognition of equivalency between their own SPS measures and those adopted by the European Union for live animals, meats, foods of animal origin, and plants.
- As a separate matter, the United States and Switzerland should reach an understanding on BSE. As in the US-Australia FTA, the United States and Switzerland should agree to work cooperatively in the OIE, Codex, and other appropriate forums to ensure consistency in BSE standards and guidelines. Also, the United States should instruct its responsible agencies to work toward recognizing Switzerland as a minimum-risk country with the shortest possible delay.
- As in the US-Australia FTA, Switzerland and the United States should establish both an SPS committee and a standing technical working group on animal and plant health measures. Meeting at a senior level, the SPS committee should have two broad mandates: to further mutual understanding about national SPS regulatory processes, and to promote the convergence of US and Swiss SPS rules, giving appropriate consideration to EU rules.
- The working group should be instructed to resolve conflicting animal, meat, and plant standards and tests conducted in the exporting countries to the maximum extent. Whenever possible, working group members should be the same persons who handle the Swiss-EU and the US-EU files on SPS questions.

- Certain issues should be awarded priority attention in the working group: US BSE measures; Swiss certification of US slaughter plants; and labeling requirements that provide information on production methods, food safety, and animal protection.
- In addition, the SPS committee should evaluate the approval hurdles faced by US firms that ship biotech foodstuffs to Switzerland, as well as concerns stemming from the US implementation of the Bioterrorism Act. However, in dealing with these matters, representatives from both countries may sometimes find rather limited scope for accommodation, as differences may spring from fundamental societal choices. In such instances, the SPS Committee could still contribute to mutual understanding of each country's regulatory processes.
- The WTO is perhaps the most natural forum to reach a solution to the labeling issue that takes its global context into account. However, the Swiss-US FTA could allow both countries to work towards bridging the divide. The working group could be instructed to find mutually acceptable labels that would facilitate access to the Swiss market for sensitive products. The SPS committee should aim to limit the risks and costs faced by producers, for example, by reducing the time needed to comply with domestic regulations.
- Within the context of the FTA, Switzerland and the United States should reach a mutual agreement to recognize equivalent standards for organic products. This will promote trade in high-value produce and level the playing field regarding third countries that already have established equivalence of organic standards with Switzerland or the United States.
- As in the prior FTA agreements signed by both Switzerland and the United States, any disputes that cannot be resolved by the working group or SPS committee should be consigned to the WTO dispute settlement mechanism. To expedite disputes that may arise, the parties should agree in advance, in consultation with the WTO Secretariat, on a short roster of qualified panelists.

Geographical Indications

According to the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), GIs “identify a good as originating in the territory of a Member, or a region or locality in that territory, where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin” (www.sice.oas.org). GIs have spawned a certain amount of trans-Atlantic controversy, with Europe generally and Switzerland specifically. The Swiss and US approaches to GIs differ substantially. We first explain the regimes protecting GIs in Switzerland and the United

States; we then examine the Swiss and US positions in the Doha Round and in bilateral agreements. Finally, we suggest how GI issues could be addressed in the Swiss-US bilateral FTA.

Geographical Indications in the United States

Whether they are of domestic or foreign origin, the United States protects GIs through its trademark system, in the category of certification, collective marks, or common law (unregistered) versions of such marks.¹⁹ The United States links GIs and trademarks because both are source identifiers, marks of a certain quality or standard (mandatory for GIs), and indicators of particular business interests.²⁰ However, there are differences between trademarks and GIs. The function of trademarks is to indicate the commercial origin of goods or services. To register or protect a trademark, it is normally not necessary to specify the quality or standard of the good or service it identifies. By contrast, to register or protect a GI, it is necessary to establish a quality, reputation, or other characteristic of the product that is linked to its geographical origin.

GIs may be registered as certification marks, but registration is not necessary to enforce GI rights against infringement if the GI qualifies as a common-law (unregistered) certification mark. Certain statutes and regulations related to spirits, such as wine-labeling laws and USDA inspection standards, may have the incidental effect of additionally protecting GIs. These pieces of legislation are not intellectual-property laws, and consequently, they do not establish a particular sign as a GI.

Roquefort, Parma ham, Stilton, Darjeeling, and cognac are examples of foreign GIs protected in the United States through certification marks. Within the United States, GIs include Florida for oranges, Idaho for potatoes, Washington state for apples, Tennessee for whiskey, and Napa for wine. Anecdotal evidence suggests that some Swiss GIs already enjoy protection in the United States, registered as protected appellations of origin (PAOs) or protected geographical indications (PGIs). Tête de Moine Fromage de Bellelay is registered as a certification mark in the United States.²¹

19. The paragraphs in this section draw extensively on the US Patent and Trademark Office (2005).

20. A collective mark indicates the commercial origin of goods or services in a product for which no single individual owns the trademark. A certification mark has two peculiar characteristics. First, the owner of the mark does not use it. Second, it does not indicate commercial source, nor distinguish goods or services within users of the certification mark. A certification mark can take the form of any word, symbol, or name used by a person other than its owner to certify, for instance, a certain origin, quality, accuracy, or production process. Any entity that meets the certifying standards is entitled to use the certification mark.

21. Between 2000 and 2004, Swiss residents filed 14,122 trademark applications and obtained 5,025 trademarks in the United States. These figures include all trademarks, and do not indicate the extent of protection of Swiss GIs in the United States.

Even so, the US trademark system falls short of Swiss expectations, since it only protects Swiss product GIs (other than wines and spirits) from misleading use, not from simply incorrect use or confusingly similar labels. It is common to find domestic products in the United States with labels that evoke Swiss origin through confusing readings, such as “Swiss-style” or pictures of snow-covered mountains.

Recent US bilateral FTAs, such as US-Chile, US-Australia, and CAFTA-DR, include provisions on GI protection. Typically, these agreements reinforce the commitment of parties to treat GIs as trademarks, but expressly refuse GI protection in the event that they correspond to preexisting trademarks. The US-Chile FTA, US-Australia FTA, and CAFTA-DR, as well as the US-EU Agreement on Distilled Spirits/Spirit Drinks, provide mutual recognition of certain spirits. These bilateral FTAs introduce the concept of “distinctive products” that may only be manufactured in a certain region of a country, in accordance with the country’s laws governing manufacture, consumption, sale, or export. The FTAs explicitly forbid the sale, under a “distinctive product” label, of any product that does not qualify for such distinction.

Geographical Indications in Switzerland

Switzerland has a tradition dating from the 19th century of protecting GIs for all goods and services.²² Until the adoption of special rules for registering GIs for agricultural products in 1997, legal protection for agricultural GIs was exclusively granted under the federal law on the protection of trademarks and indications of source.²³ Under this law, known as the LPM, GI protection is granted automatically, without a formal notification or registration procedure, provided that certain conditions are satisfied.

In addition to the protection granted by the LPM, since 1997, producers of agricultural products can enter their GIs in a national registry.²⁴ The

22. This section draws mostly on publications of the Swiss Federal Institute of Intellectual Property (2005). We thank Institute staff members for their comments.

23. The Federal Law on the Protection of Trademarks and Indications of Source of 28 August 1992 (LPM; RS 232.11) provides general protection to trademarks and GIs. A number of ordinances complete the general protection of GI for different products such as watches (Ordinance on the Use of the Designation “Swiss” for Watches of December 1971; RS 232.119), wine (Ordinance on Viticulture and the Importation of Wine of 7 December 1998; RS 916.140), and agricultural products (Ordinance on the Protection of Appellations of Origin and Geographical Indications in respect of Agricultural Products and Processed Agricultural Products of 28 May 1997; Ordinance on PAOs and PGIs; RS 910.12).

24. See the Ordinance on the Protection of Appellations of Origin and Geographical Indications with respect to Agricultural Products and Processed Agricultural Products.

first GI for such products was registered in January 2000. The Ordinance on PAOs and PGIs distinguishes two different types of GIs, the *Appellation d'origine contrôlée* (AOC/PAO) and the *Indication géographique protégée* (IGP/PGI).

The AOC constitutes the name of a place, region, or traditional denomination used to designate an agricultural product whose quality and character draw essentially or exclusively from the surrounding geographical environment, including both human and natural factors. As of May 2005, some 13 products had successfully completed AOC registration, including, for the most part, cheeses, spirits, bakery products, and other products of vegetable origin.²⁵

The IGP concept is based on a slightly weaker link between the product and the territory of origin. This concept applies to products for which the quality, reputation, or other characteristic may be attributed to the region or place of origin. As of May 2005, five products enjoyed IGP protection, including, for the most part, meats and sausages.²⁶

An important difference from the US approach lies in the range of protection GIs enjoy. For registered AOCs and IGPs, the direct or indirect use of protected denominations for commercial purposes is strictly prohibited for similar products that do not comply with the specification. The same protection also extends to dissimilar products if the use exploits the reputation of the protected denomination.²⁷ Also, unlike the US trademark system, GI protection in Switzerland extends widely to imitations; fallacious indications; misleading packaging; translations; abusive labeling, such as “like,” “type,” and “according to the recipes;” and “other recourses to the distinctive shape of the product” even if the true origin of the product is identified.²⁸

Registering AOCs or IGPs is not an easy process, as petitions for protection undergo a thorough review by Swiss authorities. Currently, six cheese products, five meat products, one plant-based product, two alcohol-based products, and one forestry product are undergoing evaluation. Chal-

25. These products included cheeses such as L'Étivaz, Tête de Moine, Gruyère, Sbrinz, Formaggio d'Alpe Ticinese, Vacherin Mont-d'Or, and Berner Alpkäse/Hobelkäse; spirits such as Abricotine and Eau-de-vie de poires du Valais; vegetable products such as Rheintaler Ribelmals (corn), Safran de Mund (spice), and Cardon épineux genevois (vegetable); and bakery products such as pain de seigle valaisan (bread).

26. The five products are Viande des Grisons, Viande séchée du Valais, Saucisse d'Ajoie, Saucisse and Saucisson neuchâteloise, Saucisse aux choux, and Saucisson vaudois.

27. The most relevant laws are the Ordinance on the Protection of Appellations of Origin and Geographical Indications with respect to Agricultural Products and Processed Agricultural Products, and the Federal Law on the Protection of Trademarks and Indications of Source.

28. Article 16.6 of the Law on Agriculture allows an exception for prior trademarks, and Article 17a of the Ordinance does so for products that have been commercialized under a protected denomination at least five years prior to the demand for registration of the GI.

lenges against the decision to register “Emmentaler” as an AOC are still pending. Registered GIs, both AOCs and IGPs, also undergo surprise inspections and other controls to ensure respect for traditional production methods, traceability, and authenticity.

Under Swiss legislation, foreign GIs, including those of US origin, are granted the same protection as Swiss GIs. Thus, US GIs may benefit from the general protection provided by Law 232.11, and may apply for AOC or IGP registration under Ordinance 910.12. The 2003 US Commerce Department Country Commercial Guide stated that “Switzerland has one of the best regimes in the world for the protection of intellectual property, and protection is afforded equally to foreign and domestic rights holders.” (US Department of Commerce 2003). The US concern that US GI owners face systematic discrimination in the European Union does not apply to Switzerland.

All bilateral FTAs negotiated by EFTA include provisions whereby parties “ensure in their national legislations adequate and effective means to protect GIs with regard to all products, including appellations of origin” (EFTA 2003). In some of these agreements, GI protection is also granted to services. The negotiated text within EFTA reinforces, but does not go much beyond, the commitments incorporated in the TRIPS Agreement. In some FTAs (e.g., with Mexico), a separate annex deals exclusively with the protection of GIs. Annexes 7 and 8 of the Bilateral Agreement on Agriculture between the European Community and Switzerland ensure mutual protection for GI names, without recipes or enological practices, for wines, spirits, and wine-based drinks. A joint declaration also calls for the mutual protection of designations of origin and GIs for agricultural products and foodstuffs. Currently, the ad hoc working group is discussing the list of denominations that should be protected under the agreement.

US and Swiss Views of GI Protection in the TRIPS Agreement

Articles 22 and 23 of the TRIPS Agreement grant two types of protection to GIs, namely regular and “additional protection.” Regular protection for GIs that identify any type of product aims at protecting consumers and producers by preventing the use of indications that mislead the public or constitute unfair competition. “Additional protection” forbids the use of indications that do not originate in the place designated by the GI, regardless of any risk that their use might mislead the public or constitute unfair competition. “Additional protection” applies only to GIs identifying wines and spirits. Regular protection allows labeling such as “Sbrinz from Argentina,” but additional protection bans the use of that expression or kindred phrases, such as “Bordeaux produced in Australia” or “Australian wine, Bordeaux style.”

The Swiss government has actively participated in GI talks at the WTO since the Uruguay Round, and especially in the ongoing Doha Round. Switzerland considers that the TRIPS Agreement is the appropriate framework to establish minimum standards for more effective protection of GIs for all products at the multilateral level.²⁹

Swiss authorities believe that the regular protection of TRIPS Article 22 is less effective than that of TRIPS Article 23, since Article 22 is based on an inappropriate test (consumer deception or unfair competition). Protection through Article 22 of TRIPS for products other than wines and spirits does not secure GIs from abusive use in translated form, or in conjunction with modifiers such as “like,” “type,” or “style.”³⁰ Thus, producers from any other region can evoke the region of origin in a label such as “Gruyere-style cheese, made in Spain.” If this practice continues to be permitted, Swiss officials argue, GIs risk becoming generic concepts with the passage of time, loosening even the limited protection granted by Article 22.

Swiss authorities also worry that Article 22 of TRIPS distributes the burden of proof in GI disputes unfairly. GI-protected producers not only have to prove incorrect use of the disputed label but also intent to mislead the public, a difficult claim to establish. Fine print on labels, seldom read by consumers, may correctly state the origin, while the headline type conveys a false impression. Swiss officials thus conclude that, for products other than wines and spirits, GI rights are difficult to enforce under the TRIPS Agreement’s current standards of protection.

Swiss negotiators, supported by other delegations, have proposed extending “additional protection” (TRIPS Article 23) to all products as part of the Doha Round package. This would lead, in their view, to a better protection system—one that ensures the exclusivity and better enforceability of rights, eliminates abusive exploitation of certain GIs, maximizes the value of GIs as a marketing tool, creates conditions for the sustained development of certain regions, and better protects consumers from misleading labeling.

US negotiators, supported by other delegations, reject the Swiss proposal, as they consider that the current level of protection available under the TRIPS Agreement is sufficient. They argue that the Swiss proposal would tip the balance between trademark and GI protection in favor of the latter, which the US views as “a hidden subsidy” (Melzer 2002). Moreover, the United States interprets the Swiss proposal as leading to the creation of a supranational registry for GIs, and the United States believes that registration should remain a national prerogative.

29. Swiss GI-based producers have also been in the front line in advocating the creation of an international organization, such as ORIGIN (Organisation for an International Geographical Indications Network), to protect GIs more effectively at the international level, and in the WTO in particular.

30. “Additional protection” under Article 23 of TRIPS prevents this sort of abusive modifier.

Some US officials consider the Swiss proposal a vehicle for “taking back” generic terms.³¹ They worry that adopting stronger GI protection could adversely affect certain production carried out by immigrants, or descendants of immigrants, in the United States.

Recommendations for GI Issues

- To balance the political economy of Swiss market access liberalization in agriculture, the FTA will need US concessions on GIs, an area of considerable commercial value not only to Swiss farmers and food processors, but also to Swiss industry (e.g., watches, textiles, machinery, and medical devices).
- A unique feature of the Swiss food sector is its production of epicurean specialties, notably cheese and chocolate. Switzerland is also reputed for its luxury and technical industry (e.g., watches, textiles, machinery, medical devices). All of these items embody Swiss comparative advantage, but to access the US market to the maximum extent, Swiss producers need adequate GI protection. Contrary to its stance on other intellectual property rights (IPR) issues, the United States has adopted a defensive posture on the GI question.
- Nevertheless, in bilateral agreements with the European Union, Chile, Australia, and Central American countries, the United States obtained specific recognition of bourbon whiskey and Tennessee whiskey, and in turn recognized certain GIs of the partner country (e.g., Scotch whiskey, Irish whiskey, *pisco chileno*, and *pajarete*). In other words, the United States has established a precedent for recognizing particular GIs in the context of bilateral agreements.
- Based on these precedents, in the context of the Swiss-US FTA, the United States should ensure better protection of Swiss GIs for all goods and services (i.e., an agreement on the protection of GIs) and expressly recognize protection for a list of Swiss GIs (after the Annex to the Agreement on the Protection of GIs). As part of the same bargain, Switzerland should recognize the same level of protection for US GIs for all products, and expressly for the GIs listed in the agreement, such as Florida oranges, Idaho potatoes, Washington State apples, Tennessee whiskey, bourbon whiskey, and Napa wine.

31. The TRIPS Agreement allows countries to exempt from GI protection indicators that correspond to a “generic” term or preexisting trademark. Since the United States considers “Chablis” a generic term, US producers are still permitted to use that word in the United States as a synonym for white wine. The European Union disagrees, arguing that “Chablis” is a GI.

- As a collateral agreement, in the context of the Doha Development Round, the United States should accede to the request of Switzerland and other countries that Article 23 of the TRIPS Agreement be amended to state that additional protection should apply to all products. The use of words such as “like,” “style,” or “type,” or label information that, in relatively small print, correctly states the origin of the product, would then be prohibited. This amendment to Article 23 would also give Swiss producers better grounds for challenging the words “Swiss-style.”
- Finally, in the context of the Swiss-US FTA, the parties should form a standing working group on intellectual property to consult on issues concerning GIs or other intellectual property rights that arise from time to time. Disputes would continue to be handled by the WTO dispute settlement mechanism, but the working group might head off some disagreements at an early stage.

Addressing SPS and GI issues in the Swiss-US FTA could aid negotiations in agricultural trade overall. However, though the agriculture sector is quite protected on both sides, it is dwarfed in volume by manufacturing and services. These areas could see impressive gains should trade between the United States and Switzerland become more open, and it is to them that subsequent chapters turn.