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'Trade Liberalisation Should Work for All' High-Level Meeting Will Focus on Least-Developed Countries

The World Trade Organization and UNCTAD will host the High-Level Meeting on Integrated Initiatives on Least Developed Countries' Trade Development from 27-28 October (for an update see page 5). ICTSD interviewed the driving force behind the process, Ambassador Evelien Herfkens of the Netherlands, who currently chairs the WTO's Sub-Committee on Least-Developed Countries.

What do you see as unique about the high-level meeting?

First of all, I think that the whole effort is extremely timely because of the new and growing importance given to trade by countries in sub-Saharan Africa, which increasingly see it as the only way out of the debt trap and dependence on foreign aid. There is a much higher sense of ownership of that priority than I think we have ever seen since the independence of these countries.

Second, on important issues such as trade policy, coherence in the advice and conditionalities offered to least-developed countries is of tremendous importance. In my former job at the World Bank, I witnessed the confusion of several small countries regarding the trade-related advice they got from the World Bank and the International Monetary Fund, as well as the WTO and UNCTAD. Reducing that confusion would already be an important step in integrating LDCs in the multilateral trading system. I hope that we will be able to deliver a more coherent framework of international institutions working together to address the needs of a particular country. For instance, there should be greater coherence between the WTO accession process on the one hand and the programmes a country has agreed with the Bank and the Fund on the other.

Is inter-agency co-operation working?

There is a general problem of co-operation among international agencies. Partly, it's fed by the way the member governments operate: different ministries send different signals to different parts of the intergovernmental machinery - some battles are fought in Geneva rather than in capitals. Co-ordination requires governments to say the same thing in the governing bodies of the UNDP, UNCTAD and the World Bank as in the governing bodies of the WTO, the IMF and the ITC. We still have quite a bit of homework to do on that, but considering that we only started this effort about six months ago, we are not in bad shape.

Do you think we will see significant improvement in market access?

I am an impatient person, so I don't know about 'significant'. But if you look at how tiny steps have been in terms of market access for LDCs over the past three decades, I hope that this will be at least a visible step. The European Union, the United States, Canada and several important developing countries are clearly preparing something - we can only judge how significant it is when they actually announce what they are offering. I don't know, for instance, whether rules-of-origin issues, which I think are crucial, will be part of countries' efforts to increase market access.

Could the meeting introduce new conditionalities for LDCs in the international trade system?

I don't think that the conference as such will make any difference to LDCs' liberalisation obligations under the WTO, but some preferential treatment offers may introduce conditionalities. For instance, the US initiative for sub-Saharan Africa clearly conditions market access to reforms in the countries themselves. One of the problems we have had with preferential systems before, is that countries have not always been able to benefit from the preference, at least now the emphasis is on giving market access to countries that will.

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Wouldn't preferential treatment for LDCs cause trade diversion?

The question of diversion is a very difficult one. We will need to see the type of offers we get before we can judge to what extent that may happen, but until now no diversions - resulting, for instance, from regional agreements - have been beneficial to least-developed countries. I would be concerned if it turned out that preferential terms for an LDC actually reduced market access for a hardly more developed neighbouring country. In that sense there is some reason to worry about a small group of sub-Saharan African countries which are just a little bit above this group of LDCs. For the time being, my priority is to get market access. If necessary, we can deal with trade diversion later.

Why is the WTO concerned with technical assistance? Couldn't other agencies provide it more efficiently?

If the WTO really wants to become a world trade organisation, we have to

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make trade liberalisation work for all countries. Least-developed countries need additional assistance to make them 'viable trading nations', as the Tanzanian Ambassador here in Geneva puts it.

The WTO has particular technical expertise that is not by definition available in other institutions. The fact that half of the least-developed countries would like to join the WTO also argues in favour of WTO involvement. The main reason, however, is that the membership of the WTO has decided that this is something the organisation should be doing. As to the assumption underlying your question, I think that the WTO would benefit tremendously from co-operating with others and from embedding its technical assistance into the efforts of other institutions; that could really mean a quantum leap in the quality of its assistance efforts.

Should the WTO build on the international co-operation endeavours of the World Bank and other institutions?

I have been in development co-operation my whole life, and the bottom line is that all of us score poorly on technical assistance. In the OECD's Development Assistance Committee (DAC) and the World Bank, we gradually learned that just throwing foreign advisors at a problem was unproductive. Technical assistance on trade needs to be incorporated in institutional capacity-building where the government concerned has a sense of ownership about the process. There is no point in giving courses and sending in foreign experts if that is not part of a broader effort. The DAC and the World Bank have both developed guidelines on how to build institutional capacity. I would genuinely hope that the WTO would use those guidelines to build its own programme rather than try to reinvent the wheel.

Does the WTO have the capacity to deliver technical assistance?

I don't think the WTO should create a full-blown technical assistance programme of its own but instead embed its contribution in other products, such as the ITC/WTO/UNCTAD Integrated Technical Assistance Programme for Africa or the Bank's strategies, to give just two examples. To me, the ideal situation would be one where a country would assess its own needs and then decide which institution it prefers to work with. The WTO should offer its expertise as part of that institution's programme. One such partner could be the Economic Development Institute (EDI), the world's largest institutional capacity-building machine with a bigger budget than that of the entire WTO. EDI is currently moving into the trade area, again reflecting demand from the borrowers of the World Bank. WTO expertise could be integrated into that effort. To me, this would be one of the most efficient ways to go.

Should the WTO assist LDCs and other developing countries to fully exercise their rights and not only to comply with obligations?

I agree that assisting developing countries in exercising their rights is important, the question is who should provide that assistance. I am not sure that the WTO membership would warmly welcome the Secretariat's 'arming' the least-developed countries against them! Maybe UNCTAD or the World Bank would be the answer to that.

When I was still on the World Bank Board, I fought very hard to prevent the Bank from giving technical assistance to countries to help them negotiate in the World Bank/IMF initiative in favour of heavily indebted poor countries. I thought it by definition wrong that the Bank would assist someone in negotiating against itself or its membership. I always thought that it was perfect that UNCTAD had a programme to help debtor countries negotiate both in the Paris Club

and the World Bank. Here you have a similar situation: assistance in this particular area should come from a third party, independent from the whole process. Maybe the WTO could finance it. I think it should, because it is indeed an issue.

Could LDCs do more to enhance their export capacities themselves?

Yes, they could. For instance, you cannot export if you have an outrageously over-valued exchange rate - so you have to do something on the economic side. Lack of infrastructure is another major problem and we will focus on that during the conference. I am getting somewhat concerned about two trends: the first is that donors, including the World Bank, are moving out of infrastructure - it is not a sexy subject. Bilateral donors and international financial institutions now target poverty, health and education first - and so they should. Nevertheless, least developed countries have a huge need for infrastructure: trading is bringing a product out of your country and you cannot do that without a functioning port, storage capacity or roads. The second international trend which I'm concerned about is that private financing now seems the answer to everything. But although you can get a lot of private interest in financing infrastructure, that will not happen in the middle of sub-Saharan Africa. So the international community really needs to look into this again.

I think that one of the most useful things we could get out of this conference is a commitment by the World Bank to review its country strategies from the perspective of 'are we doing all we could to help these countries trade'. Infrastructure - the original mandate of the World Bank - is a huge part of that. Governments also have a large role to play because one of the sad things in LDCs is the lack of maintenance. There are a lot of examples of money completely wasted, particularly in the infrastructure sector. Donors - including the World Bank - will need some assurances that this time around the money will not go to waste.

What are the main constraints LDCs face in the WTO?

Half of least-developed countries are not even present in Geneva and those that are often have more important things to do than follow the WTO, including debates on humanitarian assistance and human rights. I believe it would be crucial to have a weekly newsletter, going to the right ministries and the right in-trays in those ministries, on matters relevant to LDCs that happened that week in the WTO.

How will the outcome of the high-level meeting to be incorporated into the formal agendas of the participating agencies?

The recommendations will be addressed to the governing bodies of these institutions. I hope that countries, including mine, are sufficiently committed to this effort to instruct our representatives on the boards of all the implementing agencies to make sure that these recommendations are discussed by their governing bodies.

Do you see any meaningful role for civil society beyond the business community in implementing the meeting's outcome?

We don't know yet what recommendations will come out of the High-Level Meeting and civil society's eventual role depends very much on those recommendations. However, I have spent enough time in the World Bank to know how important the outside voice can be. I have seen inward-looking institutions change because of outside monitoring; NGOs may never have fully understood - and governments will not tell them - how influential their efforts were in changing the Bank. I wonder if they realise how important they can be.

Sustainable Development Issues in MERCOSUR

By Eduardo Gudynas

In 1991, Argentina, Brazil, Paraguay and Uruguay established the Southern Common Market (or Mercado Común del Sur, MERCOSUR). In a few years the trade area has evolved into a customs union, albeit still a somewhat imperfect one. Today, with a total population of 200 million and a gross national product of more than US\$ 600 billion (with a 3 percent growth rate), it is the world's fourth largest market. Its almost 12 million square kilometres include tropical ecosystems, such as the Amazonian forest, as well as temperate semi-deserts, such as the Patagonia.

MERCOSUR's evolution has been a success: in 1996 Chile and Bolivia joined as associate members, and negotiations have been initiated with Peru, Mexico, the European Union and other countries. Intra-regional trade has reached more than US\$14 billion, with an average annual growth of 29 percent (higher than the growth rate of world trade as a whole).

Under this expansion, environmental impacts are to a great extent determined by intra-regional trade, a rare situation in Latin America's history. Instances include deforestation in Brazil and Paraguay, in which Brazilian enterprises are involved; the risk that Paraguay's subtropical forests disappear within the next seven years; the destruction of Uruguayan wetlands as a result of cultivation of rice exported mainly to Brazil and Peru, and gas extraction in Bolivia for sale in neighbouring countries.

Large-scale projects with serious environmental consequences have been launched. Some are physical linkages, **including** a road network to create a corridor from São Paulo through Buenos Aires to Santiago, building the world's largest bridge over the Río de la Plata and a waterway through the rivers Paraná and Paraguay, a new super-dam on the middle-part of the Río Paraná in Argentina, new roads for a coast-to-coast corridor from Brazil to Chile and Peru, and the new network of gas **pipelines** between Argentina and Bolivia through Brazil and Uruguay.

Both the old development proposals and the new integration projects pose a threat to various ecosystems, including the Pantanal, the subtropical forests of Paraguay, Bolivia and Northern Argentina, and the wetlands along the Atlantic coasts of Uruguay and Brazil.

Despite commercial achievements in the regional integration process there is little progress on the environmental issues or in the pursuit of sustainable development. Institutionally, MERCOSUR environmental concerns are currently dealt with by a working group. A basic document has been issued, and very recently the working group has approached such issues as non-tariff restrictions, the impact of environmental measures on competitiveness, including consideration of PPMs (production and processing methods); the implementation of international norms, particularly ISO 14,000; the use of a regional "green seal" (only Brazil has one); and drafting a protocol-type legal instrument for all members. Related themes, such as sanitary and phytosanitary rules are considered by other working groups.

These discussions have not advanced much. This is partly due to the timidity of the proposed measures, but also to the fact that the institutional structure of MERCOSUR is still weak. Contrary to the European Union, MERCOSUR norms do not have a supra-national

legal status, they need to be approved by each of the countries separately. Thus a sustainable development strategy depends as much on what each member country does individually as on what they agree regionally at the trade level.

As each country takes its environmental measures in isolation, consensus has not been reached on an environmental strategy for the common market. Concrete measures have not even been agreed to address serious problems, such as the environmental management of border areas or shared resources. The development models followed by MERCOSUR countries consist of a heterogeneous blend of liberal deregulation mixed with the 'new' model of import substitution.

MERCOSUR holds great potential to advance in the quest for sustainable development even though it primarily considers itself as an economic integration process. There are embryonic common political institutions, such as the Parliamentary Commission and the Foro Consultivo Económico y Social (consultative forum for economic and social issues) which consists of labour unions and employers.

The terms of international trade provide persisting reasons for MERCOSUR countries' modest environmental performance. To change this trend, rich countries need to adopt fairer trade practices as part of a global agenda towards sustainability.

Negotiations with other commercial blocs could also exert great influence. The Free Trade Area of the Americas proposed by the United States has created tension, but it could also draw renewed attention to environmental matters: negotiations with the United States would probably mean considering measures, perhaps protocols, such as the NAFTA environmental side agreement. At this point the countries of the Southern Cone emphasise the need to first strengthen their regional agreement, and only then open discussions with the US; besides they

are reticent to approach such themes as intellectual property rights or the liberalisation of investment beyond what is imposed by the WTO. The US insistence on the liberalisation of the entire continent can be understood in the light of its declining share in MERCOSUR trade (from 23 percent in the 1980s to fifteen in 1995).

Something similar might occur in the current negotiations with the European Union, in which the question of environmental product controls is being discussed. The problem of the agricultural sector also needs to be dealt with. There, European environmental norms could help promote organic agriculture in the South. We should also keep in mind that a reduction in European subsidies will increase imports from MERCOSUR, creating the danger of an enormous expansion of the sector, leading to new encroachments of farming and animal husbandry on forest ecosystems, increased agrochemicals use and more intense machinery and energy use.

Whatever the rhetoric, both governments and business associations do in fact consider environmental measures as trade barriers hidden under a green cloak. While MERCOSUR countries certainly are not at the forefront of environmental protection, it has to be recognised that the terms of international trade continue to provide persisting reasons for it. To change this trend, rich countries would need to adopt fairer trade practices as part of a global agenda towards sustainability.

Eduardo Gudynas is Director of the Latin American Center of Social Ecology, in Montevideo, Uruguay.

Committee on Trade and Environment

The Committee on Trade and Environment (CTE) met from 22-24 September. The main item on the agenda was the relationship between WTO rules and trade provisions pursuant to MEAs. The secretariats of five multilateral environmental agreements (the Basel Convention, the Montreal Protocol, the Biodiversity Convention, CITES and UNEP) and two financial mechanisms (the Fund for the Implementation of the Montreal Protocol and the Global Environment Facility) made presentations on the trade-related aspects of their respective conventions and programmes. The Climate Change Secretariat sent a note stating that the Convention contained no trade measures and that it would be 'premature to speculate' whether the greenhouse gas reduction protocol to be adopted in Kyoto would include any.

The CTE Secretariat distributed a synopsis of GATT/WTO application of Article XX to environmental measures (WT/CTE/W/53). Given the diversity of interpretations of the scope of Article XX with respect to trade measures in MEAs, many Members felt there was a need to clarify WTO rules. In their discussion on the compatibility of trade measures in MEAs with WTO rules, Members generally built on their positions contained in the CTE Singapore Report. Two positions were expressed: some Members felt policy guidance in this area should be developed through the CTE, while others considered that interpretation of the scope of Article XX should be left to the dispute settlement process.

The meeting also addressed the export of domestically prohibited goods. Nigeria proposed that the CTE reactivate the 1982 GATT Ministerial Decision for Domestically Prohibited Goods that would require DPG exports to be notified to the WTO. The European Communities expressed their support, stressing that problems remained in this area and that there was a need for more work on DPGs. Morocco and Egypt were also supportive, but emphasised the need for careful product definition. Canada and the United States felt that a reactivation of the 1982 notification system for DPGs would overlap with the 'similar and related' notification systems in the Technical Barriers to Trade and Sanitary and Phytosanitary Agreements. The US pointed out that related instruments such as the London Guidelines for chemicals, the PIC negotiations and FAO's Codex Alimentarius covered the full spectrum of chemicals for DPGs.

Members also discussed environmental reviews, environmental taxes, and the TRIPs Agreement. India submitted a new paper on the relationship between the TRIPs Agreement and MEAs. Colombia presented the Andean Pact's decision on access to genetic resources as an example of a trade instrument that complies with both the TRIPs Agreement and the Convention on Biological Diversity.

Discussion of market access and trade liberalization continued from the May meeting. India submitted a new paper on the development, access to, and transfer of environmentally-sound technologies and products. Colombia offered a study of the effects of environmental measures adopted in developed countries on its cut flower exports. Members provided input to the Secretariat's sectoral paper on the environmental benefits of removing trade restrictions and distortions, which will be circulated for the November meeting. The US referred to a paper which it intends to submit on market access for environmental services.

The next meeting of the CTE will be held from 24-26 November. The Chairman, Ambassador Ekblom of Finland, intends to circulate a draft of the CTE's 1997 report to the General Council for Members'

consideration prior to the November meeting. It has been agreed that this report will be brief and factual.

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Trade in Financial Services

The Committee on Trade in Financial Services met on 18 September to continue its work towards a protocol on trade in financial services, due for adoption on 12 December. The United States and the European Union, pushing for the 'full liberalisation' of the financial services sector in key emerging markets, may have to scale down their hopes: trade negotiators from Thailand, Malaysia and Indonesia said they were cautious about tabling further liberalisation offers due to the financial crisis currently affecting their economies.

Both the US and EU reminded developing country trading partners that safeguard measures and phase-in periods for financial services liberalisation were acceptable provisions, stressing that liberalisation would be good for the financial systems of emerging economies.

Singapore and Korea tabled offers and Hong Kong offered some revisions to its July offer. The Czech Republic, Macao, New Zealand and Ecuador submitted offers said to be improved over already liberal commitments made as part of the GATT.

Financial services liberalisation was also discussed at the International Monetary Fund/World Bank annual meetings in Hong Kong the following week. Developing country leaders said asking for further relaxation of investment rules 'would put additional stress on the economies of countries already straining to adjust to globalisation'. Many Asian nations indicated they were reconsidering liberalisation efforts, and Chinese leaders said that the international community 'must attend to [the] concerns [of developing countries] over finance, debt, trade, environment and poverty issues'. They also warned against making 'excessive demands' before admitting China to the WTO.

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TRADE POLICY REVIEW OF CHILE

The WTO completed its Trade Policy Review of Chile on 24 September. The review praised Chile's success in combining effective liberalisation policies with efforts to improve social welfare. Some Members expressed concern over Chile's emphasis on regional and bilateral trade arrangements, as well as its policies on agricultural goods and various technical barriers to trade. They argued that such agreements might complicate efforts at liberalisation by promoting different treatment for Chile's trading partners, particularly concerning rules of origin and disparities between industrial sectors facing different timetables for tariff reductions.

Commenting on its arrangements regarding least-developed countries, Chile noted that tariff quotas covered imports from least-developed countries at preferential rates, and that no restrictions existed on imports under MFN rates. The representative also said Chile maintained no rules of origin that might discriminate against LDC exports.

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LDC Trade Development: High-Level Meeting Update

The High-Level Meeting on Integrated Initiatives on Least Developed Countries' Trade Development will take place from 27-28 October, 1997 (see also cover story).

The meeting's principal aims are:

- to improve market access for LDC exports; and
- to mark the beginning of enhanced cooperation between least-developed countries and international institutions that provide trade-related technical assistance. These agencies include the WTO, UNCTAD, the International Trade Centre (ITC), the World Bank and its private sector arm, the International Finance Corporation, the International Monetary Fund and the United Nations Development Programme.

The meeting is expected to adopt an Integrated Framework for Technical Assistance, which will provide the basis for developing country-specific strategies to respond to individual LDCs' needs. The 'multi-year country-specific programmes of trade-related technical assistance activities' will be based on comprehensive needs assessments completed by LDC governments. According to the collaborating agencies, the needs assessments are essential to ensure that the integrated technical assistance programmes are properly demand-driven.

A dozen such programmes will be developed during country-specific roundtables at the High-Level Meeting. At the time of this writing, the selection of countries for the pilot strategies was still to be finalised by the WTO Sub-Committee on Least-Developed Countries. The main criteria to be used for the selection is 'the satisfactory completion of the needs assessment and the agencies' country-specific programme of technical assistance'. At the request of interested LDC governments, other such roundtables will be held after the High-Level Meeting as soon as the necessary preparations are complete.

In parallel to the country-specific roundtables, two thematic roundtables will be held during the High-Level Meeting. The first will focus on 'building capacity to trade in LDCs' and the second on 'encouraging investment in least-developed countries'. These roundtables will be attended by government delegates and staff of the agencies involved, as well as a small number of eminent business leaders and investors from developing and industrialised countries invited 'as resource persons' to participate in the Meeting in their personal capacity.

The thematic roundtables are expected to develop a set of recommendations on building trade capacity and encouraging investment in LDCs. The recommendations are likely to be addressed to LDC governments, the co-operating agencies and 'other development partners'.

Apart from the opening and closing ceremonies, plenary sessions will essentially consist of countries' announcing their initiatives for enhancing market access and other measures to facilitate LDCs' integration in the multilateral trading system. These measures will be offered by individual countries rather than the entire WTO membership.

In early October 35 least-developed countries had confirmed their attendance. Donor governments will also attend, as well as representatives of all the agencies involved in the Integrated Framework for Technical Assistance (see above).

NGO Participation

Many governments of both developed and developing countries reportedly plan to include representatives of non-governmental organisations in their delegations. Those representatives will have full access to the conference proceedings.

At the time of this writing, it was expected that the High-Level Meeting would be open to other non-governmental organisations under the so-called 'Singapore rules'. Non-profit and private sector organisations were expected to be able to participate as observers in the plenary sessions and the thematic roundtables.

At the country-specific roundtables, the countries concerned are responsible for selecting who, in addition to the six agencies, they wish to invite to the sessions.

Contact Peter Pedersen at the WTO, tel (41-22) 739-5848, fax 739-5777; or Jo Elizabeth Butler at UNCTAD, tel: (41-22) 917-5048, fax: 907-0043.

NGO Recommendations on LDC Trade Development

Thirty-five representatives of non-governmental organisations, most from least-developed countries, have agreed on a set of recommendations for the High-Level Meeting, covering the themes to be discussed at the thematic roundtables. The recommendations were developed during a joint WTO/UNCTAD NGO Symposium on Trade-Related Issues Affecting Least-Developed Countries, held in late September in Geneva.

The NGO recommendations are addressed to the governments and agencies involved in the implementation of the High-Level Meeting results. They stress that international trade and foreign direct investment are not ends in themselves but means to be used for poverty alleviation. They also point out that technical assistance should respect national development priorities of the recipient country in promoting the domestic economy, particularly through support to small and medium-sized enterprises. NGOs propose that regulations be developed to ensure that foreign investment in LDCs is productive rather than speculative.

In all, more than twenty specific recommendations are addressed to governments and the agencies involved. They have been made available to the participants of the High-Level Meeting as an informal report. Copies can be requested from the International Centre for Trade and Sustainable Development.

Members of the UNCTAD, WTO and ITC Secretariats, who acted as resource persons throughout the two-day meeting, expressed their appreciation for the substantive and focused nature of the Symposium discussions. UNCTAD Secretary-General Rubens Ricupero said in his closing remarks that the expectations for the High-Level Meeting of the business sector in least-developed countries would not be met by technical assistance alone. LDC businesses consider market access, particularly changes in rules of origin, as the most important aspect of the conference. Echoing NGO discussions, Mr. Ricupero also emphasised the importance of strengthening domestic markets and creating a favourable external environment, including debt relief.

Dispute Settlement Corner

India Loses WTO's First Intellectual Property Dispute

The WTO on 5 September circulated its first panel report dealing with alleged violations of the Trade Related Intellectual Property Rights Agreement. The panel ruled that India had not set up a TRIPS-mandated 'mailbox' system for filing patent applications. Under the agreement, developing countries that do not have patent protection in place for pharmaceuticals and agricultural chemicals must set up a system by which companies can file patent applications to be reviewed when patent protection is established. This 'mailbox' system allows companies to preserve their original filing dates to substantiate the novelty of the product for which the patent is being sought. Developing countries have until 2005 to extend patent protection to pharmaceuticals and agricultural chemicals.

The complaint was brought by the United States, which successfully argued that India had failed to set up its 'mailbox'. India contended that, although it had not changed its patent legislation, it had set up an effective system for receiving and dating patent applications, and had in fact received applications in that 'mailbox' from many, including US, patent applicants.

The panel found that India also violated Article 63 of TRIPS, dealing with transparency, and Article 70.9 for failing to provide for exclusive marketing rights. India has announced that it will appeal the report.

Appellate Body Rules on EU Banana Regime

The WTO Dispute Settlement Body on 25 September adopted the Appellate Body report on the European Union's banana imports. The Appellate Body only slightly modified an earlier panel report which found the European Union's banana import regime and import licensing procedures inconsistent with the GATT. The current EU regime grants preferential treatment to African, Caribbean and Pacific (ACP) developing countries, Union members and four Latin American countries. The complaint was brought by the US, Ecuador, Mexico, Guatemala and Honduras.

The EU has until 25 October to decide whether to comply with the ruling and dismantle its banana import regime, or to maintain it and face compensation claims of up to US\$2 billion (according to US estimates). Any course of action it chooses must be approved by the five complainants.

EU Appeals Hormone Beef Decision

The European Union on 24 September notified the WTO that it was appealing the recent panel ruling which found that the EU's import ban on hormone-treated beef was not sufficiently backed by science to be acceptable under WTO provisions.

India Improves Offer in Balance of Payments Dispute

The Indian government has reportedly made a 'substantially improved' offer on lifting import restrictions on a large number of agricultural, textile and industrial goods. Australia, Canada, the European Union and the United States are currently consulting with India under the WTO's dispute settlement mechanism over phasing out the quantitative restrictions maintained by India on 2,417 products. Although the terms of the offer have not been made public, sources say that India is willing to shorten the phase-out period from seven to three years for the majority of the products under dispute.

Mexico To Defend Anti-Dumping Duties on US Syrup

The United States announced on September 4 that it had asked the WTO for consultations with Mexico over anti-dumping duties imposed this summer on US imports of high fructose corn syrup (HFCS). To avoid WTO action, the Mexican Commerce Ministry, sugar industry officials and bottlers have reportedly reached a deal with soft drink manufacturers to limit the use of HFCS in soda production over the next three years. The Mexican government denies any involvement in the deal, which Manuel Perez Bonilla, Secretary-General of the National Association of Sugar Cane Growers, said was a 'mutual business agreement between sugar cane growers and workers and the National Association of Soft Drink Manufacturers'.

Korea Protests Anti-Dumping Duties on Semiconductors

Korea has requested consultations with the United States, alleging violations of Article XXII.1 of GATT 1994, and Article 17.3 of the Anti-Dumping Agreement, regarding the 16 July 1997 decision of the US Department of Commerce (DoC) not to revoke the antidumping duty on dynamic random access memory semiconductors (DRAMs) of one megabyte or above originating from Korea.

Korea contends that the DoC's decision was made despite the finding that Korean DRAM producers have not dumped their products for a period of more than three and a half consecutive years, and despite the existence of evidence demonstrating conclusively that Korean DRAM producers will not engage in dumping DRAMs in the future. Korea also contends that the standard of revocation adopted by the DoC appears to be impermissible under Article 11 of the WTO's Anti-Dumping Agreement.

Korea considers that these measures violate Articles 6 and 11 of the Anti-Dumping Agreement, and Article VI of GATT 1994.

EU Challenges Korea's Alcohol Taxation

The European Commission has requested the World Trade Organization to rule on whether Korean taxation of alcoholic beverages violates world trading rules. The request was made at the 25 September meeting of the WTO's Dispute Settlement Body. According to the EU, at issue is the wide gap between the tax rates imposed on imported spirits and on local produce: whisky faces 100% tax and vodka 80% while the local soju spirit only faces 35%. The case is likely to involve *like product* interpretation similar to the Japan Liquor case (Japan lost: the Appellate Body ruled that imported spirits such as whisky and local alcoholic beverages were *like products*, and should therefore be taxed in the same way. See also related articles on pages 9 and 13.)

Shrimp-Turtle Dispute

The panel examining the dispute between the United States and India, Malaysia, Pakistan and Thailand over the US import embargo on marine shrimp and shrimp products caught with mechanical nets without turtle excluder devices met from 4-5 September to hear rebuttals. On 27 October, the panel will submit its interim report to the parties in the dispute, who will have a week to request a review. The final panel report will be released to the parties on 1 December, and circulated to all WTO Members on 22 December.

Implementing MEAs: Trade and Positive Measures

By Chiedu Osakwe

The history of recent multilateral environmental agreements (MEAs) shows that their successful negotiation depends on the combination and balance between coercive trade and incentive-driven positive measures. Logic and the cumulation of policy practice with MEAs also show that the more balanced the combination of trade and positive measures, the more effective the MEA.¹

Trade measures

Trade measures in environmental policy-making are instruments applied to restrict or prohibit trade in specified products for the purpose of either reducing or eliminating an environmental externality, hence achieving a desired environmental objective. These measures are sometimes considered as negative, coercive, or even punitive. Trade measures may be applied between parties to an MEA, and/or between parties and against non-parties.

Out of the approximately 180 existing MEAs, eighteen - or ten percent - contain explicit trade provisions.² Indeed, an initial difficulty in evaluating the effectiveness of trade measures in MEAs is that judgements are based on such a narrow sample: ten percent is a low basis for far-reaching generalizations. Since the Convention on International Trade in Endangered Species (CITES) in 1973, only five MEAs with trade measures have been adopted and none since the June 1992 Rio Conference. Nonetheless, it is important to keep in mind that the five MEAs adopted since CITES may represent strategic examples of a trend to use trade restrictions in MEAs for achieving environmental objectives. This perspective is reinforced by the fact that these are the most global and actively functioning agreements, on which the attention of the global environmental and trading communities has largely focused.

The different types of trade measures in MEAs currently in use comprise outright trade bans/prohibitions, quotas, certificate arrangements that include import and export permits, Prior Informed Consent Procedures (PICs) and mandatory labelling schemes.³

Positive measures

The term positive measures is recent but has acquired currency. While it does not appear in any MEA, the term has been used in post-UNCED analysis at UNCTAD, WTO, UNEP and CSD.⁴ Positive measures are combinations of specific non-restrictive instruments, acts and processes employed by states in cooperative interaction for achieving environmental goals. These measures include the building of expert capacity, granting of grace periods to enable countries to make domestic adjustments necessary for satisfying commitments in MEAs, transfer of environmentally-friendly technology on agreed terms, funding of incremental costs of projects, joint project implementation, environmentally-friendly project subsidies, and improved market access to enhance revenues from exports. These measures can either be domestically designed for use by individual countries, or employed as part of an MEA negotiated on the basis of international cooperation.

Positive measures tend to be considered as second-order supplementary measures, offered as compromises only to weaker countries and firms lacking in capacity. Although developing countries may, on balance, need these non-restrictive measures more than developed countries, positive measures are also required by developed countries and by firms operating in them, even strongly competitive

firms. For instance, in the areas of health and safety - including environmental protection - business and industry require transitional periods to make essential technical adjustments to align their operations with technical standards and regulations. These include the installation of pollution abatement devices such as catalytic converters and de-sulphurization equipment in coal-fuelled power stations. Climate change provides an instructive example: in 1992, at Rio, developed countries (Annex 1 countries) agreed ("aimed") to stabilize their greenhouse gas emissions at 1990 levels by the year 2,000. The eight-year grace period for adjustment is a positive measure, even though most of the countries are not on target.

UNCTAD has circulated a paper which proposes an agenda for positive measures,⁵ highlights the difficulties in giving effect to them, and offers suggestions on their implementation. The case for positive measures in the paper is based on three arguments. Positive measures have been included in MEAs in recognition of the fact that compliance failures are not the result of deliberate policies, but arise from countries' need for assistance to adjust to the socio-economic changes necessary for MEA compliance. These measures can assist in mitigating the likelihood of conflicts between trade measures used in MEAs and the rules of the trading system. Accordingly, positive measures can be used as bargaining chips for undertaking new commitments.

UNCTAD also highlights three difficulties that hinder the implementation of positive measures. First, in the implementation of MEAs, compared to trade measures, no implications ensue from the abandonment of commitments to positive measures. For example, no consequences arise from a breach of the commitment to transfer technology. Second, as several MEA Conferences of Parties (COPs) have noted, the exclusive rights granted under Intellectual Property Rights (IPRs) could increase the cost of acquiring technologies authorized by MEAs. Third, apart from provisions for financial mechanisms in some MEAs, there are no explicit references to mechanisms for technology transfer, for instance, through the purchase of equipment, licensing, foreign investment, application of scientific research results in the public domain for developing technologies for the use of firms. The paper, thereafter, suggests innovative ways of implementing positive measures in capacity-building, technology transfer, transfer of financial resources and market-based instruments.

It must, however, be emphasized that positive measures do have potential weaknesses. Like trade measures, although they are necessary and effective - and sometimes may need to be discriminatory - their effects can also bias and distort, as well as lead to unforeseen and unintended effects, resulting in either welfare or environmental losses. Balanced views of positive measures just like trade measures should always be presented. Illustrative examples include:

- The rebatement of energy taxes on weaker industries has produced unintended effects of increasing pollution levels and causing severe environmental harm.
- Long adjustment periods for developing countries and weak producers in developed countries have down-sides. Under the Montreal Protocol, it has been noted that industries phasing out ozone-depleting substances may sell such substances below market price to developing countries, thus creating dependence. In a survey by UNCTAD based on a 1994 Ozone Secretariat data, a sample of 16

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The Biosafety Protocol: A Trade Agreement in the Making

The Open-ended Ad Hoc Working Group on Biosafety of the Biodiversity Convention will hold its third meeting in Montreal from 13 to 17 October, 1997. While most OECD countries have domestic legislation in place for the safe handling of living modified organisms (LMOs), regulations on exports are lacking. The mandate of the working group is to 'develop a protocol on the safe transfer, handling and use of living modified organisms, specifically focusing on transboundary movements of any LMO that may have an adverse effect on biological diversity and human health, setting out appropriate procedures for advance informed agreement'. The protocol was to be offered for adoption at the Biodiversity Convention's fourth Conference of the Parties next spring, but it now looks likely negotiations will not be completed until the fifth COP in 1999.

The protocol is likely to contain the following elements:

- **Competent authority/Focal point**
- **Advance informed agreement** - including the scope of the agreement, reporting requirements and the information to be supplied by governments. Advanced informed agreement is closely related to risk assessment (see below) and will affect the free movements of LMOs across borders.
- **Notification procedure**
- **Bilateral and regional agreements** - Parties may enter into such agreements with other Parties and non-Parties provided that they do not result in a lower level of protection than that provided by the protocol.
- **Risk assessment** - general principles or detailed provisions, discussion on who should carry out the risk assessment.
- **Risk management** - used during the development and evaluation of an LMO, for instance in laboratories through field testing prior to commercialisation.
- **Minimum national standards** - all Parties should develop national regulations and institutions which at a minimum fulfil the requirements of the protocol.
- **Unintentional transboundary movements** - accidental releases.
- **Handling, transport, packaging and labelling** - there is disagreement on whether these should be covered by the protocol. These measures would be unlikely to cause disputes between Parties to the protocol. Non-Parties, however, might claim that they constitute technical barriers to trade under the WTO's TBT Agreement. On the other hand, the TBT and the Agreement on Sanitary and Phytosanitary Measures both recognise the right to 'protect human, animal or plant life and health' and encourage Members to harmonize national standards and/or to adopt internationally-developed ones. The protocol could be regarded as such an international standard.
- **Information sharing**
- **Capacity building** - views differ on the provision of assistance to human resources development and institutional capacity building.
- **Public awareness and participation**

In addition to the trade-related requirements for advanced informed agreement, risk assessment and handling, transport, packaging and labelling (see above), trade with non-Parties remains an unresolved question. The African Group has proposed that no Party should export or import LMOs or products thereof to/from non-Parties. However, discussions on eventual trade restrictions remain at a preliminary stage. Other areas that might affect international trade are incentives for countries to join the protocol (capacity-building, technology transfer and financial assistance), verification mechanisms (to monitor compliance and settle disputes) and sanctions for non-compliance.

Links between the Convention on Biological Diversity and the WTO were also discussed by the Convention's Subsidiary Body for Scientific, Technical and Technological Advice (SBSTTA) at its third session from 1-5 September 1997. The issue came up during discussions on agricultural biodiversity. Several countries stressed that the WTO was the appropriate forum for considering trade and agri-biodiversity issues. The importance of collaboration between the WTO Committee on Trade and Environment and the Biodiversity Convention secretariat was repeatedly emphasized, and the SBSTTA recommended that the two and FAO co-operate 'in order to consider ways to develop a better appreciation of the relationship between trade and agricultural biological diversity and to initiate the identification of issues that will need to be addressed by the Conference of the Parties, while providing an opportunity for Parties and Governments to provide input'.

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The Montreal Protocol

Parties to the Montreal Protocol must establish export and import licensing systems for used, recycled and reclaimed CFCs and halons, the Protocol's Conference of the Parties agreed at their 9th Meeting, held in Montreal from 15-17 September 1997. The Parties, however, did not require mandatory licensing systems for international trade in hydrochlorofluorocarbons (HCFCs) and methyl bromide, as some countries had suggested. The licensing schemes, to take effect in 2000, will make tracking trade in ozone-depleting substances easier and help monitor illegal trade, a major topic at the Montreal meeting (Decision IX/4). This represents a significant step in tackling illegal trade, and will aid the Parties in reporting requirements. The Amendment on Exports of Reused, Recycled and Reclaimed Substances is also an important and bold initiative; it will tackle an issue that has been a significant problem in Europe and elsewhere.

Another decision (IX/18) adopted by the Meeting requests developed countries to consider banning the sale of their stockpiles of virgin CFCs anywhere in the world, except for meeting the 'basic domestic needs' of developing countries or for exempted 'essential uses'. This is important for preventing these stocks from entering the black market.

Developing countries, previously committed only to a 2002 production freeze, agreed to phase out methyl bromide production and consumption by 2015. Developed countries will accelerate total methyl bromide phase-out from 2010 to 2005, with exemptions for 'critical uses' and interim reductions of 25 percent by 1999, 50 percent by 2001, and 70 percent by 2003.

In addition to the US\$10 million agreed last year for funding demonstration projects testing the feasibility of methyl bromide alternatives, the Protocol's Multilateral Fund will make US\$25 million per year available in both 1998 and 1999 for activities to phase out methyl bromide in developing countries. Starting one year after the agreement enters into force, Parties will ban trade in methyl bromide with non-Parties.

Proposals by the European Community and Switzerland to accelerate the phase-out of the consumption of HCFCs and to introduce production controls were not accepted. These countries made a declaration urging that the issue be revisited at a future meeting.

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When the Appellate Body Errs

By Konrad von Moltke

One of the central paradoxes of the current trading system - and one with important environmental implications - is the fact that products derived from nature - beef, apples or lumber - are typically traded as *like products* even though they normally exhibit clear differences reflecting species and growing environment. On the other hand, products that are physically identical, such as pharmaceuticals or computer software, are readily distinguished by trade mark or payment of royalties. The result is that farms look like factories while cosmetic distinctions proliferate among factory-made goods.

It is difficult to conceive of a trade regime that will contribute to the promotion of sustainability unless it recognizes the right to distinguish between otherwise *like products* on the basis of the sustainability of their production methods. In many ways, this is *the* issue at the heart of the debate about trade and sustainable development. It is well known that the first tuna/dolphin panel took the view that it was not permissible to distinguish between otherwise “like” tuna in international trade based on the manner in which it was produced, that is with or without high levels of incidental dolphin mortality. This hasty and flawed interpretation has become a major obstacle to the development of an acceptable interpretation of the GATT from the perspective of those concerned primarily with the environment.

Determining which products are to be treated as “like” is of critical importance to the trading system. The concept of *like products* is in many ways the linchpin of the GATT/WTO system, whose two central principles - “Most Favored Nation Treatment” and “National Treatment” - both depend critically on it. The drafters of the original GATT 1947 text were well aware of the ambiguities of the term “like” and of the inherent dangers in using such an ambiguous term in passages so critical to the text, recognizing that it would be subject to interpretation over time. Over the years a number of major categories of otherwise *like products* have been given special status within the GATT/WTO system. For instance, under the TRIPs Agreement of 1994, products produced under intellectual property rights, trade marks or brand names have been distinguished from other *like products*. Which products are deemed to be “like” is clearly liable to change over time.

Because the *like products* issue is so central to the GATT/WTO system, decisions concerning the “likeness” of products are likely to become more numerous as the dispute resolution procedure reformed by the Uruguay Round is more frequently employed. Although disputes may not always directly address environmental concerns, any interpretation of the concept of *like products* is important from the perspective of sustainability, since it is likely to affect the willingness of the trade regime to make the adjustments necessary to accommodate the concerns of environment and sustainability.

The Appellate Body and Like Products

The recent dispute on taxes on alcoholic beverages in Japan revolved around the question of whether certain kinds of sake were “like” certain imported alcoholic beverages such as whisky, at least for purposes of taxation. The panel found that they were. Its recommendation was appealed and caused the Appellate Body to,

for the first time, express an opinion on the issue of *like products*. Both the panel and the Appellate Body had particular difficulty in analyzing Art. III.1 and III.2, the readings of which are critically important to any discussion of *like products*.

Article III.1 reads: “The contracting parties recognize that internal taxes and other internal charges, and laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products in specified amounts or proportions, should not be applied to imported or domestic products so as to afford protection to domestic production .”

Article III.2 reads: “The products of the territory of any contracting party imported into the territory of any other contracting party shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products. Moreover, no contracting party shall otherwise apply internal taxes or other internal charges to imported or domestic products in a manner contrary to the principles set forth in paragraph 1.”

The concept of like products is in many ways the linchpin of the GATT/WTO system, whose two central principles - Most Favored Nation Treatment and National Treatment - both depend critically on it.

The Appellate Body concluded that Article III.1 “constitutes part of the context of Article III.2, in the same way that it constitutes part of the context of each of the other paragraphs in Article III. Any other reading would have the effect of rendering the words of Article III.1 meaningless...” In other words the Appellate Body was reading Art. III.1 as a “chapeau” to Article III. This view appears difficult to uphold for both formal and substantive reasons.

The GATT text does have articles with “chapeaus.” The structure of Article III however, is clearly different. It contains ten paragraphs of equal weight.

Moreover, Art III.1 is explicitly referenced in two of these paragraphs (III.2 and III.5) and not in others. It is contrary to general rules of legal interpretation to assume that Art. III.1 “constitutes part of the context of **each** [emphasis added] of the other paragraphs in Article III.” Any reasonable interpretation of the article, therefore, must be based on a reading of the paragraphs as equal rather than hierarchical.

There is, moreover, a significant distinction between Art. III.1 and III.2 that seems to have been overlooked. Art. III.1 deals with **production** and covers a wide range of measures, whereas Art. III.2 addresses **products** and covers internal taxes and charges alone. For this reason, Art. III.1 does not refer to *like products* but to products in general, whereas Art. III.2 is based on the concept of “like.” Indeed, the footnote to Art. III.2 makes quite clear that a tax can be consistent with the requirements of Art. III.2 but not with those of III.1, in which case the operative criterion would be the fact that products be “directly competitive or substitutable,” as in the Japan Liquor case. Differences between the articles flow from these distinctions which make perfectly good sense, unless one is convinced a priori that the GATT does not address process and production methods. Note once again that even this criterion is not absolute but applies only where the trade regime deems appropriate: brand name and counterfeit goods are “directly competitive or substitutable” but still are treated differently within the WTO; similar disciplines will need to be developed with regard to criteria of sustainability.

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The CITES Ivory Decision: GATT Illegal or Not?

By Anne Menthon

At the last meeting of the CITES Conference of the Parties (COP), held in Harare in June 1997, some Parties claimed that maintaining the CITES-mandated international trade ban on their elephants and elephant products constituted a violation of GATT Art. XI (see box).

Zimbabwe, for instance, argued that American import restrictions on Zimbabwean ivory were no longer justifiable on conservation grounds and that they damaged the country economically. After two secret votes, the COP decided to 'downlist' Botswanan, Namibian and Zimbabwean elephant populations to Annex II. The decision contains specific clauses under which the three countries may resume ivory trade with only one trading partner, Japan.

Background

In 1989, at the seventh COP of CITES, a large majority of voters decided to transfer the African elephant to Annex I, after measures such as quotas and permits failed to stop the massacre perpetrated by poachers in quest of tusks. Only 350,000 elephants were estimated left compared to 2.5 million 20 years earlier. The ban on international ivory trade helped curtail the massacre, but it had negative economic consequences on states such as Zimbabwe and Botswana which were from the beginning against listing the elephant in Annex I.

The ninth COP in 1994 adopted the 'precautionary principle', which stipulates that in case of doubt about the status of a species or about the effect of trade on its conservation, Parties must act in the interest of preserving the species (Resolution 9.24). This explains why the ban stayed complete until the tenth COP and why some think it should not have been revoked, even though the elephant populations are stable or growing in the three countries allowed to resume controlled trade. India is among those who believe that opening the ivory trade even in a very controlled way will start a new wave of massive elephant hunting in Africa and Asia.

For states against ivory trade, the 1997 COP ivory decision represents a step back to 1977-1989 when the elephant was, ineffectually for conservation purposes, listed in Annex II. For the states who favour restarting ivory trade, it represents a move forward towards sustainable use of wild fauna.

The principle of sustainable use was recognised at the eighth COP in Kyoto in 1992. Although CITES was not established to promote trade and utilisation of wild species, it recognises that a certain level of trade can have a positive effect on conservation and

development, particularly when it becomes a motivation for sustainable use. This accounts for the slogan: 'every species must pay its way'. It also allows for consideration of the needs of indigenous populations (Resolutions 8.3 and 8.20), which sometimes conflict

with the needs of elephant conservation, particularly in areas surrounding national parks.

The criteria governing the transfer of Zimbabwe's, Namibia's and Botswana's elephant populations to Annex II cover the management of both elephant and ivory stocks. If those criteria are not respected, the populations will be re-transferred to Annex I.

Much will depend on the Parties' ability to fully implement the decision. The permission to trade concerns only stock-piled and registered ivory, but Japanese carvers - who already own important ivory stocks - tend to prefer the soft tusks of forest elephants over the harder ones from the Botswanan, Namibian and Zimbabwean plains. New tusks are also softer than those stock-piled for a long time, particularly in dry climates. Unless the export and import controls are scrupulously respected, the preference for

softer ivory may lead to increased poaching and illegal trade.

Split listing

The fact that certain populations of a species are listed in one CITES Annex while others are listed in another represents a problem in relationship to GATT Articles I, III and XIII.

According to these three articles, similar products need to be treated equally, independently of their country of origin. Article XIII authorises the application of quantitative import restrictions on a Member's products only if the restriction is also applied to 'like products' of other Members. It thus seems GATT-inconsistent that only three countries can export tusks, when ivory from other countries is similar in its physical characteristics and end-use. The fact that only one country, Japan, may import ivory, raises concern regarding quantitative export restrictions and access to resources.

The split listing mechanism allows active management of populations of a species for which trade would otherwise be forbidden. The system is consistent with Article XX of GATT since it is based on the scientific status of a species and not on production criteria. Ivory trade under CITES is not designed to protect domestic producers from foreign competition.

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US Unilateralism: A Threat to Global Sustainability?

By Kristin Dawkins

On June 30, more than 200 non-governmental organizations and individuals from dozens of countries around the world signed a letter to U.S. Secretary of State Madeleine Albright expressing “concern at the manner in which the United States government is intervening in the domestic affairs of numerous other nations regarding their intellectual property laws.” Acknowledging the need for governments to conform with international agreements to which they subscribe, the signatories pointed out to Secretary Albright it is neither “the United States’ responsibility nor its right to interfere with their national democratic processes for doing so.”

The letter was provoked by correspondence sent to the Royal Thai Government (RTG) by the U.S. State Department regarding draft Thai legislation allowing Thai healers to register traditional medicines. Dated April 21, 1997, the letter advises the RTG that “Washington believes that such a registration system could constitute a possible violation of TRIPs and hamper medical research into these compounds. The State Department letter requests a copy of the draft legislation and official responses to 11 questions, beginning with the question: “What is the relationship of the proposal to the granting of patent protection in Thailand?” and ending with the question: “Does the RTG envision a contractual system to handle relationships between Thai healers and foreign researchers in the future?”

In their letter to Secretary Albright, the NGOs suggested that the questions asked in the State Department letter imply an interest on the part of the U.S. government to facilitate the transfer of traditional Thai knowledge to U.S. researchers, and their eventual solicitation of patents on this knowledge.

Thailand is not alone at the receiving end of U.S. pressure over intellectual property rights. Earlier this year, the U.S. unilaterally reimposed import duties on US\$260 million of Argentine exports in retaliation for Argentina’s refusal to rewrite its patent legislation in a way judged by the U.S. to be adequate. Similarly, the United States threatened the Ecuadorian government, under Section 301 of the U.S. Omnibus Trade Act, with the cancellation of trade preferences if its national Congress failed to ratify a bilateral agreement on intellectual property rights, affecting some 400 products of export interest to the Ecuadorian economy and the possible loss of US\$80 million worth of income from its exports to the U.S. of uncanned tuna and fresh fish. In this case, pressure from seven Ecuadorian Indigenous groups, Ecuadorian NGOs, and other NGOs around the world may have helped the Ecuadorian economy: just weeks ago, Ecuadorian newspapers reported that the U.S. withdrew its threat of unilateral sanctions.

And months before the July 1997 decision of a dispute settlement panel of the WTO, which agreed with the U.S. that India had failed to implement the so-called “mail-box” provisions of Article 70 of TRIPs, the U.S. Ambassador to India had announced that “certain areas of research and training will be closed to cooperation” if India failed to amend its patent laws, threatening some 130 scientific projects supported by the U.S.-India Fund. (Despite the five-year transition period for developing countries, Article 70 requires them to establish legal procedures for receiving applications for patents on pharmaceutical and agricultural chemicals immediately so that, upon their full implementation of TRIPs, patents can be back-dated

to the date of filing. India had developed a legal administrative procedure, which the dispute panel deemed insufficient.)

The U.S. has also filed formal complaints with the WTO against Pakistan regarding its national patent laws governing pharmaceutical and agricultural chemical products.

Indeed, the U.S. State Department notwithstanding, the TRIPs agreement itself would appear to leave room for the draft Thai legislation – and the existing laws of Ecuador, India and Pakistan — to proceed in full conformity with WTO rules. In the first place, developing countries have until the year 2005 to fully implement TRIPs. And, Ecuador is a member of the Andean Pact which recently concluded a regional agreement widely recognized to be TRIPs-consistent. Second, Article 27.3(a) allows members to exclude from patenting “diagnostic, therapeutic and surgical methods for the treatment of humans and animals,” which surely traditional medicines are. Third, Article 27.3(b) entitles all WTO members to develop *sui generis* (literally, in Latin, “of their own making”) systems for the protection of plant varieties, which comprise most traditional medicines, as an alternative to patents.

The *sui generis* clause in TRIPs would seem to enable countries subscribing to the Biodiversity Convention or the International Undertaking on Plant Genetic Resources to craft national legislation that, ultimately, complies with TRIPs as well.

Another factor many governments must take into account, as they review their national policies concerning useful plants, is the Convention on Biological Diversity. It stipulates that parties cooperate to ensure that intellectual property rights “are supportive of and do not run counter to” the objectives of the convention: namely, the conservation and sustainable use of biodiversity, and the equitable sharing of its benefits. If patents on life promote monocultural production - an argument that the successful cloning of sheep and cattle would seem to support, as does Monsanto’s prediction that 20 percent of the 1998 soya crop in the U.S. will be planted with patented genetically-modified herbicide-resistant seed - then these patents would seem to run counter to the Convention on Biological Diversity.

The Convention on Biological Diversity also obligates parties to “respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities” relevant to biodiversity. And the International Undertaking on Plant Genetic Resources of the FAO provides for “Farmers Rights.” Now under revision, negotiators are grappling with the task of devising legal and financial instruments to support farming communities in the ongoing development and conservation of the germplasm and technologies their ancestors cultivated collectively over many generations. The patenting of seeds, plants and animals would seem to conflict with these emerging legal principles, as well.

Experts will undoubtedly haggle for years over the merits of these arguments, but the *sui generis* clause in TRIPs would seem to enable countries subscribing to each of these international legal regimes to craft national legislation that, ultimately, complies with them all. The United States should itself comply with TRIPs, and give developing countries time to meet their legal requirements without violating the norms of traditional cultures. The world can only be enriched.

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When the Appellate Body Errs, continued from page 9

Article III.1 states a general rule (“should”) because it is dealing with a wide range of circumstances, namely “internal charges, and laws, regulations and requirements affecting the internal sale ... of products,” not because it is stating a rule that applies to the rest of Article III. There can hardly be any question that this includes laws, regulations and requirements concerning the methods of production since the entire paragraph deals with production and considers measures applied to products only insofar as they affect production. Significantly, Article III.1 is not restricted to *like products*, but applies to all products. In other words, Member States can apply such measures but not so as to afford protection to domestic production. It remains unclear whether such measures can extend to the methods of production employed in other countries but there does not appear to be a line in the sand that determines which measures are acceptable and which are not. There is certainly nothing in the text that precludes regulations requiring certain forms of processing or production in other countries, provided that these do not afford protection to domestic production. Of course that applies only to products entering a country and cannot be applied to all products manufactured in other countries.

While there may be other interpretations of Article III the approach of the Appellate Body is untenable. This in turn raises the interesting question as to what happens when the Appellate Body errs in law. Clearly the drafters of the new Dispute Settlement Understanding did not give much thought to this problem. Theoretically, the Dispute Settlement Body or the General Council can address such errors and correct them. In principle, panel reports (and by implication those of the Appellate Body) do not represent binding legal interpretation; that is reserved to the parties. In practice, however, the introduction of the Appellate Body into the WTO system has reinforced the precedentiary nature of the dispute settlement process but has left no clear avenue to address mistakes that may be made. This raises thorny issues. Sooner or later, the dispute settlement process will come under close adversarial scrutiny, by environmental or other interests. The fact that the Appellate Body has adopted an indefensible position in its second report does not augur well for the future.

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For a brief legal review of some WTO ‘like product’ decisions, please see page 13.

The Clinton Administration won an unexpectedly easy victory on 2 October when the Senate’s Finance Committee approved the President’s fast-track legislation with no public discussion. The vote was regarded as a crucial test for the legislation, which still has to pass a congressional vote. ‘Fast-track’ would allow the government to negotiate trade agreements with a rapid yes-or-no vote in congress. This authority is deemed vital for the Administration’s credibility in negotiating new agreements, including the terms of Chile’s joining NAFTA and the future Free Trade Area of the Americas.

The fast-track proposal, whose possible content divided the US for months, was sent to Congress on 16 September. Despite the efforts of several Democratic congressmen and trade unions, the legislation does not require the Administration to include environmental or labour-related clauses in future free trade agreements. Instead, it directs US trade negotiators to work through the WTO to promote ‘respect of internationally recognised worker rights’ and ‘sustainable development’, and to ‘seek to ensure that trade and environmental protection are mutually supportive’.

The CITES Ivory Decision, continued from page 10

CITES and the WTO

While countries have sometimes claimed that a CITES ruling violates GATT/WTO provisions, up to now no CITES decision or measure taken by a Party to implement it has ever been brought to a GATT or WTO dispute settlement body. There are four reasons why a CITES-related WTO dispute is unlikely, at least in the short run:

- Most of the 132 WTO Members are also Parties to CITES, which has been ratified by 142 countries.
- Even if a country were to leave CITES or to add a reservation when depositing its instrument of ratification (Art. XXIII), it would find a limited number of trading partners: when trading with non-Parties, CITES members must obtain documents and certificates similar to those required by the Convention (Art. X).
- CITES has its own dispute settlement mechanism (Art. XVIII) and the WTO’s Committee on Trade and Environment has recommended that Members who are also Parties to a multilateral environmental agreement (MEA), ‘should consider trying to resolve [disputes over trade-related measures] through the dispute settlement mechanism available under the MEA’ (WTO:WT/CT/1, 1996).
- Finally, according to the principle of ‘lex specialis’, the more specific agreement (CITES) predominates over the more general one (WTO/GATT), even if the latter is more recent.

Conclusions

CITES provisions and GATT rules are essentially complementary. In contrast to disputes such as tuna/dolphin, the COP decisions are neither unilateral nor arbitrary: upon becoming a Party to CITES, a state signs an environmental agreement which authorises other Parties to impose trade restrictions based on scientifically proved criteria.

Because of its symbolic status, the elephant was the focus of interest at the tenth COP; the repercussions of its management on the management of other species are large. The reopening of ivory trade highlights one of the most controversial questions of CITES: the sustainable use of wild fauna and flora. The difficulty is to find the right balance between the principles of sustainable use and precaution, and that balance depends on the importance given by countries to conservation versus commercial objectives.

While up to now potential conflicts between CITES and GATT/WTO rules have been dealt with in informal discussions, a WTO dispute settlement request remains a possibility. Conflicts might arise, for instance, from Parties considering a CITES decision unreasonable or beyond the scope of the exceptions provided under Article XX.

The risk increases with the eventual growth of the scope of the CITES agreement. So far, CITES rulings have covered species of marginal interest to the world trading system: the 1997 decision on ivory trade refers to nearly 60 tonnes of raw tusks in three countries. Generous estimates put the price of ivory at US\$200 a kilo, and a trade worth some US\$6 million a year has no significant impact on global commercial flows. Should CITES in the future include species of major commercial importance, it might become far more vulnerable to challenges at the WTO.

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Green Products, Yellow Lights? The WTO Decisions on Like Products

By Howard Mann

“Green products” can simply be defined as products that are less harmful to the environment than similar products accomplishing the same tasks. Environmental benefits can include reusability or recyclability, less waste and more energy efficiency during the packaging, transport, use and disposal of the product, and less raw material consumption and environmental impacts in its manufacture.

From a trade law perspective, promoting the use, labeling and consumption of green products may raise a question whether the distinctions drawn between green and other products are legitimate distinctions or are disguised trade barriers and hence illegal. A critical element in looking at this issue will be the determination of ‘like products’ under trade law.

‘Like product’ issues arise under the GATT 1994 and the Agreement on Technical Barriers to Trade (TBT). The most important uses of this term are in Art. III.2 and III.4 of the GATT. These have been interpreted in the broader context of Art. III as establishing the principle that internal measures should not be applied so as to afford protection to domestic production.

Efforts to define ‘like products’ have been made. However, in 1970, a Working Party on Border Tax Adjustments concluded that the application of this provision needed to be determined on a case by case basis. Suggested criteria for this purpose included end use, consumer tastes and habits, and the products’ properties, nature and quality. No further precision on the term was achieved.

In the first dispute brought to the WTO, the US Reformulated Gasoline panel dealt with the interpretation of like product under Art. III.4. The panel found that the domestic and imported gasoline at issue had exactly the same chemical composition and physical characteristics, same end uses, tariff classification, and that they were perfectly substitutable. Hence they were found to be ‘like products’. The emphasis here was on the identical nature of the products. However, identical and like are not necessarily synonymous terms.

In the Japanese Alcoholic Tax case, the Appellate Body (AB) dealt with the issue of ‘like products’ in the context of taxes or charges under Art. III.2. It has two sentences that incorporate two different standards and tests. The first is that imported products shall not be subject to any tax or charge in excess of that applied to a domestic like product. The second is that in the case of “a directly competitive or substitutable product”, these must be similarly taxed so as not to afford protection to domestic production.

Ruling in this context, the AB stated that the test for ‘like product’ had an accordion like quality: “decision makers should keep ever in mind how narrow the range of ‘like products’ in Article III.2, first sentence is meant to be as opposed to the range of ‘like products’ contemplated in some other provisions of the GATT 1994 and other Multilateral Trade Agreements of the WTO Agreement.” The context of each provision should be a guide for this purpose. In the case of Art. III.2, where the two different tests of ‘like products’ and directly competitive products apply, it was to be construed narrowly so as not to condemn measures that its strict terms are not meant to condemn.

The AB, when looking at the broader test, emphasized the issue of substitutability in the market place: “This seems appropriate. The GATT 1994 is a commercial agreement, and the WTO is concerned,

after all, with markets.” Price elasticity was confirmed as critical in this regard.

The test must be carefully understood: the narrower the interpretation applied, the more alike the products must be to be ‘like products’, and hence the larger the ability of a government to differentiate between products. The broader the interpretation, the easier it will be find products to be ‘like products’, and the narrower will be the scope for different treatment.

The next AB report dealt extensively with the criteria of substitution. In relation to Art. III.2, the Canadian Periodicals case looked at the issue of substitution in the context of the second sentence, the lower test of directly competitive or substitutable products. In doing so it held that “a case of perfect substitutability” would fall within the narrower like product test of Art. III.2, first sentence, but not the second sentence and its broader test. The AB ruled that Canadian content and foreign content magazines are directly competitive and substitutable in spite of the fact it was the Canadian content and associated cultural values that were being fostered by the measures in dispute. These values were essentially disregarded, while the “market” for advertisers ready to substitute one magazine for the other was accepted as proof of market substitutability in a commercial agreement. The need for measures to support the industry provided further proof of consumer readiness to switch.

Given that the AB has said that the interpretation of the words ‘like product’ themselves would be broader for the other Articles of the agreement, this raises the question of which test of substitutability would apply in those instances. “Perfect substitutability” was the language used by the Panel in the Reformulated Gasoline case in determining like product under Art. III.4. But this does not appear to be supported by the AB.

The problem becomes more important when the environmental benefits are not in the physical characteristics of the product, so that the products are physically alike for purposes of a ‘like product’ test, but have different environmental costs on a life cycle basis. If the physical likeness and cost elasticity factors outweigh the role of environmental factors when a broader test is applied, green product differentiation will be difficult. The traditional GATT/WTO antipathy towards dealing with process issues, especially foreign process issues, may also impact on their role in differentiating products.

The contextual approach to when a narrow or broad interpretation should apply leaves the door open for considerable flexibility. This flexibility is applicable to Art. III.4, and to the TBT Agreement, which are directly applicable to environmental regulations. But why the different words should not still be given full effect when used in other articles of the same agreement was not explained by the Appellate Body.

One cannot now foresee how a panel would deal with environmental factors reflected in promoting green products. Given the notion of a broader test for like products in Art. III.4 and in the TBT Agreement, and the focus of the AB on commercial issues as a major factor in addressing this test, yellow caution lights are appropriate for policy makers in this area.

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developing countries revealed that CFC consumption had increased by 45 percent in the period between 1986 and 1992. The UNCTAD study concludes that allowing developing countries to increase CFC consumption may lead to a higher dependence and higher phase-out costs for the countries concerned, as well as promote the likelihood of the migration of environmentally-harmful industries.

- Relaxing the terms of transfer of technology under intellectual property rights protection could create competitive anomalies for both the recipient country and the transferring country. The transferring country could acquire competitive export advantage. Furthermore, the competitive potential and creativity of developing country recipients could be blunted by indiscriminate, inappropriate technology transfers.

In the application of positive measures, the “guilty” - polluters - should never be rewarded, weak capacities notwithstanding. It is also necessary to mention that the trade community has not expended sufficient efforts to fully understand positive measures and their effects. More work is required by the policy research community on positive measures, the scope of their application in either all or selected MEAs, their usefulness and degree of effectiveness, and their impact on countries. Additional work is also required on their pricing and competitiveness effects.

In the resolution of environmental problems, trade and positive measures are inextricably interlocked. The interactive nature of this relationship is significant and needs to be further explored; advocacy of one type of measure against the other is unproductive. For instance, the imposition of a prohibition on an environmentally harmful product “X” in the absence of readily available substitutes is meaningless. Attention should also be paid to appropriate timing:⁶ trade restrictions designed to promote environmental goals tend to be effective in the immediate and only over a limited period of time, while their prolonged application tends to generate distortions. Similarly, short phase-out periods for environmentally harmful substances are more effective than prolonged transitional periods which create distortions. A careful study of the complementarities of both types of measures and their possible creative combinations can be used to great advantage in the search for effective implementation of MEAs. In so doing, it is vital to understand that neither type of measure is neutral. They can, and do, have the potential to create distortions.

Discussions in the environmental and trade communities have become overtly biased: trade measures are seen as negative and non-trade measures as positive. However, closer examination suggests that trade measures are not always necessarily coercive: as evidenced by the interdependent use between countries of import/export permits or the Prior Informed Consent Procedure (PIC), some can be cooperative. Positive measures, however, appear to be consistently cooperative.

Conclusion

The effective implementation of MEAs requires that governments abandon encrusted positions and free themselves from one-sided approaches of either trade measures advocacy or a singular preoccupation with positive measures. While pursuing global environmental goals, environmentalists also need to free themselves from narrow constituencies. Finally, the policy research community needs to be more modest and present its valid research findings only as partial snaps of an exceptionally complex picture.

An integrated, balanced and binding combination of trade and positive measures within the same macro-framework will make MEAs

sensitive to changing environmental, technical, scientific, and economic situations, and hence more effective. More effort should be invested in creatively designing the ideal combinations of coercive trade measures and positive measures for individual MEAs. Much less time should be devoted to the debate about the GATT/WTO consistency of trade measures used in MEAs, or about which group of countries most hinders global efforts at environmental protection. Even if all differences at the WTO were to be resolved, and consensus were to be reached on accommodating trade measures pursuant to MEAs within GATT rules, MEAs would not be any more effectively implemented than they currently are. Such an accommodation would simply be legal formalism that only responds to fears and uncertainties over the possibility of legal challenges to trade measures in MEAs.

It should constantly be borne in mind that no challenge has ever been brought by any member of the WTO in respect of trade measures used in MEAs. What has been challenged are instances of unilateral extra-territorial efforts at environmental protection. The risks in this sort of conduct are so high and so potentially destructive of multilateral efforts that they should be challenged. The disciplining effects of globalization combined with multilateral trade and environmental rules present the international community with a unique opportunity to consolidate its efforts in order to secure global environmental dividends.

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NOTES

¹ The definition of balance between measures is not necessarily quantitative. It simply refers to an integrated interactive combination of trade and positive measures to ensure that: i) the appropriate mix of measures address all identified legitimate problems within the MEA; ii) measures are mutually reinforcing for the effective implementation of MEA objectives; and, iii) that possible distorting effects by one type of measure will be corrected by the other. Finally, the combination of measures also ensures negotiating compromises essential for compliance *within* and *amongst* countries.

² See, Trade Measures for Environmental Purposes Taken Pursuant to Multilateral Environmental Agreements: Recent Developments. Note by the Secretariat. Preparatory Committee for the World Trade Organization (Sub-Committee on Trade and Environment), PC/SCTE/W/3, 13 October, 1994:1. For the description of the MEAs containing trade provisions up until 1991, see, Appendix I of GATT'S International Trade, Volume 1, 1990-1991:45-47.

³ See, TRE/WII 0 17 March, 1993. (Group on Environmental Measures and International Trade). Agenda Item 2: Multilateral Transparency of National Environmental Regulations Likely to Have Trade Effects.

⁴ Nature and Extent of GEF Projects in Assisting in the Implementation of Multilateral Environmental Agreements, WT/CTE/W/58, 2nd September, 1997:footnote 1.

⁵ Positive Measures to Promote Sustainable Development in Particular in Meeting the Objectives of Multilateral Environmental Agreements, Report by the UNCTAD Secretariat, TDIB/COM.I/EM.3/2, 1997.

⁶ Refers to the period of application of a measure whether short, medium or the long-term. The period of application of measures entails significant differences in effects.

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