

### WTO General Council to Start Consideration of Outstanding Implementation Issues in June

On 3 May, the WTO General Council adopted a decision that establishes a mechanism for reviewing developing countries' concerns regarding the implementation of various WTO Agreements. Recognising the validity of these concerns, the decision notes Members' agreement that the 'General Council, meeting in special sessions, will address outstanding implementation issues and concerns, particularly those raised during the preparations for the Third Session on the Ministerial Conference'.

In March, the European Union, the United States, Canada and Japan proposed the establishment of an 'implementation work programme in which different committees will consider issues relating to implementation raised by Members and report to the General Council' (Bridges Year 4 No.3, page 1). The major difference with the implementation mechanism established on 3 May is that it not only puts implementation concerns directly under the General Council, but also specifies that the issues include those reflected in paragraphs 21 and 22 of the draft Ministerial Text of 19 October 1999. Those two lengthy paragraphs cover essentially all the points made by developing countries during the preparatory phase for the Ministerial Conference<sup>1</sup>.

#### Concern over Ties to New Round

Before accepting the decision, Malaysia sought to ensure that the implementation review would not be folded in possible future negotiations on a broad range of issues. In particular, it objected to a provision in the draft decision that stated that the implementation review process 'shall be without prejudice to any future decisions that may be taken by the General Council to further advance its work in this area, including in the context of possible further multilateral negotiations', arguing against any tie between the launch of a new round and the review. Supported by Honduras, Pakistan and India, Malaysia said that implementation should be 'adequately' dealt with before a decision was made to launch a new round.

Most WTO delegates privately admit that, in the absence of a new negotiations round, Members are highly unlikely to consider changes to existing Agreements, particularly as many developing countries seek to balance rights and obligations in sensitive treaties, such as the Anti-dumping Agreement and the Agreement on Trade-related Aspects of Intellectual Property Rights.

A compromise was reached by appending to the decision a Chair-

man's note acknowledging the statements made during the discussions and re-emphasising that 'this decision would in no way prejudice the positions of Members on any possible further multilateral trade negotiations.'

#### Scope of the Review

According to trade sources, some developing countries are seeking practical short-term solutions for the most pressing questions – particularly with regard to extending transition periods under several Agreements – whereas others take a much broader approach focused on addressing imbalances in existing Agreements, as well as the unsatisfactory implementation of Agreements and provisions in favour of developing countries. These include, *inter alia*, the slow removal of textile import quotas for the most meaningful products, and the incomplete implementation of special and differential treatment clauses in WTO Agreements. It is as yet unclear how to balance work at the General Council's special sessions and the relevant WTO committees, particularly those currently considering extension requests on a case-by-case basis (see below).

The first special session on implementation issues is scheduled for 22 June. Delegates are expected to adopt a work programme for the review and agree on a schedule for further meetings.

#### TRIMs Transition Period Decision Adopted

Developing countries were less satisfied with the decision on transition periods under the Agreement on Trade-related Investment Measures (TRIMs) adopted by the General Council on 8 May. While the decision notes that 'Members have indicated that there is a need to preserve the multilateral character of this process', it nonetheless retains the case-by-case approach applied up to now to TRIMs transition period requests.

Developing countries' transition periods under TRIMs expired on 1 January 2000, and eight among them have filed formal requests for extensions at the Council for Trade in Goods, mostly with regard to local content requirements and other restrictions on investment in the automotive sector (Bridges Year 4, No.1, page 9). None of these have yet been approved, partly because Mexico and Pakistan in particular sought a multilateral approach to examining the requests rather than bilateral consultations between

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Members on each individual case (Bridges Year 4, No.3, page 4). The United States has already announced that it will request a dispute settlement panel on India's investment restrictions on 19 June. (See page 5 – India has not requested any TRIMs deadline extensions at the WTO.)

The decision adopted on 8 May directs the Council for Trade in Goods to 'give positive consideration to individual requests from developing countries', adding that extension requests should be examined taking into account 'the particular difficulties, both external and internal, encountered by developing countries in implementing the provisions of the Agreement, and the development, financial and trade needs of the country in question.' The Chair of the Goods Council is invited to 'pursue informal consultations with interested delegations in order to facilitate the process and to reinforce the multilateral character of the exercise and its rapid conclusion'.

Another provision states that the Chair of the Goods Council should pursue 'as a matter of priority' consultations with Members who have not notified their trade-related investment measures to the WTO or requested extensions.

In his introduction to the decision, the Chair of the Council for Trade in Goods emphasised that the wording regarding a review of the TRIMs Agreement mandated in Article 9 had been accepted on the understanding that the review would 'take into account the developmental aspects of the TRIMs Agreement'.

Developing countries' transition periods have also expired under the Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPs) and the Agreement on Customs Valuation. With regard to the latter, ten countries have been granted extensions – most recently Nicaragua, Colombia and Tunisia – while nine applications are still pending (Bridges Year 4 No.3, page 4). No extension requests have been filed for TRIPs extensions, although a large number of developing countries are thought to be in non-compliance with their TRIPs obligations. Meanwhile, the US has said that it will start dispute settlement proceedings in the near future against Argentina's and Brazil's pharmaceutical patent protection violations (see page 5).

#### **Other Confidence-building Measures**

Members also heard updates on internal transparency, technical assistance and market opening offers for products from least-developed countries.

Increased market access, particularly for least-developed WTO Members, emerged as a key confidence-building measure in the multilateral trading system after the failed Seattle Ministerial Conference. A 'Draft Decision Establishing a Plan of Action in Favour of Least-developed Countries' released by the Quad (the United States, the EU, Canada and Japan) on 31 March was riddled with escape clauses regarding market access for LDC products and remains unadopted (see cover story in Bridges Year 4 No.3). However, Chile, the Czech Republic, Hungary, Iceland, Korea, Norway, New Zealand, Slovenia and Switzerland have announced autonomous new market opening measures for LDCs.

In the United States, the centrepiece of enhanced market access is the Africa-Caribbean Basin Initiative signed into law by President Clinton on 18 May. The bill could grant duty-free access for most products from more than 70 countries in sub-Saharan Africa, the Caribbean and Central America. However, the trade benefits are tied to certain conditions, such as economic reform, and carefully regulate the quotas of textiles and apparel that will be allowed into the US duty-free.

In related news, the American Textile Manufacturers Institute (ATMI) has called on the government to revoke 13 countries' GSP benefits regarding textiles, as well as stop applying growth-on-growth quotas under the WTO Agreement on Textiles and Clothing. ATMI claims that the 13 countries have not opened their

own textile markets to the extent required by the Statement of Administrative Action that accompanies the US Uruguay Round implementing legislation. South Africa and Mauritius, whose trade benefits stand to improve under the Africa-CBI bill, are among the countries named in the ATMI submission.

No decisions were taken on improving the WTO's decision-making processes or 'internal transparency' at the 8 May General Council meeting. Consultations still continue on the issue, and the Chair of the General Council stressed that they would 'continue to be conducted in a manner which fully respects the core principle of

decision-making by consensus in the formal bodies of the WTO'. He suggested that an open-ended information meeting be organised 'at some stage', where the Chairs of the main WTO bodies could provide an overview of progress.

#### **Agriculture Negotiations Chair Appointed**

The General Council also finally agreed on 8 May on the chairmanship for the special negotiation sessions of the Committee on Agriculture. Those will be chaired by Peru's WTO Ambassador Jorge Voto-Bernales, while Japan's Yoichi Suzuki will chair the Committee's regular sessions. These appointments paved the way for the appointment of the chairs of other committees under the Council for Trade in Goods (see page 4).

<sup>1</sup> Paragraph 21 of the draft Ministerial Declaration, based on developing countries' pre-Seattle proposals, spells out 'immediate action' to address implementation concerns under 12 WTO Agreements, as well as an across the board 'operationalising' of special and differential treatment provisions. The actions under paragraph 21 include, among many others, restraining anti-dumping investigations, accelerating the liberalisation of the textiles sector, prohibiting patents under TRIPs that would be inconsistent with the Convention on Biological Diversity, compulsory licensing for essential medicines, and extending the Agriculture Agreement's green box treatment to cover developing countries' non-trade concerns, such as food security and rural employment.

Paragraph 22 of the draft Ministerial Declaration deals with implementation concerns that would require changes in the Agreements themselves rather than just their application. These concerns were to be dealt with during the first year of the negotiations that were to be launched at Seattle. See also Bridges Year 3 No.8, pages 1 and 4.

## The WTO Banana Dispute: Do Ecuador's Sanctions Against the European Communities Make Sense?

By Cristian Espinosa

The European Communities<sup>1</sup> continued lack of implementation of the recommendations and conclusions contained in the various panel and Appellate Body reports on the banana dispute has brought the WTO's dispute settlement system to the limit of the instances and mechanisms envisaged by the negotiators of the Dispute Settlement Understanding.

In this case, Ecuador's decision to 'request and obtain an authorisation to suspend concessions or other obligations' to the European Communities constitutes a precedent in international trade relations. On the one hand, this is the first WTO case where a developing country is imposing sanctions on a developed country, and on the other, it is the first time that sanctions have been requested and granted under other Agreements than the GATT, allowing Ecuador to apply so-called cross-retaliation.

Recourse to trade sanctions has traditionally been a display of economic and political power between countries in dispute over a specific aspect of their bilateral relations. The country imposing the sanctions seeks in principle to produce a practical effect that will contribute to the achievement of what it regards a legitimate objective. The imposing country must also have the economic capacity to withstand the cost of foregoing the benefits brought by commercial exchanges.

These factors explain why it is generally considered not worthwhile for developing countries to use sanctions to defend their trade rights: first, for small countries the costs of the sanctions could be greater for the imposer than the one imposed upon, and second, the sanctions probably would have little chance of bringing about the desired result and thus risk proving ineffective. It is therefore not surprising that countries that have regularly applied trade sanctions – or threatened to do so – are economically and politically powerful.

If this is indeed the case, does it make sense for Ecuador to decide to impose trade sanctions on the European Communities, particularly when the differences between the two trading partners are so great? (In this case, a country with 12 million inhabitants faces an economic bloc of more than 374 million inhabitants, and Ecuador's GNP of about US\$19,700 million contrasts sharply with the US\$7,995,575 million of the European Communities.<sup>2</sup>)

### Restoring the Balance

To answer this question, it should be kept in mind that in this retaliatory action the sanctions that Ecuador is authorised to impose result from the exhaustion of the channels available under the multilateral dispute settlement system. In other words, because it was not possible to solve a dispute between two WTO Members, the ultimate recourse foreseen by the system had to be evoked: imposing sanctions in the form of withdrawing concessions that WTO Members grant each other. This means that these trade

sanctions take place within a multilateral legal framework, where Ecuador not only seeks to put pressure on the European Communities but also to re-establish a balance of rights and obligations through the correct use of all the tools and procedures at the disposal of WTO Members.

Restoring a balance of rights and obligations in the WTO context means in this case that Ecuador, using its position as the world's biggest banana exporter and the principal supplier of bananas to

the European market, has decided to exercise pressure on the European Communities, taking into account its limited capacity and the need to minimise the cost arising from the application of sanctions to the party imposing them. That is why Ecuador has had recourse to the cross-retaliation procedure, which consists of retiring concessions in other areas or sectors than those violated by the European Communities' banana import regime.



Under the WTO's dispute settlement system, sanctions should not primarily aim to punish a Member that does not comply with its WTO commitments. Neither should sanctions seek any type of retribution for the damage that this non-compliance has caused. Their main purpose, which rejoins Ecuador's objective, must be to induce the violating Member to comply with the conclusions and recommendations of the Dispute Settlement Body. In the banana case

this means that the European Communities must introduce a new banana import regime that is compatible with WTO rules.

In general, sanctions – even limited as they are – have both economic and political impacts (and, in the WTO context, an additional systemic effect). In the sense that the sanctions requested by Ecuador constitute a precedent for the dispute settlement system, the political effect in this case is much greater and therefore generates greater pressure on the European Communities. This is a way to reduce – albeit modestly – the large imbalance between trading partners that differ as widely as Ecuador and the European Communities. In addition, the fact that Ecuador is a relatively small country with a limited market for goods and services reduces the economic effect of any sanctions it may impose. To a certain extent, these factors explain why Ecuador chose to seek the right to impose sanctions in less conventional sectors, notably through the suspension of concessions related to intellectual property rights.

### Will It Work?

Within and outside the WTO, commentators have wondered whether, in a long and seemingly endless dispute, the 'legal victory' of Ecuador over the EC has any practical significance precisely because of the great imbalance between the economic and commercial powers of the two parties. It is important to recognise

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### Banana Exporters Refuse Talks on EU-ACP Agreement Waiver

At an informal meeting of the WTO Council for Trade in Goods held on 18 May, Costa Rica, Ecuador, Guatemala, Honduras and Panama refused to start deliberations on the European Union's request for a waiver that would exempt trade preferences contained in the new ACP-EU Partnership Agreement from the most-favoured nation obligation. The ACP-EU Partnership Agreement will replace the fourth Lomé Convention, which expired on 29 February (Bridges Year 4 No.3, page 4).

The European Union requested a waiver from its obligations under GATT article I.1 to permit the EU to provide preferential treatment for products originating in former Lomé Convention developing country members 'as provided for in the new Partnership Agreement for the duration of the preparatory period, 1<sup>st</sup> March 2000 – 31<sup>st</sup> December 2007.'

Unlike Lomé IV, the Partnership Agreement – formally submitted to the WTO on 4 May – does not contain a banana protocol. According to the EU, this was deliberately left out of the Agreement so as not to prejudice ongoing negotiations on the EU's banana import regime (see page 6). Under WTO rules, the Goods Council must review waiver requests within 90 days, but the five Latin American countries said they would only start deliberations on the issue once the EU had submitted a revised, WTO-consistent banana protocol to WTO.

Costa Rica, Panama, Ecuador, Guatemala and Honduras are major banana exporters, and the latter three (together with Mexico and the United States) were complainants in the latest dispute lost by the EU with regard to its banana import regime<sup>1</sup>. By demanding that the EU complement the Partnership Agreement submission with a new banana protocol, they are putting additional pressure on the Union to bring its banana import regime in line with WTO rules. (The US and Ecuador have already been authorised by the WTO to impose sanctions on the EU in retaliation the latter's continued non-compliance with panel and Appellate Body rulings.)

The EU and ACP countries reacted angrily to the Latin American refusal to start discussions on the waiver. EU Ambassador Roderick Abbot said the Latin American countries' position was 'completely unreasonable' and Zimbabwe accused them of holding the waiver hostage to a separate issue.

The waiver request is likely to be considered by the Council for Trade in Goods at its 7 July meeting.

In related news, the signing of the new Partnership Agreement has been postponed due to the coup attempt in Fiji on 18 May. The Agreement was to be signed in Fiji's capital Suva on 8 June. When this issue of Bridges went to press, the EU Council and the ACP Secretariat were looking for a new venue. The Agreement may not be signed until July or even later.

The Partnership Agreement will cover trade and aid relations between the European Union and 71 developing countries in Africa, the Caribbean and the Pacific. Fifty-five of these countries are WTO Members, including the banana exporters Senegal and Côte d'Ivoire, as well as the Winward Islands in the Caribbean.

<sup>1</sup> The WTO dispute did not concern preferential tariffs for ACP bananas – these were covered by the Lomé Convention waiver – but the quota arrangements and the import licensing practices of the EU's regime.

### China's WTO Accession Will Bring Major Changes

While painstaking work lies ahead on a myriad of technical details, China's entry to the WTO was ensured – possibly before the year's end – when it finalised a bilateral market opening deal with the EU on 19 May, and the US Congress voted to give China permanent normal trading relations (PNTR) on 24 May. Although Chinese officials were irritated that the bill passed in Congress also creates a Congressional Executive Commission, which will report on China's human rights and labour practices annually, the Commission has no power to revoke the PNTR status or to initiate unilateral US sanctions.

The long-term consequences of China's WTO membership on sustainable development – in China and elsewhere – will take some time to emerge, but they will undoubtedly be huge. Even without WTO benefits, China's total exports have increased almost nineteen-fold over the last 20 years, estimated at US\$182.7 billion in 1997. Over the same period, imports grew thirteen-fold, to reach US\$142 billion in 1997. In addition, China attracts the most foreign investment of all countries except the US.

On the other hand, the country already has serious domestic environmental problems. Air quality in major Chinese cities is among the worst in the world, mostly due to a largely coal-powered economy. A rapidly growing motor vehicle sector is responsible for large increases in nitrous oxide, carbon monoxide and hydrocarbon levels. Water pollution and soil erosion are rampant. China also contributes significantly to global environmental degradation, including ozone depletion (18 percent of the world's total) and climate change (currently second largest – but likely to be largest by 2020 – greenhouse gas emitter in the world). Trade in endangered species flourishes, and deforestation and biodiversity losses are alarming.

China's accession to the WTO will also eventually bring a significant power shift within the WTO, where the overwhelming market power of the US and the EU has long dominated trading relations in spite of a nominal equality between Members.

#### Selected New Chairpersons for WTO Bodies

(see also Bridges Year 4 No.1, page 9)

##### Committee on Agriculture

Chair: Amb. Jorge Voto-Bernales (Peru)  
Vice Chair: Mr Yoichi Suzuki (Japan)

##### Council for Trade-related Aspects of Intellectual Property Rights

Amb. Chak Mun See (Singapore)

##### Committee on Trade-related Investment Measures

Mr Oscar Hernández (Venezuela)

##### Committee on Anti-dumping Practices

Mr Yair Shiran (Israel)

##### Committee on Sanitary and Phytosanitary Measures

Mr Shishir Priyadarshi (India)

##### Committee on Technical Barriers to Trade

Mr John Adank (New Zealand)

##### Committee on Market Access

Mr Christophe Kiener (Switzerland)

##### Committee on Customs Valuation

Ms Usha Dwarka-Canabady (Mauritius)

## Dispute Settlement Corner

**US Announcement of TRIPs and TRIMs Cases  
Antagonises Developing Countries**

While the United States has not yet set a date for filing dispute settlement complaints against developing countries' intellectual property rights protection, the latter reacted angrily to the 1 May announcement that at least two such cases would be initiated in the near future.

Brazil harshly criticised the US for going back on the 17 December 1999 understanding that Members would 'exercise restraint' while consultations were underway on possible extensions to transition periods under the Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPs), the Agreement on Trade-related Investment Measures (TRIMs) and the Agreement on Customs Valuation, as well as a number of other WTO provisions that officially expired on 1 January 2000. US WTO Ambassador Rita Hayes quipped that the four months that had passed since the beginning of the year constituted 'an awful lot of restraint' and that the US had made it clear in December that the commitment to exercise due restraint did not prejudice US dispute settlement rights.

According to US Trade Representative Charlene Barshefsky, the US will challenge the TRIPs consistency of a Brazilian law that requires local production for patented pharmaceuticals. The other TRIPs case will involve Argentina's lack of protection for confidential test data on pharmaceuticals, as well as product patent protection for pharmaceutical inventions and regulations on exclusive marketing rights (Bridges Year 4 No.3, page 6). A consultation request filed in June 1999 also alleged Argentina's unfair commercial use for undisclosed test data in support of applications for marketing approval for agricultural chemical products. Denmark's copyright protection will also be challenged.

Developing countries were even angrier at the announcement of two cases related to the Agreement on Trade-related Investment Measures (TRIMs), for which at least eight developing countries have made formal extension requests at the Council for Trade in Goods (see page 1, and Bridges Year 4 No.1, page 9).

At the DSB meeting of 19 June, the US will request a panel to examine the TRIMs-consistency of India's investment restrictions in the automotive sector, notably with regard to local content and import-export balance requirements. A similar case will be initiated against the Philippines, which was among the first countries to file a request for an extended exemption from TRIMs obligations in the automotive sector. Romania's and Brazil's customs valuation practices are also targeted for priority WTO action.

Several other cases against developing countries remain possible pursuant to the findings of the annual USTR report on trading partners' compliance with the so-called 'super-301' provisions of the Trade Act of 1974. These include alleged TRIMs violations in the automotive sector in Malaysia, India's non-compliance with a bilateral textile agreement of 1994, and Mexico's customs valuation practices. Mexico's and Taiwan's government procurement sectors could also come under scrutiny. A potentially huge dispute is possible between the US and the EU with regard to the latter's subsidies to aircraft maker Airbus Industries.

**Brazil and Canada Locked in Aircraft Subsidy Dispute**

A serious trade war is looming between Canada and Brazil after the 9 May release of two compliance reports regarding the countries' implementation of WTO rulings on subsidies to domestic aircraft makers. Both were found in violation of the Agreement on Subsidies and Countervailing Measures, but according to the compliance rulings, Brazil has a longer way to go to bring its export financing programme PROEX in line with WTO provisions. At issue are 'soft loan' subsidies by the Brazilian government to buyers of Embraer jets. The compliance panel ruled that 'the continued issuance of NTN-I bonds pursuant to letters of commitment issued prior to 18 November 1999 represents the granting of subsidies contingent upon export performance', concluding that Brazil had 'failed to implement the recommendation of the DSB that it withdraw the export subsidies for regional aircraft under PROEX within 90 days'.

After the release of the reports, Canada announced that it would seek WTO authorisation for trade sanctions worth C\$7 billion (US\$4.76 billion) per year, to be applied over seven years starting most likely this summer. The sanctions would consist of a 100 percent tariff increase on selected Brazilian exports, as well as suspension of other concessions, such as Brazil's rights under the WTO Agreement on Import Licensing, or Canada's commitments to eliminate quotas on Brazilian textiles under the Agreement on Textiles and Clothing. In addition, Canada said it would impose countervailing duties without injury investigation on Brazilian imports that are found to profit from the WTO-inconsistent subsidies and suspend Brazil's access to Canada's General Preferential Tariff scheme.

At a special session of the Dispute Settlement Body on 22 May, called to consider Canada's retaliation request, Brazil appealed the compliance report findings against PROEX, and requested arbitration of the amount of damages claimed by Canada. While Canada accused Brazil of 'delaying tactics', it ultimately agreed with other WTO Members that compliance and arbitration processes must be completed before sanctions are applied (the Dispute Settlement Understanding does not explicitly provide for an appeals procedure in compliance cases). The appeal and the arbitration are likely to take about two months.

Brazilian authorities said they hoped that bilateral negotiations during the appeals process would avoid an all-out trade war. To renounce the trade retaliation, Canada is demanding that Brazil cancel export support for 900 undelivered Embraer aircraft, but so far Brazil has refused to do so. Brazil could lower future support to Embraer and offer Canada more access to Brazilian markets as compensation for trade lost by Bombardier, but cancelling already-granted export subsidies for the 900 jets in the pipeline was out of the question, Brazilian authorities said.

With regard to Canada's own export subsidies to Bombardier, the compliance panel found that Canada had implemented the recommendation to withdraw export assistance under its Technology Partnerships Canada programme, but failed to halt Canada Account support to the industry within the required timeframe. The Canada Account provides debt financing for Canadian exporters. Canadian authorities said they would make the changes required by the compliance panel.



## Dispute Settlement Briefs

**Cross-retaliation Approved in Banana Dispute**

The Dispute Settlement Body approved on 18 May Ecuador's request for trade sanctions worth US\$201.6 million against the European Union in the banana dispute. In addition to raised tariffs on goods, the sanctions will affect intellectual property rights in the areas of performers' copyrights, sound recordings and broadcasting organisations protected by the TRIPs Agreement, as well as wholesale distribution rights under the General Agreement on Trade in Services. This is the first time a country has been granted the right to impose sanctions under other WTO Agreements than the one violated by the the looser in a dispute. See analysis by Cristian Espinosa on page 3.

Ecuador has not yet said when the sanctions will go into force. Instead, Ambassador Roberto Betancour told the DSB that Ecuador would prefer compensation to trade retaliation. The package could consist of more market access for other goods, as well as increased development aid. At a high-level meeting between the two parties in early May, Commissioner Lamy said Ecuadorian proposals for financing economic development projects in banana-producing regions would be 'very carefully' examined, but stressed that any such financing would be a 'gesture of good faith in the overall context' rather than part of a compensation deal under the WTO. The EU is reportedly reluctant to set a precedent for compensating for trade losses through other means than trade concessions, such as enhanced market access.

At the DSB meeting, the EU contended that cross-retaliation would have 'serious systemic implications' to the WTO, and that the monetary value of the services and intellectual property rights would be almost impossible to determine. European goods worth US\$191.4 million are already affected by US sanctions in the banana case (see related item opposite).

The EU also told the DSB that the parties involved in the dispute continued to disagree on how to reform the banana import regime.

**Forty-one Nations Certified for Shrimp Imports**

The US government has certified 41 states as eligible to export wild shrimp to the United States. Twenty-five countries were certified because they use manual harvesting methods that do not threaten endangered sea turtles, 16 because they trawl in waters where sea turtles do not occur, and another 16 because their mechanised shrimp trawl vessels are required to use turtle excluder devices (TEDs) by law. India, Malaysia and Pakistan were not certified. Together with Thailand, they won a WTO challenge against the US shrimp import ban from non-certified countries in November 1998.

To comply with WTO panel and Appellate Body rulings, the US modified the conditions for wild shrimp imports to include not only shrimp from countries which mandate the use of TEDs, but also individual shipments guaranteed by the exporting government to have been caught by TED-equipped vessels. To qualify for the shipment-by-shipment exception, a country must demonstrate to the US State Department that monitoring and enforcement are satisfactory, and that a functioning catch segregation system is in place. Only Brazil currently fulfils the conditions for shipment-by-shipment certification, State Department officials said.

**Dispute Settlement Briefs**

- Canada will appeal a panel report released on 5 May, which confirmed that Canada's Patent Act violated the TRIPs Article 33 requirement to grant all patents 20 years of protection from date of filing. Under the Act, patents filed prior to 1989 are protected for 17 years from the date the patent was granted. Canadian authorities argued that, due to the lengthy approval period for new patents, the 17-year protection period in many cases actually exceeded the 20 years required by TRIPs. If implemented, the panel ruling would prolong protection for some 33,000 patents, most of which are for prescription drugs. Canada's strong generic drug industry welcomed the government's decision to appeal the case.
- Australia and Canada reached an agreement on 16 May on their long-running salmon dispute (Bridges Year 4 No.2, page 7). Canada will drop its WTO request for trade sanctions worth C\$45 million in exchange for Australia's giving up the requirement that imported Canadian salmon be 'consumer-ready'. Australian authorities said that processing, packaging and certification requirements, as well as a binding compliance regime for processors would replace the consumer-ready condition. Australia had claimed that non-consumer-ready salmon imports could contaminate local stocks with diseases not found in Australia. One more problem remains, however: the state of Tasmania, which is part of the Commonwealth of Australia, still refuses to lift a ban on Pacific fresh, chilled or frozen salmon. This initially Commonwealth-wide ban was the original focus of the dispute.
- The European Union is considering a WTO challenge regarding new US legislation that will require the Trade Representative to change the list of products affected by trade sanctions every six months. This 'carousel' provision was included in the Africa-Caribbean Basin Enhancement Initiative signed into law by President Clinton on 18 May (see related item on page 2). The EU argues that such rotation would exceed the amount of WTO-authorised sanctions because companies would not be able to recapture markets lost under previous sanctions while new products would be affected. The carousel issue was also one of the major sticking points of the Dispute Settlement Understanding (DSU) review, where the EU sought a clarification explicitly forbidding unilateral changes to products affected by trade sanctions. Informal consultations on the DSU review continue at the WTO between interested delegations.
- On 18 May, the DSB agreed to Colombia's request for a panel on Nicaragua's punitive tariffs on Colombian and Honduran products and services. The Nicaraguan government says the measures are justified in the interest of national security, because Honduran and Colombian vessels fish in what Nicaragua considers its territorial waters. Underlying the case is a decades-old dispute on maritime borders in the Caribbean Sea (Bridges Year 4 No.3, page 6).
- The panel ruling requested by Canada against a French ban on white (chrysotile) asbestos imports has been further delayed. Initially expected in March and then in May, the ruling is now likely to be released in July.

## CSD Reveals Unchanged Positions on Agriculture, Trade and Sustainable Development

Meeting in New York from 24 April to 5 May, the UN Commission on Sustainable Development (CSD) assessed progress and problems in implementing Agenda 21 recommendations with regard to sustainable agriculture and the interface between trade, investment and sustainable development (see box on page 8).

### Agriculture

No clear guidelines emerged from the high-level segment on land and agriculture. Reflecting the agriculture debate at the WTO, government positions remained far apart on key questions, and in particular the role that production and export support play in either promoting or hindering sustainable agricultural practices. Argentina and several other delegations strongly objected to draft decision language that encouraged governments 'to continue studying the possible role of the multifunctional character of agriculture', and requested that the term itself be formally banned from the CSD vocabulary as there was no international consensus on the concept. Cairns Group member Australia conceded that legitimate 'non-trade concerns' did exist, but stressed that multifunctionality in CSD decision elements was 'nothing but protectionism in disguise', and would not advance the interests of developing countries. Brazil dryly observed that while a concept can be acceptable in itself, 'its potential use makes it unacceptable'.

The disputed paragraph was replaced in the final CSD decision by another that encourages governments to continue studying 'the economic, social and environmental aspects of sustainable agriculture and rural development' and notes the need to avoid unjustifiable trade barriers. In a partial nod to the defenders of the multifunctionality argument, the paragraph refers to Chapter 14 of Agenda 21, which says governments should 'incorporate environmental concerns into economic activities, including agriculture', as well as assess the impacts of agricultural policies on food security, rural welfare and international trade relations.

If the EU and its allies lost their bid to gain acceptance for the multifunctional role of agriculture in trade policy-making, those extolling the environmental and trade benefits – or the 'win-win' nature – of subsidy reductions at the WTO also saw their aspirations frustrated at the CSD. Instead of urging governments to remove agricultural trade distortions, barriers and subsidies, as suggested by draft language, the CSD decision rather limply states that '[p]rogrammes that enhance commodity-based diversification in developing countries, in a manner supportive of sustainable development, including through improved market access, particularly for least-developed countries, can contribute to increase foreign exchange earnings and employment, as well as provide increased income from value-added production.'

### Investment and Financing

Debates regarding economic growth, trade and investment were less acrimonious than those on agriculture, but no less predictable. As at previous CSD meetings, developing countries repeatedly pointed out, collectively and individually, the betrayed expectations for sustainable development financing since Rio. Instead of reaching the 0.7 percent of GNP target for official development assistance (ODA), most developed countries' ODA has in fact declined significantly since 1992. Little has been achieved in the field of debt relief. Developing countries also emphasised that foreign direct investment (FDI) or 'innovative mechanisms' could not – and should not – replace ODA. Several

developed and developing countries highlighted the potential of the Kyoto Protocol's Clean Development Mechanism (CDM) as an 'innovative financial mechanism', but also cautioned that the CMD is not operational yet. Many developing countries highlighted forfeited promises in technology transfer and capacity-building.

To kick off the investment debate, Konrad von Moltke of the International Institute for Sustainable Development noted that a multilateral investment framework was neither feasible nor desirable at this point, but suggested that investment provisions under multilateral environmental agreements (MEAs) could provide sustainable development financing. While some governments expressed interest in the idea, the EU and Denmark said that they would prefer a multilateral investment framework to special provisions under MEAs. The short section on investment in the final Decision on Economic Growth, Trade and Investment notes, *inter alia*, that in promoting a 'stable, predictable, non-discriminatory and transparent investment climate', governments should address 'as appropriate, the rights and obligations of investors in order to promote sustainable development'.

### Trade

Statements made in countless interventions at WTO symposia on trade and sustainable development, were faithfully reproduced at the CSD, although some questioned whether trade and environment were in fact 'mutually supportive', as several delegates and WTO Director-General Mike Moore claimed. Martin Khor of the Third World network maintained that there was no automatic link between trade liberalisation and development, and that the only way out of the stalemate on trade and environment would be through the adoption of the principle of 'common but differentiated responsibilities' at the WTO and amending the Uruguay Round Agreements to reflect this. Only then could production and processing methods (PPMs), environmental standards and the relationship between the WTO and MEAs be meaningfully addressed. (The EU and Japan later responded that a new round of multilateral trade negotiations would provide the best way to move the developing country agenda forward).

Pakistan pointed out that many developing countries' mistrusted the entire concept of sustainable development, which they felt was consistently 'viewed through the prism of the environment', with its social and economic aspects and equity concerns largely forgotten, as the quasi-inexistent action on development financing, trade, technology transfer and debt relief amply demonstrated. Trade, finance and investment were 'at the heart of sustainable development', the Pakistani representative said, adding that environmental and social standards that restrain market access worked counter to sustainable development. His position was echoed by the Philippine delegation, which said that the essential elements of the trade and sustainable development debate were market access, development financing, new export opportunities, technical assistance and capacity-building.

In contrast, some others maintained that in the trade context the environment was regularly ignored in favour of economic development. Addressing an informal event during the CSD, one speaker said that sustainable development had 'failed miserably as an action principle' and called for repositioning the debate as 'trade and environment', with a frank acknowledgement that the two were not always mutually compatible.

*Continued on page 8*

*CSD Reveals Unchanged Positions, continued from page 7*

During the high-level segment, Finland conceded that 'win-win-win' solutions could be elusive. The United States said potential 'win-wins' could include the CDM and tariff elimination for environmental goods and services, as well as the elimination of fisheries subsidies and agricultural export subsidies. The US also identified labour, land tenure and the rule of law as constraints for mutual supportiveness of trade and sustainable development. Germany called on industrialised countries to show more sensitivity to developing countries' trade and environment issues, such as trade in domestically prohibited goods. Other governments did not comment on Bolivia's suggestion for joint work by the WTO and sustainable development institutions on forests, genetic resources, and environmental goods and services.

**Sustainability assessments**

CSD Chair Juan Mayr asked participants whether sustainability assessments of trade agreements could contribute to ensuring coherence between the multilateral trading system and sustainable development objectives. Ecuador responded that a seminar on the subject held in Quito in March had concluded that such assessments should not become mandatory or a conditionality for trade concessions (see related article on page 13).

The European Union and the United States encouraged the use of sustainability assessments. Norway said that environmental protection and sustainable development should be an overall principle for the WTO, and environmental reviews should be carried out simultaneously with trade negotiations. Germany pointed out that sustainability assessments of trade agreements would help developing and least-developed countries most.

Supported by Bolivia and Egypt, the Philippines cautioned against using sustainability assessments as conditionalities for trade concessions, but said it would be willing to look at the effects of Northern subsidies on the fisheries and agriculture sectors of the South. Egypt stressed that the Quito meeting did not link sustainability assessments to the multilateral trading system, and Guyana called for an assessment of the social impacts of trade liberalisation.

The CSD Decision on Economic Growth, Trade and Investment only notes that any assessment of trade policies 'should be conducted with a view to promote sustainable development and should not serve as a barrier to trade'. Discarded draft language had proposed that '[t]he concept of trade-related environmental impact assessments needs to be further explored, and emphasis placed on the development of methodologies'.

**Confidence-building, Market Access and MEAs**

'How to can we build confidence in the trade and sustainable development debate?' Juan Mayr asked his fellow ministers during the high-level segment. The answers of developing and developed countries were markedly different: most of the former favoured making the trade system more sympathetic to social and environmental concerns, while the latter largely saw market access as the key element of any confidence-building package. New Zealand and the Philippines singled out the removal of agricultural and fisheries subsidies as the best confidence-building measure.

Most developing countries are satisfied with the somewhat ambiguous relationship between multilateral environmental agreements (MEAs) and the WTO. In a direct allusion to unfulfilled financial and technology transfer provisions under most MEAs, the G-77 and China noted that MEAs were only meaningful when

industrialised countries fulfilled their commitments. Guyana said that technology transfer was the most important element in post-Rio environmental conventions, as it would be the only way to break the cycle of obsolete technologies that plague the South.

On the other hand, Norway, Japan, New Zealand and UNEP Executive Director Klaus Töpfer called for a clarification of the relationship between the WTO and MEAs. The Japanese representative likened the current situation to 'waiting for the volcano to erupt' in a major conflict involving MEAs and WTO. The EU highlighted the importance of the Biosafety Protocol and its recognition of the precautionary principle, as well as the fact that WTO rules and Protocol provisions have 'equal status'.

Many developing countries, as well as Norway, stressed the need to harmonise the TRIPs Agreement with the Convention on Biological Diversity (CBD), in particular with regard to CBD's benefit-sharing arrangements and the requirements for patenting of life forms under Article 27.3(b).

The final decision on making trade and environmental policies mutually supportive encourages the WTO and MEA Secretariats to co-operate in order to 'enhance complementarities between trade liberalisation and environmental protection'. It also encourages all relevant parties 'to identify and pursue opportunities where trade liberalisation holds particular promise for promoting sustainable development, including actions to address subsidies with the aim of eliminating effects which are both trade distorting and environmentally harmful, in a way that would result in trade, environmental and developmental benefits'.

References to research on the trade implications of applying the principle of common but differentiated responsibilities, the polluter pays principle and the precautionary principle were deleted.

**Sustainable Development, Agenda 21 and the WTO**

Our Common Future, the report of the World Commission on Environment and Development published in 1987, defines sustainable development as 'development which meets the needs of the present generation without compromising the ability of future generations to meet their own needs'.

In 1992 at the Rio Earth Summit, nearly 180 nations adopted Agenda 21, which recommends actions in forty programme areas identified as crucial for more environmentally-friendly, socially-just and equitable growth worldwide. The signatories agreed that the implementation of Agenda 21 would mark 'the beginning of a new global partnership for sustainable development', and the concept has since been adopted as a goal by a host of intergovernmental agencies ranging from the UN Economic and Social Council and the UN Development Programme to the World Bank and the WTO.

The only direct mention of sustainable development in the WTO Agreements occurs in the preamble of the Marrakesh Agreement Establishing the World Trade Organisation, which urges Members to conduct their trade and economic growth endeavours 'in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of development'.



## Three New AIDS Drug Initiatives Announced – But Will the Trade Provisions Make a Difference?

During the second week of May, five pharmaceutical companies, the United States government and the European Commission announced initiatives aimed at increasing poor countries' access to essential medicines. Drugs to treat AIDS were a particular focus of these efforts. Both the World Bank and the International Monetary Fund also recently adopted HIV/AIDS prevention and mitigation as integral goals of their poverty reduction strategies (Bridges Year 4 No.3, page 13). HIV/AIDS causes more deaths worldwide than any other infectious disease, and the situation is particularly dramatic in sub-Saharan Africa, where nearly one fourth of the population is infected.

### Industry Price Cuts Promised

The initiative that potentially holds the most promise for short-term relief comes from five major pharmaceutical companies allied with UN agencies involved in AIDS prevention and mitigation. Behringer Ingelheim, Bristol-Myers Squibb, Glaxo Wellcome, Merck & Co., and Hoffmann-La Roche announced on 11 May that they would work individually with UNAIDS to significantly improve Third World countries' access to AIDS medicines. At press time, only Glaxo-Wellcome had given a concrete example: Combivir (a mix of AZT and 3TC) might be sold in developing countries for as little as US\$2 instead of the global average price of US\$16.

Industry officials said they hoped that the UNAIDS framework – which includes, *inter alia*, the development of 'efficient, secure and reliable distribution systems' – would address their main concern regarding differential pricing: that the cheap drugs would not be used to treat AIDS patients in poor countries, but would be resold to developed countries at prices that would undercut those currently in force, and thus reduce earnings from the most lucrative markets for patented drugs.

Some sceptical commentators noted that the companies' ultimate aim was to forestall moves in developing countries to ignore international intellectual property protection rules in the name of public health. Doctors Without Borders – a non-governmental organisation that campaigns for access to essential drugs – called the initiative a 'small victory', at least as long as none of the companies involved had announced the exact price cuts and the specific products that would benefit from them.

### Who Will Benefit from Clinton's Executive Order?

On 10 May, President Clinton signed an Executive Order, which forbids US government agencies to seek 'through negotiation or otherwise, the revocation or revision of any intellectual property law or policy of a beneficiary sub-Saharan country, as defined by the President, that regulates HIV/AIDS pharmaceuticals or medical technologies'. Important conditionalities mitigate the positive effect of this Executive Order, however. While it effectively 'prohibits the United States Government from taking action pursuant to section 301(b) of the Trade Act of 1974 with respect to any law or policy in beneficiary sub-Saharan African countries that promotes access to HIV/AIDS pharmaceuticals or medical technologies', it also requires such beneficiary countries to provide 'adequate and effective intellectual property protection consistent with the TRIPs Agreement' and specifies that 'this order does not prohibit the United States Government from invoking the dispute settlement procedures of the World Trade Organisation to examine whether any such law or policy is consistent with the Uruguay Round Agreements'.

Section 301(b) of the Trade Act of 1994 applies to an act, policy or practice which, while *not denying rights or benefits of the United States under a trade agreement*, is nevertheless 'unreasonable or discriminatory and burdens or restricts United States commerce' (editor's italics). The failure to protect intellectual property rights may amount to such an 'unreasonable or discriminatory restriction', and give rise to USTR retaliatory action.

The WTO's TRIPs Agreement refers to such practices as 'nullification and impairment' cases, and confusion prevails at present over whether a general moratorium on such cases is still in force. ('Nullification and impairment' cases were exempted from dispute settlement procedures until 1 January 2000 under Article 64.2. The Seattle Ministerial Conference did not deliver a decision on extending the moratorium.) Further, 24 of the WTO's 37 sub-Saharan Members fall in the category of least-developed, and as such have until January 2006 to comply with TRIPs patent protection rules. Twelve other sub-Saharan WTO Members are developing countries, and should have had TRIPs-compliant intellectual property regimes in place on 1 January 2000.<sup>1</sup>

In summary, the Executive Order could make a difference to the ten sub-Saharan countries that are not WTO Members and could have faced unilateral US retaliation for making AIDS drugs accessible in ways that could be deemed 'unreasonably restrictive or discriminatory burdens' to US commerce – through compulsory licensing, for example.<sup>2</sup> However, the 24 least-developed sub-Saharan WTO Members could have challenged any attacks on their IPR laws at the WTO until 2006 even without the Executive Order. Furthermore, the presidential proclamation does not make the TRIPs compliance of the 12 sub-Saharan African developing country Members any less vulnerable to WTO dispute settlement procedures.

### EU Studying Solutions

In the run-up to Seattle, the European Union was ready to back developing country calls for the compulsory licensing of medicines on the World Health Organisation's list of some 360 essential drugs. Compulsory licensing would allow developing countries to manufacture patented drugs more cheaply. Since the failure of the Seattle Ministerial, the EU offer is no longer on the table (although it could resurface in the context of a broad-based new round of WTO negotiations). Post-Seattle, however, European drug manufacturers have started a campaign to remove patented medicines from the EU's list of concessions to developing countries.

Meanwhile, the European Commission is preparing a comprehensive communication on the 'main transmittable diseases and poverty reduction in developing countries', part of which is to deal with access to medicines. As a contribution to this study, Trade Commissioner Lamy on 10 May identified the following among areas involving trade policy that need in-depth analysis: the possible reduction or elimination of customs duties on medicines, differential pricing for developed and developing country markets, and compulsory licensing and TRIPs. An interim report on the Commission-wide undertaking, to be drafted by Development Commissioner Poul Nielsen, is expected in September.

### ENDNOTES

<sup>1</sup> South Africa is considered a developed country in the WTO.

<sup>2</sup> Of these, two are seeking WTO membership, two are observers, and six least-developed countries have no WTO status.

*The WTO Banana Dispute, continued from page 3*

that Ecuador has never pretended to ignore this disparity. To the contrary, it was the central argument used by Ecuador to obtain from the dispute settlement system, after following all the required procedural steps to the letter, an important negotiation tool for influencing the formulation of the European Communities' new banana import regime. The fact that Ecuador is pursuing a WTO-compatible reform of the import regime makes using these sanctions as a negotiation tool even more important and effective. In consequence, as long as the European Communities do not correct the illegalities of the regime, the WTO's sanctions authorisation stays in force without the EC's being able to question it.

The DSB's authorisation for Ecuador to levy sanctions amounting to US\$201.6 million, including the right to suspend concessions under the Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPs), is only the final phase of a long dispute that has pitted Ecuador against the European Communities. To get to this stage, Ecuador has repeatedly demonstrated that the EC's banana import regime nullifies and impairs the benefits accruing to it as a WTO Member. During the ultimate instance when the EC submitted to arbitration the initial request presented by Ecuador, it not only questioned the amount of the proposed sanctions relative to the damage caused, but also expressed doubt about Ecuador's right to apply cross-retaliation in other sectors.

With regard to the equivalence between the level of the damage and the value of the sanctions, Ecuador justified its request by comparing the present situation under an import regime that is WTO-inconsistent with two hypothetical cases that would comply with WTO rules. The first was based on a tariff-only regime, and the second on a tariff-quota system that would exclude the distortions and illegalities of the system currently in force. While the arbitrators did not accept all of Ecuador's claims, they estimated that the damage suffered by Ecuador due to the EC's banana import regime amounted to US\$201.6 million, and confirmed that Ecuador could impose sanctions corresponding to that amount. The arbitrators also confirmed that Ecuador had suffered nullification and impairment of the benefits accruing to it both in the sector of goods and in the sector of trade in services, recognising once more that – unlike other Latin American banana exporting countries – Ecuador distributes most of its fruit through national operators and that it has the potential to export practically all of its bananas to Europe without involving either European or North American distributors.

#### Cross-retaliation and the Burden of Proof

As to Ecuador's decision to withdraw concessions or other obligations under the WTO Agreement on Trade in Services or TRIPs, the EC argued that Ecuador must apply sanctions in the same sector where the nullification and impairment of benefits occurred, i.e. in the goods sector. The Dispute Settlement Understanding is clear in this regard: a Member who imposes sanctions has the right to decide the type of sanction it wishes to apply. In addition, if the Member justifies to the Dispute Settlement Body that imposing sanctions in the original sector where the nullification and impairment of benefits occurred would not be practical and effective, it can apply the sanctions in another sector or under another WTO Agreement.

To justify a cross-retaliation request, the country imposing the sanctions must prove that the severity of the damage is sufficiently great in economic and commercial terms to withdraw concessions in another sector or under another WTO Agreement. However, the burden of proof regarding the practicability and effectiveness

of the sanctions in the original sector where the damage was caused belongs to the party that questions the sanctions. The arbitrators confirmed that the European Communities had the burden of proof with respect to the proportionality that must exist between the sanctions and the damage resulting from these to Ecuador. The arbitrators also noted that it was up to the EC to demonstrate that Ecuador had not followed all the necessary procedures before deciding on cross-retaliation.

#### Conclusion

Now that the possibility to exercise cross-retaliation has been tested in practice, it can be said that the system is undoubtedly favourable to the Member soliciting the authority to impose sanctions. This has its *raison d'être*; after all, trade sanctions are only invoked when there is a clear case of non-compliance, as happened in the banana dispute. However, it is also clear that the cross-retaliation tool was originally designed to be put into practice in an opposite way from that used by Ecuador.

Retaliation in a different sector than the one where the non-compliance occurred was conceived as a mechanism to put pressure on Members who would not comply with decisions regarding intellectual property disputes. For instance, a developing country in non-compliance with its obligations under the TRIPs Agreement would sooner or later find itself under threat of sanctions in the goods sector. The step from one sector or Agreement to another was not going to create major problems, at least when the step was in this direction.

There is no doubt that Ecuador's action inversed the intentions of many of the negotiators during the Uruguay Round. They had expected to sanction such products as bananas, coffee, tuna, etc., from countries that violated their intellectual property protection obligations. The contrary has taken place: sanctions will be imposed on intellectual property rights in retaliation for non-compliance with basic GATT obligations regarding trade in a staple product: the banana.

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#### ENDNOTES

<sup>1</sup> At the WTO, the European Union is officially referred to as the European Communities (the EC).

<sup>2</sup> 1998 estimates by the Central Bank of Ecuador and Eurostat.

#### Key Events of the Banana Dispute

- September 1997, the DSB adopts panel and Appellate Body reports ruling that the EC's tariff-quota and import licensing systems for bananas are inconsistent with GATT and GATS provisions.
- January 1999, a new EC banana import regime enters into force.
- April 1999, a compliance panel finds that the EC's new regime still violates WTO rules. The United States is authorised to impose sanctions worth US\$191.4 million.
- November 1999, after talks fail on compensation, Ecuador seeks the right to impose sanctions through cross-retaliation.
- March 2000, WTO arbitrators decide that Ecuador can impose sanctions worth US\$201.6 million in the goods, services and intellectual property rights protection sectors.

# Trade in Services, the GATS and Sustainable Development

By Andrew Crosby and Jasmin Tacoa Vielma

Amidst the many disagreements at Seattle, governments largely agreed that mandated negotiations on services should continue as planned under the General Agreement on Trade in Services (GATS). With the commencement of negotiations on trade in services, the GATS and services issues are moving to centre stage for governments and civil society alike. This article reviews some of the main concerns surrounding trade in services and the GATS in the context of sustainable development.

The liberalisation of trade in services and effective use of the GATS presents governments with formidable challenges that are fundamentally different from those faced in goods. Sustainable development concerns intersect with trade in services across a spectrum of issues including economic and social development, and environmental and natural resource concerns. Services trade liberalisation also has implications for the policy-making process itself, potentially involving deeper coordination, greater participation, and changed political strategies in domestic policy and international commitments.

A great deal of services liberalisation has taken place autonomously in recent years, demonstrating significant national commitment to liberalisation strategies, as well as the large potential for growth in this area. This trend has provided a wealth of experience on the benefits and drawbacks of differing approaches to liberalisation including: the potential for growth in vital sectors for national development and for insertion into the global economy; the potential to encourage environmental improvement or to accelerate environmental degradation, depending on the sector liberalised and the regulatory structure; the potential to bring broad distributive benefits in areas that are undercapitalised and underdeveloped or alternately the potential to substitute domestic monopolies with similarly uncompetitive and less accountable foreign firms.

Liberalisation of services trade holds a variety of perceived dangers, such as loss of control over the provision of services and competence of suppliers by governments; the undermining of public services; potential environmental degradation; negative impacts on the culture; undermining national interests by having important infrastructural services under foreign control etc. These often arise from controversies associated with privatisation and domestic deregulation in the past and have led to a significant amount of scepticism and confusion about the possible role of services trade liberalisation under the GATS. At the same time, the importance of services trade and its liberalisation holds the promise of critically needed capital, know how, and technology in areas that are both vital to economic growth and development, and social and environmental improvement.

## Services: a sense of scale and importance.

Services play a very large and growing role in almost all economies. For many countries, services represent the largest segment of their economies compared to agriculture, industry and manufacturing. But, service exports were valued at only one

quarter of goods exports in 1998.<sup>1</sup> These figures, however, may underestimate the actual level of trade in services, as many aspects of services trade are not accounted for in national economic statistics.

Considerable growth is occurring in services trade across a range of countries, with low-income countries experiencing a five-fold increase in services exports from 1983 to 1997. Many low and middle-income countries also increased their services exports during this period: a nearly nine-fold increase occurred in East Asia and the Pacific, a four-fold increase in Latin America and a three-fold increase in South Asia. Although services exports nearly doubled in Africa and the Middle East, these regions clearly lagged behind the others. High-income countries services exports increased almost four-fold.

**While previous experiences with privatisation and domestic deregulation have led to scepticism about services trade liberalisation, such liberalisation can bring critically needed capital, know how and technology in areas that are vital to economic growth and development, and social and environmental improvement.**

## The GATS – Challenges

The GATS provides a multilateral framework of rules for the liberalisation of ‘trade in services’.<sup>2</sup> While many parts of the agreement should be familiar to those who have worked with the GATT, there are important differences between the agreements. The GATS applies to ‘measures’, broadly defined as any kind of governmental measure, affecting trade in all services supplied in any one of the following ways: Cross Border Supply; Consumption

Abroad; Commercial Presence; Movement of Natural Persons (Article I:2). Services supplied in the ‘exercise of governmental authority’, as defined by the GATS, are excluded from the scope of the agreement. The bulk of air transport services is also excluded for the time being under the provision of an annex on the sector. The most important obligations are most favoured nation (MFN) meaning non-discrimination among Member countries; Transparency, or the availability to the public of laws and regulations; Market Access and National Treatment. MFN and Transparency apply to all services covered by the agreement and cannot be qualified.<sup>3</sup> However, Market Access and National Treatment, only apply to chosen sectors, and sometimes with conditions.

The multiple possibilities available to Members in taking market entry commitments make the GATS a complex agreement, but at the same time, a potentially more powerful and flexible one. If done properly, development policy objectives can be pursued and/or supported by the Agreement. The ability to undertake Market Access and National Treatment obligations individually, and independently, allows countries to control the overall level of foreign market presence for different sectors and for different modes of supply. It also allows countries to design regimes that can be more favourable to the operations of national services and suppliers, than to those of foreign ones. This flexibility allows for the tailoring of commitments to the particular needs and policy objectives of each Member.

The significance of GATS commitments is amplified by the fact that the barriers to services trade lie in measures applicable not only to the ‘product’ as in GATT, but also to the provider and the way the service is supplied. As these measures are found primarily in

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*Trade in Services, continued from page 11*

regulations, the GATS more directly impacts domestic regulatory regimes than the General Agreement on Tariffs and Trade (GATT). Such an impact might call for reform, which in this context may mean deregulation, or 're-regulation', to ensure that the opening of the market achieves its objectives without affecting legitimate policies. Assessing the need for domestic regulatory reform is in itself a challenge due to the host of service sectors to be considered, each one with unique regulatory issues, as well as the larger task of meshing domestic regulations and requirements in a way that makes them compatible and comparable in the framework of the GATS. Such modifications may often require a deeper level of economic and social change as well as a higher level of domestic consent and participation in order to make them effective.

Compounding the complexity of the GATS, and the implications of liberalising under this framework, is the fact that the Agreement is still being developed. WTO Members are currently faced with a multiple challenge including: the finalisation of the GATS framework, i.e. developing disciplines on safeguards, subsidies, government procurement, and on domestic regulation; the negotiation of more specific commitments on a sectoral basis (while needing to devote a significant amount of attention to the determination of their opportunities and policy objectives for undertaking commitments and obtaining concessions from trading partners), and finally, the assessment of the impact of these undertakings on domestic regulation.

Furthermore, there is not a sufficient understanding of the economic, social and environmental impacts of services trade liberalisation or of how policy-making processes and considerations differ from those of the GATT. The lack of reliable and comprehensive data on services trade and of uniform definitions regarding sectors makes it difficult to assess the liberalization achieved under the Agreement. The legal intricacies, resulting in part from the need to adapt the existing international trade principles to the way services are traded and to necessary political compromises, are accompanied by undeveloped jurisprudence. In all of the above considerations, countries with less technical capacity, and less developed services sectors are at a disadvantage.

### **How Concerns Can Be Addressed through the GATS**

The GATS structure and flexibility allow Members to address a wide variety of concerns, including those related to sustainable development. In general, there is nothing in the preventing governments from pursuing legitimate regulatory objectives, including those for developmental or environmental purposes.

#### *Development*

Service sectors such as health, education, transportation, energy, financial and telecommunications are critical infrastructural services in nearly all countries, often with significant levels of government intervention, either as regulators or as providers of the services. Several concerns arise in relation to the proposed liberalisation of trade in these sectors. Chief among them is the fear that liberalization of trade in services will reduce the ability of governments to provide public service or will make government provision less economically viable. In this respect, it is important to bear in mind that the Agreement on Trade in Services excludes from its application 'services supplied in the exercise of governmental authority'. The GATS defines these as 'any service which is supplied neither on a commercial basis, nor in competition

with one or more service suppliers'. In sectors covered by the Agreement, liberalisation does not necessarily mean the extinction of public services as is evident if one considers the range of 'public services', such as education, that have been provided for quite some time in parallel by public and private actors. Universal service requirements are also possible under the Agreement. For example, governments normally impose universal service obligations on at least one and sometimes all privately owned telecom operators; they may also impose universal service requirements to ensure that education or health care are accessible to the whole population. Incompatibility might arise if the measures to pursue them are discriminatory, but even this can be resolved in advance when taking specific commitments in the sectors by introducing reservations, for instance under national treatment. It is important to assess these concerns in light of the realities of the market and bear in mind that public suppliers might be addressing the needs of segments of the population that are different from those targeted by private operators.

Further concerns include cultural differences; standards of service; stability and control over institutions; and competition policy issues. While these types of concerns must be addressed in domestic policy, the Agreement recognizes the need for regulation to achieve legitimate objectives including protection of consumers, quality of the service, competence of suppliers and integrity of the market.<sup>4</sup>

Competition concerns have, for instance, been addressed for the basic telecommunications sector separately in a negotiated instrument called the Reference Paper. Among other things, the reference paper addresses issues such as prevention of anti-competitive practices; ensuring interconnection; independence of regulator, universal service requirements neutral to competition conditions etc. The aim of these is to ensure that market access and national treatment commitments are not counteracted by non-competitive practices. Thus, it imposes disciplines that ensure that governments put regimes in place that can achieve their policy goals without adversely affecting commitments.

#### *Developing Countries*

In relation to the challenges faced by developing countries, GATS Articles IV and XIX are perhaps the most important provisions.<sup>5</sup> Article IV establishes an obligation to facilitate the increased participation of developing countries in services trade, through the negotiation of specific commitments that promote the strengthening of their domestic services capacity, improving access to information networks and distribution channels, and the liberalisation of sectors of export interest to them. While some claim that Article IV has never been effectively operationalised, because existing commitments do not respond to what the article calls for, others would argue that the only 'obligation' is to negotiate sectoral market access and national treatment concessions.<sup>6</sup>

Article XIX is complementary to Article IV. It provides for special flexibility for developing countries in terms of the pace of their liberalisation and also affirms the respect for national policy objectives. Most importantly, it opens the door for developing countries to pursue the objectives of Article IV through conditioning access to their markets. This tool to ensure that foreign services and suppliers contribute to development efforts conducted domestically, has been scarcely used, and has consisted so far of requiring training of national employees. Some

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## Sustainability or Environmental Assessments?

During the High-level Segment of CSD-8 last May, ten countries spoke on the issue of sustainability assessments of trade policy, a relatively new set of methodologies to understand the relations between trade policy and sustainable development (see page 8). Eight delegations made particular reference to a dialogue held on 6-8 March in Quito, Ecuador, where around 100 experts from 30 countries discussed the concept, purpose and usefulness of sustainability assessments. Ecuador, host country of the event, said that the meeting proved that constructive, multisectoral dialogue is possible on a complex issue such as trade and sustainable development. The Brazilian delegation, in turn, characterised the meeting as a contribution to building trust on this topic, while the delegation of Germany underlined that common ground was found in the course of the discussion.

The dialogue, chaired by the governments of Ecuador and the Netherlands and organised by WWF-International and Fundación Futuro Latinoamericano, was an opportunity to take stock of the debate on the need for sustainability assessments and their possible nature through an open exchange of views among diverse actors, including government officials, researchers, international organisations and NGOs. In particular, the meeting provided a propitious environment for clearly articulating concerns around this topic, as well as possible ways to surmount them.

The meeting demonstrated two important facts. One, there is a wide variety of approaches to assessing the sustainability implications of trade policies, a diversity that was welcome and encouraged. Two, institutions in developing countries have elaborated methodologies and conducted case studies, which compare favorably against similar initiatives in OECD countries.

The meeting made clear that there is interest in sustainability assessments as tools to facilitate the consideration of economic growth and social and environmental variables in trade policy making, but it also revealed deep concerns about their potential use as instruments of conditionality in international economic relations. As these assessments are untested tools, their usefulness, relevance and, more importantly, purposes need to be further explored. In this regard, several case studies and analyses presented at the meeting provided illustrative examples.

In general, the concerns expressed can be divided in two types. On the one hand, there are political concerns about the implementation of sustainability assessments internationally. There were no objections to sustainability assessments conducted nationally. On the other hand are the concerns regarding the methodological approaches. In particular, the point was raised about limiting the assessments to trade policy when a sustainability assessment, to be such, should address other issues, perhaps more important than trade, in international economic relations, such as financial relations and structural barriers to development.

The meeting made some inroads into ways to overcome these concerns. Building experience at the national and sectoral levels and seeking partnerships that tap existing capacities in developing countries are examples. Participants also identified illustrative guidelines to improve the way methodologies could address social, economic and environmental aspects of international trade.

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## EU Revokes Neem Fungicide Patent

On 10 May, the European Patent Office revoked a patent jointly granted to the US Department of Agriculture and W.R. Grace for a fungicide based on the Indian neem tree. Five years ago, the European Parliament's Green Party, Dr Vandana Shiva of the Research Foundation for Science, Technology and Ecology, and the International Federation of Organic Agriculture Movements launched a campaign aimed at revoking patents based on false claims of innovation in cases where the specific characteristics of the product source have in fact been part of local knowledge for centuries. With regard to the neem tree, for instance, countless generations of Indians have used neem seed extracts to make insect repellents, medicines and other specific products.

The patent was revoked because the existence of such 'prior art' invalidated the patent holders' claim of a discovery or innovative step in developing the neem-based fungicide. The fact that most countries' patent laws ignore prior art, which often only exists in oral form and age-old traditional practices, has led to what many consider to be biopiracy regarding the South's rich biological resources and traditional knowledge (about 90 other patents have been granted around the world for products and processes involving the neem tree alone). The US Patent Office was brought to cancel a patent for turmeric, when the Indian government showed that the plant had been used in traditional medicine for centuries. The WTO TRIPs Council is currently considering ways to protect traditional knowledge in the context of the Article 27.3(b) review regarding patenting requirements for life forms.

In related news, the Indian government on 15 May introduced to the Parliament a new Biological Diversity Bill, which would allow free access to Indian nationals to genetic resources for all but commercial purposes. The bill proposes the establishment of a National Biodiversity Authority, which would need to approve all applications for intellectual property rights either within or outside India for inventions based on research or information linked to a resource obtained from India.

## EU to Maintain Hormone Beef Ban

The European Union announced on 24 May that it would not lift the import ban on hormone-treated beef after the Scientific Committee on Public Health-related Veterinary Measures confirmed that no new scientific evidence existed that would reverse its earlier conclusion that one of the incriminated hormones (17B-oestradiol) should be considered a 'complete carcinogen'. An interim report with similar findings was roundly criticised by US and Canadian authorities in May 1999 (Bridges Year 3 No.4, page 5).

According to the European Commission, the Scientific Committee reviewed the most recent reports and literature concerning the hormones and concluded that these contained no new elements. The Commission now proposes to definitely ban 17B-oestradiol and its steroid derivatives in animal husbandry, and prolong the 'temporary' ban in force since 1989 on the other five hormones while complete scientific information is being sought.

In July 1999, the WTO authorised Canada and the US to impose trade sanctions on EU exports, worth C\$11.3 million and US\$116.8 million respectively, after a compliance panel found that the European Union had not complied with the WTO ruling that the ban was being maintained without adequate scientific evidence.

*Trade in Services, continued from page 12*

would argue that this tool has not been used because many development objectives can be met without resort to scheduling special conditions; others that this minimal use could be attributed in part to unawareness of the tool as such and also to the demanding nature of the preparatory process for a multilateral negotiation in services.

*Environment*

The environmental challenges related to the liberalisation of trade in services are not dealt with explicitly in the GATS except for Article XIV (*General Exceptions*) and the Decision on Trade in Services and the Environment. While it is widely recognised that important environmental considerations are relevant in the context of services trade liberalisation, WTO Members have not felt a need for more in-depth discussions on the issue nor for specific provisions relating to the environment in the GATS.<sup>7</sup> Measures for environmental considerations are not prevented by the Agreement on Trade in Services, as is the case for any other domestic regulation for legitimate objectives, and do not need to be inconsistent with sectoral specific commitments either. In case of inconsistencies, the general exceptions and/or reservations regarding measures inconsistent with market access or national treatment obligations might be sufficient to resolve the matter.

Article XIV(b) on General Exceptions in the GATS is structured similarly to Article XX(b) of the GATT (i.e. 'necessary to protect human, animal or plant life or health'). Article XIV does not contain the equivalent of GATT Article XX(g) as it was deemed unnecessary during negotiations 'since no additional cover would be obtained beyond that already contained in GATT'.<sup>8</sup> However, it was agreed that this connection would be explored further along with other subjects.

The Decision on Trade in Services and the Environment '[acknowledges] that measures necessary to protect the environment may conflict with the provisions of the [GATS]'. It goes on to say that it is not clear whether additional provisions are necessary to resolve possible conflicts beyond what is carried in Article XIV (b). Study of this issue was assigned to the Committee on Trade and Environment (CTE) with the task of determining whether any changes should be introduced in Article XIV and to make further recommendations on the relationship between Trade in Services and the Environment in relation to sustainable development. This work has remained on the CTE agenda with little progress, and currently focuses on benefits of trade in environmental services, barely touching on questions related to the adequacy of Article XIV.

Although no significant discussion has taken place on the need for additional environmental mechanisms under the Agreement, some approaches are emerging. In relation to tourism services, it has been proposed to develop an annex for the sector, including provisions to ensure that liberalisation of environmental services is consistent with sustainable development of the sector.<sup>9</sup>

Furthermore, it is conceivable that MEA objectives could be pursued, for example, by requiring suppliers originating from countries with higher environmental standards to live up to those standards in host countries which are still in the process of defining their own environmental strategies. This kind of mechanism could be compatible with GATS commitments through the inclusion of deviations from national treatment to cover higher standards of environmental protection for foreign suppliers, for example.

**Conclusion**

Services and trade in services are growing rapidly in developed and developing countries. As an instrument for services trade liberalisation, with deep domestic implications, the GATS is likely to attract more scrutiny. As such, continued liberalisation is likely to require considerably higher levels of public support in order to effect meaningful change. These efforts will need to overcome the scepticism surrounding previous privatisation and deregulation initiatives, which should be de-linked from services trade liberalisation and foreign involvement in domestic economies under the GATS.

The GATS allows great flexibility in accommodating national goals if WTO Members are able to meet the challenges posed domestically and multilaterally. To the extent that governments are able to take on new commitments under the GATS, with clear objectives domestically and internationally and the necessary regulatory systems in place, the GATS could work as a mechanism for sustainable development.

While the GATS is well supported by WTO Members and many recognise the opportunities in services trade liberalisation, they face a formidable challenge in advancing work. Services trade liberalisation is not well understood and the GATS is complex and relatively unexplored compared to the GATT. Furthermore, governments face a fundamentally different challenge in liberalising under the GATS; domestic regulatory reform is often necessary to achieve the lowering of services trade barriers. There is not a right formula to consider and answer the universe of issues; the 'right approach' has to be determined through consideration of each country's objectives on a case-by-case basis. In order to make meaningful and lasting progress governments will have to identify more clearly domestic development strategies and they will need to do this in consultation, and with the support of, broader segments of their own societies.

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**ENDNOTES**

<sup>1</sup> World Development Report 1999 – 2000. Table 12

<sup>2</sup> See <http://www.wto.org/wto/services/services.htm> for several detailed documents on trade in services and the GATS. Also <http://www.worldservicescongress.com> carries a number of informative papers

<sup>3</sup> Some Members entered MFN exemptions at the time of the signing of the agreement. In principle, these will expire after 10 years.

<sup>4</sup> Preamble, Article VI, Article XIV, the Annex on Financial Services, and Disciplines on Accountancy Sector.

<sup>5</sup> Also of relevance for developing countries are Article V.3(a) Economic Integration Agreements; Article XII.1 Restrictions to Safeguard the Balance of Payments; and Article XXV.2 Technical Cooperation.

<sup>6</sup> Article IV may be considered non-operational because of inability to effectively obtain concessions due to lack of negotiating power.

<sup>7</sup> The most obvious examples include environmental, tourism, energy, and transportation services, etc.

<sup>8</sup> For an extensive review of this issue see document WT/CTE/W/9.

<sup>9</sup> S/C/W/127 Communication from the Dominican Republic, El Salvador and Honduras.



## Globalisation and Sustainable Human Development: Africa

Following similar meetings in Latin America and Asia, under the aegis of the joint UNCTAD/UNDP Programme on Globalisation, Liberalisation and Sustainable Human Development, ICTSD convened an African policy dialogue in Windhoek, Namibia, from 10-12 May, 2000. High-level government officials and representatives of academia, civil society and the private sector examined optimal strategies for foreign direct investment, regional integration, special and differential treatment in the multilateral trading system, and export-led growth that would help achieve sustainable human development.

Regarding trade arrangements proposed by the EU for a successor to the Lomé Convention, which envisages economic partnership agreements (EPAs) with groupings of ACP countries, participants recommended that research by African institutions should stress the development dimension of EPAs. This would allow African ACP countries to better articulate and negotiate their interests in such areas as improving the EU's GSP on the basis of new differentiation criteria, explicitly locating EPA activities within the multi-lateral framework, and improving supply-side measures, including investment, to encourage industrial restructuring and diversification.

Participants noted that poverty alleviation and food security concerns were among the most critical dimensions of sustainable human development in the African context, and that these are affected by trade liberalisation and the rationalisation of import barriers. As the need for fiscal revenue and for the strengthening of productive capacity imposes significant constraints on both the depth and speed of import liberalisation, they recommended that African countries rationalise their trade regimes, keep their protection and revenue tariffs at moderate levels and improve the transparency of their import control systems. Participants noted that further and widespread reductions in intra-African trade barriers could rapidly increase trade in non-traditional exports – especially processed agricultural, food and feed products – that tend to be labour-intensive and therefore contribute significantly to poverty alleviation through creating employment opportunities.

Regarding foreign direct investment in Africa, which stood at US\$6.3 billion in 1998 or around one percent of global FDI, recommendations for using trade policy strategically included improving domestic policy environments, strengthening regional integration efforts, and regional and national policy-making processes to attract FDI and ensure that it contributed to national development and sustainable human development goals. Participants also recommended an enhancement of data collection capacity to support such strategies, particularly on FDI flows, and research on why FDI has not been forthcoming and to identify 'desirable' FDI. Participants also questioned the viability of export processing zones as export development strategies for Africa, and concluded that there was a need to evaluate past experiences with a focus on high return goods/sectors where African economies have greater dynamic comparative advantages.

Participants, who agreed to establish a 'research network on globalisation, liberalisation and sustainable development', recommended work on an African strategy for formulating improved special and differential treatment provisions in current and future WTO agreements. The strategy would need to incorporate, among others, performance indicators that clearly reflect sustainable human development objectives and a shift from timeframes to performance threshold/milestones that are defined in sustainable human development terms.

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### MEETINGS

WTO meetings take place in Geneva.

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Internet: <http://www.wto.org>

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Only extensions are provided in this list.

June 7	WTO Dispute Settlement Body Contact: Gabrielle Marceau, tel: 5519, fax: 5788
June 7-8	WTO Working Group on Transparency in Government Procurement Contact: Luis Ople, tel: 5374, fax: 5458
June 8-9	WTO Working Group on the Relationship between Trade and Investment Contact: Nuch Nazeer, tel: 5393, fax: 5458
June 15-16	WTO Working Group on the Interaction between Trade and Competition Policy Contact: Robert Anderson, tel: 5198, fax: 5790
June 19	WTO Dispute Settlement Body Contact: Gabrielle Marceau, tel: 5519, fax: 5788
June 19-21	WTO Textiles Monitoring Body Contact: J.-P. Lapalme, tel: 5223, fax: 5765
June 21-22	WTO Committee on Phytosanitary and Sanitary Measures Contact: Gretchen Stanton, tel: 5086, fax: 5760
June 22	WTO General Council – Special Session on Implementation Issues Contact: Bernard Kuiten, tel: 739-5676, fax: 5777
June 23	WTO Working Party on the Accession of China Contact: Hans-Peter Werner, tel: 5286, fax: 5458
June 26-30	WTO Council for Trade-related Aspects of Intellectual Property Rights Contact: Peter Ungphakorn, tel: 5412, fax: 5458
June 28	WTO Committee on Trade and Development Contact: Chiedu Osakwe, tel: 5250, fax: 5774
June 29-30	WTO Committee on Agriculture Contact: Paul Shanahan, tel: 5095, fax: 5760
June 29-30	WTO Committee on Agriculture – Special Session (negotiations) Contact: Paul Shanahan, tel: 5095, fax: 5760
July 5-6	WTO Committee on Trade and Environment Contact: Sabrina Shaw, tel: 5482, fax: 5620
July 7	WTO Council for Trade in Goods Contact: Suja Rishikesh, tel: 5485, fax: 5770
July 17	WTO General Council Contact: Bernard Kuiten, tel: 739-5676, fax: 5777

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### ON-LINE RESOURCES

Public Hearings on Future Multilateral Trade Negotiations Summary of views expressed by participants in public hearings convened by the Australian Department of Foreign Affairs and Trade throughout Australia in September-October 1999. URL: [http://www.dfat.gov.au/trade/negotiations/hearings/outcomes\\_summary](http://www.dfat.gov.au/trade/negotiations/hearings/outcomes_summary)

China Council Working Group on Trade and Environment. Reports and documents on China's trade and environment perspectives. URL: [http://iisd1.iisd.ca/trade/cciced/cciced\\_rep.htm](http://iisd1.iisd.ca/trade/cciced/cciced_rep.htm)

Commission on Sustainable Development. Decisions of CSD-8. URL: [www.un.org/esa/sustdev/csd8/csd8\\_decision.htm](http://www.un.org/esa/sustdev/csd8/csd8_decision.htm)