

Access to Medicines Could Become Doha's (only?) Success Story

In the grey landscape of *déjà vu* that characterises the run-up to the WTO's Ministerial Conference next November, the issue of poor countries' access to medicines looks set to provide a bright exception. On 20 June, WTO Member governments for the first time addressed this high-profile problem head-on. In a rare show of unanimity, none of the more than 40 delegates who spoke at the meeting disputed the right of developing country governments to use compulsory licensing of patented medicines to cope with public health emergencies. While interpretations of the latitude offered by the Agreement of Trade-related Aspects of Intellectual Property Rights (TRIPs) varied considerably, all speakers agreed that the HIV/AIDS epidemic in Sub-Saharan Africa, and perhaps other countries, was a 'national emergency' or 'situation of extreme urgency', which could justify the granting of licenses even without seeking the patent-holder's consent.

Two papers provided the backbone for the TRIPs Council's June special discussion. One was submitted by the 30-nation Africa Group together with 26 other developing countries on *TRIPs and Public Health* (IP/C/W/296) and the other by the European Union on the *Relationship between the Provisions of the TRIPs Agreement and Access to Medicines* (IP/C/W/280).

Intellectual Property Rights and Public Health

Developing countries seek a formal confirmation at the Doha Ministerial that 'nothing in the TRIPs Agreement reduces the range of options available to governments to promote and protect public health, as well as other overarching public policy objectives.' While such a confirmation would not necessarily require any changes in the Agreement, it would provide certainty that measures taken under existing provisions will not be subjected to dispute settlement challenges based on a narrow reading of the Agreement or other forms of coercion. Many of the points in the Africa Group's submission are drafted in language that could be used in such a ministerial affirmation.

The Group's statement that 'each provision of the TRIPs Agreement should be read in light of the objectives and principles set forth in Articles 7 and 8' led other speakers to comment on how those provisions related to the overall interpretation of the treaty.

Article 7 states that intellectual property rights protection 'should contribute to the promotion of technological innovation and to the transfer and dissemination of technology [...] in a manner conducive to social and economic welfare, and to balance rights and obligations.' According to Article 8.1, 'Members may, in formulating or amending their laws and regulations, adopt measures to protect public health and nutrition, and to promote the

public interest in sectors of vital importance to their socio-economic and technological development, *provided that such measures are consistent with the provisions of this Agreement* (editors italics).'

The Africa Group, supported by the many developing country delegates who took the floor at the meeting, focused on the *rights* conferred by these articles: 'When intellectual property rights are properly granted and exercised, they may meet their objective of contributing to the development of new medicines. However, there should be a common understanding that confirms the right of governments to ensure access to medications at affordable prices and to make use of the provisions in the Agreement whenever the scope or exercise of IPRs result in barriers to access to medicines.'

The United States, the sturdiest champion of intellectual property protection, emphasised the *obligation* that any measures pursuant to Article 7 or 8, including those to protect public health, must be consistent with other TRIPs provisions. Stressing the importance of patent protection, it argued that, rather than the simple possibility of a royalty, the market exclusivity conferred by patents provided 'the necessary incentive for companies to invest in research to discover, develop and commercialise new products'. Furthermore, because local innovators stood to benefit from the technical details that patent applicants must disclose, the US concluded that, instead of impeding research and development or discouraging competition, patent systems 'actually promote the objective of TRIPs Article 7 by contributing to the promotion of technological innovation and to the transfer and dissemination of technology.' The US also strongly emphasised the role of other factors, such as poor public health infrastructure, in impeding access to medicines.

'Although Articles 7 and 8 were not drafted as general exception clauses, they are important for interpreting other provisions of the Agreement, including where measures are taken by Members to meet health objectives,' the EU wrote. The European Union also stated that intellectual property protection provided 'an essential stimulus for creativity and innovation'. While the TRIPs Agreement had been criticised as 'limiting policy options in relation to public health concerns', the EU maintained that Articles 7 and 8, special transitional arrangements and other provisions gave Members 'a sufficiently wide margin of discretion in implementing it'.

Compulsory Licensing

Article 31 of the TRIPs Agreement on the use of patented matter without the authorisation of the rights holder sets out a number of conditions that Members must fulfil if they have recourse to such use, but does not itemise the purposes for which

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compulsory licenses may be granted. Among the most important requirements regarding compulsory licenses are the obligation to have – unsuccessfully – sought the patent holder's authorisation 'on reasonable commercial terms and conditions' prior to issuing a compulsory license, and the obligation to provide the rights holder with adequate remuneration if his patent is infringed. However, in cases of 'national emergency or other circumstances of extreme urgency', the requirement to seek prior consent may be waived.

'Members should take the view that the TRIPs Agreement in no way stands in the way of public health protection, and therefore that it should provide the broadest flexibility for the use of compulsory licenses,' developing countries averred. According to the Africa Group's submission, compulsory licenses 'are an essential tool for governments to carry out public health policies, as they may facilitate access to medicines through prevention of abuses of rights, encouragement of domestic capacities for manufacturing pharmaceuticals and in cases of national emergency or other circumstances of extreme urgency, or of public non-commercial use. Nothing in the TRIPs Agreement limits the grounds for governments to issue compulsory licenses.' The EU agreed that Article 7 and 8 justified Members' invoking public health concerns as a reason for compulsory licensing, although Article 31 makes to explicit reference to it.

Despite its general aversion regarding measures that may weaken patent protection, the US recognised that Article 31(b) allowed countries to issue compulsory licences without seeking the right holder's consent in cases of 'national emergency or other circumstances of extreme urgency', but stressed that Article 31 must be read in light of the other provisions of the TRIPs Agreement, including Article 27.1 (obligation to provide patents without discrimination as to the place of invention, the field technology and whether products are imported or locally produced). The US also took issue with the claim that compulsory licenses could be granted to encourage domestic capacities for manufacturing pharmaceuticals: 'Contrary to what some have asserted, compulsory licenses under TRIPs are not intended to be a mechanism for directing industrial development, protecting domestic industries against foreign competitors, or for promoting the now widely discredited economic policy of import substitution.'

Foreign Compulsory Licensing

One of the questions that is likely to be the subject of intense political debate, as well as technical scrutiny of TRIPs language, concerns the possibility to award a compulsory license to a manufacturer in a third country. While the chapeau of Article 31 allows governments to authorise 'third parties' to produce goods under compulsory licensing, it does not specify where those third parties should be located. However, Article 31(f) provides that compulsory licensing 'shall be authorised predominantly for the supply of the domestic market'.

Because many developing countries – particularly least developed countries and smaller economies – have limited industrial capacities and very small domestic markets to manufacture medicines locally, the African Group urged a reading of Article 31(f) confirming that 'nothing in the TRIPs Agreement will prevent Members from granting compulsory licenses to supply foreign markets.'

The EU noted that the Agreement did not appear to offer any legal certainty on the issue. 'What can be said is that a WTO Member is free to grant a compulsory licence for the importation of goods which are under patent in its own territory, as long as the imported goods have been produced in a country where they are not patented, or where the term of protection has expired.' The US concurred up to this point, but added that if a drug was protected by a patent in the foreign licensee's home country and the compulsory licensee chose to manufacture it there for export to the licensing country 'a problem [would be] created.'

This arcane-sounding point has wide implications. For instance, at this moment it is possible even for a country that extends patent protection to medicines – South Africa, say – to grant a compulsory license to a manufacturer in another country, such as India, which does not. That manufacturer would produce a generic version

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Director: Ricardo Meléndez-Ortiz
Editor: Anja Halle
Address: 13 chemin des Anémones
1219 Geneva, Switzerland
Tel: (41-22) 917-8492
Fax: (41-22) 917-8093
E-mail: ictsd@ictsd.ch
Web: <http://www.ictsd.org>

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At Long Last, Implementation Debate Receives a Nudge

How WTO Members will deal with 'implementation concerns', i.e. developing country demands for a better-balanced global trade regime, is widely recognised as the make-or-break issue of any future trade negotiations. After a year of largely one-sided discussions, the debate finally seemed to acquire some purpose and structure when seven developed and developing countries submitted an 11-page proposal to the General Council's 22 June informal preparatory session for the November 2001 Doha Ministerial Conference.

Argentina, Morocco, New Zealand, Norway, Switzerland, Thailand and Uruguay said that their document reflected 'what, in our minds, could be a good basis for the continuation of the process'. Most Members welcomed the proposal as a constructive contribution to the debate although none endorsed all its points. Indeed, the greatest merit of the seven-country effort may have been to provoke genuine reactions from industrialised countries. While the major players still seemed unwilling to move on most implementation issues unless the *demandeurs* agreed to a new round of trade negotiations, one developing country ambassador noted that, instead of insulting disinterest, they 'for the first time treated the other side with some respect.'

The seven-country proposal covered all demands made by developing countries, dividing them in four categories: issues on which early agreement could be reached; issues that have been solved, clarified or appear relatively less urgent; issues referred to subsidiary bodies to be taken up again; and other pending issues.

Early Agreement

While several developing countries said the paper did not go far enough in addressing their concerns, many industrialised countries were cautious in endorsing it, partly because it included controversial areas identified for 'early agreement'.

Anti-dumping: For instance, the seven saw potential for an agreement ahead of the Doha Ministerial on the following actions:

- pre-initiation examinations demonstrating that circumstances have changed before starting anti-dumping investigations of the same product from the same Member within a year;
- applying the 'lesser duty' rule, i.e. 'an anti-dumping duty shall be less than the margin of dumping if such lesser duty would be adequate to remove the injury to the domestic industry' while negotiations on anti-dumping are underway (Article 9.1);
- making mandatory the Article 15 provision to explore constructive remedies before applying anti-dumping duties that would affect the essential interests of developing country Members; and
- requesting the AD Committee to 'clarify whether and, if so, how the review process [of the implementation and operation of the Anti-dumping Agreement] can be improved' to ensure that it contributes to reining in abuse of the Agreement (Article 18.6).

These proposals sought a compromise between developing countries' more stringent demands included in the draft Seattle Ministerial Declaration and the extreme reluctance of the US to even discuss trade remedies such as anti-dumping practices. The EU is 'not enthusiastic' about the prospect either, but has recognised – most recently at the senior officials meeting on 25 June – that the issue would have to be addressed as part of the comprehensive round of multilateral trade negotiations it is seeking. Japan firmly wants anti-dumping to figure on the post-Doha agenda.

Textiles: The implementation submission also addressed accelerating textiles liberalisation, another area that the US has vowed to keep off the table in any potential talks. The seven outlined a possible pre-Doha agreement on

- elimination of all restrictions on imports from small suppliers and least-developed country Members;
- elimination of restrictions at aggregate or group level of imports;
- elimination of restrictions on children's clothing up to size 164;
- no reductions in quotas due to partial integration of certain product categories;
- [Unspecified] uplift in quota levels at the end of the current (i.e. second) stage of integration process for categories [that were embargoed] [in which quota utilisation exceeded 95 percent] during the last two years;
- advancing the notification for final integration; and
- not initiating anti-dumping actions against products under quota restrictions and taking no such action for a period of two years after the elimination of the quota.

The greatest merit of the new implementation proposal was to elicit genuine reactions from industrialised countries.

Agriculture: Negotiations are already underway in this sector particularly heavily protected in the EU, Japan, South Korea, Norway and Switzerland. The seven-country paper proposed only that developing countries' measures to address food security and rural development notified under the green box 'shall not be challenged during the negotiation. An indicative list of such measures needs to be attached. This restraint shall be exercised during the negotiation and until the final results of the agriculture negotiations are adopted.'

The 'protectionists' might possibly concede this much as a 'down payment' if a Doha Round were to offer further trade-offs between opening agricultural markets and liberalising trade in other sectors.

SCM: With regard to the Agreement on Subsidies and Countervailing Measures, the paper proposed, *inter alia*, that poor countries should be allowed to provide export subsidies for their non-agricultural products until their GNP per capita reaches US\$1000 in constant 1990 dollars for three consecutive years, and that the SCM Committee 'shall review the threshold of US\$1000 in Annex VII(b) and examine the possibility of including in Annex VII, Members in the low and lower-middle income categories as classified by the World Bank.'

Other possible points included a ministerial-level agreement to raise the limit under which subsidy investigations must be immediately terminated from 1 percent *ad valorem* to less than 2.5 percent for developing country exports. In addition, the SCM Committee could be instructed 'to clarify the language of the Agreement regarding investigation procedures, incorporating provisions that improve its disciplines regarding, *inter alia*, review procedures, facts available, sampling, significant volumes, calculation of amount of a subsidy, and impositions and collection of a countervailing duty, and present recommendations for adoption at the fifth Ministerial Conference.'

TRIMs: To deal with the deadlocked discussions in the Council for Trade in Goods on extending developing countries' transition periods for phasing out trade-restrictive investment measures, the seven proposed a pre-Doha agreement to extend the deadline for full compliance with the TRIMs Agreement according to the 'two-plus-two' formula, i.e. until the end of 2003 or the fifth WTO Ministerial Conference (see Bridges Year 5 No.4, page 7).

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Mixed Signals on Doha Round

On 25 June, Deputy Trade Representative Peter Allgeier gave a first indication of the United States' position regarding the contents of a potential new round of multilateral trade talks. His statement was the only new development to emerge from the senior officials' meeting on the prospects for launching the negotiations in Doha.

Stressing the need for a balanced agenda, Mr Allgeier identified, *inter alia*, the following as elements that 'could attract widespread support':

- Ambitious mandates for the built-in agenda items of agriculture and services;
- Further development of the Dispute Settlement Understanding;
- Negotiations on market access for non-agricultural products;
- 'Appropriate means to address several issues on which substantial work has been done, including trade facilitation, transparency in government procurement, investment and competition policy [...] we are open to exploring how best to treat these topics in the context of launching the round';
- 'Treatment of the intersection of trade and environment issues', singling out liberalisation of environmental goods and services, agricultural subsidies and fisheries;
- 'Both immediate and continuing efforts on implementation issues of importance to many developing countries; we recognise the high degree of importance of this subject and are committed to addressing it in the coming weeks and at the Ministerial';
- 'We should address both internal transparency in the operations of the WTO and external transparency to enhance the credibility of the WTO in the eyes of the public opinion'; and
- 'A contribution to the debate underway on globalisation, which includes the social dimensions of globalisation.'

While several points in this list were clearly intended to accommodate European ambitions, their wording remains vague. It is still unclear how the US proposes to address investment or competition policy. On the other hand, there is scant likelihood of US support for the EU's environmental agenda of clarifying the relationship between WTO rules and those in multilateral environmental agreements, eco-labelling or the precautionary principle.

With developing countries as staunchly opposed as ever to any treatment of labour standards within the WTO, both the EU and the US spoke gingerly of 'the social dimensions of globalisation', which could be addressed in the context of the newly-strengthened ILO mandate to tackle the question.

Other WTO Members held to their well-known positions with regard to new negotiations. Thus, while EU Director-General for Trade Peter Carl stressed that rule-making on investment and competition were 'indispensable to the European Community', Joshua Law, Director-General of Hong Kong's Trade and Industry Department, summed up the position of the numerous developing countries who oppose bringing in investment, competition policy and government procurement, not to speak of 'non-trade' issues such as trade and the environment or labour standards: 'For those who continue to argue for a comprehensive round, I have to say honestly that an overly ambitious agenda is a recipe for no round at all.' The Africa Group, India, Pakistan and Indonesia stressed that the WTO's agenda was already full with the mandated negotiations on agriculture and services, the on-going reviews of the TRIPs and TRIMs Agreements and work on implementation issues.

The General Council will meet in late July to take stock the Doha preparations and the prospects for launching a new round there.

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They also noted the need to draft Ministerial Declaration language on new notifications of TRIMs-inconsistent measures.

TRIPs: On the many developing country demands regarding intellectual property rights, the proponents only saw potential for an early agreement on a 'reaffirmation that the TRIPs Agreement, under the conditions set out therein, does not prevent Members from issuing compulsory licences for, *inter alia*, drugs deemed to be essential by the WHO or from accepting parallel imports upon their territories' (see related article on page 1).

Special and Differential Treatment. Most WTO Agreements contain SDT provisions in favour of developing countries, most notably in the form of temporary exemptions and longer adjustment timeframes. Other provisions are of a 'best endeavour' nature, exhorting Members to pay particular attention to the situation of developing and least-developed countries when applying trade-restrictive measures and other such clauses. Many developing countries have been asking that all SDT provisions be made mandatory.

The seven proposed that Members work toward language in the Ministerial Declaration that would instruct WTO Councils and subsidiary bodies 'to undertake, within their work programme, a revision of the special and differential treatment provisions contained in the Agreements and to submit proposals for practical improvements to their implementation for consideration by the fifth Ministerial Conference,' as well as reaffirm the terms of the 1979 Enabling Clause, which allows for preferential treatment for developing countries.

The third section of the paper suggested that all implementation issues currently under discussion in other WTO bodies 'shall be brought back to the General Council for reconsideration in the special session on implementation scheduled for September.' While many of the issues in question are largely of a technical nature, they include some key sustainable development concerns, such as the review of TRIPs Article 27.3(b) and the demand of many developing countries that the provisions of the Agreement be harmonised with the Convention on Biological Diversity.

Other Pending Issues

The long list under this heading (36 items) included all the most far-reaching developing country demands. Unlike in the other sections, the seven did not propose compromises or other modifications to these points. Instead, they noted that 'these are the issues that we believe can only be addressed in the context of a negotiation, on the basis of an appropriate mandate; or a political commitment to do something while negotiations are underway.'

Eleven demands were listed regarding both anti-dumping and subsidies. On the former, many concerned raising thresholds for initiating anti-dumping investigations against developing countries and, on the latter, increasing developing countries' leeway to subsidise their industrial production. This list also proposed to include 'measures for legitimate development goals' under Article 8 (identification of non-actionable subsidies) of the Agreement on Subsidies and Countervailing Measures.

Other major points included making technical assistance mandatory under Article 11 of the Agreement on Technical Barriers to Trade, exempting developing countries from domestic content disciplines under the Agreement on Trade-related Investment Measures and providing greater flexibility for development policies.

Dispute Settlement Corner

US Drops TRIPs Dispute Against Brazil's Patent Law

In a joint communication issued on 25 June, Brazil and the United States announced that without prejudice to their different interpretations of the consistency of Article 68 of Brazil's Industrial Property Law with the TRIPs Agreement, 'the US government will withdraw the WTO panel against Brazil concerning the issue, and the Brazilian government will agree, in the event it deems necessary to apply Article 68 to grant compulsory licenses on patents held by US companies, to hold prior talks on the matter with the US. These talks would be held within the scope of the US – Brazil Consultative Mechanism, in a special session scheduled to discuss the subject.'

Throughout the now-abandoned dispute settlement proceedings, the US emphasised that the dispute was not directed against Brazil's public health policies. After the countries reached agreement on the WTO case, US Trade Representative Robert Zoellick again stressed that the US was 'supportive of Brazil's bold and effective program to combat the HIV/AIDS crisis' and that its dispute with Brazil had been 'over a narrow provision in Brazil's patent law designed to pressure patent owners to manufacture their invention in Brazil'.¹

While pharmaceutical patents are the obvious candidates for activating the provision, US officials have been at pains to point out that Article 68 could be applied to all patents on industrial manufactures (Bridges Year 5, No.4, page 10). A USTR press release emphasised that, rather than caving in to Brazilian demands, 'the United States and Brazil [had] agreed to transfer their disagreement over a provision of Brazil's patent law from formal WTO litigation to a newly created bilateral consultative mechanism.' While this mechanism 'should prove useful as the United States and Brazil continue to work to accommodate their mutual desire to protect intellectual property rights without compromising their efforts to combat HIV/AIDS,' the US warned that it continued to view local manufacturing requirements as being 'inimical to the principles of free trade and inconsistent with various WTO rules, including the TRIPs Agreement' and would 'aggressively engage other countries that impose or maintain such requirements and, if appropriate, pursue WTO dispute settlement.'

Official protestations aside, the dispute had become a political embarrassment to the US government with the international media spotlight on developing countries' access to essential drugs in general and to HIV/AIDS therapies in particular. Thirty-nine pharmaceutical multinationals dropped their lawsuit against the compulsory licensing and parallel importing provisions of South Africa's Medicines Act on 18 April (Bridges Year 5 No.4, page 18). The World Health Organisation, the UN General Assembly and the UN Commission on Human Rights have also addressed the issue in recent weeks.

In contrast to US insistence that the WTO challenge was not aimed against Brazil's generic drug producers, Brazilian authorities made clear that they viewed Article 68 as an essential element of the country's public health policy. However, it is important to note that the provisions of Article 68 have never yet been used and Brazil's present flourishing generic production relies on drugs already in the public domain.

Speaking at the TRIPs Council special discussion on intellectual property rights and access to medicines on 22 June (see page 1), Brazil's Ambassador Celso Amorim highlighted the importance of the disputed provisions to his country's fight against the AIDS pandemic:

Two elements are absolutely necessary for the success of the Brazilian Programme for Universal Distribution of HIV/AIDS Medicines (and indeed to make it sustainable): the local production of medicines and negotiations with the pharmaceutical industry. [...] In the case of drugs used in Brazil in the treatment of AIDS, local manufacturing has been utilised so far for products that were already in the public domain, without any infringement to patents. But the possibility of issuing compulsory licenses is also an essential element of the negotiation between the government and pharmaceutical industries. Besides that, local production of pharmaceutical products is often crucial to ensure that medications are readily available at affordable prices. Local manufacturing of pharmaceutical products also encourages sustainable access to medications by insulating the price of patented medicines against currency devaluations, as well as supporting the development of local expertise, which is vital in addressing local needs.

The Brazilian AIDS Programme is strictly consistent with the TRIPs Agreement. The Brazilian Law on Industrial Property provides strong patent protection for pharmaceutical products, and efficient mechanisms to fulfill the objectives of the TRIPs Agreement in a coherent way with our public health policy. While Brazil has never resorted to compulsory licenses under the current law, a recent experience of our Ministry of Health in negotiations with one pharmaceutical company has demonstrated that the very existence of compulsory license mechanisms – together with the political will of the government to issue it – is important to persuade patent holders not abuse their rights to the detriment of public health objectives. In this case, a pharmaceutical company (Merck, *ed.*), which was refusing to bring its unreasonably high prices on two patented anti-retrovirals, has agreed to cut its price in 64 percent and 59 percent respectively, when the government gave unambiguous signs of its intention to issue a compulsory license. Therefore, this remains an essential element in our health policy – and we intend to keep it.

¹ According to Office of the US Trade Representative, Article 68(1)(I) provides that if a patented product is not being manufactured in Brazil within three years of the issuance of the patent, the government may compel the patent owner to license a competitor. However, Article 27.1 of the TRIPs Agreement provides that patents may be used without discrimination as to '... whether the products are imported or locally produced'. The United States continues to question the consistency of this provision under the obligations of the TRIPs Agreement, which prohibits such conditions. A separate article in Brazil's patent law – Article 71 – provides for compulsory licensing of drugs to combat a public health crisis. Other provisions of Article 68 permit compulsory licensing to address (1) abuse of patent rights, (2) abuses of economic power and (3) failure by the patent holder to supply the needs of the domestic market. The United States was not challenging these provisions in this case.

Dispute Settlement Briefs

- Brazil scored a (conditional) victory in its long-running dispute with Canada over aircraft export subsidies when a WTO panel ruled on 20 June that its export support programme Proex was essentially in line with multilateral trade rules. According to trade diplomats, the still-confidential report found that changes made to Proex in the wake of previous adverse rulings had made it 'on its face' consistent with the Agreement on Subsidies and Countervailing Measures. In the future, however, Brazil should abide by the OECD 'gentlemen's agreement' on export credits, which limits loan repayment terms to ten years at the most and requires such financing to cover no more than 85 percent of the purchase price. Through Proex, the Brazilian government provides low-cost financing for the clients of the aircraft manufacturer Embraer.

In December 2000, the Dispute Settlement Body authorised Canada to impose trade sanctions worth US\$250 million on Brazilian exports, as a compliance panel had determined in July that Brazil's Proex reforms had not gone far enough at that point. However, instead of exercising its trade sanction authority, Canada chose to provide Air Wisconsin a government-guaranteed loan and interest support package worth more than US\$1 billion for the purchase of 75 regional aircraft from Embraer's bitter rival, Montreal-based Bombardier.

This prompted Brazil to seek another dispute settlement panel on loan guarantees provided by Canada's Export Development Corporation, Industry Canada and the Province of Quebec to support the country's regional aircraft industry. The panel is expected to render its verdict in mid-August at the earliest.

Canada claims that, while not necessarily WTO-compatible, the loan it provided to Air Wisconsin – and may yet provide to Northwestern Airlines – exactly mirrors financing arranged by Brazil for Embraer's clients. The June panel findings on the latest Proex reforms may make that claim harder to support.

- A preliminary compliance panel ruling of 22 June found that the US Extraterritorial Income Exclusion (ETI) Act adopted last year to replace the foreign sales corporations (FSC) tax regime still violated the WTO Agreement on Subsidies and Countervailing Measures. The Appellate Body ruled in February 2000 that the tax breaks enjoyed by US corporations under FSC regime amounted to an illegal export subsidy. The replacement legislation was challenged by the EU in November 2000 and, according to trade sources, the interim ruling held that it still provided an illegal subsidy, *inter alia*, because the tax breaks it offers are contingent on export performance (violation on SCM Article 3.1(a)). The ETI Act also violates the national treatment obligation in both the SCM and the GATT because to qualify for tax exemptions, at least 50 percent of the value of the goods must be attributable to US inputs and labour. The US will appeal the panel findings.

While the EU – whose own tax arrangements are vulnerable to similar challenges – has requested authorisation to impose trade sanctions in excess of US\$4 billion, both sides have indicated their willingness to negotiate a solution. In any case, the appeals process is likely to take several months. Should the EU ultimately prevail, the WTO has a further two months to arbitrate the amount of the sanctions.

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of a patented brandname drug and export it to the country that granted the license. However, India and the few other developing countries allowed to postpone full patent protection in some fields of technology under Article 64.4, must extend such protection to all fields, medicines included, as of January 2005. Under a narrow reading of the Article 31(f) requirement that compulsory licenses should be authorised *predominantly for the supply of the domestic market*, it could then become 'TRIPs-illegal' to manufacture generics under a foreign license for export. This would in turn affect the 'client country's' access to affordable drugs.

The EU's submission offered 'another possible interpretation of the Agreement that would allow a Member to issue a compulsory licence to a manufacturer in another country, provided the government of that other country recognised the licence (which it would not be obliged to do under the Agreement), and provided that all the goods manufactured under the licence were exported to the country granting the licence.' The EU added that it was 'far from certain whether such a "permissive" reading of the Agreement would stand scrutiny by a panel or the Appellate Body'.

The US commented that the EU's 'possible interpretation' of the Agreement raised questions that should be addressed in case of 'further discussion of this concept'.

The Special Case of AIDS

While the TRIPs Council discussions on access to medicines are not limited to any particular disease, most speakers at the June meeting singled out the HIV/AIDS pandemic. Whatever their more general views or reservations concerning compulsory licensing, industrialised countries concurred that the proportions that the AIDS epidemic had reached in certain countries could be considered as 'a national emergency or a circumstance of extreme urgency' that would dispense them from seeking the patent holder's consent prior to granting a license to a third party (Article 31(b)). The US put epidemics such as HIV/AIDS within a Member's territory on par with 'war, civil strife or natural disasters for purposes of exercising the waiver authority,' and the EU said that the level of HIV/AIDS infection reported in some developing countries appeared to be a 'very good reason for describing it as a national emergency or as a circumstance of extreme urgency.'

The Next Steps

The debate on access to medicines at the WTO has barely begun. In addition to the topics above, Members will need to address in more depth the difficult issues of parallel imports and the protection of undisclosed test data against 'unfair commercial use', both key concerns for the pharmaceutical lobby in industrialised countries. Developing countries, supported by Norway, are also seeking a moratorium on dispute settlement cases against their health-related IPR measures until all the open questions have been answered.

While it is already certain that ministers will address access to medicines, the format and wording are still under intense discussion. These will now follow two parallel tracks: the General Council special sessions on Doha preparations will focus on the 'political dimension', i.e. Ministerial Declaration language, while the TRIPs Council will continue to explore the legal interpretation of the relevant provisions, such as the meaning or relevance of 'predominantly domestic' or 'anti-competitive practices'.

Due to lack of space, the other outcomes of the TRIPs Council session and other late June WTO meetings will be covered in the next issue of Bridges.

Panel Stresses Multilateral Environmental Agreement as Permanent Solution to Shrimp Turtle Dispute

The latest WTO panel on the shrimp-turtle dispute ended its report with an exhortation to Malaysia and the United States to 'co-operate fully in order to conclude as soon as possible an agreement which will permit the protection and conservation of sea turtles to the satisfaction of all interests involved and taking into account the principle that States have common but differentiated responsibilities to conserve and protect the environment.' The concluding remark reflected the leitmotiv of the 114-page report released on 15 June, which repeatedly emphasised the trade body's preference for multilateral solutions to environmental problems, but upheld, at least for the time being, the US import embargo on marine shrimp caught without turtle excluder devices (TEDs). The devices allow highly-endangered sea turtles to escape from shrimp trawl nets where they often drown.¹

In its landmark report of 12 October 1998, the Appellate Body ruled that the US shrimp embargo was legitimate under GATT Article XX(g) because it related to the conservation of exhaustible natural resources (i.e. sea turtles) and was made effective in conjunction with restrictions on domestic production (US shrimp trawlers must use TEDs at all times; see box on page 8 for the provisions of the import prohibition). This marked the first time that a trade embargo was found to be WTO-compatible under GATT Article XX(g) despite its violation of the Article XI obligation not to institute import restrictions other than taxes, duties or other charges. The AB did, however, fault the US for the discriminatory way the import ban was carried out (Bridges Vol.2 No.7 page 9).

The ruling released in June concerned Malaysia's complaint that the US had not properly implemented the Appellate Body's findings. Seeking a complete repeal of the import ban, Malaysia's central points focused on its conviction that

- the United States was not entitled, further to the Appellate Body findings, unilaterally to adopt an import ban outside the framework of an international agreement;
- such an agreement should have been negotiated before the eventual imposition of an import ban; and
- the revised Section 609 implementation Guidelines still amounted to the US imposing its own conservation policy and standards on other Members and thus violated Malaysia's sovereignty.

The US maintained that changes made to the embargo's application had brought it into compliance with WTO rules. Those changes included:

- revising the implementing Guidelines for Section 609 to make them more flexible and predictable;
- providing increased technical assistance in the installation and operation of TEDs; and
- entering into negotiations with Malaysia and other Asian exporters aimed at concluding a multilateral agreement on sea turtle conservation.

The compliance panel found in favour of the United States on all essential points.

Negotiate, Don't Litigate

One of the Appellate Body's most serious charges against the US was that no serious attempt had been made to find a multilateral solution to sea turtle protection in South-East Asia prior to the

embargo's entry into force in May 1996. The AB wrote:

Another aspect of the application of Section 609 that bears heavily in any appraisal of justifiable or unjustifiable discrimination is the failure of the United States to engage the appellees, as well as other Members exporting shrimp to the United States, in serious, across-the-board negotiations with the objective of concluding bilateral or multilateral agreements for the protection and conservation of sea turtles, before enforcing the import prohibition against the shrimp exports of those other Members.

This failure, contrary to the provisions of the US law itself, led to Section 609 to be applied in a manner that violated the chapeau of GATT Article XX, which requires measures not to be applied 'in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail.'

Arbitrary or Unjustifiable Discrimination

While the United States had made only desultory efforts with regard to Asian and Indian Ocean nations, an Inter-American Convention for the Protection and Conservation of Sea Turtles was negotiated between 1993 and 1996 with countries of the Caribbean and Western Atlantic region. According to the Appellate Body, the success of those negotiations demonstrated that multilateral

procedures were available and feasible. In its compliance challenge Malaysia seized this point arguing, *inter alia*, that the US could not adopt an import ban outside the framework of an international agreement, and that, by continuing to apply a unilateral measure after the end of its 13-month period to implement the AB findings – pending the conclusion of an international agreement – the US had failed to comply with its GATT obligations.

The compliance panel thought otherwise. The United States could not, it wrote, 'travel back in time in order to grant the same phase-in period to Malaysia as it had granted the Caribbean/Western Atlantic countries. Interpreting the Appellate Body findings as requiring such a thing would be tantamount to making any compliance impossible in this case.'

While the Appellate Body had said that serious efforts in good faith should have been made 'before the enforcement of a unilaterally designed import prohibition', the compliance panel wrote

The question of the conformity with the DSB recommendations and rulings has to be assessed on the basis of the actions taken by the United States subsequent to the adoption of the Panel and Appellate Body reports.

The Points to Prove

The panel noted that the US had three points to prove if it wished to avoid the charge of continued unjustifiable discrimination:

- the United States had to take the initiative of negotiations with the appellees, having already negotiated with other harvesting countries (Caribbean and Western Atlantic countries);
- the negotiations had to be with all interested parties ('across-the-board') and aimed at establishing consensual means of protection and conservation of endangered sea turtles; and
- the United States had to make serious efforts in good faith to negotiate.

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According to the panel, the US had fulfilled these conditions: it had initiated and participated in, as well as provided funding for, meetings that had resulted in the adoption of a Memorandum of Understanding on the Conservation and Management of Marine Turtles and Their Habitats of the Indian Ocean and South-East Asia at an intergovernmental meeting of 24 states held in Kuantan, Malaysia in July 2000. Participants had agreed to work towards finalising a Conservation and Management Plan at the next intergovernmental session scheduled to be held in 2001, at which time the Memorandum of Understanding (MoU) would be open for signature.

The MoU is non-binding, but its signatories have agreed to consider making it legally-binding once the Conservation and Management Plan (CMP) has been adopted and annexed to it. The panel noted that the content of the final agreement would depend on the CMP, acknowledging the US point that 'the negotiations may, or may not, result in multilaterally agreed steps that will save sea turtles from extinction'.

The Panel would like to recall that what is required from the United States according to the Appellate Body reasoning is serious good faith efforts in the negotiation of an agreement aiming at the protection and conservation of sea turtles, taking into account the situation of the other negotiating parties. In other words, the United States, in the present case, has an obligation to make efforts commensurate with its position as the country seeking the protection and conservation of sea turtles. [...] *In the present case, it is because the United States has demonstrated that it was making serious good faith efforts that it is, in our opinion, provisionally entitled to apply the implementing measure, which may be subject to further control under Article 21.5 of the DSU (editor's italics).*

Sustained Effort Necessary

The panel noted that in interpreting the terms of the *château*, we must keep in mind that sustainable development is one of the objectives of the WTO Agreement and that, in its 1996 report to the Singapore Ministerial Conference, the Committee on Trade and Environment had endorsed 'multilateral solutions based on international cooperation and consensus as the best and most effective way for governments to tackle environmental problems of a transboundary or global nature.'

While the compliance panel acknowledged that the United States could 'not be held liable for the fact that a number of other parties in the Kuantan meeting were not in favour of a binding text', it insisted that the US had a '*continuing obligation to make serious good faith efforts towards a binding agreement (editor's italics)*'.

Finally, the Panel would like to clarify that, in a context such as this one where a multilateral agreement is clearly to be preferred and where measures such as that taken by the United States in this case may only be accepted under Article XX if they were allowed under an international agreement, *or if they were taken further to the completion of serious good faith efforts to reach a multilateral agreement, the possibility to impose a unilateral measure to protect sea turtles under Section 609 is more to be seen, for the purposes of Article XX, as the possibility to adopt a provisional measure allowed for emergency reasons than as a definitive 'right' to take a permanent measure.* The extent to which serious good faith efforts continue to be made may be reassessed at any time. For instance, steps which constituted good faith efforts at the beginning of a negotiation may fail to meet that test at a later stage (editor's italics).

Sovereignty Issues

In October 1998, the Appellate Body wrote:

Perhaps the most conspicuous flaw in this measure's application relates to its intended and actual coercive effect on the specific policy decisions made by foreign governments, Members of the WTO. Section 609, in its application, is, in effect, an economic embargo which requires *all other exporting Members*, if they wish to exercise their GATT rights, to adopt *essentially the same policy* (together with an approved enforcement program) as that applied to, and enforced on, United States domestic shrimp trawlers.

While the statutory provisions of Section 609 did not, in themselves, require other WTO Members to adopt US policies (see box)

any flexibility that may have been intended by Congress when it enacted the statutory provision has been effectively eliminated in the implementation of that policy through the 1996 Guidelines [...] and through the practice of the administrators in making certification determinations.

In other words, while Section 609 itself only required 'comparable' regulatory programmes or incidental catch rates, the implementing Guidelines in force at the time of the Appellate Body determination amounted a *de facto* obligation for shrimp exporters to adopt and enforce legislation requiring the use of TEDs, as is the case in the US. This, the AB ruled, had an unjustifiably coercive effect on policy decisions made by foreign governments.

Revised Guidelines

The United States dealt with these points through changes to the implementing Guidelines for Section 609. The most important of these was to provide for 'shipment-by-shipment' certification for fisheries that export TED-caught shrimp from non-certified nations. US environmental groups have won a legal challenge against this change as an unlawful weakening of the intent of Section 609, i.e. the effective protection of sea turtles. The government has appealed against that verdict, and until the Court of Appeals has ruled on the case, the Revised Guidelines remain in force. Should the government lose, it may appeal to the Supreme Court. Malaysia (and several of the third parties in the case) expressed concern that the US government may be forced to terminate the shipment-by-shipment exception, which is the main flexibility instrument of the Revised Guidelines. The panel stated that even if that possibility could not be excluded, 'the situation before us is, for the moment, the one provided for in the Revised Guidelines, which on this point are not contested by Malaysia.'

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Section 609 prohibits the importation of shrimp or products from shrimp which have been harvested with commercial fishing technology, which may affect adversely species of sea turtles protected by the Endangered Species Act, except in cases where the President certifies to the Congress that

(a) the government of the harvesting nation has provided documentary evidence of the adoption of a regulatory program governing the incidental taking of such sea turtles in the course of such harvesting that is comparable to that of the United States; and

(b) the average rate of that incidental taking by the vessels of the harvesting nation is comparable to the average rate of incidental taking of sea turtles by United States vessels in the course of such harvesting; or

(c) the particular fishing environment of the harvesting nation does not pose a threat of the incidental taking of sea turtles.

Can Trade Arrangements Reduce Poverty in Southern Africa?

By Moses Tekere

Closer regional trade and economic co-operation is a launching pad toward regional economic 'take off' and international competitiveness. It creates conditions for addressing critical problems facing the region such as employment, income generation, and human development and poverty elimination if it is designed in a manner that benefits the majority, the informal sector, rural population and women.

Extra-territorial trade liberalisation arrangements can be effective and important tools for addressing poverty if:

- they provide better market access for goods that are produced and exported by the poor and protect the products they produce for basic needs when access to imports is problematic;
- trade distortions such as subsidies are minimal on export products in which the poor have a comparative advantage;
- the composition of traded goods shifts from low-rent to high-rent goods, i.e. from immiserising growth to prosperity; and
- there are safety nets to cushion poor communities who face adjustment costs.

The central goal should be to enhance the direct participation of the poor in regional trade rather than reliance on trickle down effects.

Poverty in the Southern African Development Community

The litany of poverty statistics for SADC countries¹ according to the 1999 UNDP Human

Development Report is inexhaustible. First, average gross domestic product per capita in the region is among the lowest in the world and the national poverty head count as a percentage of population for 1984-95 is above 50 percent for half of SADC countries. Their human development indexes also low and, according to the human poverty index, the poorest countries are Mozambique and Malawi, followed by Tanzania, Zambia, Namibia, Botswana and Lesotho. South Africa and Zimbabwe have a lower human poverty index, but they also have the highest level of income inequality. Mauritius, followed by South Africa, has the least poverty problem in the region. The bulk of the people who suffer from higher incidences of poverty and food insecurity are in the rural areas. Food insecurity and famine are inseparable from poverty that in turn is inseparable from the deficiencies in public policy as well as environmental shocks.

Overview of Regional Trade Issues

The SADC trade protocol, whose implementation started in September 2000, provides *inter alia* a framework for reform measures aimed at liberalising intra-SADC trade through a phased removal of tariff and non-tariff barriers. The main objectives of the trade protocol are to secure expanded regional markets, exploitation of economies of scale, provide attractive opportunities for foreign and domestic investment, improve value adding process, stimulate efficient operation of commodity and service markets, promote expansion of exports and incomes, reverse the historical trend for SADC states to depend on primary exports to the OECD, and minimise the deterioration of terms of trade and eventually enhance the welfare of the region.

There is evidence of growth in intra-SADC trade even before the start of the SADC trade protocol's implementation last year. First, for all countries except Mauritius, the share of imports coming from SADC was higher in 1997 than in 1995. While this shift is not a direct response to the adoption of the protocol, it is a clear indication that potential for trade expansion exists if the tariff dismantlement process sets in. Intra-SADC trade is heavily skewed in favour of South Africa, whose exports to all SADC countries increased significantly between 1995 to 1997. Growth of imports into SADC countries from the rest of SADC between 1995 and 1997 varied. On one hand, Mozambique's imports from other SADC countries declined drastically while for Mauritius, the South African Customs Union and Tanzania there were no changes. Zimbabwe, Zambia and Malawi recorded marginal gains in imports from SADC. Further, although on an upward trend, intra-regional trade is still a small fraction of each country's total trade, and increasing trade flows within SADC are considered as an indicator of success of regional integration.

Can the SADC Trade Protocol Deliver for the Poor?

Rather than posing poverty reduction as an explicit objective from the outset, the SADC trade protocol relies on trickle down effects arising from regional trade expansion. Currently, the dominant intra-SADC commodity imports of most member countries are fuel and fuel products, machinery and medicines. Intra-SADC trade is also common in vehicles, textiles

and clothing. Agricultural products, which are more relevant for first stage poverty reduction, do not feature prominently in regional trade and small producers are mostly involved only in informal cross border trade.

Five main conclusions can be drawn regarding the SADC trade protocol's effectiveness for poverty reduction:

- Market access for agricultural goods produced and exported by the poor will remain unfavourable since most countries either back-loaded liberalisation or heavily protected these sectors.
- The rules of origin applied in some sectors such as textiles and clothing, which are major employers in manufacturing in SADC, are too stringent and act as trade barriers.
- Some countries use trade-distorting subsidies.
- The positive impact of trade liberalisation within SADC on poverty is limited because, due to historical, traditional and production rigidities, the poor continue to produce and export goods whose terms of trade are continually worsening and where rent is minimum or export prices hardly cover production costs.
- Finally, while poor communities are supposed to benefit from regional trade, so far SADC has left them out of the trade debate.

The Spaghetti Impact of the SA-EU Free Trade Agreement

Early last year, SADC's major trading partners South Africa and the European Union signed an Agreement on Trade and Co-operation whose primary objective was to establish a free trade area in conformity with WTO provisions over a ten-year transitional period for the EU and twelve years maximum for South

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Africa. The free trade area covers free movement of goods in all sectors, as well as liberalisation of trade in services. This agreement will have both negative and positive effects on SADC. The likely negative effects include displacement of some SADC exports on the South African market by those from the EU. Displacement is also likely to occur in other SADC countries as subsidised EU goods 'sneak in' via South Africa duty-free and cause SADC states a loss of revenue. SADC customs services will face a high burden in administering rules of origin, and investment is likely to be diverted from the region into South Africa. Preferential market access for SADC goods in both SA and the EU is likely to erode.

The positive effects include the opportunity provided by the cumulation provisions, increased competition and other trickle down dynamic effects. A number of products of export interest to SADC are excluded from the general tariff liberalisation within the EU-SA agreement, which at least preserves SADC preferential access in SA for these products vis-à-vis the EU.

New ACP-EU Relations Likely to Miss Poverty Reduction Goals

Compared to other North-South trade arrangements, the Lomé Convention between developing countries in Africa, the Caribbean and the Pacific (ACP) and the European Union has served as an important poverty alleviating instrument for SADC through its preferential tariffs, commodity protocols, the Stabex and Sysmin packages, as well as financial co-operation. Last year, the agreement was replaced by a transitional arrangement (the Cotonou Agreement) and negotiations for a new trade arrangement between the SADC/ACP and the EU – based on reciprocity and leading to the establishment of a free trade area – are scheduled to start in September 2002. Preliminary studies indicate that opening SADC markets to EU products within the proposed free trade area will pose serious problems due to the enormous difference in levels of economic transformation between the EU and SADC countries.

Specific problems of a Southern Africa-EU free trade agreement include: trade-distortive effects of EU subsidies that undermine areas where SADC has potential to develop a competitive advantage; serious adjustment problems for infant industries in SADC; lack of guarantee for the continuation of commodity protocols that are very important for SADC; silence on the issue of current rules of origin which have tended to restrict expansion of trade within the Lomé Convention; and narrowing of margins of Lomé preferences due to the unilateral extension of market preferences to other regions and countries by the EU.

Why the WTO Has Failed to Reduce Poverty

Trade liberalisation measures within the WTO (tariff binding, reductions, etc.) were seen by SADC states both as 'locking in' trade liberalisation and as *complementary and supportive international instruments to buttress national efforts*, i.e. economic structural adjustment programmes. However, more than six years after the conclusion of the Uruguay Round Agreements, the WTO's promise to Sub-Saharan Africa has not materialised. Instead, at least so far, the WTO has imposed stricter disciplines in terms of notifications compliance with no substantive benefits. Reasons why developing countries and the poor fail derive benefits lie within the design and implementation of the WTO Agreements. Trade with the WTO has failed to address poverty due to:

- *Reduced market access.* Sectors of particular importance to the members of the Southern African Development Community (SADC), such as tropical products and agriculture which em-

ploy the majority of the poor, remain un-liberalised. Northern protectionism is costing developing countries up to US\$700 billion in annual export earnings.²

- *Agricultural Subsidies.* Subsidised cheaper agricultural imports from developed countries are pushing small-scale producers out from the market. Further trade effects can be expected if industrialised countries offset their losses from reduced export subsidies by increasing support elsewhere, for instance for organic or sustainable agriculture.
- *Tariff peaks* remain fundamental constraints for developing countries exports. Export products of interest to SADC countries, such as clothing, textiles or leather goods, continue to face exceptionally high tariff peaks in most industrialised markets.
- *Tariff escalation.* Tariffs on developing country exports to industrialised countries tend to escalate depending on the level of processing of the products. For example, tariffs on cotton exports are lower than those on textiles and clothing.
- *Sanitary and phytosanitary measures.* SADC exports suffer from sanitary and phytosanitary measures and standards being used as instruments to restrict exports into industrialised markets. For example, procedures to prove that some areas are pest- and disease-free or low risk are usually long and burdensome.
- *Trade defences.* Finally, SADC countries face difficulties in defending their trade interests in both domestic and international markets when trade remedy instruments such as anti-dumping, subsidies, countervailing or safeguard measures are brought against their exports. It would require considerable resources from SADC members to establish the requisite institutional, information, financial and human resources that would enable them to make use of similar instruments against subsidised exports from developed countries.

Conclusion

Those working on regional trade and poverty face a number of challenges. Among the most important are:

- Defining poverty: who are the poor and why are they poor?
- Defining the relationship between trade and liberalisation nationally, regionally and extra-regionally.
- How can we design trade agreements that address poverty effectively and directly?
- A holistic approach to regional trade integration, i.e. ensuring effective linkages between micro and macroeconomic policies.
- How does regional trade address the crisis of production facing the poor so as to allow them to actively participate in regional integration via trade?
- How to ensure equitable distribution of benefits from regional integration in favour of the poor?
- How to ensure that extra-regional trade relationships do not undermine regional trade integration or, alternatively, how to ensure that the poor benefit from these agreements?
- How to ensure a fair playing field in trade within and between classes, SADC states and with big powers?

Dr Moses Tekere is Director of Trades & Development Studies Centre in Harare, Zimbabwe. This article is adapted for Bridges from a paper presented at the Southern Africa Regional Poverty Network Regional Roundtable Discussions on 26 April 2001 in Pretoria.

ENDNOTES

¹ Angola, Botswana, the Dem. Republic of Congo, Lesotho, Malawi, Mauritius, Mozambique, Namibia, the Seychelles, South Africa, Swaziland, Tanzania, Zambia and Zimbabwe.

² UNCTAD. 1999. Trade and Development Report.

G-15 Leaders Call for a WTO Agenda with an Over-arching Theme of Development

The heads of state of nearly 20 influential developing countries urged industrialised nations to address development concerns at the WTO's Ministerial Conference in Doha, but studiously avoided any mention of new multilateral trade negotiations at the eleventh summit-level meeting of the Group of Fifteen held in Jakarta, Indonesia, from 30-31 May.¹

In the joint communiqué issued at the meeting's conclusion, the G-15 leaders emphasised the needs to bridge the digital divide between developing and industrialised countries and to address pandemics and epidemics such as HIV/AIDS, tuberculosis and malaria. They stated forcefully that the implementation of the WTO's Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPs) should 'in no way prevent developing countries from taking measures, such as compulsory licensing and parallel imports to ensure access to life-saving and essential drugs at affordable process to overcome the hazards to public health and nutrition caused by HIV/AIDS and other diseases,' adding that the forthcoming special discussion in the TRIPs Council presented 'an opportunity for promoting a convergence of views in this regard.'

Although the G-15 leaders pointedly kept from referring to WTO negotiations, they did note that several aspects of the multilateral trading system were detrimental to developing countries. Among these were tariff peaks and escalation, and non-tariff barriers 'including new restrictions under the pretext of sanitary and phytosanitary measures'. In addition, the communiqué signatories underlined their opposition to 'the use of subsidies, anti-dumping and safeguard provisions as protectionist and trade-distorting measures by developed countries', and urged the latter to promote 'substantial liberalisation in agriculture and textiles and in other sectors and modes of supply of services of export interest to developing countries, in particular the movement of natural persons, as envisaged in the General Agreement on Trade in Services.'

The heads of state reiterated their strong opposition to including 'non-trade issues such as labour standards and environmental conditionalities' into the WTO agenda, and expressed concern over such conditionalities in WTO Members' GSP schemes. They also cautioned that measures aimed at improving least-developed countries' market access must not negatively impact on other developing countries.

The G-15 leaders stressed the need for a 'meaningful solution to the implementation issues pertaining to the Uruguay Round Agreements and Decisions by the fourth Ministerial Conference of the WTO, and for the operationalisation of the special and differential provisions in favour of developing countries as a binding commitment.' Calling for a WTO where the 'development dimension' would constitute the over-arching theme, they stressed that developing countries needed to 'preserve a flexible policy space in which [they] could pursue policies oriented to promote and sustain competitiveness and dynamism within their goods and services sectors.'

While the summit participants clearly opposed a further integration of environmental concerns in the multilateral trading system, they noted that industrialised countries had failed to keep the commitments undertaken at the 1992 UN Conference on Environment and Development (UNCED) both with regard to domestic action and to promises of financial and technology

transfers to developing countries. Nevertheless, the outcomes of that conference (i.e. Agenda 21 and the conventions on biodiversity, climate change and desertification) were the right fora for addressing global environmental problems in the spirit of 'common but differentiated responsibilities'.

The leaders welcomed the forthcoming World Summit on Sustainable Development – Rio+10 to be held in Johannesburg in 2002 – as an opportunity to identify 'concrete measures to ensure that the developed countries in particular, fulfil their commitments under Agenda 21 and the Rio Declaration principles', but said that the meeting should 'exclude any attempt to renegotiate the commitments undertaken at UNCED 1992 and the introduction of new issues, including environmental standards as conditionality for trade.' They singled out as G-15 priorities the protection of biological diversity and traditional knowledge (developing countries are also pursuing these objectives in the context of the TRIPs Agreement reviews, see page 15).

¹ Algeria, Argentina, Brazil, Chile, Colombia*, Egypt, India, Indonesia, Iran*, Jamaica, Kenya, Malaysia, Mexico, Nigeria, Peru, Senegal, Sri Lanka, Venezuela and Zimbabwe (*accepted as new members at the Jakarta summit).

Excerpts from the G-15 Joint Communiqué

We stress that the development dimension should constitute an over-arching theme in the WTO agenda. We have sustained our efforts to open our markets, strengthen our institutions and orient our economies to the challenges of the new economy. We note, however, that tariff peaks, tariff escalations and non-tariff barriers, including new restrictions under the pretext of sanitary and phytosanitary measures, persisting in industrialised countries on products of export interest to developing countries, have already adversely impacted on the export performance of these products and growth in developing countries.

We are against the use of subsidies, anti-dumping and safeguards provisions as protectionist and trade distorting measures by developed countries. It is also regrettable to observe that while negotiations in the WTO have significantly led to the liberalisation of trade in many sectors, equal attention has not been given to those sectors of particular importance to developing countries, such as textiles and agriculture. We urge developed countries to demonstrate their true commitment to free trade by promoting substantial liberalisation in agriculture and textiles and in other sectors and modes of supply of services of export interest to developing countries, in particular the movement of natural persons, as envisaged in the General Agreement on Trade in Services.'

We also strongly reiterate that non-trade issues such as labour standards and environmental conditionalities should not be included in the WTO agenda.

The Agreement on Trade-related Aspects of Intellectual Property Rights should be implemented in a way that contributes to the promotion of technological innovation, transfer and dissemination of technology and social and economic welfare of developing countries.

Shrimp-Turtle Dispute, continued from page 8

The Revised Guidelines also provide for the possibility to certify national programmes 'if the government of a harvesting nation demonstrates that it has implemented and is enforcing a comparably effective regulatory program to protect sea turtles in the course of shrimp trawl fishing without the use of TEDs.' These changes have permitted certain fisheries in Australia, Brazil and Pakistan to export shrimp into the US even if these countries do not require all shrimp trawlers to use TEDs at all times.

Malaysia has sought neither a nation-wide nor a fisheries-specific certification under Section 609. In its compliance challenge, it contended that the Revised Guidelines continued to be biased toward TED use and thus to an imposition that other WTO Members adopt US conservation practices in violation of their sovereign right to define their own environmental policies and standards.

Malaysia stressed that 'in the absence of any multilaterally agreed standards on the use of TEDs' it was under no obligation to use them, neither were TEDs 'the sole measure to protect sea turtles'. Malaysia argued that experts had pronounced its sea turtle conservation programme, which focuses on the protection of nesting beaches, 'among the best of the world' and that Malaysia should not be required to submit itself to US-determined standards. The US countered that as Malaysia had not sought certification, it was not in a position to tell whether the Malaysian programme could be judged of comparable efficiency to the US one, which mainly relies on the obligation to use TEDs. Dr Scott Eckert, an expert heard by the panel, praised Malaysia's turtle egg protection, but said that among the different possible threats 'the incidental take of sea turtles by fishing industries' was the most significant.

The panel concluded its sovereignty discussion as follows:

The Appellate Body Report found that, while a WTO Member may not impose on exporting Members to apply the same standards of environmental protection as those it applies itself, this Member may legitimately require, as a condition of access of certain products to its market, that exporting countries commit themselves to a regulatory programme deemed comparable to its own. [...] *If Malaysia exported shrimp to the United States, it would be subject to requirements that may distort Malaysia's priorities in terms of environmental policy. As Article XX of the GATT 1994 has been interpreted by the Appellate Body, the WTO Agreement does not provide for any recourse in the situation Malaysia would face under those circumstances. While we cannot, in light of the interpretation of Article XX made by the Appellate Body, find in favour of Malaysia on this 'sovereignty' issue, we nonetheless consider that the 'sovereignty' question raised by Malaysia is an additional argument in favour of the conclusion of an international agreement to protect and conserve sea turtles which would take into account the situation of all interested parties* (editors italics).

Amicus Briefs

The compliance panel also dealt briefly with the red-hot issue of friend-of-the-court briefs. In its introduction, it noted that two non-governmental organisations had submitted briefs,² which were sent to the parties for comment on their admissibility and relevance.

Malaysia responded that the panel had no right to accept or consider unsolicited briefs, arguing that it was of 'prime importance for the panel's consideration' that the practice of admission and acceptance of unsolicited submissions by panels and the Appellate Body had been the subject of intense debate at a special meeting

of the General Council on 22 November 2000, and that 'the overwhelming view of the WTO Members at the meeting was that panels and the Appellate Body did not have the authority to receive or consider unsolicited briefs' (see Bridges Year 4 No.9, page 1).

The United States attached one of the briefs – submitted by the National Wildlife Federation et al. – to its own submission to the panel, arguing that it was 'directly relevant to the issues in this dispute' because it addressed the issue of US compliance with the recommendations and rulings of the DSB. In addition, the brief presented the submitters' views on the status under international environmental law of consensual versus unilateral environmental measures, 'an issue raised to varying extents by Malaysia and certain third parties'. As the signatory organisations had 'a great interest and specialised expertise in sea turtle conservation and related matters', their views should be of value to the panel in resolving the matters at issue in this dispute, the US wrote.

The United States also argued that in opposing the panel's right to consider *amicus* briefs, Malaysia made 'the rather extraordinary argument that the Appellate Body was wrong and the panel should ignore the Appellate Body finding'. Malaysia's rationale that the Appellate Body finding gave greater rights to *amici* than to WTO Members, was 'demonstrably false', the US said:

Under the DSU, any WTO Member may preserve its third-party rights and have its views considered by a panel. In stark contrast, the Appellate Body findings simply provide panels with the *discretion* to consider unsolicited submissions.³

Malaysia countered that it was not suggesting that the panel should overturn the Appellate Body's decision on this issue, but that, 'in the light of the development in the special meeting of the General Council on 22 November 2000, the panel should exercise extreme caution when dealing with unsolicited *amicus* briefs.'

The panel did just that. In the 'findings' section of the report, it simply 'took note' of the parties' different points of view; decided to not to include the independent Earth Justice submission; and noted that the National Wildlife Federation submission attached to the US rebuttal was 'already part of the record'. The panel did not further comment on the substance of either *amicus* brief or whether it had taken into account any of the arguments of the brief the US had annexed to its submission.

Malaysia and the United States have agreed that either side may appeal the compliance panel ruling. At the time of this writing neither had announced its intention of doing so.

ENDNOTES

¹ The embargo was established pursuant to Section 609 of Public Law 101-162, adopted in 1989 as complementary legislation to the Endangered Species Act, which protects all species of sea turtles that occur in the US (see box on page 8).

² The brief attached to the US rebuttal was submitted by the National Wildlife Federation on behalf of the Center for Marine Conservation, Centro Eoceanos, Defenders of Wildlife, Friends of the Earth, Kenya Sea Turtle Committee, Marine Turtle Preservation Group of India, National Wildlife Federation, Natural Resources Defense Council, Operation Kachhapa, Project Swarajya, and Visakha Society for Prevention of Cruelty to Animals. The other *amicus* brief was submitted by Earth Justice Legal Defense Fund on behalf five other conservation organisations.

³ *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, Appellate Body Report, paras 108 and 110.

CITES Acts to Prevent Unsustainable Exploitation of Sturgeon Species

By Juan Carlos Vasquez

On 22 June, the CITES Standing Committee agreed to recommend that all imports of caviar and other sturgeon products be suspended from four Caspian Sea nations in 2002 unless they implement a series of measures designed to stem the alarming depletion of sturgeon stocks in the region (see separate story on page 14). The article below provides the context behind the decision.

The sturgeon is one of the world's most valuable wildlife resources. This Northern hemisphere fish can be found in large river systems, lakes, coastal waters and inner seas throughout Azerbaijan, Bulgaria, China, Iran, Kazakhstan, Romania, Russia, Turkmenistan, Turkey, the Ukraine, other European countries and North America. For the world's wealthy, caviar, i.e. unfertilised sturgeon roe, is a delicacy. For the range states, sturgeon is a major source of income and employment, as well as an important element of the local food supply. Current trends in illegal harvest and trade put all these benefits at risk.

Since 1998, international trade in all species of sturgeon has been regulated under CITES due to concerns over the impact of unsustainable harvesting and illegal trade in sturgeon populations in the wild. The situation in the Caspian Sea, where most of the world's caviar is produced, became particularly worrying after the demise of the USSR, which led to the virtual collapse of existing management and control systems. The resulting decline in sturgeon stocks gave rise to a recognition of the urgency to prevent further depletion and to rehabilitate the species. To achieve this, the rate of exploitation must not exceed the carrying capacity and the capacity of regeneration of the species. In other words, trade in these species must be regulated to avoid overexploitation.

CITES, the Convention on International Trade in Endangered Species of Wild Fauna and Flora, was designed more than 25 years ago to cope with circumstances where international trade was a strong factor in the threat of extinction of a species. It is known for its effective decision-making and compliance mechanisms to prevent unsustainable exploitation of wildlife. The development and enforcement of effective trade measures, founded on good conservation science, is one of the key instruments in achieving its objectives.

CITES Action on Sturgeon

When the decline of sturgeon stocks became evident, the 10th meeting of the Conference of the Parties in 1997 mandated CITES to take the lead in helping to bring the international sturgeon trade under control. This was an important step to ensure long-term conservation and better management of the species – and essential to preserve the resource for future generations.

Since the Appendix II listing (see box) entered into force on 1 April 1998, all sturgeons and parts or derivatives thereof (e.g. caviar, meat, skin, live fish, etc.) that enter into international trade require the issuance of permits and certificates, as well as labelling of caviar when exported from producer countries. The permit system established by CITES allows control of trade and makes it easy to trace the source of any given shipment of caviar. It also provides data to assess the stocks and estimate the levels of trade.

Continued on page 14

Key Elements of CITES Significant Trade Review

The 'significant-trade review' process is the Convention's mechanism for remedial action when there is reason to believe that Appendix II species are being traded at significant levels without adequate implementation of CITES provisions. If implemented correctly, the process acts as a safety net for the Convention by ensuring that species do not decline while they are listed in Appendix II. The mandate for this process, provided by Resolution Conf. 8.9 (Rev.), is implemented by the Animals and Plants Committees working with the Secretariat, who make recommendations to the Standing Committee if appropriate measures are not taken.

The process starts with a detailed review of the biological, trade and other relevant information of the species concerned by the Animals/Plants Committees. After consultation with the range states, the Committees make 'primary' or 'secondary' recommendations to the countries involved if the available information indicates that the provisions of Article IV of the Convention are not being implemented.

Primary recommendations include, for example, administrative procedures, specific quotas, zero quotas or temporary restrictions on exports of the species concerned. Secondary recommendations may advise field studies or evaluation of threats to populations or other relevant factors, including illegal trade, habitat destruction, internal or other uses, designed to provide the information necessary for a Scientific Authority non-detriment finding.

Before the recommendations are developed, however, the Secretariat transmits the relevant Committee's concerns to the range states. Wherever a satisfactory response is received within six weeks, the species in question is eliminated from the process. Where there is an unsatisfactory response – or no response – the Committees make recommendations for action. These are transmitted to the range states with a timeframe for implementation (90 days, 12 months or two years depending on the nature of the recommended action). The Secretariat and Committees end the process if implementation by the range state is satisfactory, though it may be reintroduced at a later stage if further concerns are brought forward. If implementation is unsatisfactory or no response is received, the Secretariat will recommend strict measures to the Standing Committee, which may include the suspension of trade where appropriate, and the Parties are informed of any such decisions. The recommendation is suspended or withdrawn when the affected Party satisfies the Secretariat on its compliance.

Appendix II Listing

Appendix II includes species, which might become threatened if trade in them was not controlled and monitored, as well as species similar in appearance, which must be monitored in order to make the trade restrictions effective. Control mechanisms include export quotas and permits issued by the government authority in the country of origin guaranteeing that the specimen in question was legally obtained and that its export does not threaten the survival of the species.

Multilateral Environmental Agreements in Brief

- Meeting in Paris on 22 June, the CITES Standing Committee decided against recommending an immediate suspension of imports of caviar and other sturgeon products in order to help the recovery of the Caspian Sea's dwindling sturgeon stocks, provided that no further catches be allowed in 2001.

No catch/export quotas will be granted for 2002 unless Azerbaijan, Kazakhstan, Russia and Turkmenistan agree, by the end of this year, on 'appropriate mechanisms for the establishment and implementation of a common policy for the conservation and utilisation of sturgeon resources involving all countries exploiting sturgeons in the Caspian Sea, that will be the basis of coordinated management of shared sturgeon resources (including the establishment of catch and export quotas for 2002)'.

To stave off an immediate trade ban, the four nations also agreed to conduct a comprehensive survey of Caspian sturgeon stocks and to collaborate with Interpol and the World Customs Organisation on a study of illegal trade and law enforcement needs. Further steps will be necessary by June 2002, including increased collaboration on monitoring and managing sturgeon stocks, as well as 'significantly increased efforts to combat illegal harvesting and trade and to regulate domestic trade.'

Fulfilling these conditions will require significant pressure on Turkmenistan, which is not a CITES member, from the other three nations involved. Iran, a major Caspian caviar producer, is not required to take specific measures as its harvests and trade are more strictly monitored and most stocks it exploits stay in Iranian waters throughout their lifecycle. However, the four states concerned by the Standing Committee's recommendations depend on Iran's co-operation, *inter alia*, because the common sturgeon conservation policy must involve '*all states that conduct commercial fishing in the Caspian Sea*' (editor's italics).

- Negotiations on access to and conservation of plant genetic materials for food and agriculture have almost concluded. If the remaining disagreements can be ironed out, the FAO's November conference is slated to adopt the revised International Understanding on Plant Genetic Resources for Food and Agriculture after seven years of negotiations.

A major step forward was made when delegates agreed on 30 June that companies/plant breeders must share some of the profits derived from the commercialisation of new seeds based on plant genetic material accessed under the Multilateral System established by the revised IU. Two crucial questions, however, remain unresolved: one concerns the right to patent products developed from the open-access germplasm, and the other the scope of the crops made available under the system. So far, only 34 food crop groups and 29 groups of forage crops have been agreed out of the more than 100 deemed necessary for food security.

The original treaty, adopted in 1983, viewed plant germplasm held in public seedbanks as 'a heritage of mankind' which should be made available without restriction. The revised version attempts to bring access to genetic resources of essential food and forage crops in line with the objectives of the Convention of Biological Diversity, including 'the fair and equitable sharing of the benefits arising from the use of genetic resources'.

The next issue of Bridges will cover the latest IU developments in more detail.

CITES Acts, continued from page 13

However, listing the remaining sturgeon species in CITES Appendix II was only the first step to control and maintain sturgeon stocks, ensuring that their international trade was sustainable. The more than 150 CITES member countries acknowledged that the listing would not, in itself, be enough and gave their full and unconditional support to lay out a wide range of compliance issues that Parties and range states were encouraged to address. These included fishery management programmes, improving legislation, promoting regional agreements, development of marking systems, aquaculture and the control of illicit trade (Resolution Conf. 10.12 (Rev.)).

Another part of this Resolution directed the CITES Animals Committee to include the *Acipenseriformes* (sturgeons and American paddlefish) in its Review of Significant Trade. This review determined that several species of sturgeon were unsustainably exploited in at least some of their range, primarily through illegal fishing. Other species were being fished at their biological limit and vulnerable to declines if significant reduction of harvesting and management plans were not put in place. This review, largely based on information provided by the range states themselves, showed a pattern of declining yields in the Caspian Sea sturgeon populations that required immediate attention.

It is also important to recognize that managing a high-value open-access resource, particularly for new countries with economies in transition, is not always an easy task. States need to have the institutional and financial resources required to improve management of the stocks, regulate access and implement regulations. The lack of capacity to manage the species could be regarded as an opportunity for illegal trade. Poachers will be tempted to exploit the species until the point of economic extinction to maximise their profits. The most adequate CITES measure to prevent this failure in the short term is a temporary trade restriction until the countries are able to make a commitment and implement CITES recommendations.

However, as the countries will be selling their meat and caviar domestically if they have to, suspension of international trade will not in itself stop the unsustainable practices. But it does send the message that if the states want to sell internationally to CITES Parties, then management of the resource must provide for sustainability, and laws must be effectively enforced.

Although a prolonged prohibition of trade in caviar may have negative consequences in certain range states, concrete measures are needed to address real concerns over the detrimental nature of the current harvest of and trade in sturgeons and sturgeon products. Any suspension of imports would be temporary, conditional upon range states taking a series of actions that should greatly improve compliance with the provisions of CITES and improve the management of and control over the resource.

Under the circumstances, range states may have an opportunity to develop more effective and more widely supported regional agreements and management strategies, which should ultimately be of great benefit to the species and the countries concerned.

Juan Carlos Vasquez is Legal and Trade Officer at the Enforcement Assistance Unit of the CITES Secretariat. The author would like to thank colleagues who reviewed earlier drafts. Special thanks go to Stephen Nash and Tom De Meulenaer for their valuable insights and comments.

Contact: CITES Secretariat, tel: (41-22) 917-8156, fax: 797-3417, e-mail: juan.vasquez@unep.ch, Internet: <http://www.cites.org>

Africa Group Roundtable on TRIPs, Biological Resources, Public Health

At the request of Zimbabwe, current co-ordinator of the Africa Group to the WTO, ICTSD held on 12 June an informal Roundtable on TRIPs, Biological Resources and Public Health aimed at providing support to the Africa Group for the preparation of the June TRIPs Council Meeting. In addition to African negotiators, the meeting mobilised four experts including Prof. Johnson Ekpere from the University of Ibadan and consultant for the drafting of the OAU Model Law on Access to Genetic Resources and Community Rights; Dr. Tewolde Egziabher from the Ethiopian Environmental Protection Authority; Prof. Thomas Cottier, former trade negotiator and Director of the World Trade Institute; and Cecilia Oh from the Third World Network.

The first session of the meeting focused on the concerns raised by the African Group in the review of TRIPs Article 27.3 (b) including the criteria for patenting of life forms; the need to clarify the *sui generis* option for plant variety protection, particularly as it pertains to farmers' rights and the protection of traditional knowledge, as well as the need to harmonise the TRIPs provisions with the Convention on Biological Diversity (CBD) and the FAO International Undertaking (IU, see also page 14). On the TRIPs/CBD relation, some experts highlighted differences in the perspective and approach taken by the two Agreements. To promote the conservation and sustainable use of biodiversity and the sharing of benefits arising from this use, the CBD emphasises the notion of community, whereas the TRIPs Agreement only recognises individuals and private interests. This approach is particularly reflected in Article 27.3(b).

On the implementation of this provision, some experts held the view that the OAU Model Law on Access to Genetic Resources and Community Rights offered a viable alternative to the UPOV model. They stressed that if properly implemented in national legislation, the OAU Model Law was compatible with the TRIPs Agreement. Conflicts might, however, occur with Article 27.3(b), which requires Members to grant patents on micro-organism, since the Model law clearly rejects patenting of life forms and biological processes. Some experts stressed that this position was consistent with the Africa Group submission for the review of Article 27.3(b) (WT/GC/W/302), which proposes that all living organisms be excluded from patentability. Beyond ethical concerns this position reflects the fact that there is no scientific definition of a micro-organism, that even modified living organisms do not constitute an invention and that reproduction is a natural phenomenon which cannot be patented. Most experts agreed that when addressing this issue, African countries should first and foremost look at their national priorities including their anticipated nutrition base in 20 years and if GMOs are or will be needed.

Other concerns were raised with regard to the implementation of the TRIPs Agreement and the OAU Model Law in the field of access legislation and protection of traditional knowledge. One expert stressed that the implementation of a system of access based on the OAU Model law should be complemented by a multilateral agreement to ensure its enforcement at the international level. With respect to the protection of traditional knowledge and community rights, some proposed that WTO Members could introduce the notion of prior informed consent in the TRIPs Agreement (e.g. disclosure of the origin of the material used when submitting a patent application). They nevertheless pointed out the difficulties in defining the origin of crops and medicinal plants as different communities often use them simultaneously in different geographical areas. Another avenue that could be explored in this field is the inclusion of this issue in the current negotiations on Agriculture through special and differential treatment for land races.

The second session focused on TRIPs and access to medicines. During this session, experts provided substantive comments on and technical inputs for the Africa Group submission to the special discussion on TRIPs and access to medicines held on 20 June 2001 (see page 1).

Contact: Christophe Bellmann (cbellmann@ictsd.ch). Background papers distributed at the meeting will shortly be available on the ICTSD web site.

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Fax: (41-22) 917-8093
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WTO documents related to the TRIPs Agreement

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MEETINGS

All WTO phone and fax numbers start with (41-22) 739.

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

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
July 25 Geneva	WTO Council for TRIPs informal session on access to medicines Contact: Peter Ungphakorn, tel: 5412, fax: 5458
July 30 Geneva	WTO General Council 'reality check' on launching a new trade round at Doha Contact: Nuch Nazeer, tel: 5393 fax: 5458
Sept. 19-21 Geneva	WTO Council for TRIPs Contact: Peter Ungphakorn, tel: 5412, fax: 5458