

### TRIPs and Public Health vs TRIPs and Pandemics?

It looks increasingly certain that WTO Members will adopt a stand-alone statement on the Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPs) and access to medicines at their Ministerial Conference in Doha, Qatar, in November. While both developed and developing countries have put forward detailed draft proposals for ministers' endorsement, all acknowledge – more or less formally – that the importance of a Ministerial Declaration on TRIPs and health will reside in its political rather than technical content.

The elaboration of such a statement was the central focus of the 19-21 September session of the TRIPs Council, and the political dimension was obvious even in the titles of the texts proposed by the different coalitions: the draft submitted by nearly 50 developing countries was called a *Declaration on the TRIPs Agreement and Health*, while Australia, Canada, Japan, Switzerland and the United States ('Australia + 4') proposed a preamble entitled *Access to Medicines for HIV/AIDS and Other Pandemics* (this was later followed by six operational paragraphs from Canada, the Czech Republic, Japan, New Zealand, Switzerland and the US, i.e. 'US + 5'). The European Commission's compromise contribution was headed *Declaration on TRIPs and Access to Affordable Medicines*.<sup>1</sup>

These differences go beyond semantics. The joint developing country draft (see page 3 for further details) sought to ensure that any doubts about the TRIPs Agreement's flexibility with regard to measures taken by developing countries to address access to drugs would be resolved in favour of their sovereign right to protect public health. Its first preambular paragraph affirmed that

The protection and promotion of public health and nutrition is a fundamental obligation and prerogative of the State and that Members retain their sovereign power in this regard.

The corresponding operative part (i.e. 'Ministers declare that') boldly stated: 'Nothing in the TRIPs Agreement shall prevent Members from taking measures to protect public health.'

Quipped one developing country trade diplomat: 'If we get operative paragraph one, we will not even need the rest.' He and other developing country delegates noted that the EC text, which also addressed access to medicines and public health, was 'very close' to their concerns, while the other industrialised country proposals seemed aimed at restricting the Declaration's scope to pandemics such as tuberculosis, malaria and, in particular, HIV/AIDS.

Preambular language in the five industrialised countries' draft would have ministers recognise that 'access to medicines for treatment of HIV/AIDS and other pandemics, such as malaria and tuberculosis' is a major challenge for the global community and

that international organisations, governments, NGOs and private actors have the common responsibility 'to contribute to the promotion of the most favourable conditions for improving access to medicines for treatment of HIV/AIDS and other pandemics.'

The various drafts also showed different interpretations on the extent that other TRIPs provisions should be read in the light of the social and health objectives embodied in Articles 7 and 8.

While the developing country draft Declaration emphasised 'the fundamental importance of the objectives and principles of the TRIPs Agreement', the 'US + five' proposed that each provision of the TRIPs Agreement 'should be read in accordance with customary rules of interpretation of public international law as reflected in the Vienna Convention on the Law of Treaties.' The EC was more specific: 'Each provision of the TRIPs Agreement should, in accordance with Article 31 of the Vienna Convention on the Law of the Treaties, be read in the light of its object and purpose as set out in Articles 7 and 8 of the TRIPs Agreement.'

Unlike the other industrialised country drafts, the EC proposal agreed with developing countries that protection and enforcement of intellectual property rights should contribute to the transfer and dissemination of technology, and noted the need to give least-developed country Members 'maximum flexibility in the domestic implementation of laws and regulations in order to enable them to create a sound and viable technological base.'

#### The Role of Patent Protection

Developing country delegates consulted for this story were at pains to stress that their draft Declaration was not directed against patents as such but only sought to contain potential adverse effects on public health. In contrast to their over-riding health objective, they saw the US-led groups' proposals as attempts to affirm that patent holders' rights were paramount under the TRIPs Agreement.

The five-country preamble stressed that – rather than patents – 'determinant factors' for improving access to medicines were efficient infrastructure to distribute, deliver and monitor drug usage; research and development particularly targeted at the major communicable diseases of relevance for developing countries; mechanisms to finance drug purchases and affordable pharmaceuticals; and the implementation of effective healthcare systems. It also emphasised that strong intellectual property protection was 'a necessary incentive for research and development of life-saving drugs' and proposed that ministers reaffirm that TRIPs contributes to the availability of medicines.

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The EC's proposed preamble also noted that IPRs needed to be adequately protected and proposed a recognition that they serve public health objectives globally. However, unlike the 'Australia + four' paper, the EC acknowledged that intellectual property was 'one of the factors which have a bearing on the price of medicines'. Both texts also expressed concern over drugs made available under tiered pricing schemes or aid leaking back into markets not eligible for lower prices.

### Compulsory Licensing and Parallel Imports

Although the details of the texts vary considerably, agreement seems to have emerged that each country is free to determine the grounds for granting compulsory licenses under Article 31. There is more divergence on when Members can forgo seeking prior consent from the rights holder.

Developing countries did not seek to define what would amount to 'national emergency' or 'other circumstances of extreme urgency' that would allow such practices (see para. 4 opposite), but the 'US + five' proposed that

An affected Member's government can declare pandemics of life-threatening communicable diseases such as HIV/AIDS, malaria and tuberculosis, as situations of 'national emergency' or as a 'circumstance of extreme urgency' within the meaning of Article 31(b) of the TRIPs Agreement.

The EC again sought the middle ground:

In the case of a national emergency or other circumstances of extreme urgency or in cases of public non-commercial use, Members may, subject to Article 31(b) of the TRIPs Agreement, grant compulsory licenses without prior efforts on the part of the user to obtain authorisation from the right holder. Epidemics of life threatening communicable diseases can qualify as situations of 'national emergency' or as a 'circumstance of extreme urgency' within the meaning of Article 31(b) of the TRIPs Agreement.

The EC also backed developing countries' point that a compulsory license issued by a Member may be given effect by another Member, which 'may authorise a supplier within its territory to make and export the product covered by the license'. This would allow developing countries that cannot produce generic medicines themselves to licence a company in another country to manufacture a given drug for export to the Member granting the license.

All proponents also agreed (although the 'US + five' draft hedged this acknowledgement with several qualifications) that Members could choose the 'exhaustion regime' – i.e. the legal basis for parallel imports – that best suited their interests (enshrined in TRIPs Article 6, which provides that 'nothing in this Agreement shall be used to address the issue of the exhaustion of intellectual property rights' for dispute settlement purposes).

Some far-reaching points of the developing country draft were not commented on by other Members at the September Council meeting. Among these were paragraphs related to prohibiting the use of bilateral pressure – i.e. threats of sanctions or grant of incentives or other benefits – to prevent developing countries from using TRIPs flexibility to the full (para. 10). Also undiscussed were ongoing differences on developing countries' proposals that Members 'exercise utmost restraint' in initiating and pursuing dispute settlement proceedings with regard to developing countries' measures to protect and promote public health (para. 11), and the extension of transition periods under TRIPs (para. 13).

No formal TRIPs Council sessions are scheduled before the Doha Ministerial, but informal consultations will continue on how to address access to medicines. The draft Ministerial Declaration released on 26 September proposed that 'the issue of the relationship between intellectual property and [access to medicines] [public health] be addressed in a separate declaration.'

<sup>1</sup> All proposals presented at the Council meeting were informal 'non-papers'. The EC draft was withdrawn as it had not been formally cleared by EU members, but sources said the reason was procedural rather than disagreement on its content.



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## Highlights from the Joint Developing Country Draft Ministerial Declaration on the TRIPs Agreement and Health

Affirming that the protection and promotion of public health and nutrition is a fundamental obligation and prerogative of the State and that Members retain their sovereign power in this regard;

Discharging the obligation to protect and promote the fundamental human rights to life and the enjoyment of the highest attainable standard of physical and mental health, including the prevention, treatment and control of epidemic, endemic, occupational and other diseases [...] as affirmed in the International Covenant on Economic, Social and Cultural Rights;

Cognizant of the concerns expressed by non-governmental organizations, public health advocates and the worldwide public regarding potential implications of TRIPs Agreement on the availability and affordability of needed medicines [...];

Emphasizing that the protection of intellectual property rights, in particular patent protection, should encourage the development of new medicines and the international transfer of and access to technology to promote the development and maintenance of sustainable domestic manufacturing capacities for medicines and other health care products;

Recalling the Preamble of the TRIPs Agreement, which, among others, prescribes that measures and procedures to enforce intellectual property rights should not themselves become barriers to legitimate trade and recognizes the special needs of the least-developed country Members in respect of maximum flexibility in the domestic implementation of laws and regulations in order to enable them to create a sound and viable technological base;

Reaffirming the General Council decision of 7-8 February 2000 (W1/GC/M/53) that the mandated review of the TRIPs Agreement, among others, should address the impact of the agreement on the trade and development prospects of developing countries;

### The Ministers Declare that

1. Nothing in the TRIPs Agreement shall prevent Members from taking measures to protect public health.
2. Each Member retains the right to establish its own policy and rules regarding the exhaustion of intellectual property rights.
3. Each Member has the right to allow other use [i.e. other than that allowed under Art. 30 of the TRIPs Agreement] of the subject matter of a patent without the authorization of the right holder, including use by the government or third parties authorized by the government, and to determine the grounds upon which such use is allowed.
4. In the case of a national emergency or other circumstances of extreme urgency or in cases of public non-commercial use, Members may grant compulsory licenses without prior efforts on the part of the user to obtain authorization from the right holder.
5. A compulsory license issued by a Member may be given effect by another Member. Such other Member may authorize a supplier within its territory to make and export the product covered by the license predominantly for the supply of the domestic market of the Member granting the license. Production and export under these conditions do not infringe the rights of the patent holder.

6. Members are not obliged to apply the conditions set forth in subparagraphs (b) and (f) of Article 31 of the TRIPs Agreement where the use of the subject matter of a patent is permitted to remedy a practice determined after judicial or administrative process to be anti-competitive.

7. Nothing in the TRIPs Agreement shall prevent Members from establishing or maintaining marketing approval procedures for generic medicines and other health care products, or applying summary or abbreviated marketing approval procedures based on marketing approvals granted earlier for equivalent products.

8. Nothing in the TRIPs Agreement shall prevent Members from disclosing or using information held by its authorities or the patent holder where it is so required for reasons of public interest, including where such disclosure or use is necessary to implement effectively any compulsory licenses or other measures adopted by public authorities in the public interest.

9. Under Article 30 of the TRIPs Agreement, Members may, among others, authorize the production and export of medicines by persons other than holders of patents on those medicines to address public health needs in importing Members.

10. Each Member shall, within or beyond the framework of the WTO, refrain from imposing or threatening to impose sanctions and refrain from employing the grant of incentives or other benefits in a manner which could curtail the ability of developing and least-developed country Members to avail themselves of every possible policy option to protect and promote public health.

11. Members shall exercise utmost restraint in initiating and pursuing dispute settlement proceedings relating to measures adopted or implemented, particularly by developing and least-developed country Members, to protect and promote public health.

12. In its examination of the scope and modalities for the possible application of subparagraphs 1(b) and 1(c) of Article XXIII of GATT 1994 (i.e. the so-called 'non-violation' cases, *ed.*) to the settlement of disputes under the TRIPs Agreement, and without prejudice to recommendations that the Council for TRIPs may adopt and submit to the Ministerial Conference on other relevant aspects, in no event shall such subparagraphs be rendered applicable to measures adopted and implemented by Members, particularly developing and least-developed country Members, to protect and promote public health.

13. In view of the special needs and requirements of least-developed country Members, their economic, financial and administrative constraints, and their need for flexibility to create a viable technological base, the transition period provided for their benefit under Article 66.1 of the TRIPs Agreement shall be extended for another period of five (5) years from the expiration of the transition period provided thereunder, particularly in respect of the obligation to render available patent protection on products or processes relating to public health, without prejudice to further extensions.

14. The TRIPs Council shall monitor and evaluate on an ongoing basis [...] the effects of the TRIPs Agreement on health, with particular emphasis on access to medicines and research and development on medicines for the prevention and treatment of diseases predominantly affecting people in developing and least-developed countries.



## Emergency Safeguard Mechanism in GATS: A Gateway to Liberalisation?

Since the General Agreement on Trade in Services (GATS) entered into force in January 1995, WTO Members have regularly made half-hearted attempts to fulfil the mandate they had themselves taken up: decide, through negotiations, whether or not the GATS should be armed with an Emergency Safeguard Mechanism and, if so, how it should be defined. The GATS initially required that the question be settled three years after the entry into force of the WTO Agreement. This and other deadlines have lapsed and been extended; the third and latest in line expires by 15 March 2002.

However, there has been a significant increase in activity since several developing countries declared that they would not make any substantial commitments to open up their services markets in the current round of negotiations (GATS 2000) without including an Emergency Safeguard Mechanism (ESM) into the Agreement. In a perfect world, as one delegate put it, negotiations on further liberalisation and negotiations on an ESM would be independent of one another. And so they were until the first and current round of market access negotiations under the GATS commenced in 2000. At present, however, David is up against Goliath in trying to secure a path of liberalisation in services trade compatible with national interests and every possibility to pursue these is explored.

### GATS and Emergency Safeguard Measures

Emergency safeguard measures are, together with subsidies and government procurement, part of the Uruguay Round's unfinished business, the completion of which was sought through the inclusion into the GATS of a 'built-in' agenda, which requires, *inter alia*, Members to hold multilateral negotiations on the question of an ESM. GATS Article X.1 states that 'There shall be multilateral negotiations *on the question* of emergency safeguard measures based on the principle of non-discrimination' (italics added). The phrasing of this paragraph is generally understood to imply that prior to any negotiations on a specific provision, Members should agree upon the need for an ESM. After six years of discussions within the Working Party on GATS Rules (WPGR), they have so far been unable to agree on either aspect.

An ESM may be defined as a temporary measure taken against imports if, as a result of unforeseen developments and of the effect of the specific commitments undertaken by a Member under the GATS, imports of services occur in such increased quantities and under such conditions as to cause or threaten to cause serious injury to domestic suppliers of like or directly competitive services.<sup>1</sup> Several WTO Agreements, including the GATT (through the Agreement on Safeguards) and the Agreement on Agriculture, provide for safeguard measures under certain conditions. The lukewarm initial interest in an ESM from developed and developing countries alike could also be linked to the more general complexity of the services area. While responding to the question whether an ESM is necessary, or desirable, is the condition *sine qua non* for proceeding to negotiations on the feasibility aspects of a specific provision, the WPGR has tended to focus on the latter point, less contentious than the question of principle.

### Is the Adoption of an ESM Desirable?

A delegate from the very proactive ASEAN Group recently complained that the desirability of an ESM has been taboo within the WPGR for quite some time. This may, at least in part, be explained by the very polarised stances on the pros and cons of an ESM, as well as by the linkages some have recently made

between the sensitive issue of the ongoing market access negotiations and the establishment of safeguard measures.

Those who question the necessity of an ESM cite the wide leeway allowed to Members in making specific commitments under the GATS and in changing their commitments *ex post*. And the GATS does indeed provide considerable flexibility in terms of liberalisation commitments. In contrast to the GATT, it only obliges countries to liberalise the services sectors they have themselves chosen in their national schedules (the so-called 'bottom up' approach), and even those may be subject to certain qualifications or exceptions from the most-favoured nation treatment obligation. Furthermore, Art. XXI provides for the possibility to renegotiate scheduled commitments under certain conditions. Opponents to the adoption of emergency safeguard measures also argue that they prevent economic efficiency, are often used for protectionist purposes and give rise to an increased number of disputes within the WTO.

However, although GATS provisions are flexible, they are not designed to temporarily protect relevant domestic industries against injury as an ESM would. Specifically, Art. XXI on the renegotiation of scheduled commitments only allows Members to modify or withdraw such commitments three years after their entry into force. In addition, the withdrawing country is must enter into consultation with Members potentially affected by the modifications in order to set acceptable compensation. Apart from the fact that these consultations are likely to be protracted, which hampers the possibility to respond to emergencies in a timely manner, modifications under Art. XXI are not intended to be temporary measures; using them for emergencies would make the existing schedules of the Members unstable and unpredictable.

### Is the Adoption of an ESM Feasible?

If the crafting of a workable instrument for emergency safeguards has been difficult in other areas, in developing one for the complex area of trade in services negotiators face new challenges.

The ASEAN Group, a strong supporter of the adoption of an ESM, has submitted successive draft Agreements on emergency safeguard measures, which have served as a basis for negotiations and spurred discussions on feasibility aspects. Its latest draft,<sup>2</sup> submitted in late October 2000, addresses all the 'hot spots' arising in relation to the formulation of an ESM under the GATS: the definition of 'domestic industry' and 'injury', the questions of compensation, transparency and surveillance, as well as the special treatment to be consented to developing countries.

The question whether and to what extent an ESM should include commercial presence (mode of supply 3, meaning, for instance, the establishment of a branch of a foreign owned firm in the country in question) has proven particularly contentious. A majority of Members seems to be against the inclusion of mode 3 in an ESM, arguing that while the very notion of safeguards presupposes the ability to draw a clear line between 'foreign' and 'domestic' suppliers, such a distinction is artificial at best in the context of mode 3. Moreover, opponents contend that the aim of an ESM should be to protect national productivity and employment in a sector and not primarily national capital ownership. The ASEAN Group, however, tenaciously clings to its opinion (reflected in the Articles I:2 and II:4 of the draft Agreement) that mode 3 should and could be included in an ESM. To counter practical problems

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## Doha Ministerial: Implementation, Agriculture and Environment Emerge as Toughest Nuts to Crack

While the devastating terrorist attacks in New York and Washington on 11 September have raised some questions about postponing or changing the venue of the WTO's fourth Ministerial Conference, at the time of this writing Member countries and the WTO Secretariat expected that the meeting would be held in Doha, Qatar, from 9-13 November as scheduled.

**Draft Ministerial Declaration Expected End-September**

As this issue of Bridges went to press, the release of a draft Ministerial Declaration prepared by General Council Chair Stuart Harbinson was imminent. The bi-annual Ministerial Conference is the WTO's highest decision-making body, and the Ministerial Declarations issued at the conclusion of these meetings provide direction for the organisation's work until the ministers meet again.

The draft Declaration was likely to consist of:

- Ministers' views/statements on current issues (i.e. preambular paragraphs reflecting the background against which their decisions are taken);
- Implementation (to be addressed though a separate General Council/Ministerial Decision);
- Ongoing negotiations and reviews (i.e. negotiations on agriculture and services, and mandated reviews of specific Agreements such as TRIPs);
- Other elements of the work programme (i.e. possible new negotiations or other work priorities);
- Organisation and management of the work programme, and
- Technical assistance and capacity building.

Speaking at an informal General Council meeting on 20 September, Mr Harbinson said 'very useful progress' had been made 'towards a clearer understanding of what we can realistically hope to recommend to Ministers, and what the remaining problem areas are.' He added that consultations had revealed 'small but very encouraging signs of flexibility among delegations, and an understanding of the limits of each other's positions'.

On implementation, the draft was to propose the adoption of a General Council decision, which included options for a separate Ministerial Decision on Implementation. Based on Members' proposals and the Chair's consultations, draft text for this – released on 26 September – was to be discussed at the 3 October General Council Special Session on Implementation (see pages 7 and 9).

**Mini-Ministerials**

Meanwhile, countless meetings, in and outside of the WTO, have taken or will take in preparation for the bi-annual event. Ministers from 16 countries representing different positions met informally in Mexico City on 31 August and 1 September to explore the scope for launching a new round of trade liberalisation in Doha. While participants said the meeting increased understanding of the political imperatives faced by different Members, no breakthroughs occurred in setting the November Ministerial agenda.

Another 'mini-ministerial' is scheduled for 13-14 October in Singapore. The list of participants has not yet been finalised, but observers say it is likely include trade ministers from more countries than the Mexican meeting (the choice is up to the Singaporean government). While the agenda of the informal meeting has not been made public, talks are likely to focus on the 'difficult issues' addressed in Mexico City, including how to handle developing

countries' implementation requests, the mandate of the agricultural negotiations, and how to incorporate environment-related concerns. Participants will also examine the scope for narrowing positions on starting WTO negotiations on investment and competition policy rules.

**Regional Meetings**

The Singapore 'mini-ministerial' will take place in the margins of the annual Asia Pacific Economic Co-operation Forum meetings in Shanghai, where the heads of state of Pacific Rim countries will also address the trade bloc's stance on launching new WTO talks. There is little chance of a genuinely united stand emerging from the meeting, however, as APEC's 21 member economies include countries generally opposed to wider negotiations, such as Malaysia and Indonesia, as well as solid advocates Australia, Chile, Canada and the United States.

**The draft Declaration is expected to show 'small but encouraging signs' of flexibility among delegations.**

Other regional blocs to have addressed the topic lately include the South Asian Association on Regional Co-operation (SAARC), which issued a joint statement on 23 August opposing links between the trade agenda and environmental or labour issues. SAARC also cautioned against tying progress on implementation concerns to the launch of a new round of WTO negotiations (see page 7). Instead, the seven countries said that they considered that the mandated negotiations and reviews, the on ongoing work programme in the various working groups, the accession of 30 countries, taken together with the work programme for the resolution of the implementation issues themselves, 'provided a sufficiently broad agenda for now.'

In contrast, ministers attending the third Asia Europe Meeting of Economic Ministers on 11 September expressed their 'political will and flexibility in building support for launching a round at the fourth WTO Ministerial Conference in Doha' and said that new trade negotiations should be held 'at the earliest possible opportunity to promote growth'. To reach consensus on the launch of a round, ministers agreed that 'the negotiating agenda should be sufficiently broad and balanced to reflect the interests and concerns of all WTO members. The round should encompass further trade liberalisation, improvement, strengthening and development of WTO rules'. However, European Trade Commissioner Pascal Lamy admitted that there were still 'dissenting voices' among the ten Asian participants, and Malaysia's International Trade Minister Rafidah Aziz cautioned against insisting on the inclusion of 'new issues' such as investment, and competition policy, the environment or labour standards. Commerce Minister Adisai Bodharamik of Thailand said that Bangkok would find a comprehensive round 'too difficult' at present.

The EU has been the staunchest advocate for initiating a new cycle of multilateral trade negotiations in Doha, including rulemaking/clarification of existing rules in areas ranging from investment and competition policy to government procurement and the environment. To get the round off the ground, Commissioner Lamy has sought more flexibility from member states on some of the most intractable issues, such as agriculture and the environment. He has also asked EU ministers' blessing for undertaking negotiations on investment, competition policy and government procurement on a plurilateral basis, which would allow developing countries not to sign onto any ensuing agreements.

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However, at least for the time being, European governments maintain a united front on keeping intact their pre-Seattle comprehensive negotiation mandate, although France on 7 September broke ranks by suggesting that the Union should have a fall-back position in case the attempt to launch a broad-based round in Doha backfired. But, rather than scale down the Union's ambitions, French Trade Minister François Huwart proposed that in case of an impasse on a comprehensive new round, Members agree to postpone the launch by a year or two, and focus in Doha on celebrating China's accession to the WTO and offer better market access to developing countries' textile exports.

African countries have also held several meetings on the Doha agenda, most of which have strongly emphasised that implementation concerns must be resolved before a new round of any sort can be envisaged. However, the Southern African Development Community did call for industrial tariff negotiations to be added to the negotiation menu at Doha (see page 12).

**Convergence and Divergence**

What has changed, perhaps, as a result of these and other preparatory meetings, is a more wide-spread – if conditional – developing country willingness to add industrial tariff reductions to the on-going negotiations on agriculture and services. According to observers, the United States at the Mexican 'mini-ministerial' seemed less categorically opposed to negotiations on trade remedy laws such as anti-dumping, and the EU hinted at greater flexibility on the agricultural negotiations mandate in the context of a new round. But despite these signs of convergence, positions remain polarised in other areas, including negotiations on 'new issues' (i.e. rule-making on investment, competition policy and government procurement), as well as attempts to bring environmental or labour-related concerns within the legally-binding rules of the world trading system.

Apart from implementation (see page 7), two substantive areas are proving particularly difficult: agriculture and the environment.

*Environment*

Developing countries – and quite a few industrialised ones – continue to argue that negotiations on environmental issues are either unnecessary diversions, or attempts to weaken existing rules in a way that would make it easier for Members to adopt protectionist measures in the name of environmental or health protection. The European Union, Japan, Norway, Switzerland and Korea thus face an uphill battle on their demand that the new round formally clarify the relationship between WTO rules and those in multilateral environmental agreements (on which a conflict was narrowly avoided in the swordfish dispute, see page 13). They also want to establish guidelines on the use of precaution in the application of such treaties as the WTO's Agreement on Sanitary and Phytosanitary Measures, and the scope of WTO-consistent eco-labelling. When this issue of Bridges went to press, the divided Quad (the EU, the US, Japan and Canada) was working on draft Ministerial Declaration language on 'sustainable development' that would be politically acceptable to the EU and Japan while not actually committing the WTO membership to negotiations on trade and environment as such.

The ongoing agricultural negotiations offer another avenue for addressing environment-related questions in future WTO talks. The US, for instance, seeks to establish rules on 'timely and transparent' approval processes for biotechnology crops; the EU

has put forward a controversial proposal on animal welfare (Bridges Year 4 No.5, page 2); and a number of both developed and developing countries are leading a push to initiate negotiations on reductions in fisheries subsidies that contribute to fleet over-capacity and thus to over-fishing (Bridges Year 5 No.6, page 7).

*Agriculture*

Although negotiations will continue on agriculture regardless of a launch of a new round, the scope and range of the talks depend greatly on the context where they are undertaken.

The European Union, Japan, Switzerland and other countries that heavily subsidise their agricultural sectors have insisted that Article 20 of the Agreement on Agriculture only requires Members to initiate negotiations for 'continuing the process' of 'progressive reductions in support and protection resulting in fundamental reform', and that those negotiations started on schedule in 2000. These countries have been reluctant to specify the mandate further or to agree on a deadline for the conclusion of the negotiations.

The Cairns Group on agricultural exporters on the other hand – most recently at its final pre-Doha ministerial meeting in September – is calling for specific goals such as:

- the elimination of all forms of export subsidies;
- substantially improved market access, including through deep cuts in tariffs, the curtailment of tariff peaks, the removal of tariff escalation, substantial increases in all tariff quota volumes, strengthening of tariff quota administration rules, and elimination of remaining non-tariff measures; and
- major reductions in trade and production-distorting domestic support, leading to its elimination.

Ultimately, the Cairns Group seeks to 'end discrimination against agriculture and fully integrate it into WTO rules', with a 'clear understanding of timetables and benchmarks' for concluding the negotiations. The group also wants the Doha Ministerial to confirm that 'enhanced and concrete special and differential treatment provisions for developing countries should be an integral part of the outcome of the negotiations.'

While the positions above are clearly miles apart, the EU has said that in the context of a comprehensive round of new negotiations – but only then – it could show greater flexibility. This might mean toning down EU insistence on the multifunctional role of agriculture, i.e. the main argument put forward by the Union since pre-Seattle Ministerial days as justification for treating agriculture differently from other sectors covered by WTO rules.

However, talks on the agricultural negotiation mandate are likely to go the wire over two issues: agreement on a timeframe and deadline, and a specific mandate with regard to export support.

The EU's official stand remains that export subsidy reductions can only be addressed if all forms of support – including export credits, support provided by state trading enterprises and food aid – are tackled on an equal footing. The US has so far fiercely opposed putting export credits and loan guarantees on the table.

Developing countries' agricultural negotiation priorities are twofold: deep reductions/elimination of all forms of support in industrialised countries and market opening through tariff cuts and quota elimination on the one hand and, on the other hand, greater flexibility for developing countries' subsidy policies, capped at much lower levels than those of industrialised countries.



## Doha Implementation 'Down Payment' Outlined

A draft General Council Decision on Implementation-related Issues and Concerns, separate from the Doha Ministerial Declaration (see related article on page 5) was released just hours before this issue of Bridges went to press. This eagerly-awaited paper, due to be discussed at the General Council's next Special Session on Implementation on 3 October, provides an important indication on how the nearly hundred changes/clarifications to existing Agreements – identified by developing countries as necessary for redressing the imbalances in the international trading regime – are likely to fare at the Doha Ministerial Conference.

The 26 September text follows an earlier paper, submitted by Mr Harbinson and WTO Director General Mike Moore to the General Council last July, which outlined part of a potential 'implementation package', but disappointed developing countries as it left out such key areas as anti-dumping or textiles, on which the authors said more consultations were necessary (Bridges Year 5 No.6, page 4). The first developing country reactions to the new, more comprehensive draft were generally unhappy as well, with diplomats finding few signs of new flexibility on their long-standing demands.

The 26 September draft proposes that the General Council adopt the following decision:

- (i) to take immediate action, as set out in Annex I, to address the implementation difficulties encountered by developing countries in a number of areas;
- (ii) to develop recommendations for Ministers, based on the proposals set out in Annex II, for decision at the Fourth Session of the Ministerial Conference;
- (iii) to recommend to Ministers, [at] the Fourth Session of the Ministerial Conference to address other implementation issues in the course of the future work programme of the WTO as provided for in the draft Ministerial Declaration; and,
- (iv) to request the Director-General [...] to ensure that WTO technical assistance focuses, on a priority basis, on assisting developing countries to implement existing WTO obligations, as well as on increasing their capacity to participate more effectively in future multilateral trade negotiations.

The bottom line of the draft General Council Decision lies in paragraph (iii): the 'other implementation issues' are left to be addressed '*in the course of the future work programme of the WTO as provided for in the draft Ministerial Declaration*' (editor's italics). Paragraph 10 of that text reads in part 'we adopt the Decision contained in document.... to address other outstanding issues (i.e. based on Annex II, see page 9, *ed.*). We agree that remaining implementation issues should be fully addressed, in accordance with appropriate guidelines to be developed under the work programme we are establishing.' This wording seems to indicate that the 'remaining implementation issues' – i.e. those that would involve the most changes – can only be addressed post-Doha, either through a painfully slow and incremental process such as that achieved in the General Council Special Sessions on Implementation, or through a new round of trade negotiations.

Annex I (immediate action by the General Council) differs little from the proposals made in the July draft and highlighted in Bridges Year 5 No.6, page 4. The draft General Council recommendations for a Ministerial Decision on Implementation in Annex II, or the 'Doha Down Payment', are excerpted on page 9.

## Developing Countries Propose New S&amp;D Agreement

Perhaps in an attempt to balance developing and developed country interests in the WTO's future work programme, a group of twelve developing countries<sup>1</sup> on 18 September proposed four new initiatives on 'non-trade-related' topics to be launched in Doha:<sup>2</sup> the start of negotiations for a Framework Agreement on Special and Differential Treatment; and the establishment of three working groups for the study of the inter-relationship between trade and transfer of technology; trade and finance; and trade and debt.

The proponents of the Framework Agreement on Special and Differential Treatment (S&D) argued that the entire concept underwent a 'dramatic transformation' in the Uruguay Round Agreements. While prior to the WTO, S&D treatment was a recognition of the special problems of *development* faced by developing countries, the WTO Agreements only recognise the special problems that developing countries may face in their *implementation*. This shift had meant, *inter alia*, that there no longer was an underlying assumption that the level of development had a relationship with the level of rights and obligations under the multilateral trading system.

To remedy the situation, the 12 proposed that WTO Members elaborate a 'framework agreement on special and differential treatment', reflecting a different basis for S&D treatment. Among possible treaty elements, they suggested the following:

- Special and differential treatment shall be mandatory and legally binding through the dispute settlement system of the WTO (including notification requirements and inclusion of these commitments in country schedules).
- In any future agreement that the Members may agree, there shall be an evaluation of the development dimension. This evaluation should include the fact as to how these agreements facilitate attainment of developmental targets.
- The Members shall undertake an evaluation of the implications of any future agreement, with respect to implementation costs in terms of financial, capacity building and technical assistance.
- The transition periods shall be linked to objective economic (debt level, level of industrial development, human development index, etc.) and social (literacy and life expectancy) criteria.
- Without an evaluation of the fact whether an industrial policy has a demonstrable adverse impact on trade, there shall be no prohibition of policies which promote growth and development in developing countries.
- The application of the concept of Single Undertaking for developing countries should not be automatic.

## Working Group Proposals

The proposal for technology transfer notes that industrialised countries have not faithfully implemented of provisions in the WTO Agreements that refer to developing countries' access to technology,<sup>3</sup> which has prevented developing countries from fully benefiting from the growth in international trade. The proponents suggest that ministers agree in Doha to set up a working group to assess, *inter alia*, developing countries' technology transfer needs and industrialised countries' implementation of the relevant provisions; identify problems and constraints; and study 'the design of instruments and incentives, including tax incentives, that developed countries could grant to enterprises and institutions

*Continued on page 10*

## China's WTO Accession Deal Finalised

On 17 September, the WTO successfully concluded negotiations on China's terms of membership after 15 years of talks. During the previous week, the much-awaited session of the Working Party settled the last major blocks and cleared the way for Beijing to join the trade body by the end of the year.

The Working Party will now forward some 900 pages of legal text to the WTO's 142 Members. Formal acceptance is expected to take place at the Doha Ministerial Conference. Thirty days after China notifies its acceptance of the agreement, it will legally become a Member of the WTO.

The last two hurdles concerned ownership of life insurance companies and Mexico's phase-out schedule for anti-dumping duties on Chinese goods (Bridges Year 5 No.6, page 8). The latter issue was settled on 13 September. The deal between China and Mexico allows Mexico to keep its anti-dumping measures covering some 1300 Chinese products for six years after China's accession. According to a Mexican statement, the possibility of implementing anti-dumping measures after the six-year period is subject to demonstration of continued Chinese dumping.

## Insurance Impasse Breached

Talks had also been stuck over the enduring issue of foreign ownership in Chinese-based insurance ventures. The US demanded that life insurers already settled in China be allowed to maintain their existing ownership structures in future branches. Although the US remarked that their stand did not endorse any single company's interest, such a provision would have guaranteed New York-based American International Group (AIG) the right to retain 100 percent ownership of its Chinese ventures. The EU had resisted such concessions unless they were extended also to its insurers according to the most-favoured nation principle.

The phrasing used in the revised deal, trade sources said, specified that any concession granted on branching should be automatically extended to all Members, thereby granting to EU life insurers future market access benefits on a par with AIG in the life insurance sector. China in turn reassured the US that its accession would not lead to any reduced market access for US firms already in China (notably the AIG).

## China's Entry Shuffles Cards on the WTO Table

Once in the WTO, China will represent the world's fifth largest trading power after the Quad group (composed of the US, the EC, Japan and Canada). Several analysts conjecture that China's entry will change the balance of forces in the body, adding weight on the side of developing countries. Conversely, easier access to a market of one billion people is widely believed to offset Quad concerns over the stance China might take in the trade organisation.

However, many developing countries with labour-intensive export-oriented economies fear that Northern markets will reallocate their demand toward cheaper Chinese goods, especially in the clothing, textiles and footwear industries, as well as other industrial goods. In an attempt to mitigate the China's expected dominance in global trade in consumer goods, many of them negotiated bilateral agreements with China. Developing countries are also concerned about a diversion of current flows of foreign direct investment from other developing countries following China's WTO accession.

## WTO in Brief

- Apart from access to medicines, the agenda of the September TRIPs Council meeting included the review of implementation of the TRIPs Agreement, geographical indications and review of Art. 27.3(b) concerning the protection of inventions of plant varieties.

Among these, geographical indications sparked the most interest. A group of 17 developed and developing countries is spearheading a move to enlarge the coverage of products protected by geographical indications beyond wine and spirits, the only products that currently enjoy such protection under TRIPs. They seek to do this either in the context of a new round of trade talks or through linking the TRIPs review to the ongoing agricultural negotiations. In the latter context, the European Union in June 2000 tabled a proposal entitled *Food Quality – Improvement of Market Access Opportunities*, which sought, *inter alia*, to 'obtain effective protection against usurpation of names in the food and beverages sector'. The 17 WTO Members who seek a similar goal, circulated a paper responding to questions mainly from the Cairns Group and the US, which are opposed to extending geographical indications protection to such items as Darjeeling tea, Gruyère cheese or Parma ham. Several trade sources said that how to proceed on geographical indications was 'clearly an issue for ministers to decide'.

Ministers could also clear the way forward regarding the review of the TRIPs Agreement, mandated under Article 71.1 but currently stagnating for lack of direction. The only small move on a related issue came from Zambia, which tabled a non-paper in response to questions regarding its earlier proposal for an improved monitoring and reporting mechanism on technology transfer under TRIPs Article 66.2.

Little happened on the review of Article 27.3(b) either, although Australia tabled an interesting paper describing its national experience in protecting biological diversity, traditional knowledge and cultural expression. Otherwise, some Members are starting to show interest in these issues, including disclosure requirements in patent applications involving genetic resources, as advocated in particular by Brazil, India and the Andean Community.

- At an 11 September informal meeting of the Committee on Subsidies and Countervailing Measures, India, Brazil, El Salvador and Jamaica separately submitted four implementation-related proposals ahead of the WTO Ministerial Conference in Qatar in November. While developed countries said they would study them for further discussions, trade officials from the EU, Japan, Canada and the US indicated that the proposals were unlikely to be approved before Qatar. The Committee's report on implementation-related discussions will pave the way to finalising draft Ministerial Decision language regarding amendments to the SCM Agreement (see related article on page 9).
- The Committee for Agriculture held a special negotiating session on 27-28 September. A report will appear in the October issue of Bridges.
- **Rectification:** According to the country's trade diplomats, Pakistan has not – as was mistakenly reported in the July-August issue of Bridges – announced that it will seek an extension for phasing out its investment-related restrictions beyond the two-plus-two formula agreed by the Goods Council on 31 July.



## Excerpts from the Draft Ministerial Decision on Implementation

The excerpts below are taken from Annex II of the draft General Council Decision on Implementation-related Issues and Concerns (see page 7), which contained proposals for recommendations for a Doha Ministerial Decision on these issues.

## The Ministerial Conference

**Textiles:** agrees that the provisions relating to the early integration of products and the elimination of quota restrictions should be effectively utilised.

- agrees to calculate the quota levels for small suppliers for the remaining years of the Agreement by applying the most favourable methodology available in respect of those Members under the growth-on-growth provisions from the beginning of the implementation period; to extend the same treatment to least-developed countries; and, where possible, to eliminate quota restrictions on imports of such Members.
- agrees to calculate the quota levels for the remaining years of the Agreement with respect to other restrained Members as if implementation of the growth-on-growth provision for state 3 had been advanced to 1 January 2000.
- agrees to exercise particular consideration and restraint before initiating investigations in the context of contingent trade remedies on textile and clothing exports from developing countries.
- agrees that Members, without prejudice to their rights and obligations, shall notify any changes in their rules of origin concerning products falling under the coverage of the Agreement to the Committee on Rules of Origin, which may examine them before they are applied.

**Anti-dumping:** agrees that investigating authorities shall *examine with special care* (editor's italics) the initiation of an anti-dumping investigation where an investigation of the same product from the same Member resulted in a negative finding within the 365 days prior to the filing of the application. Unless this pre-initiation examination indicates that circumstances have changed, the investigation shall not proceed.

- recognises that, while Article 15 of the Anti-dumping Agreement (requiring Members to explore 'possibilities of constructive remedies' before applying anti-dumping duties that would 'affect the essential interests of developing country Members', *ed.*) is a mandatory provision, the modalities for its application would benefit from clarification. Accordingly, the Committee on Anti-dumping Practices is instructed, through its working group on implementation, to examine this issue and to draw up recommendations within 12 months on how to operationalise this provision.
- notes that Article 5.8 of the Anti-dumping Agreement does not specify the time-frame to be used in determining the volume of dumped imports, and that this lack of specificity creates uncertainties in the implementation of the provision. The Committee on Anti-dumping Practices is instructed, through its working group on implementation, to study this issue and to draw up recommendations within 12 months, with a view to ensuring the maximum possible predictability and objectivity in the application of time-frames.

- The Committee on Anti-dumping Practices is requested to draw up guidelines for the improvement of annual reviews, and to report its views and recommendations to the General Council for subsequent decision within 12 months.

**Rules of Origin:** agrees that any interim arrangements on rules of origin implemented by Members in the transitional period before entry into force of the results of the harmonisation work programme shall be consistent with the Agreement on Rules of Origin [...]. Without prejudice to the Members' rights and obligations, such arrangements may be examined by the Committee on Rules of Origin.

**SCM:** urges members to apply, where possible, a higher *de minimis* level in countervailing duty investigations of products originating in developing country Members than the levels set forth in Articles 27.10 and 27.11 of the Agreement on Subsidies and Countervailing Measures (these Articles set the overall subsidisation ceilings under which countervailing duties cannot be imposed against developing country products, *ed.*).

- Bracketed paragraphs refer to action to be taken in the light of the work of the SCM Committee on special and differential treatment of developing country Members. This work includes the finalisation of the Annex I decision on Article 27.4 (on developing countries' transition periods for phasing out non-agricultural export subsidies); and a decision on the implementation of Article 27 concerning developing country Members with a small share of exports in import markets and in global trade.<sup>1</sup>

**TRIPs:** directs the TRIPs Council to continue its examination of the scope and modalities for complaints of the types provided for under subparagraphs 1(b) and 1(c) of Article XXII of GATT 1994 (i.e. the so-called 'non-violation' complaints, *ed.*) and make recommendations to the Fifth Session of the Ministerial Conference. The Ministerial Conference agrees that Members, in the meantime, will not initiate such complaints.

**Editor's notes:** the draft Ministerial Declaration proposed that the relationship between intellectual property and access to medicines/public health be addressed in a separate declaration, see page 1.

Draft recommendations on two points regarding agriculture were missing from Annex II in light of work to be completed at the Agriculture Committee's regular session, held just after the implementation draft was released. These points included action on the implementation of the Decision on Least-developed and Net Food-importing Developing Countries, and on the implementation of Article 10.2 of the Agreement on Agriculture (development of internationally agreed disciplines on export credits, export guarantees and insurance programmes).

<sup>1</sup> According to the 19 October 1999 draft Ministerial Declaration, developing countries seek to exempt from SCM disciplines export subsidies granted by developing countries that amount to less than five percent of the product's value, as well as the non-imposition of countervailing measures against developing country exports where these are 'negligible', i.e. count for less than seven percent of the total volume of imports.

## Dispute Settlement Corner

- The United States and Canada have agreed on the issues to be addressed in independent bilateral consultations regarding the nearly 20-year old conflict that opposes them on softwood lumber. In the margins of several ongoing Canadian WTO challenges related to the dispute, the two sides agreed in August to set up a bilateral working party outside the WTO context to 'reach a durable alternative to litigations'.

The working party will examine such issues as Canadian stumpage fees, i.e. a tax on each tree harvested on government land; tenure policies that provide Canadian sawmills with guaranteed amounts of lumber; and laws requiring mills to cut a minimum amount of wood. According to the US lumber industry, all three policies amount to government subsidies to Canadian foresters and processors. On the basis of a preliminary Commerce Department finding, the US currently applies a 19.3 percent countervailing duty to Canadian lumber exports, and Canada has requested 'accelerated consultations' on the issue at the WTO. The final Commerce determinations are due in December.

- At press time, the US still had not announced whether it would appeal a 21 August compliance report, which found that its Extraterritorial Income Exclusion Act (ETI) violated the WTO Agreement on Subsidies and Countervailing Measures (SCM Agreement). The ETI replaces earlier legislation on foreign sales corporations (FSCs), which the Appellate Body confirmed in February 2000 provided SCM-illegal export-contingent tax benefits American companies. Last August, the European Union won its challenge of the US implementation of that ruling, alleging that the replacement legislation ran as foul of WTO rules as the original FSC regime. A decision to appeal must usually be announced within 60 days of the issuance of the ruling.

The EU has agreed to hold off a sanctions request until the appeals process is complete. It has estimated the financial damage suffered by Member economies at US\$4 billion, a sum that easily dwarfs any previous sanction awards. Once the substantive litigation is terminated – and if the compliance panel ruling is upheld in favour of the EU – the US is likely to ask the WTO to arbitrate the amount of the sanctions. In view of the enormous sum involved, the two sides may also attempt to negotiate a solution rather than go the route of trade retaliation.

- The Dispute Settlement Body confirmed the appointment of three new Appellate Body Members in 25 September 2001. Luis Olavo Baptista (Brazil), John S. Lockhart (Australia) and Giorgio Sacerdoti (EC) will replace Claus-Dieter Ehlermann (EC), Florentino Feliciano (the Philippines) and Julio Lacarte-Muro (Uruguay), whose terms of office expire on 10 December 2001. The four continuing members in the complement of seven are: J. Bacchus (US), G. M. Abi-Saab (Egypt), A. V. Ganesan (India), and Y. Taniguchi (Japan). The appointments were made according to the Dispute Settlement Understanding (DSU), which stipulates that the AB shall 'comprise persons of recognised authority with demonstrated expertise in law, international trade and the subject matter of the WTO Agreements generally.' The DSU also requires the Appellate Body to be broadly representative of the WTO membership.

## Implementation, continued from page 7

in their own territories in order to disseminate and transfer technology to developing countries.'

While debt and financing are usually the bailiwick of the World Bank and the International Monetary Fund, the 12 countries proposed that the WTO should get involved in these areas in order to ensure that developing countries 'genuinely benefit from further liberalisation.'<sup>4</sup> The working group on debt should study, *inter alia*, the implications of debt on the capacity of developing countries to take advantage of trade liberalisation and suggest 'remedial measures and appropriate flexibilities [...] to ensure that once a country is faced with a specific level of debt, it should not be required to implement particular agreements including maintenance of market access under GATT and GATS.' The working group should also analyse the relationship between the debt burden of developing countries and flexibility for imposition or maintenance of export restrictions under GATT and GATS; and establish debt thresholds beyond which augmented special and differential treatment provisions would automatically become operative.

The trade and finance proposal calls on WTO Members to focus, *inter alia*, on such issues as institutional measures that need to be taken to facilitate greater and more effective developing country participation in WTO proceedings; 'new conceptual and substantive approaches to multilateral agreements involving developed and developing countries [...] to provide a different notion of "level playing fields", based on recognition of their different objective circumstances'; a 'more coherent framework in the fields of both trade and finance with the recognition of diversity of appropriate policies based on diversity of levels of development and national situation'; mechanisms under the umbrella of coherence to alleviate the situation of countries damaged by financial instability, particularly exchange rate instability; and a multilateral surveillance system both to coordinate macroeconomic policy and to ensure that these policies were compatible with the requirements of development policy.

\* ICTSD's work programme in relation to the issues above focuses on special and differential treatment, competitiveness and technology. For more information, contact Ricardo Meléndez-Ortiz at (41-22) 917-8492, e-mail: [rmelendez@ictsd.ch](mailto:rmelendez@ictsd.ch).

## ENDNOTES

<sup>1</sup> Cuba, the Dominican Republic, Honduras, India, Indonesia, Kenya, Malaysia, Pakistan, Sri Lanka, Tanzania, Uganda and Zimbabwe.

<sup>2</sup> The Singapore Ministerial in 1996 created three working groups perceived to pursue industrialised country interests, i.e. investment, competition policy and government procurement. The EU and Japan are leading a push to negotiate new WTO disciplines in these areas in the comprehensive round of multilateral trade talks they seek to launch in Doha.

<sup>3</sup> In particular, GATS Article IV.2; TRIPs Articles 7, 8 and 66.2; TBT Agreement Preamble; and SPS Agreement Article 9.1.

<sup>4</sup> Preparations are currently underway for a UN Conference on Financing for Development, scheduled for March 2002, which is to address 'national, international and systemic issues relating to financing for development in a holistic manner in the context of globalisation and interdependence.' Debt and trade are on the conference agenda, as is 'enhancing the coherence and consistency of the international monetary, financial and trading systems in support of development'. While the World Bank and the IMF have already defined how they will contribute to the meeting's preparation, the WTO has remained on the sidelines.

## Developing Country Participation in Multilateral Trade Negotiations

By Sheila Page

Developing countries and their interests were largely absent from GATT negotiations before the Tokyo Round. Temperate agriculture was effectively excluded; many tropical agricultural products had special or long-term trading arrangements; clothing and textiles were covered by the Multi-Fibre Arrangement (MFA) and its predecessors from the 1950s; and many developing countries had special trading relationships with the ex-colonial powers, which gave them better than the MFN treatment offered by the GATT and thus no incentive to participate in GATT negotiations. Most developing countries considered UNCTAD more important than the GATT for information and representation, and their relations with traditional trading partners more important than the GATT for securing market access for their exports. The exception was on specifically 'developing country' issues. India, for example, had led the successful pressure for the addition of Part IV (1966) to the GATT Agreement which effectively allowed them to maintain their own policies to protect or direct trade.

By the time of the Tokyo Round (1973-79), some developing countries were already moving into manufactures and starting to see advantages from negotiations, although commodities remained dominant in most countries' exports. Nevertheless, negotiations during the Round were very much based on EU-US leadership, united in supporting the continued exclusion of temperate agriculture; and the few developing countries which were exporting manufactures were only starting to face non-tariff barriers. Most were still eligible for preferences. 'Voluntary' export restraints had started to spread from the original target, Japan, to the more advanced developing countries during the 1970s, and the restrictions on clothing exports were starting to become important, but most developing countries, while facing potential barriers, were either not increasing their exports or diversifying into still uncontrolled sectors. The Tokyo Round conclusion, like all preceding Rounds, allowed 'plurilateral' arrangements, with countries able to choose which they joined, and thus allowed developing countries to remain outside the negotiations on rules.

### Uruguay Round: Asian and Latin American Participation

By the beginning of the Uruguay Round, the position of the developing countries was very different from 1973: trade was more important in their economies; many were changing from an internally orientated strategy to an external one, so that access for their exports had become essential for their development strategy. Some countries were already committed to changing from an inward to an outward-orientated approach to development at the beginning of the Round, and others moved (or were pressured to move) increasingly to this position during the difficult economic conditions of the late 1980s. If export-led growth was the right strategy, then obstacles to trade were not merely inefficient; they were major constraints on development.

Their own trade was becoming significant in world markets: about a quarter of the total, so that other countries wanted access to them (and felt threatened by competition from them: they were providing an eighth of manufactured exports at the beginning of the round and more than a fifth by the end). And just as some

developing countries, as exporters of manufactures, were now interested in traditional GATT business, developed country trade interests had also changed. The US, eventually followed by the Cairns group, put agriculture back on the agenda.

Although the Round was started on the initiative of the United States, which wanted to open services and agriculture, some developing countries also had specific policy objectives: to remove the restraints on their trade from the exclusion of agriculture and from the MFA. The success of the most advanced had brought them up against both existing and new trade barriers.

**As governments acquire national capacity for trade policy, they may be less likely to conform to a 'developing country position'.**

In the meeting to launch the Round, the basic developing country position was opposition to any change in services or rules, and to any trade liberalisation by developing countries. Positions were taken either by the leading developing country participants, India and Brazil, or more formally by the G77. These were based on the traditional inward-looking, active national trade policy approach, and therefore on distrust of any international intervention or rules. The most significant sign of a more considered and active approach to participation was the emergence of different groups of developing countries, with different interests, most notably on textiles and agriculture. Both had to take account of important divisions: between the MFA quota-bound countries and those not bound, and between food exporters and importers, who benefited from subsidised developed country food. These negotiations followed very different patterns, and offer two new models for developing country participation.

### From a United Position to Interest-based Negotiations

The MFA negotiations were led by developing countries, and had the advantage of including their generally recognised leader, India, and another already active participant, Bangladesh. Here the two interests operated as a bloc. Quota and non-quota countries settled their differences before negotiating with the importers. The final settlement allowed sufficient time for any non-quota exporters whose advantage had been initially in simply being not protected to develop alternative exports and/or to find ways of exploiting its advantage as an existing, experienced exporter and thus to protect its position. There were efforts by some developed importers to mobilise opposition to reform from the potential losers (the non-quota-bound like Bangladesh), but the developing countries preferred to ally themselves with other developing countries. Success can thus be attributed to strong leadership, an acceptable compromise on interests, and good negotiating tactics.

On agriculture, however, the emergence of the Cairns Group brought new non-major country interests in and provided a group for developing countries to join. Although Australia and Canada led, Argentina and Brazil were important participants, and were particularly active in preventing an EU-US-brokered settlement in 1990. The participation of developing countries was therefore very different from the pattern in the clothing and textile negotiations, or in all previous negotiations about 'special and differential treatment' for developing countries were no longer operating as a group, and some were on opposing sides.

*Continued on page 12*



*Developing Country Participation, continued from page 11*

Food importers supported, and were supported by, protectionist developed countries which provided them with cheap food. For the exporters, it was clearly a successful strategy; for the importers, it failed: a provision to help food-importing countries was included in the Agreement, but without means of implementation. It is not clear whether an alternative, MFA-like, strategy of trying to find an intra-developing country compromise would have been available for agriculture: the food importers were smaller, weaker negotiators, often aid-dependent, while the Cairns Group was more tied to a rigid pro-liberalisation position, without (at this time) concessions to countries that wanted time to adjust or sympathy for countries dependent on subsidies. In contrast, the leaders of the textile and clothing negotiations included India which still regarded itself as speaking for all developing countries, not simply protecting its own interests, and may have modified its policies accordingly.

On services, too, there was a move from a united position to interest-based differences. As a group, developing countries initially opposed any inclusion of services in the GATT (reflecting Indian and Brazilian policies of a highly protected domestic sector), but the long duration of the Round gave time for some countries to identify their own advantages (this became even more marked in the run-up to Seattle and in the services negotiations in 2000-1). After the initial opposition at Punta del Este, there was no unified developing country position for or against services negotiations.

Thus on a few individual items, the Uruguay Round brought significant benefits for some countries. But by the end of the negotiations, many of the preferences available to developing countries had been eroded by cuts in the MFN (general) tariff rates, especially in manufactures. The outcome of the negotiations for the first time included major commitments by the developing countries: all the Latin American and most of the Asian countries not only bound their tariffs, but lowered them. The negotiations were extended to services, and again the Latin American and more advanced Asian countries made significant commitments. In contrast, African countries made very limited commitments, with offers effectively limited to binding some existing tariffs and rules.

The Uruguay Round resulted in a substantial number of rules in new areas, most conspicuously on intellectual property, but also on technical areas like customs valuation and policy areas such as anti-dumping and the use of subsidies. These were for the first time applied to all developing countries because of the 'single undertaking': the decision that all the agreements should be considered as a package and be accepted by all Members.

Various estimates were made after the end of the Round of the economic effects on developing countries. While the numbers vary, the general conclusion was that those who had gone into the Round with clear objectives had gained at least part of these, with acceptably low costs in concessions to other countries. The Latin American countries had gained access on manufactures and agriculture; the Asian, access on textiles and clothing. These more than balanced their concessions on tariffs and losses of preferences. Strengthening the rules on conventional trade and their enforcement benefited all developing countries. Some modifications of the rules to take account of their interests exceeded expectations, for example on subsidies and customs valuation. The services agreement was assumed to be mainly a consolidation of existing rules, rather than liberalisation; the only change here was a 'gain' from certainty of access, and some transparency. The intellectual property and anti-dumping agreements were expected to be on balance negative for most developing countries.

**Emergence of African Interests?**

The group which had none of the advantages from these changes, but all the disadvantages, was Africa. It had high existing preferences and therefore little to gain from improved access, and much to lose, on relative access and costs of implementation. It was also the area still more like the developing country average of the 1950s and 1960s: low shares of trade in countries' economies, low share of world trade, and a concentration on traditional products. Therefore it is not surprising that the rule which had held pre-1980, that developing countries had little to gain from negotiations, appeared still to hold for Africa in the 1990s. But the gains for others made Africa's failure to gain more obvious and resented, and the obligation to accept the agreements on the rules was new.

Since the Uruguay Round, in the absence of negotiations and bargaining, the formation of alliances has been less evident. There are two conflicting influences: international and traditional pressures to accept that there are 'developing country' interests, reinforced by the international exchange of information and opinions about the outcome of that Round (the G-77 model), and, against this, increasing national pressure for countries to research and consult to identify their specific national interests, accepting that these may differ from other developing countries and that some developed countries may be more appropriate allies (the Cairns Group model).

Pre-Seattle, the former prevailed: the traditional groups like the G-77 met, and issued agreed positions. The proposals which developing countries put forward for the agenda, however, showed differences in emphasis on the inclusion of investment or competition or the importance of changes to the rules. At the Seattle Ministerial, there were no negotiations, and thus no required choices. However, a general developing country interest in more transparency and more participation gained ground.

Post-Seattle, some new coalitions are getting stronger. The Caribbean has a Regional Negotiating Machinery and Small Island Developing States have formed an informal group. The Africa Group (all Africa, cutting across the various regional trade and other groups), which started to meet in the run-up to Seattle, has spearheaded access to medicines and biodiversity-related issues. South Africa and Egypt have joined Brazil and India as recognised leaders among developing countries. It is also notable that the statements rejecting the legitimacy of the Ministerial procedures in Seattle were not made by the developing countries as a group, but by developing regions, and one of these was Africa.

But changes at national level may bring an even greater transformation. In the Uruguay Round, in the absence of identification of issues and interests at the national level, country positions were defined by the delegations in response to international stimuli, rather than by national governments in response to national pressures. Smaller countries accepted leadership by the major developing nations: these were the only 'pressure' group operating on them. But the increased interest in the outcome of negotiations has meant new policy-making at national level. As more countries acquire national capacity for trade policy, delegations with a clear mandate from their local government, perhaps in consultation with economic or other interests, might be less likely to conform to a 'developing country' position. The role of traditional alliances may diminish.

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## Sustainable Development Angles to the Swordfish Dispute

By Markus Gehring

At first, the *EC – Chile Swordfish Dispute* appeared as two completely different cases. One was initiated before the WTO against provisions in Chilean Fisheries Law that prohibited port entry of EU vessels carrying swordfish. According to the European Communities, this restriction violated GATT Article V on the freedom of transit and GATT Article XI, which prohibits quantitative restrictions. The other case was filed by Chile in a special Chamber of the International Tribunal of the Law of the Seas (ITLOS) in Hamburg. Chile alleged that the EC's swordfish fishing practices violated UN Convention on the Law of the Sea (UNCLOS) Articles 116 to 119 on the conservation of living resources in the high seas, as well as UNCLOS Article 64 on the failure to co-operate with the coastal state in case of highly migratory species.

The underlying issue in these international charges was identical. Large trawlers from countries of the European Union fished swordfish right outside Chile's Exclusive Economic Zone. The by-catch consisted of sharks, turtles and other endangered marine species. While Chile adopted conservation measures aimed at protecting not just of the species but also of traditional fishing methods, European vessels wanted to unload their fish in Chilean ports for transshipment to the United States.

The dispute has come to an end for the time being. The ITLOS special Chamber has suspended proceedings in the *Case concerning the conservation and sustainable exploitation of swordfish stocks in the South-Eastern Pacific Ocean* until 1 January 2004.<sup>1</sup> The process for the constitution of a WTO panel on *Chile – Measures affecting the transit and importation of swordfish* has also been suspended.<sup>2</sup> Both disputes were put on hold after Chile and the EC reached an 'arrangement' on 25 January 2001.

While much of the legal debate that arose from the dispute<sup>3</sup> has already been laid out in Bridges,<sup>4</sup> some questions remain. From an international sustainable development law perspective, three aspects are particularly challenging.

- First, does the EC-Chile 'arrangement' constitute a new form of addressing trade and sustainable development disputes? This arrangement potentially provides a precedent-setting alternative to the EU's attempt to 'forum shop', i. e. to search for the dispute settlement mechanism that best suits its interests.
- Second, how does the legal principle of *good faith* – as laid out in UNCLOS Article 300, for example, and particularly in light of the UN Straddling Fish Stocks Agreement<sup>5</sup> – affect the substantive case?
- And third, does the precautionary principle as expressed in UNCLOS, as well as in the WTO, provide a viable solution to the dispute?

### Amicable Solutions: a Defence against Forum Shopping?

The EC-Chile 'arrangement' was reached in the context of an economic co-operation agreement between the parties. There thus was strong motivation for finding an amicable solution, something

often lacking in trade and sustainable development disputes. Mutually agreed solutions are at the heart of sustainable development, which calls for more and deeper co-operation and integration of conflicting interests.<sup>6</sup> In environmental matters, in particular, there often is a strong obligation for international co-operation.<sup>7</sup>

The temptation to search for the most appropriate dispute settlement mechanism, a frowned-upon phenomenon known as 'forum shopping' in International Private Law,<sup>8</sup> is very high. Several



high-profile cases involving trade and sustainable development disputes have been settled in the GATT or later in the WTO. In its report to the 1996 WTO Ministerial Conference, the Committee on Trade and Environment called upon WTO Members to develop procedures regarding disputes over trade measures taken pursuant to a multilateral environmental agreement (MEA).

As the UN Convention on the Law of the Sea is one of the few MEAs to provide a functioning dispute settlement mechanism, it seems clear that this case should have been solved under it. In practice, however, WTO Members have shown a preference for the trade body's Dispute Settlement Understanding when it is in their commercial interest. The swordfish dispute is only an addition to a series of GATT/WTO cases that – despite all their particularities – have dealt with marine resources.<sup>9</sup> This might indicate that, especially with regard to the marine environment, the relationship between MEAs and WTO needs to be clarified.

In the swordfish dispute, a spirit of co-operation, and possibly some economic interests, made an arrangement possible. Chile and the EC agreed to create a Bilateral Scientific and Technical Commission which, among other duties, will evaluate the state of stocks and monitor fishing trends, identify research priorities and draw-up necessary programmes, including data collection. This commission will also advise on possible conservation measures, including by-catch regulations. Four vessels of each party are allowed a maximum catch of 1000 tonnes per year.

An international agreement on the conservation of swordfish shall be initiated, and the WTO and ITLOS disputes shall be suspended under the condition that the terms of the arrangement are followed. This last clause is particularly interesting because it substitutes the otherwise lacking compliance. This could also be seen as a viable model for developing countries to address conservation issues.

While the arrangement should be welcomed because potentially conflicting judgements in different fora were avoided, it bears the danger that issues of interest to the broader international community are redirected into bilateral accords. One of the achievements of the 1992 UN Conference on Environment and Development was to call for co-operation on all levels. Therefore the parties to this 'arrangement' should put a special emphasis on the terms that call for an initiative for an international swordfish conservation agreement or, even better, ratify the existing UN Straddling Fish Stocks Agreement.

*Continued on page 10*

*Swordfish, continued from page 13*

### **Good faith**

The principle of *good faith* is a fundamental part of almost every legal system and of international law, meaning in general that every obligation has to be fulfilled in a way that the contracting partner could reasonably expect. To describe it negatively, it stands against the abuse of rights. It is expressed in UNCLOS Article 300:

#### *Good faith and abuse of rights*

States Parties shall fulfil in good faith the obligations assumed under this Convention and shall exercise the rights, jurisdiction and freedoms recognized in this Convention in a manner, which would not constitute an abuse of right.

Both parties based part of their challenge in the ITLOS case on Article 300. The EC maintained that a unilateral measure of Chile would violate good faith and Chile claimed that the EC with its fishing of a straddling stock migrating between different coastal zones and the high sea violated not only Article 300 but also the 'general thrust' of the UNCLOS. Chile's position appears to be the strongest on this particular point. It is backed by the 1995 United Nations Agreement for the Implementation of the Provisions of the Convention Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks.<sup>10</sup> The Agreement allows in Article 23.3 that

[s]tates may adopt regulations empowering the relevant national authorities to prohibit landings and transshipments where it has been established that the catch has been taken in a manner which undermines the effectiveness of subregional, regional or global conservation and management measures on the high seas.

Unfortunately, the Agreement is not yet in force and Chile has not even signed it. The EC, however, has.<sup>11</sup> While this makes it impossible for Chile to invoke the rules of the Straddling Stocks Agreement, the EC has to 'refrain from acts which would defeat the objectives and purpose of the treaty' (Article 18 Vienna Convention on the Law of Treaties). This seems to indicate that the EC was more likely to violate the good faith obligation.

### **Precaution**

The last general question with a strong sustainable development dimension touches on the precautionary principle. Consensus is still lacking on it being a general, i.e. legally-binding, principle of international law, though strong arguments exist.<sup>12</sup> However, in this case we are dealing with two legal regimes which have, to some extent, both recognised the precautionary principle.

With regard to requests for provisional measures in the *Southern Blue Fin Tuna* cases,<sup>13</sup> the ITLOS ruled that 'the parties should in the circumstances act with prudence and caution to ensure that effective conservation measures are taken to prevent serious harm to the stock of Southern Bluefin tuna.'<sup>14</sup> The tribunal did not *expressis verbis* name the precautionary principle as the reason for its order, but the mention of prudence and caution strongly suggests its influence. One could argue that as the ITLOS only dealt with provisional measures, there was no need to invoke the precautionary principle because for provisional measures prudence and caution are inherent. While this is true in a general context, in this specific dispute Japan, Australia and New Zealand had no consensus on whether there was scientific proof of danger for the fish stocks. This indicates that the judges were aware of the precautionary principle.

The situation in the WTO is similar. While the Appellate Body has already ruled that the precautionary principle is inherent to some provisions in the SPS Agreement,<sup>15</sup> it did not recognise the principle's general effectiveness.

There were some scientific uncertainties in the *Swordfish dispute*, namely the state of the stocks, the amount that can be fished sustainably and the avoidance of by-catch. Although these questions are currently addressed by the Bi-lateral Scientific and Technical Commission (BSTC) set up under the EC-Chile arrangement, the invocation of the precautionary principle could have helped the development of a legal solution to this case.

In such a scenario, Chile would have to prove, both at the WTO and the ITLOS Chamber, that there is scientific uncertainty about the different questions (however, the invocation of precaution in the WTO in order to justify a unilateral measure under GATT Article XX would involve further problems<sup>16</sup>). That rather difficult task fulfilled, the burden of proof shifts, leaving it to the EC to show evidence that its activities do not endanger the situation of the stocks. Precaution can therefore be a powerful tool to address sustainable development concerns in a legally sound way. The action that both parties have taken in the January arrangement may lead to the same result because the BSTC is called upon to resolve the scientific questions. Additionally, the precautionary approach appears as a principle in Article 6 of the UN Straddling Fish Stocks Agreement.

### **Conclusions**

Legal scholars tend to be careful about drawing general conclusions from a particular case. But if a general conclusion can be drawn from the provisional settlement of the swordfish dispute, it is that in the absence of a coherent global legal regime for sustainable development, more amicable arrangements are needed in most cases. Especially when different fora are available for the solution of the dispute, an arrangement should be seen as preferable to taking disputes involving trade to the WTO with its relatively effective dispute settlement mechanism. This is even more true in disputes that involve developing countries because the danger of economic pressure can never be excluded. But bilateral arrangements are still to some extent unsatisfactory. In view of the WTO Doha Ministerial, and the World Summit for Sustainable Development in Johannesburg only ten months later, countries – helped by civil society involvement and support – have an opportunity to reach a more coherent global legal regime for sustainable development.

The principle of good faith is a rather broad, but very common principle. If an international consensus exists in the form of a signed international agreement, its clear violation should be considered as an abuse of rights. As seen above, precaution can provide a viable solution to disputes that involve scientific uncertainty. The precautionary principle is already so well interpreted in many countries' *domestic* legal regimes that further international application should be discussed. As no one doubts the existence of the principle of good faith, which has different concretisations, the same could be valid for the precautionary principle. The WSSD could confirm this principle and the WTO could in Doha start to negotiate its inclusion in the treaties.

*Markus Gehring is the first ICTSD-CISDL Legal Fellow. He wrote this article in co-operation with Jorge Cabrera Medaglia, CISDL Commission Member. (For endnotes, please see page 18).*

*Continued on page 18*



## Mercosur and the Andean Community Seek Safety in Numbers

By Mauricio López Dardaine

The recent IMF approval of an agreement on behalf of Argentina had an unusual string attached to it: acceleration of negotiations between Mercosur and the United States. While ripples of the Black Tuesday of 11 September may somewhat affect the timetable of such talks, if Mercosur supports the US in the coming struggle – as it most likely will – negotiations may gain in strength rather than be weakened. It is early days yet to assess the full impact on these rounds. What is more certain is that the Free Trade Area of the Americas (FTAA), because of its broader scope, is here to stay (see related article on page 16).

The framework of this US/Mercosur agreement, hailed by some local newspapers as a child of the IMF/Argentina negotiations, was actually created back in 1991, together with the very Treaty of Asunción which launched Mercosur. It had been dormant for over a decade, and was resurrected during the last Mercosur Summit, held in Asunción, Paraguay, in June 2001.

If carried to a successful conclusion, these talks entail acceleration of the whole FTAA process. Why? Simply because they involve two key players: Brazil and the US. This is the crux of the matter, no more, no less.

### New Momentum for Mercosur-CAN Integration

If the Buenos Aires and Quebec FTAA meetings made Mercosur and the Andean Community (CAN)<sup>1</sup> – both active FTAA negotiation participants – very much aware of the fact that sand was running low in the upper container of the hourglass, this new twist of fate ought to confirm that strategic collective appraisal.

Thus, from 22-24 August, Mercosur and the Andean countries sat down in Montevideo for what we might call ‘a second chance at economic integration’. Between May 1966 and March 1999, Mercosur and CAN conducted an exhausting series of rounds of negotiations with a view to creating a free trade area among the nine countries involved, on the basis of block to block talks. Ingenuity and diligence were deployed. However, in February 1999 it became clear that no end was in sight, and the process miscarried.

What were the reasons for this failure? Among the main issues upon which Mercosur and CAN were unable to reach an agreement was the relative importance each attributed to the Patrimonio Histórico or the actual preferences included in the series of bilateral agreements between the individual Mercosur and CAN members. CAN claimed, rightly, that these preferences were essential in order to sustain their exports, and therefore wanted them extended at the highest level granted to any individual CAN country, whereas Mercosur was far more interested in concessions for new products.

Another issue was that CAN unilaterally banned all their agricultural products tariff positions as far as the negotiation was concerned. The different rules of origin each block wanted to apply were another point of friction. But there was an over-riding element that could have swept all these discrepancies away, had it been used to the extent that it should have: political backing at the highest level of each of the nine governments involved. Although a very important ministerial meeting held in Montevideo in early 1998, put the issues above into clear perspective and gave realistic new directions, the commitment was not strong enough.

If we are to make the same mistakes again, there is little likelihood that Mercosur and CAN shall come to terms by the end of 2001.

What are the consequences facing CAN and Mercosur if they fall short of their chosen goal ?

CAN is an innovative integration process that saw the light of day in the late sixties. Mercosur is of a younger breed. Although the Asunción Treaty was signed in March 1991, the process itself started between Argentina and Brazil during the mid-eighties.

Both blocs have had time to reach the inner limits of commercial growth. Mercosur actually did it so fast – between 1991 and 1997 – that the rhythm created a great deal of commercial turmoil, especially between Argentina and Brazil, which came to a head when Brazil devaluated the real on 13 January 1999. At the root of this continuing friction is the lack of a body to rule on trade conflicts, which then become unmanageable and require presidential-level intervention. Up to this day, however, Brazil has been most reluctant to discuss the establishment of such a body.<sup>2</sup>

So, on the one hand, there are two blocks that have almost reached their limits of internal commercial growth. On the other hand, Mercosur must take steps towards some form of conclusive conflict management without delay. In this respect, its present crisis may be helping Brazil to see things the right way. CAN, we feel, suffers maybe from an excess of formal institutions, and appears to be the very opposite of Mercosur in this respect. One would say both need some effective redressing of the structural maladies they are suffering from, probably working in opposite directions.

At the same time their main growth problem remains the fact that they have been almost unable to effectively export to the world a significant part of their GDP. Argentina and Brazil scarcely export nine percent of their respective GDPs. Both countries are thus unable to escape their present predicament. This implies Mercosur as a whole is in a tight spot. And indeed it is.

So, outward growth appears to be the name of the game. One available road is that of the FTAA. But the FTAA spells grave risks as well as opportunities. If none of the nine countries we are talking about, not even Brazil, can face the US on its own, how could countries the economic size of Ecuador or Paraguay?

### Despite Differences, Hope Prevails

There are centrifugal forces at work within both CAN and Mercosur, but sense seems about to prevail. So even if it was apprehension, above all, that spurred the countries assembled in Montevideo last August, there is little doubt that all of them must be evaluating the high risk of failure. And as we tend to be spirited in our decisions, even if decisions are made for the wrong reasons, we have a certain degree of hope as to their outcome.

Indeed, many of the concerns expressed above were a significant part of the negotiations between CAN and Mercosur, including the talks that took place in August.

*Continued on page 16*

## US-Mercosur Four-Plus-One Talks Start

The first meeting of the 'four-plus-one' talks between Mercosur and the United States that Mauricio López Dardaine credits with spurring further integration between Mercosur and the Andean Community (see previous page) was held on 24 September in Washington. Trade ministers of the five countries vowed to unite in their efforts to launch a new WTO round at the Doha Ministerial, as well as to 'redouble' efforts to ensure the successful conclusion of the Free Trade Area of the Americas no later than January 2005.

'We, the Ministers Responsible for Trade of the United States and the Member States of Mercosur – Argentina, Brazil, Paraguay and Uruguay – met on September 24, 2001, in Washington, D.C., under the auspices of the 1991 Rose Garden Agreement. Recent events have crystalized for us the importance of a strong trade relationship among our countries in order to encourage economic growth. In this time of crisis, we recognize, as we did in 1991, the importance of promoting an open and predictable environment for trade and investment and the significant role this plays in fostering economic growth and development. We also recognize the importance the economic environment plays in the consolidation of the democratic institutions we cherish. We are determined to build on the foundations of the Rose Garden Agreement in facing the challenges ahead.'

'We note that in 1991 we agreed to work toward the conclusion and implementation of the Uruguay Round. Today we resolve to use the Rose Garden Agreement as a means to unite in our efforts to launch an ambitious new WTO round at the Doha Ministerial in November of this year. We pledge to work together in pursuing a market-oriented agricultural trading system and to open markets for agricultural products that are so important to our economies. We also agree to redouble our efforts to ensure the successful conclusion of the Free Trade Area of the Americas no later than January 2005.'

'The FTAA is a crucial part of the hemispheric effort, centered in the Summit of the Americas, to create a region of democracy, economic growth and prosperity, and the rule of law. In addition, we have decided to reinvigorate the Council on Trade and Investment established by the Rose Garden Agreement. It will carry out a work program, which will allow us to pursue our goal of free trade and in the immediate term to explore ways to contribute to economic growth and sustainability through better market access. In order to carry out a program of work in areas of mutual interest, we have established working groups in the areas of agricultural trade, industrial trade, investment development and electronic commerce.'

'In order to prepare for this meeting and ensure the success of subsequent meetings of the Council on Trade and Investment, we have each appointed a Four-Plus-One coordinator. We have directed our coordinators to carry out the work program we have decided upon today.'

'To that end, we agreed that the Council on Trade and Investment will meet toward the end of the current year. At that meeting we will review progress in the WTO, coordinate our FTAA efforts in support of this crucial phase of negotiations, and agree on measures to deepen our trade relationship in specific areas and overall.'

'We are firmly committed to pursuing free trade through the launch of the next WTO round, the completion of the Free Trade Area of the Americas and the removal of impediments to trade and investment flows through the work of the Council on Trade and Investment.'

*Mercosur and the Andean Community, continued from page 15*

For instance, with regard to dispute settlement, the meeting's proceedings state that 'the delegations decided that the subject of dispute settlement should be dealt with in parallel to the plenary sessions. In this framework, the delegations presented and defended their proposals, and exchanged views with special reference to those issues where opinions diverge.

These differences are related, essentially, to the following matters:

- Scope of application, specially with regard to nullification and impairment provisions and whether non-violation cases should be taken into consideration;
- Possibility of choosing between the regional forum (MS/CAN) and that of the WTO;
- Stage at which a panel would be involved;
- Whether the members of the panel should be magistrates themselves;
- Stage of consultations or direct negotiations between parties;
- Enforcement criteria regarding compensations and the possibility of taking varying development levels into account while devising measures;
- Third parties' participation within the dispute settlement process.'

What all this shows is that the experiences of the recent past have made the negotiators within both CAN and Mercosur aware of the need to have sound mechanisms to make sure agreement can survive trade disputes. And this is a step in the right direction.

Last but not least, the fact that specific dates for a total of three additional meetings have been agreed to between both blocks,<sup>3</sup> means to those with some experience in this kind of negotiations, that there is a will to secure an Agreement before the end of this year. To be ready by May 15, 2002, when Market Access negotiations of the FTAA are bound to begin.

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## ENDNOTES

<sup>1</sup> CAN, Comunidad Andina de Naciones – former Pacto Andino – is a sub-regional pact between Bolivia, Colombia, Ecuador, Peru and Venezuela. All of these countries are, just as Mercosur members Argentina, Brazil, Paraguay and Uruguay, part of the ALADI – Asociación Latino Americana de Integración (Tratado de Montevideo 1980. Other ALADI members include Chile and Mexico. Cuba is a recent addition.

<sup>2</sup> On September 13, 2001, Cavallo in Argentina – present Minister of Economy – and Lampreia in Brazil – former Minister of Foreign Affairs – made separate declarations regarding the need to make an honest assessment of these strong discrepancies within Mercosur. Cavallo is in favour of some sort of compensating monetary mechanism (rate of exchange band such as the EU used to have before the Euro came of age) and an effective dispute settlement body. Lampreia, on the other hand, pointed out that Mercosur must consolidate its internal free trade area before it can give any thought to actually advancing towards a customs union. And we feel both, in their separate ways, are right.

<sup>3</sup> These meetings will take place in: Lima from October 17 to 19; also in Lima on November 5 and again on the week of November 26, this time in Montevideo.

## African Preparatory Meetings in the Run-up to Doha

African preparatory meetings towards the fourth WTO Ministerial Conference (9-13 November, 2001 in Doha, Qatar) have sought to define common negotiating objectives among and between regional economic groups. While the meetings have come up with agreed positions on implementation concerns, African countries' response to calls to launch a new round of multilateral trade negotiations in Doha has been more mixed.

Access to medicines to combat communicable diseases prevalent in developing countries has united African countries. They have taken the lead in pushing for an unambiguous ministerial statement in Doha that nothing in the Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPs) prohibits measures taken to provide access to medicines at affordable prices and to promote public health and nutrition. In their regional meetings, African ministers also called for a moratorium on dispute settlement proceedings in cases that involve TRIPs provisions and public health. Some also stressed the need for protection of traditional knowledge in the context of intellectual property rights.

### LDC Trade Ministers' Meeting in Zanzibar

Solutions to implementation issues – ie., developing countries' demands for a better balanced trade regime – are a crucial element within African preparations. Meeting from 22-24 July 2001 in Zanzibar, trade ministers of the world's least-developed countries (LDCs) addressed implementation as a separate category of a Development Agenda, alongside market access, the 'built-in agenda' and 'new issues'. Specific implementation proposals focused, *inter alia*, on agriculture, subsidies, services, sanitary and phytosanitary measures and technical barriers to trade, textiles, TRIPs, antidumping measures and safeguards. Ministers called for immediate implementation of bound duty-free and quota-free access for agricultural exports originating in LDCs, covering all products in their primary, semi-processed and processed forms. They also said that LDCs should be exempted from the disciplines of the Agreement on Trade-related Investment Measures (TRIMs).

With regard to their participation in a new round, ministers stated that the scope of future negotiations would have to take into account least-developed countries' inability to 'participate effectively in negotiations on a broad agenda and implement new obligations due to the well-known limited capacity of LDCs'. They recommended that study processes continue in the 'new issue' working groups, i.e. on investment, competition policy and government procurement, prior to deciding whether to formally introduce any of these issues in a future negotiation agenda. LDC ministers also said that the current work programme of the Committee on Trade and the Environment should be extended to emphasise a prohibition on the use of environmental considerations for protectionist purposes against LDC products.

### OAU-ECA African Trade Negotiators Preparatory in Addis

Implementation also appeared as a separate agenda item in the conclusions and recommendations of the Organisation of African Unity (OAU) and UN Economic Commission for Africa (ECA) high-level brainstorming meeting for African trade negotiators held in Addis Ababa, Ethiopia, in late June. That meeting's recommendations stressed that asymmetries and imbalances should be addressed in a number of WTO Agreements, and that effective implementation of obligations should be sought particularly in relation to special and differential treatment provisions (see related

article on page 6). In this regard, participants noted that re-evaluation of the adequacy and sufficiency of the concept of transitional periods should be addressed especially for the TRIPs and TRIMs Agreements, taking into account the resource and implementation capacity constraints facing African countries. They called on the review of Annex VII of the Agreement on Subsidies and Countervailing Measures to take into account the specificities and development needs of a number of African countries.

Contrasting with the LDCs' general pessimism at Zanzibar regarding the launch of a new round, the OAU-ECA negotiators stated that if it was not possible to address the remaining implementation issues before or at Doha, these should be taken up after Doha. However, they stressed that there was 'no consensus to negotiate and set up rules' in the areas of investment, competition policy, trade facilitation, transparency in government procurement, environment or e-commerce. African trade negotiators argued that most of their countries were not in a position to agree to launch negotiations in these areas because: (i) Members were not convinced that negotiations on new issues would yield benefits to African countries; (ii) the new issues were not within WTO competence in developing multilateral rules; and (iii) more burdens of obligations would be added, while the problems of implementing Uruguay Round Agreements continued. The recommendations did not exclude the possibility of negotiations on industrial tariffs, provided there was a consensus to include certain key elements such as tariff peaks, tariff escalation and the establishment of special and differential treatment measures with a view to promoting industrial development in Africa.

OAU trade ministers were to meet again from 19-23 September 2001 in Abuja, Nigeria. Agenda issues included intra-African trade concerns, preparations for the Doha Ministerial Conference and for the Cotonou Partnership Agreement negotiations, as well as implementation of the US Africa Growth and Opportunity Act.

### SADC Ministers Call for Tariff Negotiations

A ministerial meeting of the Southern African Development Community (SADC) held on September 4, 2001, in Balaclava, Mauritius, also attempted to form a common position in the run-up to Doha. The meeting communiqué was explicit on the items that must appear in a post-Doha negotiating agenda:

- implementation issues arising from the Uruguay Round;
- mandated negotiations on agriculture and trade in services; and
- industrial tariffs, particularly on tariff peaks and escalation.

The communiqué urged WTO Members to address immediately those implementation issues that can be implemented before Doha. SADC ministers also called on Members to expeditiously grant a waiver of the MFN principle for the ACP/EU Partnership Agreement (so far, Latin American banana producers have refused consideration of the waiver request at the WTO's Council for Trade in Goods).

Ministers stressed that their acceptance of industrial tariffs negotiations was conditional. In particular, they called for a commitment from developed countries to provide meaningful market access to exports from LDCs, small economies and landlocked countries, and the elimination of protection for industries where SADC member states possessed a competitive advantage. Participation in negotiations would also be contingent upon a prior technical analysis by UNCTAD to identify the challenges and opportunities involved in industrial tariff negotiations.



*Emergency Safeguard Mechanism, continued from page 4*

and developing countries' (in particular) great fears of diminishing foreign investment, the ADA proposes several options for the protection of 'acquired rights' and entitlements of foreign investors

**Recent Developments and Challenges Ahead**

Until recently the WPGR discussions on emergency safeguards were conducted without much developing country involvement, but the scenario changed rather radically with the launch of GATS 2000 and several developing countries' announcement that they could not be expected to further liberalise their services markets without having an exit in case of emergencies.

The fact that the Africa Group included a call for the establishment of an ESM in its recent market access proposal<sup>3</sup> instead of circulating it within the WPGR neatly illustrates the link now made between liberalisation negotiations and the adoption of an ESM. The Africa Group requested that the adoption of an ESM be ensured to provide developing countries greater flexibility. Recent informal papers from Venezuela, Mexico and Brazil also seek to clarify difficult notions of an ESM in order for discussions to advance.

The bottom line of developing countries' argumentation is that they have little experience in services trade, and lack the capacity to analyse all potential effects of increasing market access in a given sector. The introduction of an ESM would offer Members recourse against risks not presently perceived and thereby induce them to make higher commitment. Considering Members' minimalist approach so far in scheduling commitments under the GATS, from a liberalisation friendly perspective the provision of an ESM could be important in leading the present round of negotiations to success.

And indeed, several notorious opponents to the adoption of an ESM are beginning to reconsider their positions. Switzerland, for instance, recently submitted a discussion paper,<sup>4</sup> co-sponsored by Chile and Costa-Rica, which addresses the whole range of feasibility issues while stressing the proponents' persistent doubts as to the merits of an ESM. This change of attitude is due to market access arguments presented by developing countries.

As always, however, the sword can be double edged. The lack of disaggregated data in many services sectors will render proof of causal injury very arduous to establish, in particular for developing countries. In addition, as pointed out by the former Indian ambassador to the WTO, Mr Zutshi, an ESM could also be used against developing country interests and prevent imports in sectors of interest to them and where they are already facing restrictive commitments from industrialised Members.

Several WTO Members, principally developing countries, at present strongly advocate in favour of the adoption of an ESM. The challenge they face is to ensure that Members come up with a balanced mechanism that will not prove to be an enemy in disguise.<sup>5</sup>

<sup>1</sup> Yong-Shik Lee, *Emergency Safeguard Measures under Article X in GATS, Applicability of the Concepts in the WTO Agreement on Safeguards*, Journal of World Trade 33(4): 47-59, 1999

<sup>2</sup> ASEAN Non-paper, *Draft Agreement on Emergency Safeguard Measures for Trade in Services*, Job. 6830, 31 October 2000

<sup>3</sup> See S/CSS/W/7.

<sup>4</sup> Ibid.

<sup>5</sup> The WPGR Chair has predicted that the major part of remaining work will be addressed between the second part of November until March 2002.

*Swordfish Dispute, continued from page 14*

**ENDNOTES**

<sup>1</sup> ITLOS, Case No. 7 – Order 2001/1 of 15<sup>th</sup> March 2001, Chile/European Communities, para. 6.

<sup>2</sup> WTO document WT/DS193/3 of 6<sup>th</sup> April 2001.

<sup>3</sup> Marcos Orellana, *The Swordfish Case*, ASIL Insights, February 2001.

<sup>4</sup> Marcos Orellana, *The Swordfish in Peril: the EU Challenges Chilean Port Access Restrictions at the WTO*, Bridges July-August 2000, p. 11; and Bridges Nov./Dec. 2000, p. 5 and Jan/Apr. 2001, p. 9.

<sup>5</sup> United Nations Agreement for the Implementation of the Provisions of the UN Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks. 1995.

<sup>6</sup> *Agenda 21*, also David Hunter, Julia Sommer and Scott Vaughan: *Concepts and Principles of International Environmental Law: An Introduction*. Geneva, 1994. This study surveys three principle MEAs and finds co-operation to be more important than coercion.

<sup>7</sup> See Christopher G. Weeramantry in ICJ Case concerning Kasikili/Sedudu Island (Botswana/Namibia) of 13 December 1999, para. 102 pp.

<sup>8</sup> See for example the Bonn and Lugano Conventions on Jurisdiction.

<sup>9</sup> Tuna Dolphin I and II and Shrimp-Turtle, to name just the most famous ones.

<sup>10</sup> ILM 34 (1995), 1542.

<sup>11</sup> Although with a clarification on the EC's competences, see EC Declaration upon Signing the UN Straddling Fish Stock Agreement.

<sup>12</sup> See James Cameron and J. Abouchar, "The Status of the Precautionary Principle in International Law", in D. Freestone and E. Hey (eds.), *The Precautionary Principle in International Law* (Kluwer, 1996) 29, p. 52; and Tim O'Riordan, James Cameron & Andrew Jordan (eds.), *Reinterpreting the Precautionary Principle*, Cameron May 2001.

<sup>13</sup> New Zealand and Australia v. Japan, Cases 3 and 4, Order of 27 August 1999.

<sup>14</sup> Southern Bluefin Tuna Cases, order on the requests for provisional measures, at para. 77.

<sup>15</sup> *EC-Hormones*, Appellate Body report, para. 120 and confirmed in *Japan – Agricultural Products* (AB-1998-8), WT/DS76/AB/R of 22.02.1999, para. 81.

<sup>16</sup> See Marcos Orellana, *The Swordfish in Peril*, supra note 4.

This commentary inaugurates the Bridges Legal Column on Trade and International Sustainable Development Law. The column is provided by the Centre for International Sustainable Development Law (CISDL), a Montreal-based institution being launched in co-operation with three MEA secretariats and the Faculties of Law of McGill University, Université de Montreal and Université de Québec a Montréal. The CISDL Commission consists of legal scholars and professionals from 18 countries, and its international advisory board includes leading judges, experts and academics from more than 25 countries. The new CISDL work programme on Sustainable International Trade, Investment and Competition Law is being designed with strong guidance from ICTSD through a new joint legal fellowship which will build strong cooperative links and co-ordinate CISDL contributions to Bridges on a regular basis.

## TRIPs Review and Implementation in Africa

As the current TRIPs review under Art. 27.3(b) and 71.1, as well as the debate on access to medicines continue to divide WTO Members, most African countries struggle to implement their commitments in their national legislation. In doing so, they face a complex web of interests and concerns, which are only partially – and sometimes inconsistently – addressed by a variety of legal instruments including TRIPs, the Convention on Biological Diversity (CBD), the International Undertaking (IU), or UPOV. As a contribution to this process, ICTSD and the African Centre for Technology Studies (ACTS), in collaboration with the Quaker UN Office in Geneva, convened an African dialogue on IPRs, Biological Resources and Health in Nyeri, Kenya on 30-31 July. The Dialogue not only served to link regional trade policy makers and influencers (trade negotiators, ministries of trade, environment and agriculture, academics and NGOs), but also to ensure that Geneva-based negotiators continue to represent the interests of their respective regions in the review process, while keeping them abreast of developments at the global level.

When African countries ratified the Uruguay Round (UR) Agreements, they accepted to undertake commitments on IPRs for several reasons. First, TRIPs appeared as a necessary trade-off to obtain concessions in other fields including textiles and agriculture; second, it provided a multilateral and rule-based approach to IPRs, which was perceived as preferable to bilateral pressures; and, finally, the results of the UR were expected to foster foreign investment and economic development.

Among the difficulties faced by many African countries in implementing the Agreement, participants cited the fact that in practice, most provisions 'favouring' developing countries (Art 7, 8, 27.3(b), 30, 31, 65, etc.) were either too restrictive or difficult to enforce; transition periods had been set in an arbitrary manner; and the Agreement did not include financing or other implementation support mechanisms. A key question in that respect was how to promote technology transfer (Art 66.2), through multilateral instruments as opposed to bilateral negotiations with firms. Other constraints included a lack of human and institutional capacity to implement the Agreement, uncertainty about its impacts on development and the concerns of the various stakeholders involved in the debate, as well as persistent lack of inter-ministerial co-ordination, public participation and clear policy articulation.

With respect to the relationship between TRIPs, the CBD and the IU, most participants recognised the contribution of the OAU Model Law on Access to Genetic Resources and Community Rights, although some raised concerns about its translation into domestic legislation. Among these were its potential incompatibility with TRIPs provisions on the patenting of life forms, and the difficulty to operationalise, in a legislative framework, concepts such as prior informed consent and benefit-sharing, as well as the definition of who owns traditional knowledge, how to protect it, or how to define the origin of biological material.

On TRIPs and health, participants recognised that TRIPs was just part of the problem. This was illustrated by the Namibian case where in spite of the fact that most essential drugs are not patented, medicines remain unaffordable for the majority of the poor. In that context, some participants argued that clear empirical data on the impacts of TRIPs on health would allow the Africa Group to strengthen its positions in the WTO. In conclusion, several participants insisted on the need for African countries to develop clear strategies and text proposals through participatory and co-ordinated processes, building on civil society expertise and other backstopping capacities. Referring to the recent South African case, they stressed the need to firmly state their common interpretation of the TRIPs Agreement. While all recognised the key role of the Africa Group in WTO negotiations, some argued that in some cases it was also important to allow for 'flexibility in group positions'.

For more information, contact Christophe Bellmann (cbellmann@ictsd.ch). Papers submitted at the dialogue are now available on the ICTSD web site (<http://www.ictsd.org/dialogueweb/Dialogues/dialogue-archive.htm>).

The International Centre for Trade and Sustainable Development (ICTSD) implements its programme of information, dialogues and research through partnerships with institutions around the globe.

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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/>

Oct. 8 Geneva	WTO Committee on Trade and Development Contact: Lucie Giraud, tel: 5075, fax: 5458
Oct. 8-9 & 12 Geneva	WTO Council for Trade in Services Contact: Nuch Nazeer, tel: 5393 fax: 5458
Oct. 9 Geneva	WTO Committee on Technical Barriers to Trade Contact: Hans-Peter Werner, tel: 5286, fax: 5458
Oct. 10 Geneva	WTO General Council Contact: Nuch Nazeer, tel: 5393 fax: 5458
Oct. 10-12 Geneva	WIPO 2 <sup>nd</sup> Session of the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge & Folklore Contact: WIPO Secretariat, tel: (41-22) 338-9428; e-mail: <a href="mailto:francis.gurry@wipo.int">francis.gurry@wipo.int</a>
Oct. 12 & 26 Geneva	WTO Council for Trade in Goods (textiles) Contact: Nuch Nazeer, tel: 5393 fax: 5458
Oct. 14-15 Singapore	Informal Ministerial Meeting (on the Doha Agenda) Contact: Ong Yen Cheng, Permanent Mission of Singapore to the UN (Geneva), tel: (41-22) 929-6641
Oct. 15 Geneva	WTO Sub-Comm. on Least-developed Countries Contact: Lucie Giraud, tel: 5075, fax: 5458
Oct. 15 Geneva	WTO NGO Briefing on Services Council Contact: Bernard Kuiten, tel: 5676, fax: 5777
Oct. 15-17 Geneva	WTO Textiles Monitoring Body Contact: Luis Ople, tel: 5374, fax: 5458
Oct. 17-18 Shanghai	APEC Economic Leaders' Meeting Contact: APEC Secretariat, tel: 65-276-1880, fax: 65-276-1775, e-mail: <a href="mailto:info@mail.apecsec.org.sg">info@mail.apecsec.org.sg</a>
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
Oct. 29 – Nov. 9 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>
Oct. 31 – Nov. 1 Geneva	WTO Committee on Sanitary and Phytosanitary Measures Contact: Hans-Peter Werner, tel: 5286, fax: 5458

Oct. 31–Nov. 2 Geneva	WTO Committee on Subsidies and Countervailing Measures Contact: Luis Ople, tel: 5374, fax: 5458
Nov. 2 Geneva	WTO NGO Briefing on SPS Committee Contact: Bernard Kuiten, tel: 5676, fax: 5777
Nov. 2-15 Rome	31 <sup>st</sup> Session of the FAO Conference, including 'World Food Summit: five years later' Contact: Nora McKeon, tel: (39-06) 5705-3852, fax: 5705-5175; e-mail: <a href="mailto:Nmckeon@fao.org">Nmckeon@fao.org</a>
Nov. 9-13 Doha, Qatar	Fourth WTO Ministerial Conference Contact: Keith Rockwell, tel: 5015, fax: 5458
Nov. 26-29 Geneva	WTO Council for Trade-related Aspects of Intellectual Property Rights Contact: Peter Ungphakorn, tel: 5412, fax: 5458

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