

Least-Developed Countries: No New Trade Concessions Before Doha

The third United Nations Conference on Least-developed Countries (LDCs) closed in Brussels on 20 May with no significant new concessions from industrialised countries in key areas. The political declaration and the 60-page programme of action adopted by 193 government representatives emphasise that the 'primary responsibility for development in LDCs rests with LDCs themselves'. Financial commitments by 'development partners' – i.e. donor governments – remain largely the same as those adopted (and not yet reached) at last the last UN LDC conference a decade ago. Concrete goals, such as free and compulsory access to primary education for all children by 2015, are preceded by softening language, which specifies that 'measures will be pursued *in line with* the following goals and targets' (editor's italics).

The Trade Aim

The conference debates highlighted both the importance and the limits of LDC goods' duty-free access to industrialised country markets.¹ Although a host of goods from least-developed countries – some 90 percent of tariff lines – enter duty-free into most developed countries, quotas and prohibitive tariffs continue to restrict access of their most competitive agricultural and textile products. Significant tariff escalation for manufactured goods hampers LDCs' industrialisation and economic diversification efforts. And, more and more, all developing countries complain about ever-tightening sanitary standards and technical regulations, which they see as a deliberate strategy to keep out products that would pose a direct threat to competing domestic equivalents (see related article on page 3).

In their declaration, trade, finance and development co-operation ministers ringingly underscored their belief that increased trade was 'essential for the growth and development of LDCs', but they only committed themselves 'to seizing the opportunity of the fourth WTO Ministerial meeting in Doha in November 2001, to advance the development dimension of trade, in particular for the development of LDCs'. The action plan prudently states that industrialised countries will 'aim at' (rather than 'commit to') enhancing least-developed countries' participation in the multilateral trading system. For instance, they will 'aim, including through actions within relevant multilateral fora at improving preferential market access for LDCs by working towards the objective of duty-free and quota-free market access for all LDCs' products'. This contrasts with earlier draft language that would have committed them to aiming a little higher, i.e. 'removing all trade barriers facing LDCs exports in the markets of developed trade partners in the shortest possible time, and in any case no later than 2003.'

Similarly, the aim to make technical assistance for 'the implementation of multilateral trade agreements mandatory and an integral part to be undertaken in future trade agreements' emerged in the adopted action programme as 'strengthening, as required, technical assistance for the implementation of multilateral trade agreements and considering making such technical assistance an integral part of commitments to be taken in future trade agreements.'

In its earlier version, the draft programme of action had also proposed that development partners aim at 'exempting all LDCs, including those acceding to the WTO, from undertaking commitments on domestic support and export subsidies in the area of agriculture, and expanding non-actionable categories of industrial subsidies to include those subsidies for development, diversification and upgrading of industries needed by LDCs'. The final text only proposes that industrialised countries examine 'the possibility of strengthening the effectiveness of non-actionable categories of subsidies in order to take into account the needs of LDCs', and aim at 'increasing support to enhance agricultural production and productivity'.

According to the action plan, industrialised countries will aim to continue to support the effective participation of LDC in international standard-setting processes and to provide assistance for infrastructure needed for quality control. Other industrialised country goals are adhering to international standards in their application of the WTO's Agreement on Sanitary and Phytosanitary Measures, and 'taking measures, where appropriate, to compensate for trade losses incurred by LDCs as a result of unilateral measures found to be inconsistent with the SPS Agreement'.

The action plan also confirms the aim to build LDC's capacity, through the Integrated Framework for Technical Assistance and other channels, in trade negotiating, economic diversification, transport infrastructure, regional co-operation and enhancing women's ability to exploit trading opportunities.

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One concrete trade capacity-building initiative did emerge from the meeting: the decision to establish a World Trade University with headquarters in Toronto, Canada, and campuses in Africa and Asia. The institution is to be funded by UN agencies and private contributions. Its backers hope to have the university up and running by 2003 with some 600 students from developing countries and countries in transition attending the first year. Courses will focus on 'affordable and accessible' instruction in trade law, international banking and the multilateral trading system.

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Other Financial Resources

As in the trade area, ministers made no new commitments in other fields of development financing, including official development assistance (ODA) and debt relief. Instead, they committed themselves to 'seizing the opportunity of the Conference on Financing for Development in March 2002 in Monterrey, Mexico for the mobilisation of resources for development, in particular for the LDCs' (see related article on page 10).

Industrialised countries reaffirmed their decade old-ODA goals: donor countries, which already provide more than 0.20 percent of their GNP as ODA to least-developed countries 'continue to do so and increase their efforts'; donors having met the 0.15 percent target 'undertake to reach 0.2 per cent expeditiously'; and donors having committed themselves to the 0.15 percent target 'reaffirm their commitment and undertake either to achieve the target within the next five years or to make their best efforts to accelerate their endeavours to reach the target'. In practice, OECD donors' aid to LDCs dropped from 0.09 percent in 1990 to 0.05 percent in 1998. Only Denmark, Luxembourg, the Netherlands, Norway and Sweden have fulfilled their targets.

The only mildly encouraging news on the ODA front was major donors' commitment to 'implement the OECD-DAC recommendation to untie aid to LDCs, which will significantly increase the value of aid in an expeditious manner as agreed in the OECD in May 2001.'

Ministers declared themselves 'concerned with the external debt overhang that affects most LDCs and remains a main obstacle to their development', and affirmed their 'commitment to provide the full financing and the speedy and effective implementation of the enhanced HIPC (heavily indebted poor countries, *ed.*) Initiative, which is essential for freeing domestic budgetary resources for poverty reduction.' These are not new commitments, however; neither are promises to make 'expeditious progress towards full cancellation of outstanding official bilateral debt within the context of the enhanced HIPC Initiative ...in return for [HIPC countries] making demonstrable commitments to poverty eradication'.

As for foreign direct investment, the most concrete outcome was the signing of 29 bilateral investments by the trade and finance ministers of Benin, Burkina Faso, Burundi, Cambodia, Chad, Comoros, Guinea, Mali and Mauritania.

Health

While the ministerial declaration expressed concern over 'the acute threat of the HIV/AIDS pandemic and emphasise[d] the need for the strongest possible measures to combat this or other communicable diseases', a closer look at the accompanying action plan reveals only general, non-quantified, promises to enhance official development assistance for health, safe water and sanitation, and to 'assist LDCs to set up effective health infrastructures and to increase access to necessary medicines and vaccines, including urging the pharmaceutical industry to make drugs related to communicable diseases, particularly HIV/AIDS, malaria and tuberculosis, more widely available and affordable, particularly for the LDCs, while reaffirming the need for strict compliance with safety and quality assurance and other relevant laws and regulations'.

There are no hard targets for ODA, nor deadlines for HIV/AIDS mortality reduction, and no word on multilateral co-operation to ensure that intellectual property rules such as the WTO's TRIPs Agreement do not hinder governments' ability to respond to health crises. The action plan's language in fact closely reflects the European Union's existing tropical communicable diseases initiative, which focuses on exploring the potential of differential pricing with the pharmaceutical industry, rather than a commitment to refrain from TRIPs-related disputes at the WTO.

¹ While least-developed countries' share of global trade declined from 0.48 percent in 1990 to 0.4 percent in 1999, exports nevertheless now represent 49 percent of their gross domestic product compared with 35.8 percent a decade ago.



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The State of Development in Least-Developed Countries

By John Cuddy

Whilst the 1980s were dubbed the “lost decade” for developing countries in general, the 1990s have become the decade of increasing marginalisation, inequality, poverty and social exclusion for least-developed countries (LDCs) in particular. The violence and social tensions, which afflict several LDCs are caused, in part at least, by increasing deprivation and inequality. Some 1.3 billion people (nearly a quarter of the world’s population) continue to live in extreme poverty on less than a dollar a day, and a further nearly one billion people on less than US\$2 per day.

State of Development Policy

The question of whether the international community can manage the globalisation process in a way that facilitates the integration of LDCs in the world economy and at the same time offers a more equal sharing in its benefits is at the centre of the current development policy debate.

There is now widespread agreement that the goals of development extend beyond the relatively narrow objective of economic growth, to include distribution and poverty reduction, social development and environmentally sustainable development. There is also a recognition that the achievement of these wider developmental goals should be built on a more inclusive and participatory process of policy-making whereby all groups in society, in particular disadvantaged groups whose voice was seldom heard in the past, participate in making decisions that affect all their livelihoods. The Poverty Reduction Strategy Paper (PRSP) is at the core of the effort by all development partners – national and international, multilateral and bilateral – to find ways to implement these widely agreed objectives (and also to bring to development cooperation a much greater degree of coherence than has been the case hitherto).

In the 1990s, the most important feature of development policy in many LDCs was an accelerating process of economic liberalisation in many of them. Thirty-three out of 48 LDCs undertook policy reforms under the IMF-financed structural adjustment programmes between 1988 and the transformation of this facility into the Poverty Reduction and Growth Facility. The main exceptions were countries experiencing severe civil conflict and/or sanctions by the international community (Afghanistan, Angola, Liberia, Myanmar and Sudan) and a group of seven island LDCs, most of which were excluded from the process owing to their higher income level.

Liberalisation has, of course, been deeper and longer in some of the reforming LDCs than in others and reforms have been stronger in some domains than in others. But the available evidence suggests that LDCs have kept up with other developing countries in the process of structural reform in all areas except financial sector reform and the reform of the public enterprise sector, and they have gone further than other developing countries in pricing and marketing reform. The *Least Developed Countries 2000 Report* shows that trade liberalisation has actually proceeded further in the LDCs than in other developing countries. In 1999, sixty percent of the 43 LDCs for which data is available had average tariff barriers below 20 percent and non-tariff barriers that covered less than 25

percent of production and trade. Similarly, UNCTAD data on foreign investment regimes for the late 1990s shows that, in a sample of 45 LDCs, only nine maintain strict controls on remittances of dividends and profits and capital repatriation.

State of Development Trends

The second key feature of the state of development in LDCs is that the developmental impacts of this new policy environment have fallen far short of expectations. In fact, the *Least Developed Countries 2000 Report* finds that two-thirds of LDCs lost ground to other developing/low-income countries in the 1990s. While economic growth was faster for the group as a whole in the 1990s than in the 1980s, real GDP per capita grew at only 0.9 percent during 1990-98 and, excluding Bangladesh, at only 0.4 percent.

While there were variations within the group, thirty-two LDCs either fell behind other developing countries in terms of per capita income, or experienced absolute deterioration in living standards during this period.

Although least-developed countries have undoubtedly made some progress in a number of social indicators during the past two decades, on average the gap between LDCs and other developing countries has grown apace. LDCs continue to lag behind other developing countries

in terms of improvements in life expectancy and infant mortality. Male primary school enrolments seem to have picked up in the early 1990s, recovering some of the ground lost to the low- and middle-income and other low-income countries in the 1980s. But the gender gap in education in LDCs is much greater than that in other developing country groups and the difference seems to have widened substantially during the last two decades.

If these development trends continue, only four LDCs – Bhutan, Laos, Lesotho and Sudan – are set to reach a GDP per capita of US\$900, which is one of the threshold criteria for graduation from the category of LDC, in the next 25 years and only another four – Bangladesh, Guinea, Mozambique and Uganda – will reach this level in the next 50 years. Just eight LDCs (in a sample of 30) are on target to reach the international development goal of universal primary education by 2015 and only seven are on target for reducing infant mortality by two-thirds between 1990 and 2015.¹

Implications

The development experience of the 1990s for many LDCs is one in which they are falling behind other developing countries, and some are getting stuck in vicious circles of economic stagnation and regression. The challenge now is to look forward and, on the basis of lessons gained from experience, to elaborate national policies which can promote accelerated and sustainable pro-poor growth and to design international cooperation in a way which can support these efforts so that LDCs are integrated into, rather than marginalized from, the global economy.

This is what the third UN Conference on LDCs is all about (see page 1). But I would like to underline two points here.

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First, analysis of successful development experiences shows that sustained and accelerated economic growth is built on the development of productive capacities and international competitiveness, and on a structural transformation away from a narrowly-specialised primary commodity economy. It is through increased trade that LDCs will escape from aid dependence and indebtedness, and this requires enhanced policy attention to the structural constraints that are such important features of most LDC economies. Notable in this regard are lack of social and economic infrastructure, the weakness of market development, the thinness of the entrepreneurial class and low private sector capabilities.

Second, it is important that a supportive international environment is put in place to enable these efforts. This requires attention to aid flows, which have fallen dramatically in the 1990s (in real per capita terms, net ODA to LDCs has dropped by 45 percent since 1990); debt relief which is sufficient to engineer a durable exit to the debt problem and lift the crippling fiscal constraint of debt on most LDCs; enhanced efforts by donors as well as recipients to increase aid effectiveness (grasping the nettle of aid tying); and innovative measures which can promote international trade and international investment for LDCs without adversely affecting other developing countries.

Whilst the process of economic reform in LDCs has been widespread and in many cases deep, the implementation of the external finance commitments made at the last LDC Conference in Paris in 1990, has been weak. The share of aid to LDCs of the OECD's Development Assistance Committee donors' GNP fell from 0.09 percent in 1990 to 0.05 percent in 1998, and only five DAC members have met the targets of the Programme of Action, namely Denmark, Luxembourg, the Netherlands, Norway and Sweden.

In the face of this, we must look elsewhere for the finance necessary to spur LDCs' development process. Of all the sectors vital for a truly sustainable development process, one stands out for the huge contribution which it can make to generating that finance: that sector is trade. No matter how much attention is devoted to aid or to foreign direct investment (FDI), it is trade which makes the preponderant contribution to development finance. A look at the figures is convincing: aid flows to all developing countries amount to less than US\$50 billion annually; FDI inflows come to less than US\$200 billion annually; but export earnings of developing countries exceed US\$1500 billion annually, thirty times the value of aid and seven times that of FDI.

Furthermore, studies by the World Bank, UNCTAD, the WTO and others indicate that the removal of trade barriers could significantly increase the value of developing country exports. A conservative estimate is an increase of over US\$100 billion annually – half as much as all FDI inflows put together. That is the reason why so many countries are looking forward to the beginning of a new “round” of negotiations in the WTO to further liberalise trade.

The above is for all developing countries. For LDCs, the figures are quite different although trade again dominates: annual aid flows are US\$12 billion; FDI: US\$5 billion;² and exports: US\$25 billion. The experience of other developing countries shows that international trade could make a much more significant contribution to the development prospects of LDCs. Why has it not? There are two reasons: first, least-developed countries' competitive supply capacity is limited; second, even when competitive goods (and services) are available for export, access to the markets of trade partners is constrained by barriers.

Take market access. The Uruguay Round of trade negotiations reduced tariffs on industrial products quite significantly, and these now average very low levels in industrial countries (on the order of 3-5 percent). But these are not the goods in which LDCs have a competitive supply capacity. Their exports are concentrated in products such as textiles and clothing; footwear, leather and leather goods; and foodstuffs (meat, fish, cereals, dairy products, fruit, vegetables, sugar). All of these face high tariff and non-tariff barriers, often many times higher than the average tariff. In some cases, those tariffs reach well over 100 percent, making it extremely difficult for LDCs to export competitively.

Another problem facing LDC exporters is the persistence of what is known as “tariff escalation”, whereby countries apply higher tariffs to more fully processed products. This is especially pernicious because it discourages LDCs from advancing along the processing chain, where much of the added value of a product is to be found. Studies by UNCTAD have shown that often only 10-15 percent of the final retail price paid by the consumer actually reaches the producer: the remainder of the product's value is generated in the processing, marketing and distribution chain. Hence the importance of capturing part of that chain, and particularly of participating in the processing of raw materials. This is discouraged by the escalation of tariffs as the stage of processing increases. FAO studies have shown that, although tariff escalation was reduced by the Uruguay Round, it still averages 17 percent in Europe, the US and Japan, and in many cases of interest to LDCs is much higher (e.g. 85 percent on second-stage fruit products into the EU, 82 percent on first-stage sugar products into Japan and 28 percent on second-stage sugar products into the US).

It is for these reasons that so much importance is attached to the “duty-free, quota-free” initiative led by Commissioner Lamy of the Commission of the European Communities. The European Council has now agreed that the member states of the European Union should accord duty-free, quota-free treatment to all exports of the 49 least developed countries (LDCs), with the sole exception of armaments. This is a major initiative, which will significantly increase the trade opportunities – and thus the opportunities for growth and investment – of these countries. Initiatives which go part-way in this direction have also been undertaken by the US, Japan and Canada. A number of smaller developed countries and some developing countries have also announced initiatives in this direction.

But more needs to be done. The US initiative (called “AGOA” – the African Growth and Opportunity Act), laudable as it is, excludes Asian LDCs and is heavily conditional,³ while the initiatives of Japan and Canada do not extend coverage to all LDC exports.

Now is the time for the international community to show that it is serious about coming to grips with perhaps the greatest moral imperative of our time: to, in the words of the Millennium Summit “halve, by the year 2015, the proportion of the world's people whose income is less than one dollar a day and the proportion of people who suffer from hunger”. Extending duty-free, quota-free treatment to all the exports (except arms) of all LDCs would be a giant step along the road to achieving this universal goal.

John D.A. Cuddy was the Executive Secretary of the United Nations Conference on Least-developed Countries. This article is adapted from a longer paper prepared by Dr Cuddy for the Preparatory Meeting on Energy on 14 March 2001 in Vienna.

For endnotes, please see page 12

Doha Agenda Starts to Emerge but Major Differences Remain

Much was made in the press of the recent call of OECD trade ministers to launch a new round of multilateral negotiations at the fourth WTO Ministerial Conference in Doha next November. However, the vague wording of their final communiqué papered over the considerable differences that separate even the world's richest 34 countries regarding the contents of the round. And, despite some development-friendly language in the communiqué, there is no common understanding on how to deal with the crucial issue of implementation.¹ The communiqué also skirts around the divisive themes of how to address questions related to labour rights or the environment (see next page for excerpts).

Setting the Agenda

Meanwhile, groundwork continues in several fora at the WTO, including:

- General Council meetings to sketch out the Ministerial Meeting agenda;
- A parallel series of General Council special sessions to deal with implementation concerns;
- The TRIPs Council, which is carrying out a mandated review of the Agreement, as well as looking into the relationship between TRIPs and Convention on Biological Diversity (see page 7);
- The Council for Trade in Goods, which is reviewing developing countries' requests for longer phase-out periods for trade-related investment restrictions (see page 7);
- Other committees where certain implementation issues have been referred (see page 8); and
- The ongoing negotiation sessions on agriculture and services.

The pace of informal sessions of the WTO General Council has intensified as Members seek to define the broad contents of the Doha Ministerial Declaration, which will shape the WTO agenda for the next two years, including the decision whether or not to start negotiations on a wider range of topics. The preparations follow a six-point checklist put together by GC Chair Stuart Harbinson:

- Ministers' views/statement on current issues;
- Implementation;
- Ongoing negotiations/reviews;
- Other elements of the work programme;
- Organisation and management of the work programme; and
- Technical assistance and capacity-building.

Ministers Views

On 10 May, Members discussed the first item on the checklist, i.e. the political statement that usually precedes actual decisions in Ministerial Declarations. Brazil's proposal, supported by Argentina, India and the African Group, to include a reference to drug pricing, public health and the Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPs) garnered broad support. Brazil would also like a ministerial decision establishing a work programme on the subject.

Other issues likely to figure in the political statement of the Doha Declaration include references to the importance of sustainable development in dealing with environmental problems and the emergence of a 'development deficit' stemming from the implementation of the Uruguay Round Agreements. Many developing countries also said that ministers should commit to concrete action on the issues flagged in the political statement.

New Elements

The controversial 'other elements of the work programme' were addressed on 15 May. These include the so-called Singapore issues (investment, competition policy, transparency in government procurement and trade facilitation), as well as other areas championed as negotiation topics by Members. The response to this checklist cluster will decide whether a 'round' can be launched or not.

Although the meeting revealed no major changes in well-established positions, it did shed some light on where movement could occur. Mr Harbinson said he detected broad, if not unanimous, support for industrial tariff negotiations.

Civil society's deepening scepticism about the benefits of the multilateral trading system must be reversed through action on implementation, Brazil warns.

Other proposals drew more mixed responses. The EU, Japan, Korea, Switzerland and Norway continued to push for a comprehensive round that would include negotiations on agriculture and services (already underway), all the Singapore issues, anti-dumping rules, as well as the relationship between WTO rules and multilateral environmental agreements, recognition of the precautionary principle and eco-labelling. Most developing countries and quite a few developed ones, including the US

and Australia, maintained that no negotiations were desirable in the latter two areas. Reducing perverse agricultural subsidies would advance environmental goals much more efficiently, these countries argued (see related article on page 8).

Investment and competition policy remain divisive both among developed and developing countries, with the difference that the majority of the former would like to initiate negotiations in these areas while the majority of the latter would not. The US, which is still defining its position on several fronts, expressed support for a 'limited round' that would exclude investment and competition policy, and focus instead on agriculture, services, industrial tariffs, transparency in government procurement and, perhaps, changes to dispute settlement procedures.

No signs point to a US change of heart on amending anti-dumping rules, although farm groups have recently requested the Administration to show more flexibility (see page 9). Addressing this issue remains a key developing country priority within or without a new round. The EU and its allies have already acknowledged that the issue should be addressed during new negotiations, and Canada said it would be prepared to include it as well.

India and Pakistan proposed the establishment of working groups on trade and debt and trade and finance as part of a future work programme. Pakistan appeared more flexible than previously about new negotiations, which it and other major developing countries have hitherto staunchly resisted, arguing that future WTO work should focus only on correcting imbalances in existing agreements (see implementation below). At the 15 May meeting, Pakistan said it could consider adding new issues to the ongoing agriculture and services negotiations provided that these were 'trade-related' and offered benefits to all WTO Members. Among developing countries, at least Chile, Costa Rica, Singapore, South Africa and Hong Kong are in favour of broad-based negotiations.

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Implementation

Implementation-related debates are being held in variety of WTO bodies. The General Council special sessions that are supposed to result in recommendations for ministerial action in Doha have made slow progress, and developing country demands that would require amending the text of WTO Agreements look unlikely to be addressed before Ministerial Conference.

At the latest special session on implementation on 27 April, the EU said that before Doha more could be done on TRIMs transition period extensions (see page 7), improving annual reviews of the Anti-dumping Agreement, reviewing TRIPs provisions on technology transfer, increasing technical assistance and reviews related to the Agreement on Sanitary and Phytosanitary Measures, and transparency and notification of rules of origin. These improvements, nowhere near to being agreed among industrialised countries, are minimal compared to developing countries' demands. At Doha, the EU suggested that ministers could consider issues related to subsidies, anti-dumping rules and accelerating liberalisation of textiles and clothing, but refrained from specifying what the outcome might be.

Both the EU and Japan let understand, however, that far-reaching changes would only have a chance in the context of broader negotiations. General Council Chair Stuart Harbinson confirmed that his consultations revealed few prospects for progress on developing countries' demands related to agricultural subsidies or intellectual property rights.

Many developing countries continued to stress the need for concrete results in the implementation review process. India, Pakistan, Malaysia and Zimbabwe on behalf of the African Group rejected the proposal to roll some of the issues into a new round. Malaysia warned that the implementation review outcome would seriously impact on the Doha preparatory process; Pakistan said that the review's success would largely depend on action on textiles and clothing (so far, no progress has occurred on this issue); and Zimbabwe highlighted the importance of making special and differential treatment provisions binding. Brazil said that with the consequences of imbalances in existing agreements becoming ever more apparent, civil society opposition to free trade and the WTO was growing in developing countries.

The next special session, planned for late June/early July, will take stock of progress – or the lack of it – across all issues raised by developing countries in the implementation review.

The General Council also met on 17 May to discuss implementation concerns in the context of Doha preparations. Despite a general acknowledgement that implementation was crucial to the success of the Ministerial Conference, no concrete progress was made. The US in particular seemed reluctant to make concessions at this stage, and few trade officials expected a more co-operative attitude in the two meetings that were scheduled to discuss textiles (23 May) and anti-dumping demands (1 June).

At another meeting, held on 18 May on ongoing negotiations and reviews, developing countries said they wanted ministerial decisions in Doha on the TRIPs and TRIMs reviews (see page 7).

¹ Meeting on the sidelines of the OECD Council in Brussels, Quad ministers (Canada, the EU, Japan and the US) failed to find a common position on implementation issues.

The Multilateral Trading System

Excerpted from the OECD Council Communiqué 2001

We are committed to *the launch of a new global round of multilateral trade negotiations* at the WTO Ministerial Conference in Doha in November. [...] The broader framework of a new round will contribute to moving forward the 'built-in agenda' and will offer the prospect of a wider distribution of the benefits sought by all participants. We renew our commitment to the strengthening of the multilateral trading system and our rejection of protectionist pressures.

All WTO Members will have to find their concerns and interests reflected in the final result, and negotiations will need to be conducted in a transparent manner. [...] The links between trade liberalisation and environment, as well as the sustainable use of natural resources, will need to be carefully clarified. All WTO Members will need to be creative and flexible in addressing areas and modalities of negotiation.

Trade and labour as well as other social development issues raise concerns that must be addressed through dialogue that takes into account the expertise of all relevant international institutions, including the WTO.

A new round is essential for developing countries given the need to stimulate their economic growth, alleviate poverty and promote their integration into the multilateral trading system. We recognise that they have a particular interest in a number of areas, including agriculture and textiles and clothing. Some progress has been made to date on Uruguay Round implementation issues and we urge all WTO members to seek ways to address developing country requests and concerns, and to build confidence as preparations for Doha proceed.

We welcome recent initiatives by OECD Members to liberalise preferential market access for the least developed countries, and the moves to incorporate trade into poverty reduction strategy programmes. Enhanced capacity building and technical assistance are also vital, if developing countries are to benefit from more open markets. We support the recently revised Integrated Framework Initiative.

Taking into account the strong interest of civil society regarding globalisation and the process of trade and investment liberalisation, we are committed to transparency and to increased and sustained communication with the public.

We are convinced that progressive multilateral liberalisation and strengthening of the rules, in the context of an effective and predictable governance framework and greater coherence among international organisations, and when combined with mutually supportive environmental and social policies, are fundamental for sustainable development and a major driving force for innovation, growth and enhanced human welfare worldwide.

WTO-consistent preferential trade agreements can complement but cannot substitute for coherent multilateral rules and progressive multilateral liberalisation.

TRIMs Compromise Looks Off Again

At its 18 April meeting, the WTO's Council for Trade in Goods (CTG) once more failed to agree on a multilateral approach to developing countries' requests for extensions of their transition periods under the Agreement on Trade-Related Investment Measures (TRIMs). In fact, the United States appeared to backtrack from the flexibility it had shown at the March session, when Members seemed headed for a general agreement on the so-called 'two-plus-two' formula as a framework for reviewing pending extension requests of ten developing countries (Bridges Year 5 No.1-3, page 10).

Under the TRIMs Agreement, developing countries should have phased out trade restrictions on foreign investment, such as local content requirements, by 1 January 2000. The 'two-plus-two' formula would extend that deadline 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.

The extension of TRIMs transition periods is a key developing country demand in the implementation context. But while they seek an across-the-board solution, industrialised countries in the Council for Trade in Goods have insisted on reviewing the requests individually. At the April meeting, most developed countries were ready to grant two-plus-two treatment to all Members requesting extensions, although many pressed for definitive phase-out plans before final agreement.

The United States, however, refused to agree on such blanket treatment. Malaysia, it said, could only have the two extra years it originally asked for and, together with Romania and Pakistan, must provide more information before decisions can be made. In addition, the US has launched a WTO dispute against the Philippines' local content and export-import balancing requirements in the automotive sector. The Philippines has asked for a five-year extension, but the most the US has been willing to concede is three and a half years. The US has also, so far unsuccessfully, pressed the Philippines (and a number of other countries) to agree on accelerated dispute settlement proceedings after their extensions expire.

On the other hand, Pakistan, which wants a longer extension than the four years currently under consideration, is holding out against the two-plus-two framework, and Malaysia, Mexico and the Philippines are adamant that the formula must apply to all requesting countries equally. The latter two have threatened to bloc any agreement that differentiates between applicants.

Paraguay Threatens to Bloc Cotonou Agreement Waiver

At the CTG's April meeting, Ecuador and Paraguay again refused to start consideration of the EU's request for a waiver for its new Partnership Agreement with African, Caribbean and Pacific (ACP) countries. Ecuador may drop its resistance following the completion of its negotiations on the EU's banana import regime (see page 10), but Paraguay warned that it would bloc the waiver because it would give preferential access to all ACP countries, although 19 of them had a higher GDP per capita than Paraguay (without a waiver, ACP countries' trade preferences are technically open to dispute settlement challenges at the WTO). After months of opposition, Costa Rica seemed ready to proceed with the waiver request.

The Council will meet again on 5 July.

TRIPs Council to Discuss Access to Drugs

At the request of Zimbabwe, the Council for Trade-related Aspects of Intellectual Property Rights (TRIPs) agreed at its 2-6 April session to devote a full day to a special discussion of intellectual property issues relevant to access to medicines during the next TRIPs Council meeting on 18-20 June. The issue has acquired high visibility in the wake of the recently settled South African court case (see page 18), as well as the WTO disputes that the US has initiated against Brazilian and Argentine intellectual property laws (see page 10). In addition, the UN Human Rights Commission in April adopted a resolution on access to medications in contexts such as HIV/AIDS, which called upon states to 'refrain from taking measures which would deny or limit equal access for all persons to preventive, curative or palliative pharmaceuticals or medical technologies used to treat pandemics' and to 'adopt legislation or other measures, in accordance with applicable international law, *including international agreements acceded to*, to safeguard access to such [...] pharmaceuticals and medical technologies from any limitations by third parties' (editor's italics).

While the June special session will look into the controversial questions of compulsory licensing and parallel imports, it will also build on expert discussions at the workshop on differential

pricing and financing of essential drugs co-sponsored by the Secretariats of the WTO and the World Health Organisation from 8-11 April in Høsbjør, Norway. According to a WTO summary of the meeting, the following issues need further work:

- international funding for ensuring effective access to essential medicines;
- the most appropriate ways to practice differential pricing;
- how to avoid backlash over higher prices in developed countries, and the prevention of trade diversion; and
- how to treat middle-income developing countries and well-to-do populations in poor countries under differential pricing?

No breakthroughs occurred on the other items on the TRIPs Council's April agenda, and WTO sources predicted that progress on major issues was unlikely unless they were discussed as part of a new round of trade liberalisation talks or within the agriculture negotiations. Developing countries, such as India, are pushing for the harmonisation of the TRIPs Agreement with the provisions of the Convention on Biological Diversity (CBD), particularly with regard to patenting obligations for plant varieties and micro-organisms (Article 27.3b), and the protection of traditional knowledge (Peru submitted a paper, IP/C/W/246).

At the April session the US again said that it did not see a conflict between the two agreements and called on Members to bring any potential problems to the attention of the TRIPs Council so that they could be discussed (IP/C/W/257). The EU's paper (IP/C/W/254) acknowledged the concerns expressed by developing countries within the context of the review of Article 27.3(b), but concluded that the solutions did not necessarily lie within the scope of the Article itself, but rather in developing appropriate international instruments to achieve the objectives of the CBD and the TRIPs Agreement; providing technical assistance to developing countries; and possible negotiation of measures within the IPR system. Detailed discussions of the papers were postponed to the next Council meeting.

Members may provide limited exceptions to the exclusive rights conferred by a patent, provided that they do not unreasonably prejudice the legitimate interests of the patent owner.

TRIPs Article 30

Trade and Environment Committee to Debate WTO/MEA Relationship, Non-tariff Barriers and Subsidies

The WTO's Committee on Trade and Environment will meet on 27-28 June to discuss items related to the linkages between the multilateral environment and trade regimes. The meeting will start with an information session with several Secretariats of multilateral environmental agreements (MEAs).

Members are expected to discuss a joint paper on compliance, enforcement and dispute settlement provisions in the WTO and MEAs, which the WTO Secretariat, the UN Environment Programme and MEA Secretariats should release in late May. The Secretariat of UN Framework Convention on Climate Change will brief Members on progress in setting up a compliance regime under the Kyoto Protocol (the US officially abandoned its greenhouse gas reduction targets and support for the Protocol in March; see related story on page 16).

Debate will continue on New Zealand's proposal (WT/CTE/W/180) to establish a voluntary consultative mechanism, which WTO Members could use to explore alternatives to trade measures under MEAs. New Zealand suggests that prior to imposing trade restrictions pursuant to their obligations under an international environmental agreement, Members hold informal consultations in order to identify the 'first-best' means to address the environmental problem. The paper emphasises that such a mechanism would not 'in and of itself' guarantee the delivery of an acceptable solution to all parties at all times or rule out the use of trade measures. Rather, New Zealand writes: 'such a voluntary instrument may facilitate an improved understanding of different points of view; allow for the identification of a range of different policy options; maximize the potential for an agreed solution; minimize conflicts between parties on trade and environment related policies while at the same time avoiding inefficient environmental and economic outcomes.'

Observers say that New Zealand's idea has gathered broad support from both developed and developing countries. The US, however, remains lukewarm about the consultative mechanism and opposed to a formal clarification of the WTO-MEA hierarchy, which the EU wants to put on the agenda of broad-based new trade negotiations it is seeking. Switzerland has also suggested that Members issue an interpretative decision that clarifies the respective competence of WTO Agreements and MEAs (Bridges Year 4 No.6, page 9).

Delegates will continue discussions from February on India's paper on the effect of environmental measures on market access (WT/CTE/W/177). The paper cites several examples of trade-related environmental measures (TREMs) that act as non-tariff barriers, including technical and sanitary regulations, and the cost of compliance with eco-labelling or ISO certification criteria. The paper does not challenge the legitimacy of TREMs, but advocates greater transparency in standard-setting and improved notification of measures under consideration. India also suggests that industrialised countries provide capacity-building, technology transfer and technical assistance, as well as infrastructure development to mitigate environmental problems.

Argentina has submitted a paper on legitimate non-trade concerns, which spells out 'three of the most acute environmental and social consequences of the existing trade restrictions and distortions affecting trade in agriculture: rural poverty, unemployment and environmental degradation' (WT/CTE/W/188; the paper has also been tabled at the agriculture negotiations as G/AG/NG/W/88).

Lively exchanges are also expected regarding fisheries subsidies. Substantial subsidy reduction is championed by a number of countries, most notably Iceland, the US and the Philippines, as a prime example of a win-win solution that would benefit both trade and the environment (see article below). Recognising that there are indeed too many boats chasing too few fish, the European Union now seems more amenable to discuss subsidy reductions,¹ but Japan and Korea remain opposed to bringing the topic to the WTO. They argue that not all subsidies are environmentally harmful, and that the first task should be to clearly distinguish between those that encourage unsustainable fisheries practices and those that can help curb them. The OECD and the FAO should complete their work on the subject before tackling subsidy reductions at the WTO, the two countries maintain.

Members may also debate the relationship between the TRIPs Agreement and the protection of traditional knowledge under the CTE's Work Programme item 8. This issue has already surfaced in the TRIPs Council itself, as well as in the brand-new Intergovernmental Working Group on Intellectual Property Rights and Traditional Knowledge under the auspices of the World Intellectual Property Organisation (WIPO).

¹ In March 2001, the European Commission released a Green Paper on the EU's common fisheries policy after 2002, which advocates drastic cuts in support to fishing efforts and fleets.

SCM Committee Asked to Tackle Fisheries Notifications

On 30 April, the World Wide Fund for Nature (WWF) sent a letter to Mauritian Ambassador Usha Dwarka-Canabady, who chairs the Committee on Subsidies and Countervailing Measures, urging her and the Committee to 'take action to address the continuing failure by many WTO Members to comply with WTO rules requiring notification of subsidies to the fishery sector.' The conservation organisation, which together with Iceland co-sponsored a proposal for fisheries subsidy reduction at the Seattle Ministerial, wrote that 'time [had] come to put an end to the almost wholesale disregard for the notification obligations contained in Article 25 of the SCM Agreement.' According to WWF, only 15 percent of fisheries subsidies (estimated at US\$20 billion a year) are notified at best. The issue is likely to be brought up at a future SCM Committee meeting by one of the Members advocating fisheries subsidy negotiations at the WTO.

At its 2-3 May meeting, the Committee decided to hold three informal sessions (on 28 May, 22 June and 20 July) on implementation-related issues raised by India, Colombia and the Dominican Republic together with other developing countries. India's point concerns aggregate and general rates of remission of import duties consumed in the production process and Colombia seeks an amendment to footnote 61 of the Agreement (the definition of 'inputs consumed in the production process'). The Dominican Republic proposes changes to Article 27.3, which requires developing countries to have phased out subsidies based on local content requirements by January 2000, and least-developed countries to do so by January 2003.

The next regular session of the SCM Committee will take place from 30 October to 2 November 2001.

Dispute Settlement Corner

Loss of Trade Remedy Cases Outrages US

On 27 April, a WTO panel ruled that a US safeguard measure on Pakistani cotton yarn violated the Agreement on Textiles and Clothing (ACT). According to trade officials, the panel held that the US failed to demonstrate the existence or the threat of serious damage to its domestic yarn suppliers as required by ACT Article 6.2. The report is expected to be circulated to WTO Members in late May. The US then has 60 days to file an appeal.

The import quota at issue was introduced in March 1999 after US suppliers complained about Pakistani cotton yarn flooding the market and causing serious damage to domestic producers. Prior to Pakistan's initiating the complaint, the measure had twice been condemned by the WTO's Textiles Monitoring Body (Bridges Year 3 No.5, page 9). Pakistan – the world's second biggest yarn supplier – welcomed the panel decision as a victory in developing countries' struggle against US restrictions on clothing and fabric imported by cheap-labour countries.

The ruling adds to a series of trade remedy cases that the US has recently lost at the WTO, including disputes over anti-dumping measures on steel products from Korea and Japan (see WT/DS179/R and WT/DS184/R) and the recent Appellate Body ruling upholding New Zealand's and Australia's complaint over US safeguard measures on lamb meat imports (see WT/DS177/AB/R and WT/DS178/AB/R).

These challenges against trade remedy measures – a cornerstone of US trade policy – have given rise to extremely critical responses. US delegates blasted the lamb ruling in a meeting of the Dispute Settlement Body (DSB) on 16 May in Geneva, and warned that limiting Members' safeguard rights could make them less willing to open their markets in the future.

Addressing the President on 14 May, Ranking Member of the US Senate Finance Committee, Max Baucus, said that the Appellate Body ruling was the 'the continuation of a troubling trend', which 'risk[ed] eroding US support for the WTO's dispute settlement procedures.' He called on Trade Representative Robert Zoellick to keep the lamb safeguard measure in place.

In setting the agenda for the WTO Ministerial Meeting next November, the US has strongly resisted adding anti-dumping to any potential negotiations menu. To reinforce the point, sixty-two Senators requested President Bush in a 7 May letter to ensure that the US 'no longer use its trade laws as bargaining chips in trade negotiations nor agree to any provisions that weaken or undermine US trade laws.'

On 14 May, however, an alliance of US farming associations 'strongly urged' the President to 'resist calls for any *a priori* exclusion of discussions of trade remedy laws in on-going and upcoming trade negotiations', as removing a key negotiating item would 'take away significant leverage from the United States as it begins discussions to eliminate subsidies and reduce tariffs with Europe and Japan', and thus threaten US ability open new markets for its farmers. 'Any decision to prevent the United States from even sitting at the negotiating table if trade remedy issues are raised also seriously undermines US credibility in promoting trade liberalisation,' the farm groups wrote.

Malaysia Loses Shrimp-Turtle Implementation Challenge

A compliance panel has rejected Malaysia's challenge of the United States' implementation of panel and Appellate Body rulings in the shrimp-turtle case. At issue was the continuation of an import prohibition of wild shrimp caught by vessels without turtle excluder devices (TEDs), which US legislation requires on all domestic shrimp trawlers, as well as foreign vessels whose catch is exported to the United States. TEDs allow highly endangered marine turtles and other bycatch to escape from shrimp nets. Before the WTO dispute, only states that were certified by the State Department as requiring TEDs in mechanised shrimping operations could export shrimp to the US.

In 1998, the Appellate Body ruled that the import ban in itself was justified under GATT Article XX(g), but condemned several discriminatory elements in its implementation (for a detailed analysis of the AB report, see Bridges Vol.2, No.7, page 9).¹

After the AB ruling, the US changed its implementation guidelines to allow fisheries-specific (or 'shipment-by-shipment') certification, as well as nation-by-nation certification.² US environmental groups have challenged this change in court, where a government appeal of an initial finding in their favour is currently pending (Bridges Year 4 No.6, page 7).

US submissions to the compliance panel also highlighted its participation in negotiations for an Indian Ocean and South-East Asian Regional Agreement on the Conservation and Management of Marine Turtles and Their Habitats, and its efforts to provide more technical assistance in building, installing and operating TEDs.

The still confidential compliance ruling was handed to the parties in the dispute on 16 May, and is expected to be publicly circulated in mid-June. Sources familiar with the report said the panel was satisfied that the US had made 'good faith' efforts to negotiate regional turtle conservation treaties and could keep the import ban in place until the conclusion of those negotiations. Some commentators pointed out, however, that the panel's criteria for a 'good faith' effort in multilateral environmental co-operation – an approach preferred to trade measures – must be studied in detail before the verdict's wider implications could be determined.

In its compliance challenge, Malaysia had argued that 'by not lifting the import prohibition and not taking the necessary measures to allow the importation of certain shrimp and shrimp products in an unrestrictive manner, the United States has failed to comply with the [...] recommendations and rulings of the Dispute Settlement Body.' At press time it was not clear whether Malaysia would appeal the decision.

Bridges will report on the findings in more detail once the panel report has been made public.

¹ Article XX(g) allows Members to impose measures 'relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with domestic production or consumption'

² Unlike the other complainants in the original dispute (who were approved), Malaysia did not seek to be certified as a nation.

Dispute Settlement Briefs

- The European Union adopted a new import regime for bananas on 2 May, just two days after it reached an agreement with Ecuador on the criteria for the 'newcomer' category and tightening requirements for obtaining import licences. Ecuador sought to ensure that as many as possible of its small and medium-sized banana importers would be included in the newcomer category, which reserves 17 percent of available licences to operators who entered the market after 1993. The majority of the licences (83 percent) will be distributed to 'traditional suppliers' on the basis of market share between 1994 and 1996, and will primarily go to multinational companies.

Ecuador was the only party to the eight-year dispute to hold out against a deal made between the EU and the United States in April 2001 (Bridges Year 5 No.1-3, page 9).

The new regulations will go into force on 1 July 2001, and once they are fully operational, the US will lift the nearly US\$200 million in trade sanctions that it has imposed since 1999 on a range of European exports.

- Despite a growing pressure from outside – and even inside – the WTO to ensure that intellectual property protection does not prevent developing country governments from making available affordable medicines to combat epidemics such as AIDS, the US will not withdraw its WTO challenge against Brazil's industrial property protection law. Although the contested Article 68 has so far been exclusively used by the generic pharmaceutical industry, in particular to manufacture AIDS drugs, US Trade Representative Robert Zoellick said in May that the Article's 'local working' requirements potentially applied to all industrial manufactures, not only medicines, and that 'that [was] the nature of this dispute'.

Although a panel was established in February, the three panelists have not been appointed; neither has the US yet requested the establishment of a panel in a similar dispute – still at the consultation stage – it has initiated against Argentina (Bridges Year 5 No.1-3, page 8).

- Consultations still continue between the United States and ten other WTO Members on the Byrd Amendment, a piece of trade remedy legislation that the complainants say would give industry an added incentive to petition for anti-dumping investigations. Officially known as the Continued Dumping and Subsidy Offset, the amendment requires anti-dumping and countervailing duties collected by customs to be redistributed to the petitioning industries.

Although the amendment has already passed Congress, the Administration has not yet released the regulations that would allow the disbursements to be made. Several Senators are pushing for action, however, and it is widely expected that the regulations will be adopted in time to fulfil the amendment's requirement that the first payments be made no later than 1 December 2001. At that point, the ten complainants are likely to request the establishment of a panel to rule on the amendment's WTO compatibility.

¹ The countries are: Australia, Brazil, Chile, the EU, India, Indonesia, Japan, Mexico, South Korea and Thailand.

What Role for the WTO in Financing for Development?

An event related to the United Nations LDC Conference (see page 1) took place in May 2001: the third session of the preparatory committee for the International Conference on Financing for Development. The heads of state-level conference itself will be hosted by Mexico in Monterrey from 18-22 March 2002.

The conference mandate is to address 'national, international and systemic issues relating to financing for development in a holistic manner in the context of globalisation and interdependence'. It will look into ways to mobilise funds from domestic and international sources, including through foreign direct investment, trade, debt relief and official development assistance (ODA), as well as through improved coherence between intergovernmental development, financing and trade agencies.

At the May preparatory session, delegates examined, *inter alia*, a compilation of government views on the conference themes (A.AC.257/23+Add.1), a Bureau progress report (A.AC.257/22-Rev.2) and a facilitator's working paper proposing questions that governments could consider in greater depth (A.AC.257/24).

The paper on government views contains predictable positions from the G-77 and China, the United States and the European Union. The sections on trade largely cover the same ground as papers submitted by these countries at the WTO implementation and Ministerial preparatory debates. Other sections of the government submissions faithfully reflect known positions on topics such as international financial institutions, good governance, debt and ODA. Switzerland's contribution focused on financing 'public goods' as 'the most promising avenue to take'. Israel's frustration with development summitry came through clearly in a brief statement, which proposed, *inter alia*, that all heads of state participate in one of six working groups formed to address the conference themes, and strive to produce a brief and substantive document rather than a lengthy outcome document that would 'again serve only as a reference book for future summits'.

One of the goals of the financing for development process is greater coherence between the policies of the World Bank, the IMF and the WTO. The former two have already agreed on the modalities of their contributions to the summit preparations, but the WTO has not, no doubt due to its government-driven nature.

On 9 April, the FfD Bureau met with Members of the WTO Committee on Trade and Development, which was designated by the General Council as the WTO 'interlocutor' in the FfD process. According to the Bureau's report, 'Members of the Committee indicated that the Committee was not in a position at that time to make a definitive determination on the most appropriate modalities of its further engagement with the FfD process. The Bureau was also informed that the Committee on Trade and Development had been working for some months on a statement to convey to the Prep Com as a contribution of the WTO membership to the preparations of the International Conference on FfD, but it had not yet been able to finalize the corresponding text. Members of the Committee suggested that once they completed the WTO statement, they would be better able to address questions of the modalities for enhanced WTO participation.' The statement was not finalised in time for the May Preparatory Committee meeting.

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Changing Investment Litigation, Bit by BIT

By Luke Peterson

While the trade community focuses upon the likelihood of including investment provisions in a projected Free Trade Agreement for the Americas and in a possible future WTO round, there has been surprisingly little stock-taking of existing international investment agreements and their impact upon sustainable development. Readers probably are familiar with the aborted Multilateral Agreement on Investment and the equally controversial provisions of Chapter 11 of the North American Free Trade Agreement (NAFTA), but many may not realize that these agreements draw upon the established practice of hundreds of bilateral investment agreements (BITs) that have been signed since the late 1950s.

These earlier agreements ought to be of far greater public concern given the alarming uses to which their more famous cousin, the NAFTA, has been put in recent years. Foreign investors have successfully used its Chapter 11 investor-state dispute settlement mechanism to litigate against governments before international tribunals on a number of grounds. The most alarming cases for the sustainable development community have been those that have challenged government health, environment and other regulations as forms of creeping or indirect expropriation.

In one recent case, a NAFTA tribunal ordered the Mexican government to pay the Metalclad Corporation nearly US\$17 million in compensation for having prevented the company from establishing a waste management facility in the community of Guadacalzar (a portion of this award was recently set aside by a domestic court in the Canadian province of British Columbia, but the case may be appealed to a higher level in Canada, see page 18).

Due to a significant public outcry over several recent investor-state disputes targeting health or environmental regulations, the Canadian government has shown some appetite for “clarifying” the intent of the NAFTA’s investor rights chapter, but Mexico and the United States disagree on the need for an amendment.

Whatever the prospects for such efforts at damage-control, they come rather late in the game. Upwards of 60 bilateral and multilateral investment agreements already exist in the Americas, and figures released last year by UNCTAD reveal that these agreements are proliferating at an astonishing rate world-wide. In the last ten years alone, the number of BITs quintupled – going from 385 to 1,857. While there is considerable variation in these agreements, most BITs typically include disciplines in the following areas:

- national and most-favored-nation treatment;
- fair and equitable treatment;
- guarantees in respect of expropriation and compensation for war and civil disturbances;
- guarantees of free transfer funds and repatriation of capital and profits;
- subrogation of insurance claims; and
- dispute settlement provisions, both state-to-state and investor-to-state.

Most BITs cover only investments which are already “sunk” or “established”, but the BITs concluded by the United States – and many of those concluded by Canada – go further and extend national treatment and most-favored nation treatment to cover the entry and establishment of investments.¹

Despite such differences of nuance, it has been increasingly standard, at least since the 1980s, for BITs to replicate the two most controversial features of the NAFTA: an investor-state mechanism which allows investors to take their own claims to tribunals, as well as generous provisions against expropriation of investments.

On expropriation, one well-placed lawyer within the Washington-based International Center for the Settlement of Investment Disputes (ICSID) – the forum where many BITs and NAFTA cases are arbitrated – admits that most of the BITs signed in the Americas “have comparable provisions” to the NAFTA’s Chapter 11.²

Thus, whatever the prospects for a diplomatic solution to the problems presented by Chapter 11, it is clear that the legal community now have their eye on the NAFTA’s long-lost cousins, the BITs. Savvy lawyers recognize that these BITs may prove to be useful tools for challenging government policies. While tribunals have not yet had the opportunity to confirm these suspicions, there is considerable evidence that they are being asked to do so.

Indeed, one prominent litigator predicted in a recent speech to a conference of arbitrators that, “We are witnessing the beginning of what may become a flood of litigation under the BITs”.³

William D. Rogers, a Senior Partner with Washington law firm Arnold & Porter, went on to add that the BITs represent, “an open invitation to unhappy investors, tempted to complain that a financial or business failure was due to improper regulation, misguided macroeconomic policy or discriminatory treatment by the host government.” Meanwhile, the United Nations Conference on Trade and Development also warns that many BITs provisions on expropriation are cast so broadly that investors may use them to challenge so-called “regulatory takings” of their investment.⁴

The first BITs cases seeking to mimic the NAFTA-style litigation against health and environmental regulations are now emerging. Last autumn, a Spanish investor invoked a BIT between Spain and Mexico in order to challenge a Mexican environmental law. Sources at the Washington-based ICSID confirm that the case will be heard later this year. Nor is this case expected to be an anomaly.

Noting that big American and UK law firms are becoming more aware of these bilateral investment treaties, Thomas Walde, Director of the Centre for Energy, Petroleum and Mineral Law Policy at the University of Dundee and an expert on such agreements, predicts an increase in BITs disputes. Walde, who happens to be a fan of these agreements and the protections they offer investors, says that lawyers are beginning to invoke bilateral investment treaties during informal negotiations with governments. In fact, the mere threat of litigation under a BIT may suffice to change the mind of a nervous government contemplating regulations that might hamper a foreign investor.

In this vein, there is evidence that the international consortium, which became embroiled in a controversial water privatization in Cochabamba, Bolivia, may have recourse to a BIT signed between Holland and Bolivia. When International Water Ltd. was forced to

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leave the country after a series of protests and riots over the rise in domestic water charges, media coverage tended to portray this as a triumph of people-power over corporate-might.

What has gone unreported, however, is that the company is currently seeking compensation for its losses from the Bolivian government. A high-level company official confirmed to me that if these negotiations fail, International Water will explore various legal options – including launching a BIT investor-state claim.

This newfound interest in the BITs is all the more striking given that investors had ignored these obscure agreements for so long. Long after investor-state provisions became standard features of international investment agreements – obviating the need for a home state to take up an investor's case against a host state – investors still preferred to use the agreements only as a last resort, in cases of outright seizure of factories or other fixed assets.⁵

The number of cases brought to the International Centre for the Settlement of Investment Disputes (the arbitral forum mentioned in the overwhelming number of BITs) reflects this restraint.⁶

In its 35-odd year history, ICSID has handled a mere 79 cases, of which approximately 40 have dealt with a BIT.⁷ However, a staggering *half* of ICSID's case-load has been instigated in the past *five* years alone.⁸ Whereas the center might have seen no more than a single new dispute each year during the 1980s, it now sees 1 or 2 new disputes a month. It seems that the high-profile disputes under the NAFTA appear to have inspired many litigators to dust off the NAFTA's more obscure predecessors.

Any coming "flood" of litigation under the BITs could also spill over from the Washington-based dispute settlement center into other arbitration forums. Indeed, many modern BITs offer a choice of such forums; in addition to ICSID, claims may be lodged with the arbitration divisions of the International Chamber of Commerce, or with the Chambers of Commerce in Stockholm or Vienna. Investors also frequently enjoy the ability to have their dispute heard by an ad hoc tribunal situated anywhere in the world.

This multiplicity of forums makes it all the more difficult to gauge the extent of the problems which may be posed by these investment agreements. Whereas the Washington-based ICSID at least discloses the name of parties involved in pending cases, as well as a terse indication of the issue at stake, other forums refuse to reveal even such basic information. They are forbidden to confirm the existence of any pending arbitrations and even settled cases remain confidential unless both parties agree to make details public.⁹ Indeed, the London Court of International Arbitration touts such secrecy as a benefit for prospective clients on its webpage:

Litigation in national courts is generally open to the public and to the media. By contrast, arbitral proceedings are conducted in private, so that the identities of the parties and of the tribunal, and the nature of the dispute, should remain confidential.

While such confidentiality may be attractive for investors seeking to exercise their rights away from the glare of public scrutiny, it ought to be deeply worrying to the sustainable development community. As far as can be ascertained, emerging disputes under bilateral investment treaties appear to be targeting government regulations in key areas of public policy such as water, energy, environment and health. Despite this, the resolution of such disputes is left in the hands of secretive tribunals that take no

account of the wider public interests at stake, nor of the various safeguards available under domestic legal systems. Clearly, this system, which may have been well-suited for purely commercial arbitration, is deeply unsatisfactory in an era when investment agreements are starting to be wielded as trump cards against sensitive public policies.

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ENDNOTES

¹ UNCTAD, *Bilateral Investment Treaties in the Mid-1990s*, Geneva and New York, 1998)

² Also confirmed in a declassified paper on BITs prepared by the OAS Trade Unit for the FTAA negotiating group on investment.

³ William D. Rogers, Speech to Inter-American Development Bank Conference, Oct. 26-7, 2000

⁴ UNCTAD, *Taking of Property*, Issues in International Investment Agreements Series

⁵ Thomas Walde & Stephen Dow, *Treaties and Regulatory Risk in Infrastructure Investment*, Journal of World Trade 34(2): 1-61, 2000

⁶ Antonio R. Parra, *The Role of ICSID in the Settlement of Investment Disputes*, ICSID News, Vol. 16, No. 1, Winter 1999

⁷ Conversations with ICSID Staff lawyers, January/February 2001

⁸ Antonio R. Parra, *The Role of ICSID*, pp 5-8

⁹ It is possible for final Awards to be published provided that all information which might identify the parties has been excised.

The State of Development of LDCs, continued from page 4

ENDNOTES

¹ The eight LDCs on track to reach the primary school enrolment objective are Afghanistan, Bangladesh, Benin, Cape Verde, Gambia, Malawi, Myanmar and Togo. The seven LDCs likely to reach the goal of infant mortality reduction are Comoros, Eritrea, Gambia, Maldives, Nepal, Vanuatu and Yemen.

² Although average inflows in the late 1990s were higher than in the early 1990s for 29 out of 45 LDCs for which data is available, about three-fifths of the increase in private capital inflows was concentrated in four countries – Cambodia, Laos, Uganda and Tanzania. For most LDCs, private capital is generally such a small proportion of total capital inflows that even where private capital inflows have been increasing they have been unable to offset the decline in official development assistance.

³ The US International Trade Commission assessed the impact of duty- and quota-free treatment for textiles and clothing (the "sensitive" sector in the US) for sub-Saharan Africa as follows: "US domestic shipments of apparel would decrease by about 0.1 percent (US\$47.1 million) with the removal of quotas and duties on US apparel imports from SSA. Corresponding employment losses amount to approximately 676 full-time-equivalents (an upper-bound estimate). The estimated impact on the US textile industry and its workers is considerably smaller; the decline in domestic shipments and employment would be negligible." Despite this, "Representatives of the US textile and apparel industry opposed the opening of the US market to sector goods from low-wage countries in SSA. They expressed concern about transshipments from Asian firms, which have quotas and therefore would be the unintended beneficiaries of US efforts to assist SSA countries." On the other hand, "US importers supported the measure as a means to obtain low-cost goods for sale in the domestic market, thereby lowering the overall cost of apparel in the United States." (<http://www.usitc.gov/332S/ES3056.HTM>)

Precautionary Principle and GMO Labelling Divide Codex

'Codex seems to have become the latest battleground for trade negotiators, rather than health practitioners,' observed a delegate to the Codex Committee on General Principles (CCGP) after the body failed yet again to reach consensus on working principles for risk analysis at its 23-27 April meeting. The comment reflects the heightened importance of Codex standards as a benchmark for WTO consistent measures related to food safety.¹

Talks on defining international risk analysis factors in food safety broke down when a number of delegates insisted on the removal of all references to the precautionary principle. At the CCGP's spring 2000 session, the European Union's Communication on the Precautionary Principle raised a slew of questions and criticism, and a drafting group was established to develop new proposals on the 'definition of and criteria for the application of precaution when scientific evidence is insufficient to objectively and fully assess risk from a hazard in food' (Bridges Year 4 No.3, page 13).

At the CCGP's April 2001 meeting, the United States and some other countries called for the deletion of the entire section on the Use of Precaution (paragraphs 34 and 35 of the draft Working Principles for Risk Analysis), while the EU in particular argued for its maintenance, as well as a clearly worded reference to the precautionary principle. All countries agreed that governments had the right to take interim measures to protect the health of citizens, but disagreed on the role of Codex in cases of significant scientific uncertainty.

In view of the impasse, the Committee decided to refer the issue to the full Codex Alimentarius Commission for advice, and requested the Secretariat to undertake a comprehensive redraft of the Working Principles, including paragraphs 34-35. The new draft is to be circulated to governments for comment before the CCGP's next session in April 2002.²

Consensus proved equally elusive at a May meeting of the Codex Committee on Food Labelling (CCFL), where delegates made little progress on draft guidelines on the labelling of genetically modified (GM) foods and ingredients. The guidelines were prepared by the Ad Hoc Working Group on the Labelling of Foods Obtained through Biotechnology, which was set up in 1999 when the CCFL failed to agree on a recommendation on labelling of processed foods containing GM ingredients (Bridges Year 3 No.4, page 1).³

At this year's CCFL meeting, delegates never got past the first section on the purpose of the guidelines, as the US and other major GMO producers opposed proposed text that the primary purpose of labelling should be to facilitate consumer choice. Delegates also disagreed on the scope of the guidelines. Some countries disputed the need for draft paragraph 1.1.2(b), which would apply the labelling guidelines to food/food ingredients that are 'produced from, but do not contain' GM organisms.

Some commentators considered the stalemate a victory for the US processed food industry, which fears that Codex guidelines would encourage mandatory GM food labelling. Mari Stull, Director of International Regulatory Policy at the Grocery Manufacturers of America welcomed the decision to postpone the debate. 'The decision indicates the Committee's caution about advancing a standard not based on sound science that doesn't protect the health of consumers and does not facilitate fair practices in food trade,' she said.

A revised version of the draft guidelines, which will take into account the points of contention and the agreed definitions, will be prepared for the next meeting of the CCFL in May 2002 when a whole day will be set aside to discuss the GM labelling issue.

The next meeting of the full Codex Alimentarius Commission will be held in Geneva, Switzerland, from 2-7 July, 2001.

¹ The WTO Agreement on Sanitary and Phytosanitary Measures recognises the Codex Alimentarius Commission as the international organisation responsible for food safety-related standard-setting and the harmonisation of food safety measures affecting trade. Measures based on Codex guidelines or recommendations are considered consistent with the SPS Agreement, whereas those that go further are vulnerable to dispute settlement challenges.

OECD Agricultural Export Credit Scheme Collapses

OECD governments failed to agree on new agricultural export credit disciplines in time for adoption at their Council meeting on 16-17 May 2001 (see related article on page 14).

Export credits are currently not subject to reduction commitments under the WTO Agreement on Agriculture. AoA Article 10 on 'circumvention on export subsidy commitments' does, however, commit Members to work 'toward the development of internationally agreed disciplines to govern the provision of export credits, export credit guarantees or insurance programmes and, after agreement on such disciplines, to provide export credits, export credit guarantees or insurance programmes only in conformity therewith.' The lack of an international agreement may make the use of such schemes vulnerable to WTO challenges.

Negotiations on export credit disciplines have been underway at the OECD for several years, but during the Council meeting Canada refused to go along with a compromise worked out by OECD governments. At issue in particular were new disciplines on state trading enterprises, such as Canada's wheat and dairy boards.

Pressure will now increase to shift the negotiations to the WTO. The European Union, whose export subsidies are under attack at the WTO's agricultural negotiations, has long argued that reform in other forms of export support (i.e. export credits, state trading enterprises and food aid) should also be included in the talks. After the collapse of the OECD effort, EU Agriculture Commissioner Franz Fischler said it would be necessary to 'discuss this issue within the coming round' of WTO negotiations. Developing countries agree (they seek the elimination of all forms export support by industrialised countries). The EU's allies Korea and Japan, as well as most Cairns Group members, also favour the inclusion of export credits in agricultural support reduction negotiations. The United States – which uses a number of export credit guarantee programmes – has until now been determined to keep export credits out of WTO negotiations. While US Agriculture Secretary Ann Veneman stressed that agreement might still be found at the OECD, other commentators said governments were likely to abandon the effort.

In other Council news, the trade and finance ministers of OECD's 30 member countries called for a new round of WTO negotiations to be launched in Doha (see page 6).

Export Credit Agencies: Protectionism in a Globalised World

By Sander van Bennekom

Decades of tariff reductions, elimination of customs duties and other types of economic liberalisation have changed the global economy, but they have not put an end to national industrial policy. Government still use a variety of measures to attract investment, stimulate trade in specific sectors or protect domestic industry, and it is unlikely that they will give them up. These instruments to pursue national policy goals are just as much part of the globalisation process of today as the ongoing efforts to reduce trade and investment barriers.

The mix of protectionism and liberalisation offers tremendous opportunities for corporations to increase their profits: those that are able to benefit from protectionist instruments such as subsidies, tax reductions or patent protection and subsequently offer their goods and services to the global market enjoy all the benefits from international trade without running any of the risks. The mix between economic liberalisation and protectionism also raises questions about the use of public funds. A considerable percentage of government spending is aimed to facilitate private trade and investment, with little control over the way in which those funds are allocated. Export credit agencies are a typical example of such private/public cooperation that so far has received little attention from civil society.

ECA Activities

Export credit agencies (ECAs) are governmental or semi-governmental entities that subsidise and promote a country's foreign trade and investment. This government support can take the form of direct credits, refinancing, interest rate support, aid financing, guarantees or export credit insurance.

The insurance of export credits is the best-known activity of ECAs, but certainly not the only one. Nearly all industrialised countries have established one or more such agencies, and their role in the global economy is significant. Roughly, ten percent of world export is supported by ECAs and about 24 percent of total developing country debt is to these agencies. ECAs are most commonly used to support large infrastructure projects. Well-known projects such as the Three Gorges dam in China or the Hidrovia project in Latin America are supported by ECAs. It is noteworthy that the United States Overseas Private Investment Corporation has refused to insure the Three Gorges dam, *inter alia*, because of the environmental problems associated with the project. However, other – mostly European – export credit agencies stepped in, apparently content to finance the venture without asking difficult questions.

Business is the driving force behind the way in which ECAs operate. For instance, in 1997, twenty-two captains of industry in the Netherlands urged the Dutch government to be more generous with the insurance of export credits in order to ensure Dutch corporations' continued competitiveness with those in surrounding countries. Other corporations such as the German electronics giant Siemens have made ECA contracts a common part of their overseas

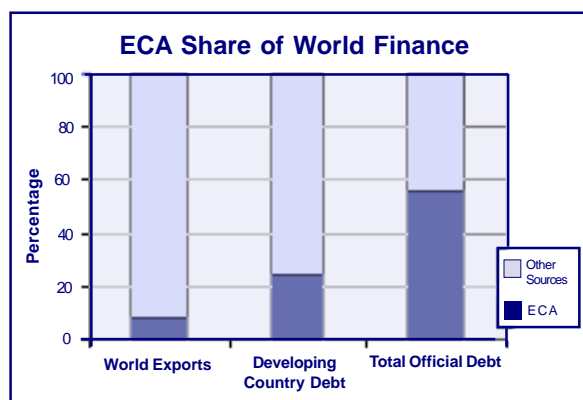
investment. The number of projects supported by ECAs in combination with the lack of oversight in their work creates several specific problems to which international reform efforts have so far failed to produce solutions. The following outstanding problems can be identified.

Lack of Uniform Standards

Many ECAs have no arrangements for environmental impact assessments or other screening procedures usually required before spending public funds. Some ECA-sponsored projects violate international agreements, such as the Convention on Biological Diversity, the UN Framework Convention on Climate Change or more general policy goals, such as combating poverty. The diversity in ECA standards also creates problems. It means that corporations can shop around at different ECAs for the contract that best serves their interests, as the case of the Three Gorges dam illustrates.

Lack of Transparency

Most countries are extremely reluctant to give data about the projects covered by their national export credit agencies, to the point that it is often impossible to obtain information about ECA-supported projects or the criteria that were taken into account by the agencies. European agencies tend to be particularly secretive, which makes it very difficult for policy-makers to exercise control. The lack of transparency has also led to many reported cases of corruption.



The Reform Process

The Organisation for Economic Co-operation and Development (OECD) is currently engaged in negotiations on ECA reform (the OECD Working Party on Export Credits and Export Guarantees), but no agreement has thus far been found (see related article on page 13). The lack of uniform standards is widely recognised as a major problem, as are many other basic flaws in current ECA regimes such as policy coherence. However, there is little guarantee that the OECD process will bring satisfactory results; indeed members of the working party continuously emphasise the constraints of commercial confidentiality instead of recognising the need for transparency in public spending.

The financial backing from ECAs is larger than the money spent by the World Bank, the International Monetary Fund and the regional development banks combined and the magnitude of the ECAs is in sharp contrast with the publicity. A group of committed and knowledgeable civil society activists is already working on ECA reform (more information and material can be found at the ECA-watch website www.eca-watch.org). There is a clear need for more public dialogue on this issue, both within and outside the OECD countries.

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After the Quebec Summit, New Directions for Free Trade in the Americas

By Pierre Marc Johnson

Leaving Quebec City on 22 April, thirty-four heads of state of the Americas could be satisfied with the new impetus given to hemispheric cooperation on a wide range of issues. The third Summit of the Americas built on the significant developments in hemispheric integration policies achieved at the Buenos Aires Trade Ministerial, and the Montreal Environment Ministerial held prior to the Summit.

These policy developments open the door for new directions for trade liberalisation in the hemisphere as it relates to sustainable development. With massive demonstrations against the FTAA process in the streets of Quebec City and an ever-widening gap between parts of civil society and their governments on trade issues, officials will soon have to address trade-related social and environmental concerns both in the FTAA and other hemispheric cooperation processes. In addition, President Bush's goal to obtain Trade Facilitation Authority by the end of this year is likely to prompt Senators and Members of Congress to raise environmental and social issues.

This article first looks into new elements of hemispheric integration policy that are creating opportunities for a trade and sustainability agenda. It then focuses on a strategy that was proposed at the pre-Summit Hemispheric Trade and Sustainability Symposium.

Hemispheric Policy Developments

Linking Trade and Environmental Policy

The Quebec City Declaration contains prudent but significant language on trade, sustainability and openness: *"We will work with all sectors of civil society and international organizations to ensure that economic activities contribute to the sustainable development of our societies."* While this statement fails to establish a direct link with the FTAA process, it echoes language in both the Buenos Aires and Montreal Ministerial Declarations. The former stated that: *"We reiterate that one of our general objectives is to strive to make our trade liberalization and environmental policies mutually supportive [...]"*. In a similar manner, environment ministers in Montreal declared their intention to *"maximize the potential for mutually supportive policies regarding economic integration and environmental protection."* This language opens the door for innovative bridging mechanisms between trade and environmental policy.

Progress on Transparency and Civil Society Participation

Progress has also been made on issues of transparency and civil society participation. In Buenos Aires, ministers reaffirmed their commitment to *"the principle of transparency in the FTAA process"* and recognized *"the need for increasing participation of the different sectors of civil society in the hemispheric initiative"*. According to the Summit Declaration, the decision to make public the preliminary draft of the FTAA Agreement was *"a clear demonstration of our collective commitment to transparency and to increasing and sustained communication with civil society."*

Mechanisms for effective civil society participation are to be strengthened in the next few months. The Buenos Aires Declaration instructed the FTAA Committee on Civil Society to improve its interaction with civil society, while the Quebec Summit Action Plan contained commitments to the development of *"strategies*

[...] to increase the capacity of civil society to participate more fully in the inter-American system...", and to seeking the establishment of public and private funding instruments *"aimed at building the capacity of civil society organizations"*. These general intentions need to be defined with concrete proposals for mechanisms that would allow for a constructive and productive involvement of civil society in hemispheric policy-making.

Strengthening Hemispheric Environmental Cooperation

In the Quebec City Declaration, governments committed themselves to strengthening *"environmental protection and sustainable use of natural resources with a view to ensuring a balance among economic development, social development and the protection of the environment, as these are interdependent and mutually reinforcing."* This statement was supported in the Summit Action Plan's commitment to *"consult and coordinate domestically and regionally, as appropriate, with the aim of ensuring that economic, social and environmental policies are mutually supportive and contribute to sustainable development, building on existing initiatives undertaken by relevant regional and international organizations."* Lastly, the Montreal Ministerial mentioned the intention of ministers *"to work, in particular, to ensure that the process of economic integration supports our ability to adopt and maintain environmental policy measures to achieve high levels of environmental protection."* Again, these are broad declarations of intent that need to be implemented through innovative mechanisms for policy integration.

A Trade and Sustainability Agenda in the Americas

Prior to the Quebec Summit, IISD, IUCN and UNEP/ROLAC organised a Hemispheric Trade and Sustainability Symposium in Quebec City.¹ The event provided an opportunity for 200 representatives from the business, NGO, governmental, inter-governmental and academic sectors to address trade and sustainability issues related to the FTAA in the broader Summit of the Americas context. The Symposium strove to identify policy options that could be mutually beneficial to trade, development and environment, and that could support better co-ordination of trade and environmental policies in the Americas.

A Hemispheric Triple-Win Strategy for Trade and Sustainability

A Chair's Paper entitled *"The FTAA and Hemispheric Integration – Building a Triple-Win Strategy for Trade and Sustainability in the Hemisphere"* was released on April 18 and later distributed to delegations attending the Quebec Summit.² The proposed strategy rests on three pillars:

- Build an environmentally-sound FTAA through the incorporation of environmental provisions in the text of the Agreement;
- Strengthen environmental cooperation in the Americas, especially in trade-sensitive or trade-related sectors; and
- Strengthen dialogue with civil society by creating a High Level Hemispheric Experts Group on Trade and Sustainability.

The most innovative part of the paper is the proposal to create a High Level Hemispheric Experts Group on Trade and Sustainability that would act as a bridging mechanism between civil society and intergovernmental processes, and between trade and environmental policies. The group would include participation from hemispheric

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Benefit-sharing Obligation Continues to Dog IU Talks

The 41-nation Contact Group on the Revision of the International Undertaking on Plant Genetic Resources for Food and Agriculture made only marginal progress on technical issues at its latest meeting held in Spoleto, Italy from 23-28 April.

At the core of the International Undertaking (IU) are rules governing access to and use of the large germplasm collections held in 17 international agricultural research centres operating under FAO auspices. The mandate of the IU revision, underway at the FAO Commission on Genetic Resources for Food and Agriculture since 1993, is to come up with an access and benefit-sharing regime for genetic resources for food and agriculture that would reflect the provisions of the Convention on Biological Diversity (CBD).

In line with the CBD, the central element of the revision is the establishment of a Multilateral System (MS) of Access and Benefit-sharing to 'facilitate access to plant genetic resources for food and agriculture, and to share, in a fair and equitable way, the benefits arising from the utilisation of these resources'. The MS will cover the genetic resources held in the FAO international research centres, as well as material made available by other international institutions and national or privately owned collections on a voluntary basis.

Delegates have already agreed that the benefits to be shared under the MS will include exchange of information, access to and transfer of technology, capacity building; and sharing of commercial benefits. Technology transfer and commercial benefit-sharing are of direct relevance to discussions currently underway in the context of the WTO review of the Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPs, see page 8). At issue is the payment of royalties on profits made through patents or other commercial protection on improved varieties and genetic material developed from resources accessed under the MS.¹

In Spoleto, discussions on commercial benefit-sharing mirrored those at the contact group's previous meeting in Neuchâtel last year.² Delegates focused in particular on the pros and cons of a mandatory benefit-sharing scheme versus a voluntary system, and basing royalty payments on commercial profit rather than the application of restrictive intellectual property rights. The talks did not, however, bridge the divide between developing countries – who demand a mandatory benefit-sharing system – and those, most notably the US, Australia, New Zealand and Canada, who continue to evoke potential conflicts with TRIPs Articles 27.1 and 27.3(b), i.e. the obligation to grant patents for inventions regardless of the field of technology and to protect plant varieties, and the requirement that exceptions to the exclusive rights conferred by a patent must not 'unreasonably conflict with the normal exploitation of the patent' or 'unreasonably prejudice the legitimate interests of the patent owner' (Article 30).

Other key issues still unresolved include whether the multilateral system should include collections outside government control, and whether intellectual property rights may be applied to isolated genes/gene sequences of MS resources. Negotiations will continue at an extraordinary session of the Commission on Genetic Resources for Food and Agriculture on 24-30 June (www.fao.org/ag/cgrfa/meetings.htm). The aim is to complete the revision in time for adoption at the FAO Conference next November.

¹ Bridges Year 7 No.7, page 14

² Bridges Year 4 No.9, page 13

Kyoto Protocol's Fate in Balance

Jan Pronk, chair of the UN climate change negotiations, convened an informal meeting in New York from 20-21 April 2001 in order to break the deadlock surrounding the 'operationalising' of the Kyoto Protocol. The last meeting of Conference of the Parties was suspended in November 2000, when Parties failed to agree on four key issues (for more details, see Bridges Year 4 No.9, page 13):

- supplementarity, i.e. the extent to which developed countries must meet their greenhouse gas reduction commitments through domestic action;
- offsetting emissions by existing carbon 'sinks' such as forests and the inclusion of sink projects in the Clean Development Mechanism;
- how to sanction non-compliance with the reductions agreed under the Protocol; and
- whether to establish mechanisms to finance developing countries' adaptation activities, technology transfer and the diversification of fossil fuel-dependent economies.

For the April meeting, Mr Pronk had prepared a compromise proposal that sought to bridge the gulf that separates the European Union and the Umbrella Group (Australia, Canada, Japan, Norway, New Zealand, Russia, the Ukraine and the US) on most of the outstanding questions.¹ Despite its conciliatory tone, the meeting did not produce significant progress, not least because of the uncertainty surrounding the entire Kyoto process after the US publicly announced in March 2001 that it would not ratify the Protocol (Bridges Year 5 No.1-3, page 13).

The Kyoto Protocol, which only binds industrialised countries (Annex I Parties), requires ratification by 55 countries to enter into force. These 55 must include enough Annex I Parties to cover at least 55 percent of the total 1990 carbon dioxide emissions of all industrialised countries. This double majority will be difficult to achieve without the participation of the United States, which by itself was responsible for 36.1 percent of Annex I carbon emissions in 1990.² In addition, although Parties can use a variety of mechanisms to reach their Kyoto reduction targets, some of the necessary measures are certain to have significant effects on competitiveness and trade. It is doubtful whether other countries will adhere to their Kyoto commitments if the price is competitive disadvantage vis-à-vis an economic powerhouse such as the United States.

Although further consultations (held in the margins of the Diplomatic Conference to sign the new Convention on Persistent Organic Pollutants on 21-23 May) pointed to no clear way forward, a new compromise text was to be released in early June. Despite the dim outlook, Mr Pronk believes that Protocol is not 'dead', as the US claimed after its March announcement. However, Mr Pronk warned that the impasse needed a political solution and urged countries to involve foreign ministers in their discussions.

The Conference of Parties will resume its sixth session on 18-27 July 2001 in Bonn.

¹ Available at http://www.unfccc.int/sessions/cop6_2/unfccc_np.pdf. See also Bridges Year 4 No.7, page 1.

² In Kyoto in 1997, the US agreed to reduce its emissions of six greenhouse gases by seven percent from 1990 levels by the year 2012 at the latest, but United Nations statistics show that between 1990 and 1998, the US contributed 60.5 percent of the increase of these gases in the atmosphere.

Implications of the Canada – Costa Rica Free Trade Agreement

By Monica Araya

Following the third Summit of the Americas in April 2001 and after less than a year of negotiations, Canada and Costa Rica signed a free trade agreement. Their bilateral relationship involves only a small share of the overall trade and investment flows within the Americas and is unlikely to make a major trade impact in the hemisphere. Yet, certain aspects of this negotiation could shed some light on the hemispheric integration journey, which continues to trigger as much enthusiasm as opposition.

Key Latin American governments remain skeptical about the depth of the US commitment to give birth to the Free Trade Area of the Americas (FTAA) by 2005. That skepticism becomes up-front mistrust whenever subjects such as ‘environmental protection’ are mentioned in the FTAA talks. No environmental approach seems to gain the negotiators’ support: some proposals are perceived as too excessive (i.e. trade sanctions), others as terribly insensitive to the environment (i.e. maintaining the *status quo*). Simply put, addressing environmental issues has turned into a ‘hemispheric puzzle’ for both supporters and opponents. But one thing seems clear: an FTAA without any environmental component is an unlikely scenario vis-à-vis the increasingly organized opposition to the FTAA, especially among civil society. Thus, the challenge is how to address – not how to oppose – legitimate environmental concerns in the negotiations. As we will see, Canada and Costa Rica agreed on a trade and environment formula that could have some relevance for the Americas.

Drivers behind the Bilateral Trade Deal

Both the Canadian and Costa Rican governments viewed the trade agreement as win-win situation, underscoring the complementary nature of their trade flows (US\$269 million in 2000) and the good shape of their bilateral relationship. The collapse of the global trade talks in Seattle together with the uncertainty of the FTAA (i.e. lack of fast-track negotiation authority in the US or Mercosur’s mixed signals) added momentum to Costa Rica’s request for an FTA. Costa Rica has enjoyed a comfortable trade surplus with Canada and most of its products already enter Canada duty free. But notable exceptions (agricultural products, textiles and machinery) still made the FTA a relevant target. Additionally, the government expects to increase Canadian investment flows and to signal its serious commitment to developing a free trade area with the US in the future, with or without an FTAA.

For its part, the Canadian government wanted to signal its commitment to the hemisphere. It also viewed Costa Rica as the perfect market for small and medium-sized Canadian enterprises to gain experience in accessing markets in the region. Canada sought to eliminate tariffs on key exports (i.e. paper products, auto parts and plastics), to reduce red tape and ease border procedures for Canadians business in Costa Rica. Establishing a framework on competition policy that could serve as a model for the region was another goal. Together with the model framework for competition policy, the innovative stand-alone provisions on trade facilitation were among major achievements of this negotiation.

The FTA resembles the NAFTA on issues such as services, investment and dispute settlement. Disciplines on investment build upon the 1998 investment protection agreement, which provides for a set of procedural and substantive warranties for investments and investors.

Dealing with the Environment

Despite the lack of enthusiasm on behalf of Costa Rican negotiators, the FTA is complemented by an agreement on environmental cooperation (and a second one on labor issues). Although the side agreement is based upon models such as the NAFTA and the Canada-Chile agreement, there are important differences. Some of the general features are:

- **Enforcement:** Countries commit to enforce their environmental laws and to ensure that *domestic* proceedings exist to sanction violations. Interested persons may request the government to investigate alleged violations under domestic law.
- **Compliance and Public Participation:** A person or non-governmental organization may request a response of either country with respect to the effective enforcement of their environmental laws and regulations. A summary of both the inquiry and response will be made public.
- **Cooperation:** Possible priorities include: environmental management systems, the role of the public in environmental policy-making and promoting efficiency on biodiversity conservation and the sustainable use of natural resources.
- **Implementation:** both governments will meet every two years to review overall progress, but meetings to address cooperation will be more frequent.
- **Some key differences:** lack of compliance will entail neither trade sanctions nor fines; no bilateral commission or dispute settlement system was created; and funding will be arranged on a case-by-case basis.

Significance for the Americas

This side agreement is sure to raise both praise and criticism, but the pivotal element is the approach to ‘sanctions’. Those who assume that the only way to improve Latin America’s environmental (or labor) record is through sanctions will conclude that the relevance of this agreement is very limited.

But, if the assumption is that trade sanctions are not appropriate for greening trade negotiations, then the Canadian-Costa Rican arrangement becomes precedent-setting (trade sanctions are usually offensive and unfair because they cannot be used equally by economies of very dissimilar sizes). Additionally, the Americas’ recent trade record shows that sanctions have not led to environmental progress. In fact, the cooperative spirit of the side agreements has driven progress in both the NAFTA and the Canada-Chile context.

The Canada-Costa Rica approach could also receive more attention in the future because it will serve as the model for trade negotiations between Canada and both Central America and the Caribbean. One could expect that the more countries that follow the sanctions-free approach to the environment and benefit from it, the weaker the case against trade and environment linkages will be.

Perhaps the main weakness of the trade and environment formula developed with Costa Rica is that it does not address some of the key questions from environmental advocates about the FTAA: the NAFTA-like investment provisions. But, despite this shortcoming, Canada deserves a good amount of credit for trying to explore a formula that deals not only with environmental

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Regional News in Brief

- The much-publicised trial over the compulsory licensing and parallel import provisions of Section 15 C of South Africa's 1997 Medicines Act ended in a whimper rather than a bang: in the words of a health activist, the 39 multinational pharmaceutical companies that had challenged the government 'simply caved in'. The Pharmaceutical Manufacturers' Association of South Africa had claimed that Section 15 C would give the government unconstitutional powers to override patents in contradiction to obligations under the WTO Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPs).

In the one-page Joint Statement of Understanding reached between the parties just before the case was to resume in court on 18 April, the South African government reiterated its 'commitment to honour its international obligations, including TRIPs', while the companies 'recognised and reaffirmed' the government's right to 'enact national laws or regulations implementing Act 90 of 1997 or adopt measures necessary to protect public health, and broaden access to medicines in accordance with the South African Constitution and TRIPs.'

The case served as a catalyst for a flurry of activity on developing countries' access to drugs to combat pandemics such as HIV/AIDS, including prompting the WTO's TRIPs Council to schedule a whole day of discussion on intellectual property rights issues relevant to access to medicines during its next session from 18-20 June (see page 7). It also looks more than likely, that the Doha Ministerial Declaration will address the issue, probably through a call on WTO Members to refrain from unilateral action using TRIPs provisions when serious public health factors are at stake (see page 3).

- The Supreme Court of British Columbia on 2 May essentially confirmed the verdict reached by a NAFTA tribunal last August in the investment dispute opposing the California-based Metalclad Corporation to the Mexican government. The tribunal had found that the government's denial of an operating permit for Metalclad's nearly-completed waste treatment facility in San Luis Potosí amounted to an expropriation of company property and ordered it to pay Metalclad US\$16.7 million in compensation. Appealing the decision, Mexico sought to have the compensation put aside (Bridges Year 4 No.7, page 11).

Although the Canadian court did not reverse the NAFTA court's expropriation finding under Chapter 11, it did rule that the Mexican government had not violated Chapter 11 transparency obligations (there were none, the court said). Metalclad had argued that the government's failure to provide the company a 'clear and predictable' regulatory and legal framework was contrary to Chapter 11 minimum treatment standards. The court accordingly set aside more than US\$1 million of the compensation award.

Metalclad President Grant Kessler called decision a 'pyrrhic victory', as the court only agreed to compensation for the company's actual investment rather than the US\$90 million Metalclad had sought for the loss of potential business value. According to Metalclad's legal council Clyde Pierce, expropriation provisions of future investment agreements should cover the potential value of a business, even if it is not yet operational when the expropriation happens (see related article on page 11).

Both sides in the dispute are considering further appeals.

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demands at home ('no FTAs without an environmental component') but also seeks to respond to Latin American concerns ('no sanctions'). This unusual act of accommodation contrasts sharply with the US preference to dictate formulas regardless of whether they would work in Latin America.

But, perhaps the recent environmental policy reversals in the US will affect its stance on trade sanctions for environmental purposes. International frustration about the lack of allegiance to the Kyoto Protocol, the oil-coal friendly domestic energy plan, or even the prospect of drilling a National Wildlife Refuge in Alaska seriously weaken the Bush Administration's credibility to discipline environmental behavior abroad. This needs to be understood by those in the US Congress (and their constituencies) who are correct in promoting a greener FTAA, but wrong when they use sanctions as the *sine qua non* condition for supporting the trade agenda.

It is not yet clear what a successful 'environment formula' for the FTAA would be. But Canada's effort to negotiate – not impose – environmental issues in a trade context with a much smaller country is certainly welcome as a positive precedent in the Americas.

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New Free Trade Directions in the Americas, continued from page 15

institutions such as the OAS, ECLAC, the IDB and the FTAA Secretariat, and various sub-regional organisations. Government, industry and civil society experts would be represented, with a view to keeping the group regionally balanced.

The Expert Group would function as a non-advocacy mechanism to facilitate comprehensive policy dialogues among different interests, sub-regional perspectives and sectors. It could advise a series of hemispheric processes that are Summit or FTAA-related. It would have focal points in each of the five Americas sub-regions, and be linked by extensive Internet-based data and information sharing systems. Preliminary discussions could be initiated before the end of 2001 with the aim of launching the group in 2002.

Conclusion: The Need for Early Action

The Quebec Summit policy developments opened opportunities for innovative mechanisms for civil society participation and policy integration. The High Level Hemispheric Experts Group on Trade and Sustainability could be one of these promising innovations. With the confirmation of the 2005 deadline for FTAA process, and market access negotiations to be initiated no later than 15 May, 2002, it is urgent that such a bridging mechanism be established to support a trade and sustainability agenda. A coalition of like-minded countries could be formed to support this proposal, and first steps could be taken towards the creation of the Experts Group. We hope this initiative will draw support from various segments of the trade and environment policy communities.

Pierre Marc Johnson is Senior Counsel at Heenan Blaikie and former premier of Quebec. He co-chaired the Hemispheric Trade and Sustainability Symposium in April 2001. The author wishes to thank Karel Mayrand for his important contribution to this article.

¹ www.iisd.org/trade/qc2001

² The Paper is available in three languages and can be downloaded on the Symposium website.

ICTSD Initiatives Explore Value of IPRs to Developing Countries

At a recent ICTSD informal dialogue on Intellectual Property Rights, Biological Resources and the Protection of Traditional Knowledge, representatives from governments, NGOs, IGOs, academia and the media heard three different perspectives on the relevance of IPRs for protecting traditional knowledge (TK).

While not opposed to patents in general, Gordon Chavunduka from the Zimbabwe National Traditional Healers Association highlighted some of the practical impediments to obtaining patents on medicines and associated TK, such as the high cost associated with patent applications, and the question of how to share benefits in a fair and equitable way while taking into account the collective nature of the knowledge. He also expressed concern regarding the theft of TK by academics, scientists and other countries.

Anil Gupta from the Indian Institute of Management acknowledged that IPRs, while not the only type of incentive, can be useful for the protection of TK. Efforts should focus on addressing the asymmetries in the current IP system and amending the TRIPs Agreement, rather than attempting to establish a separate treaty on TK. Practical suggestions for improving the IP system included reducing the transaction cost for determining the 'novelty' of an innovation; allowing developing countries to seek protection for information disclosed up to five years prior to the TRIPs Agreement's entry into force; and developing an international internet-based registry for innovations. In addition, changes should be made to IP laws in developed countries, such as requiring patent applicants to show that the knowledge was obtained with the consent of the TK holder and/or in accordance with national regulations.

Alejandro Argumedo from the Indigenous People's Biodiversity Network, in contrast, did not regard IPRs as an appropriate tool for protecting TK, as they are based on terms and conceptual foundations outside the worldview of many indigenous peoples. Instead, TK should be protected through local strategies, which are linked to space, and by preserving the integrity of indigenous cultures. To this end, the Asociación Andes is establishing 'agro-biodiversity protected areas' based on local protocols that govern access to and transfer of biological material and associated knowledge. At the same time, Peru is developing a *sui generis* system to protect TK, which will attempt to link local management and systems to national legislation. Regarding possible changes to the IP system, he called for standard setting to ensure that user countries monitor where the knowledge originates before granting a patent, and for developing a treaty on innovation. At the international level, he regarded the Convention on Biological Diversity as the most appropriate forum for addressing these issues.

Capacity-building on TRIPs and development

The ideas explored in the informal meeting will be further developed in future ICTSD activities. In particular, ICTSD and UNCTAD, with financial support from DFID, are launching a two-year capacity building project on TRIPs and Development. The main goals of the project are to generate a better understanding of the development implications of TRIPs; and to strengthen developing countries' negotiating capacity. The project's key outputs are:

- The publication of a negotiating resource on TRIPs and development designed as a practical tool for negotiators and policy-makers to facilitate informed participation and decision-making processes;
- A policy discussion paper which will provide policy-makers and influencers with a broad understanding of IPRs issues and their impact on development;
- A series of case studies to allow concrete evidence to emerge on the impact and relevance of IPRs in developing countries. The studies will be selected on the basis of priorities identified by developing countries.

The published outputs will be the result of a thorough process of consultation with various stakeholders. This participatory process will lead to the establishment of a network of negotiators, policy-makers and stakeholders. Contact: C. Bellmann (cbellmann@ictsd.ch); H. Baumüller (hbaumuller@ictsd.ch).

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MEETINGS

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Please contact the Secretariat for confirmation of dates.
<http://www.wto.org/>

June 18-22 Geneva	WTO Council for Trade-related Aspects of Intellectual Property Rights Contact: Peter Ungphakorn, tel: 5412, fax: 5458
June 20 Geneva	WTO Dispute Settlement Body Contact: Nuch Nazeer, tel: 5393 fax: 5458
June 24-30 Rome	6 th Extraordinary Session of the FAO Commission on Genetic Resources for Food and Agriculture Contact: Clive Stannard, CGRFA, tel: (39-6) 5705-5480, e-mail: clive.stannard@fao.org
June 27-28 Geneva	WTO Committee on Trade and Environment Contact: Hans-Peter Werner, tel: 5286, fax: 5777
June 28-29 Geneva	WTO Committee on Agriculture Contact: Peter Ungphakorn, tel: 5412, fax: 5458
June 28-29 Geneva	WTO Committee on Technical Barriers to Trade Contact: Hans-Peter Werner, tel: 5286, fax: 5458
July 2-7 Geneva	24 th Session of the Codex Alimentarius Commission Contact: John Riddle, Media Relations, tel: (39-6) 5705-3259, e-mail: John.Riddle@fao.org , Internet: http://www.codexalimentarius.net/
July 5 Geneva	WTO Council for Trade in Goods Contact: Nuch Nazeer, tel: 5393 fax: 5458
July 5-6 Geneva	WTO Working Group on the Interaction between Trade and Competition Policy Contact: Robert Anderson, tel: 5198, fax: 5790
July 6-7 Geneva	WTO NGO Symposium on Issues Confronting the World Trading System Contact: Bernard Kuiten, tel: 5675, fax: 5777
July 10 Geneva	WTO Committee on Phytosanitary and Sanitary Measures Contact: Peter Ungphakorn, tel: 5412, fax: 5458
July 12 Geneva	WTO Council for Trade in Services Contact: Nuch Nazeer, tel: 5393 fax: 5458
July 18 Geneva	WTO General Council Contact: Nuch Nazeer, tel: 5393 fax: 5458
July 18-27 Bonn	Resumed Sixth Session of the Conference of the Parties to the UN Framework Convention on Climate Change Contact: UNFCCC Secretariat, tel: (49-228) 815-1000, fax: 815-1999, e-mail: secretariat@unfccc.de
July 20 Geneva	WTO Sub-Comm. on Least-developed Countries Contact: Lucie Giraud, tel: 5075, fax: 5458
July 24 Geneva	WTO Dispute Settlement Body Contact: Nuch Nazeer, tel: 5393 fax: 5458

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