

### Ducking the Debate, the WTO Confirms Developing Countries' Worst Fears

The WTO's persistent refusal to address the system's structural deficiencies with regard to transparency and public participation is a dangerous game at a time when so many are openly questioning the institution's authoritativeness and legitimacy.

Now the absence of formal institutional arrangements has come home to roost in the form of widespread indignation over a list circulated by the Secretariat concerning 'non-governmental' participants to the Doha Ministerial Conference. The imbalances of this list have the potential of confirming the worst fears of developing countries and critics of the multilateral system, who see the WTO as dominated by corporate interests and bent on come-hell-or-high-water liberalisation with little regard to its consequences to the poor, the marginalised, development or the environment.

All in all, 647 individuals have been invited to register for the Ministerial. More than half of these represent business-related associations (OECD-based lobby groups and specific commercial interests account for 85 percent). Even among public interest groups, less than a third come from developing countries. More than thirty US government-appointed bodies – such as the Industry Sector Advisory Committee on Chemical and Allied Products for Trade Policy Matters – have been confirmed as eligible NGOs (Friends of the Earth, an NGO with offices and membership in developed and developing countries, has launched a sign-on letter requesting the WTO to review their approval). In addition, while due to 'space limitations' in Qatar most entities on the list have been offered one place, some have been granted multiple slots.

#### Systemic Failure Alert

Beyond the question of who gets to go to Doha lies a much larger and serious systemic failure of the world trading system to engage with public interest groups. This failure is evident in the General Council's continued stonewalling on 'external transparency' despite efforts of some Members.

The WTO is the only major intergovernmental organisation or policy forum that has no formal arrangements for dealing with other than government representatives. Many WTO Members continue to argue that the organisation's unique nature as a government-to-government contractual negotiating forum would be jeopardised if such arrangements were put into place, but other inter-governmental organisations with similar functions seem not only to work, but also to have benefited from adopting formal mechanisms, procedures and criteria for civil society participation. The UN's Economic and Social Council, UNCTAD, the World Bank, the European Court of Justice or NAFTA could offer models and ideas in this regard.

The WTO's interaction with non-governmental organisations is based on two brief provisions: Article V.2 of the Marrakesh Agreement, which states that the General Council 'may make appropriate arrangements for consultation and co-operation with non-governmental organisations concerned with matters related to those of the WTO'. The 1996 Guidelines for Arrangements on Relations with Non-governmental Organisations (WT/L/162) allow the Secretariat to organise *ad hoc* symposia, informal briefings and the like but propose no formal avenues of interaction. In practice, NGOs have attended plenary sessions of Ministerial Conferences, although no formal decision exists on these events being open to the public.

While neither the Marrakesh Agreement nor the Guidelines contain elements for determining what constitutes an NGO, governments have developed several sets of criteria over decades. Operational in the organisations cited above among many others, these criteria differ according to the nature of the institution and are used to determine whether an applicant organisation can get accredited or otherwise formally recognised. The rights and obligations of accredited parties are spelled out with regard to access to documents and meetings, circulating papers or taking the floor during meetings. Many institutions also have a mechanism for providing financial assistance to ensure that developing country NGOs are not disproportionately under-represented at meetings.

#### No Policy Is Worst Policy

None of the above applies at the WTO. In the absence of formal institutional accreditation, the Secretariat has opted for a pragmatic *ad hoc* approach, which considers any entity that is not a government or a company as a 'non-governmental organisation'. To be eligible for attendance at the very few WTO events open to any form of public participation, the interested NGO must satisfy the Secretariat that it is 'concerned with matters related to those of the WTO'. Since no other guidelines exist (such as North-South balance, balance between private and public interests, etc.), eligible organisations are usually registered on a first-come-first-served basis. This lack of agreed procedures is a perfect recipe for the kind of unbalanced representation that has raised so much indignation about the Doha arrangements.

As the WTO has taken no steps to seriously address its interaction with civil society – either in Doha or, much more importantly, in Geneva where decisions are prepared – there is more than delicate irony in the only reference to external transparency in the draft preamble of the Ministerial Declaration: 'Ministers are committed to making our operations appropriately transparent and to promoting an improved understanding of our organisation.'

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## Agriculture Negotiations Tackle Food Safety

At the 23-27 July special session of the Committee on Agriculture, the European Union tabled a controversial paper on food safety, proposing criteria for the application of precaution under the Agreement on Sanitary and Phytosanitary Measures (SPS) that would serve as a guideline for panelists in future disputes. According to the EU, the issue needs to be addressed to avoid the public perception that the WTO requires Members to force consumers to accept unsafe food.

The EU, other European countries, Japan and Korea argued that Article 5.7 of the SPS Agreement should be clarified through an Understanding that would send the right signals to consumers. Article 5.7 allows Member to take provisional health measures when relevant scientific evidence is insufficient, and the substance of the discussions revolved around whether the Article was clear enough to maintain the balance between the need for consumer protection on the one hand and the need to avoid disguised protectionism on the other.

To create predictability for Members and to prevent Article 5.7 from being abused for protectionist purposes, the EU proposed that precaution be applied according to the following five criteria: (i) the measure should not be discriminatory; (ii) it should be aimed at achieving consistency in the level of protection that the Member has chosen; (iii) the adopted measure should presuppose an examination of the benefits and costs of action and lack of action; (iv) it should be reviewed if new scientific information is obtained; and (v) the measure must be based on scientific evidence provided by qualified and respected sources, but not necessarily by the majority of the scientific community.

The US and many developing countries strongly opposed this effort to bring food safety onto the agriculture negotiating agenda. They argued that the EU's version of the precautionary principle was based on political rather than scientific considerations. Suspecting that the EU was chiefly interested in finding another avenue for addressing the controversial precautionary principle in the WTO, the US, the Cairns Group and India said that instead of the agriculture negotiations, food safety should be discussed at the SPS and the TBT Committees.

The meeting also addressed export subsidies and food security.

Deliberations on export subsidies added little to previously stated positions. In a 'non-paper', the Cairns Group elaborated further on its February proposal on export subsidies (G/AG/NG/W/11), which advocated, *inter alia*, an immediate 50 percent reduction in export subsidy use. The Group proposed that developed countries achieve the elimination of their remaining export subsidies within three years, and developing countries within six years. Another non-paper from Nicaragua, Venezuela, Panama, Peru and Zimbabwe did not call for an immediate down-payment in export subsidy reductions, but for gradual reductions with complete elimination by 2006. It proposed that developing countries be given longer time periods to eliminate export subsidies without specifying an exact date.

Switzerland's informal paper proposed that countries be allowed to offset deep cuts in export subsidies on certain product lines with more moderate cuts for other products. Cairns Group members opposed flexible export subsidy reductions, noting that in the past this type of flexibility had been used to protect sensitive product lines while liberalising commodities of minor consequence. Japan argued that export disciplines should be strengthened to equal the rigorous standards of import disciplines. It called for the abolition of Article 9.2 of the AoA – which permits the roll-over of unused subsidies to subsequent years.

The US, and a group of 12 developing countries submitted non-papers on food security which principally reiterated or elaborated already-known positions. Japan proposed the establishment of an international stockholding fund that would allow developing countries to borrow basic foodstuffs in case of food shortages.

The Committee's next meeting on 24-26 September will cover rural development, geographical indications, green and blue box domestic supports, and special safeguards.



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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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## 'Mini Ministerial' in Mexico Unlikely to Break Doha Agenda Impasse

Trade ministers from nearly twenty key WTO Members will take another stab at breaking the deadlock surrounding the agenda of the WTO November Ministerial Conference at an informal meeting hosted by Mexico on 31 August and 1 September. Among participants are comprehensive-round supporters European Union and Japan, Cairns Group members Australia, Canada and Brazil, 'no new round' advocates Egypt, India, Pakistan and Malaysia, as well as the United States, Singapore, South Africa and Tanzania. According to the Mexican government, the meeting only intends to 'contribute to the success of the of the fourth [WTO] Ministerial Conference' through giving 'political guidance to the preparatory work'. Although no official statement will be made, the meeting is expected to provide an indication of whether a consensus is achievable on the launch of a new round of multilateral trade negotiations at the WTO's fourth Ministerial Conference, to be held in Doha, Qatar, from 9-13 November.

### The Reality Check

WTO Members had initially envisaged deciding whether or not to pursue the launch of a new round in late July but, as many had predicted, the 'reality check' – which was to reveal the scope for consensus – came and went without hard and fast decisions. Members' statements revealed no notable developments in positions adopted in the run-up to the WTO's previous Ministerial Conference in Seattle two years ago.

**There is no consensus in favour of expanding the negotiation agenda in respect of even one additional subject proposed.**

*Amb. Narayanan, India, July 2001*

The Like-minded Group (LMG) of developing countries, led by India, Pakistan and Malaysia (the other members include Cuba, the Dominican Republic, Egypt, Honduras, Indonesia, Jamaica, Kenya, Sri Lanka, Tanzania, Uganda and Zimbabwe) continued to underline the priority they attached to redressing the imbalances in existing WTO Agreements and their implementation (see page 4). Unless those concerns were satisfactorily addressed before the Ministerial, these countries saw no chance of widening the ongoing 'built-in' negotiations on agriculture and services to other areas. In particular, the Like-minded Group signalled its strong opposition to negotiations on 'Singapore issues', i.e. investment, competition or government procurement rules, not to mention environmental or labour standards. Some of LMG members have since hinted at flexibility regarding market access negotiations, provided that these also address tariff peaks and escalation, as well as non-tariff barriers. South Africa remains a strong advocate of tariff negotiations. Other developing countries in favour of a broader approach include Chile, Costa Rica and Singapore.

At the other end of the scale, the European Union, Japan, Norway, South Korea and Switzerland still pursue a 'comprehensive round' where most of the subjects above, together with the most politically-sensitive implementation issues, would be addressed simultaneously in a single undertaking. While the EU is willing to relegate labour-related issues to the new ILO Commission on the Social Dimensions of Globalisation (see page 15), it has ruled out a 'mini round' consisting of the built-in agenda and market access/industrial tariff negotiations without the controversial Singapore issues. In addition, the EU is virtually isolated in its demand that future negotiations clarify the relationship between trade rules and those enshrined in multilateral environmental agreements, and agree on the application of the precautionary principle or eco-labelling within WTO provisions (see related article on page 7).

In contrast, the United States could easily live with a 'mini round' spiced up, perhaps, with some rule-making on electronic commerce. In spite of assurances of collaboration and convergence of views, the EU and the US remain far apart on a number of key questions. Many of these concern the scope of the agricultural negotiations already underway (see page 2), but others relate to the substance of a wider round, which both support. For instance, beyond a catch-all reference – 'we are open to exploring how best to treat these topics in the context of launching the round' – the US still has not provided details on what would constitute 'appropriate means' to address government procurement, investment and competition policy (Bridges Year 5 No.5, page 4). It also remains openly hostile to the EU's environmental agenda.

While the main goal of the Cairns Group, a coalition of 18 developed and developing agricultural exporter countries, is to drastically cut domestic and export farm subsidies, many of its members

support widening negotiations beyond the built-in agenda in hopes that trade-offs in other sectors would result in more significant liberalisation of agricultural trade.

The 'reality check report' issued by General Council Chair Stuart Harbinson for the July meeting acknowledged that 'some' were 'cautious' and others 'yet to be convinced' on the launch of a new round in Doha, and that even those in favour of a wider negotiating programme were 'a long way from reaching consensus on the scope and level of ambition that

an enlarged negotiating agenda would have.' These caveats notwithstanding, some developing countries disputed the Chair's assessment that discussions so far had shown 'wide and growing – though not universal – support among WTO Members for enlarging the agenda', while the EU in particular claimed that there had been 'very substantial progress toward the launch of an ambitious and comprehensive new round of trade negotiations.'

'The task of bridging the substantial gaps we still face in a very short time is difficult and complex. It is not impossible, however, given two essential conditions: a strengthening of the political will to find consensus solutions and the conversion of the political will into negotiated outcomes,' Chair Harbinson stated in his July report. For the moment, no government seems inclined to blink first and, as Seattle showed, leaving a host of difficult issues to the Ministerial itself is unlikely to reconcile a divided membership.

### Intense Meetings Expected in the Fall

Experts consulted for this story were sceptical of the Mexican meeting's chances of marshalling the political will sought by Mr Harbinson. Many Members also remain suspicious of the EU's apparent push for a vaguely-worded Declaration which they fear could be used to slip new items on the agenda after the Ministerial. In the absence of an agreement, the main achievements of Doha might be an official affirmation of the flexibilities that the TRIPs Agreement provides to Members pursuing public health objectives and, most likely, China's accession to the WTO.

Ministerial preparations in Geneva will resume in earnest during the first week of September. Informal General Council meetings on the Ministerial Declaration and other issues are likely to take place frequently before the Council's next formal session on 10 October.



**July Implementation Text Not up to Expectations, Developing Countries Say**

Developing countries expressed frustration at the conclusion of the 20 July General Council Special Session on Implementation, marked by a general unwillingness to take concrete decisions. Delegates discussed a paper prepared by General Council Chair Stuart Harbinson and WTO Director-General Mike Moore based on consultations undertaken on a well-received proposal submitted by a group of seven countries at the 21 June informal GC meeting (Bridges Year 5, No.5, page 3). Many developing country Members said the Moore-Harbinson text, which left out key sections of the seven-country paper, did not 'live up to expectations'.

In their introduction, the authors noted that they submitted the paper on their own responsibility with the intention to 'advance the effort to find broadly acceptable solutions, where possible, to outstanding implementation-related issues and concerns raised by Members.' They also cautioned that the paper did 'not purport to be an agreed or definitive text. Further consultations need to include in particular the tirts on anti-dumping, textiles and clothing, and TRIMs which have not yet been addressed.'

The paper focused on the section entitled 'issues on which early agreement could be reached' of the document put forward by Uruguay and six other other countries in June. While it proposed more concessions than the December 15 decision – called 'lower than my lowest expectation by India's WTO Ambassador – many saw it as a step back from the 'glorious seven' proposal, which had listed potential compromises on anti-dumping, textiles and clothing, and trade-related investment measures (TRIMs).

Among highlights of the four-page Moore-Harbinson text were:

**SDT:** 'Members reaffirm that Article XVIII of the GATT 1994 is a special and differential treatment provision for developing countries and that recourse to it should not become more onerous than Article XII of the GATT 1994'.

**Agriculture:** 'During the negotiations on agriculture, Members agree to exercise restraint in challenging measures notified under the green box by developing countries to promote rural development and adequately address food security concerns.'

**SPS:** 'Where the appropriate level of sanitary and phytosanitary protection allows scope for the phased introduction of new sanitary and phytosanitary measures, the phrase "longer time-frame" for compliance referred to in Article 10.2 of the Agreement on the Application of Sanitary and Phytosanitary Measures, shall be understood to normally mean a period of not less than 6 months.'

'Members instruct the [SPS] Committee to come up with concrete guidance, based on an exchange of information, that will assist developing countries to better understand the requirements and steps needed to facilitate access to equivalency agreements under Article 4 of the [SPS] Agreement.'

**SCM:** 'Members request the Committee on Subsidies and Countervailing Measures to examine all relevant conditions for determining when export credits provided by developing-country Members do not constitute export subsidies, and identify and examine any technical issues relating to that question, and to report to the General Council before the Fourth Ministerial Conference.'

'Members agree that Annex VII to the SCM Agreement be interpreted to include the countries that are listed therein until their GNP per capita reaches US\$ 1,000 [...] for three consecutive years.'

'Members instruct the SCM Committee to consider further the implementation of Article 27 of the Agreement, taking into account the percentage share of exports of individual developing-country Members' products in import markets and in global trade.'

'Members request the SCM Committee to examine the threshold in Annex VII and to consider issues raised by developing country Members in this respect, and to report to the General Council before the Fourth Ministerial Conference.'

'Members are urged to apply, where possible, a *de minimis* level of 2.5 per cent in countervailing duty investigations of products originating in developing country Members.'

'Members request the SCM Committee to review the provisions of the SCM Agreement regarding countervailing duty investigations and to report to the General Council before the Fourth Ministerial Conference.'

**Services:** 'Members shall take steps so that administrative practices do not impede the full and effective implementation of their commitments under the General Agreement on Trade in Services (GATS), particularly as regards the supply of services under Mode 4 as provided in Article 1.2(d) of the GATS.'

**TRIPs:** 'Members reaffirm that nothing in the TRIPs Agreement prevents Members from taking measures with respect to parallel imports, provided they comply with the conditions specified in the Agreement. They further reaffirm that Members can issue compulsory licenses under certain specified conditions.'

**Cross-cutting issues:** 'Members instruct the Committee on Trade and Development to review all special and differential provisions in the WTO Agreements and report to the General Council before the Fourth Ministerial Conference on how they could be operationalised and further enhanced so as to facilitate the greater participation of developing countries in the multilateral trading system.'

Members agreed to refer further consideration of export credits, countervailing duties and special and differential treatment provisions to the relevant subsidiary bodies.

*TRIMs Compromise Reached*

On 31 July, the WTO Council on Goods finally agreed on a formula for extending the deadline for eight developing countries' compliance with the Agreement on Trade-related Investment Measures (TRIMs). Argentina, Colombia, Malaysia, Mexico, Pakistan, the Philippines, Romania and Thailand have until the end of this year to phase out their TRIMs-inconsistent measures – mostly in the automotive sector – and will have another two years on request, provided other Members accept their definite phase-out plans. The Philippines has already secured a three-and-a-half year grace period (it agreed to expedited dispute settlement procedures thereafter). Although the two-plus-two formula does not foresee extensions beyond 2003, Pakistan has announced that it will seek a further extension until 2008.

## Dispute Settlement Corner

**US-Canada Lumber Dispute Continues on Many Fronts**

On 23 August, the Dispute Settlement Body adopted a panel report on the United States' countervailing measures against Canadian soft-wood lumber export restraints (WT/DS194/R). The US had claimed that Canada was subsidising its wood industry through limiting the volume of raw logs exported for processing, which kept domestic lumber supplies high and thus artificially lowered prices. The panel ruled in favour of Canada in finding that the export restraint could not be regarded as a subsidy as defined by Article 1.1 of the WTO Agreement on Subsidies and Countervailing Measures (SCM).

Canada had also sought clarity on whether Section 771(5)(B)(iii) of the US Tariff Act of 1930 was consistent with the SCM Agreement when applied to certain export restraints. Although the US has never used Section 771, its provisions implement the SCM Agreement and thus allow for the imposition of countervailing duties on subsidised imports. In this regard, the panel found for the US: Section 771(5)(B)(iii) was not inconsistent with the SCM Agreement since it did not actually *require* the treatment of export restraints as financial contributions or the imposition of countervailing duties against practices that are not subsidies within the meaning of Article 1.1.

The very DSB meeting that adopted the report on export restraints, saw the establishment of another panel on the long-running dispute between the two countries. Canada is challenging Section 129(c)(1) of the US Uruguay Round Agreements Act, which applies in cases where the DSB has ruled that a US anti-dumping or duty order violates WTO rules but where US authorities make a new determination, resulting in new import duties on the same goods entering the country after the original measure has been revoked. Canada claims that this legislation prohibits the US from fully implementing WTO rulings in trade remedy cases.

In yet another WTO action in the case, Canada on 21 August requested 'accelerated consultations' regarding the 19.31 percent import duty on Canadian lumber announced by the US on 19 August and applied retroactively from 19 May. Canada is challenging the legal grounds used by US authorities to make 'critical circumstances' and countervailing duty determinations, as well as the fact that US regulations do not provide for 'individual expedited company reviews' of subsidy rates, which Canada alleges are required by Article 19.3 of the SCM Agreement.

During this nearly 20-year old dispute, US softwood lumber producers have repeatedly alleged that stumpage fees – a tax on each harvested tree – levied by Canadian provincial governments are below market value and therefore constitute a subsidy to domestic producers. In 1996 the two countries entered into a Softwood Lumber Agreement (SLA) in which Canada imposed a five-year export restraint on raw logs and the US agreed to curb remedial actions against Canadian imports. One day after the SLA expired, US lumber producers announced that they would call on the US International Trade Commission to impose anti-dumping and countervailing duties up to 70 percent on Canadian lumber.

The two sides agreed on 30 August to set up a working group in an effort to 'reach a durable alternative to litigations.' The working group is due to meet on 18-20 September in Ottawa.

**US Appeals Pakistan's Victory on Yarn Safeguard**

A panel report circulated to Members on 31 May found that the US safeguard measure on Pakistan's combed cotton exports was inconsistent with the Agreement on Textiles and Clothing. The Textiles Monitoring Body (TMB) had already condemned the measure in June 1999 and recommended that the US lift it. The panel found that in making the safeguard determination, the US had not taken into account yarn produced by domestic textile manufacturers for their own use, the effect of Mexican yarn imports and had not demonstrated that Pakistani exports were causing an 'actual threat' of serious damage to its domestic yarn makers. The panel recommended that the import restriction be removed promptly, but the US appealed all the adverse findings on 9 July.

In related news, on 8 August, the US complained to the TMB about increased textiles transshipment of mostly Chinese-made goods through third countries, adding that the problem was 'most prevalent' in Hong Kong and Macau. The complaint also concerned import bans and other market access impediments affecting US textile imports in 'certain countries'.

**Panel Established on Byrd Amendment**

At the request of nine countries,<sup>1</sup> the DSB on 23 August established a panel on the so-called Byrd Amendment, a piece of US trade remedy legislation that the complainants say would give industry an added incentive to petition for anti-dumping investigations. Officially known as the Continued Dumping and Subsidy Offset Act, the amendment requires anti-dumping and countervailing duties collected by customs to be redistributed to the petitioning industries.

In their joint complaint, the nine countries alleged that the offsets mandated by the Act provided a 'strong incentive to domestic producers to file or support petitions for anti-dumping or anti-subsidy measures, thereby distorting the application of the standing requirements provided for in the Anti-dumping Agreement and the Agreement on Subsidies and Countervailing Measures. In addition, the Act makes it more difficult for exporters subject to an anti-dumping or countervailing duty order to secure an undertaking with the competent authorities, since the affected domestic producers will have a vested interest in opposing such undertakings in favour of the collection of anti-dumping or countervailing duties.'

This is the largest joint dispute settlement action in WTO history. Commenting on the number of petitioners, EU Trade Commissioner Pascal Lamy said: 'The Byrd amendment is not an US-EU problem but a US-Rest of the World problem. Our unprecedented joint action will send a very clear signal to the US of the need to repeal legislation that so clearly flies in the face of the letter and the spirit of WTO law.'

<sup>1</sup> The countries are: Australia, Brazil, Chile, the EU, India, Indonesia, Japan, South Korea and Thailand. NAFTA members Canada and Mexico have also requested a panel on the matter and when that request is approved by the DSB – probably at its September meeting – all eleven will seek US consent to combine the two panels into one.

### Dispute Settlement Briefs

- In the context of the ongoing WTO discussions on the TRIPs Agreement and access to medicines (see opposite), it is interesting to note that the mere threat of issuing a compulsory license can make a pharmaceutical company concede dramatic price cuts on brandname drugs.

This was illustrated once again when Brazilian Health Minister José Serra announced on 22 August that he had started the process of issuing a compulsory license to the state-owned laboratory Far-Manguinhos to manufacture nelfinavir, which is marketed under patent as Viracept by the Swiss-based multinational Roche. Nelfinavir is one of the 12 drugs commonly used in AIDS cocktails. Minister Serra said that Roche had refused a sufficiently large price cut in its patented medicine, which accounted for 30 percent on the government's drug budget. Local manufacture of nelfinavir was set to start in February 2002. However, on 31 August Mr Serra announced that the company had agreed to reduce the price of Viracept by another 40 percent, or to about 30 percent of the US price.

Speaking at the TRIPs Council special discussion on intellectual property rights and access to medicines last June, Brazil's Ambassador Celso Amorim noted that the possibility of issuing compulsory licenses was 'an essential element of the negotiation between the government and pharmaceutical industries', and that 'the very existence of compulsory license mechanisms together with the political will of the government to issue it' had already brought Merck to cut its price for two patented anti-retrovirals by 64 percent and 59 percent respectively (Bridges Year 5 No.5, page 5).

- On 11 July, the EU and Brazil announced that they had reached an agreement on their dispute over soluble coffee. Brazil asked for consultations on the matter last October, alleging that changes in the EU's General System of Preferences had eroded its share of the European soluble coffee market and were inconsistent with the most-favoured nation principle (Bridges Year 4 No.9, page 6).

According to an EU press release, the introduction of various preferential regimes, in particular the GSP Drugs regime (a special reduction of duty for Latin American countries combating illicit drug production), resulted in Brazil being the only major EU supplier to pay a nine percent import duty instead of zero or 3.15 percent like other suppliers. This led to erosion of its market share in the EU. The EU will create a new tariff rate quota, under which imports of all origins will be given duty free access. The level of the quota will be 10,000 tonnes in the first year, 12,000 tonnes in the second and 14,000 tonnes in the third, and be reviewed after that. By virtue of its past export performance to the EU Brazil will be the main beneficiary of that quota. The other preferential regimes will not be affected by the new quota.

- Malaysia will appeal the June 2001 compliance panel report on the US implementation of WTO rulings in the shrimp-turtle dispute. The panel found that the US was entitled to keep its import prohibition on marine shrimp caught without turtle excluder devices as long as it actively sought a multilaterally negotiated solution to turtle conservation (Bridges Year 5 No.5, page 7).

### TRIPs Council Battles with Access to Drugs

After an auspicious start in June, the 25 July informal meeting of the TRIPs Council showed sharp divisions on how far Members would be willing to go in confirming developing countries' right to take advantage of the flexibilities contained in the WTO Agreement on Trade-related Aspects of Intellectual Property Rights.

Developing countries are seeking an unambiguous statement that nothing in the TRIPs Agreement prevents Members from taking measures with respect to parallel imports and compulsory licenses when these are necessary to protect public health. Their preference goes to a stand-alone decision/declaration, which would have more weight in future dispute settlement proceedings than language in the more general Ministerial Declaration. Draft language for the Doha Declaration preamble floated in July recognised the flexibility available in the TRIPs Agreement to 'ensure that public health needs can be met' and agreed that this flexibility should be interpreted in the light of the objectives and principles contained in its Articles 7 and 8. The US and Switzerland objected to preambular language being used in substantive decisions.

#### Compulsory Licenses and Parallel Imports

The most controversial issue remained the right of governments to issue a compulsory license to a company in another country to manufacture generic versions of patented drugs for export into the country that granted the license. This is particularly important to those developing countries that lack the capacity to produce such medicines domestically. At the July 25 meeting, the US and Switzerland argued forcefully that TRIPs Article 31(f) prohibited such practice, because it required patent derogations to be 'authorised *predominantly* for the supply of domestic markets.' Members disagreed on the precise meaning of *predominantly*.

According to TRIPs Article 31(b), Members are not required to seek a patent waiver from the rights holder in cases of 'national emergency or other circumstances of extreme urgency'. Delegates continued to differ on the definition of 'national emergency'. On behalf of the Africa Group, which is spearheading the access to medicines debate, Zimbabwe argued that the Article depended on 'situations of critical and extreme importance in which governments deem it necessary to issue compulsory license'. The Council agreed that the HIV/AIDS epidemic could justify granting compulsory licenses without prior consultation with the patent holder.

Developed countries with major pharmaceutical industries also sought to restrain developing countries' recourse to parallel imports, while the Africa Group stressed Members' right to adopt the principle of international exhaustion of rights in their national legislation under Article 6, 'a crucial element in the balance of rights and obligations in the TRIPs Agreement'.

#### Dispute Settlement Moratorium

Developing countries' demand that Members agree to 'observe a moratorium on all dispute actions that are aimed at preventing or limiting Members' capacity to promote access to medicines and protect public health' raised stiff opposition. The US, the EU and Switzerland argued that discussing a moratorium or 'due restraint' in dispute settlement actions was beyond the TRIPs Council's mandate, which was limited to clarifying the Agreement. The next TRIPs Council meeting on 19-21 September will devote an entire day to compulsory licensing, parallel imports and the social and public health principles set out in the TRIPs Agreement.



## CTE Meeting Shows Familiar Splits on MEA-WTO Relationship, Ecolabelling and Fisheries Subsidies

The Committee on Trade and Environment (CTE) met on 27-28 June. On the agenda were an information session on compliance and dispute settlement under the WTO and multilateral environmental agreements (MEAs), the WTO-MEA relationship, domestically prohibited goods, the Convention on Biological Diversity and the TRIPS Agreement, eco-labelling and fisheries subsidies reform.

Members welcomed a joint WTO-UNEP-MEA Secretariat paper on compliance and dispute settlement (WT/CTE/W/191), which highlighted most environmental agreements' focus on mechanisms to assist Parties in complying with their obligations in a flexible and non-confrontational manner, rather than sanctioning non-compliance. The importance of notifications was highlighted as key to transparency and compliance in both the WTO and MEAs.

Discussions on the WTO-MEA relationship showed no new elements. For instance, several Members said that the potential for conflicts between MEAs and the WTO should not be exaggerated as MEAs seldom contain trade measures (only about 20 of over 200 MEAs do) and that there has not been a conflict to date. India said that MEA issues should be resolved in the MEA itself through the provision of financial and technology transfer and capacity building. Senegal, the Gambia and Ghana stressed the importance of capacity building.

Canada agreed with New Zealand, Switzerland and the EU that it would be prudent, for both environmental and trade reasons, to clarify the WTO-MEA relationship. While Australia noted that the consensus in the 1996 CTE report (WT/CTE/1) that the WTO could accommodate environmental concerns had not been contradicted by panels or the Appellate Body, Canada said that WTO Members, not the dispute settlement system, bore the primary responsibility for clarifying the WTO-MEA relationship.

#### TRIPs and the CBD

Brazil, Norway, Japan and others stressed the need to ensure that the TRIPs Agreement and the Convention on Biological Diversity (CBD) were implemented in a complementary manner. Thailand and Indonesia said it was necessary to develop an international framework to protect genetic resources; domestic legislation was necessary, but not sufficient. Peru recalled its submission and Brazil's paper on access to genetic resources and protection of traditional knowledge.

Brazil noted the synergies between the current TRIPs review of Article 27.3(b) and this item of the CTE's work programme, and Norway recalled its paper in the TRIPs Council on the TRIPs-CBD relationship (IP/C/W/293). Several countries, including Peru and Tunisia, shared their national experience in implementing the CBD and the TRIPs Agreement. Switzerland recalled its proposal in the TRIPs Council to create a database to increase understanding of traditional knowledge and benefit sharing resulting from its use (IP/C/W/284). Korea said that the establishment of databases on traditional knowledge would contribute to providing patent examiners with easier access to related prior art. Many Members reiterated their support for CBD Secretariat's request for observer status in the TRIPs Council, particularly given the papers under discussion in the TRIPs Council on the CBD-TRIPs relationship.

#### Labelling

Switzerland's paper on Marking and Labelling Requirements in the CTE and the Committee on Technical Barriers to Trade (G/TBT/W/162-WT/CTE/W/192) created a lively discussion. It proposed that Members clarify TBT disciplines on labelling to strengthen the provisions in order to avoid unnecessary barriers to trade and protectionist measures. The EU, Japan and the Czech Republic supported the Swiss paper as a basis for further discussions. However, as in the Agriculture Committee's discussions on clarifications to the SPS Agreement (see page 2), the majority of Members felt that TBT provisions were already sufficiently clear. Developing countries in particular feared that any clarification would weaken, not strengthen, the TBT Agreement, making it easier for Members to adopt protectionist measures under green disguise. In any case, the generic labelling issues raised in the Swiss paper should be addressed in the TBT Committee, Malaysia, Thailand, Indonesia, Chile, Canada, Venezuela, Guatemala and others said.

**Canada, New Zealand, Switzerland and the EU agreed that it would be prudent, for both environmental and trade reasons, to clarify the WTO-MEA relationship.**

Nevertheless, several Members agreed with Switzerland that the multiplicity of labelling was causing market access problems for developing country exports, particularly with respect to the increasing reference to life cycle analysis and non-product-related production and processing methods (PPMs), and deliberations should ensure labelling was not misused. The EU said clarification would reduce the risk of PPMs being abused for protectionist purposes, promote predictability, reduce trade frictions, and give policy makers greater confidence in designing measures compatible with global trade rules.

#### Fisheries Subsidies

The reduction of fisheries subsidies that contribute to fleet overcapacity and thus overfishing has become a favourite 'win-win-win' scenario – benefits to environmental protection, trade liberalization and development – of a number of countries. At the CTE meeting, Iceland, New Zealand, the United States, Australia, Chile, Peru and Norway called for fisheries subsidies to be addressed at the Qatar Ministerial, with Australia stressing that subsidy reform should be placed in the context of the WTO contribution to sustainable development.

Major subsidisers Japan and Korea stressed the need to maintain a 'holistic approach' to fisheries issues in general and that subsidies should be considered in the context of sustainable use of fisheries resources. Korea noted the need to define fisheries subsidies. The EU, Japan and Korea reiterated that the the UN Food and Agriculture Organisation (FAO) was the main forum for discussions on fisheries and the various aspects of fisheries management. The FAO said that a key conclusion of the first inter-agency meeting to enhance collaboration on work on fisheries subsidies was that information and analysis were still inadequate.

Members also welcomed the presentation by the UN Secretariat on the United Nations Consolidated List of Products Whose Consumption or Sale Have Been Banned, Withdrawn or Severely Restricted (WT/CTE/W/194), and stressed the need to disseminate this list as widely as possible.

The next CTE meeting will take place on 3-4 October 2001.

## Despite Mexican Problem, China's Accession by Doha Is Likely

With China's negotiations on accession conditions all but complete, hopes are running high that formal approval will crown the country's 15-year effort to join the WTO at the Doha Ministerial Conference next November. Only one major element is missing before Members can sign off on the accession protocol: the conclusion of bilateral negotiations between China and Mexico.

Mexico is tenaciously clinging to its demand for an eight-year transition period for phasing out anti-dumping duties – some of which amount to 1000 percent – on nearly 1,400 categories of Chinese goods, mostly in the textiles and footwear sectors. So far, China has agreed to three years at the most.

Textiles and footwear figure among the most important export products of both countries. According Mexican Economy Minister Luis Ernesto Derbez, the eight years are needed to 'have an industrial restructuring programme in place so that Mexican textiles and shoes can be competitive with China.' Although on 13 August, Minister Derbez said that the two countries were 'getting closer to agreement', he vowed that the extension request was a discussion in which Mexico was 'not willing to give way'. More negotiations are scheduled for September.

### *Exemption Could Not Be Challenged as an MFN Violation*

In addition to taking on the obligations contained in all the Uruguay Round Agreements, a country acceding to the WTO negotiates with its trading partners the terms of opening its markets to foreign competition. Those terms will, in most cases, apply to all WTO Members on a 'most-favoured nation' basis. However, while the MFN and national treatment principles do in principle confer on the acceding party non-discriminatory access to other Members' markets upon accession, the latter may obtain exemptions from their own obligations through bilateral negotiations. Since such discriminatory market access restrictions would only apply to the acceding party, no other Member can challenge their inconsistency with WTO rules after the access protocol has been approved.

In the case of the Mexican anti-dumping measures, China – and some other countries – are concerned that Mexico would have greater protection for a longer period compared to other parts of the world. This is why, in spite of Mexican assurances that it will not hold China's WTO accession hostage to the two countries' bilateral negotiations, other WTO Members are unwilling to formally adopt the accession protocol without knowing the exact terms agreed between the two countries.

### *US Insurance Claim*

In another last-ditch effort, the United States is seeking an agreement that new branch offices of insurance companies already doing business in China will not be considered new companies. Insurers that already have operations in China are not bound by the 50 percent foreign ownership cap that applies to companies entering China's insurance market. Considering branch offices as part of established businesses rather than new entrants would benefit the US insurance giant AIG (American International Group Inc.). The EU, whose joint ventures in China have a relatively high Chinese participation, has so far insisted that the same rules must apply to all insurance companies. Diplomats taking part in the accession negotiations were sceptical of the chances of the US effort, which they said would violate the WTO's most-favoured nation principle.

Although the Chinese State Planning Commission issued a 'special plan for the key areas of accession to the WTO' on 6 August, many WTO Members doubt that China will be in a position to implement the complex accession agreement as scheduled in the light of the enormous work required to change existing laws, regulations and practices. However, with the pressure to have at least one success to celebrate in Doha, these doubts are unlikely to derail the accession process. Eager to finally demand rather than just make concessions (see box below), China is a self-declared advocate of a new round of WTO negotiations, but its exact priorities are another great unknown on the post-Doha agenda.

In related news, former World Bank Mission Chief in Beijing Pieter Bottelier on 9 August criticised the anti-dumping and safeguard provisions China was made to accept as part of its accession terms (see box below). He called them 'extraordinary extensions and broadening of the normal safeguards that are a standard part of the WTO Agreement,' adding that China was 'singled out for highly discriminatory provisions here'. In an address to the SAIS China forum last November, Pieter Bottelier noted that while these provisions could be applied unilaterally – and China would have no recourse under WTO rules – their frequent or indiscriminate use would lead China to 'lose respect for the WTO system and damage could be done to its international credibility'.

### **Some Major Chinese Accession Concessions**

- **Industrial goods:** China accepted to be treated as a developed rather than a developing country.
- **Domestic agricultural support:** A major hurdle in the accession process was cleared when China gave in to US insistence that it cap its agricultural production subsidies at 8.5 percent of output rather than the ten percent allowed to developing countries under the Agreement on Agriculture. The US had argued that China was not a developing country and should thus accept the 5 percent ceiling of industrialised nations. According to most estimates, China's rural population of more 800 million farmers will suffer the greatest job losses – possibly as many as 120 million – as a consequence of opening the Chinese market to foreign competition. Too great a dependence on foreign food could also result in diminished food security.
- **Anti-dumping:** Other WTO Members may use non-market economy (NME) standards for up to 15 years after accession when investigating Chinese companies for dumping violations.
- **Special Safeguards:** Other WTO Members may apply product-specific safeguard measures against Chinese exports in response to 'import surges' that cause 'market disruptions' to domestic producers for up to 12 years after China's accession. These standards are laxer than those usually allowed under the WTO Safeguards Agreement.
- **Textiles:** If Chinese textile and clothing imports are considered 'disruptive' to domestic markets, other WTO Members may impose quotas until the year 2008, that is three years after all quotas must be abolished under the Agreement on Textiles and Clothing.



## Enhancing the Sustainable Use of Agrobiodiversity

By Tewolde Berhan Gebre Egziabher

The Convention on Biological Diversity (CBD) defines “biological diversity” as “the variability among living organisms... and the ecological complexes of which they are part; this includes diversity within species, between species and of ecosystems.” The term “agrobiodiversity” is used to refer to the diversity of agricultural systems and to the taxa of plants, animals and microorganisms found in them, whether these taxa are deliberately introduced by the farmer or are in the agroecosystem without even the awareness of the farmer.

Over the thousands of years of the history of agriculture, farming communities have learnt various biological and physical methods of coping with the problems of loss of components of agroecosystems, such as terracing, fallowing and the conscious use of species to counter negative impacts on agroecosystems. These and other methods either reduce or prevent soil erosion, reduce loss of water from the soil, drain the soil to reduce waterlogging, or bring water for irrigation.



**The lures used by industrialised countries to bring Africa into the agroecosystem market are deeply flawed.**

their markets and they often come up with highly marketable quick-fixes to the market-making fundamental problems they have created. The most recent quick-fix, genetic engineering, is being championed not as a means of improving homeostasis, but as a means of producing crops that will grow in degenerating agroecosystems. The logical end result of degeneration is destruction. If transgenic crops can grow in an environment under destruction, it would be bad enough since it would lull us into accepting degeneration until it is too late to reverse it. As it is, so far genetically engineered crops have been used only to put more disruptive factors into the agroecosystem: poison to invertebrate animals in the case of Bt transgenic crops, and universal poison to other plants in the case of herbicide tolerant transgenic crops.

Without giving the issue much conscious thought, Africa is being lured into the agroecosystem market by the industrialized countries.

### *Industrial Agriculture: Creating the Ecosystem Market*

Industrial agriculture tries to produce a homogenous environment irrespective of the distinctiveness of the pre-existing ecosystem. Therefore, it uses irrigation extensively, often thereby geographically extending the age-old problems associated with it. It divorces animal production from crop production. It plants single variety monocultures as a continuum over very extensive areas. Ecosystem disruption thus becomes inevitable. One indicator of such a disruption is the regular and quick collapse of crop varieties owing to emerging vulnerabilities to diseases and pests. This keeps breeders employed. It also gives the suppliers of pesticides and herbicides a captive market. Nutrients are leached out and washed away and have to be externally supplied at regular intervals. This gives chemical companies a captive market. Soil structure deteriorates and compaction becomes a serious problem. This gives agricultural machinery companies a captive market. The natural components of the ecosystem are thus replaced by tradable artificial components that are bought and sold in the market.

### *Africa and the Ecosystem Market*

Assuming that these purchased replacement agroecosystems can achieve the same level of homeostasis as the natural ones raises a question: why pay when you can take the same free from nature? Once we realize that the suppliers of these replacement agroecosystem components are from industrialized countries and the African farmer is getting into dangerous dependency, industrial agriculture as it stands now globally, should be feared by Africa. Since food is absolutely essential, the production by Africans within Africa of these substitute ecosystem components would then have become the top priority of the time.

In fact, these purchased replacement ecosystem components do not make a homeostatic replacement agroecosystem. They combine to steadily destroy the natural components of the agroecosystem. Unlike the natural components, these replacement agroecosystem components do not respond to feedbacks effectively. Therefore, the more they replace the natural components, the less homeostatic the agroecosystem becomes. The suppliers of these replacement components want to increase

One lure is that of turning Africa into a Europe by mere imitation. The thinking on development in both Europe and Africa is usually linear. It assumes that, if we in Africa are to develop, we must do what Europe has done. This makes us lose sight of the fact that Europe has been, and is, making many mistakes which we can avoid. Realizing their past mistakes in managing their agroecosystems, industrialized countries have now developed an “organic products” market to stimulate corrective action.

Presumably in order to protect this niche market, “organic” products have to satisfy some requirements that may have little to do with agro-ecosystem homeostasis. For example, a complete prohibition on the use of chemical fertilizer makes no sense if an area is already deficient in a nutrient such as potassium. It would only help restore homeostasis at a higher level of production if a measured amount of potash were applied to kick-start the process. From then on, increased production can be maintained by homeostatic feedbacks provided, of course, that the waste from the use of the biomass produced is returned to the agroecosystem. The criteria should, therefore, become more robust to enable the restoration of homeostasis to abused agroecosystems. Even as the criteria now stand, however, much of Africa can with little effort produce for the growing organic food niche market of Europe and North America.

A second lure is technical and financial aid which is effectively used by Europe and North America to make Africa adopt the new ways which they choose for it.

This lure is reinforced by the demand or assumed demand of industrialized country markets for a specified homogenous agricultural produce. Often, in fact, the market is fickle and it disappears after the advocated change in agriculture has taken place in Africa. For example, DDT and other pesticides were in the past pushed on Africa by the industrialized countries. Now, their continued application is used by those same industrialized countries as a reason for rejecting African products. This is a neat way of pre-empting competition. The prevaricating attitudes of industrialized countries towards eliminating subsidies as desired by the preambular paragraphs of the WTO Agreement on Agriculture

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*Agrobiodiversity, continued from page 9*

is consistent with this view that they scheme among themselves to pre-empt emerging competition from developing countries.

The fourth, and perhaps the most potent, lure is the appeal to the African young of the European and American agricultural education systems. Both when we teach within Africa and when we send our young to industrialized countries, we use European and/or American curricula and teaching materials. Young Africans are thus taught that agroecosystem components have to be bought and sold, and they put them all in the market when that is not necessary in the belief that they are modernizing Africa. The industrialized countries use the argument that labour is expensive when they encourage trade in many of the agroecosystem components, e.g. the use of herbicides to avoid hand-weeding. The educated African does not consider the massive unemployment when she/he accepts this trade in its entirety.

It is time for industrialized countries to start regulating their destructive marketing of replacement components. In Africa, this marketing is still not complete in spite of the wishes of its elite. Thus we can and should reign in our elite and resort to helping re-establish homeostasis to the African agroecosystems. Nature is very quick at healing itself if it is given a chance!

### Incentive Measures for Maximizing the Use of Agrobiodiversity

Positive incentives encourage required developments while perverse incentives hinder them. Existing agrobiodiversity incentives are, on the whole, perverse and lead to loss of biodiversity.

#### *Perverse Incentives*

Trade in substitute components to create the same homogenous agroecosystem in all areas necessarily ends up by eliminating the diversity that used to grow in the replaced agroecosystems. This is the main global cause of the disappearance of crop species and varieties, domestic animal species and breeds, and agricultural soil animals, fungi and bacteria. It is not only the concerted effort of the private sector to create markets for its own products that is the cause of all this; there are also direct and indirect subsidies for the marketed substitute agroecosystem components which make the biological management of agroecosystems financially less attractive than the purchased unstable substitute agroecosystems.

*Direct Subsidies:* All industrialized countries subsidize agriculture to varying degrees. In contrast, the agriculture of developing countries must, on the whole, subsidize educational and health services, the building of infrastructure, and especially the expansion of the pampered but often not very effective industrial sector. This puts the agrobiodiversity-intensive agriculture of the farming communities of the South globally at a disadvantage. And, instead of eliminating perverse subsidies, North America and Europe continue to use the WTO Agreement on Agriculture merely as a smoke-screen to maintain existing Northern subsidies to industrial agriculture to the detriment of agrobiodiversity.

On the other hand, the hitherto unsubsidized agrobiodiversity-rich agricultural systems of the farming communities of the South may not be subsidized on the ground that the establishment of new subsidies would go counter to the aim of the Agreement. Why should old “sins” be tolerated and only new ones condemned? This absurd situation presumably prevails because it is only by stimulating trade in agroecosystem components that industrialized countries can maintain their lead in agriculture.

*Indirect Subsidies:* Indirect Northern subsidies, which do not at all figure in the Agreement on Agriculture, are even more damaging. For example, tropical “subsistence” agriculture produces about 30 units of energy in the form of biomass for each unit of energy put into the agricultural production process. But agriculture in the U.K. produces only 0.4 units of energy in the form of biomass for each equivalent unit of input of energy. This means that U.K. agriculture uses up 75 times (or 7,500 percent) more energy than African “subsistence” agriculture. Who pays for the energy subsidy in the U.K.? Conversely, if the African and other Southern subsistence farmer sold her/his produce at the international market without competition from produce that has not internalized its costs of production, would she/he not dominate the world food market? Would that not restore agrobiodiversity in agriculture?

It may be argued that the “subsistence” farmers would not produce enough food for the world. It should be pointed out that there is no “subsistence” farmer that does not sell some produce when the opportunity arises. Therefore, the competitive advantage would stimulate more “subsistence” production. And, while energy consumption might increase, the increase would be less than the decrease that would ensue in industrial agriculture.

#### *International Moves to Give Incentives for the Maximizing the Use of Agrobiodiversity*

The CBD, especially in its Articles 8(j) and 10(c), was the first international legal instrument that recognized the role of local and indigenous communities in the conservation and sustainable use of biodiversity, and their right to be consulted when their biodiversity or their related knowledge and technologies are used by others. It also recognizes that those using the biodiversity or technologies should give a fair share of the benefits arising from the use to the local and indigenous communities. It expects countries to provide incentives to those who conserve and sustainably use agrobiodiversity (Articles 11 and 20 (1)), and hence to their local or indigenous communities. The detailed mechanisms of implementation of these rights are being developed under the CBD. The most important step in this direction was the creation of an “Ad Hoc Open-ended Working Group” on the issue.

Starting from the CBD, the negotiations on the Revision of the International Undertaking on Plant Genetic Resources for Food and Agriculture (IU) under the auspices of the FAO have recognized Farmers’ Rights, with the determination of the specific nature of those rights being left to each national law (see related article on page 11). Any state can thus legally recognize Farmers’ Rights as a set of rights that the farming community itself recognizes as its own under its own customary (usually unwritten) laws. Africa has developed such a Model Law for the Protection of the Rights of Local Communities, Farmers and Breeders and for the Regulation of Access to Biological Resources, which African countries are currently adapting to national circumstances.

Farmers’ Rights to use farm-saved seed will cushion Africa’s farmers from the forced seasonal purchasing of seed. This forced purchasing is usually effected by a North-based transnational corporation, patenting the seed that farmers want, or are convinced, or even coerced, to plant. That is why the African Model Law prohibits the patenting of living things. In this way, it tries to protect smallholder farmers from being controlled by companies and to help the farming communities to continue maximizing the use of agrobiodiversity and biological systems to maintain their agroecosystem at a homeostasis of a high level of productivity.

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## The International Undertaking on Plant Genetic Resources in the Context of TRIPs and the CBD

By Robert J. L. Lettington

Agriculture is probably the oldest form of globalisation known to the world with the principles of the cultivation of crops and domestication of livestock having spread from some eight or ten centres of origin 10 to 20,000 years ago<sup>1</sup> to almost the whole globe today. Pigs, cows and smallholder farming may not seem revolutionary but they were the Coca-Cola and Internet of the world for millennia. The process, partly due to its varied origins and long history, continues today with all regions of the world being interdependent for the continued vitality and future improvement of their crops and livestock. Throughout history small farmers have been the backbone of this system, cultivating a diversity of varieties and breeds, gradually improving them through informal exchange and cooperation.

In recent history the international aspect of this system was taken up by the public sector, still largely on a basis of informal exchange. However, in the last ten years the dynamics in the use and, above all, ownership of biological material have changed with the entry into force of the Uruguay Round Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPs) and the Convention on Biological Diversity (CBD).

In their treatment of the use and ownership of biological material these agreements have largely been responses to the increasing interest of the private sector in this material. Unlike the public sector, the private sector is driven by a proximate<sup>2</sup> profit motive. Producing a single product with the widest possible application, and ideally limiting the source of that product to a single company generally captures maximum profits. However, homogenisation in agriculture undermines the diversity that ensures its continued vitality, and indeed viability, while limiting access to the means of production threatens the immediate food security of those without the means to leverage that access.

The aim of the International Undertaking (IU)<sup>3</sup> is to ensure the conservation, sustainable use and continued free flow of a diversity of germplasm for crops of major importance, the basis of world food security. This '*special nature*' of agriculture and its associated '*distinctive features and problems needing distinctive solutions*' are recognised in the preamble of the IU.

The preamble also recognises that this special nature places questions of the management of plant genetic resources for food and agriculture (PGRFA)<sup>4</sup> '*at the meeting point between agriculture, the environment and commerce*'. This points out the fact that the International Undertaking is intended to address systemic deficiencies in the application of existing trade and environmental agreements, above all TRIPs and the CBD, to agricultural systems. Rather than examine the details of the IU, which will probably be the subject of many theses and much debate, discussion here will focus on manner the IU addresses these systemic deficiencies.

### What is the International Undertaking?

The heart of the IU is the Multilateral System (MLS).<sup>5</sup> The MLS guarantees that PGRFA for crops covered by the system will be made freely available for research and breeding in agricultural food and feed uses. In return for this 'facilitated access' those who commercialise products incorporating PGRFA from the MLS will

be obliged, payments being voluntary where products do not restrict further research and subsequent commercialisation, to pay a percentage of their profits towards furthering the broader objectives of the IU. The MLS covers a list of crops, which is still the subject of negotiation, currently consisting of approximately 80 species of food crops and forages. However, the question of coverage is more complex than the simple inclusion of a species.

A basic analysis reveals three basic categories of PGRFA covered by the MLS. The first includes material held under the management and control of the states party to the IU. This would include national collections and *in situ* resources found on public property.

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### Benefit Sharing under the IU

The main benefit to be gained from participation in the Multilateral System is the free flow of germplasm, which promotes the vitality of crops throughout the world, thus guaranteeing their future. A further type of benefits consists of provisions frequently found in other international agreements, including TRIPs, on technology transfer, capacity building, exchange of information and similar measures.

The key novel element of benefit sharing under the IU is mandatory contributions derived from the commercialisation of products developed from plant genetic resources accessed under the Multilateral System. The payment is mandatory when the commercialised product has limits on its availability for use in further research and breeding and voluntary in the event that the product is freely available for such purposes. The IU does not discriminate between IPR holders and others in terms of the application of its benefit sharing provisions. However, it could be argued that while it does not explicitly do so, it does in practice due to the distinction between products available for further research and breeding and those that are not. If this argument were to be accepted, one would turn to TRIPs Article 28, *Rights Conferred*. Nowhere does this Article make any reference to immunity from any kind of charges or levies associated with the holding of a patent, indeed intellectual property offices routinely make fees a requirement for the processing of a patent application and for the maintenance of a patent once granted. This latter point may well be worth bearing in mind: patents only grant limited rights and one should be clear as to exactly what those rights are.

The political importance of the commercial benefit sharing provisions has far outweighed any likely tangible benefits, particularly due to their linkage to the question of intellectual property rights. These provisions are extremely unlikely to generate substantial funds, the seed industry is simply not that profitable a business in global terms and the likely royalty rate that industry will accept is going to be low, probably substantially less than one percent of sales. Perhaps one might have been better off seeking a proportion of direct and indirect subsidies to products rather than of the profits they generate since for the OECD countries alone subsidies are estimated to amount to 110 percent of the combined GDP of Africa!



*The International Undertaking, continued from page 11*

It is also likely to be understood so as to include *in situ* plant genetic resources found on private land in states that vest the rights to genetic resources in the state rather than in the landowner. The second category is the *ex situ* collections of the Consultative Group on International Agricultural Research (CGIAR) and other international institutions that agree to submit their collections to the authority of the IU's Governing Body, an arrangement similar to that which is currently in force between FAO and twelve CGIAR centres. The final category is other private collections that are to be encouraged to submit to the authority of the Governing Body.

A critical point to note about the coverage of the MLS is the distinction between the physical and the conceptual control of crops and forages under the system. The IU expressly states its intention to respect property rights of all kinds and thus one is clearly not talking about the physical ownership of all examples of a crop or forage becoming public. What one is talking about, are the conceptual elements of the crop or forage being public. A rough analogy might be to buying a car. When you buy a car nobody else has rights to take that individual example of a car away from you but equally you have no right to prevent anybody else from using the same type of car, or to stop the manufacturer from producing more of the same. This has become significant with some commentators erroneously raising the idea of governments being obliged to enter private property and remove PGRFA for public distribution in fulfilment of their IU obligations.

*Recognition of the Innate Value of Agrobiodiversity*

The theoretical and practical basis of the IU lies in the recognition of the innate value of agrobiodiversity, something akin to the economic concept of internalising external costs. The idea is that while some PGRFA 'achieve prominence' through being developed into commercial products that are profitable for their developers and farmers alike, the ability to consistently produce these products depends on the broader base of PGRFA from which the desired characteristics can be selected. Most classically bred varieties are developed from a number of immediate predecessors, that may in turn have been developed from others and so on *ad infinitum*, so that the value of the related background agrobiodiversity can often be far more immediate than one might imagine. Most products of modern biotechnology, including GMOs, are not substantially different, as they tend to consist of elite lines of a variety with the biotechnology element constituting an 'added extra'. In more explicit terms the IU recognises this innate value in Article 1, Objectives, and through its provisions on conservation and sustainable use, principally contained in Part II, General Provisions.

*Recognition of Farmers' Contributions to Agrobiodiversity*

A further fundamental fact affirmed by the IU is that farmers, ever since those first examples of cultivation 10 to 20,000 years ago, have played a critical role in recognising, conserving, developing and distributing agrobiodiversity across the globe. In the modern world the heirs to this tradition are actually the least technologically advanced farmers, as they are the ones who are most dependent on the biological characteristics of their crops rather than on added inputs, and thus who place the greatest value on diversity. The IU's recognition of this contribution comes in two forms that are intended to encourage the continuation of this tradition, on which all agriculture ultimately depends, and to provide some substantive assistance to the small farmers who are often some of the most marginalized sectors of society. This is achieved firstly through the preambular paragraphs on Farmers' Rights and, more

particularly, by Part III of the IU, on the same subject. The more substantive assistance is to be found in the priority that the IU gives to small farmers in its provisions on benefit sharing and conservation and development activities.

*Acceptance that Conserving and Developing Agrobiodiversity Costs Money*

Inextricably tied to the concepts that agrobiodiversity is innately valuable and that farmers have husbanded it for millennia is the fact that the conservation and development of this infinitely valuable asset comes at a price. Historically this was not a major problem for two reasons. Firstly the main food producers, directly dependent on the diversity of their crops for survival in the same way that today's small farmers often are, were also the main agents of conservation and development. As a result the costs of the conservation and development were accounted for in the cost of the final product. Secondly, mankind's impact on the abundant global pool of agrobiodiversity was minimal, meaning that conservation and development were not urgent tasks and could be undertaken informally.

However, recent history has seen fundamental shifts in both these dynamics. The rise of industrial agriculture has limited the immediate dependence of the world's main food producers on the natural quality of their crops, and thus on the agrobiodiversity that guarantees this quality, at the same time that mankind's negative impact on the base of agrobiodiversity has reached unprecedented levels. The problem is that even industrial agriculture is still *ultimately* dependent on the ever-dwindling base of agrobiodiversity, as dramatically illustrated by the Wheat Rust crisis in the mid-west United States in the 1970s, but has managed to externalise the costs of conserving and developing it.

Industrialised agriculture now acts as a free rider on the efforts of the world's remaining small farmers who are largely excluded from recapturing the costs of conservation and development due to falling commodity prices<sup>6</sup>. In effect the IU's Article 14 on Benefit Sharing in the Multilateral System and Article 19 on Financial Resources, should not be seen as development assistance but rather as addressing a market failure; an insurance policy where industrial agriculture and the world's food consumers<sup>7</sup> are the insured while small farmers and developing countries are the insurer.

**TRIPs and the IU**

**Table 1: TRIPs and the IU**

TRIPs	IU
<ul style="list-style-type: none"> <li>• Limited Monopolisation to encourage creativity</li> <li>• <i>Sui Generis</i> System for the Protection of Plant Varieties</li> <li>• Rights to Capture Benefits</li> <li>• Technology Transfer</li> <li>• Adam Smith's 'Invisible Hand'</li> </ul>	<ul style="list-style-type: none"> <li>• Public Goods to encourage diversity and limit entry barriers</li> <li>• Farmers' Rights</li> <li>• Rights to Access Benefits</li> <li>• Technology Transfer</li> <li>• Financial Mechanism</li> </ul>

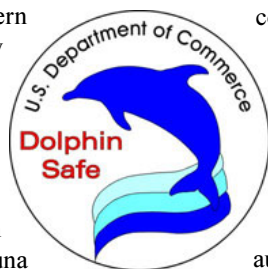
The fundamental difference between TRIPs and the IU, which can be seen in all the elements that differ between the two in Table 1 above, is that TRIPs depends on an ability to command a premium, to capture benefits through manipulation of market forces, as a reward for innovation. This is achieved through the concept of a limited monopoly that is common to all intellectual property rights.

*Continued on page 16*

## Dolphin-safe Standard Shows Limits of US Multilateral Environmental Co-operation

On 23 July, a US appeals court ruled that tuna products sold in the United States under the 'dolphin-safe' label must be caught without encircling purse seine nets. The ruling confirmed a lower court finding that the Commerce Department's new dolphin-safe standard for tuna products was unlawful (Bridges Year 4 No.6, page 1).

The incriminated standard was developed in response to the legally-binding Agreement on the International Dolphin Conservation Programme (IDCP), which sets overall dolphin mortality limits and other conservation measures in the Eastern Tropical Pacific Ocean (ETP), but does not prohibit any particular fishing technique. Instead of disqualifying tuna caught with purse seine nets, the new standard required on-board observers to certify that no dolphins were seen killed or seriously injured in fishing operations. For reasons not fully understood, yellow-fin tuna in the ETP swim under dolphins. Fishermen use the air-breathing mammals to locate schools of tuna and then capture both with encircling nets, where millions of dolphins are estimated to have been killed in the heyday of unrestricted purse seining. Although the technique is still used in the area, according to US government figures, dolphin mortality in the ETP has dropped to about 2,000 annually under the IDCP.



The new standard was challenged by the Earth Island Institute, Defenders of Wildlife and other conservation organisations, which claimed that it unlawfully weakened dolphin protection and was adopted with insufficient scientific proof that encircling nets were not harming dolphin populations. The appeals court affirmed that changing the standard was 'not in accordance with the law and constituted an abuse of discretion because the Secretary [of Commerce] failed to (1) obtain and consider preliminary data from congressionally mandated stress studies and (2) apply the proper legal standard to the available scientific information.' According to the court, the International Dolphin Conservation Programme Act (IDCPA) required the Commerce Secretary to give a 'yes or no answer' to the question of 'whether or not the fishery-related activities were adversely impacting the dolphins.' A failure to find evidence of significant adverse impact – which the court maintained could have been obtained – did not constitute a finding that would justify relaxing the labelling standard.

### The Mexican Paradox

The ruling was a blow to Mexico, which would have been able to export 'dolphin-safe' tuna to the US under the new standard – applied for just over two months in 2000 – but not the old one, which now remains in force. Although the label is voluntary, nearly all US canners buy only 'dolphin-safe' tuna and nearly all distributors use a label identifying their products as such.

Ironically, just one day after the old dolphin-safe standard was reinstated on 11 April 2000, the US lifted its the decade-long import embargo against Mexican tuna. The embargo was terminated after the National Marine Fisheries Service issued an 'affirmative finding' that Mexico was faithfully applying the IDCP's conservation measures (eleven countries are still affected by the import ban due to a failure to secure such an affirmation). Mexico's 'affirmative finding' was renewed on 19 April 2001. However, while Mexican fisheries are in principle free to ship their tuna to the United States, the 'dolphin-safe' standard imposes a *de facto* embargo on their products causing a loss of 'millions of dollars' in revenue according to the Mexican government.

Referring to this conflict between the affirmative finding on Mexico's fulfilling its obligations under the IDCP and the market barrier posed by the dolphin-safe standard, the three-judge panel wrote: 'In urging this court to reverse the district court, the Secretary and amici stress that this case involves international concerns and competing policies for protecting dolphins. That it does, but it is not our role to make policy decisions about ETP dolphin conservation. Such decisions are within Congress's bailiwick, and both the Secretary and this court must defer to congressional intent as reflected in the IDCPA.'

### More Litigation in Perspective

If bilateral consultations on the dolphin-safe standard, scheduled for 11 September under the Agreement on the International Dolphin Conservation Programme, yield no progress, Mexican authorities may yet again consider bringing the dispute to the WTO, possibly as a discrimination case against countries fishing in the ETP, the only region where the use of purse seine nets disqualifies tuna exports for the 'dolphin-safe' label. Mexico has also threatened to withdraw from the IDCP. The US government has not yet indicated whether it will appeal the case further in domestic courts.

Meanwhile, another lawsuit initiated by Defenders of Wildlife and its allies continues at the Court of International Trade (CIT) against the government's lifting of the Mexican tuna embargo. They have asked the court to 'require the government to re-evaluate its lifting of the embargo, taking into consideration impacts on dolphin populations and marine biodiversity, and to prepare an environmental impact statement, as required by federal law, in order to take a hard look at the environmental impact of the new regulations and the lifting of the embargo.' The CIT is expected to rule on the case before the end of the year.

## EU's New Biotech Rules Raise Hackles

The European Union's new labelling and traceability regulations on foods and animal feeds that contain genetically modified organisms have come under attack even before entering into force. Both Canada and the United States are conducting a detailed legal analysis of the new rules in order to build a foundation for an eventual WTO dispute in case some of their key elements remain unchanged in the parliamentary and ministerial approval process that is likely to delay their entry into force until 2003. The EU has notified the new regulations to the WTO Committee on Technical Barriers to Trade, where they will undoubtedly spark intense debate.

The traceability rules adopted by the European Commission on 25 July require GMO labelling of all foods that have been made from genetically modified material even if DNA from that material is no longer present in the finished product. To sell their products as GM-free, food processors must provide a traceability certificate that goes back to the farmer and guarantees that the crop was not genetically modified. The same requirement applies to animal feed.

The Commission says that the new regulations will streamline approval processes for GM crops (13 crop variety applications have been pending for several years), foods and feeds, but biotechnology crop producers vocally oppose rules that would effectively require total segregation of GM and non-GM crops.

## Climate Negotiators Secure Bonn Agreement

When the Sixth Session of the Conference of the Parties to the UN Framework Convention on Climate Change resumed in Bonn in July, all bets were off on whether the Kyoto Protocol could be rescued after the US disassociated itself with the treaty in March 2001. However, unlike at their previous meeting in the Hague last November, negotiators managed to agree on implementation arrangements for the Protocol that essentially guaranteed its 'environmental integrity' although the European Union had to make major concessions on several key issues.



Among outstanding items were the use of carbon sinks (such as forests); 'supplementarity' (i.e. to what extent countries can reach their emissions targets using the Kyoto mechanisms); compliance; and funding. The final agreement was largely based on a proposal presented by COP-6 Chair and Dutch Environment Minister Jan Pronk (available at [http://www.unfccc.int/cop6\\_2/index.html](http://www.unfccc.int/cop6_2/index.html)).

Disagreement on the extent that carbon sinks (land use, land use changes and forestry) could be used to offset greenhouse gas emissions was among the major factors that sunk the November meeting. In Bonn, countries agreed that sinks could be used to meet greenhouse gas emissions targets during the first commitment period (2008-2012). Individual country quotas will be set to ensure that they will only account for a fraction of the emissions reductions. Delegates also adopted rules for the 'Kyoto mechanisms' (i.e. the Clean Development Mechanism, Joint Implementation and Emissions Trading) with an emphasis on domestic action as a 'significant element' of industrialised countries' efforts to meet their targets. In return for its new-found flexibility on sinks, the EU secured the exclusion of nuclear power projects from the Clean Development Mechanism. The US and its allies had argued that industrialised countries should be allowed to offset emissions at home by financing nuclear power plants in developing countries. Countries also agreed to establish a special climate change fund and a fund for least-developed countries under the UN Framework Convention on Climate Change (UNFCCC), as well as a Kyoto Protocol adaptation fund to finance concrete adaptation projects. However, there is no legal obligation to contribute, and no funding level was agreed.

Compliance turned out to be the most contentious issue, largely due to concerns by Japan, whose participation had become crucial after the US refusal to ratify the Protocol. In the end – instead of financial penalties payable to a 'compliance fund' – delegates agreed on a regime that will reduce allowed emissions for non-compliant countries in the second commitment period. Further details of the compliance regime will be developed once the Protocol enters into force. Japan's Environment Minister Yoriko Kawaguchi said his country was 'pleased to join in the consensus. Today's agreement is a vital step forward in [bringing] into force the Kyoto Protocol.'

### Positive and cautious reactions

Delegates greeted the final agreement with a standing ovation. Despite playing only a marginal role in the complicated negotiations, the G-77/China group of developing countries called the agreement an 'honourable deal' that represented a 'triumph of multilateral negotiations over unilateralism.' While the US continues to consider Protocol 'not sound policy', environmental groups generally welcomed the deal – dubbed 'Kyoto Lite' by Greenpeace – as a starting point for action on climate change, but also cautioned against complacency.

### Agrobiodiversity, continued from page 10

This is why the WTO Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPs) is being championed by UPOV and WIPO, who are accusing Africa of violating TRIPs. In spite of what they say, however, the relevant provision in TRIPs, which is Article 27.3(b), does not state that seed has to be patented, it can be protected through Breeders' Rights.

Articles 6 and 8 of the CBD require countries to conserve and sustainably use biodiversity, and Articles 11 and 20.1 require countries to provide incentives to those who conserve and sustainably use biodiversity. Decision III/9 states that countries should "suppress or mitigate negative incentives having a deleterious effect on biological diversity." Decision III/11 is a concise though detailed enough recommendation to countries on how to maximize the use of agrobiodiversity in agriculture. Although the implementation of this decision has, on the whole, been poor so far, Africa can use it to good effect by putting it into practice in the context of the Community Rights and Farmers' Rights of the Model Law.

### Possible National Moves

As pointed out above, much of the agricultural produce of Africa's farming communities would qualify as "organic" in industrialized countries. African foods could easily get into the global "organic" niche market if the continent's agriculture and trade ministries were to develop organic product certification systems that would be acceptable in Europe and North America.

In fact, a new niche market could be created. With the right public relations campaign, African food products could be accurately described as coming from richly diverse agroecosystems, and buying them as a way to conserve and sustainably use biodiversity.

Direct subsidies to agrobiodiversity-rich community farming systems are unlikely in Africa because the agriculture sector subsidizes – rather than being subsidized by – other economic sectors. In any case, since African countries are already in the WTO without having had such agricultural subsidies registered, the Agreement on Agriculture prevents them from providing such support to their farming communities in the future. They could fight back through Articles 11 and 20.1 of the CBD and paragraph 12 of Annex 2 of the Agreement on Agriculture.

Since industrial agriculture is a major threat to the conservation and sustainable use of agrobiodiversity, the last part of Article 22.1 of the CBD could be invoked to challenge the Agreement on Agriculture of the WTO. Article 22.1 of the CBD states that when "a serious damage or threat to biological diversity" is encountered, rights and obligations entered in other international legal instruments can be set aside in order to make it possible to create a solution to the problem, perhaps along the lines of Paragraph 12 of Annex 2 of the Agreement on Agriculture. This paragraph exempts environmental programmes from having to have their subsidies removed, and agrobiodiversity is a major environmental issue. But, since the monetary incentive Africa would give, if at all, is small anyway, there is no need for a confrontation on this issue.

*Tewolde Berhan Gebre Egziabher is General Manager of the Environmental Protection Authority of Ethiopia. In this article, the author builds on ideas he presented at an informal WTO Africa Group Roundtable Discussion on TRIPs, Biological Resources and Public Health, organised by ICTSD on 12 June 2001, and elaborated further in a longer paper prepared for a SADC Plant Genetic Resources Centre workshop in Lusaka in September 2001.*



## Codex Agrees to Some Mandatory GM Labelling but Remains Divided on Precaution and Traceability

The Codex Alimentarius Commission met in Geneva from 2-7 July to discuss, once again, the labelling of foods derived from biotechnology and the role of precaution in risk analysis. Previous attempts to forge agreement at the relevant Codex Committees met with failure earlier this spring (Bridges Year 5 No.4, page 13).

### No Mandatory Labelling for all GM Foods

Rejecting an EU-backed proposal that all GM foods should be labelled as such, delegates agreed to mandatory labelling only in cases where specific GM foods and inputs are scientifically proven allergens. Labels could state either that the food in question is a 'product of modern biotechnology' or 'contains genetically modified organisms', but final approval of the terminology depends on agreement of labelling standards.

An Ad Hoc Intergovernmental Task Force on Foods Derived from Biotechnology is to finalise guidelines on the labelling of GM foods and ingredients by 2003, but both the proposed scope and the purpose of those guidelines came under intense criticism at the Codex Committee on Food Labelling (CCFL) in April. A revised version will be prepared for the next CCFL session in May 2002 (Bridges Year 5 No.4, page 13).

The key question of traceability – how, and the extent to which, GM inputs are detected in food – was not addressed at the full Codex meeting due to time constraints. The issue will be taken up by the Codex Executive Committee next November. The EU suffered a setback in July, however, when Codex members led by the United States and backed by Argentina and Malaysia rejected an Executive Committee recommendation that the Codex Alimentarius Commission should 'ensure coherence between Codex and texts arising from the Cartagena Protocol dealing with such matters as traceability, labelling and identification of living modified organisms used as food' (see related article on page 13).

### Domestic Approval Necessary for GM Foods

Agreement was reached in principle that foods produced with biotechnological inputs should be approved by domestic governments prior to commercialisation. Although precise risk assessment methodologies were not agreed upon at the meeting, there was consensus that any risk assessment should take into account the potential for GM foods to catalyse allergic reactions.

### Risk Analysis and Precautionary Principle

Delegates agreed that core principles governing risk assessment should be developed within the Codex General Principles Committee. Should such principles fail to be decided at the committee level, they would instead be decided by the Codex Alimentarius Commission itself.

Although the precautionary principle was not explicitly referred to at the Codex meeting, the question of risk uncertainty was raised. Notably, the Codex membership did agree that in cases where evidence of risk existed, but where such evidence was insufficient or inconclusive, Codex should not elaborate a specific safety standard per se, but should instead elaborate a 'related text', such as a voluntary code of conduct or practice. One non-governmental observer noted, however, that under WTO rules the difference between elaborated standards and other texts remained unspecified and could therefore generate unintended trade consequences.

At its July session, Codex approved new guidelines for organic livestock production. Such farming should aim to use natural breeding methods, minimise stress in animals, prevent disease and progressively eliminate the use of certain chemical veterinary drugs, including antibiotics. The new standard recommends that animals should be fed with quality organic feedstuffs, not meat and bone meal, and prohibits the use of growth hormones.

While less than 100 of the Commission's 165 members attended the July session, compared to previous meetings developing countries were nevertheless relatively strongly presented. The importance of their effective participation in international standard-setting organisations has been repeatedly stressed in the WTO's implementation discussions.

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

## ILO to Decide on Globalisation Commission in November

The Governing Body of the International Labour Organisation is to decide at its November meeting how to proceed with the organisation's work on the social dimensions of globalisation. ILO's Director-General Juan Somavia is proposing the establishment of a World Commission of 'eminent personalities with outstanding knowledge and experience of the social dimensions of globalisation, chaired by an internationally respected figure of the highest political level' to prepare a comprehensive and authoritative report on the subject with particular emphasis on 'the interaction between the global economy and the world of work.' The November Governing Body meeting will discuss the precise mandate and composition of such a commission, as well as the coverage of the final report. While the report could hardly avoid dealing with the impact of globalisation on employment and wages, no direct reference to the divisive concept of 'trade and labour' as a potential topic has been made.

Nevertheless, commenting on the initiative, EU Ambassador Carlo Trojan said the report could provide a politically acceptable solution for both advocates and opponents of the trade and labour linkage. If the report were done properly, there would be 'no particular reason why we [would] have to deal with this in a new round of negotiations in the WTO'. Developing countries, fiercely opposed to discussing labour issues in the WTO, have agreed to the ILO Director General's conducting preliminary consultations on creating the World Commission, but stress that labour standards must not be used to erode their competitive advantage or as trade barriers to their exports. US Trade Representative Robert Zoellick has made it clear that to obtain domestic and congressional support for a new round of multilateral trade negotiations the labour and trade issue must be addressed in some form. Brazil has suggested broadening the debate to include other dimensions than the negative effects of trade liberalisation, such as the impact of trade protectionism and cross-border financial flows on employment and social development. The preparation of the report is likely to take two years.

*The International Undertaking, continued from page 12*

However, as the idea of a monopoly clearly shows, commanding a premium depends on an ability to exclude. Inevitably monopolies tend to exclude the most marginalized actors and, unfortunately, the most marginalized actors in agriculture are the small farmers in developing countries; the very same farmers who play the major role in conserving and developing the basic agrobiodiversity upon which the monopoly they are excluded from was originally built.

Thus, if TRIPs were to be the only system governing agrobiodiversity, it would actually undermine the basic tools of future development for short term gain rather than achieving its goals of the long term availability and promotion of innovation. The IU thus seeks to ensure that the basic tool of agriculture, agrobiodiversity, remains as a common pool, hence the existence of Farmers' Rights rather than plant variety protection, that all may draw from for mutual advantage. To avoid asymmetries in access to its benefits, which would inevitably undermine food security, it depends on a financial mechanism rather than market manipulation to support it and thus the success of Articles 14 and 19 of the IU are critical to its effective implementation.

**The CBD and the IU****Table 2: The CBD and the IU**

CBD	IU
<ul style="list-style-type: none"> <li>• Sovereign Rights</li> <li>• Comparative Advantage</li> <li>• Right to Capture Benefits</li> <li>• Contributions of Indigenous and Local Communities</li> <li>• Technology Transfer</li> <li>• Financial Mechanism</li> </ul>	<ul style="list-style-type: none"> <li>• Public Goods</li> <li>• Mutual Advantage</li> <li>• Right to Access Benefits</li> <li>• Farmers' Rights</li> <li>• Technology Transfer</li> <li>• Financial Mechanism</li> </ul>

Ironically, considering the fierce debates over conflicts with TRIPs, the CBD creates some of the exact same problems for agriculture as TRIPs. This largely derives from the access and benefit sharing mechanism developed in Article 15. Sovereign rights over genetic resources are an effective method for limiting the asymmetries of a neo-colonial paradigm where manufactured products are valued and the raw materials that create them are discounted. However, sovereign rights still depend on the concepts of monopoly and market manipulation, and thus exclusion, found in TRIPs. Comparative advantage, part of the market's invisible hand, will guarantee an ability to capture benefits, but if you have no comparative advantage, and in agriculture very few countries do<sup>8</sup>, then you have no leverage.

What the CBD does do<sup>9</sup>, however, and TRIPs does not (admittedly because conservation is not a primary goal of TRIPs), is to recognise that monopolies and market manipulation will not provide a comprehensive answer to conserving biodiversity and thus Article 15 is only one element of a wider package, a wider package that is largely mirrored in the conservation and sustainable use provisions of the IU.

These parallels extend to the CBD's recognition of the contributions of indigenous and local communities, almost identical, if less detailed, to Farmers' Rights, and to its establishment of a financial mechanism. The relative contributions of benefit sharing under Article 15 and the GEF to CBD related conservation activities in developing countries might prove to be instructive for the future relative performance of Articles 14 and 19 of the IU.

**The IU: Safety Valve for TRIPs and the CBD****Table 3: The CBD and TRIPs – A Crisis for Agriculture**

CBD	TRIPs
<ul style="list-style-type: none"> <li>• National sovereignty in access to genetic resources depends on comparative advantage: <ul style="list-style-type: none"> <li>– No country or region has an overall comparative advantage in agricultural biodiversity.</li> <li>– Bilateral exchange raises costs and, since everybody depends on agriculture, marginalises the poor.</li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>• Intellectual property rights depend on an ability to charge a premium for access to an individual product: <ul style="list-style-type: none"> <li>– Charging a premium means limited access and thus under-mines food security.</li> <li>– A premium of individual products undermines the value of diversity.</li> </ul> </li> </ul>

The conclusion is simple: the TRIPs and CBD mechanisms for managing genetic resources do not, and will not, address the specific needs of agriculture and thus asymmetries and pressure on PGRFA will increase. An effectively implemented IU will act as a safety valve that guarantees the future availability of a diversity of PGRFA, and thus the future of agriculture.

Robert J. L. Lettington is a Law and Policy Consultant at the International Centre of Insect Physiology and Ecology (ICIPE) in Nairobi, Kenya. He adapted this article for Bridges from a paper and presentation at the ICTSD/ ACTS Eastern and Southern Africa Multi-stakeholder Dialogue on Trade, Intellectual Property Rights and Biological Resources in Nyeri, Kenya, on 30-31 July 2001.

**ENDNOTES**

<sup>1</sup> Diamond, Jared, *The Rise and Spread of Food Production in Guns, Germs and Steel: The Fates of Human Societies* (New York, 1997).

<sup>2</sup> The term 'proximate' is used on the understanding that the public sector does have an 'ultimate' profit motive in terms of benefits for society as a whole, otherwise it would be a pointless exercise, but that this differs from the profit motive of the private sector, which is more immediate and focused on shareholders.

<sup>3</sup> The Agreed Text of the IU adopted on 1st July 2001 can be found at <[www.fao.org/ag/cgrfa](http://www.fao.org/ag/cgrfa)>.

<sup>4</sup> The exact definition of PGRFA is one of the outstanding issues in the current text with the main question being the degree to which the 'genetic parts and components' of plant material are also PGRFA in their own right. The concern of developing countries over this is the belief that benefit-sharing requirements should be triggered by the use of genetic parts and components in the same way as they are for other plant material.

<sup>5</sup> Id. at Part IV of the Agreed Text.

<sup>6</sup> 'Commodity markets worked in such a way that prices of primary commodities (excluding oil) declined to their lowest levels since the Great Depression. Sub-Saharan Africa alone lost more than \$50 billion in export earnings between 1986 and 1990 because of depressed commodity prices.' *Human Development Report* (UNDP, 1992).

<sup>7</sup> '[T]hose that spend money on food...' as opposed to those who eat, Tansey, G, *Food Security: A Food System Overview* in Broggio and Kaukab eds., *The Geneva Documents: Proceedings of the Workshops on TRIPs, CBD and the International Undertaking* at 58 (IAO/South Centre, 2000, [www.iao.florence.it](http://www.iao.florence.it)).

<sup>8</sup> Thus in the preamble to the IU the Parties thereto are; 'Cognizant that plant genetic resources for food and agriculture are a common concern of all countries, in that all countries depend very largely on plant genetic resources for food and agriculture that originated elsewhere'

<sup>9</sup> This apart from the CBD Conference of the Parties repeated recognition that it is not an appropriate framework for PGRFA.

## Biotechnology, Biosafety and Trade: Issues for Developing Countries

On 18-20 July, ICTSD held a workshop on *Biotechnology, Biosafety and Trade: Issues for Developing Countries* aimed at providing Geneva-based negotiators a broad perspective for dealing with these intersecting issues in the lead-up to the next WTO Ministerial Conference in November 2001 and other ongoing discussions in these areas. The workshop built on ideas explored in the *Panel Discussion on Biotechnology: Challenges and Opportunities* held jointly by ICTSD, UNCTAD and the South Centre last December.

### Background

Biotechnology, biosafety and trade concerns – including research, production, commercialisation, identification, handling, release into the environment, and labelling of genetically modified organisms (GMOs) – are relevant in the context of WTO debates on Technical Barriers to Trade (TBT), the Application of Sanitary and Phytosanitary Measures (SPS), Trade-related Aspects of Intellectual Property Rights (TRIPS) and agriculture, as well as the overarching issues of market access and competitiveness. These discussions have important implications for both developed and developing countries, as well as importers and exporters of GMOs.

At the same time, negotiations taking place in other institutional settings may impact on international trade, or may themselves be affected by the developing trade regime, including implementation arrangements of the Cartagena Protocol on Biosafety and the development of multilateral, regional and national standards and regulations for the release, safety assessment and food use of genetically modified organisms.

As one of the objectives of the workshop was to foster coherence in positions adopted at the different fora where these issues are discussed, the two-day meeting primarily involved representatives from Geneva-based missions who are actively engaged in the WTO and other multilateral negotiations relevant to biotechnology, biosafety and trade. Participants also included other ‘influencers’ (e.g. different actors in governments, NGOs, academia and inter-governmental organisations) with an interest in the subject matter.

Discussions were structured around six issue areas each of which was introduced by an expert on the topic, and accompanied by a discussion paper.<sup>1</sup> Speakers and analysts included Calestous Juma, Centre for International Development, Harvard University; Joseph Gopo, Biotechnology Research Institute, Scientific & Industrial Research and Development Centre, Zimbabwe; Arturo Martinez, Dept. of Environmental Affairs, Ministry of Foreign Affairs, Argentina; Prof. A.H. Zakri, Institute of Advanced Studies, UN University, Tokyo; Christiane Wolff, WTO Agriculture and Commodities Division; Atul Kaushik, Cabinet Secretariat, Government of India; Jayashree Watal, WTO Intellectual Property Division and Paolo Bifani, Consultant. Instead of representing conclusions, the following report focuses on issues that were repeatedly addressed throughout the discussions.

### Biotechnology within the context of technological development

Several participants stated that biotechnology was not fundamentally different from other technologies, and should thus be seen within the larger context of technology’s role in economic development and international trade. Others, however, stressed

that while biotechnology might in principle have the same disciplines as other technologies, it was often perceived as distinct when it related to food and medicines. Furthermore, it was emphasised that biotechnology did not relate to specific *products*, but to a *cluster of techniques* employed to produce goods that could be used under different circumstances and for different goals.

### Integrated approach to risk assessment and risk management

Many thought that assessing and managing risk involved not only scientific information and statistical probabilities, but should also take into account socio-economic and environmental considerations, potential benefits, alternative scenarios, public perceptions, and the current and anticipated levels of scientific uncertainty.

For instance, risk assessment and risk management should also evaluate the consequences of using biotechnology as opposed to using alternative technologies, such as possible side effects of GM crops on non-target species compared to risks arising from pesticide use. Such analysis should assess the *level* of risk for GM products, as well as address the question of risks that are either unknown or might be ‘unknowable’. The relatively low level of risk tolerance for GM foods reflects the often significant difference between actual and

perceived risk, which highlights the importance of effective risk communication; public trust in GM products could be enhanced through providing reliable and impartial scientific information on potential risks to all stakeholders, including the media.

The factors above should be evaluated within the different environmental and socio-economic contexts where biotechnology might be applied. To assess how GM products will behave in a given environment, risk assessment and risk management must be based on knowledge of local ecosystems. This knowledge, however, is often limited, in particular in developing countries, which frequently lack the necessary scientific and financial capacity to conduct ecological studies.

Taking socio-economic considerations into account might increase the benefits that can be derived from a GM product, possibly making the risks of using the technology more acceptable. For instance, pest-resistant crops – which might increase productivity and reduce pesticide use – are potentially important to farmers in tropical regions where pests are generally more prevalent than in temperate climates. Other potentially significant applications in developing countries include stress- and herbicide-tolerant crops, as well as foods with enhanced nutritional value.

### GMOs as ‘like’ products

Many participants acknowledged the importance of the ‘like product’ question in relation to GMOs, i.e. whether a genetically-modified product could/should be considered directly comparable or ‘like’ its conventional counterpart. With no clear ruling or consensus among Members on this issue, the context and provisions of a dispute settlement case are likely to influence the interpretation of ‘like’. However, in the event of a WTO dispute, the ‘like product’ concept is most relevant under GATT Article III (non-discrimination between like products of domestic and foreign origin), but becomes less so if the health and environmental

*Continued on page 18*



*Biotechnology, Biosafety and Trade, continued from page 17*

exceptions under Article XX are evoked. Some participants raised the question of how to resolve the significant gap between countries' stance on this issue, cautioning that a discussion at the WTO might open a Pandora's box.

**Needs of Developing Countries**

Many participants said that the fulfilment of biotechnology's potential would require research to take more account of developing countries' needs, including the differences in national priorities and context, rather than focus on developed countries' priorities (as is currently the case). To obtain the benefits and be competitive in biotechnology, developing countries need access not only to the products but, more importantly, to the technology. In addition, access to genetic resources and the associated traditional knowledge plays a role, highlighting the need for benefit-sharing and prior informed consent.

Capacity-building related to institutions, infrastructure, policy development and implementation, human resources, local-level ecological data, and research and development is urgently needed. Such efforts would not only be required for producers of GM product, but also for importers and exporters. Capacity is also lacking to effectively participate in international negotiations, including the WTO negotiations and international standard-setting organisations.

**Whose responsibility?**

Several participants addressed the question of who should take the initiative for biotechnology-related developments, such as policy-making and capacity building, and where the responsibility for the provision of funding should lie (i.e. national versus global, private versus public). While many acknowledged the necessity of a multilateral framework, they also stressed the need for developing countries themselves to be more proactive. To this end, countries should make an increased effort to formulate their own biotechnology priorities, develop policies and regulations at the national level, increase investment in science and technology, and focus their production efforts more on the domestic rather than the export market.

Regarding funding, some participants thought that developing countries should aim to find ingenious ways to raise funds at the national level instead of relying on foreign aid and other external funding sources, which often come with conditionalities. One participant, however, pointed out the ultimate responsibility should rest with the global community rather than developing countries themselves. There was also some disagreement on whether biotechnology-related funding, in particular for baseline ecological research, should be financed by the private or the public sector. While some believed that funding for research with no direct market value was most likely to come from the public sector, others said that the private sector should also bear some of the cost.

Some also called for greater South-South cooperation to exchange and learn from each other's experiences, while others pointed out the need for increased coordination among all stakeholders. In the WTO, countries should capitalise on the current trend towards greater equity in the WTO, as well as step up the pressure on developed countries to implement special and differential treatment provisions of various Agreements.

<sup>1</sup> The workshop papers are available at the ICTSD website <http://www.ictsd.org/dialogweb/Dialogues/19-07-01-docu.htm>.

**Trade Implications of Biotechnology**

The use of biotechnological processes could lead to changes in production methods that could affect market structures. In particular, biotechnology might reduce the cost of production in industrialised countries, thus potentially affecting developing countries' competitiveness and comparative advantage. Patents might also impede developing countries' access to technology and thereby their ability to take advantage of market opportunities. Standards used for risk assessment or labelling might have similar effects in developing countries without the capacity – whether scientific, financial or human resource-related – to comply with them. The development of international standards could help reduce these potential trade barriers. Trade conflicts might also arise if measures, such as risk assessment requirements or import restrictions taken pursuant to the Cartagena Biosafety Protocol did not comply with WTO rules. In this context, the WTO should provide guidance to Members regarding the different approaches to precaution in the Cartagena Protocol and the WTO, in particular the SPS Agreement (Article 5.7).

While numerous WTO Agreements could be applied to biotechnology-related issues, including those on agriculture, SPS, TBT, TRIPs and the GATT, there has been a lack of formal debate on GMOs in the WTO. For instance, widespread confusion reigns regarding notifications of biotechnology regulations under the SPS and TBT Agreements. Commenting on the emerging shift of biotechnology-specific discussions to other fora, such as the Codex Alimentarius Commission, one participant pointed out that the mandate of several WTO bodies indirectly covered biotechnology (i.e. SPS, TBT, CTE, CTD, DSM), but that all these fora had a limited scope and could only tackle part of the issue. The EU's proposal to establish a WTO working group on biotechnology at the 1999 Seattle Ministerial Conference has not been discussed since the failure of the talks. While the dispute settlement mechanism (DSM) provides a 'default option' for resolving outstanding questions, up to now WTO Members have been reluctant to use it for biotechnology-related disputes. This led some to suggest that these questions might need to be settled outside the WTO.

In the future, technological competition among nations is likely to become *the* driving economic force. Those who have a competitive advantage through ownership of biotechnology will defend it. Thus, discussions in international fora will need to take into account technological development issues. Also, technological rather than geographical compatibility are likely to create new biotechnology alliances between countries.

In order to ensure an advantageous outcome, developing countries should identify their priorities and concerns before aiming to amend WTO Agreements, which in any case seems unlikely to occur in the near future. Instead, they might look at the recent discussions on TRIPs and health, i.e. rather than try to change the Agreements, they should focus on ways to use existing provisions to their best advantage. The WTO itself might also need to become more proactive in its approach to biotechnology to resolve some of the uncertainties that still prevail. Such an approach, however, might require the stimulus of prior developments outside the WTO.

*The paragraphs above summarise points of view expressed during the discussions rather than reflect a consensus among workshop participants.*

### TRIPs and the CBD: What Language to Take to Doha?

On 18 July, ICTSD held an informal roundtable aimed at providing substantive inputs to the discussion on the compatibility of the TRIPs Agreement with the Convention on Biological Diversity (CBD) and contributing to the definition of language for the Doha Ministerial Declaration. In addition to developing country delegates, academics and NGOs, the meeting mobilised four key resource persons acting in their own capacity: Vicente Sanchez (Chile), former chairman of the CBD negotiating process; Calestous Juma (Kenya), Centre for International Development, Harvard University; Atul Kaushik, Cabinet Secretariat of India; and Francisco Cannabrava, Brazilian Mission to the WTO.

Beyond the differences in the provisions themselves, participants highlighted differences in the core principles underlying TRIPs and the CBD. On the one hand, the trade regime is based on non-discrimination and freedom to operate and trade. It also builds on well-established national principles, which have been consolidated at the international level. The environmental regime, on the other hand, works on the basis of differentiated treatment, prior informed consent and intends to translate new – and sometimes vague – principles into domestic legislation. In that context, some participants argued that resolving the conflict between the two regimes did not require additional text but the strengthening of environmental principles. The CBD should therefore develop technical bodies to provide inputs for the operationalisation of such principles or delegate this work to other technical bodies.

Other participants stressed that any international solution on the compatibility of TRIPs with the CBD should accommodate and reflect national systems on access and benefit sharing in order to ensure that national specificities in biodiversity, traditional knowledge (TK), and culture are taken into account. International recognition and integration are also crucial to prevent biopiracy from countries that have developed national access and benefit sharing legislation.

With respect to Doha, some participants felt that the Ministerial Declaration should at least recognise the different approaches of the two regimes; the contribution of TK to society and the economy; the need for further work in the field of information collection and disclosure; and the necessity to strengthen the capacity of the trade community to preserve biodiversity and regulate access and benefit sharing. Participants in favour of a non-conflictual approach to the TRIPs/CBD relationship argued that the two regimes were not incompatible as such but might conflict in their implementation (eg. the disclosure clause in the Indian and Andean Community IPR bills could be interpreted as an additional requirement under TRIPs art. 27.1). They highlighted the need to ensure that both instruments are mutually supportive in order to avoid such conflicts in the WTO, which would cause serious systemic problems, as they would raise the question of the WTO's competence in implementing the CBD. As a minimum, the Ministerial Declaration should state that TRIPs provisions do not run counter to the CBD. As reflected in some developing country proposals submitted to the WTO, some participants also advocated the inclusion in TRIPs of disclosure requirements for sources of genetic material and related TK, as well as some of the CBD basic elements contained in Art. 8(j), i.e. evidence of benefit sharing and prior informed consent by the relevant government or communities. While this could be done through a review of Article 29, some participants argued that it might be easier to focus on Article 27.3(b), which is already under review and deals with genetic resources.

#### *Africa Dialogue on Trade, IPR and Biological Resources*

On 30-31 July ICTSD and ACTS in collaboration with QUNO, held an Eastern and Southern Africa Dialogue on Trade, IPR and Biological Resources in Nyeri, Kenya. The objective was to provide an opportunity for Geneva-based African negotiators, national policy-makers and influencers to interact and exchange views, with the ultimate goal of mobilising regional expertise for Africa's participation in the negotiations of TRIPs review. Papers presented at the meeting will be posted shortly on ICTSD's web site and Bridges will report on this meeting in its next issue.

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Tel: (41-22) 917-8492  
Fax: (41-22) 917-8093  
E-mail: [hcameron@ictsd.ch](mailto:hcameron@ictsd.ch)

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## MEETINGS

All WTO phone and fax numbers start with (41-22) 739. Only extensions are provided in this list.  
Please contact the Secretariat for confirmation of dates. Internet: <http://www.wto.org/>

Sept. 10, 17 & 27 Geneva	WTO Committee on Anti-dumping Practices Contact: Luis Ople, tel: 5374, fax: 5458
Sept. 11, 18 & 28 Geneva	WTO Committee on Subsidies and Counter-vailing Measures Contact: Luis Ople, tel: 5374, fax: 5458
Sept. 19 Geneva	WTO Committee on SPS Measures Contact: Peter Ungphakorn, tel: 5412, fax: 5458
Sept. 19-21 Geneva	WTO Council for TRIPs Contact: Peter Ungphakorn, tel: 5412, fax: 5458
September 20 Geneva	WTO Council for Trade in Goods Contact: Nuch Nazeer, tel: 5393 fax: 5458
Sept. 24 Geneva	WTO NGO Briefing on Council for TRIPs Contact: Bernard Kuiten, tel: 5676, fax: 5777
Sept. 25 Geneva	WTO Dispute Settlement Body Contact: Nuch Nazeer, tel: 5393 fax: 5458
Sept. 27 & 28 Geneva	WTO Committee on Agriculture, special session Contact: Peter Ungphakorn, tel: 5412, fax: 5458
Sept. 28 Geneva	WTO Working Group on the Interaction between Trade and Competition Policy Contact: Hans-Peter Werner, tel: 5286, fax: 5458
Oct. 3 Geneva	WTO Working Group on Trade and Investment Contact: Nuch Nazeer, tel: 5393, fax: 5458
Oct. 3-4 Geneva	WTO Committee on Trade and Environment Contact: Hans-Peter Werner, tel: 5286, fax: 5777
Oct. 5 Geneva	WTO Council for Trade in Goods Contact: Nuch Nazeer, tel: 5393 fax: 5458
Oct. 8 Geneva	WTO Committee on Trade and Development Contact: Lucie Giraud, tel: 5075, fax: 5458
Oct. 8-9 Geneva	WTO Committee on Technical Barriers to Trade Contact: Hans-Peter Werner, tel: 5286, fax: 5458
Oct. 8-9 & 12 Geneva	WTO Council for Trade in Services Contact: Nuch Nazeer, tel: 5393 fax: 5458
Sept. 24 Geneva	WTO NGO Briefing on Trade and Environment Contact: Bernard Kuiten, tel: 5676, fax: 5777
Oct. 10 Geneva	WTO General Council Contact: Nuch Nazeer, tel: 5393 fax: 5458
Oct. 15 Geneva	WTO Sub-Comm. on Least-developed Countries Contact: Lucie Giraud, tel: 5075, fax: 5458
Oct. 22-23 Geneva	WTO Committee on Anti-dumping Practices; Ad Hoc Group on implementation issues Contact: Luis Ople, tel: 5374, fax: 5458

Oct. 22-26 Bonn	First Meeting of the Ad Hoc Working Group on Access and Benefit-sharing Contact: CBD Secretariat, tel: (1-154) 288-2220, fax: 288-6588, e-mail: <a href="mailto:secretariat@biodiv.org">secretariat@biodiv.org</a>
Oct. 25 Geneva	WTO Dispute Settlement Body Contact: Nuch Nazeer, tel: 5393 fax: 5458
29 Oct. – 9 Nov. Marrakesh	Seventh 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: <a href="mailto:secretariat@unfccc.de">secretariat@unfccc.de</a>

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