

No Consensus on New Round Despite Release of Pre-Doha Drafts

Trade ministers meeting in Qatar on 9-13 November for the fourth WTO Ministerial Conference face a wide range of tough tradeoffs and decisions, as three draft texts issued on 27 October spell out a variety of unresolved issues among WTO Members.

The three draft texts consist of (i) the Ministerial Declaration, (ii) a Decision on Implementation, and (iii) a Decision on Trade-Related Aspects of Intellectual Property Rights (TRIPs) and Access to Medicines / Public Health. Together, they represent the culmination of WTO General Council Chair Stuart Harbinson's efforts to draw convergence between Members' views on a host of areas that could be up for negotiation or review at the conclusion of the Doha Ministerial. Not surprisingly, the more contentious items on the agenda are also those over which agreement has eluded Members in the past, including at the 1999 Ministerial Conference in Seattle.

Traditional fault lines have emerged over TRIPs and health/medicines (see page 6); implementation and special and differential treatment (see page 4); agriculture; environment; and the so-called new issues, including investment and competition policy. Nevertheless, Mr Harbinson and WTO Director-General Mike Moore hope the new drafts present enough of a middle for Members to reach consensus to undertake what the Declaration calls a 'broad and balanced work programme' that would include an 'expanded negotiating agenda'. These have been widely interpreted as codewords for launching a new round.

Initial reactions to the documents have been less than supportive: while one developed country Member saw them as a 'solid basis' for agreement, an EU representative expressed doubts. Developing countries – as well as civil society groups – have for the most part condemned the texts. Nigeria on 29 October sent a blistering letter to Chair Harbinson claiming that the draft Declaration was one-sided and 'generally accommodated in total the interests of developed countries while disregarding the issues of interest to developing countries.' The letter stressed Nigeria's continued opposition to 'new issues' or tariff negotiations and invited the Chair to include 'alternative views' in a revised draft text so as to give ministers 'the other side of the story'.

Delicate Balance on Agriculture

The text on agriculture in the draft Declaration is unchanged from an initial wording released by Mr Harbinson on 12 October. No WTO Member is completely satisfied with language – described by one trade official as a 'balance of unhappiness' – but most have said it could serve as a 'basis' for

discussions. For many countries, particularly the EU, the issue remains a 'make-or-break' concern for the Ministerial.

Inter alia, the text would commit Members to negotiations aimed at 'substantial improvements in market access' and 'reductions of, with a view to phasing out, all forms of export subsidies, and substantial reductions in trade-distorting domestic support.' This language has been criticised by both the free market-oriented Cairns Group of agriculture-exporting countries and by the EU, Japan, South Korea, Norway and Switzerland, which make generous use of export subsidies. Some Cairns Group members want to see the language strengthened from 'trade-distorting' to include 'production-distorting' domestic support. European Commission representative Carlo Trojan called the export subsidies text 'unacceptable' to EU countries. In prior negotiations the EU has strongly resisted any commitment to eliminate export subsidies, as well as insisted that negotiations cover all forms of export support, including export credits.

A number of developing countries warned that language on special and differential treatment contained in the agriculture text should not be weakened. The text currently stipulates that 'special and differential treatment for developing countries shall be an integral part of all elements of the negotiations and shall be embodied in the Schedules of concessions and commitments and as appropriate in the rules and disciplines to be negotiated'.

India and Zimbabwe (speaking on behalf of African Members) said they would withhold consensus on agriculture and on other parts of the Declaration if the special and differential treatment language were changed in any subsequent revisions. In spite of reservations from practically all quarters, the 'balance of unhappiness' is not likely change, at least until ministers tackle the agriculture negotiating mandate in Doha.

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Published by the International Centre for Trade and Sustainable Development.

Environment

Also deemed by many as a 'make-or-break' issue for the Ministerial talks, environment has emerged as a major area of contention between the EU – supported to varying degrees by Norway, Switzerland and Eastern European countries – on one side, and most other Members on the other. The EU group is pushing for negotiations that would clarify a range of environmental issues, including the use of precaution, the relationship between WTO rules and those of multilateral environmental agreements, and ecolabelling to be initiated at Doha, while the rest of the Membership remains opposed to these.

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Aiming at a middle ground, the latest draft Declaration proposes that Members initiate a two-stage process at Doha. In the first stage, which would last until the fifth Ministerial Conference in 2003, the WTO's Committee on Trade and Environment (CTE) would identify any need to clarify relevant WTO rules. In the second stage, the CTE would report to the fifth Ministerial and make recommendations on the possibility of launching negotiations on areas previously studied. This could be seen as providing political capital to the CTE, which has so far not produced any tangible results or recommendations.

Also under environment, the draft Ministerial Declaration would urge the CTE to give particular attention to environment-trade-development 'win-win-win' scenarios; to the relationship between the multilateral trading system and MEAs; to the relevant provisions of the TRIPs Agreement, and to 'ecolabelling', though the latter is not elaborated upon in any way.

The draft Declaration has kept reference in the preambular section both to sustainable development and the right of Members, under WTO rules, to take measures to uphold and enforce the levels of health, safety, and environmental protection they deem appropriate. Language committing the Committees on Trade and Environment, as well as Trade and Development, to act as forums to identify and debate environmental and developmental aspects of the (potential) negotiations has also been left in from the earlier draft.

New Issues Antagonise Developing Country Interests

The so-called 'new' or 'Singapore' issues (brought forward at the 1996 Ministerial in Singapore) of investment, competition policy, transparency in government procurement, and trade facilitation have all emerged as areas for eventual negotiation under the revised draft.

The new issues are supported mainly by the European Union, Japan and other developed countries who want to launch negotiations in these areas soon as possible, presumably in order to provide tradeoffs for agricultural and other concessions they may be required to make under a new round. Most developing countries, and in particular the Like-Minded Group including India, Pakistan and Malaysia, oppose the adoption of any of these areas as negotiating items, arguing that developing countries are simply not ready to engage in talks that could bring new commitments when previous imbalances (i.e. implementation) remain unaddressed.

'We have been clearly pointing out that we are not in a position to commence negotiations in any one of these four areas, said Indian Ambassador Srinivasan Narayanan at a General Council session in October. 'My minister was asked to accept a non-prejudicial study programme with a clear stipulation that negotiations will commence in these areas only when there is explicit consensus,' he said.

The September draft Declaration had put forward two options for both investment and competition: either countries could choose to enter negotiations in each or to undertake further analytical work. The revised draft now would commit Members to negotiations on possible multilateral frameworks, i.e. on rules rather than market access, on investment and competition after the fifth Ministerial Conference, with the proviso that Members could opt out of negotiations, or opt in to the new agreements at a later time.

It remains unclear what a number of participants would constitute the necessary 'critical mass' to engage in negotiations. However, one source indicated that benefits gained by a country in the negotiating process could then be revisited by others if that country were to pull out of the talks at a later date. This could mean that a country wanting to opt into an investment or competition agreement in future may not have access to benefits it negotiated in the leadup process. While the texts on investment and competition are less than what the EU and Japan had originally been seeking, the two Members have indicated they could live with the formulation.

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BRIDGES

Between Trade and
Sustainable Development

Published by the International Centre for
Trade and Sustainable Development.

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Material from *BRIDGES* can be used in other publications with full academic citation.

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ISSN 1562-9996

Annual subscription:

US\$225 for OECD country addresses
US\$75 for other countries
Courtesy subscriptions are possible thanks to the support of ICTSD's funders.

The International Centre for Trade and Sustainable Development (ICTSD) is an independent non-profit organisation that aims to contribute to a better understanding of development and environmental concerns in the context of international trade. It upholds sustainable development as the goal of international trade and promotes participatory decision-making in the design of trade policy.

The *BRIDGES* series of publications is possible in 2000-2001 through the generous support of: the Governments of Switzerland (SECO) and the United Kingdom (DFID), the John D. and Catherine T. MacArthur Foundation and the Rockefeller Foundation.

It also benefits from contributions from ICTSD's core funders: the Governments of Finland, Denmark, the Netherlands and Sweden; Christian Aid (UK), IUCN The World Conservation Union, MISEREOR, NOVIB (NL), Oxfam (UK) and the Swiss Coalition of Development Organisations (Switzerland).

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TRIPs and Public Health, Opportunities for Doha

By Evelyne Herfkens

What should we do about the immense tragedy of the AIDS epidemic, which continues to rage mercilessly around the world, particularly in Southern Africa?

You cannot defeat AIDS with a single drug. The best treatment is a cocktail of several drugs. If one is missing, the whole cocktail loses much of its effect. I see this as a parallel to the fight against AIDS. We must attack it on all fronts at once. Openness and prevention, yes, but also more information, research, improved healthcare and access to affordable medicines. All of these are vital for our cocktail.

This comment focuses on one ingredient in the cocktail: the cost of medicines and, connected with that, of developing new drugs. In short, patents and trade-related intellectual property rights. These rights go beyond AIDS; the same facts apply to malaria, tuberculosis and many other diseases. In every case, the international community's challenge is to stem the tide of these diseases, which ruin any prospect of development for the poor.

World Trade Talks

The Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPs) is on the agenda of the fourth WTO Ministerial Conference in Doha, Qatar. Before looking at TRIPs in detail I want to touch briefly on the vital framework that it is part of.

We still do not know whether Doha can go ahead. The terror attacks on Washington and New York have already forced us to cancel the Children's Summit and the annual World Bank/IMF meeting. It will be a crying shame if Doha also falls through.

The new WTO round is immensely important. A new round is the best way of opening up international trade to benefit the poor. The incipient recession makes it harder to throw the markets open, and the recent attacks will make it even more so. The IMF forecasts a decline in world trade growth from 12.4 percent last year to 4 percent in 2001. The World Bank expects economic growth in developing countries to fall from 4.3 percent to 3.5 percent. The poorest will be hit hard if this carries on. We can then abandon our hope of meeting our target to halve world poverty by 2015.

Earlier this month Professor Jeffrey Sachs wrote that a proactive trade policy was more important now than ever before to give developing countries confidence in the world trade system. Market access is part of that. But also fair and balanced TRIPs rules are really key for restoring confidence in the WTO and thereby creating the conditions for a global round of trade negotiations that really deserves the name 'development round'.

TRIPs and Health

Fair and balanced TRIPs rules mean striking a balance in intellectual property law. On the one hand, we want to provide incentives for innovation and research, and on the other hand we want to make products widely accessible. This balance is in the public interest. Fair patent rules mean more than industry's self-interest.

Where we strike the balance differs from country to country and from situation to situation. It is essential to understand that. Patents

must reward real innovation and top research. The poorest countries stand to gain little from that at first; they have scant knowledge of their own to protect by patents, and when patent law comes into force they suddenly have to pay more to import knowledge in knowledge-intensive products. TRIPs shifted the global rules in favour of the industrialised countries, although the more advanced developing countries may eventually also gain from patent protection.

A balanced interpretation of TRIPs has everything to do with universal human rights.

Many of the latter have their own drug companies, producing generic medicines. The Western pharmaceuticals industry often dismisses them as "copycat companies", but I am less negative. You could see the production of generics as an important step towards developing their own products, as well as reaching the social objective of making medicines

affordable. The economist Jayashree Watal has found that patent protection would almost certainly lead to patented medicines doubling or tripling in price. This includes treatment for major diseases like AIDS in countries where patents apply.

Developing countries went along with including TRIPs in the Uruguay Round in the hope of making compensatory gains on other fronts, such as access to rich countries' markets for agricultural products and textiles. While their hopes have not yet come true, the TRIPs Agreement itself is less rigid than is sometimes suggested. Broadly speaking, it leaves countries free to protect their national health interests. Rather than the Agreement itself, the problem is how to interpret its rules. Consensus in the WTO by means of a separate declaration by the ministers, should really put an end to that problem.

Compulsory Licences and Parallel Imports

The provisions on compulsory licences and parallel imports are the key here, and the Agreement gives Members some freedom in these areas. Developing countries must be allowed to make use of it without rich countries' holding a knife to their throat. It is totally unacceptable for rich countries to apply bilateral pressure on them to be stricter than TRIPs allows, or to be stricter than the rich countries themselves. Surely the whole point of multilateral agreements is to protect countries from the bilateral jungle where the strongest always win?

I also want to stress the need to re-examine the provision that governments can issue a compulsory licence only to national companies producing predominantly for their domestic market. That shuts the poorest countries out: they have no industry of their own to give licences to. I am pleased to see the EU is trying to get the WTO members to agree to a solution and has already drawn up a legal framework to tackle this problem.

A balanced interpretation of the TRIPs Agreement has everything to do with universal human rights. The UN High Commissioner for Human Rights recently released a report, which maintained that most WTO Members are bound to implement the Agreement in the light of their human rights obligations as 111 out of the WTO's 141 Members have also ratified the International Convention on Economic, Social and Cultural Rights.

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Draft Implementation Decision Drops Action in Key Areas

Textual changes in the second draft of the Ministerial Declaration and in the revised Decision on Implementation indicate that many areas of importance to developing countries have been watered down from the previous releases on 26 September. This could threaten the possibility of any agreement at Doha, particularly given that developing countries were not fully satisfied with the initial implementation language in the previous draft to begin with (Bridges Year 5 No.7, page 7).

A 3 October General Council session on implementation geared to reach agreement on a range of 'early harvest' areas fell apart due to developing countries' numerous concerns with the text, primarily over perceived inconsistencies between the structure, language and professed aims of the draft implementation document, and the lack of specifics on certain key issues. India, for one, expressed 'profound disappointment' in the original implementation text.

The September proposal divided implementation deliverables into three Annexes: those for agreement before Doha (Annex I), those for agreement at the Ministerial (Annex II), and those to be addressed within the context of a new round (Annex III). Because no agreement was reached on 3 October, in the latest text the original 'early harvest', or Annex I, items have now been folded into Annex II.

The new draft implementation Decision has backtracked on some major developing country concerns. It has dropped 17 demands from the original text in areas such as safeguards, textiles and clothing, technical barriers to trade, and trade-related investment measures, and sent them to relevant WTO bodies for further study and analysis.

Key stipulations that made industrialised countries most uncomfortable have been deleted or weakened, including special and differential treatment in the Agreement on Subsidies and Countervailing Measures, and rules of origin in textiles. Pointing to a reason behind these changes, the United States said on 23 October that not all implementation demands were appropriate for future negotiation, particularly those on textiles and clothing and on anti-dumping. The only anti-dumping provision that does not require at least a year's further work to develop recommendations for action would oblige Members to conduct a 'pre-initiation examination' on whether circumstances have changed prior to a initiating a new anti-dumping investigation if a previous one on the same product from the same country resulted in a negative finding within 365 days.

The draft Implementation Decision would have Members agree to a work programme that could make some S&D provisions mandatory and/or more operational. Under paragraph 12 of the Decision, the WTO Committee on Trade and Development would be tasked to: 'identify those special and differential treatment provisions that are already mandatory in nature and those that are non-binding in character, to consider the legal and practical implications...of converting special and differential treatment measures into mandatory provisions...and to report to the General Council with clear recommendations for a decision by July 2002.'

If the Committee cannot reach consensus on whether a certain provision can be made mandatory, the work programme would authorise the CTD to make the provision more operational. Developing countries had originally requested that all S&D provisions be made mandatory.

TRIPs and Public Health, continued from page 3

This, she says, means that countries must be encouraged to prevent the abuse of intellectual property rights through an effective competition policy. And that they must be encouraged (yes, encouraged) to incorporate TRIPs provisions on compulsory licences and parallel imports into their national legislation "as safeguards to protect the right to health and to access to essential drugs". Not, I would point out, to give them up, as Jordan was forced to do in order to conclude a bilateral trade agreement with the US.

This is a vital issue. The TRIPs Agreement allows plenty of leeway, but it is crucial that national legislation is in place.

These are the ingredients I think we must deal with in the separate ministerial declaration on TRIPs which is currently in the pipeline. The declaration must give developing countries the security that they can make full use of the freedom TRIPs allows in the interests of their nations' health. A failure to agree on such a declaration would be sending them quite the wrong signal.

Conclusion

The flexible interpretation of TRIPs that I call for does not amount to an attack on the pharmaceuticals industry. We are talking about perfectly legal instruments under a global, rules-based system. Industry sometimes gives the impression of seeing it as an attack, and it has a powerful lobby for a narrower interpretation.

But its arguments do not convince me. The main one is that any relaxation of patent rules will slow down research into new medicines. I have my doubts about the gloomy announcement that AIDS research has already been scaled down because of compulsory licences. Income from patent protection in poor countries is of very little importance when decisions on research investment are made. People in those countries will not be able to afford patented AIDS antiretrovirals anyway. The deciding factor is the home market in rich countries.

Industry also claims that pressure groups exaggerate the importance of patents. It says that surveys suggest that only 16 percent of AIDS drugs are patented in Africa, leaving plenty of scope for cheaper drugs. Since even these cheaper drugs are too expensive for the poor, patents have no relevance whatsoever; money is the bottleneck. Here industry is contradicting itself: one moment it says that patents do not matter, another moment it says they are vital to stimulate research.

I will be happy to continue discussing sensible differential pricing proposals with industry. It is a question of solidarity for patients in rich countries to pay what they can afford while the poor pay much less. That allows industry to get a return on its investment from the rich. But we have to make absolutely sure that cheap medicines do not trickle back into our own markets.

Another idea is for new medicines, particularly vaccines, to be developed with some public money from rich countries; a lot of health research is already publicly funded. That is another way of making sure that expensive research is not paid for out of the empty pockets of patients in developing countries. While patent protection might indeed give future generations of AIDS patients more hope, as Nefarma director Cees Visser says, that should not be a reason to give AIDS patients in poor countries less hope now. We cannot allow patents to make their lives even more difficult.

Ms Eveline Herfkens is Minister for Development Co-operation of the Netherlands.

Draft Declaration on TRIPs and Health Reflects Deep Division on Scope for Flexibility

Declaration on Intellectual Property and Access to Medicines or on Intellectual Property and Public Health? It is a sign of the unbridged gap between WTO Members' approach to the TRIPs Agreement's flexibility with regard to public health measures that even the title of the draft going to ministers in Doha is bracketed.

The former, more limited, option is favoured by developed countries with significant pharmaceutical sectors, while the developing countries prefer the broader title referring to public health. This division becomes even clearer with paragraph 4, which offers two bracketed options for the purpose of the document.

Option 1: [Nothing in the TRIPs Agreement shall prevent Members from taking measures to protect public health. Accordingly, while reiterating our commitment to the TRIPs Agreement, we affirm that the Agreement shall be interpreted and implemented in a manner supportive of WTO Members' right to protect public health and, in particular, to ensure access to medicines for all.

In this connection, we reaffirm the right of WTO Members to use, to the full, the provisions in the TRIPs Agreement which provide flexibility for this purpose.]

This language reflects developing countries' proposals. It would put even the broadest interpretation of TRIPs flexibility beyond the reach of dispute settlement challenges. Some developing country delegates suggested that they might be flexible on wording as long as the notion that nothing in TRIPs prevents Members from taking measures to protect public health is somehow safeguarded. Others said that the second sentence was equally important, and might even suffice on its own.

Option 2: [We affirm a Member's ability to use, to the full, the provisions in the TRIPs Agreement which provide flexibility to address public health crises such as HIV/AIDS and other pandemics, and to that end, that a Member is able to take measures necessary to address these public health crises, in particular to secure affordable access to medicines. Further, we agree that this Declaration does not add to or diminish the rights and obligations of Members provided in the TRIPs Agreement. With a view to facilitating the use of this flexibility by providing greater certainty, we agree on the following clarifications.]

The scope of Option 2 is broader than that proposed by the most hawkish defenders of pharmaceutical patents, led by the United States and Switzerland, at the September TRIPs Council meeting (Bridges Year 5 No.7, page 1). Nevertheless, developing countries consider Option 2 unacceptable as it essentially boils down to recognising the obvious. Stating that the Declaration does not add to or diminish Members' rights and obligations could also reduce its value as a deterrent against dispute settlement proceedings or as guidance to future panels. As one developing country delegate put it: 'An affirmation that we have got the right to exercise our rights is not worth a Declaration.' Others concurred: an unmodified Option 2 would make the Declaration pointless and could even result in its rejection by developing countries. This would be a major embarrassment to the WTO as the TRIPs Declaration has been widely expected to be one of Doha's chief achievements.

Another key developing country priority also appears compromised. From the start to the TRIPs and access to medicines debate, they

have pushed for an admission that compulsory licenses granted to manufacturers in foreign countries are TRIPs-compatible when the granting country lacks the capacity to produce generics. This possibility is hampered by TRIPs Article 31(f), which requires authorisation to produce under a compulsory licence to be targeted 'predominantly for the supply of the domestic market of the Member authorising such use'. The right to grant third country licences has been among the most controversial points of the talks so far. In the draft Declaration, ministers recognise that 'WTO Members with insufficient or no manufacturing capacities in the pharmaceutical sector could face difficulties in making effective use of compulsory licensing under the TRIPs Agreement'. However, the draft would only have ministers instruct the TRIPs Council to find an 'expeditious solution' to the problem and to report to the General Council before the end of 2002.

'A simple affirmation that we have the right to exercise our rights is not worth a Declaration.'

Developing country delegates were pleased that some of their points were included unbracketed in the draft, even if these are less concessions than spelling out rights implicit in existing TRIPs provisions. Thus the draft confirms that Members have 'the right to grant compulsory licences and the freedom to determine the grounds upon which such licences are granted'. This language clarifies Article 31, which lays down the procedural steps Members must follow prior to granting compulsory

licenses but does not specify the grounds for doing so.

Southern diplomats also noted with satisfaction that the draft acknowledges that Members have 'the right to determine what constitutes a national emergency or other circumstances of extreme urgency'. TRIPs Article 31(b) allows Members to waive the obligation to seek the rightholder's consent before issuing compulsory licenses in such circumstances, but does not offer criteria as to what exactly could be regarded as a 'national emergency'. The draft notes that it is 'understood that public health crises, including those relating to HIV/AIDS and other epidemics, can represent a national emergency or other circumstances of extreme urgency'.

The recognition that Members are free to determine their own 'exhaustion regimes' for intellectual property rights (subject to the MFN and national treatment provisions of GATT Articles III and IV) is another source of satisfaction, although this principle is already embodied in TRIPs Article 6. The draft language confirms that countries may adopt intellectual property rights legislation that allows them to import patented medicines from another country where they are cheaper rather than from the manufacturer or its local outlets. Manufacturers generally disapprove of parallel imports (diplomats involved in the drafting of the TRIPs Declaration reported that the United States may attempt to add a definition of the products covered before signing off on para. 9).

Somewhat surprisingly, the draft says nothing about preventing the 'leakage' of cut-price medicines made available to developing countries back to developed country markets.

Diplomats generally agreed that the concessions contained in the draft's two last paragraphs would not make much of a practical difference. They would extend until 2016 least-developed countries' transition period for patenting obligations and provisions on the protection of undisclosed information, and grant a dispute settlement moratorium for Sub-Saharan countries' measures designed to improve access to drugs used to treat AIDS and other pandemics.

Dispute Settlement News

US Shrimp Import Ban Is Legitimate, Appellate Body Rules

On 22 October, the Appellate Body released its latest report on the shrimp-turtle dispute, confirming that the United States' import embargo on marine shrimp did not, as currently applied, violate its WTO obligations (WT/DS58/AB/RW). The shrimp-turtle dispute has now been through all stages of the WTO dispute settlement process: panel and Appellate Body reports, a compliance review and, finally, its appeal (see references below, as well as related articles on pages 19 and 20).

Since June 1996, the United States has prohibited the importation of marine shrimp caught without special devices that keep endangered sea turtles from drowning in trawling nets. India, Pakistan, Malaysia and Thailand challenged this import restriction as an 'extra-jurisdictional and unilateral application of domestic law' and won a partial victory in April 1998. Reversing many of the panel findings, the Appellate Body ruled in October 1998 that the import prohibition was legitimate under GATT Article XX(g) because it related to the conservation of natural resources and was made effective in conjunction with similar domestic restrictions. It did, however, fault the US for the discriminatory way the ban was applied; including a *de facto* imposition of US standards on foreign governments and differences in treatment of Latin American and Asian countries.

The US subsequently addressed the discriminatory aspects in the application of the relevant legislation, including the initiation (and funding) of negotiations on an Indian Ocean/South East Asian regional sea turtle conservation treaty. Malaysia, however, asserted that only lifting the import ban completely would implement previous WTO rulings. A compliance panel requested by Malaysia confirmed in June 2001 that the steps taken by the government did bring the US in compliance with the AB recommendations (Bridges Year 5, No.5, page 7).

The panel ruled that the ban could be *provisionally* maintained while the US continued to negotiate in good faith with Malaysia and other shrimp exporters 'with the objective of concluding bilateral or multilateral agreements on the protection and conservation of sea turtles'. Once an agreement is reached, the embargo must be lifted as a more appropriate – and fully WTO-compatible – instrument will be available to protect marine turtles over their entire range (a Western Hemisphere treaty already exists).

Negotiation Obligation

Malaysia appealed this finding, arguing that the panel erred in concluding that the United States only had an obligation to negotiate – rather than to conclude – a regional agreement on the protection of sea turtles before imposing the ban. Malaysia claimed that the panel's finding led to 'the absurd situation where any WTO Member would be able to offer to negotiate in good faith on an agreement incorporating its unilaterally defined standards before claiming that its measure is justified under Article XX [...] and in the event of failure to conclude an agreement, claim that the measure applying the unilateral standards could not constitute unjustifiable discrimination.'

The October 2001 Appellate Body report disagreed with this charge. Turning Malaysia's argument around, the AB noted that an international turtle conservation treaty might not be possible

despite serious good faith efforts: 'Requiring that a multilateral agreement be concluded by the United States in order to avoid "arbitrary or unjustifiable discrimination" in applying its measure would mean that any country party to the negotiations with the United States, whether a WTO Member or not, would have, in effect, a veto over whether the United States could fulfil its WTO obligations. Such a requirement would not be reasonable.'

Coercion and Unilateral Measures

Malaysia had also asserted that Section 609 of US Public Law 101-162, which contains the provisions on shrimp imports, constituted arbitrary or unjustified discrimination because exporting countries must apply fishing techniques unilaterally decided by the US in order to have access to the US market.

The AB referred to its 1998 conclusion that conditioning access to a Member's domestic market through unilaterally prescribed policies 'may, to some degree, be a common aspect of measures falling within the scope of one or another of the exceptions (a) to (j) of Article XX.' It also noted that it was 'not necessary to assume that requiring from exporting countries compliance with, or adoption of, certain policies [...] prescribed by the importing country, renders a measure *a priori* incapable of justification under Article XX. Such an interpretation renders most, if not all, of the specific exceptions of Article XX inutile, a result abhorrent to the principles of interpretation we are bound to apply.'

The AB confirmed that the new US guidelines to implement Section 609 sufficiently removed the coercive effect on foreign governments not to constitute arbitrary or unjustified discrimination. The main change in the guidelines is that the US may certify specific fisheries as having a sea turtle protection programme 'comparable in effectiveness' to that of the United States. This 'shipment-by-shipment' exception allows fisheries that comply with US standards to export shrimp to the United States even from uncertified countries. Under the old guidelines certification was only possible on a 'nation-by-nation' basis.

According to the latest Appellate Body report, 'authorising an importing Member to condition market access on exporting members putting in place regulatory programs comparable in effectiveness to that of the importing Member gives sufficient latitude to the exporting member with respect to the program it may adopt to achieve the level of effectiveness required. It allows the exporting member to adopt a regulatory program that is suitable to the specific conditions prevailing in its territory.'

Main Previous Bridges Articles on the Shrimp-Turtle Dispute

Panel report, April 1998 (WT/DS58/R): *WTO Condemns Shrimp Ban, Recommends Negotiated Solutions to Conserve Sea Turtles* (Bridges Year 2, No.3, page 11).

Appellate Body report, October 1998 (WT/DS58/AB/R): *The US Shrimp-Turtle Appellate Body Report: Setting Guidelines toward Moderating the Trade-Environment Conflict* (Bridges Year 7, No.3, page 9).

Article 21.5 panel report, June 2001 (WT/DS58/RW): *Panel Stresses Multilateral Environmental Agreement as Permanent Solution to Shrimp-Turtle Dispute* (Bridges Year 5, No.5, page 7).

TRIPs and the CBD: What Language for the Ministerial Declaration?

By Franciso Cannabrava

Compatibility between the Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPs) and the Convention on Biological Diversity (CBD) landed on the agenda of the WTO already in 1996, when the Committee on Trade and Environment discussed the relationship between the two Agreements, based on a proposal by India. The debate found a second wind in 1999 when the Council for TRIPs initiated the review of Article 27.3(b), which is the main TRIPs provision dealing with exceptions to patent rights over biological resources. Since then, WTO Members, and in particular developing countries, have submitted numerous proposals on how to address the issue. Reaching a consensus at the Doha Ministerial Conference on this issue appears feasible but will largely depend on the flexibility shown by developed countries.

Key Points in the TRIPs/CBD Debate

Based on the debate at the CTE and the TRIPs Council, three approaches can be identified regarding the relation between the TRIPs Agreement and the CBD.

- The first, which was defended by some developing countries during the initial WTO discussions, is to argue that the CBD and TRIPs are essentially incompatible, given that the former recognises the sovereign rights of its Contracting Parties over their own genetic resources, while the latter provides for the possibility of private rights (patents) over the same resources.
- The second, which reflects the views of some developed countries, including the US, is that there is no conflict between TRIPs and the CBD and therefore no need for harmonisation.
- Finally, a third approach considers that while TRIPs and the CBD are not inherently incompatible, they are likely to conflict in the way they are implemented, which demands some modifications within Article 27.3(b) of TRIPs to incorporate some of the elements of the CBD.

In the context of multilateral negotiations and the search for systemic solutions, the first two approaches do not seem to offer viable solutions to ensure an optimal relation between the two Agreements. In support of the third approach – which seems to be shared by an increasing number of developing and developed countries at the TRIPs Council today – it is important to note that the objectives of both the TRIPs Agreement and the CBD (expressed, respectively, in their Articles 7 and 10) contain a number of common elements: the ‘*fair and equitable sharing of the benefits arising out of the utilisation of genetic resources*’ of the CBD, for instance, is compatible with the TRIPs objectives of ‘*balance of rights and obligations*’ and ‘*mutual advantage of producers and users of technological knowledge*’. The CBD also mentions the objective of ‘*transfer of technology*’, which is certainly consistent with TRIPs objective of ‘*transfer and dissemination of technology*’. In this context, WTO Members should therefore opt for the third approach and proactively aim at mutually supportive relations between TRIPs and CBD.

As most negotiated texts, TRIPs is ambiguous in many respects. This ambiguity allows for flexibility in the way WTO Members interpret the Agreement and implement it in their domestic

legislation. While incompatibilities with the CBD depend, to a great extent, on how one reads the Agreement and which provision one emphasises, this absence of a common interpretation increases the risk of WTO disputes.

The disclosure requirements provided under some national intellectual property laws, such as those of Brazil and the Andean Community of Nations (CAN Decision 486 requires the inventor to disclose the source of the biological material used in the ~~invention~~ *as a sine qua non* condition for the granting of a patent), are classic examples. While such measures might be taken to implement the CBD obligation to regulate access to biological resources and ensure fair and equitable benefit-sharing, some might see them as additional requirements for patentability and challenge them at the WTO as being incompatible with Article 27.1. While the TRIPs Agreement offers some basic requirements for patentability (novelty, inventive step and industrial application, for example) it clearly does not exclude the possibility of Members’ including other requirements in their own national legislation.

The lack of common understanding of the TRIPs/CBD relationship could cause a serious systemic problem in case of a WTO dispute.

Beyond the deterrent effect that this lack of common understanding might have on developing countries seeking to take full advantage of the flexibility

provided under the Agreement when drafting national legislation, such a dispute would create a serious systemic problem. First, if the case were brought to the Dispute Settlement Body, the panel would have to address the WTO’s competence to rule on domestic legislation arguably passed to implement another international instrument, namely the CBD. Second, a panel ruling against such a measure would raise the question of the WTO’s mandate and legitimacy to determine how Member states must implement the Convention on Biological Diversity.

What Could Doha Contribute?

In order to anticipate these systemic problems and move the discussion forward, the forthcoming WTO Ministerial Conference should incorporate in Article 27.3(b) some of the basic elements of the CBD. In this context, Brazil considers that Article 27.3(b) should be amended to include the possibility of Members requiring, whenever appropriate, as a condition to patentability:

- the identification of the source of the genetic material;
- the related traditional knowledge used to obtain that material;
- evidence of fair and equitable benefit-sharing; and
- evidence of prior informed consent from the Government or the traditional community for the exploitation of the subject matter of the patent.

A large number of countries – including India, the countries of the Andean Community, Norway and several African and Asian countries – have already supported this proposal. Additionally, the Ministerial Conference should also take into account the language in Article 16.5 of the CBD and state, as political guidance for WTO Members, that the provisions of the TRIPs Agreement are supportive of, and do not run counter to, the objectives of the Convention on Biological Diversity. An interpretative note to Article

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GATS and the Environment: Are There Reasons to Be Concerned?

Growing awareness that trade in services not merely relates to environmentally benign sectors such as business and communication, but also to energy, tourism and transport services, has drawn increasing attention to the actual and potential environmental impact of WTO's General Agreement on Trade in Services (GATS).

Alternatively depicted as the product of a conspiracy among Northern-based multinational corporations to dismantle governments' ability to pursue any kind of public policy objective standing in the way of private profit,¹ or as an Agreement presenting only 'win-win' potentials,² the GATS is currently the subject of public turmoil.

The environmental effects of the GATS are virtually *terra incognita*. The paucity of reliable data on services trade has thus far hampered global assessment and analysis of the Agreement's actual and potential impact on the environment.³ In addition to the lack of academic input, the complexity of the GATS and of trade in services further compounds the problem. Not surprisingly, these ingredients, exacerbated by the recent launch of a new round of market access negotiations (GATS 2000), have fused into a highly emotional and polarised debate that would need to gain some sobriety in order to enable meaningful and constructive dialogue among stakeholders.

Framing the issues

Several services sectors present significant environmental impact potential – both positive and negative – the most obvious of which are energy, environmental services, tourism and transport. Liberalisation of trade in services under the GATS could bring about economical, or physical, impacts such as scale and technology effects,⁴ as well as regulatory impacts resulting from the harmonisation of national regulations affecting trade in services. While the environmental implications of further liberalisation under the Agreement in relation to sensitive sectors are poorly understood, they are generally acknowledged as potentially significant. Much more contentious are the recent concerns raised by civil society regarding the perceived far-reaching intrusion of the GATS into domestic policy-making, in particular governments' ability to set environmental protection standards.⁵ In this respect, a provision in the GATS regulatory framework requiring Members to develop disciplines to ensure that certain kinds of domestic regulation 'are not more burdensome than necessary to ensure the quality of the service' (Art. VI:4) is spurring a (very) heated debate.⁶

The GATS has not, as of yet, produced much meaningful liberalisation. During the GATS negotiations in the Uruguay Round, Members in general only consented to make commitments in sectors already liberalised. In addition, negotiators were not able to complete certain aspects of the Agreement's regulatory framework relating to, *inter alia*, the disciplines on domestic regulation mentioned above; instead, it was decided that unfinished business would be tended to through further, 'built-in agenda' negotiations.

Terra incognita notwithstanding,⁷ WTO Members in 2000 engaged in a new round of negotiations aimed at increased liberalisation in services trade as mandated by GATS Article XIX. While

discussions relating to the GATS' regulatory framework have been conducted since the end of the Uruguay Round, Members have so far been unable to reach consensus on any of the issues.⁸ These talks are now held along side market access negotiations.

In light of the developments above, how could future liberalisation in services be effectively linked with environmental concerns?

GATS 2000 and the Environment

Does increased liberalisation rime with deregulation in the context of trade in services? Will governments find their hands tied by requirements resulting from market access and national treatment obligations – the tools for liberalisation under the GATS – or from necessity tests applicable to certain domestic regulations, when adopting measures aimed at environmental protection but which affect trade in services? Well, in the current state of affairs, one is tempted to respond that it is anyone's guess.

Since the GATS has come under sustained fire from civil society for its potential of forced deregulation, the WTO has repeatedly argued that the GATS explicitly recognises Members' right to regulate in order to meet national policy objectives. While this is stated in the GATS preamble, the 1995 Ministerial Decision on Trade in Services and the Environment acknowledges that measures necessary to protect the environment may conflict with provisions of the GATS.⁹ In case of conflict between GATS obligations and environmental policy measures, Article XIV – the Agreement's (so far untested) general exceptions clause, drafted in quasi-identical language to that of GATT Article XX – might provide some relief.

According to Article XIV, measures otherwise inconsistent with provisions in the Agreement are allowed if they are 'necessary to protect human, animal or plant life or health'. Again, while the WTO now states that Article XIV 'overrides all other provisions',¹⁰ the 1995 Ministerial Decision cited above stresses that 'the fact that certain restrictions might be necessary in these circumstances does not imply that Article XIV would be the provision needed to justify the imposition of those restrictions.' It is also interesting to note that the corresponding Article in the GATT (Art. XX) has – for a variety of reasons – thus far only been able to provisionally sustain one GATT-inconsistent national measure involving environmental considerations (see page 6).¹¹

Perhaps more importantly, almost all Members that have submitted proposals in environmentally sensitive sectors have stressed that further liberalisation must be without prejudice regarding Members right to regulate in order to meet national policy objectives.¹² Since a national measure can only be challenged by another Member in dispute settlement, hopes are that panels will have due recourse to the negotiating history of the current round in their interpretation of individual obligations under the GATS.

The GATS Agreement is drafted in a way that allows great flexibility for Members in the process of achieving progressive liberalisation. Market access and national treatment obligations only apply to sectors and modes of supply of services that countries choose to list in their schedules of specific commitments. Furthermore, even

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China's WTO Membership: Trade and Environmental Implications and Challenges

By Wanhua Yang and Tao Hu

After fifteen years of negotiations, the fourth WTO Ministerial Conference is expected to approve China's membership in Doha. The accession will be beneficial to China's economic development and reform, and to the multilateral trading system, as China will open up its market of 1.3 billion people to WTO Member States.

Wider market opening and changes in the structure and volume of trade are expected to significantly alter China's economy. The relationship between the economy and the environment will also inevitably change. A clear picture of the potential implications and challenges of China's WTO membership will not only help identify the necessary policy and administrative capacity needed to address trade-related environmental challenges and environment-related trade challenges, but also define China's role in the multilateral trading system.

Domestic Environmental Impacts

China's accession to the WTO is likely to lower tariffs and increase market access for trading partners, but it also means greater international market access for Chinese exports, causing substantially increased production in certain sectors, which will undoubtedly add new pressures on the environment. Decline in other sectors will create opportunities to phase out inefficient and highly polluting industries and contribute to environment protection.

The Development Research Centre of China's State Council predicts that after China joins the WTO, the general development trends will be: primary and secondary industries including land-intensive agriculture (in particular grain production), traditional manufacturing and processing will shrink; labour-intensive industries such as manufacturing, textile and handcrafts will expand; and tertiary industries will grow; particularly rapidly in knowledge-intensive sectors such as consulting, community services, education and culture, information and telecommunication), as well as capital-intensive sectors (banking, securities, insurance, brokerage and real estate, etc.).

These trends may mean a gradual phase-out of low value-added and inefficient sectors, which usually perform poorly in financial and environmental terms. The decrease in land-intensive agricultural activities may lead to less use of land, fertilizer and pesticides.

WTO accession will create a dramatic increase in foreign direct investment (FDI). Although FDI may bring advanced technology and management expertise that will give impetus to technical innovation and structural adjustment in Chinese enterprises, these benefits do not accrue automatically and need adequate policy guidance. China's own experience in foreign investment shows that in some cases, small and medium sized foreign-funded firms have moved to China's southern provinces to take advantage of lower environmental standards and lax enforcement.

Lower tariffs will also mean more cars more and thus more pressure on urban air. A rapid growth in trade may lead to significant increases in the demand for transport services such as infrastructure - and its consequences for land use. Air and noise pollution due to increased road traffic, and trucks in particular, may worsen. More trade may also entail significant environmental

effects through upgrading existing infrastructure such as docking, loading/unloading and warehouse facilities.

Environmental impacts will vary from region to region according to differences in the economic impact of WTO accession and in environmental conditions. Generally speaking, environmental pressure is likely to increase in central and western regions but decrease gradually in eastern regions due to the move of low value-added and labour-intensive industries from developed eastern regions to central and western China.

Secondary environmental consequences can also be expected. For example, WTO accession will lead to migration from the countryside to urban areas, resulting in increased demand for housing, local transport and environmental services such as water and wastewater treatment and more air pollution.

Appropriate policy measures must be put in place to address the environmental consequences of WTO accession.

Although WTO accession may offer an opportunity for the rational restructuring of China's economy and industries, which could reduce pollution per unit of output, there is a concurrent risk of increased output negating the gains per unit. To prevent this from happening and to deal with the challenges outlined above, appropriate policy measures must be put in place to address the environmental consequences of WTO accession.

Potential Global Environmental Impacts

After accession to the WTO, China is also likely to increase imports of resource-based products for various reasons, which could increase environmental pressures in exporting countries that do not protect their own environment efficiently.

China is currently the second largest timber importer in the world. These imports are likely to grow after WTO accession if tariff rates for imports of processed forest products are further reduced and non-tariff measures such as trading rights are phased out. Increased imports of forest products would benefit the country greatly, helping to address the domestic timber shortage and support domestic forest conservation efforts.

In the agricultural sector, tariff reduction and quota elimination is likely to lead to increased imports of wheat, corn, rice, cotton, oil and sugar. From the environment and sustainable development perspective, it would benefit country's land conservation, as less land will be used, less fertilizers and pesticides will be applied, and non-point source pollution will be reduced.

In the energy sector, increased imports of natural gas could help ease China's heavy dependency on coal and increased imports of petroleum products may help ease oil exploitation. The importation of other natural mineral resources could prevent environmental impacts associated with mining.

The probable increase in natural resource-based imports might raise the issue of the environmental impacts in exporting countries. China should avoid being viewed as exporting deforestation and unsustainable exploitation of natural resources to other countries. China and the exporting countries need to pay sufficient attention to the environmental challenges and sustainable use of resources.

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27.3(b) should also clarify that discoveries or naturally occurring material, including in isolated form, shall be excluded from patentability. Such an amendment would not only help clarify the relation between the two instruments; it would also represent a necessary step to prevent biopiracy of genetic resources and related traditional knowledge (TK). Developing countries do not have the capacity to follow each and every patent issued outside their territories on the use of their resources and challenge cases of misappropriation of biological material. An internationally agreed solution appears to be an appropriate and cost-effective approach to this complex issue.

As we move towards the next Ministerial Conference after two years of a rich and intensive debate within the TRIPs Council, the momentum should not be lost. WTO Members are in a position to come up with some guiding language in the Ministerial Declaration on these issues.

The TRIPs Agreement is under severe criticism by public opinion today, in light of general concerns with its potential negative impacts over public health and biodiversity, among other overarching public policies. WTO Members should take the opportunity of the Ministerial Conference in Qatar to establish an adequate balance between the interests of developing and developed countries. Developed countries cannot oppose the idea of ensuring a mutually supportive relation between TRIPs and the CBD. They therefore should show sufficient flexibility to allow WTO Members to take action in that direction.

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when they do undertake such commitments, Members may subject them to 'limitations' and 'conditions'. At the end of the day, it is likely that carefully scheduled commitments, resulting from integrated negotiation positions involving not only trade ministries but also environmental policy-makers, would be the best way to ensure that GATS 2000 has a satisfactory outcome from an environmental perspective. Conversely, lack of information, data, analysis and comprehension of the GATS and of trade in services in general certainly constitutes the major challenge for the environment in the present services negotiations, not only in terms of addressing potential threats, but also for the regulations needed to reap environmental benefits from liberalisation of trade in services. A positive, if modest, step in this direction might have been taken by Switzerland, who recently requested the WTO Secretariat to prepare a study for the assessment of the environmental effects of services liberalisation. The study is expected to be completed by March 2002.

Prepared by Caroline Wiman, ICTSD GATS and Sustainable Development Programme.

ENDNOTES

¹ See, for instance, Scott Sinclair, *GATS: How the World Trade Organization's new "services" negotiations threaten democracy*, Canadian Centre for Policy Alternatives, 2000.

² See OECD, *Environmental services: the 'win-win' role of trade liberalisation in promoting environmental protection and economic development*, COM/TD/ENV(99)93/FINAL, 11 September 2000.

³ See, however, WWF, *Preliminary Assessment of the Environmental & Social Effects of Trade in Tourism*, May 2001; and Dale Andrew, *Services trade liberalization: Assessing the environmental effects*, OECD 2000.

⁴ Scale effect refers to economical growth following trade liberalisation, which can have negative environmental impacts resulting from increased production and consumption, and positive impacts such as increased revenues to address environmental concerns. Technology effects refer to impacts on production processes due to the transfer of technology, environmentally friendly or harmful.

⁵ Elisabeth Tuerk (CIEL)/Peter Fuchs (WEED), *The General Agreement on Trade in Services (GATS) and future GATS-Negotiations – Implications for Environmental Policy Makers*, Draft, September 2001.

⁶ Measures 'relating to qualification requirements and procedures, technical standards and licensing requirements [should] not constitute unnecessary barriers to trade in services' or be 'more burdensome than necessary to ensure the quality of the service' (GATS Article VI:4).

⁷ It should be noted that lacking knowledge of the effects of the GATS is not limited to the environment; the social and economical impacts are also largely unexplored.

⁸ Negotiations on unfinished aspects of GATS' regulatory framework are being conducted in subsidiary bodies to the Council on Trade in Services; they include domestic regulation, government procurement and emergency safeguards.

⁹ Doc. S/L/4, 1 March 1995.

¹⁰ WTO, *GATS – Fact and fiction*, 2001.

¹¹ United States – Import Prohibition of Certain Shrimp and Shrimp Products. Recourse to Article 21.5 by Malaysia. Report of the Appellate Body, 22 October 2001 (WT/DS58/AB/RW).

¹² See, for instance, the Japanese and Canadian negotiating proposals on energy services (S/CSS/W/42/Suppl.3; S/CSS/W/58).

India's Plant Variety Protection and Farmers' Rights Act

By Suman Sahai

The Indian Parliament has finally passed the Plant Variety Protection and Farmers' Rights Bill. India has now, for the very first time, put in place a law to grant Plant Breeders' Rights on new varieties of seeds. The law also grants Farmers' Rights. These have been included in the legislation as a result of the determined and sustained campaign by NGOs, spearheaded by the Gene Campaign.

Gene Campaign's position right from the start was that if the *status quo* had to be changed and India had to grant Plant Breeders' Rights, our legislation would have to grant a strong Farmers' Rights at the same time. We maintained that 'plant back rights', i.e. the right to save seed from the harvest to sow the next crop, were no rights, only exemptions. Breeders under UPOV granted such exemptions, referred to as Farmers' Privilege. We insisted that Indian law had to grant rights, not provide exemptions, to its farmers.

Our key demand was for the farmer to retain the right to *sell* seed to other farmers, even if the variety was protected by a Breeders' Right. This right to sell seed is crucial to maintaining the livelihood basis of the farming community and the nation's self-reliance in agriculture. The clause on the right to sell seed was the major bone of contention to the very end of the legislative process.

The pivotal importance of the farmer having the right to sell seed has to be seen in the context of seed production in India, where the farming community is the largest seed producer, providing about 87 percent of the country's annual requirement. Denying the farmer the right to sell seed would displace the farming community as the country's major seed provider. Their only replacement would be the 'life science' corporations since budget cuts have seriously weakened the capacity and output of the other major player, the public research institution. Any development that would give multinational corporations a significant share in seed production in India was unacceptable to civil society groups.

Farmers' Rights

In section 39 (iv) of the chapter on Farmers' Rights, the right to sell seed – even protected seed – has finally been provided

The farmer shall be deemed to be entitled to save, use, sow, resow, exchange, share or sell his farm produce including seed of a variety protected under this Act in the same manner as he was entitled before the coming into force of this Act.

However, the farmer is not entitled to sell '*branded* seed of a variety protected under this Act' (editor's italics).

Other Kinds of Farmers' Rights

The Act acknowledges the role of rural communities as contributors of landraces and farmer varieties in the breeding of new plant varieties. Breeders wanting to use farmers' varieties for creating Essentially Derived Varieties (EDVs) can not do so without the express permission of the farmers. Anyone can register a community's claim and have it duly recorded at a notified center. If the claim is found to be genuine, a share of profits made from the new variety has to go into a National Gene Fund.

Exemption from fees: Further protecting farmers from the new set of provisions being put in place, the new Act stipulates that farmers

wishing to examine documents and papers or receive copies of rules and decisions made by the various authorities will be exempt from paying any fees.

Disclosure: Explicit and detailed disclosure in the passport data about the parentage of the new variety is required. If concealment is detected in the passport data, the Breeders certificate stands to be cancelled.

No terminator technology: Breeders must to submit an affidavit that their variety does not contain a Gene Use Restricting Technology (GURT) or terminator technology.

Protection against innocent infringement: Rightly assuming that farmers may unknowingly infringe Breeders' Rights since they will not be used to the new situation, the law provides for protection from prosecution for innocent infringement.

Good Clauses that Could Do Better

Benefit-sharing: The provision for payment for use of farmer varieties is welcome but modalities of implementing benefit-sharing must be made simpler and less bureaucratic. The revenues earned should only be available for use by farming communities, in the way that they decide.

Protection against bad seed: The clause protecting the farmer from spurious seed leaves too much to the discretion of the Authority. There should be specific guidelines, such as that compensation should amount to at least twice the projected harvest value of the crop. In addition, a jail term should be provided for repeated offence.

Rights of Breeders and Researchers

Breeders' Rights are fully protected by the legislation. On registration, the breeder has complete rights of commercialisation for the registered variety. These include the right to produce, sell, market, distribute, import or export the registered variety.

Penalties for infringing Breeders' Rights: Violation of a Breeders' Right can apply to the variety itself, as well as to its packaging. Penalties can range from Rs. 50,000 to ten lakh as well as a jail term ranging from three months to two years, depending on the severity of the damage caused. For repeated offence, fines can go upto Rs. 20 lakh and the jail term to three years.

The new law has provisions for Researchers' Rights which allow scientists and breeders free access to registered varieties for research. The registered variety can also be used for the purpose of creating new varieties. This flexibility is curtailed only when the registered variety needs to be used repeatedly as a parental line for commercial production of another variety.

Protection of Public Interest

The legislation includes public interest clauses, like exclusion of certain varieties from protection and the grant of compulsory licensing. To safeguard public interest, certain varieties may not be registered if it is felt that prevention of commercial exploitation

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of such variety is necessary to 'protect order or public morality or human, animal and plant life and health or to avoid serious prejudice to the environment'.

Compulsory licenses: The grant of a compulsory license is provided for if it is shown that the reasonable requirements of the public for seeds have not been satisfied or that the seed of the variety is not available to the public at a reasonable price. The breeder may file an opposition but should the charge be valid, the breeder can be ordered to grant a compulsory license under certain conditions, including the payment of a reasonable license fee. However, no compulsory license will be awarded if the Breeder can demonstrate reasonable grounds for his inability to produce the seed.

After Plant Variety Legislation, What Next?

Now that we have enacted a Plant Variety Protection and Farmers' Rights law, the next step will be to decide through which international platform India will interact with other nations. At present the only international platform is the UPOV, a Western platform regulating Plant Breeders' Rights for the industrial nations, and controlled by the life science corporations.

India Should Not Join UPOV

Gene Campaign opposes India's joining UPOV because UPOV does not address our needs and because its working is totally alien to the conditions of agriculture prevailing in the countries of the South. We believe that developing countries must create their own platform, which will grant Farmers' Rights distinct from Breeders' Rights, and be geared to work towards food and nutritional security in our countries. There is no concept of Farmers' Rights in the UPOV system, rights are granted only to the breeder, which in today's context means the seed companies. UPOV laws are formulated by industrial, not agricultural economies. In these countries the farming community is by and large rich and constitutes from two to five percent of the population. These countries do not have the large numbers of small and marginal farmers that we do.

CoFaB, a Developing Country Alternative to UPOV

Gene Campaign, along with Centre for Environment and Agriculture Development, has drafted an alternative treaty to UPOV to provide a forum for developing countries to implement their Farmers' and Breeders' Rights. This treaty is called the Convention of Farmers and Breeders, CoFaB for short. CoFaB reflects developing country strengths and vulnerabilities and seeks to secure their interests in agricultural policy-making.

The UNDP Human Development Report 1999 commended CoFaB as a 'strong and coordinated international proposal which offers developing countries an alternative to following European legislation by focusing legislation on need to protect farmers' rights to save and reuse seed and to fulfil the food and nutritional security goals of their people.' Gene Campaign's purpose in drafting an alternative to UPOV was to provide the basis for a discussion on what kind of non-UPOV platform developing countries should have. Once consensus emerges after comprehensive analysis and critique among developing countries, it will not take long to come up with a minimum operational framework with which to start.

Suman Sahai is Convenor of Gene Campaign, a grassroots-level NGO headquartered in New Delhi, which focuses on bioresources, indigenous knowledge, intellectual property rights and the rights of rural and tribal communities.

*China's WTO Membership, continued from page 9***Environment-Related Trade Implications**

Although WTO membership will provide opportunities to increase exports and many sectors are likely to benefit from it, these same sectors will face challenges from increasingly stringent environmental standards and various voluntary measures. Textiles, toys, leather, other light industry products and many agricultural goods are most likely to encounter environmental measures from western countries where consumers are more environmentally conscious.

Meanwhile, if imports of forest and food products grow, the chance to bring in alien invasive species will also increase. In order to protect human, plant and animal health and the environment, China needs to strengthen its sanitary and phytosanitary regulatory regime.

A high degree of policy preparedness will be necessary to enhance policy and administrative capacity to address the issues above.

First, it is imperative for China to adjust its environmental policy to address the consequences brought about by structural changes due to WTO membership. As changes in the economy will largely define the environmental agenda, more thorough assessments of the environmental consequences of WTO accession should be undertaken to ensure that the necessary policies are in place to address environmental challenges of trade liberalization and to promote sustainable trade. Policy guidance is needed to seize the opportunity that China's WTO accession provides to address environmental problems through restructuring. WTO membership may also bring excellent opportunities for China to gradually upgrade its environmental management systems and standards.

Second, China needs to make efforts to comply with its WTO obligations. WTO rules will limit the options available to public authorities to respond to changes in environmental threats since any measures that are adopted must be both non-discriminatory and comply with the transparency provisions in various WTO Agreements. To increase predictability and transparency, China must codify existing practices into written laws and regulations.

Third, China must integrate environmental concerns into relevant trade policies to address challenges both at home and abroad. Close cooperation will be necessary among departments responsible for trade, environment and technical standards, and others. "Green" measures in foreign countries should be studied to help enterprises meet the green challenge in international markets.

Fourth, there is a need to support Chinese officials in acquiring in-depth understanding of WTO rules related to trade and the environment and the policy issues involved. This will help them participate in future WTO negotiations, assist in the adoption of domestic rules consistent with WTO rules addressing trade and environmental issues, as well as resolve disputes within China's jurisdiction, at the bilateral level and under WTO auspices.

Finally, China's accession will bring changes in the "balance of power" between developed and developing countries in the WTO. As a participant in WTO decision-making and negotiations, China needs to develop a forward-looking and positive position in order to play an active role in promoting both trade liberalization and sustainable development.

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Sustainable Development - An Ethical Construct in Search of a Multilateral Expression

By K. G. Anthony Hill

The Brundtland Commission posited sustainable development as an ethical tenet. The ethic to be applied was *trans-border* (transnational), extending to all peoples. It was to be *trans-temporal*, extending across generations. This approach was to provide, at the very least, the 'basic needs' and the 'opportunity' for better lives for all; it was our common responsibility, our common future. It required economic growth, an 'absolute essential to relieve the great poverty that is deepening in much of the developing world'. Today, poverty continues to deepen, while paradigmatic policies and programmes fall in and out of fashion.

The major political document underpinning the GATT/WTO trading system, the GATT 1947, embodies the Brundtland ethic. Its bedrock principles extend across borders and generations: 'most-favoured nation' (MFN) and national treatment, due process in settlement of disputes, commitments openly negotiated (bound schedules) and consensus decision-making.

Granted, actual trading practices fall short of the model. Some of the rules and 'arrangements' sanctioned in the GATT/WTO even pervert the principles, whether in the sectors of agriculture, energy, technology or textiles and clothing. The golden age of the GATT is no more. The WTO has elevated GATT-inconsistent practices to a tantalising art form. So tantalising that those who rail against its inequities suggest that all multilateral environmental agreements (MEAs) should be brought within its fold. And those who proclaim its civilizing mission wish it to be the depository for all trade and investment transactions among governments.

What to do?

Should there be negotiations in the WTO on issues raised under the rubric of trade and environment, and sustainable development?

A short and pointed answer: No! To undertake negotiations without due care is to run the risk of compounding the fracture between the developing and the developed worlds. With deepening poverty, rising income disparities, depleting resources and discretion amplified by faulty rules, sustainable development objectives will be but a chimera.

To be more specific:

Recall that the Uruguay Round started out with 'Trade in Counterfeit Goods' and ended with TRIPs. 'Like products' were to be treated as 'unlike products' unless branded. From there, the trading, consuming and investing communities found that capital (now intellectual) had moved firmly into the proprietary domain. The terms of trade and cost of capital had moved several notches up the scale for newly industrialising economies. Despite the intellectual opprobrium on TRIPs in the 'free trade' WTO, there seems to be no likelihood that it can or will be reversed. The consensus to do so cannot be mustered.

Recall that services or 'trade-related services' also began as a separate track in the Uruguay Round, albeit 'under the aegis of GATT' (i.e. to be examined and tested for its GATT-ability, based on its principles. The GATS did not quite measure up to it).

Recall that the phrase 'single undertaking' is nowhere to be found in the Marrakesh Agreement establishing the WTO. Nevertheless, it now appears as part of the WTO *acquis*, binding all Members to each and every Agreement. No reservations are allowed. Compensation can be exacted from any sector following an adverse ruling by the WTO Dispute Settlement Mechanism.

The transformation of the GATT culture into that of the WTO (from vocational to professional, from pragmatic to ideological, from collegial to litigious) favours the *trade-weighty* over *trade equity*. Without equity – now listed in the compendium of endangered species – to supplement the rules and to mitigate their inflexibility, fairness, justice and the 'balance of benefits' anticipated by developing countries will remain elusive.

'No', however, is not the complete answer. The WTO will continue to be the central multilateral trade institution. Trade liberalisation will continue to be a channel for increasing welfare and enlarging opportunities. Tradeable environmental goods and services will need predictable multilateral rules. But development must be restored as a central objective of the trading system. The benefits from trading must be equitably shared.

How to Do It?

While a decision to negotiate at the Doha Ministerial Conference appears to be premature, the urgency in tackling global climate variability and change suggests that business should not continue as usual in the WTO. It will not be enough to return to the Committee on Trade and Environment and engage in discussions based on the 10-point Agenda.

A clear mandate is needed to energise these discussions. A framework of issues agreed by governments could be the starting point, leaving open the option to make changes proposed by interested parties.

Here is an outline of the approach:

- Recognition and guarantee of the rights of Indigenous Peoples and Tribes, their traditional knowledge and the biodiversity in their homelands.
- Proper understanding of the *science* of climate change, its impacts and the necessary adaptation/mitigation strategies.
- Due attention to scientific, legal and technical principles, *inter alia*, the precautionary principle, the polluter pays principle, risk assessment and management methodologies, etc.
- Population dynamics and the application of ethical tenets, including equity.
- Analysis of the potentially *operational* elements of sustainable development:
 - (i) *Development* (economic growth, general welfare, accretion of capital stocks);
 - (ii) *Sustainability* (natural systems and resources, especially biodiversity and 'ecological integrity'); and
 - (iii) *Social Capital* (the range of opportunities for self- and community improvement over time; the network of social and market relationships, as well as equity).

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Parliamentarians Have a Role to Play in Doha

By Fergus Watt

In the run-up to the Qatar Ministerial Meeting, much critical commentary has focused on the WTO's persistent efforts to sideline debate on structural reform, particularly with regard to transparency and public participation issues.

Much of this attention has quite rightly been leveled at the awkward arrangements for non-governmental participation at Doha, which have the effect of diminishing NGO engagement at a time when public concern over the legitimacy of the organisation has never been greater.

Meanwhile, a similar drama is unfolding with respect to the another initiative to enhance the WTO's external transparency: finding an appropriate role for parliamentarians in the work of the organisation.

At stake here is the prospect of beginning a process with the potential to make the WTO more democratically accountable. Parliamentarians in Doha will be confronted with important questions concerning the need to play an ongoing role within a permanent political oversight body which is part of the institutional machinery of the WTO.

Questions regarding the role of parliamentarians in trade governance are not new. Indeed, growing interest by parliamentarians in the work of the WTO has been a recurring feature of WTO meetings. At the last Ministerial, a group of 120 parliamentarians issued the *Seattle Declaration*, which called for the creation of a permanent parliamentary standing body alongside the WTO as a necessary step in the democratisation of trade governance.

Subsequently, international meetings in April, 2001 (under the auspices of the European Parliament) and June, 2001 (under the auspices of the Inter-Parliamentary Union) each brought together parliamentarians from the major regions of the world to discuss parliamentary involvement in the ongoing work of the Organisation. Although both meetings called for further discussions among parliamentarians on the occasion of the WTO Ministerial Meeting, there are some noteworthy differences and competing 'visions' for the role of parliamentarians in the future of the WTO.

Follow-up meetings in September at the European Parliament, Strasbourg, and early October at the IPU secretariat in Geneva, were required to develop a shared framework for discussions. Thus, parliamentarians will meet in Doha November 11, on the basis of a joint invitation from the European Parliament and the IPU (in collaboration with two regional bodies, the Latin American Parliament and the Parliamentary Assembly of the Council of Europe).

These seemingly arcane preliminary decisions have proved difficult precisely because they reflect the differences of views on the appropriate role for parliamentarians in the WTO, and which body should be empowered to organise parliamentary participation. Boiled down, one point of view, championed by the group led by the EuroParliamentarians, would see parliamentarians participate in some sort of permanent, newly-created parliamentary assembly which, although having only consultative powers, would be representative of world citizenry and would play a role as a 'parallel' deliberative body in bringing public concerns to the present intergovernmental structures.

The alternative, more minimalist conception, championed by the IPU as well as WTO senior officials, would provide national parliamentarians with a more long-distance relationship with the WTO. Rather than a permanent standing body, the IPU favors a 'parliamentary dimension' animated by occasional international meetings. According to the IPU declaration this June, 'Parliamentary oversight at home keeps governments accountable, and through them, the international trade agreements they negotiate. Parliamentary involvement can also help make the trading system [...] more widely understood and supported.' In other words, parliamentarians can play a useful role 'selling' WTO agreements to a skeptical public as long as they leave the difficult negotiations and debates to governments and their diplomatic representatives.

NGOs have a stake in the outcome of this debate as well. Most would welcome a well-structured parliamentary assembly not only for reasons of principle, i.e. the contribution it would make toward democratising WTO affairs. More pragmatically, a parliamentary dimension to the WTO's work would provide a badly needed public forum, providing NGOs an opportunity to air their concerns over the range of trade-related issues which have for good reason aroused concern among broad sections of public opinion. Furthermore, just as NGOs would welcome a well-structured parliamentary assembly, they have good reason to oppose a weak parliamentary forum. They fear that WTO officials would cite these pro forma 'consultations' with elected parliamentarians as an excuse to avoid extending participation and observer rights to civil society representatives.

A strategic alliance between progressive parliamentarians and NGOs will be essential if long term progress is to be made on the kind of permanent forum for parliamentarians which can make the WTO more transparent and accountable.

Not surprisingly, the Draft Declaration circulated early in October by the WTO's Chairman of the General Council and Director-General provides very few starting points to advance debate on these, and other, transparency issues. The Draft Declaration makes only passing references to the need for 'a better public understanding of the WTO' and 'improved dialogue with the public.'

On the brighter side, there is no need for all the complexities related to parliamentary involvement in the WTO to be reconciled by the end of the Qatar Ministerial. The next step in this debate need consist only in finding a formula for moving the discussions more formally within the intergovernmental post-Qatar agenda. As long as acceptable language can be included in the Qatar Declaration and Programme of Action, then subsequent discussions can proceed on a more official level to develop proposals for the actual creation of a parliamentary forum, proposals which might be adopted under more favourable conditions, perhaps as early as the next Ministerial Conference.

Getting there won't be easy. Parliamentarians meeting in Doha will need to be more than passive observers. They will need to make their case strongly if they want to advance prospects for a greater role in WTO affairs.

Fergus Watt is Executive Director of the World Federalists of Canada.

NGOs Table Their Cards for Doha

'We reiterate our opposition to continued attempts to launch a new round or expand the WTO by bringing in new issues such as investment, competition, government procurement, biotechnology or by accelerated tariff liberalisation. Expanding the WTO into issues such as investment and competition policy or requiring all countries to adhere to WTO government procurement rules (starting with an initial phase of transparency rules), would threaten national self determination and the survival of small and medium sized local firms and farms, remove support for local economies, and cause immeasurable social and environmental damage. We also reject the new tactics of the European Union in particular to sneak in investment and competition negotiations by introducing them as plurilateral agreements. There must be a moratorium on further trade liberalisation initiatives at the WTO. Instead, the issues of inequity – implementation issues – for developing countries must be urgently addressed. These should not be linked up in the context of further liberalisation negotiations.'

Opposed to investment negotiations, NGOs call for institutional reforms and priority attention to implementation concerns.

Thus reads the first demand addressed to WTO Member governments by 350 public interest organisations in *Our World Is Not For Sale, WTO Shrink or Sink*, a petition launched early this year by the Council of Canadians. The document also includes calls on the WTO to protect basic social rights and environmental sustainability, as well as basic social services; to stop corporate patent protectionism, particularly with regard to seeds and medicines; to consider food as a basic human right and reform the Agriculture Agreement accordingly; to expand and operationalise special and differential treatment; to democratise decision-making; and to reform the dispute settlement system. The diverse group of signatories around the world includes Via Campesina, Focus on the Global South, Genetic Resources Action International, the Third World Network, the Institute for Agriculture and Trade Policy, the Lebanese Platform on the WTO, the Swiss Coalition of Development Organisations, ATTAC France, as well as several national branches of Friends of the Earth and Oxfam.

Many of the points made in *Our World Is Not For Sale* – priority to implementation concerns, no negotiations on investment and rebalancing the TRIPs Agreement so that it better serves the public good – are common to a number of NGO position papers, including Oxfam International's policy brief *Is the WTO Serious about Reducing Poverty? The Development Agenda for Doha*. OI, a network of twelve development agencies that work in 120 countries, advocates that any new negotiations be targeted to bring about 'wide-ranging changes [...] to ensure that the world trade regime promotes poverty reduction, respect for human rights, and environmental sustainability' (see highlights on page 16).

Institutional and Policy Reform

In October 2001, Oxfam, the World Wide Fund for Nature (WWF), Friends of the Earth, the Institute for Agriculture and Trade Policy, ActionAid and the Centre for International Environmental Law released a joint statement urging WTO Members involved in drafting the Doha Ministerial Declaration 'to seriously address the systemic inequalities and imbalances, which have prevented it from making meaningful progress on key substantial issues and continue to cast doubts on the legitimacy and transparency of the multilateral trading system'. The NGO coalition said ministers should instruct the WTO General Council to 'develop a

comprehensive work programme on institutional reform, covering both internal issues (capacity-building, meetings, decision-making, reform of dispute settlement measures) and external issues (NGO accreditation, co-operation mechanisms with intergovernmental organisations, parliamentary oversight and national consultation guidelines.' The General Council should come up with recommendations for action on these subjects by the WTO fifth Ministerial Conference in 2003.

Consumers International and the International Institute for Sustainable Development (IISD) have also expressed particular concern about the WTO's structural deficiencies in dealing with public participation and promoting sustainable development. In the first of its seven 'viewpoints' on the Doha Ministerial, IISD highlights another systemic concern: the WTO's lack of a mission statement clearly articulating the end that the institution intends to serve. IISD proposes that ministers launch an open process in Doha, aimed at

formulating a clear set of goals and objectives that would, 'for the first time, provide the missing shared standard for evaluating the impact of trade policy'. In another viewpoint paper, IISD argues that the WTO is 'institutionally incapable' of implementing an investment agreement and that the lack of transparency of WTO negotiations makes it the wrong forum for an agreement where 'essential public goods' would be at stake (see page 18).

Environment

IISD proposes discontinuing the WTO's Committee on Trade and Environment and addressing environmental issues in each of the Agreements and bodies where they are important. It also recommends the negotiation of a WTO Agreement on Trade-related Environmental Measures, which should contain at least (1) an agreed understanding on the application of precaution in regulatory decisions and (2) a firm commitment to assist developing country exporters in meeting environmental and human health-based technical regulations.

In its document entitled *Can the World Trade Organisation Live up to the Challenges of a Globalising World?*, WWF acknowledges that a more integrated world is, in principle, desirable to effectively address global environmental problems, but warns that more trade cannot be a goal in itself. To tackle growing inequality and depletion of natural capital, WWF proposes a clarification of the relationship between trade rules and multilateral environmental agreements (MEAs); the elimination of harmful trade barriers, such as fisheries subsidies that contribute to fleet overcapacity; institutional reforms for enhancing transparency and participation, resolution of implementation issues and non-expansion of WTO jurisdiction into new areas.

Oxfam also supports clarification of the status of MEAs in relation to trade rules, and the incorporation of the 'precautionary principle' into WTO Agreements, which it regards as measures that 'do not require a new round'. However, there must be safeguards against protectionist abuse of these provisions. Consumers International also calls for the Agreements on Sanitary and Phytosanitary Measures and Technical Barriers to Trade to be applied in conformity with the precautionary principle.

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A Development Agenda for Doha

Excerpts from Oxfam International's position paper

If governments demonstrate sufficient political will, these policy proposals can be addressed in the short term within the context of existing WTO negotiations on agriculture, services, intellectual property and implementation issues. Until this happens, it is inappropriate to discuss the launch of a broad round of negotiations incorporating a range of new issues. Oxfam wishes to see the following specific outcomes of the Doha Ministerial Conference:

Agreement now on the following five key points

- A commitment by rich countries to provide *tariff/quota-free access* for all LDC exports by 2003;
- A commitment by rich countries to *phase out agricultural export subsidies* by 2003;
- An agreement on a binding, *pro-public health interpretation of TRIPs* and a commitment to revision of the Agreement;
- An agreement on stopping protectionist *abuse of anti-dumping rules* by rich countries, notably the United States;
- A commitment by rich countries to increase substantially the funding of *trade-related technical assistance*.

A commitment to achieve the following over the next two years*Agriculture*

- Elimination of all forms of export support by industrialised countries and reduction of other trade-distorting subsidies.
- Recognition of the right of developing countries to protect and promote domestic food production as part of their national food-security strategies.

Market access

- Greater access to rich-country markets for developing-country exports, especially in the agricultural and textiles sectors.
- Priority given to reducing tariff peaks and escalation, but also protectionist use of non-tariff barriers (e.g. rules of origin and sanitary standards).

Intellectual property

- Revision of TRIPs to give developing countries greater choice about if and when to introduce high levels of intellectual property protection in pharmaceuticals and other sectors.

Services

- Ensuring that services negotiations are based on voluntary commitments by developing countries, by sector, and without external pressure for hasty or ill-considered commitments.
- Agreeing liberalisation in areas of interest to developing countries, such as the movement of natural persons.

Other implementation issues, including

- Extending transition periods for compliance with existing Agreements such as TRIMs (investment regulation) and TRIPs.
- Revision of the Dispute Settlement Understanding to make it fairer for poor countries.
- Reviewing the boundaries of the WTO role and its coherence with other international institutions and conventions.

Like most other public interest NGOs, Oxfam rejects the notion of a 'comprehensive' round of trade negotiations, which would include investment, competition policy, government procurement or trade facilitation. It would, however, support 'eventual multilateral agreements on new issues if genuinely developmental, e.g. dealing with corporate monopoly and restrictive practices, tighter regulation of transnational corporations, or control of corruption, although these would not necessarily be under the wing of the WTO.'

NGOs Table Their Cards, continued from page 15

Greenpeace's Ministerial contribution *Safe Trade in 21st Century: the Doha Edition* goes considerably further: it suggests that Members refrain from engaging in new talks to put pressure on the United States to sign the Kyoto Protocol, an MEA that requires the collective greenhouse gas emissions of industrialised countries to drop five percent below their 1990 levels by 2012 (the US officially disengaged from the Kyoto process in March 2001). Alleging that the US benefits from 'hidden subsidies' in the energy sector due to its 'free rider' position vis-à-vis those WTO Members that are Parties to the Kyoto Protocol, Greenpeace invites Members to consider bringing the US before a WTO dispute settlement panel.

The Greenpeace agenda also calls for the institutionalisation of 'environmental and social impact assessments' of trade policies to ensure their sustainability, as well as urges WTO Members to definitely and resolutely accept the precautionary principle as a cornerstone of its decision-making.

Consumer Concerns

Consumers International (CI), a federation of 273 consumer organisations in 121 countries, takes a different approach calling on WTO Members to launch a consumer round in Doha. CI believes that trade liberalisation will only enhance consumer welfare if it is supported by robust domestic consumer policy and specifically addresses the needs of the poorest consumers.

Future WTO negotiations should strengthen the Agreement on Agriculture to enhance the food security of vulnerable consumers, and ensure that no services sector is liberalised under the General Agreement on Trade in Services (GATS) unless effective and pro-consumer regulatory bodies are established. With regard to technical standards, a minimum twelve-month phase-in period for the application of new SPS or TBT measures to developing country exports might guarantee a fair compromise between the needs of both consumers and exporters.

NGO Statements on the Internet

- **Is the WTO serious about reducing poverty?**
<http://www.oxfam.org.uk/policy/papers/doha.html>
- **A Consumer Round for the WTO**
<http://www.consumersinternational.org/news/pressreleases/Consround170901.html>
- **Can the World Trade Organisation Live up to the Challenges of a Globalising World?**
<http://www.ictsd.org/ministerial/doha/WWFdohastatement.pdf>
- **Open Letter on Institutional Reforms in the WTO**
Action Aid, WWF, OI, IATP, CIEL
<http://www.oxfam.org.uk/policy/papers/wtoreform.pdf>
- **Our World Is Not For Sale**
<http://www.canadians.org/campaigns/campaigns-trade-notforsale.html>
- **Investment – Avoiding a Dangerous Minefield for the WTO**
(third of a series of 'Viewpoint' position papers).
http://www.iisd.org/pdf/2001/trade_qatar_viewpoint3.pdf
- **Safe Trade in 21st Century: the Doha Edition**
http://www.greenpeace.org/politics/wto/doha_report.pdf

Investment and the WTO: What Next?

By Pierre Sauvé

There are strong grounds to believe that investment will be part of any broadened negotiating mandate to launch a new round of multilateral negotiations. One important reason for reaching such a conclusion is that the Uruguay Round's built-in agenda of resumed negotiations on agriculture and services is arguably too narrow to command much enthusiasm among the WTO's diverse membership or to allow for an acceptable balance of benefits from the negotiating process. The search is thus on for the optimal size and content of a negotiating mandate capable of bringing all key stakeholders to the table. Given the role of investment as the leading integrative force in a globalising world economy, the vigorous trend towards liberalising FDI during the last decade, and the extensive preparatory work at the inter-governmental level (including bilateral and regional efforts at investment rule-making), it would be somewhat anomalous if a new round of multilateral negotiations were to be launched without some effort at addressing the trade-investment interface more comprehensively.

A *de minimis* approach to investment at the WTO would represent an important step in multilateral rule-making.

That said, there is no denying that the recent years have seen a significant scaling back of ambitions on the trade and investment front. The reasons include the disappointing outcome of attempts at crafting a far-reaching (and over-ambitious) Multilateral Agreement on Investment at the OECD; the growing assertiveness of civil society opposition to trade and investment liberalisation and its claim that multinational corporations stand to be the only beneficiaries of investment regime liberalisation; rising concerns over the perceived challenge to regulatory sovereignty flowing from the operation of investment protection and dispute settlement disciplines under the investment chapter of the NAFTA; as well as the desire of many developing country members of the WTO to see their Uruguay Round implementation concerns properly addressed before any expanded negotiating agenda is considered.

For these reasons, WTO members will likely consider a more modest set of proposals on investment when they next meet at the ministerial level. A scaled-back set of ambitions constitutes a significant retrenchment from what OECD countries were prepared to contemplate only a short while ago in context of the MAI negotiations. A *de minimis* approach would likely feature the following six core elements:

- (i) a narrow definition of "investment", limited to foreign direct investment (investment which entails either commercial presence, lasting interest and/or managerial control) and excluding portfolio investment and other types of assets (e.g. intangible assets, contracts) covered by the "broad" definitions typically found in bilateral investment protection agreements;
- (ii) a focus on strengthened conditions of transparency in the development, promulgation, implementation and enforcement of domestic rules governing the entry and post-entry operations of foreign established enterprises;
- (iii) a predominant focus on post-establishment investment liberalisation issues, aiming at the progressive application of national treatment, and excluding disciplines on investment protection (which from the perspective of FDI-originating countries are most likely best dealt with bilaterally); with the possibility of a GATS-like, voluntary, approach to commitments on pre-establishment matters;¹

- (iv) providing for WTO-like, *state-to-state*, dispute settlement procedures rather than private party recourse to dispute resolution procedures, e.g. so-called investor-state arbitration;
- (v) following a GATS-like approach to scheduling liberalisation commitments, with bound commitments undertaken voluntarily in sectors and sub-sectors, subject to the retention (and possible progressive elimination) of existing non-conforming and/or discriminatory measures; and

(vi) a focus on the *development dimension of the trade and investment interface*, including up-front commitments for technical assistance and capacity-building on the part of FDI-originating countries and a commitment to assess the developmental effects of the TRIMs Agreement.

A credible argument can be made that a *de minimis* approach along the lines just described would represent an important step forward in multilateral rule-making, establishing a more solid foundation on investment than is currently the case and allowing

for a further deepening and broadening of disciplines in subsequent WTO negotiating rounds. Such an argument cannot be easily dismissed, and proposals that call for a scaled back effort on trade and investment need to be looked at seriously.

That said, such scaling back may well represent an excessive reaction to the demise of the MAI and to perceptions of structural flaws in the rules governing investment in Chapter 11 of the NAFTA. There can be little doubt that many OECD governments have been hesitant on investment rule-making matters since the MAI talks ended. The question arises, however, of the extent to which governments have conducted a proper, sober, analysis of the underlying causes of the MAI's failure and of the NAFTA's putative failings and determined how best to avoid a repeat performance or address such problems in a WTO setting. Significant downsizing of what may be 'doable' on investment in a WTO setting could well be excessive, premature and potentially counterproductive in the absence of such analysis. For this reason, should a negotiating mandate prove elusive when WTO ministers next meet, member countries should agree to renew the mandate of the Working Group on the Relationship between Trade and Investment until the next Ministerial gathering.

Even a 'de minimis' Approach Would Face Major Challenges

While a *de minimis* scenario represents a credible option for ministers to consider, it still raises many policy challenges. For one, its focus on a limited agenda of generic rules on investment appears to assume a degree of architectural overhaul that WTO Members have not yet addressed in the Working Group, let alone reached consensus on.

It is, indeed, quite unclear how *existing* WTO disciplines would relate to and cohere with any new set of investment rules. Would the TRIMs Agreement be incorporated by reference? Would its scope extend to investment measures affecting trade in services? How would the TRIMs Agreement's scope of prohibited measures be modified and/or expanded? Would provisions from the Subsidies and Countervailing Measures Agreement pertaining to investment measures be treated in a similar vein?

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Investment and the WTO, continued from page 17

If so, would ministers not wish to map out some negotiating objectives in the difficult area of investment incentives before agreeing to anything? On the basis of what prior WTO work could such objectives be drawn up?

How would the treatment of commercial presence in the GATS co-exist alongside a potentially generic set of *de minimis* investment disciplines? In particular, how would the fairly broad definition of commercial presence contained in the GATS (focusing on both matters of pre- and post-establishment) cohere with the narrower definition envisaged in a possible new WTO instrument? How keen should WTO members be to agree on a GATS-like approach to investment liberalization? Were a *de minimis* set of investment disciplines to focus solely on measures affecting trade in goods, what kind of impediments would liberalization discussions address? (given that a majority of investment restrictions target services industries rather than manufacturing).

Environment, Labour and Business Views Differ

There remains, as well, the thorny issue of the treatment of labour and environment-related issues in any WTO set of disciplines on investment. Political support for investment rules may be weak enough in some key capital exporting countries to require a compensatory bargain to assuage labour and environmental groups. This could take the form of calls for a binding provision committing WTO Members not to lower their labour or environmental standards with a view to attracting investment. As in the NAFTA (where such language is not, however, legally binding), such a commitment could be subject to dispute settlement in the case of a recurring pattern of lax or non-enforcement of domestic standards. It could also lead either to retaliatory trade sanctions or to the levying of monetary fines against offending countries.²

Much as a commitment of this type might be acceptable to most (but not all) developed countries, to whom the bulk of world FDI flows is destined (it is not coincidental that such countries also maintain the highest standards of environmental and labour

protection), there is little doubt that adding provisions of this type could harden the resistance of developing countries towards more comprehensive investment rule-making in the WTO.

A final, open, question concerns private sector attitudes towards proposals for a scaled-back effort on investment at the WTO. The business community in many FDI-originating countries has come to view the bilateral route as offering superior returns on scarce negotiating efforts on investment protection matters while professing considerable interest in transparency-related issues.

In some developed countries, the latter objective appears to have assumed equal importance to that of addressing investment distortions or discriminatory impediments to entry and operation. This is all the more so as internationally active firms are often able to internalise the costs imposed by the latter barriers. And host countries have on the whole shown little inclination, in an environment characterised by high capital mobility, to reverse the course of policy once they embark on the path of significant investment regime liberalisation.

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ENDNOTES

¹ A GATS-like, à la carte, approach could also be envisaged with regard to a minimum set of investment protection disciplines dealing inter alia with unimpeded payments and transfers, expropriation and compensation, protection from strife, general exceptions, etc. WTO members might also need to consider the need for an investment equivalent of GATT Article 24 or GATS Article V (which are WTO-sanctioned departures from MFN treatment arising from regional trade agreements).

² It has also been suggested that a WTO set of investment rules could feature (most likely non-binding) provisions dealing with matters of corporate social responsibility. Precedents for provisions of this sort can already be found in the United Nations' Global Compact or the OECD's recently revised Guidelines on Multinational Enterprises. This may well be an area where the interests of OECD-based NGOs and trade unions coalesce with those of their developing country counterparts (including in some instances some developing country governments).

NGO Views on the WTO and Investment

'An international investment agreement must also address the goals of public policy that are impacted by investment, e.g. environment, community development, technology transfer, public health and employment [...] The WTO is designed as a negotiating forum for trade concessions. Its dispute settlement procedures are remarkable, yet they do not meet basic criteria of legitimacy, transparency and accountability. It is quite unsuited for an investor/state dispute settlement process. The WTO is institutionally incapable of implementing an investment agreement.'

'Investment – Avoiding a Dangerous Minefield for the WTO', IISD

'WWF considers that negotiations towards an investment regime within the WTO should not be pursued. Until the international debate on investment rules begins to seriously address the relationship between FDI and the basic needs of conservation and sustainable development, all international investment negotiations will be premature. [...] Moreover, substantial doubt exists whether the WTO itself would be an appropriate vehicle for a new global investment regime.'

'No Investment Agreement within the WTO', WWF International

Sustainable Development – An Ethical Construct, continued from page 13

The principle of 'subsidiarity' should be paramount in deciding the most effective level for performance and determining responsibility. The WTO, its Members and the Secretariat would then be in a more informed position to determine the special role the institution could play in helping to change behaviour and foster sustainable development through expanding trade.

The 'range of opportunities' to allow participation and sharing will require genuine financial and technological capital transfers, both through markets and official channels. Central to this are *fair terms of trade*. The WTO and all other relevant regional and international organisations must once again place this at the centre of their statistical/research agendas and policy reform programmes.

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Sustainable Use of Natural Resources, the WTO and MEAs

By Jon Hutton

The WTO promotes trade liberalisation while multilateral environmental agreements (MEAs) use trade-restrictive measures to protect natural resources. Although to date no state has attempted to take formal proceedings against MEA measures at the WTO, there is good reason for thinking that the two regimes may conflict. Indeed, fear that this may happen is driving a large section of the environmental community to move pre-emptively to ensure that MEA measures are exempt from WTO processes. This article analyses the relationship between the WTO and MEAs such as the Convention on International Trade in Endangered Species (CITES) from a somewhat different perspective, that of community groups in Southern Africa concerned with the sustainable use of natural resources for development purposes.

Trade Measures for 'Environmental Protection'

Two sorts of trade restrictions are applied in the name of 'environmental protection': we term these 'unilateral' or 'pursuant' measures. In simple terms, unilateral restrictions are unashamedly taken to satisfy a domestic agenda while pursuant measures are so named because they are applied pursuant to a multilateral environmental agreement¹.

Unilateral Measures

Unilaterally imposed trade restrictions have always been a major tool to effect policy changes and some observers claim that there cannot be multilateralism without unilateralism because, in a world where members of the international community hold different views, unilateral, power-based measures are necessary to bring all parties to the negotiating table.² The WTO, however, is designed to turn a power-based system to one based on rules in which unilateralism is unwelcome – and this is clearly to the benefit of the developing world.

Unilateral trade measures fall into one of three categories:

- They may be direct restrictions on trade (such as the US ban on harp seal products). In this case they run counter to GATT Article XI unless they meet the terms of the Article XX exemptions.
- They may relate to a characteristic of the product, such as its packaging, which is termed a product standard. If the restrictions discriminate against other producers, they violate Article III. Even where they are not discriminatory, Agreements such as that on Technical Barriers to Trade (TBT) may make them WTO-illegal.
- Finally, restrictions might be introduced, not because of a characteristic of the product, but because of the way it was produced. This is termed a restriction related to production and process method (PPM) standards. The majority of objections to imports on environmental and animal welfare grounds are to do with the way the item is produced.

Why would any country want to influence the process methods in another? In general, the reasons are either environmental (in broad terms) or economic. In the *Shrimp-Turtle* case, the US Government was clearly influenced by both considerations: it wanted to 'save' turtles, but it also wanted other fishing nations to introduce fishing technology that would not put its own fishermen at an economic disadvantage.

Until the *Shrimp-Turtle* Appellate Body report, the WTO's dispute settlement mechanism appeared to have ruled out the legality of unilateral trade measures applied extra-territorially to coerce other countries to change their internal policies. While the situation is now much more uncertain, three key considerations call into question the use of unilateral trade measures under any circumstances:

- Can there be an unambiguous definition of what is environmentally bad in any particular situation?
- Who should decide when a measure is bad for the environment in any situation?
- Is it possible to distinguish between measures taken for primarily environmental reasons from those taken for primarily commercial trade protectionist reasons in any particular situation?

In our experience, when these questions are carefully and honestly considered, the adoption of unilateral trade measures in the name of environmental protection is a very unattractive tool to achieve any policy objective which is both effective and equitable.

The WTO and Multilateral Environmental Agreements

While no formal WTO dispute has been initiated in this area, it has long been recognised that there is potential conflict between WTO rules and restrictive trade practices taken pursuant to some multilateral environmental agreements (MEAs). Many of the actors involved hoped that the Committee on Trade and Environment (CTE) would anticipate problems of this sort and suggest fixes (such as an amendment to GATT/WTO to give more generous exceptions to MEAs). However, the committee has been unable to make conclusive recommendations, although its report to the Ministerial Conference in Singapore in 1996 did clearly lay out the issues and thinking of Members.

One option is to ignore the problem until a dispute is raised, but many developed countries are concerned about the *status quo*, calling for pre-emptive measures to avoid conflict. The EU, for example, has expressed concern that 'the WTO legal system should provide increased legal certainty concerning the use of trade measures in Multilateral Environmental Agreements [...] to prevent conflicting between the two sets of rules.'³

A clash between WTO rules and restrictive trade provisions of MEAs can be addressed by:

- creating a balancing mechanism;
- determining one is superior to the other; or
- modifying one or both systems.

Within much of the developed world there is an overwhelming desire for generous exemptions for measures taken pursuant to an MEA. Trade measures might be legitimised by:

- amending Article XX to include a new exemption;
- encouraging members seek a waiver from WTO obligations; or
- creating a list of MEAs which prevail over the GATT.

In Europe, few voices oppose this position. However, many resource-rich developing countries feel that the WTO should have a say even where measures are taken pursuant to an MEA.

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Developing countries often feel unfairly disadvantaged by MEA regulations and wish to retain the possibility of appeal to the WTO dispute settlement process as a last resort.

They argue that the move to exempt MEAs assumes that each MEA:

- is dealing effectively with the relevant environmental threat;
- is truly a platform for consensus; and
- has an effective dispute settlement mechanism.

Furthermore, it is clear that the trade restrictions allowed by an MEA might be disproportionate and counter to the WTO principle that, even where they are allowed, trade measures should be the least restrictive necessary to achieve a policy objective.

Where any of these things is in question, developing countries are surely justified in asking if it is appropriate to deny the WTO a say?

These are not new arguments – they have been considered by the Committee on Trade and Environment and elsewhere – and it has been recognised that any exemptions for MEAs ought, perhaps, to depend on consideration of the way that the MEA is designed.

Unfortunately, there has been no real progress on these matters within CTE. As a result we conclude that there are three most likely scenarios through which the potential conflict between WTO and the MEAs might resolve itself.

- First, the measures taken by MEAs might be legitimised within the WTO.
- Second, resolution could be left to the WTO dispute mechanism which will gradually build up case-by-case legal precedent that will be applied when a dispute on the conflict between the WTO and an MEA finally occurs.
- As an alternative to both of these, MEAs themselves might take steps to avoid conflict by examining their effectiveness, reviewing their operations to incorporate WTO principles (such as least trade restrictive practices) and creating their own compulsory and binding dispute settlement mechanisms.

Development of WTO Jurisprudence Applicable to MEAs

As a leader amongst developed countries, the US appears to have realised that it cannot garner the necessary support (especially from developing countries) to amend Article XX to exempt MEAs from WTO rules, but will instead ‘rely on WTO panels and appellate bodies to interpret WTO rules in relation to trade sanctions imposed for environmental protection purposes on a case by case basis.’⁴ This is an important development because such an approach is highly risky for resource-rich developing countries. After 129 distinct disputes, 21 panel reports and 17 Appellate reports it is commonly held that the WTO is evolving as a legal system and if the Appellate Body (a key part of the Dispute Settlement Understanding) makes liberal decisions as to the acceptability of coercive extra-territorial measures (as it appears to have done in its finding on the *Shrimp-Turtle* dispute), any subsequent rulings are unlikely to make the interpretation of the rules more restrictive again.

To demonstrate how unpredictable the process is, consider that after the 1991 and 1994 *Tuna-Dolphin* and 1998 *Shrimp-Turtle* panel decisions it appeared that trade restrictions did not fall within the scope of the Article XX(g) exemption if they attempted to coerce foreign countries to modify their domestic regulations.⁵ The simple interpretation of this was that extra-jurisdictional

measures of this type were GATT-illegal. A state could not use trade measures to force its particular moral or environmental priorities on a foreign country. However, panel decisions are only binding for the direct parties to a dispute. They need not be accepted or followed by subsequent dispute settlement panels and the 1998 *Shrimp-Turtle* Appellate Body report found that it was not the extraterritorial element of environmental standards which was GATT-incompatible, but the arbitrary manner of application. So, it appears that unilateralism which targets foreign production and process methods is now acceptable within the WTO, though with certain constraints of application.

Finally, while many countries are clearly keen to see enhanced principle- and rule-based adjudication within the WTO, some developed countries appear to be particularly keen that the system develop towards some sort of ‘World Trade Court’. The significance of this is that such a ‘Court’ might be able to deem itself ‘not competent’ where disputes are political, cultural or environmental, thus creating another mechanism that can prevent an effective challenge to some types of unilateral trade measures.

Steps within MEAs to Attenuate Potential Conflict

Where an MEA includes trade measures that potentially conflict with the principles and articles of WTO agreements, the MEA can take significant steps to reduce the likelihood that a dispute relating to trade measures pursuant to its provisions will be taken to the WTO. Working with the WTO Secretariat, MEA Parties and Secretariats can draw up criteria of ‘WTO compatibility’. This would include, *inter alia*, determination of whether the MEA

- is the most effective mechanism for dealing with the environmental problem;
- allows equivalent treatment of members and non-members;
- is truly a platform for international consensus (i.e. does it allow unilateralism); and
- has an effective dispute settlement mechanism.

In addition, the MEA should give express recognition that it takes into account WTO principles, including the requirement that trade measures should be least restrictive to achieve the desired end, that they should not be arbitrary or unjustifiably discriminatory, or a disguised restriction on trade.

Where CITES is concerned, it is hardly likely that the Parties and the Secretariat will be satisfied that the dispute settlement mechanism is effective. There are likely to be concerns about stricter domestic measures – there may even be room for debate as to the very assumptions which underlie the Convention (that all commercial trade in endangered species is incompatible with conservation).

Discussion and Conclusions

While many advocates of sustainable use of natural resources would hold that CITES has not shifted sufficiently from its anti-trade starting point, it does not follow that the solution must be to make CITES subordinate to the WTO’s trade liberalising stance. Decisions about the application of trade measures to the wildlife trade are best made not on the basis of an *a priori* opposition to/ support of trade liberalisation, but in the light of the circumstances prevailing in the individual case. There thus is a case for thinking that CITES should retain some autonomy in making decisions about which trade measures to apply. This position can be consistently combined with pressing the case for CITES’ continued evolution in the direction of support for sustainable use.

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Is WTO Law Becoming More Sustainable?

By Mario Prost

For the past two decades, the concept of ‘sustainable development’ has offered an integrated approach to the relationship between trade, environment and development policies. Defined by the Brundtland Commission as ‘development that meets the needs of the present without compromising the ability of the future generations to meet their own needs’, sustainable development represents a vision where economic, environmental and development policies are mutually supportive of a common goal, rather than conflicting separate tracks requiring an impossible hierarchical choice. In the legal sphere, an initially conceptual matrix is now being translated into a corpus of increasingly well-defined principles that make up International Sustainable Development Law (ISDL).

When the WTO was created in 1995, GATT law was perceived as highly unsustainable. For example, GATT Article XX was still being interpreted as ‘a limited and conditional exception’, very far from the integrated perspective required by sustainable development. However, the drafters of the WTO Agreement’s Preamble introduced sustainable development as one of the main goals of the multilateral trading system. Five years later seems an opportune moment to assess whether WTO ‘law’, as interpreted by dispute settlement panels and the Appellate Body, is indeed becoming more sustainable. As the analysis below makes clear, some legal advances have been made with respect to key principles of sustainable development, but many challenges remain.

Legal Advances and Remaining Challenges

Since 1995, several elements indicate that in interpreting WTO provisions, dispute settlement panels and the Appellate Body (AB) are aware of the sustainable development approach. In the 1998 *Shrimp-Turtle* case, for example, the panel noted that ‘the first paragraph of the Preamble of the WTO Agreement acknowledges that the optimal use of the world’s resources must be pursued *in accordance with the objective of sustainable development*’ (para. 42). In the same dispute, the AB considered that sustainable development ‘must add colour, texture and shading to our interpretation of the Agreements annexed to the WTO Agreement’ (para. 153).

Sustainable development is not a vague rhetorical device; it is becoming a coherent body of legal principles, which must be taken into account when dealing with economic, development or environmental issues. In 1994, the International Institute for Sustainable Development (IISD) convened a group of experts, which identified seven such principles with specific reference to trade. The sustainability of WTO law can be analysed by surveying the application of these principles in recent trade disputes. Due to space constraints, we only look at four of the seven ‘Winnipeg Principles’, although the others (environmental integrity, cost internalisation and efficiency, and openness) are necessary for a complete picture.

International Co-operation

‘Sustainable development requires strengthening international systems of co-operation at all levels, encompassing environment, development and trade policies.’ This fundamental principle underlies international sustainable development law, which aims at avoiding conflicts and bringing the most satisfactory solutions to essentially transboundary problems.

This first principle seems to have had a major influence in some recent interpretations of WTO rules. Without describing the whole evolution that has occurred within WTO ‘case law’ – i.e. panel/AB rulings on individual disputes – one has to underline the 1998 Appellate Body report’s formal recognition of this principle in the *Shrimp-Turtle* dispute. Indeed, while remaining wary about unilateral actions in general, the AB in this case deduced that Article XX’s introductory dispositions amounted to real ‘obligation to negotiate’. Furthermore, a compliance panel set up under DSU Article 21:5 ruled in June 2001 that, for the US measures not to constitute ‘unjustifiable discrimination’, the United States ‘had to take the initiative of negotiations’ and ‘to make serious efforts in good faith to negotiate’ prior to any unilateral initiative (WT/DS58/RW, para. 5.66; for further details see Bridges Year 5 No.5, page 7). While this is only an obligation to negotiate – rather than to conclude international agreements – WTO case law today clearly asks for international co-operation (see related article on page 6).

Equity

A second fundamental principle is equity, defined by the IISD as the ‘distribution both within and between generations of physical and natural capital, as well as knowledge and technology’. While States are sovereign equals, ISDL recognises that developing and developed countries share ‘common but differentiated responsibilities’ in the transition to sustainability, as illuminated in Principle 7 of the 1992 Rio Declaration.

Recent interpretations of WTO rules move toward an obligation to consider the particular situation of developing countries when adopting environmental measures. In the *Shrimp-Turtle* case, the first panel declared that ‘environmental policies must be designed taking into account the situation of each Member, both in terms of its actual needs and in terms of its economic means’ and that ‘conservation measures should be adapted, *inter alia*, to the environmental, social and economic conditions prevailing where they are to be applied’ (para. 52). The second *Shrimp-Turtle* panel expressly mentioned the principle of ‘common but differentiated responsibilities’ in its conclusions (para. 7.2).

This principle was also recognised in the 2001 Asbestos case, where exemption of measures necessary to protect human health were reviewed with due consideration to Members’ practical ability to implement alternatives. It thus appears that equity has, to some extent at least, penetrated WTO law. This is a partial recognition at best; other aspects of equity, such as its intergenerational component (often said to be the heart of sustainable development), have not yet been seriously considered by the dispute settlement system.

Science and Precaution

Reconciling trade, environment and development requires scientific knowledge about the complex interactions between these trends. But our understanding of ecosystems is still highly uncertain and in many circumstances, environmental changes cannot be easily reversed, if at all. For these reasons, precaution, which underlies a number of multilateral agreements, should be used in decision-making for sustainable development. Where scientific uncertainty

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exists, it must not be used as a reason for postponing measures to prevent potential harm.

The need for sound science has been emphasised in disputes involving the Agreement on Sanitary and Phytosanitary Measures. In the 1997 *Beef Hormones* dispute, the Appellate Body stated that 'the precautionary principle [...] still awaits authoritative formulation' (para. 123), and limited its application to provisionally adopted measures. Rulings in the 1998 *Salmon* and 1999 *Fruit Varietal* cases also required Members to provide risk assessments containing scientific evidence to justify trade restrictions allegedly taken to safeguard human, animal or plant health. The beginning of an integration of the precautionary principle into WTO law can be found in the 2001 Appellate Body report on the *Asbestos* case, which took health risks into account when it ruled that carcinogenic chrysotile asbestos and its non-carcinogenic substitutes were not 'like products', in spite of the defendant's claims that controlled use strategies were available to make handling chrysotile asbestos safe. Precaution still requires stronger recognition on par with that granted to science under WTO law.

Subsidiarity

Actions necessary to reach sustainable development may occur at different levels of jurisdiction, depending on the nature of issues. The principle of subsidiarity implies a choice between these different levels, based on their effectiveness. In particular, international policies should be adopted only when this is more effective than policy action by individual countries. This principle advocates decisions to be made at the lowest level consistent with effectiveness, but the WTO is clearly designed as a hierarchy. The role of rules within regional or bilateral agreements is still unclear in the law of the world trading system. However, a recent WTO ruling demonstrated respect for measures taken under a regional agreement: in the 1999 *Turkey – Restrictions on Imports of Textile and Clothing Products*, it was found that under certain conditions, Article XXIV can justify a measure which is inconsistent with other obligations under the GATT 1994.

Conclusion

An analysis of WTO legal interpretations since 1995 shows that the rhetoric of sustainable development is no longer ignored but also reveals many remaining challenges concerning the principles of ISDL. We may even question whether these are really being integrated into WTO law, or whether referencing them in case law only helps the WTO to shed its poor environmental image without obliging Members to rethink the foundations of the multilateral trading system, or to directly address the complicated relations between trade liberalisation, environmental protection and development considerations. A move from mere rhetoric to real implementation of ISDL principles would certainly require a political impulse from WTO Member states. Unfortunately, such political will appears absent for the moment. The draft Doha Ministerial Declaration, for example, solely mentions the aim to protect the environment and promote sustainable development, without referring to existing principles or attempting to transform the sustainable development goal into legal obligations. While some progress has been made in recent years, the WTO still has work to do if it is to move beyond recognition of the ISDL rhetoric into a more sustainable world trading system.

Mario Prost is a Researcher at the Center for International Sustainable Development Law based in Montreal. He wrote this article in co-operation with Marie-Claire Cordonnier-Segger and Markus Gehring, both from CISDL.

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On the other hand, if CITES is to play a role in promoting constructive utilisation of wildlife, it is important that decisions are taken on a multilateral rather than a unilateral basis. As has been seen, the decisions of WTO dispute panels have typically expressed support for multilateral decision-making. Nevertheless, there remains some ambiguity about the distinction between multilateral and unilateral measures. CITES is a multilateral treaty that allows scope for unilateral measures. It is, therefore, equally unattractive for supporters of sustainable use for CITES to be completely exempt from any of the provisions of the WTO in a way that entirely removes the possibility of any appeal to the WTO's dispute settlement mechanism.

In light of these comments, the following conclusions are drawn as to the best approach for resource-dependent countries to the relationship between the WTO and MEAs such as CITES.

First of all, given that it is difficult both to distinguish between measures taken for primarily environmental reasons from those taken for primarily commercial trade protectionist reasons, it is appropriate to reject the unilateral imposition of trade restrictions under most circumstances. Next, it is appropriate to avoid a situation in which the WTO dispute settlement mechanism is allowed gradually to evolve a jurisprudence, which defines the relationship between the WTO and MEAs. This will almost certainly favour the view of developed countries. The idea of a World Trade Court, which could decide for itself whether or not trade disputes are within its competence, is not attractive.

Instead, the WTO should encourage MEAs to undertake their own internal review and reform to assess the way they use trade measures, to determine the effectiveness of their dispute settlement measures and to incorporate WTO principles as far as possible. Even though we believe it is essential that resource-rich developing countries be able to use the dispute settlement mechanism of the WTO as the final arbiter in disputes over unilateral trade measures with an environmental flavour, if MEAs are prepared to review their mechanisms, it may be possible to persuade some in the developing world that it is acceptable for the WTO to develop criteria for limited exemptions for trade measures pursuant to MEAs.

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ENDNOTES

¹ Some suggest that measures applied 'in support of a multilateral environmental agreement' (such as those taken by the US under the Pelly Amendment, for example) form a third category. However, close inspection reveals that these are almost always 'unilateral' measures in the strict sense of the term.

² It is, for example, often stated that slavery only came to an end because of unilateral action.

³ Message of the European Community to the WTO High Level Symposium on Trade and Environment, March 1999.

⁴ Inside US Trade - Volume 17 (12) March 26 1999

⁵ e.g. 1994 *Tuna-Dolphin* panel: 'If...Article XX(b), were interpreted to permit contracting parties to impose trade embargoes so as to force other countries to change their policies within their jurisdiction, including policies to protect living things, and which seriously required such changes to be effective, the objectives of the General Agreement would be seriously impaired.'

Pre-Doha Drafts, continued from page 2

Under the new draft, and unchanged from the first text, negotiations on transparency in government procurement and trade facilitation would begin right away.

Also unchanged is language mandating 'examination' of the relationship between trade, debt and finance, as well as the relationship between trade and transfer of technology. In proposals submitted to the WTO on 18 September by the Like-Minded Group, developing countries had requested that working groups be established on trade and debt, trade and finance, and trade and transfer of technology. They also proposed that Members negotiate a Framework Agreement on Special and Differential Treatment (see Bridges Year 5 No.7, page 7 for more details on these proposals), but the draft Declaration only mentions the proposal in passing while endorsing with the work programme on special and differential treatment set out in the Decision on Implementation-related Issues and Concerns (see page 4).

Industrial Tariffs, LDCs and TRIPs Issues

One notable area of concern to developing countries is paragraph 16, on market access for non-agricultural products. This section would mandate Members to engage in reductions in tariff peaks, tariff escalation, and non-tariff barriers, primarily in industrial goods. The original formulation provided developing countries with an out, saying that their commitments could be based on 'less than full reciprocity'. The new text seems to have weakened this latter provision, referring the 'special needs and interests of developing and least-developed countries' to other text on special and differential treatment both in the GATT and in the new draft Declaration. It is unclear whether readings of these S&D provisions could be interpreted as strongly as granting developing countries 'less than full reciprocity,' however.

This despite a proposal circulated on 19 October by Kenya, Mozambique, Nigeria, Tanzania, Uganda, Zimbabwe and Zambia, which said that liberalisation of industrial tariffs under structural adjustment schemes had previously led to serious problems of de-industrialisation and loss of value-added jobs. The proposal advocated a study process – rather than negotiations – to determine the implications of reductions in tariffs and non-tariff barriers on developing country economies.

On other issues, the latest draft has included a new paragraph (35) on least-developed countries (LDCs), which *inter alia* would commit Members to the objective of duty- and quota-free market access for products originating from LDCs. It has also kept intact language that would 'clarify and improve' WTO rules on anti-dumping, an issue that has been resisted vehemently by the United States (anti-dumping is also addressed in the Implementation Decision, see related article on page 4).

Geographical indications, ministers would mandate the TRIPs Council to address the 'extension of the protection of geographical indications provided for in Article 23 to products other than wines and spirits'. This paragraph seems tied to the launch of some sort of 'new round', as the Council would be requested to report, by 2002, to the Trade Negotiations Committee established to oversee negotiations. A large number of both developed and developing countries have been pushing for extending TRIPs protection to food items and other products characterised by their geographical origin.

Ministers would also request the TRIPs Council to pursue its work on the mandated reviews of Article 27.3(b) and the implementation of the Agreement itself under Article 71.1, as well as examine – under the implementation concerns mandate – the relationship between the TRIPs and the Convention on Biological Diversity. In undertaking this work, the Council should 'take fully into account the development dimension'.

Copies of key documents relevant to the Ministerial process are accessible on the ICTSD website at: <http://www.ictsd.org>.

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See also list of NGO Doha Position Papers on page 16.