

Asbestos Ruling Breaks New Ground in 'Like Product' Determination

In a landmark decision, the WTO's Appellate Body on 12 March not only confirmed that France's import ban on chrysotile asbestos was consistent with GATT rules, but reversed the original panel's finding that a product's end use rather than its characteristics, including toxicity, was irrelevant in determining its 'likeness' with competing products.¹

In 1998, Canada challenged the French government's 1996 prohibition on the manufacture, sale and import of all forms of asbestos and products containing them.² France defended the measure on the grounds that asbestos was a known carcinogen estimated to kill more than 2000 people a year in France alone. Canada did not contest the toxicity of asbestos, but maintained that chrysotile asbestos, the only form of the substance still allowed in France and other EU countries, was safe under properly controlled use and therefore should not be banned outright. Canada suggested that the French import ban was more of an attempt to protect domestic asbestos substitute makers than a legitimate public health measure.

The original panel ruled in last September that Canada was right to assert that the import restriction violated GATT Article III.4, which requires equal treatment for 'like products',³ but went on to exempt the measure from this obligation under GATT Article XX(b), which allows such derogations when they are necessary to protect human, animal or plant health.⁴

While the panel decision marked the first time that the human health exemption was found to justify an otherwise GATT-inconsistent measure, it raised serious concerns within the health and environmental communities about the panel's 'like product' analysis, which disregarded the fact that, unlike their substitutes, asbestos and asbestos fibres were potentially life-threatening (Bridges Year 4 No.7, page 9).

While Canada sought to overturn the panel's approval of the ban in its appeal, the European Communities requested that it be upheld and the Article III.4 'like product' violation finding reversed.⁵ Canada also contested the original panel's finding that the French decree was not regulation subject to the WTO Agreement on Technical Barriers to Trade, which requires, *inter alia*, that prohibitions be based on the descriptive characteristics of products, rather than their performance.

Health Risk Can Determine Likeness

From the sustainable development point of view, the Appellate Body's most significant finding was to reverse the panel's conclusion that chrysotile asbestos and its substitutes were 'like

products'. It concurred with the EC that health risk constituted a legitimate factor in determining whether products were 'like' and thus subject to GATT Article III.4 obligation to be treated equally.

Rejecting the panel's exclusively market access-oriented approach to a 'likeness' determination the AB wrote:

[The] evidence about the extent to which products can serve the same end-uses, and the extent to which consumers are – or would be – willing to choose one product instead of another to perform those end-uses, is highly relevant evidence in assessing the 'likeness' of those products under Article III:4 of the GATT 1994.

We consider this to be especially so in cases where the evidence relating to properties establishes that the products at issue are physically quite different. In such cases, in order to overcome this indication that products are *not* 'like', a higher burden is placed on complaining Members to establish that, despite the pronounced physical differences, there is a competitive relationship between the products such that all of the evidence, taken together, demonstrates that the products are 'like' under Article III:4 of the GATT 1994. *In this case, where it is clear that the fibres have very different properties, in particular, because chrysotile is a known carcinogen, a very heavy burden is placed on Canada to show [...] that the chrysotile asbestos and PCG fibres are in such a competitive relationship* (emphasis added).

After a lengthy examination of the criteria to take into account in a 'like product' analysis, the Appellate Body:

- *reversed the panel's findings that it was 'not appropriate' to take into consideration the health risks associated with chrysotile asbestos fibres in examining the 'likeness', under Article III:4 of the GATT 1994, of those fibres and PCG fibres, and, also, in examining the 'likeness', under that provision, of cement-based products containing chrysotile asbestos fibres or PCG fibres;*

- *reversed the panel's findings that chrysotile asbestos fibres and PCG fibres were 'like products' under Article III:4 of the GATT 1994);*
- *found that Canada had not satisfied its burden of proving that these fibres were 'like products' under that provision; and reversed, in consequence, the panel's finding, in paragraph 8.158 of the Panel Report, that the measure was inconsistent with Article III:4 of the GATT 1994 (emphasis added throughout).*

These findings are crucial, as the differentiation between otherwise similar hazardous and non-hazardous

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products shifts the burden of proof from the Member who restricts market access on health grounds to the Member who challenges the restriction. If a panel determines that competing products are not 'like' because of a significant difference in the risk they entail, the Article III.4 requirement to grant them equal market access no longer applies. This leaves it to the plaintiff to prove that the alleged health risk does not in fact exist, and that the contested measure should not be exempt from the GATT's general obligations.

Science Warrants Article XX(b) Exemption

In its appeal, Canada tried to make such a case: it disagreed with the panel's conclusion that the manipulation of chrysotile asbestos cement products posed a risk to human health and thus fell under the scope of Article XX(b), which allows Members to take measures to protect human health even if those measures are inconsistent with other GATT provisions. The Appellate Body wrote that it saw 'Canada's appeal on this point as, in reality, a challenge to the panel's assessment of the credibility and weight to be ascribed to the scientific evidence before it.' It further noted that all four scientists consulted by the panel concurred that a health risk did exist and that the carcinogenic nature of chrysotile asbestos fibres had been acknowledged since 1977 by international bodies, such as the International Agency for Research on Cancer and the World Health Organisation. The Appellate Body thus found the panel 'well within the bounds of its discretion in finding that chrysotile-cement products pose a risk to human life or health', and upheld the conclusion that the import ban was a measure to protect human life or health within the meaning of Article XX(b) of the GATT 1994.

To qualify for an exemption under Article XX(b), measures must not only be designed to protect human/animal/plant health, they must also be 'necessary' in the sense that no less restrictive alternative is sufficiently effective or reasonably available. Canada argued that 'controlled use' was available as a less trade-restrictive alternative. The Appellate Body took a different view:

In this case, the objective pursued by the measure is the preservation of human life and health through the elimination, or reduction, of the well-known, and life-threatening, health risks posed by asbestos fibres. The value pursued is both vital and important in the highest degree. The remaining question, then, is whether there is an alternative measure that would achieve the same end and that is less restrictive of trade than a prohibition.

Canada asserts that 'controlled use' represents a 'reasonably available' measure that would serve the same end. The issue is, thus, whether France could reasonably be expected to employ 'controlled use' practices to achieve its chosen level of health protection – a halt in the spread of asbestos-related health risks.

In our view, France could not reasonably be expected to employ any alternative measure if that measure would involve a continuation of the very risk that the Decree seeks to 'halt'. Such an alternative measure would, in effect, prevent France from achieving its chosen level of health protection.

The Appellate Body thus upheld the panel's conclusion that the EC had demonstrated a *prima facie* case that there was no 'reasonably available alternative' to the French prohibition, and that the regulation was 'necessary to protect human ... life or health' within the meaning of Article XX (b) of the GATT 1994.

TBT Finding May Inform Future Cases

Canada was more successful in its request that the Appellate Body reverse the panel's conclusion that the Agreement on Technical Barriers to Trade did not apply to the French decree. However, while the AB decided that the regulation was indeed a 'technical regulation' under the TBT Agreement, it cautioned that the finding applied only to 'this particular measure' and did not mean that all internal measures under GATT Article III.4 fell under the scope of the TBT Agreement. The Appellate Body did not examine the specific TBT violations alleged by Canada (Articles 2.1, 2.2, 2.4 and 2.8, see below for details).

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Doha: Round or No Round Is Not the Question

Virtually all WTO Members, as well as numerous non-governmental actors, are seeking changes in global trade disciplines. While the proposed changes still run the gamut from making existing WTO Agreements less exacting for developing countries to negotiating a wide range of new liberalisation instruments and commitments, there is hardly a voice in defence of a total status quo. Whether you are for or against a 'new round of trade negotiations' is therefore largely a question of semantics.

Speculation about new negotiations intensified when 15 countries announced in January that they supported the a rapid launch of a round of trade talks and asked WTO Director-General Mike Moore to seek agreement on a broad agenda for such negotiations by next July. Among those making the request were, predictably enough, the European Union, Japan, Korea and Switzerland, but also Argentina, Australia, Brazil, Egypt, South Korea, Mexico and Nicaragua.

In early March, WTO Members agreed to hold informal consultations in the General Council to set the agenda for the WTO's fourth Ministerial Conference in Doha, Qatar, next November, including exploration of potential consensus on the scope of a 'new round'.

While the goal is to reach broad agreement by July, many trade sources predict that the process will continue at least until September. If no consensus on the contents of future trade talks can be found by then, Members are likely to conclude that the launch of a 'round' is not an option rather than risk another Ministerial like Seattle, where a total lack of pre-conference agreement on what new negotiations should cover made for an impossible agenda and ultimately led to the suspension of the meeting with no results at all.

Potential Agenda Ingredients

What are the elements of a possible agenda currently on the table? First, the 'built-in' negotiations mandated in various WTO Agreements, including in particular agriculture and services, as well as a review of the implementation of the Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPs). These will either continue along the lines recently agreed by Members (see separate articles on pages 6 and 7), or be rolled into a larger context if agreement can be found on what that context should be.

Second, developing countries' concerns and difficulties with regard to existing Agreements. In Doha, Ministers will consider the results of the implementation review currently underway at the WTO and provide guidance for further action. Among developing countries top priorities are changes to anti-dumping rules, exemptions from TRIPs and investment disciplines and the removal of restrictions in textiles trade.

Industrial tariff cuts are among the least-opposed other elements that have been proposed for future negotiations, which would then presumably qualify as a 'round'.

More controversial negotiation topics, even among industrialised countries, include the development of new multilateral trade rules on electronic commerce, investment and competition policy. Still more controversial would be the clarification sought by the EU on the relationship between the international trade and environmental regimes. Any discussion on labour standards and trade rules appears unlikely. See next page for more details.

Implementation Demands

Led by India, Pakistan, Malaysia and Egypt, developing countries are seeking to address imbalances inherent in existing WTO Agreements, and many of them insist that this – and not rule-making in new areas or further liberalisation – should be the focus of future work at the WTO. At the very least, they demand meaningful progress in the ongoing implementation review before considering taking on potential new obligations. For these countries, a tangible down payment in this area – agreed before the Doha Ministerial – is a *sine qua non* for the launch of comprehensive new negotiations, which, they believe, would benefit industrialised countries most (see separate article on page 5).

Whether they can be packaged as a 'round' or not, all WTO Members have interests that require negotiations.

Nevertheless, the persistent lack of substantive results in the implementation review may lead developing countries to conclude that, however legitimate their rebalancing demands, sufficient momentum for meeting them will not materialise without broader negotiations that would offer industrialised countries trade-offs in other sectors. During a visit to India in early January, WTO Director-General Mike Moore argued that it was 'naïve' to believe that all of developing countries'

difficulties in implementing the Uruguay Round Agreements, as well as their 'perceived iniquities', could be dealt with in isolation.

This, of course, is the credo of the most powerful advocates for new comprehensive negotiations, the European Union and Japan. While both have so far firmly rejected making major concessions or a 'down payment' ahead of Doha, they have multiplied consultations with developing countries in order to convince them that implementation concerns can only be adequately addressed in the context of broad-based new negotiations now dubbed a 'development round'.

'We don't feel the remotest need to make a down payment,' the European Commission's Peter Carl told the press after a meeting with senior developing country representatives in late March. Instead, he proposed an 'early and clear distinction' on what was 'doable' without modifying existing Agreements before the Doha Ministerial, and what could be addressed as part of wider negotiations. In the same vein, Japan's Deputy Foreign Minister Yoshiji Nogami stressed that implementation demands involving 'modification of agreed instruments' could only be achieved through negotiations. 'How can we change these,' he asked, 'if the countries that are requesting the modification are not willing to participate in the negotiations?'

Among the few concrete examples offered by the EU and Japan of what could be achieved through a 'development round', both have proposed negotiations on anti-dumping disciplines and other trade remedies. In the implementation review, developing countries' many detailed demands for changes in these areas have made no progress at all. The EU acknowledges that it has internal difficulties with addressing anti-dumping practices within the Union, but officials in late January said that there was a 'clear acceptance' that trade policy instruments would have to be reviewed as part of the talks.

Trade Commissioner Lamy has also warned EU countries that they should be ready to make concessions in sensitive areas such as textiles and agriculture (the EU has already offered duty-free market access to products from least-developed countries, see page 18).

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The EU's and Japan's promises of potential gains for developing countries notwithstanding, it would be a challenge to translate the development rhetoric into a meaningful negotiating agenda, particularly as the US remains extremely reticent, if not downright hostile, about opening existing Agreements or commitments to revisions (see below).

Investment and Competition Policy

Europe is also signalling new flexibility on the controversial 'new issues' of investment and competition policy, which it previously insisted had to be an integral part of any future trade negotiations (in addition to the EU and Japan, many industrialised countries support negotiations in these areas, as do a few developing countries such as Chile and Costa Rica). While the EU Council of Ministers has not given its official blessing to the idea, the European Commission is exploring developing countries' responses to a plurilateral approach to investment and competition policy, which would allow them to stay out of the negotiations and unbound by any resulting commitments. Among EU governments, France is strongly opposed to this approach and so far no significant shifts have occurred in developing country positions, although some privately acknowledge that it would be easier to agree on the development of multilateral rules on investment than on competition policy. The US is also likely to continue its opposition to talks on competition policy, largely because they could provide an avenue to address anti-dumping.

Environment

Whether or not a new round is launched, environmental concerns are likely to figure most prominently in the agricultural negotiations. Environmental protection is one of the main 'non-trade concerns' that the EU and its allies argue are legitimate reasons for subsidising agricultural production. The agriculture negotiations may also deal with approval processes for genetically engineered crops and – less likely – animal welfare.

In the context of the broad-based new negotiations it is seeking, the EU wants Members to clarify three environment-related issues: the relationship between WTO rules and those of multilateral environmental agreements, the use of environmental and consumer safety labelling, and the application of the precautionary principle. Modest as this seems, it would be difficult to convince other Members to place these items on the negotiating agenda. For one thing, developing countries are suspicious about linkages between trade and environmental issues, because of their potential for green protectionism and other market access restrictions. Second, the WTO's Committee on Trade and Environment has discussed the first two issues for five years with no result, and the EU's February 2000 paper on the application of the precautionary principle raised serious questions from developing and developed countries alike.

Whether the US would bring in environmental concerns in the context of a new WTO round is currently a subject speculation, but the Bush Administration is widely expected to keep a low profile. At the national level, US green activists worry that mandated environmental reviews of trade agreements may not be carried out. A set of guidelines for such reviews was released in December 2000, and outgoing USTR Charlene Barshefsky said they would be used to evaluate the WTO's ongoing agriculture and services negotiations. But most Republicans oppose environmental reviews – as well as the inclusion of environmental provisions in trade agreements – and the guidelines may not be implemented.

Labour

It appears all but certain that the trade and labour linkage, which contributed to the collapse of the Seattle Ministerial, is off the table in the present context. Unlike the Clinton Administration, the new White House team is opposed to the inclusion of labour provisions in trade agreements in general, and the same trend prevails in Congress. New US Trade Representative Robert Zoellick has categorically ruled out the use of trade sanctions for labour right violations, and the European Union has reaffirmed its opposition as well. Before Seattle, the EU failed to muster support for a joint WTO-ILO standing forum to examine the relationship between trade liberalisation, development and fundamental labour rights. It is presently advocating a separate, independent, forum where representatives of 'relevant intergovernmental organisations', including the WTO and the ILO, could examine labour and other social issues related to international trade. A meeting could be organised prior to the Doha Ministerial, but this may remain a one-off event rather than the launch of a more permanent forum.

US Position Remains Unclear

In general, much will depend on the Bush Administration's international trade priorities. At his Senate confirmation hearing on 30 January, US Trade Representative Robert Zoellick said that the United States should reassert its leadership in shaping a new round of global trade talks, and vowed to move 'expeditiously' on seeking fast-track negotiating authority for President Bush. Mr Zoellick and Pascal Lamy agreed on 9 March that the EU and the US would 'work together' to ensure the launch of a new round this year, and said both were 'committed to try to make it happen.' So far, however, most signs point to a stronger US focus on hemispheric concerns, such as the Free Trade Area of the Americas, as well as bilateral trade deals, and most WTO Members remain unsure of how committed the US really is to progress in the multilateral arena (see also page 15).

In addition, the key aspects of US trade policy are unlikely to change. No new flexibility can be expected with regard to intellectual property rights rules or textiles. And, as during the run-up to the Seattle Ministerial, the United States remains unswerving in its opposition to addressing trade remedy policies at the WTO.

Civil Society: 'Call off the Offensive'

While civil society appears less massively mobilised against the Doha Ministerial than it was in the pre-Seattle days, 21 NGOs have issued a joint statement urging the proponents of a new round to 'call off their offensive'. According to the statement, the EU's proposal, in particular, is 'causing serious divisions and destabilising the multilateral trading system.' The groups oppose the introduction, even on a plurilateral basis, of investment, competition policy or transparency in government procurement into the WTO, where 'negotiations on these issues would be particularly disastrous for people in developing countries, as their possibility for development would be closed.' The signatories also rebuke WTO Director-General Mike Moore for 'actively campaigning for a new round' when most Members oppose it.

However, while urging governments to reject a new round, the statement does not close the door all new negotiations. For instance, the organisations call for changes in the TRIPs, TRIMs and Agriculture Agreements, including the removal of the TRIPs Agreement from the WTO altogether. This, they say, 'should be the focus of the WTO talks in the next years.'

Arm Twisting Continues on Where and How to Address Implementation Issues

When the WTO General Council adopted a decision on implementation-related issues and concerns on 15 December 2000, most developing country trade officials said that the only positive thing in it was the last paragraph, which provided for the continuation of the implementation review until the fourth WTO Ministerial, now scheduled from 9-13 November in Doha, Qatar.

'Implementation concerns' cover a large number of problems that developing countries consider are due to the imbalances in existing WTO Agreements, which they see as severely biased in favour of developed countries. For instance, they seek making mandatory the 'best endeavour' provisions in developing countries' favour, which they claim have been either ignored or only partially implemented. Other demands include new exemptions and extensions from compliance deadlines for some of the key Agreements.

They argue that they took on burdensome new commitments during the Uruguay Round – in agricultural subsidy use, intellectual property rights protection and removing investment restrictions designed to protect local industry, for instance – on the understanding that they would reap significant benefits from trade liberalisation in the textiles and agricultural sectors. Not only have those benefits have failed to materialise, but industrialised countries' agricultural subsidies have in fact grown considerably and trade in the most commercially-meaningful textile products remains restricted. Meanwhile, they assert, developing countries' national development efforts are jeopardised due to obligations contained in WTO Agreements.

Most developing countries still condition the launch of a new round of trade negotiations on resolving implementation concerns.

December Decision Called 'Lower than Lowest Expectations'

The decision adopted in December was even weaker than the draft decision released in late November and blasted by developing countries as dismissive of their concerns. While the draft committed Members to do very little more than 'consider', 'explore' or 'examine with utmost care' some of the various demands on the table, it at least contained sections on such key areas as anti-dumping and textiles (Year 4 No.9, page 3).

These sections were dropped altogether, and others were considerably cut and weakened further in the final version of the three-page decision, which India's Ambassador Srinivasan Narayanan called 'lower than my lowest expectations'. The concrete action promised by the document boils down to the following:

- *Agriculture*: Members shall be more transparent in the administration of tariff rate quotas and the notification guidelines and procedures on quota allotment. In addition, the Committee on Agriculture is to 'examine all possible means to improve the effectiveness of the implementation of the Decision on Measures Concerning the Possible Negative Effects of the Reform Programme on Least-developed and Net Food-importing Developing Countries.'
- *Sanitary/phytosanitary standards and technical barriers to trade*: standard-setting organisations are urged to ensure effective developing country participation.
- *Customs valuation*: the Customs Valuation Committee is encouraged to continue the examination of individual developing country requests for extending compliance deadlines.
- *Rules of origin*: expediting work on the harmonisation of rules of origin, to be completed by end-2001 at the latest.

- *Subsidies and countervailing measures*: the inclusion of Honduras in the list of countries that are allowed to subsidise their industrial goods exports, i.e. countries with a per capita GNP of less than US\$1000. In addition, the Committee 'shall examine as an important part of its work' the possibility to establish export competitiveness on the basis of a period longer than two years, as well as the 'issues of aggregate and generalised rates of remission of import duties and of the definition of "inputs consumed in the production process".'

Renewed Demands Meet with 'Deafening Silence'

To restart the implementation review, a new list of outstanding developing country demands was circulated in February. Unlike the December decision, this document included all proposals for changes in existing Agreements and their implementation, including intellectual property rights, anti-dumping and textiles.

With the subject matter thus outlined anew, WTO Members met in an informal General Council session on 16 March to consider the way forward. It quickly transpired that it would take more than reframing the scope of the review to spark concrete action on implementation issues. General Council Chair Stuart Harbinson reported that informal consultations had yielded little hope for 'immediate progress' regarding demands on agricultural subsidies (see page 7), more lenient application of sanitary and

phytosanitary standards or TRIPs obligations on patenting.

At the March special session, industrialised country Members listened impassively – not one of them spoke – while numerous developing country delegates stressed the importance they attached to achieving concrete results. Among their most-frequently voiced demands were extending the compliance deadline on intellectual property rules, with particular emphasis on pharmaceutical and plant patenting, and the need to reform anti-dumping practices and restrictions on textiles trade.

Warning: No New Round without Prior Concessions

In view of the insignificant progress thus far, speculation inevitably turns to the possibility of dealing with these concerns in the context of wider negotiations that would offer incentives for trade-offs (see page 3).

Despite intense wooing from the European Union and Japan, most developing countries remain opposed to broad-based new negotiations (South Africa, Costa Rica, Chile and Singapore are notable exceptions). At the March meeting, key players such as India, Egypt, Pakistan and Malaysia warned that they would block all attempts to get a 'round' off the ground in Doha unless outstanding implementation concerns were resolved before setting the Ministerial agenda.

At this stage, industrialised countries are clearly unwilling to enter into substantive debate. Although some progress on the least-controversial issues could occur in the next few weeks, major concessions seem unlikely before July, when WTO Members are expected to decide whether to pursue the launch of new negotiations. The General Council's next formal special session on implementation is scheduled for 27 April.

Developing Countries Gain Ground in Setting Guidelines for Services Negotiations

On 28 March, WTO Members adopted a set of draft guidelines for the continuation of the mandated negotiations in services (S/L/93). Some Members and observers acknowledged that the guidelines provided little substantive advancement over the text of the GATS itself, however they felt that the adoption of the guidelines did send a signal that WTO Members were ready to move ahead on talks despite the absence of a new trade round.

Reconciling the Interests of Developed and Developing Countries

Numerous informal meetings and four successive sets of draft negotiating guidelines and procedures proved necessary to bridge the gap of Members' divergent interests on services – particularly developing countries' right to special and differential treatment.

A first draft, issued in January 2001, contained several key elements that were included in a proposal submitted in December 2000 by the G-24, a coalition of developing countries including Argentina, Brazil, India, Pakistan and Thailand. The text contained elements such as the establishment of mechanisms for the effective implementation of GATS Article IV, which aims to increase developing countries' participation in global services trade. As proposed by the G-24, the document also stated that 'there shall be appropriate flexibility for individual developing country Members' and established the 'request and offer' approach as the principal method of negotiating specific commitments (i.e. countries seeking liberalisation make a request and other countries counter with an offer).

At an informal meeting on 7 February, developed countries, and the US in particular, called the first draft unbalanced because it focused too much on developing countries' needs. Members asked that a second draft be issued, taking into account the comments in the meeting. The second draft was subsequently issued and strongly rejected by some 70 developing country delegations. The African Group and CARICOM joined in the opposition to this draft, voiced initially by India on behalf of the G-24, because the developmental dimensions present in the first draft, such as the mention of flexibility for developing countries and provisions for special treatment for least-developed countries, had been dropped from the new text, while issues traditionally advocated by industrialised countries, such as the requirement of a standstill during negotiations or the provision on technical review remained in the draft. Since no agreement could be reached, the meeting was adjourned and Members requested the Chair to undertake further consultations. Meetings on the negotiating guidelines resumed on 15 March. The G-24, the African Group, and CARICOM requested that development concerns present in the first draft be sufficiently addressed in any new proposal.

A third draft, released on 16 March, reintroduced certain references to the development concerns present in the first draft. It also contained some bracketed elements (on which further guidance from the Council on Trade in Services was considered necessary) on issues such as flexibility for developing countries in relation to negotiations on most-favoured-nation (MFN) exemptions.

Finally, a fourth draft was tabled and discussed on 23 March. Some development elements bracketed in the third version were integrated in the new text, which led a developing country trade source to underscore that this latest set of guidelines, while drawing large consensus among Members, was even closer to developing country concerns than the first draft.

In particular, CARICOM and the African Group pushed for a reference to the needs of smaller economies and service suppliers, which raised concerns on how such terms should be defined. This was included in the draft.

Disagreement also persisted concerning the sequencing between the conclusion of rule-making and the start of negotiations on specific commitments, as well as on when criteria for credit on autonomous liberalisation should be agreed. While Members set a firm deadline for completion of negotiations on safeguards (15 March 2002), they were more divided on other issues and agreed to 'aim to complete' negotiations on subsidies, and disciplines on domestic regulations and government procurement.

Some key points of the guidelines adopted on 28 March

Objectives and Principles

- A recognition of the 'right of Members to regulate, and to introduce new regulations, on the supply of services';
- An acknowledgement that negotiations 'shall aim at increased participation of developing countries in trade in services' and that there shall be 'appropriate flexibility' for individual developing countries with special priority to least-developed country Members;
- A reference to the size of economies and to small and medium service providers;
- Stronger language on developing countries' demand that negotiations 'shall respect the existing structure and principles of the GATS, including the right to specify sectors in which commitments will be undertaken and the four modes of supply'; and
- Dropping the requirement for a stand-still, advocated by some developed countries, but opposed by many developing countries, such as India.

Scope

- No *a priori* exclusion of any service sector or mode of supply, but a specification that 'special attention shall be given to sectors and modes of supply of export interest to developing countries';
- 'appropriate flexibility' for developing countries when negotiating MFN exemptions. According to a developing country trade source, this requirement is motivated by the fact that most developing countries have few, if any such exemptions, whereas industrialised countries such as the US, the EU and Canada 'are champions of MFN exemptions';
- On sequencing between rulemaking and the start of negotiations on specific commitments, agreement to conclude talks on safeguards by 15 March 2002, and 'best endeavor' language for completion of talks on subsidies, and disciplines on domestic regulations and government procurement; and
- No reference to the Annex on Air Transport.

Modalities and Procedures

- The starting point for the negotiation 'shall be the current schedules, without prejudice to the content of the request';
- The main method of negotiations shall be the request-offer approach, as wished by developing countries in contrast to the 'cluster' or 'formula' approaches advocated by the US and the EU in an effort to speed up the pace of liberalisation; and
- A best endeavour clause to agree on criteria for credits on autonomous liberalisation prior to negotiations on specific commitments.

African Countries Make a Flurry of Proposals as Agriculture Negotiations Enter Second Phase

The first phase of the WTO's agricultural negotiations, mandated in the Agreement on Agriculture (AoA) independently of any trade 'round', drew to a close 27 March. During the second phase, scheduled to start in May, the Committee on Agriculture will move to more technical work before starting negotiations on market access and other concessions in phase three.

Multifunctionality and other Non-trade Concerns

In February 2001, Japan submitted its long-awaited proposal on the broad goals of the built-in negotiations (G/AG/NG/W/91). As expected, the paper relied heavily on the concept of 'multifunctionality', which the EU, Japan, Korea, Norway and Switzerland use to cover their 'non-trade concerns', such as environmental protection, rural development and employment, cultural heritage, food security and food safety. Agriculture's unique contribution to all of these areas, the multifunctionality advocates argue, justifies levels of government support not allowed for other sectors of goods, which fall under the General Agreement on Tariffs and Trade (for a more thorough discussion on non-trade concerns and multifunctionality, see Bridges Year 4 No.9, page 7).

In addition to the more general objections to the multifunctionality argument, most WTO Members – and the Cairns Group of agricultural exporters in particular – criticised Japan's suggestion that countries should be allowed to use import restrictions and safeguards to protect their agricultural sectors against sudden import surges.

The European Union's comprehensive proposal (G/AG/NG/W/91), which reiterated positions previously put forward in individual papers, was better received, particularly as the EU specified that measures to address non-trade concerns should be targeted, transparent and not contribute to depressing world agricultural prices.

India offered a developing country perspective to the treatment of non-trade concerns (G/AG/NG/W/102). It proposed the creation of a 'food security box', which would exempt from AoA disciplines measures designed by developing countries to guarantee adequate food security. While the Indian proposal received favourable comment from many developing countries, which also emphasised food security as a core objective, some other Members argued against a two-tiered system of rights and obligations. Such an approach, they said, ran counter to WTO logic, which advocates a single set of rules with derogations permitted for qualified developing countries.

A joint proposal by the African Group (G/AG/NG/W/142) singled out food security, sustainable rural development and poverty alleviation as the central non-trade concerns to kept in mind when negotiating agricultural reform. It also emphasised the importance of special and differential treatment for developing countries, and urged more attention to be paid on the special problems encountered by least-developed and net food-importing developing countries.

In addition to the joint paper, individual proposals from seven African countries (Namibia, Senegal, Kenya, the Democratic Republic of Congo, Nigeria, Egypt, and Morocco) were discussed at the March special session (ten of the 44 proposals submitted to the negotiation were tabled exclusively and independently by African countries). These (and other proposals) are posted at the WTO's agriculture website http://www.wto.org/english/tratop_e/agric_e/agric_e.htm

At an earlier session, Mauritius (G/AG/NG/W/96) and small island developing states (G/AG/NG/W/97) argued that preferential market access schemes for vulnerable developing countries should be preserved, while CARICOM proposed that such arrangements only be used as transitional support to the overall development of a developing country (G/AG/NG/W/97).

State-trading Enterprises and Export Credits

In March, Mercosur (Argentina, Brazil, Paraguay and Uruguay) called for stricter disciplines on state-trading enterprises (STEs), which the trade block said distorted trade in favour of domestic producers through monopoly import/export rights. While the United States and EU were in favour of the proposal, Canada,

Australia and New Zealand – each has STE trade management schemes – argued that the use of STEs was no different from the distorting effects of cross-subsidisation common in private trading practices. The main issue, they said, should be the trade effects of cross-subsidisation.

Together with India, Malaysia, Costa Rica, Guatemala and Chile, Mercosur also submitted a proposal on export credits (G/AG/NG/W/50). The group said that export credit disciplines should be reinstated in the new agreement, because the

current Article 10.2 – which requires Members to develop internationally agreed disciplines on a export credits – had failed to curb their use. (Including export credits into future support reduction negotiations is also a major goal of the EU.) The US – the largest user of export credit schemes – reiterated its position that export credit disciplines were under negotiation at the Organisation for Economic Co-operation and Development and should continue in that forum.

Phase Two Work Plan Approved

The phase two work plan adopted on 27 March foresees three formal negotiating sessions (in September 2001, December 2001 and February 2002) and a stock-taking exercise in March 2002. Three informal special sessions will be held in May and July 2001 and in February 2002.

During phase two, WTO Members are to submit and discuss more detailed proposals on the following topics:

- tariff quota administration and tariffs reductions,
- amber box subsidies,
- export subsidies,
- export credits and state-trading enterprises,
- export restrictions, and
- food security, food safety and rural development.

This list is indicative rather than exhaustive. While Members can use it to guide their preparations for subsequent meetings, they can also add other areas. Norway, for instance, has indicated that it will seek to include 'the environment' in future sessions.

The work plan also specifies that special and differential treatment will be an integral part of all elements of the negotiations.

The first meeting of phase two – an informal special session of the Committee on Agriculture – will take place on 21-23 May. It will be chaired by Thailand's Ambassador Apiradi Tantraporn.

Dispute Settlement Corner

US Challenges Brazil's Access to Drugs Regime

Developing countries reacted with outrage when the US announced in May 2000 that it would challenge Brazil's and Argentina's patent legislation at the WTO. Their main point was that Members had not addressed a key developing country implementation demand, i.e. the extension of the transition period for full compliance with the Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPs) beyond 1 January 2000.¹

In spite of developing country criticism, the case against the patent provisions of Brazil's industrial property law proceeded to the panel stage on 1 February. The US raised two main points: a 'local working clause' in the law's Article 68, which requires the patented product either to be manufactured in Brazil, or the patented production procedure to be made available to Brazilian manufacturers. If the patent holder does not apply the local working requirement, Article 68 allows parallel importing, i.e. importers may buy the product from other sources than the Brazilian patent holder. Although Article 68 does not specifically refer to drugs, its provisions are mainly used by the pharmaceutical industry and importers of medicines.

The US argues that Article 68 provisions violate TRIPs Article 27.1 on non-discrimination in protecting patent rights, as well as Article 28.1 on patent holders' exclusive marketing rights. Brazil not only maintains that the local working, compulsory licensing and parallel importing provisions are compatible with the TRIPs Agreement, but is considering a counterchallenge claiming that US patent legislation contains comparable local working provisions.

Separately, the US-based multinational Merck has threatened to take the state-owned Far-Maguinhos laboratory to court in Brazil if it does not stop importing a cheap generic form of Merck's Stockrin AIDS drug from India. The laboratory says it only uses the generic Efavirez for research purposes, which is permitted by Brazilian law. See also related article on page 17.

Argentina Next?

At the time of this writing, two rounds of consultations had been held, apparently with no results, between the US and Argentina with regard to similar alleged violations of the TRIPs Agreement, but the US had not yet requested the establishment of a panel. Among other complaints, the United States considers that Argentine patent laws fail to protect against unfair commercial use of undisclosed test or other data; improperly exclude certain subject matter, including micro-organisms, from patentability; deny certain exclusive rights for patents; fail to provide certain safeguards for the granting of compulsory licenses, including timing and justification safeguards for compulsory licenses granted on the basis of inadequate working; and impermissibly limit the exclusive rights conferred by transitional patents, and so deny the opportunity for patentees to amend pending applications in order to claim certain enhanced protection provided by the TRIPs Agreement (WT/DS196/1).

¹ The TRIPs Agreement contains no provisions for extending the transition periods. While the demand has been made in a general way in the implementation review, no Member has requested more time to phase out specific TRIPs-incompatible measures.

Export Subsidy Row Escalates between Brazil and Canada

Brazil and Canada have initiated yet another round of WTO dispute settlement proceedings in their battle over aircraft export subsidies.

After a mutual challenge over compliance with previous WTO rulings, Brazil's export financing programme Proex was still deemed to provide a prohibited export subsidy last July. On 12 December 2000, the Dispute Settlement Body authorised Canada to start trade sanctions worth US\$225 million to compensate for economic losses caused by Brazil's non-compliance with WTO rules.

Instead of imposing retaliatory duties on Brazilian exports, however, Canada offered a loan and interest support package worth more than US\$1 billion to Bombardier in order to match Brazil's export subsidies to Embraer, which was competing with the Canadian manufacturer for a contract of 75 regional aircraft to United Airlines affiliate Air Wisconsin. Canadian authorities said it exactly mirrored Brazil's current Proex support for Embraer. Bombardier eventually won the Air Wisconsin contract.

Brazil claims that Proex financing now complies with the Agreement on Subsidies and Countervailing Measures (SCM Agreement), particularly as the government has adopted the OECD Commerce Interest Reference Rate as a benchmark for loans to Embraer's clients. According to Canada, Proex still violates the WTO's export subsidies disciplines. On 16 February 2001, Canada obtained the establishment of yet another panel on the matter.

Brazil struck back on 12 March by requesting a dispute settlement panel on a range of Canadian export support measures. Claiming that Embraer did not receive the kinds of loan support now offered by Canada to Bombardier, Brazilian trade negotiator José Graça Lima called the deal a 'retaliation made with [Canada's] own hands'. In addition to the loans offered to Bombardier for the Air Wisconsin sale, Brazil questioned Canada's wider financing, loan guarantee and interest rate support schemes, which it said were prohibited under the SCM Agreement (WT/DS222/2).

US-Philippines TRIMs Case to Proceed After All

On 16 March, the United States notified the WTO Secretariat that it was seeking the nomination of panelists in its dispute regarding the Philippines' investment restrictions in the automotive sector. The US obtained the establishment of a dispute settlement panel on 17 November, but agreed to hold off the appointment of the three panelists while bilateral consultations continued between the parties (Bridges Year 4 No.9, page 5).

At issue are local content and import-export balance requirements that the US claims are inconsistent with the Agreement on Trade-related Investment Measures (TRIMs), which entered into force for developing countries on 1 January 2000. The Philippines has applied for a five-year extension of the TRIMs compliance deadline for measures under its Motor Vehicle Development Programme. While the WTO's Council on Trade in Goods is close to agreement on a four-year extension for most such requests (see page 10), in bilateral consultations the US has pressed the Philippines to agree to a shorter extension, as well as to accelerated dispute settlement proceedings. Both sides said they would continue negotiating in spite of the panel's constitution.

Dispute Settlement Corner

EU and US Agree on Banana Regime Reform

On 11 April, after more than two years of negotiations, the European Commission and the United States reached a bilateral agreement on how to reform the EU's banana import regime. The deal, which still needs to be approved by EU member states and the European Parliament, paves the way for lifting US trade sanctions worth US\$191 million. The list of EU exports affected by sanctions was about to be changed under US 'carousel' legislation.

Instead of the widely-contested 'first-come, first-served' licensing system that was to go into effect on 1 July, the EU will grant licenses to 'primary operators' based on trade flows between 1994-1996, and add 100,000 tonnes to the Latin American banana quota. The current 'other' quota will be reduced by 100,000 tonnes and exclusively reserved for duty-free bananas from ACP countries, most of which are former European colonies in Africa, the Caribbean and the Pacific. While the 1994-1996 historical reference period is more favourable to Latin American producers and the multinationals that distribute them than the current quotas or the 'first-come, first-served' system, most of them – and Chiquita International in particular – had sought a quota allocation based on trade flows before 1993, when the EU adopted a Union-wide import regime that gave privileged access to ACP bananas. At press time it was not clear whether Chiquita would withdraw the lawsuit it filed in January in the European Court of Justice, seeking US\$525 million in damages caused by the current import regime.

The US agreed to a 17 percent 'newcomer' import license category, a somewhat higher figure than it sought in an effort to guarantee that established operators capture most of the available licenses.

The newly-agreed regime, scheduled to take effect on 1 July 2001, is due to be converted to a tariff-only system in 2006, when import quotas will be abolished and differential tariffs established for ACP and other bananas. France and Spain still oppose a tariff-only system, and EU members are divided on the level of eventual tariff differentiation, which would need to be negotiated at the WTO. The Commission has proposed a €275/tonne tariff preference for ACP and European bananas instead of the current €75/tonne. ACP banana producers contend a €275/tonne preference would not suffice to guarantee market access, while the US and Latin American countries find the proposed difference too high.

The 750,000 tonne exclusive duty-free ACP quota needs a waiver under GATT Article XIII (prohibition of discrimination in quota allocation), and the US has agreed to support the waiver request. If the other parties involved in the dispute are satisfied with the proposed new regime, consideration of a GATT Article I waiver for the EU's Partnership Agreement with ACP countries can also finally start at the Council for Trade in Goods (see page 10).

At press time, Colombia, Costa Rica, Guatemala, Honduras and Panama were expected to accept to the US-EU agreement, while Ecuador – the only party amenable to the 'first-come, first-served' option, provided there was a quick transition to a tariff-only regime – was studying its implications. Agreement remained an option, but so did a new WTO compliance review (during which consideration of the two waivers would be blocked), as did activation of WTO-authorised sanctions in the intellectual property rights sector (Bridges Year 4 No.2, page 7).

Swordfish Dispute Settled between Chile and the EU

Chile and the European Union dropped their mutual legal challenges in the swordfish dispute after bilateral negotiations produced a settlement in late January. The EU had requested a WTO panel on Article 165 of Chile's Fisheries Law, which denies port access for vessels carrying swordfish caught in high seas off the Chilean coast. Chile claimed that the measure was necessary to preserve dwindling swordfish stocks and took the dispute to an arbitral tribunal under the UN Law of the Sea Convention. The dispute had the potential for conflict between the trade and environment regimes, as the two bodies might have reached different conclusions (Bridges Year 4 No.8, page 5).

Both proceedings were called off when the two parties agreed to a three-point plan to manage the conflict:

- Resumed meetings within the Bilateral Scientific and Technical Commission on swordfish stocks in the South-East Pacific;
- Access for four EU vessels to Chilean ports for landing and transshipping swordfish. These vessels are supposed to collaborate with Chilean boats in scientific data collection; and
- A commitment to develop a multilateral framework for the conservation and management of swordfish in the South-East Pacific by the year 2002.

The next issue of Bridges will provide more details on the solution reached between the two parties. For background, see article by Manuel Ruiz in Bridges Year 4 No.6, page 11.

Dispute Settlement Briefs

- The panel report on the United States' implementation of WTO findings in the shrimp-turtle dispute has been delayed further, reportedly due to serious disagreement between the three panelists (Michael Cartland, GB, Carlos Cozende, Brazil and Kilian Delbrück, Germany), who also heard the original complaint. Civil society is watching the case with particular interest, as the US attached a 20-page *amicus* brief to its submission and urged the panel to exercise its discretion to take account of the brief – written by 11 citizens' organisations in Asia, Africa and Latin and North America – not only as part of the US submission but also as a stand-alone friend-of-the court brief.

The panelists announced on 13 February that 'administrative constraints' would delay their report until the second half March. It is now expected in late May at the earliest. The panel was established last October at the request of Malaysia, which is seeking the removal of the US import ban on shrimp caught without turtle excluder devices (Bridges Year 4 No.8, page 6).

- The compliance panel established 20 December 2000 on the revised US foreign sales corporations tax scheme will not complete its work until July (Bridges Year 4 No.9, page 6).
- The panel established on 19 June 2000 to rule on Pakistan's complaint about a US safeguard on imports of combed cotton yarn is likely to deliver its report in the end of April (Bridges Year 4 No.3, page 6).

Goods Council Closer to TRIMs Compromise

At the 14 March 2001 session of the WTO's Council for Trade in Goods (CTG), Members seemed to have reached a general agreement that the 'two-plus-two' formula introduced at the Council's last meeting in November would serve as a framework for reviewing the submissions of ten developing countries and economies in transition requesting an extension of their transition periods for the Agreement on Trade-Related Investment Measures (TRIMs).

Under the TRIMs Agreement, developing countries were required to phase out trade restrictions on foreign investment, such as local content requirements, by 1 January 2000. The 'two-plus-two' formula would extend the transition period until the end of this year, and grant an additional two years for requesting Members, who have made good faith efforts to comply and submitted a binding phase-out plan for their remaining TRIMs-inconsistent measures.

At the November meeting, developing countries objected to the non-renewable nature of the second extension, as well as US efforts to link granting it to the requesting Member's agreeing to accelerated dispute settlement proceedings once the second period was over on 1 January 2004. They also sought multilateral approval for all requests rather than the case-by-case scrutiny in parallel bilateral consultations that the US and the EU have insisted on (see Bridges Year 4 No.9, page 2).

While these differences are not resolved, developed and developing countries seemed closer to compromise at the March CTG session. Although no final decisions on extensions were made, the US agreed that Argentina and Mexico could be included in the two-plus-two framework, as could Pakistan, Romania, Colombia and Chile, on condition that they provide more information. Before further consideration of Malaysia's request, the US said it needed a clear phase-out commitment. For an update on the US-Philippines dispute on investment restrictions see page 8.

The US and the EU also suggested that Thailand and Egypt seek waivers for their TRIMs measures under Article IX of the Marrakesh Agreement Establishing the WTO rather than extensions of the TRIMs transition period. The two countries submitted their extension requests after the 1 January 2000 deadline, and are thus already technically violating their TRIMs obligations. Trade sources said such a waiver would be harder to obtain than an extension under TRIMs Article 5.3, and developing countries requested greater flexibility for Members who were not able to notify their TRIMs measures or to request extensions in time.

Cotonou Agreement Waiver Still Stalled over Bananas

As at several recent CTG meetings, Central and Latin American banana producers blocked consideration of the EU's request for a waiver for its new Partnership Agreement with African, Caribbean and Pacific (ACP) countries. Ecuador, Costa Rica, Guatemala and Paraguay refused to start deliberations on the issue because the EU still had not submitted implementing legislation for its proposed banana import regime, and information on the waiver request was thus insufficient (see related article on page 9).

In the absence of a waiver, ACP countries' trade preferences – which the EU continues to grant – are technically open to dispute settlement challenges at the WTO. Should that happen, the EU is likely to argue that the case can only go forward once the Goods Council has delivered its verdict. The Council will meet again on 18 April under its new Chair, Ambassador Istvan Major of Hungary.

WTO News in Brief

- At its 2-6 April session, the Council for Trade-related Aspects of Intellectual Property Rights (TRIPs) agreed to hold a special Council session on 17 June to discuss the impact of intellectual property rights and pharmaceutical patents on developing countries' access to medicines. The issue has become the focus of international attention in the wake of a lawsuit brought by multinational pharmaceutical companies against the South African government (see page 17), as well as the US WTO challenge of Brazil's patent law (page 8).

In related news, the Secretariats of the WTO and the World Health Organisation convened a workshop on how to improve poor countries' access to essential drugs from 8-11 April in Høsbjør, Norway. Experts from developed and developing countries were to look in particular at differential pricing and other financing mechanisms, keeping in mind the TRIPs framework.

The TRIPs Council also dealt with geographical indications, technology transfer and related matters, as well as the reviews of the TRIPs Agreement and Article 27.3(b) on plant variety protection. The Council meeting and the expert workshop on differential pricing of essential drugs will be reported on more fully in the next issue of Bridges

- At the 30 March meeting of the Committee on Technical Barriers to Trade, developing countries reacted strongly against draft Belgian legislation that would create a social label. According to the notification of the planned measure (G/TBT/N/BEL/2), the label could be affixed to products that 'meet the criteria and standards recognised in particular by the International Labour Organisation'. It should assist consumers to 'make a fully informed choice of products or services supplied to them on the basis of respect for human persons', as well as provide an 'incentive to developing countries to develop socially responsible enterprises.' Although use of the label would be voluntary, developing countries called the initiative 'disturbing' and a burden that would restrict their trade. Egypt said the relationship between labour standards and trade did not belong to the WTO, and Pakistan requested Belgium to withdraw the legislation.
- The WTO's fourth Ministerial Conference will take place in Doha, Qatar, from 9-13 November. According to the WTO Secretariat, an NGO Centre will be made available in Doha for civil society representatives, with ample room for press conferences and meetings. The exhibition hall, where the NGO Centre will be housed, is a two-minute walk away from the Convention Centre where the Ministerial Conference will be held. Regarding accommodation, Qatar will provide 4,400 rooms for all participants, including delegates, observers, press and NGOs. While the number of rooms is expected to be sufficient, a restriction on the number of participants may apply. The formal application process for NGOs who want to attend the Ministerial Conference will begin in May.

The Secretariat has also established an interdivisional task force on WTO relations with NGOs. The task force aims to develop ideas and strategies on how to interact with NGOs, organise workshops and symposia on relevant issues, and improve interaction through the WTO website. The group will be comprised of approximately 12 representatives from the WTO's key divisions and will report to the Director-General and various structures of management as well as play a coordinating role for NGO-related activities within the WTO Secretariat.

The WTO and PPMs: Time to Drop a Taboo

By Aaron Cosbey

Let us put to bed, for once and for all, the false distinction between product standards and standards based on process and production methods (PPMs).¹ This distinction is neither based in GATT text and negotiating history, nor useful in application.

The traditional interpretation of GATT law holds that distinguishing among products at the border on the basis of PPMs is a violation of the GATT principles of non-discrimination.² This is based on a reading of the national treatment and most-favoured nation clauses (GATT Arts. III and I, respectively) that defines “like” products as those that are distinguishable by their characteristics as products. Some recent dispute panels have used the criterion of commercial substitutability to determine which products are “like,” and therefore subject to identical treatment at the border of the importer. But in neither case is there scope for products produced differently to be considered “unlike,” and thus treated differently.

This interpretation has caused no small amount of concern in the environmental community, for whom how a product is produced is one of the central aspects of effective environmental management.³ In fact, the “PPMs issue” is at the heart of the long-running trade and environment debates, and its satisfaction would contribute powerfully to making the objectives of environmental integrity and increased welfare through trade mutually supportive.

It has been convincingly argued that the distinction between PPM-based standards and product-based standards is not based in GATT text or in GATT negotiating history.⁴ This paper takes that proposition as a given, and goes on to argue that the distinction is neither warranted nor useful in practice. It concludes with some recommendations for helping exporters, particularly in developing countries, adapt to both product- and PPM-based new standards.

Unpacking the Objections to PPMs

Aside from the issue of PPM-based standards’ GATT-legality, those who object to them offer three main arguments. First, such standards provide unacceptable scope for protectionist measures by those setting them. Second, enforcing them is difficult in practice. Third, they infringe on sovereignty by exporting the values of the standard-setter to exporting countries. Because of these factors, the argument goes, PPM-based standards impose unacceptable costs on exporters, particularly in developing countries. These considerations are dealt with in turn below.

It is quite true that allowing countries to distinguish at the border among goods based on how they were produced opens up a whole new field of possibilities in which to exercise protectionist tendencies. Canada might, for example, support its domestic automobile industry by decreeing that all imported automobiles must be manufactured by workers who are fans of ice hockey, Canada’s de facto national game.

But it is also true that we have the tools to address such problems. In fact they are currently in use to protect exporters from exactly the same sort of behaviour in the context of product-based standards. There is no fundamental difference between a WTO panel trying to distinguish between protectionism and legitimate

protection of health and environment in the context of a product standard – say, a ban on asbestos in building materials – and in the context of a PPM-based standard. The task is the same, and the tools at hand – for example, the chapeau to GATT’s Article XX – are the same.⁵

Those tools in fact help to cool off a long-standing hot-spot of trade and environment disputes: the question of unilateral measures for environmental protection. If we accept that the rules governing product-based measures are already working to weed out protectionism, and are capable of doing the same in the context of PPM-based measures, we have made the question of unilateral measures meaningless. Any PPM-based measure is propounded within the framework of multilaterally-agreed rules, and thus is not in any meaningful sense unilateral at all.

So while it must be conceded that the scope for protectionism may be increased by allowing countries to use PPM-based distinctions at the border, it should not be conceded that the existing tools are not up to the job, or that the task is fundamentally different in the context of PPM-based standards than in the context of product standards.

The argument that enforcing PPM-based standards is impractical seems to present a real-world reason for distinguishing them from product-based standards. The latter, it is argued, can be checked at the border for compliance. The former cannot; compliance or non-compliance has no physical effect on the final product.

This argument may have held water when the GATT was negotiated. It even had merit when negotiators of the Agreement on Technical Barriers to Trade (TBT) used it in the Tokyo Round. But it has lost all relevance in today’s world. Third-party certifications and testing are now a basic fact of life for many businesses, with multinational specialized standards firms ready to service the growing demands. And the reality is that a huge number of PPM-based standards are already in effect, albeit imposed by buyer firms rather than governments. ISO 14001, which in many sectors is becoming a prerequisite for international trade, is clearly a PPM-based environmental management standard. Governments, too, propound PPM-based standards. Many sanitary and phytosanitary (SPS) standards are PPM-based, as are rules for intellectual property protection. None of the practical difficulties predicted for PPM-based standards has proved insurmountable in these contexts.

The notion that PPM-based standards constitute an infringement on sovereignty is on its face reasonable: they force producers in developing countries to produce to the standards of the importers, which may be inappropriate for the country of manufacture. But on closer examination this objection does not hold water. First, it should be noted that there is no difference in effect between such standards and product standards. Both mandate a change in the production process, both presumably imply increases in production costs – at least in the short run. And both constitute a new condition of entry into the market of the standard-setter. So the effects of product-based standards – which it is agreed do not necessarily violate the principle of non-discrimination – are no different than those of PPM-based standards.

Continued on page 12

The WTO and PPMs, continued from page 11

But more fundamentally, it seems strange to contend that an importer specifying its preferences, either with regard to the final product or with regard to the method of production, is infringing on sovereignty. Absent protectionist motives, how is such a specification any different than the countless buyers' specifications with which exporters are routinely faced, many of which detail the PPMs to be used? It is not. If the producer wishes to ignore these specifications, there is no force that can change his or her mind, and thus no infringement on sovereign rights. Neither is there an export of values as such. In fact, the real forceful export of values would take place were a country forced to import goods produced in ways of which it did not approve – the situation under the traditional interpretation of GATT law.

The one force that might change an exporter's mind is the market; if the production process does not change, the buyer will go elsewhere. As in response to any sort of market change due to consumer preferences, an exporter facing PPM-based standards will either adapt or perish.

Impacts on Less-developed Countries

This brings us to the fourth issue – the effects of such standards on developing country exporters. If the proper framework for discussion were trade and environment, the dictum “adapt or perish” would be the end of the story. But, as has been forcefully argued in the past, the proper framework for discussion is in fact trade and sustainable development.⁶ We therefore need to be concerned if the preferences of the affluent importer adversely affect the lives and livelihoods of exporters in less well-off nations.

Whether the prospect is a ban on azo dyes in textiles, or on old growth forest products – that is, whether it is a product-based measure or a PPM-based measure – the decision to enact new standards needs to be taken responsibly, and in line with the well-established objects and purposes of WTO special and differential treatment for developing countries. In a break with such well-established tradition, however, such treatment should be based in hard law requirements. The soft-law commitments to special and differential treatment as now specified are demonstrably more honoured in their breach than in their observance.⁷

Some of the guidelines that any standard-setter should have to observe include:⁸

- Transparency in the process of standard-setting, and the opportunity to comment on draft measures.
- Adequate lead-time in announcing new standards to allow for adaptation.
- Where appropriate, efforts to work toward international agreements on standards.
- Allowance for functional equivalence in meeting standards (i.e., not specifying particular technologies or production methods, but rather outcomes).
- Where requested by exporters, assistance in adapting, such as training and technology transfer;
- establishment of centres for testing and certification; and
- financial assistance for one-time adjustment costs.

The costs of the latter measures could be borne by the standard-setter, or by some cost-sharing arrangement between that country and a special WTO fund for adaptation. The practical benefit of forcing standard-setters to help in the adjustment to their standards – respect for the principles of sustainable development aside – is that it works to abolish the separation between costs and benefits

now inherent in the system. In the context of domestic standards, governments are forced to balance the costs and benefits of regulation at some level, since both are incurred nationally. In the international context these costs and benefits are separated so that there is little incentive for countries to act reasonably in demanding improved producer performance. This can lead to extremely costly standards that have only slight benefits.⁹

In summary, there is no practical difference between standards based on product characteristics, and standards based on process and production methods. Both offer the same challenges, and for both tools exist to address the problems that can arise in their use. It is time that the trade and environment debates moved beyond this false distinction to address issues of real import, such as the need to address the needs and special difficulties faced by developing countries in the face of the existing system of multilateral trade rules. Doing so will help to ensure that those rules contribute to sustainable development.

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ENDNOTES

¹ In this text, “PPMs” stand for non-product-related PPMs. Similarly, “product standards” are shorthand for both product standards and product-related PPM-based standards. For an explanation of these distinctions, see IISD/UNDP, *Environment and Trade Handbook*. Winnipeg: IISD, 2000, 41 - 42.

² See, for example, Janet Chakarian, “PPMs and the GATT,” in OECD, *Trade and Environment: Process and Production Methods*. Paris: OECD, 1994, 113 - 120.

³ It has also caused consternation for other groups such as animal welfare advocates and those concerned with human rights.

⁴ See Rob Howse, “The Product/Process Distinction - An Illusory Basis for Disciplining ‘Unilateralism’ in Trade Policy,” *European Journal of International Law*, 11, No. 2, 2000.

⁵ In fact, the Article XX chapeau has been used successfully to weed out PPM-based protectionism. The WTO Shrimp-Turtle case (United States – Import prohibition of certain shrimp and shrimp products) is an excellent example of this dynamic at work – the Appellate Body had no fundamental problems with the application of PPM-based distinction, but found that the measure was applied in a manner that was arbitrary and unjustifiable, and constituted a disguised barrier to trade.

⁶ See IISD (1994), *Trade and Sustainable Development Principles*. Winnipeg: IISD.

⁷ See Ricardo Meléndez-Ortiz and Ali Dehlavi, 2000, “Trade, Environment and Sustainable Development, The Case for Updating Special and Differential Treatment in the WTO,” in Peider Kőnz et al., eds., *Trade, Environment and Sustainable Development, Views From Sub-Saharan Africa and Latin America: A Reader*, Tokyo/Geneva: UNU/ICTSD.

⁸ Some of these guidelines are derived from the Appellate Body decision in the WTO Shrimp-Turtle case (AB-1998-4).

⁹ A recent World Bank study estimated that the European Union's new aflatoxin standards would reduce African exports to Europe of nuts, cereals, and dried fruits, cutting exports by \$670 million compared with the levels that would prevail under international standards. The benefits are estimated to be an annual reduction of 1.4 deaths per billion. Tsunehiro Otsuki, John S. Wilson and Mirvat Sewadeh, “A Race to the Top? A Case Study of Food Safety Standards and African Exports,” World Bank Working Paper No. 2563, Washington, D.C.: World Bank, 2001.

US Sharply Criticised for Stance on Climate Change

US President George W. Bush's increasingly strong rejection of the Kyoto Protocol and his recent declaration that he would not impose caps on CO₂ emissions for US industries have met with strong criticism from around the world. His comments mark a major setback after promising signs at the G-8 meeting in Trieste, Italy, earlier in March that the US and EU might be coming closer to an agreement on climate change. In Trieste, environment ministers from the world's seven leading industrialised countries and Russia unanimously committed themselves 'to strive to reach agreement on outstanding political issues and to ensure in a cost-effective manner the environmental integrity of the Kyoto Protocol.'

The recent admission by US Environmental Protection Agency head Christie Todd Whitman that the US had 'no interest in implementing that treaty' clearly confirmed President Bush's previous opposition to the Kyoto Protocol and is seen by some as the clearest indication yet that US involvement in the UN climate change negotiations is all but over.

In a letter to Senator Chuck Hagel of Nebraska on 13 March, Mr Bush reaffirmed his opposition to the Protocol, which commits industrialised countries to cut their greenhouse gas emissions by 5.2 percent by 2012. 'I oppose the Kyoto Protocol because it exempts 80 percent of the world, including major population centres such as China and India, from compliance, and would cause serious harm to the US economy,' he wrote. Going back on a pledge made during his election campaign last year, President Bush also said in the letter that he would not seek to impose mandatory emissions reductions for CO₂ at US power plants as such caps would force a shift from coal to natural gas, which he claimed would lead to higher electricity prices.

Mr Bush furthermore pointed out 'the incomplete state of scientific knowledge of the causes of, and solutions to, global warming'. These remarks followed the release of three reports on the science, impacts and mitigation strategies by the Intergovernmental Panel on Climate Change (IPCC) earlier this year in which scientists presented 'new and stronger evidence that most of the warming observed over the last 50 years is attributable to human activities'.

Consternation from Europe and NGOs

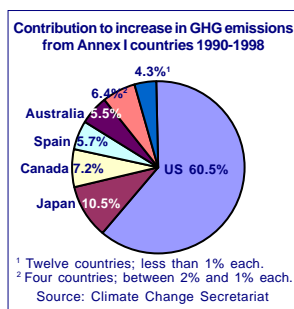
World leaders reacted strongly to Mr Bush's remarks. In a joint letter to the US President, Romano Prodi, President of the European Commission, and Göran Persson, the Swedish Prime Minister chairing the recent EU summit in Stockholm, wrote that the US and Europe 'urgently needed' to continue talks on climate change after the failure of the last round of negotiations in The Hague in November last year (Bridges Year 4 No.9, page 13). They also highlighted the importance of the issue for foreign-policy relations between the EU and the US. 'The global and long-term importance of climate change, and the need for a joint effort by all industrial countries in this field, makes it an integral and important part of relations between the USA and the EU,' they wrote.

The EU plans to send a high level delegation to Washington early in April which will aim to 'clarify' the US position on the Kyoto Protocol, Environment Commissioner Margot Wallström announced as European condemnations of President Bush's change of heart multiplied. In a strongly worded letter to Ms Whitman, French Environment Minister Dominique Voynet expressed her government's 'very active concern' and warned the

US that it 'would have to bear a very heavy responsibility' if it called into question the widely-valued climate change treaty.

In his meeting with President Bush on 29 March, the German Chancellor Gerhard Schröder reiterated his disagreement with Mr Bush on this issue, but also assured that 'our respective staff' would get together to continue the climate change negotiations as planned at COP-6 Part II in Bonn, Germany, from 16 to 27 July.

Even Canada – traditionally a key ally of the US on climate change and part of the Umbrella Group (US, Canada, Australia and New Zealand) – expressed its disappointment with the US President's position. According to the Canadian Environment Minister David Anderson, Mr Bush's move will greatly hinder breaking the stalemate over the stalled climate change talks. However, Minister Anderson also suggested that the EU had lost an opportunity to conclude a deal with the outgoing Clinton Administration and was thereby also responsible for the failure of the talks. 'I would prefer Mr Bush not to have made the decision he made, but I would devoutly hope that the Europeans have learned their lesson when it comes to negotiating with the Umbrella Group and not make that same mistake again,' he said.



Strong reactions were also heard from many inter- and non-governmental organisations. In defence of developing countries, UN Framework Convention on Climate Change Executive Secretary Michael Cutajar highlighted the significantly greater per capita emissions of CO₂ in the North compared to the South. 'Fairness suggests that the developed countries act first to limit emissions,' he said. Friends of the Earth criticised the US position as 'environmental isolationism' and called

on the rest of the world to continue climate change talks without the US. Comments were equally critical from the World Wildlife Fund for Nature (WWF) and the Union of Concerned Scientists, which accused Mr Bush of submitting to the interests of America's coal and power plant lobbies. The US-based Environmental Defense Fund warned that the country's image was suffering as a result of Bush's position.

Little Hope for Policy Reversal

While a senior US State Department official declared that the US had not intention of repudiating the Kyoto Protocol, most analysts have little hope that Mr Bush will bring the US back into a deal that would force US industries to cut emissions. 'There is no alternative but to go for ratification without the United States,' said Michael Raquet, a climate expert at Greenpeace. Most countries, however, are unlikely to go ahead with implementing the Protocol if the US – the biggest polluter emitting around a quarter of the world's CO₂ – is not included. According to Environment Commissioner Wallström, such a move would allow US industry a free ride at the expense of other developed countries. 'Why should we put European businesses under such high pressure and let American companies off the hook,' she asked.

Christian Egenhofer, senior fellow at Brussels-based think-tank Centre for European Policy Studies does not expect the US to sign up to anything as ambitious as the Kyoto Protocol, but speculates that it might try to set up a regional emissions reduction regime instead. 'The US will certainly come up with something and the EU will have to react – it will be sooner rather than later,' he said.

Asbestos Ruling, continued from page 2

As the original panel had determined that the contested decree was not a technical regulation, the Appellate Body found no ‘issues of law’ or ‘legal interpretations’ to review regarding them. The AB also noted that the meaning of the different obligations in the TBT Agreement had not previously been the subject of any interpretation or application by either panels or the Appellate Body, and that the reach of the Agreement’s provisions had ‘yet to be determined’. These remarks seem to point the way to an inevitable future clarification of the scope of TBT Agreement, particularly with regard to the obligations of central government bodies contained in Article 2.6. Canada clearly sought to use these provisions to bolster its case against the ‘excessively trade-restrictive’ nature of the French asbestos ban. In contrast, sustainable development advocates hold that the inclusion of human health and the environment in the Agreement’s legitimate policy objectives justifies a bolder application of the precautionary principle in the treaty’s interpretation, and could even be used to defend trade measures based on production and processing methods (see related article on page 3).

The Appellate Body’s ruling in the asbestos case has no bearing on such matters, nor does it change the substantive outcome of the dispute: while the AB found that the French decree constituted a technical regulation, it reserves its judgment on the TBT Agreement’s on ‘the facts on record’. Furthermore, the AB noted that the Agreement applied solely to a ‘limited class of measures’, for which it ‘imposes obligations on Members that seem to be different from, and additional to, the obligations imposed on Members under the that seem to be different from, and additional to, the obligations imposed on Members under the GATT 1994.

Amicus Briefs

The Appellate Body also dealt briefly, and too summarily for comfort, with its controversial handling of the issue of *amicus curiae* (friend-of-the-court) briefs.

While most WTO Members oppose non-governmental actors’ interference in the WTO’s dispute settlement proceedings (only the US whole-heartedly defends it), previous Appellate Body rulings have confirmed that unsolicited submissions may be taken into account in the panel and appeals processes. Although such briefs have extremely rarely been accepted in practice, the Appellate Body anticipated a record number of spontaneous contributions to its hearing of the asbestos dispute. In November 2000, it issued a stringent procedure for the submission of amicus briefs, valid for the asbestos appeal only. This caused a near-revolt with several developing country Members, and many industrialised countries agreed with their strongly-held view that only the General Council could make such procedural decisions. The Chair of General Council issued a stern warning to the Appellate Body to exercise ‘extreme caution’, and nothing more was heard from the WTO on how matters evolved (Bridges Year 4 No.9, page 1).

Under the non-committal heading of Preliminary Procedural Matter, the Appellate Body report sheds some light on the issue. The thirteen submissions received from non-governmental organisations prior to the establishment of the filing procedure were returned to sender together with a copy of the new guidelines. According to the list included in a footnote, most submissions came from industry organisations.

The asbestos appeals panel ultimately received 17 applications requesting leave to file a written brief pursuant to the new

procedure. Six of these arrived after the 16 November deadline and leave to file a written brief was denied because ‘the application was not filed in a timely manner’.⁷ According to the Appellate Body report, the AB ‘carefully reviewed and considered’ the other 11 applications and ‘in each case, decided to deny leave to file a written brief.’ The reasons for the denial were not specified the beyond an all-purpose ‘failure to comply sufficiently with all the requirements set forth in paragraph 3 of the Additional Procedure’.⁸

The Appellate Body did not elaborate further on the question.

ENDNOTES

¹ European Communities – Measures Affecting Asbestos and Asbestos-containing Products, Report of the Appellate Body.

² Decree No. 96-1133, 24 December 1996.

³ In this case, chrysotile asbestos (and products containing it) and its substitutes (PVA, cellulose and glass fibres).

⁴ European Communities – Measures Affecting Asbestos and Asbestos-containing Products, Panel Report, 18 September 2000.

⁵ The European Communities – the EU’s official designation within intergovernmental organisations – represents its member countries in WTO disputes.

⁶ TBT Article 2.1 requires technical regulations to apply equally to foreign and domestic products. Article 2.2 stipulates that such regulations must not be ‘more trade-restrictive than necessary to fulfil a legitimate objective’, and requests Members to consider ‘available scientific and technical information, related processing technology or intended end-uses of products’ in assessing risks to such objectives, including protection of human health or safety, or the environment. Article 2.4 provides that technical regulations should be based on relevant international standards except when such standards ‘would be an ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued’. Article 2.8 requires Members to base their technical regulations on ‘product requirements in terms of performance rather than design or descriptive characteristics’.

⁷ Applications denied for missing the deadline: Association of Personal Injury Lawyers (United Kingdom); All India A.C. Pressure Pipe Manufacturer’s Association (India); International Confederation of Free Trade Unions/European Trade Union Confederation (Belgium); Maharashtra Asbestos Cement Pipe Manufacturers’ Association (India); Roofit Industries Ltd. (India); and Society for Occupational and Environmental Health (US).

⁸ Applications denied for ‘failure to comply sufficiently with all the requirements set forth in paragraph 3 of the Additional Procedure’: Professor Robert Lloyd Howse (United States); Occupational & Environmental Diseases Association (United Kingdom); American Public Health Association (United States); Centro de Estudios Comunitarios de la Universidad Nacional de Rosario (Argentina); Only Nature Endures (India); Korea Asbestos Association (Korea); International Council on Metals and the Environment and American Chemistry Council (United States); European Chemical Industry Council (Belgium); Australian Centre for Environmental Law at the Australian National University (Australia); Associate Professor Jan McDonald and Mr. Don Anton (Australia); and a joint application from Foundation for Environmental Law and Development (United Kingdom), Center for International Environmental Law (Switzerland), International Ban Asbestos Secretariat (United Kingdom), Ban Asbestos International and Virtual Network (France), Greenpeace International (The Netherlands), World Wide Fund for Nature, International (Switzerland), and Lutheran World Federation (Switzerland).

Feast or Famine: U.S. Trade Policy in 2001

By Viji Rangaswami and Timothy M. Reif

In trade policy as in other areas of life, understanding where we are going is informed by an understanding of where we have been. In the United States, we have just come from a five-year deadlock in Congress that lasted from 1995 until 2000, followed by important steps forward over the last 12 to 18 months in implementing a trade policy that accepts and shapes economic globalization.

During the five-year impasse, Congress engaged in an increasingly bitter debate over globalization and trade policy. One side argued that, regardless of the framework of rules involved, more trade was always better and globalization would work out for the best on its own; the other side took the position that globalization should be stopped. The result was stalemate.

In 2000, Congress began to move beyond this polarized debate to adopt a new approach: to accept that globalization is here to stay and to ensure that the process is *shaped*. By addressing head-on the most difficult issues on the trade agenda, Congress was able to enact important trade legislation: (1) a significant expansion of the U.S. preferential trade program with Caribbean Basin region; (2) creation of an enhanced preferential trade program and other benefits for sub-Saharan Africa; (3) extension of permanent normal trade relations ("PNTR") to China; and (4) rejection of a resolution whose passage could have called into question Congress' support for a continued commitment to the World Trade Organization.

The key question now is how to sustain the forward motion and avoid a return to the years of stalemate.

A Policy Framework for U.S. Economic Engagement

As in 2000, there are three straightforward guideposts to progress on the United States trade agenda in 2001. First, Congress and the Administration must address head-on the issues of labor standards and environmental regulations in the context of global competition. To attempt to sidestep or finesse these issues will likely return the United States to domestic policy gridlock in this vital area.

Second, we must be innovative and find ways to address each trade policy circumstance on its own terms, all in a framework that effectively shapes the process of economic globalization. One size does not fit all. An approach that may be appropriate for a free trade agreement may not be appropriate for a multilateral approach.

Third, we must continue to build confidence while we rebuild U.S. trade policy block by block, taking issues one at a time. The trade policy issues we discuss below are potential building blocks to achieving success on all fronts; it would be a serious mistake to use them as bargaining chips or political pawns.

We are, of course, acutely aware, that preparing the United States to engage with our trading partners is only the first step. The United States will have to work hard to explain the positions it takes – particularly on the most controversial issues, such as the nexus between labor standards and trade, and environmental regulations and trade – and confront the concerns of our trading partners, particularly among developing countries, even as we vigorously advocate our positions. At the same time, we would

expect others to work hard to understand the positions and issues being raised by the United States and other countries so that we can work together to build greater understanding and trust.

We also believe that there should be more discussion of several myths and misconceptions surrounding the labor standards issue in particular. One such myth is that inclusion of labor and environmental standards will undermine the comparative advantage of evolving economies. The objective is not to erode comparative advantage by imposing "U.S. standards", but for nations to abide in practice by basic standards to which in virtually every case they have agreed – the five core ILO labor standards on child and prison labor, non-discrimination, and the right of workers to associate and bargain collectively.

Although labor and environmental standards can be used as excuses for protectionism, it would be a serious mistake to ignore their legitimacy and the vital issues at stake.

In addition, while it is possible to use issues of labor and environmental standards as an excuse for "protectionism," and that must be guarded against, it is a serious mistake to dismiss them with that argument or to view them as stemming from pressures of interest groups. The greater danger is to ignore their legitimacy and the vital issues at stake.

Finally, trade policy must increasingly be combined with aid and technical assistance. The objective is to build developing countries' capacity to implement regulations more effectively in a variety of areas, from intellectual property rights to sanitary and phytosanitary standards to labor standards.

U.S./Jordan Free Trade Agreement

Implementation of the U.S.-Jordan free trade agreement (FTA) is the first essential building block in the construction of a foundation for future American trade policy. The FTA, signed in October 2000, was formally transmitted to Congress on January 6, 2001. The implementing legislation is relatively straight forward, and could be considered and passed by Congress quickly.

The Jordan agreement includes labor and environmental provisions enforceable in the same manner as all other obligations. These provisions are a responsible and effective mechanism to implement the two countries' shared commitment to strong labor and environmental standards and effective enforcement of labor and environmental laws. They are appropriate to the agreement and context in which they were negotiated. Moreover, the mechanism is reinforced by the two countries' jointly expressed commitment to press for a dialogue on such issues in the WTO through the establishment of a working group.

While some have urged that the implementing legislation be delayed because of the inclusion of labor and environmental provisions, we believe that delaying consideration of the implementing legislation, or attempts to re-open the agreement would seriously jeopardize the chances for passage of any other trade initiatives this year.

Successful implementation of the Jordan agreement is an opportunity to generate momentum for progress on the trade agenda, provide appropriate recognition for key economic and

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trade policy reforms undertaken by Jordan, and support U.S. efforts to promote peace and stability in the Middle East.

U.S. - Vietnam Bilateral Trade Agreement

Under the building blocks approach, Congress should also tackle the U.S.-Vietnam bilateral trade agreement (BTA) this spring. Congressional approval of the BTA would make Vietnam eligible for MFN status on an annual renewal basis.

This agreement was essentially completed in early 1999, and therefore does not reflect the progress on addressing labor and environmental provisions we have made in bilateral and regional agreements over the last 18 months. As the U.S.-Vietnam trade relationship grows, we need to have an up-to-date framework of rules governing competition. For Vietnam, a key component of our trade relationship will involve negotiation of a U.S.-Vietnam textile and apparel agreement. We should make clear that our objective will be to achieve positive incentives in the labor standards area, as was done in the one negotiated with Cambodia. Such an approach presents an opportunity for Vietnam to achieve improved access to the U.S. market based on improved enforcement of core ILO labor standards.

With regard to the Cambodia textiles bilateral agreement, it is true that there have been problems in the agreement's implementation. However, its benefits are valid and should be carried forward, even as problems are corrected. The basic approach – using positive incentives to strengthen labor standards by providing an expansion of quota in case of success, not a reduction of quota in case of failure – is sound. Moreover, the agreement stands as a retort to those who claim that the goal of acknowledging the nexus between trade and labor standards is to restrict trade.

Andean Trade Preferences Act

Enacted in 1991, the Andean Trade Preferences Act (ATPA) granted Bolivia, Colombia, Ecuador and Peru tariff preferences on certain goods for a 10-year period. The purpose of the ATPA is to strengthen legitimate economic activities in the Andean region, and to create viable alternatives to illegal drug trade. Authorization for the program expires in December 2001.

Most would agree that the program should be extended, and that we should consider ways to enhance the benefits provided, including by extending benefits to Andean apparel products. That can be accomplished if, as we did in the context of the CBI, we find ways to build on the complementarities between the U.S. textile and apparel industry and the Andean industry, and we address the labor-trade nexus. In addition, for maximum impact ATPA extension and expansion should be considered in the context of a broader aid and development package.

Fast Track, FTAA and WTO Negotiations

Trade ministers of 34 countries in the Western Hemisphere will meet in Buenos Aires on April 6-7, 2001. They intend to present draft negotiating chapters along with requests for directions on how to proceed, at the next Summit of the Americas, scheduled for April 22-23, 2001, in Quebec City. Seven months later, the Fourth WTO Ministerial Conference will be held in Doha, Qatar, on November 9-13, 2001. The objective of the meeting will be to outline new areas for trade negotiations in agriculture and services, as well as possible additional areas like e-commerce, industrial tariff reductions, and reform of the dispute settlement process.

We believe that the United States should be prepared to engage with its trading partners at each of these meetings to move forward in a wide range of areas to shape the challenges of globalization by maximizing its benefits and minimizing its pitfalls. Many of our trading partners have internal political and policy issues to address in preparing for additional negotiations. In the U.S., a key political and policy issue is whether and on what terms to revive fast track trade agreement negotiation and approval procedures.

The U.S. fast track framework reflects the fact that the U.S. Constitution awards Congress the express authority to regulate trade with foreign nations, while the President retains the authority to negotiate agreements with foreign countries. To address the shared responsibility of the U.S. executive and legislative branches in this area, there have always been three distinct elements to the U.S. fast track equation.

The first element is to identify priority negotiating objectives for the United States, established in law by Congress, in consultation with the executive. With respect to priority negotiating objectives, there is substantial work to be done in the area of labor standards and environmental regulations – as well as in the area of services negotiations, agriculture, e-commerce, trade remedies and others – to compile the priority negotiating objectives for the United States.

The second element is to establish a set of procedures to ensure that Congress – and all interested members of the public – are involved at each phase of the negotiations. Finally, once the first two elements have been worked out, Congress agrees to put into place certain procedures that provide for an up-or-down vote on implementing legislation for the trade agreement. If Congress is to be successful at reviving fast track, it will almost certainly have to follow this same approach.

As noted above, revival of fast track cannot and should not be considered in a vacuum. If the trade agenda we have outlined above is successfully implemented – including by addressing in a WTO-consistent manner the crisis in worldwide steel overcapacity and its severe impact on U.S. workers and firms – those steps will serve as important building blocks to improve the prospects for reaching agreement on fast track. If these steps are taken, we believe that Congress should be prepared this year to collaborate with the Administration to establish procedures for the U.S. to negotiate and implement new bilateral, regional and multilateral trade rules.

The United States stands at a point of both promise and peril. The promise of this moment is that we have the opportunity to build on the progress of the last 18 months – efforts to shape globalization in China PNTR, CBI-Africa, the Cambodia textile agreement, and the Jordan Free Trade Agreement. If we heed the lessons of the last 18 months, we can move forward on the trade agenda for 2001. The peril of this moment is that if we fail to learn those lessons – turn our back on innovation and return to a rigid approach that excludes issues like labor standards or environmental regulations from the trade agenda, or seeks to marginalize them, then the opportunities before us can easily be dashed and our direction reversed. We remain hopeful that, with what is at stake for this country and all our trading partners around the world, the United States will realize the promise of this moment.

Viji Rangaswami is Democratic Trade Counsel and Timothy M. Reif is Democratic Chief Trade Counsel of the Committee on Ways and Means at the US House of Representatives. They wrote this comment for Bridges in their personal capacity. It does not necessarily reflect the view of any Members of the United States Congress.

South African Patent Trial May Herald Major Clarification of TRIPs Rules

A trial with potentially world-wide ramifications on access to medicines has been postponed in South Africa from early March to 18 April. The case was brought by the Pharmaceutical Manufacturers' Association of South Africa (PMA) against the government, whom the PMA accuses of seeking unconstitutional powers to override its patents through pending legislation, which permits broad-scale parallel imports and compulsory licensing.

TRIPs Violation Alleged

The international dimension of the patent dispute hinges on the PMA's claim that the 1997 Medicines Act violates the WTO's Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPs). Parallel imports from third countries (where drugs are cheaper than those of licensed distributors in the host country), as well as compulsory licensing, are possible under TRIPs in cases of public health emergencies, but the latitude offered by the treaty is largely untested. At a minimum, TRIPs Article 31 requires that patent holders be offered fair compensation if their products are made by non-licensed manufacturers. The Agreement does not specify how such compensation should be determined if the two sides disagree, neither does it contain a definition for a 'public health emergency' that would justify bypassing patent legislation.

The pharmaceutical industry (the 39 PMA plaintiffs are multinational corporations) insists on a narrow interpretation of the TRIPs exceptions to patent-holders' exclusive marketing rights. Their main argument is that patent revenue provides an incentive for the costly research and development of new drugs.

The South African court's decision – whether in favour of the pharmaceutical companies or the government – could lead the loser to take the case to the WTO's dispute settlement mechanism in order to force a binding decision on what exactly is allowed under TRIPs rules.

Intense Civil Society Involvement

Civil society's interest and involvement in the 1997 Medicine Act trial matches that of the pharmaceutical industry. The main reason for the postponement of the judicial proceedings was to give the plaintiffs enough time to respond to points raised in an *amicus* brief that the Treatment Action Campaign (TAC), an AIDS activists group, was allowed to submit late in the process in spite of stiff resistance from the PMA. The citizen's brief is expected to focus on the consequences of PMA member's policies on HIV positive South Africans, who make up nearly a fifth of the country's population. On the first day of the trial, thousands of protesters took to the streets in Pretoria, Cape Town and Durban.

In addition to highly-effective local groups, many international health advocacy organisations support the South African legislation, including the British charity Oxfam, which has launched a world-wide campaign to cut the cost of medicines for the poor. In a recent report, Oxfam called on the WTO to shorten the 20-year patent protection currently offered by TRIPs and to clarify the criteria under which compulsory licensing and parallel imports can be invoked. In cases that have a significant non-trade dimension, Oxfam argues for the acceptance of *amicus curiae* briefs, as well as for joint panels of experts from the WTO and other organisations such as the World Health Organisation (WHO). 'The WTO must change the rules that the drug industry is now using to cripple cheap, local competition, which in turn is inflating the cost of new and patented medicines,' the Oxfam report said.

Industry representatives have denied that patent obligations are a significant barrier to affordable medicines. Instead, they blame infrastructure bottlenecks and the low priority of public health concerns. Harvey Bale, Director-General International Federation of Pharmaceutical Manufacturers' Association, said that the South African government's slow response to PMA members' price cut offers (see below) proved that the real issue of the trial was political point-scoring rather than access to medicines.

SADC to Re-examine Multinational Price Cut Offer

In May 2000, five multinational companies pledged to drastically cut the price of some of their AIDS-related drugs in Africa under the auspices of UNAIDS (Bridges Year 4 No.4, page 9). Member governments of the Southern Africa Development Community (SADC) initially said that – even at slashed prices – acquiring the medicines would divert funds from fighting other endemic illnesses (SADC is seeking a broader political deal on access to essential drugs; see related articles on pages 10 and 20).¹

SADC governments are now negotiating with the companies involved in the UNAIDS programme (Boehringer-Ingelheim, Bristol-Meyer Squibb, GlaxoWellcome, Merck and Hoffmann-La Roche). In the wake of the South African trial, many of these the 'big five', all of which are also PMA members, have made significant new concessions. Most importantly, Bristol-Meyer announced on 15 March that it was dropping its opposition to other companies' selling generic versions of its patented AIDS drugs in Africa. Bristol-Meyer will also offer the combination its brandnames Xerit (stavudine) and Videx (didanosine) in Africa for a dollar a day (in the US, the dose costs US\$18). Merck promised it would make the anti-retrovirals Crixivan and Sustiva available at about a tenth of their US prices (between US\$500-600 per patient per year). The other three have either offered some of their brandname AIDS drugs free for certain categories of population under UNAIDS auspices or promised discounts to employers and non-profit groups.

A Budding Price War

This spirit of co-operation notwithstanding, a potential price war looms between multinational drug companies and Bombay-based Cipla Ltd, which has offered to make AIDS medicines available in Africa for about a third of the current market price. GlaxoSmithKline, which owns the exclusive rights to one of the drugs involved, has already warned that it may take legal action against the Indian company if it persists in selling a 'triple-therapy' AIDS cocktail for US\$350 per person a year to the Nobel-winning non-governmental organisation Médecins sans Frontières for use in African countries struggling with the epidemic (the Brazilian Far-Maguinhos laboratory faces a similar challenge from Merck, see page 8).

According to Cipla's Chairman D. Yusuf K. Hamied, the company tried to convince multinational patent-holders to license their products voluntarily, but in the absence of a response requested the South African patent commissioner to grant compulsory licenses on medicines necessary to respond to the national AIDS emergency. The companies targeted by the action, as well as the government, are still studying its implications. Even if the Department of Trade and Industry agrees to Cipla's request, the compulsory licensing procedures may take several years.

¹ See also *Essential Drugs in Southern Africa Need Protection from Public Health Safeguards under TRIPs*, Bridges Year 4 No.7, page 3.

EU Sets Milestone in Confidence-building with LDC Market Access Offer

On 26 February, European trade ministers adopted a slightly down-scaled version of the Everything But Arms (EBA) initiative first presented by the European Commission in September 2000. With the exception of arms, the initial proposal would have given most products from least-developed countries (LDCs) immediate duty- and quota-free access to EU markets. Only imports of sugar, rice and bananas would have been regulated for a further three years (Bridges Year 4 No.7, page 14).

France, Spain, Belgium, Greece and Portugal objected to the inclusion of these three commodities to the market opening deal, prompting some to dub it Everything But Farms. The latter three countries withdrew their opposition when the Commission extended phase-in deadlines for the most sensitive products and added a safeguard provision to mitigate import surges. Rules of origin will also be tightened to prevent trans-shipment from countries not entitled to EBA benefits.

The proposal adopted in February – over-ruling continued opposition from France and Spain – offers duty- and quota-free access to most LDC goods (with the exception of arms) as of 5 March 2001. Duty-free quotas for sugar and rice will be enlarged by 15 percent a year until quota elimination in 2009. Out-of-quota rice and sugar tariffs will be reduced in three stages (20 percent in 2006, 50 percent in 2007 and 80 percent in 2008) and completely removed by 2009 at the latest. Import duties on fresh bananas, to be eliminated in 2006, will be lowered by 20 percent a year starting in January 2002.

A 'World-wide First'...

Obtaining world-wide duty- and quota-free access for least-developed country products was something of a personal mission for former WTO Director-General Renato Ruggiero, and his successor Mike Moore warmly welcomed the EU initiative. Trade Commissioner Pascal Lamy called it a 'world-wide first', which proved that the EU was serious about 'getting the most disadvantaged to share in the fruits of trade liberalisation'.

Prior to the EU's adoption of the EBA, at least the United States, Canada, New Zealand and Norway had also announced improved market access for least-developed country goods, but none have the potential impact of the EU initiative. The US, for instance, adopted the African Growth and Opportunity Act (AGOA) in May 2000, but its implementation has been delayed due to procedural requirements. In addition, the AGOA largely conditions acceptance of textile products on the use of US-made fabric or yarn (Bridges Year 4 No.8, page 11). WTO Members roundly criticised an earlier offer to extend duty- and quota-free treatment to 'essentially all' LDC exports by Canada, the EU, Japan and the US because all proponents would have had numerous ways to block the entry of sensitive products (Bridges Year 4 No.3, page 1).

... and a Strategic Confidence-building Block

The European Union is the leading promoter of a new round of comprehensive trade negotiations, and the EBA is a key element of its confidence-building strategy among developing countries, many of which remain sceptical about the multilateral trading system's responsiveness to their concerns.

While Everything But Arms is a free-standing gesture, the EU clearly hopes that the initiative will help garner support for its broader goals. Commissioner Lamy said the adoption of the EBA was a 'sign of political goodwill' in the run-up to the WTO's fourth Ministerial Conference, which was 'expected to agree on a broad agenda to launch a new round of multilateral trade negotiations in which the interests and concerns of the developing countries will have to be addressed.'

EU optimism notwithstanding, odds remain even on the launch of a Qatar Round. First, although the LDC market-opening proposal could be considered as a down payment on further concessions the EU might make during new WTO negotiations, the Like-minded Group of key developing country Members still insists on progress on a far broader set of problems related to the implementation of existing Agreements before consenting to the launch of a new round of trade talks (see page 3).

Second, no other industrialised country seems poised to follow up on the EU's unilateral market opening offer. Even the Union's main allies in pushing for a comprehensive round, Japan, Korea and Switzerland, have shown no signs of emulating it. US Trade Representative Robert

Zoellick said he appreciated the EU's gesture as a 'message to the developing world that globalisation can help them', but promised no further action from the Bush Administration.

Initiative Raises Questions about Preferential Schemes

Some commentators, including World Bank economist Michael Finger, frankly warned against the dangers inherent in all preferential trading schemes, pointing out that other developing countries, rather than European competitors, were likely to pay for LDCs' increased access to EU markets.

This fact accounts for the muted reaction of many developing country WTO Members. Among those worried about potentially diminishing market share are some of the nearly 80 African, Caribbean and Pacific nations that for decades have had privileged access to EU markets under a succession of Lomé Conventions and continue to do so under the Partnership Agreement signed in Cotonou in July 2000 (Bridges Year 4 No.3, page 4).

The EBA initiative would put another nine LDCs on par with the 39 least-developed and 32 developing countries that already have quasi-limitless access to the EU under the Cotonou treaty. Some of these are likely to face tougher competition if newly-eligible LDCs step up their export capacity. For instance, Caribbean island banana producers, whose fruit have up to now found a secure destination in the EU, may find their market share eroding. Trade diversion could also occur in the textiles sector. India's exports, for instance, will remain under quota restrictions until 2005, while those from neighbouring, least-developed Bangladesh have unrestricted access as of March 2001.

For more information on the EBA, see:
<http://europa.eu.int/comm/trade/miti/devel/eba.htm>
 For the EU's impact assessment study on the EBA, see:
http://europa.eu.int/comm/trade/pdf/eba_ias.pdf

Latin America: Protection of Biological, Genetic and Cultural Resources

The majority of Latin American countries are in the process of drafting national legislation on access to biological and genetic resources and the protection of traditional knowledge. In doing so, they are confronted to a complex web of interests and concerns, which involve a large number of stakeholders and are only partially – and sometimes inconsistently – addressed by a variety of international instruments including the Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPs), the Convention on Biological Diversity, the FAO International Undertaking on Plant Genetic Resources (IU) and UPOV.

As a contribution to this process, the International Centre for Trade and Sustainable Development (ICTSD) and the Sociedad Peruana de Derecho Ambiental organised a Regional Dialogue on Trade, Intellectual Property and Biological Resources in Cusco, Peru, in February 2001, in collaboration with ANDES, ECLAC and the Quaker UN Office (QUNO). The meeting provided a platform for an open exchange of views and experiences between key stakeholders from environment, agriculture and trade ministries, intellectual property offices, Geneva-based trade negotiators, academics, environment and development NGOs, and indigenous groups. It was also the first of a series of proposed meetings, which will feed into an informal Geneva-based dialogue process for developing country WTO delegations co-ordinated by QUNO. The process aims to increase understanding among developing country negotiators on TRIPs Article 27.3(b), and provide space to identify common interests and positions in the review process.

Traditional Knowledge

A key question in the dialogue was whether traditional knowledge could be adequately and appropriately protected using IPR tools. Representatives from indigenous organisations, in particular, felt that intellectual property was based on theoretical foundations alien to their worldview. Other participants stressed that in the absence of specific international legislation, it was essential to start working with communities proactively to create locally acceptable protocols for resource management, which may be used to inform the development of national legislation.

Expanded participation of indigenous groups and local communities in the design, development and implementation stage is indeed essential to processes of building socially responsible regimes for the regulation of resources. Peru, for instance, is currently building a Regime for the Protection of Traditional Knowledge. The proposed plan involved the creation of a register for the collection of traditional knowledge, a fund for the distribution of benefits from products developed with this knowledge, the requirement of prior informed consent in resource transactions, and the compulsory licensing for commercial products. However, after receiving limited feedback in initial stages, the proposed draft was rejected by indigenous groups, which found its format and basic concepts incompatible with their own understanding of resource rights.

A participant proposed another mechanism for increasing the equity in resource transactions: the creation of a biodiversity cartel to raise the marginal value and returns from resources such as traditional knowledge. This cartel would depend on countries and communities being able to agree upon the designation of a particular value to a shared resource. Until the formation of such a cartel, communities could treat traditional knowledge not currently in the public domain as a type of trade secret.

TRIPs and Regional/National Legislation

Dialogue participants noted that the TRIPs Agreement offered a certain amount of flexibility, *inter alia* through the varied interpretation of terms in Article 27.3(b) (micro-organisms, biological processes and plant varieties), which makes possible the development of different national regimes of the protection for biological and genetic resources. They stressed the importance of this type of flexibility because it enables the development of regionally appropriate protection regimes, and places limits on the authority of the WTO to determine national level policy.

Latin American countries have raised the protection of traditional knowledge within the context of international negotiations at the WTO and the World Intellectual Property Organisation (WIPO). Many developed countries are, however, opposed to treatment of traditional knowledge issues at the WTO, and Latin American countries' capacity to put forth their proposals in TRIPs negotiations has been limited. Last year at WIPO negotiations, the United States rejected Colombia's proposal for the disclosure of access contracts. Strengthening their negotiating capacity/weight will require defining very clear objectives and strategies regarding how they would like traditional knowledge to be protected.

At the regional level, the Andean Community has two legally-binding instruments that deal with the protection of biological and genetic resources and traditional knowledge: Decision 391, which links laws of access with those related to industrial property and provides guidelines for resource protection, and Decision 486 on Industrial Property. The latter recognises the rights of communities to decide over their collective knowledge. The legislation contains provisions that require organisations making use of traditional knowledge for product development to supply copies of contracts with communities from which resources are obtained, as well as documents showing the licensed authorisation for the use of the knowledge (Bridges Year 4 No.9, page 11).

Brazil's recent Plant Variety Protection (PVP) Law allows the protection of 'essentially derived varieties', but two of its provisions provide models for countries seeking to limit the scope of intellectual property rights: the first prohibits 'double protection' for plant varieties (i.e. the simultaneous application of patents and plant variety protection), and the second extends the privilege of saving seed for subsequent plantings to small farmer organisations. On the other hand, Brazil's Law on Industrial Property limits patentable material to inventions rather than forms of life or biological processes, and grants patents only to micro-organisms with transgenic components. The immediate impact of the two laws has been the reconfiguration of Brazil's seed industry, as large agribusinesses consolidate their hold on small seed companies with hopes to dominate future sales of transgenic varieties.

Venezuela is also seeking to develop a national strategy, which recognises collective rights of ownership. While recognising the patentability of inventions and bio-technical discoveries, Venezuela prohibits the patenting of traditional knowledge. Instead, it proposes the creation of databases of traditional knowledge as a way to promote conservation, add value and regulate access to such resources. Such databases would be used in conjunction with author's rights and denomination of origin for knowledge already within the public domain.

This article is based on a dialogue report written by Amanda King for ICTSD.

EU and US Disagree on TRIPS/Public Health

Undoubtedly with an eye on the potential launch of broad-based trade negotiations in Doha, the European Commission announced in February 2001 that the EU would promote discussions within the WTO, the World Intellectual Property Organisation and the World Health Organisation (WHO) in order to achieve an international consensus on the link between the TRIPs Agreement and public health protection issues. According to the EU, the debate should contribute to a clarification of the compulsory licensing and parallel importing provisions allowed under TRIPs.

In the run-up to Seattle, the EU was amenable to developing country demands for the compulsory licensing of all medicines on the WHO's essential drugs list. Soon after, however, the Union quietly dropped the issue due to vigorous opposition from the European pharmaceutical lobby. Since then, the European Commission has tried to forge consensus – both internally and among major trading partners – around a broader plan to support developing countries' struggle to cope with highly-infectious diseases such as AIDS, tuberculosis and malaria (Bridges Year 4 No.7, page 14).

Differentiated pricing is one of the key elements of the EU's tropical communicable diseases strategy, but the Commission faces an uphill battle in convincing European drug manufacturers to tailor their prices according to developing countries' ability to pay. The Commission also proposes increased EU funding for research on tropical diseases and infrastructure improvements. In addition, it suggests that developing countries themselves make medicines more accessible through reduced import tariffs, taxes and local registration fees (see also page 10).

Fearing that any potential clarifications or changes would weaken rather than strengthen international intellectual property protection, the US has steadfastly objected to opening up the TRIPs Agreement during future multilateral trade negotiations. In keeping with this position, it reacted with extreme caution to the EU's tropical diseases initiative at a March ministerial-level meeting between the two trading blocks. Among their major reservations about joining the EU in persuading patent holders to accept differentiated pricing, US authorities cited industry fears that, instead of treating patients at home, developing countries would re-export the cheap drugs to wealthy countries, which provide the most lucrative markets for patented medicines. US officials seemed unconvinced by the Commission's proposed safeguards against re-importation, including differential labelling, packaging and trademarks, as well as special enforcement procedures and contractual arrangements between drug exporters, importers and distributors.

Commenting on the EU initiative, a State Department spokesperson confirmed that no changes to the previous Administration's AIDS policy were being considered. The US will abide by President Clinton's May 2000 Executive Order, which prohibits trade sanctions against sub-Saharan countries for violations of American intellectual property laws 'with respect to any law or policy [...] that promotes access to HIV/AIDS pharmaceuticals or medical technologies', but the waiver only concerns US patent protection legislation. Violations of TRIPs obligations, less stringent than US laws, can still be pursued in the WTO (Bridges Year 4 No.4, page 9). That is why South Africa, for instance, remains on the US 301 intellectual property violations 'watch list', and why disputes have been initiated against Brazil's and Argentina's patent protection practices (see related article on page 8).

Don't Steal, Don't be Lazy, Don't Lie

Ama Sua, Ama Llulla and Ama Qella

In March of 2000, University of California researchers Jeffrey Ehlers and Mark Sterner patented a bean variety known as *nuña*. The patent, which gives Ehlers and Sterner exclusive monopoly ownership over *nuña* crosses able to grow at low altitudes, is inspiring wide-ranging protest in the Andes. Particularly worrying to farmers, policy-makers and researchers alike is the fact that the patent restricts not only all of the United States Plant Introduction Accessions listed on *nuña* beans, but also includes material currently held in the international bean collection of the Centro Internacional de Agricultura Tropical, declared by the Food and Agriculture Organization to be held 'in trust' for the global community.

Recently, a group of organizations came together in Peru to raise their voices in protest of the patent on *nuña*. Taking advantage of the presence of international experts at the Dialogue on Commerce, Intellectual Property and Biological and Genetic Resources in Latin America (see page 15), officials from six communities convened a seed tribunal with the support of the Asociación Regional de Productores Ecológicos del Cusco, the Federación Departamental de Campesinos del Cusco and the Asociación Kechua-Aymara.

Using a traditional format for community conflict-resolution, a panel of local officials heard evidence from *nuña* cultivators and expert witnesses on the local political, economic and social impacts of the *nuña* patent. Swearing by the three tenets of the Incan ethic – don't steal, don't be lazy and don't lie – witnesses told the story of how wild *nuña* or was domesticated by farmers. *Nuña* is special not only for its high nutritive content, but because when heated the interior of the bean inflates and pops out of its skin, similar to popcorn. According to tradition, popped *nuña* was invented by women looking for a way to conserve the beans in order to carry them to far-off fields. Currently dozens of *nuña* varieties are cultivated and consumed across the Andes.

During the tribunal, farmers protested what they viewed as the theft of a resource critical to local food security, and of great importance to Andean culture and history. Concerns were voiced that the patent could prevent local attempts to improve *nuña* through breeding, and the future development of *nuña* as an export crop for Peru. Farmer testimony was followed by statements from technical experts from Brazil and Colombia who acknowledged similar problems of resource appropriation in their own countries, and discussed the role of national and international legislation to protect native cultivars and the traditional knowledge of communities. After deliberation, the panel of judges outlined a resolution to wage war against the *nuña* patent, initiated by letters of protest to CIAT, the Peruvian patent office and the World Intellectual Property Organization (WIPO).

In addition to providing a fora for community members to arrive upon concrete measures in their protest of the *nuña* patent, the tribunal was an opportunity for both community members and foreign visitors to reassess their understanding of resource rights. The politicization of local communities will become increasingly common as patents on native cultivars, such as the *nuña*, galvanize communities to fight to protect their agricultural heritage.

The Covenant on Economic, Social and Cultural Rights: A Treasure Chest of Support for Developing Countries' Concerns in the WTO?

By Caroline Dommen

Developing countries are increasingly pushing for the WTO to take their concerns more effectively into account. While calling for the full implementation of special and differential treatment (SDT) provisions of the Uruguay Round Agreements in their favour, they are also asking for a more general rebalancing of Members' rights and obligations under the multilateral trade regime. For instance, developing countries seek significant changes in the current WTO negotiations on agriculture, the reviews of the TRIPs Agreement and its Article 27.3(b), and the General Council's ongoing special sessions on implementation concerns. Many of these demands are reflected in their counter-arguments to challenges to their implementation of the TRIPs Agreement, particularly manifest in the WTO dispute initiated by the US against Brazil's compulsory licensing provisions.

This article will argue that the International Covenant on Economic, Social and Cultural Rights is a useful but little-known tool that developing countries could use to support their arguments in favour of stronger SDT provisions, as well as to defend their interests in WTO negotiations and legal challenges on specific issues of concern to them.

The International Covenant on Economic, Social and Cultural Rights

With the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights (ICESCR, or Covenant) is one of the two central international human rights treaties adopted to give legally binding effect to the 1948 Universal Declaration of Human Rights. The ICESCR has been in force since 1976 and today 144 countries are bound by its provisions.

The main rights set out in the ICESCR are those to an adequate standard of living, housing, work, education, food, health, to take part in cultural life, and to enjoy the benefits of scientific progress. Article 2 requires that all parties 'take steps individually and through international assistance and co-operation (...) to the maximum of its available resources' with a view to 'achieving progressively' the full realisation of the rights set out in the ICESCR. Progressive realisation has been interpreted to mean that states must move as expeditiously as possible towards guaranteeing the rights set out in the ICESCR. Thus, while the Covenant does not require states to provide food, education, or perfect healthcare to all their citizens directly upon ratification, it does require them to immediately take steps towards realising the rights set out in the ICESCR, and to avoid backward movement (retrogression) from realisation of those rights.

States must also comply immediately with the Covenant's obligation to prevent discrimination of any kind (including on grounds of race, sex, religion or political opinion) in the realisation of economic, social and cultural rights. The UN Committee on Economic, Social and Cultural Rights (CESCR, or Committee), which supervises implementation of the ICESCR, has consistently confirmed that the principal concern of the ICESCR is the situation of the most vulnerable and disadvantaged members of society.

Importantly for those concerned with international economic relations, the Committee has emphasised that the ICESCR's requirement that a state party take steps 'to the maximum of its available resources' refers both to the resources available within a state and those available through international co-operation and assistance.¹

Practical Application of the ICESCR in the WTO Context

At the WTO, where agreements are usually the result of trade-offs between negotiators' interests, developing countries' concerns often lack the necessary weight to be sufficiently reflected in the final outcome. Developing countries could thus strengthen their hand by bringing WTO Members' legal commitments under the ICESCR to the negotiating table.

The following sections will illustrate two of the areas in which the legally binding provisions of the ICESCR can be relied on by developing countries in their claims for the international trading system to respond to their needs.

The TRIPs Agreement - Disputes and Review

A WTO dispute settlement panel was set up in January 2001 to rule on a US complaint against Brazil's Industrial Property Law, which imposes a 'local working' requirement that stipulates that a patent shall be subject to compulsory licensing if the subject matter of the patent is not worked in Brazil.² The US claims that this violates the TRIPs Agreement by discriminating against US owners of Brazilian patents whose products are imported into, but not produced in, Brazil, and by curtailing patent owners' exclusive marketing rights. Brazil is invoking the possibility of compulsory licensing to put pressure on US and European pharmaceutical companies to lower their prices of HIV/AIDS drugs, saying that if they do not, Brazil will grant licenses for generic versions of these drugs to be produced in Brazil – at much lower cost.

Brazil's programme to combat and treat HIV/AIDS is generally regarded as a success, not only in treating the disease itself, but also in providing momentum to improve the level of healthcare available in the country overall. If Brazil were prevented by the US legal challenge in the WTO from continuing this programme, it could be considered a retrogressive step in contravention of the ICESCR, which Brazil ratified in 1992. From a legal perspective, therefore, Brazil could well rely on its ICESCR obligation to uphold its citizens' right to health as a defence against the challenge of its compulsory licensing provisions.

In the reviews of the TRIPs Agreement several WTO Members have re-emphasised the importance of TRIPs Articles 7 and 8. Article 7 states that the Agreement should be conducive to social and economic welfare and should contribute to a balance of rights and obligations. Article 8 provides that governments can take public health, nutrition and other public interest concerns into account in formulating their intellectual property laws, and can

Continued on page 12

Covenant, continued from page 13

prevent abuse of intellectual property rights. India, for instance, has argued that the TRIPs review should include an assessment of the Agreement's social, economic and welfare impacts.

In submissions to the WTO in recent years, a number of developing countries have called for a less stringent interpretation of TRIPs' intellectual property protection requirements to reflect their concerns. Jamaica, Pakistan, Sri Lanka, Tanzania, Zambia and others have proposed that the TRIPs Agreement review ensure access to pharmaceuticals, including by safeguarding the right to compulsory licensing of pharmaceuticals. In the Article 27.3(b) review, many developing countries including the African Group, Brazil, Colombia, India and Peru, have called for a clarification or amendment of Article 27.3(b) that would reflect their social concerns, *inter alia*, by acknowledging and protecting traditional knowledge, and allowing the continuation of traditional farming practices including the right to save and exchange seeds. While many developing countries would like to remove any intellectual property protection obligation from Article 27.3(b), others, such as the US and European countries, would prefer to strengthen the requirement. Similarly, as demonstrated by its WTO challenge against Brazil, the US wants to limit the legitimate use of compulsory licensing to the minimum allowed by TRIPs.

Developing countries could add legal weight to their demands for relaxing the intellectual property protection obligations in the areas discussed above by relying on the ICESCR. Indeed, they should emphasise that protecting the rights to culture and to an adequate standard of living of indigenous groups and farmers, as well as the right to food and health of those who depend on their products or knowledge, is a legal obligation pursuant to the ICESCR. Moreover, developing countries could emphasise that their duty to ensure access to pharmaceuticals at a cost which does not result in discrimination in access to drugs between their wealthy and their poorer citizens requires them to allow compulsory licensing or parallel imports. The ICESCR also provides the legal basis for emphasising the public interest when seeking the appropriate balance between private and public interests that the TRIPs Agreement is supposed to ensure.

ICESCR and Agriculture Article 20 of the Agreement on Agriculture (AoA), which sets out the scope of the agriculture negotiations currently underway, states that these should, *inter alia*, take into account 'non-trade concerns' and the 'other objectives and concerns mentioned in the Preamble' of the AoA. Such non-trade concerns are of great importance to many developing countries, and have taken up a significant amount of time in the negotiations so far, covering food security, rural development, socio-economic issues (including rural employment and poverty and marginal and subsistence farmers) and environmental protection. India has said that a developing country should be able to limit imports of agricultural products to ensure that the livelihood and employment of its rural population are not affected by import surges. Several developing countries have proposed that the agriculture negotiations result in the creation of a 'development box', which would allow them to take measures to protect and enhance their domestic food production capacity particularly in key staples, increase food security and food accessibility for the poorest and provide, or at least sustain, existing employment for the rural poor. Developing countries are also increasingly pointing out that trade barriers in industrialised countries hamper the growth of agricultural exports from developing to industrialised countries. The ICESCR's international co-operation and assistance provisions could be relied on by developing countries calling for

removal of import barriers to their agricultural exports and reduction of industrialised country subsidies that distort agriculture trade. Furthermore, the ICESCR provides strong support for calls for the creation of a 'development box'. Mauritius has indeed pointed out that Article 20 of the AoA should be read in conjunction with other international commitments including 'the ICESCR, which emphasises the importance of adequate food supply alongside the continuous improvement of living conditions.'³ The Mauritian paper goes on to emphasise agriculture's role as a shock absorber or social safety net in countries, which face numerous constraints and are not endowed with many advantages. Meanwhile, several industrialised countries such as Japan, Switzerland and other European countries with highly-protected and subsidised farm sectors, claim that non-trade concerns, such as the maintenance of rural communities or environmental protection, allow them to continue to protect agricultural producers.

Developing country and industrialised country non-trade concerns are quite different and some developing countries fear that theirs will get lost amongst those of industrialised countries. The ICESCR, with its emphasis on the protection of basic livelihood rights of the most vulnerable and disadvantaged, could be used as a yardstick to help distinguish between industrialised countries' and developing countries' non-trade concerns. The ICESCR could also help identify the minimum levels of livelihood that a new international agriculture regime must preserve.

ICESCR as a Tool for Developing Countries

A preliminary assessment of the effects of the Uruguay Round Agreements shows that in areas such as agriculture and access to pharmaceuticals, the international trade regime is increasingly depriving some developing countries of the means to uphold the economic, social and cultural rights of their citizens. Developing countries wishing to implement measures that might not seem wholly WTO-consistent in order to offset harmful effects of the Uruguay Round Agreements could rely on the ICESCR, which calls for international co-operation to realise the rights of the most disadvantaged and vulnerable sectors of society. The Covenant's international co-operation provisions clearly provide support for their calls to industrialised countries to comply with the commitments they made in developing countries' favour at the end of the Uruguay Round. The ICESCR could also be used as a shield against pressure from industrialised countries to adopt new, potentially harmful rules. In this way, the ICESCR's legally-binding provisions could constitute a strong new concrete element of support to arguments in favour of better defining the content and scope of SDT provisions in the WTO context.

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ENDNOTES

¹ General Comment No. 3 (1990), The Nature of States Parties' Obligations. This and other documents relating to the ICESCR are available on the web via at www.cesr.org/ESCR/basicescr.htm Official documents of the Committee, as well as States parties' reports on their implementation of the ICESCR are available at www.unhchr.ch/tbs/doc.nsf.

² Brazil – Measures Affecting Patent Protection, Request for the Establishment of a Panel by the United States, WT/DS199/3, 9 January 2001.

³ See Statement by Mauritius - Fourth Special Session of the Committee on Agriculture, G/AG/NG/W/75, 30 November 2000.

Chiang Mai Dialogue on Trade and Environment

Environment and trade officials from 23 Asian countries met for a two-day multi-stakeholder dialogue with civil society representatives on 29-30 March in Chiang Mai, Thailand, as part of a process geared towards better articulation of regional sustainable development interests and concerns and how they apply in the multilateral trade system. The Chiang Mai dialogue was the fourth of a series of such meetings held by ICTSD with local partners, back-to-back with WTO regional seminars on trade and the environment (the WTO seminars stemmed from the Member States' recognition, in 1998, of the pressing need to provide policy forming processes – in capitals, and at the geographical regional level – with space and tools for better understanding and exploration of the issues under debate at the multilateral level).

The Context

In the aftermath of the Seattle and as we move forward in the preparation for the Doha Ministerial Conference, the nature of future trade negotiations remains more uncertain than ever. However, all possible outcomes involve key trade and sustainable interest to Asian countries. The negotiations under the Uruguay Round built-in agenda include agriculture and services, whereas other agreements of particular interest to Asian countries such as the TRIPs Agreement, are under review. At the same time, WTO Members are discussing new proposals on implementation (transition periods, imbalances in existing WTO agreements), enhancing transparency, increased market access for least developed countries and technical assistance. On the other hand, if a new comprehensive round of trade negotiations is eventually launched, it will probably encompass new issues of central importance to Asian countries such as environment, investment and competition policy.

With these concerns in mind, the government-civil society dialogue in Chiang Mai was convened by ICTSD in collaboration with the Heinrich Boell Foundation (HBF) and the Chulalongkorn University Centre for Ecological Economics (CEE). In contrast with the WTO regional trade and environment seminar (for Asian governments only), which took place immediately prior to the ICTSD/HBF/CEE event, the multi-stakeholder dialogue provided a space for Asian civil society groups to present their research and interact with their government officials.

Policy Coherence and Market Access Emerge as Key Themes

One theme that emerged frequently at the dialogue was the need for greater policy coherence at the domestic level between trade and environment ministries. Some participants at the meeting said that this could be reinforced by making use of expertise in trade-environment matters that could be provided by non-governmental groups active in the issue area. Both Thailand and Pakistan indicated that they intended to initiate consultation processes in their own countries to enable decision-makers to be more familiar with the impacts of trade negotiations on the environment and vice versa.

Many participants also voiced concerns around market access and competitiveness. In a presentation to the dialogue, Dr. Ngowan Lam from the Economic and Social Commission for Asia and the Pacific (ESCAP), said that market access for Asian goods and services alone is not sufficient to guarantee development. 'Market access is important,' he said, 'but unless you have a competitive supply it won't be productive.'

Similar meetings have been previously convened in Latin America and Africa by ICTSD with the three aims of reinforcing dialogue and participatory decision-making in trade policy; enhancing analytical capacity of non-governmental actors; and contributing to the dissemination of developing countries' civil society perspectives.

Further information on the dialogue is available on the ICTSD website at: <http://www.ictsd.org/dialogueweb/Dialogues/29-03-01-desc.htm>.

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May 3 Geneva	WTO Working Group in Transparency in Government Procurement Contact: Luis Ople, tel: 5374, fax: 5458
May 7 Geneva	WTO General Council Contact: Nuch Nazeer, tel: 5393 fax: 5458
May 14-20 Brussels	Third UN Conference on LDCs Contact: UNCTAD, tel: (41-22) 907-5893
May 16 Geneva	WTO Dispute Settlement Body Contact: Nuch Nazeer, tel: 5393 fax: 5458
May 21-22 & 23 Geneva	WTO Committee on Agriculture (negotiations) Contact: Peter Ungphakorn, tel: 5412, fax: 5458
May 22 Geneva	WTO Committee on Trade and Development Contact: Lucie Giraud, tel: 5075, fax: 5458