

The Doha Declaration's Meaning Depends on the Reader

Rarely have the words 'something for everybody' rang truer than after the adoption of the WTO Ministerial Declaration in Doha on 14 November 2001. While this may seem as a fair outcome of gruelling round-the-clock negotiations, the phrase actually takes on a new meaning: Members' interpretations of the documents adopted by ministers vary so widely that, three weeks after the end of the talks, it still is far from clear what exactly they have committed to.

Ministers undoubtedly launched a 'broad-based' round of multilateral trade negotiations on nine topics – eight of which are to conclude as a 'single undertaking' by 2005. The eight are implementation, agriculture, services, industrial tariffs, subsidies, antidumping, regional trade agreements and the environment. However, ambiguities pertain to virtually all key areas, including when – or even whether – negotiations will actually start on investment, competition policy, trade facilitation and transparency on government procurement (see page 6).

Many of the ambiguities have to do with negotiating mandates that seem *a priori* to preclude meaningful outcomes, notably through clauses indicating that the negotiations will not change Members' rights and obligations or diminish the effectiveness of the Agreement under negotiation. In other areas, such as geographical indications, Members already disagree as to whether negotiations have or have not effectively been launched, or under which body or timeline they are to be conducted. These questions are covered below in more detail, as well as in separate articles on implementation and the environment.

Development Round?

There is no doubt that the Declaration contains more 'development-friendly' language than any of its predecessors. Whether this is enough to qualify the negotiations as a 'development round' largely depends on who is doing the qualifying and how the provisions will be acted on. Many developing countries still see the post-Doha agenda as heavily skewed towards industrialised country interests, particularly as they obtained few immediate gains on implementation issues (see page 7). Most importantly, no progress at all was made on market access for textile products.

Instead of a significant Doha 'down-payment', three priority areas for developing countries are included in the 'single undertaking'. Implementation is an issue for negotiations in its own right, although an overlap in different mandates and timelines is already creating major confusion. Anti-dumping and subsidy reform – which

is also at the heart of the implementation concerns – will be negotiated under the heading of WTO rules. While the launch of negotiations on these topics is a major achievement, the 'single undertaking' implies concessions in other areas in order to advance the implementation agenda. In addition, the United States' political difficulties with weakening trade remedy laws, as well as the increasingly ambivalent position of many countries as both users and targets of anti-dumping measures, will make for complex negotiations whose outcome is anything but a foregone conclusion.

The Declaration contains unusually substantial sections on such topics as technical assistance, capacity-building and least-developed countries. References to capacity-building and respect for developing countries' special situation are also liberally sprinkled throughout paragraphs dealing with other topics. This is particularly true in the case of the controversial Singapore issues, where some developing countries draw a direct link between effective technical assistance and an eventual agreement to start negotiations (see pages 6 and 19).

A non-negotiating work programme has also been launched on some priority issues for developing countries, including trade and debt, finance and technology transfer, the special problems of small economies, as well as special and differential treatment.

Whether all these provisions will prove substantive as well as substantial will be a key factor in developing countries' acceptance of the single undertaking outcome.

Environment Arrives on the WTO Agenda

Identified as the major 'win-win-win' opportunity for the world trading system – good for the environment, good for trade and good for development – fisheries subsidies have finally made it onto the WTO negotiations agenda after years of inconclusive talks in the Committee on Trade and Environment. Unprecedented – and most improbable only weeks ago – negotiations have also been launched on clarifying the relationship between the multilateral trade and environment regimes, as well as information exchange between WTO committees and MEA secretariats (see page 5).

In addition, negotiations will start on liberalisation of trade in environmental goods and services. However, uncertainty about what is an 'environmental' good or service, or what either could be construed to mean, has led some WTO Members and environmental NGOs to question the wisdom of the initiative (see pages 9 and 19).

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Agriculture

In Doha, defining the agricultural negotiating mandate once again revolved around what to do with export subsidies, pitting the European Union against practically the entire WTO membership. The former was on record that draft language on reducing export subsidies 'with a view to phasing [them] out' was unacceptable. While the phrase stayed in, it emerged from Doha with the qualification that the talks must be carried out 'without prejudging the outcome of the negotiations' (paragraph 13 of the Ministerial Declaration). Thus, while some Cairns Group members rejoice in finally getting a 'commitment' to the elimination of export subsidies, EU officials stress that Members are only committed to 'working in the direction of' such elimination and have not agreed to a deadline for reaching the goal. The level and speed of the reductions will continue to be at the centre of difficult negotiations.

Another ambiguous point is what *are* the export subsidies that the negotiations will aim to phase out? In an uneasy compromise between the US position that the talks should focus on *export subsidies* and the EU demand that they cover *all forms of export support*, the Ministerial Declaration speaks of '*all forms of export subsidies*'. While most trade delegates from developed and developing countries consulted for this story were inclined to believe that this provision also applies to the export subsidy elements in other export competition regimes, such as export credits, food aid or state-trading enterprises, the US expressed caution if not outright rejection.

The negotiations are also to aim at 'substantial reductions in *trade-distorting domestic support*'. Some Cairns and Like-minded Group members regard this mandate as a potential gate for negotiations on all subsidy boxes (amber, blue, green), whereas the EC clearly stated that this would only refer to those notified under the amber box of trade-distorting subsidies.

Implementation, S&D and Non-trade Concerns

The list of outstanding implementation concerns compiled in WTO document JOB 01/152/Rev.1 contains one agricultural issue: the question whether – in the event that domestic support prices are lower than the external reference price (so-called 'negative AMS') – Members shall be allowed to increase their non-product specific AMS by an equivalent amount (paragraph 2). This issue will be discussed within the mechanism for the agriculture negotiations (to be established by the Trade Negotiations Committee, i.e. not necessarily the special sessions of the Committee on Agriculture, in which the negotiations have taken place up to now).

According to paragraph 13 of the Ministerial Declaration, special and differential treatment (S&D) 'shall be an integral part of all elements of the negotiations and shall be embodied in the Schedules of concessions and commitments'. While this basically restates Article 15.1 of the Agreement on Agriculture, the requirement that S&D should be embodied 'as appropriate *in the rules and disciplines* to be negotiated, so as to be *operationally effective*' is seen – especially by developing countries – as a commitment that future S&D provisions will be incorporated in the AoA in an enforceable manner in contrast to non-operational commitments in the Marrakech Decision, which only contains best endeavor language.

Many consultations were held in Doha on the creation of a 'development box' that would give greater latitude for developing countries' agricultural support measures. However, none of the delegations interviewed for this story interpreted the requirement that S&D should 'enable developing countries to *effectively* take into account their development needs, including food security and rural development' as an explicit reference to a development box. India, for example, regarded it rather as an expression of political will to make special and differential treatment more operational in the agricultural sector.

The Declaration also 'takes note' of non-trade concerns (NTCs) as reflected in Members' proposals and 'confirms' that they will be taken into account in the

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Developing Countries and Industrial Tariff Negotiations

By Vinod Rege

At the Ministerial Conference held in November 2001, WTO Members decided that the current negotiations on the liberalisation of trade in services and agricultural products should be complemented by negotiation for the liberalisation of trade in non-agricultural products (industrial products).¹ The initiative to include industrial tariffs in the negotiating agenda was taken by developed countries and a few developing countries. Most developing countries were, however, sceptical of the desirability and appropriateness of launching negotiations in this sector. This brief article attempts to explain the reasons behind these countries' reluctance to engage in further liberalisation of trade in industrial products at this time and, now that the decision has been taken, propose steps that may have to be taken in adopting ground rules for the negotiations that adequately take into account their concerns.

Tariff profiles of developed and developing countries

The Uruguay Round made significant progress in increasing the spread of binding and in reducing tariffs on industrial products. Almost all tariffs of developed countries have been bound against further increases and, as a result of the reductions made, average tariff levels of developed countries as a group declined from 6.3 percent at the beginning of the Uruguay Round to 3.8 percent by 2000, the year in which the staged reduction agreed to in the round was completed.

This average level of tariffs does not, however, reveal the high level of tariffs that are applicable in these countries to imports of labour-intensive products, such as textiles and clothing, leather and leather products, and footwear. The United States, Canada, Japan and the European Union apply duties over three times the average rate for a number of tariff lines in these product groups. Such tariffs – exceeding 12 percent – are known as peak tariffs. In most cases, products subject to such peak MFN tariffs are also either excluded from the generalised system of preferences or are subject to high preferential rates.

Most of the products affected by peak tariffs also reflect tariff escalation according to the degree of processing. Although, as a result of the reductions made in the Uruguay Round, such escalation has declined significantly in most developed countries, rising tariffs from raw materials to intermediate products and sometimes peaking for finished industrial products continue to restrict export opportunities and thus hamper the development of resource-based processing and manufacturing industries in developing countries.

For developing countries, the shift that had taken place in their trade policies, as well as the measures they had already taken on autonomous basis to open up their markets, enabled them to participate more actively in the tariff negotiations in the Uruguay Round. They offered, *inter alia*, to bind tariffs they had reduced earlier on autonomous basis on some products and, where considered appropriate and possible, reduced their applied rates further. As a result of these reductions, the average level of tariffs of developing countries as a group is estimated to have fallen from 15.5 percent in the pre-Uruguay Round period to 12.3 percent

after the implementation of the reduction agreed to in the Uruguay Round. This average however conceals that there are a few countries, which have significantly higher average rates.

The Round also witnessed a significant increase in the level of tariff bindings given by developing countries. In offering such bindings, these countries were permitted as a matter of special and differential treatment to bind their tariffs at rates higher than the reduced rates agreed in the negotiations. Such bindings allow the countries to raise their tariffs to the level of bound rates, without breaking their GATT obligations. While Latin American countries have widely bound their rates at higher levels, countries in Asia and Africa appear to have made relatively less use of this technique.

WTO data indicates that, except for a very limited number of sectors, tariff escalation according to the degree of processing is not noticeable in developing countries.

Estimated welfare and trade gains from further liberalisation

The extent to which further liberalisation of trade in non-agricultural products would result in furthering economic growth through increased trade has to be examined in the light of the tariff profiles in developed and developing countries described above. The results of the macroeconomic studies undertaken since the establishment of WTO in 1995 by research organisations and the recent study by the World Bank estimate that substantial income gains are likely to accrue to all countries, if all of them – developed, developing and transitional economies – further liberalise their trade in goods. Over 70 percent of the income gains is expected to occur from the removal of distortions in trade in agriculture, as a result of reductions in tariffs and in domestic subsidies and the elimination of export subsidies. The estimated gains from further liberalisation in the industrial sector vary from US\$86 billion to US\$189 billion, depending on the methodology used and the basic assumptions made.² Such gains are nearly double in studies based on the assumption of monopolistic competition in the world economy compared to those which assume free competition. This is because the monopolistic competition model assumes that it would be possible for producers to take advantage of economies of scale and would also be able to innovate continuously by using up-to-date technology.

According to some of the studies, the estimated income gains accruing from the liberalisation of trade in industrial products may be almost equally divided among developed and developing countries. However, the major beneficiaries among developing countries are likely to be those with a relatively high stage of development, such as India and the ASEAN countries in Asia and Brazil and some of the central and southern countries in Latin America. Countries in Africa are expected to gain only marginally, if at all.

All these studies estimate that trade would grow faster than would have been the case if trade were not to be further liberalised. They emphasise that further liberalisation by developing countries would

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negotiations. Many delegates predict that the notion of NTCs 'as reflected in [Members'] proposals' will bring the whole NTCs debate back on the negotiation table. EU Agriculture Commissioner Franz Fischler certainly sees it that way. In addition to highlighting the avenues that this 'clear reference' to non-trade concerns opens for 'the protection of the environment in rural areas and vitality of the countryside', he said that the EU was 'determined to ensure that our consumers can have confidence in the safety of the food they eat, whether it is imported or produced at home. This text recognises our right to pursue the proposals we have already submitted in Geneva in this context.' Prior to Doha, the EU made a concerted – but generally ill-received – effort to get food safety on the agricultural negotiations agenda (Bridges Year 5 No.6, page 2).

A Like-minded Group member took the view that, as developing countries' key non-trade concerns – food security and rural development – are mentioned under S&D, the paragraph on NTCs merely referred to developed countries. A Cairns Group member stressed the wording that NTCs 'will be taken into account [...] as provided for in the Agreement on Agriculture', pointing to the fact that AoA Article 20(c) refers to such concerns together with 'the objective to establish a fair and market-oriented trading system'. Therefore, this source said, the Declaration – just as Article 20 – solely recognised NTCs that do not lead to trade distortion.

The first benchmark for progress is 31 March 2003, by which date Members are to agree on 'modalities for further commitments' (para. 14). To most delegates consulted for this article that deadline was one of the major achievements regarding agriculture and the added value in comparison to AoA Article 20, under which the built-in negotiations have proceeded to date. They see the modalities as a recipe for creating schedules and conducting calculations. Based on these negotiation outlines, Members must submit their comprehensive draft Schedules before the fifth WTO Ministerial, likely to be held in late 2003. The subsequent negotiations on rules and disciplines and related legal texts are to be concluded before 1 January 2005 (para. 45). Where and in what form all this will take place is still to be decided by the Trade Negotiations Committee under the authority of the General Council.

Services

Elaborated in the shadow of high-profile and contentious issues such as agriculture and access to medicines, provisions in the Ministerial Declarations relating to the relatively uncontroversial area of services trade nevertheless present some interesting features from a sustainable development perspective.

Specifically, these features relate to:

- The evolution, from the first draft Ministerial Declaration to that finally adopted, of the preambular provision on Members' right to regulate the supply of services and its link to environmental and health concerns;
- Aspects of the Declaration's paragraph on services, in particular the inclusion of deadlines, or, depending on the interpretation, timeframes, regarding the future conduct of the ongoing negotiations to progressively liberalise trade in services.

Qualified by one developing country trade source as 'a bone thrown to NGOs', the reaffirmation of Members' continued right to regulate services trade in the Ministerial Declaration admittedly responds to fears of forced deregulation expressed not only by some international organisations, but also by developing countries and other WTO Members.

The September Declaration draft linked the right to regulate to health and environmental protection through a recognition of Members' right 'to take measures to uphold and enforce the levels of health, safety and environmental protection they deem appropriate, *including the right to regulate, and to introduce new regulations on, the supply of services*' (emphasis added). In the Ministerial Declaration the paragraph was rescinded in two parts, and the right to regulate the supply of services separated from environmental aspects (paras 6 and 7).

Initially opposed to by several developing countries, Members finally agreed to include dates for initial requests (30 June 2002) and offers (31 March 2003) for specific commitments in the process of the GATS 2000 negotiations in the Declaration's paragraph 15 on services. According to trade sources, developing countries only came on board – many of them reluctantly – after securing similar commitment for the negotiations on agriculture (see page 2). The para. 15 reference to the Guidelines and Procedures for the Services Negotiations adopted on 28 March 2001 is considered as positive for developing countries since this document contains much development-friendly language.

Market Access for Non-agricultural Products

Industrial tariff negotiations will also be included in the single undertaking despite deep reservations – or even outright opposition – from many African and LDC Members. Before and at Doha they repeatedly stated that they were not prepared to take on further liberalisation in trade in goods before studies had been conducted on its impact on their economies. These concerns are not adequately reflected in the Declaration, although the latter provides for 'appropriate studies and capacity-building measures' to assist LDCs to participate effectively in the negotiations (para. 16).

Among gains to developing countries is the promise that the negotiations shall aim to reduce or 'as appropriate' to eliminate not only tariffs, but also tariff peaks and escalation, as well as non-tariff barriers 'in particular on products of export interest to developing countries'. No sector shall be *a priori* excluded from the negotiations, which 'shall take fully into account the special needs and interests of developing and least-developed country participants, including through less than full reciprocity in reduction commitments' (see also related article on page 3).

Intellectual Property Rights

Ambiguities are also rife in the Ministerial Declaration's provisions dealing with intellectual property rights, in particular regarding geographical indications and Articles 27.3(b) (patentability of life forms) and 71.1 (review of the implementation of the TRIPs Agreement).

The Declaration explicitly mandates negotiations on establishing a multilateral system of notification and registration of geographical indications for wines and spirits. It thereby effectively reiterates the TRIPs Council's existing mandate to establish such a system, but includes the negotiations as part of the single undertaking, thus setting a time limit for completion (2005).

Whether negotiations are also mandated for the extension of geographical indication (GI) protection for products other than wines or spirits, however, is still being hotly debated in the wake of the Conference. Some Members have expressed concern that interpreting the Declaration's provisions as not providing a negotiating mandate for GI extension might set a precedent for the possibility of negotiations on other outstanding implementation concerns.

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Environment: A Potential 'New Beginning for the World trading System?

For the first time in the WTO's history, governments in Doha agreed to negotiations on environmental issues, thereby at least partly meeting one of the European Union's key demands and inching the WTO closer to supporting sustainable development. These negotiations will take place as part of the single undertaking, which includes seven other issue areas (see page 1). While the European Union and the United Nations Environment Programme (UNEP) have welcomed the text, a number of developing countries and environmental organisations have reacted with mixed feelings (see page 19).

Setting the Stage for Promoting Sustainable Development

In firmer language than ever before in a WTO text, the Ministerial Declaration's preambular paragraph 6 stresses that the multilateral trading system and efforts towards environmental protection and sustainable development *can and must* be mutually supportive. In addition, the preamble recognises Members' right 'to implement measures to protect human, animal or plant life or health', though this is qualified with the requirement that such measures 'are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination [...] or a disguised restriction on international trade, and are otherwise in accordance with the provisions of the WTO Agreements'. This language reflects that previously used by the WTO Appellate Body in the *Shrimp-Turtle* dispute.

The preamble, also for the first time, explicitly recognises the importance of promoting co-operation between the WTO and relevant international environmental and development organisations. Although it singles out UNEP and other intergovernmental institutions, the paragraph also provides a window for co-operation with international non-governmental organisations involved in development and environment, notably in the lead-up to the World Summit on Sustainable Development to be held in Johannesburg next September (para. 10, in which Members express their commitment to improve dialogue with the public and make the WTO's operations more transparent through more effective and prompt information dissemination, complements this nod towards external transparency). In mentioning the Johannesburg Summit, the WTO could be positioning itself to provide input into that process over the next year (see related article on page 13).

Fisheries Subsidies

The start of negotiations on fisheries subsidies – mandated under paragraph 28 – is arguably the most substantial payoff in terms of sustainable development contained in the Declaration. The decision to negotiate clarification and improvement of WTO disciplines on fisheries subsidies 'taking into account the importance of this sector to developing countries' marks a notable change from the previous WTO mandate on this issue, which had restricted discussions in this area to the non-negotiating body of the Committee on Trade and Environment (CTE). Reductions in perverse fisheries subsidies that promote overfishing have been sought in the CTE by the 'friends of fish', including Iceland, the Philippines, Peru and the US. Until recently these efforts were fiercely resisted by the EU and Japan. Praising the leadership of Iceland and the US at Doha, David Schorr of the World Wildlife Fund noted that, for the first time, governments had 'recognised the responsibility of the WTO to do its part in promoting the health of a vital natural resource.'

Clarifying the Trade and Environment Relationship

The Ministerial Declaration also launches environment-related negotiations in three other areas (para. 31):

- (i) the relationship between WTO rules and trade obligations set out in Multilateral Environmental Agreements (MEAs);
- (ii) procedures for information exchange between MEA secretariats and relevant WTO committees, including criteria for granting observer status; and
- (iii) the reduction or elimination of tariff and non-tariff barriers to environmental goods and services (see page 9).

The first area of negotiations under environment (para. 31 (i)) is qualified by text stating that the negotiations 'shall not prejudice the WTO rights of any Member that is not a party to the MEA in question', which would seem to indicate that even after the negotiations conclude, Members not party to given MEA may retain the right to challenge trade measures taken pursuant to that agreement in the WTO.

The Declaration further specifies the mandate under (i) and (ii) by saying that the negotiations '*shall not add to or diminish the rights and obligations of Members under existing WTO Agreements*', and singling out the Agreement of Sanitary and Phytosanitary Measures – most probably to forestall any potential EU effort to slip the precautionary principle into the negotiations (see Bridges Year 5 No.6, page

2). Bearing these caveats in mind, negotiations on these issues are likely to result in clarifications or footnotes to existing rules rather than changes in any of the WTO Agreements.

CTE Role Re-focused

Paragraph 32 instructs the CTE to continue its work programme while focusing in particular on the effect of environmental measures on market access, relevant provisions of the Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPs) and eco-labelling. The first two issues, which are of particular concern to developing countries, were undoubtedly selected for priority attention in order to obtain their support for negotiations on the environment. Eco-labelling is a well-known pet issue for the EU, which pushed hard for its inclusion on the Declaration in Doha. The CTE is further tasked with the identification of any need to clarify relevant WTO rules, and with reporting to the fifth Ministerial Conference with recommendations for future action, *including the desirability of negotiations*. However, as with paras 31(i) and (ii), the text indicates that CTE discussions should not impact on Members' rights and obligations under WTO Agreements.

The Declaration (para. 51) also calls on the CTE and the Committee for Trade and Development 'to identify and debate developmental and environmental aspects of the negotiations, in order to help achieve the objective of having sustainable development appropriately reflected'. This provision, together with the language in para. 32, could help elevate and focus the mandate of the CTE, where discussions have so far produced no concrete results.

Environment-related provisions can also be found in the agricultural negotiations mandate (see page 2); ministers' instructions to the TRIPs Council (see page 6); and para. 10.2 of the Implementation Decision (see page 8).

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While countries opposed to extending GIs, including the US, Argentina and other Cairns Group countries, argue that no mandate exists, others dispute this conclusion. Switzerland (WT/MIN(01)/W/11) in a communication submitted on behalf of the EU and 13 other countries states that the Ministerial Declaration provides 'a clear mandate to launch negotiations' on GI extensions. This conclusion was also supported by India, which in a joint submission with Bulgaria, Kenya and Sri Lanka (WT/MIN(01)/W/9) asserts that negotiations have been launched on GI extension 'as part of the negotiations on outstanding implementation issues'. 'It is our understanding that no additional consensus is required for the launching of these negotiations,' the submission states. The US, in contrast, stressed that ministers had 'avoided launching negotiations' on GIs. 'We have confirmed with the [WTO] Secretariat that we do not believe – and they agree – that this [Declaration] mandates negotiations,' a US official said.

At the centre of the controversy is para. 12 of the Declaration which provides two options for negotiations on outstanding implementation-related concerns (which also include GI extension), namely (a) issues to be negotiated under a specific mandate where such a mandate is provided in the Declaration, and (b) outstanding implementation issues to be addressed by the relevant WTO bodies which will report to the Trade Negotiations Committee by the end of 2002 'for appropriate action'. While some Members argue that GI extension should be addressed under (a), others see it as an issue for discussion under (b). Also, among those supporting the latter interpretation, some assert that 'appropriate action' could, but does not necessarily imply negotiations, whereas others say that it can only be regarded in the context of negotiations.

While the extension of GIs is listed as one of the developing countries' implementation concerns, it is in practice not a North-South dispute, but rather pits countries that want to use GIs (protecting product names that denote the region of production) to promote exports and prevent misappropriation (mainly in Asia, Europe and Africa) against the main agriculture exporting countries that do not want their products to be prevented from using these names. One developing country representative not in favour of negotiations pointed out that GI extension is likely to lead to new obligations for developing countries while the benefits will mainly go to developed countries that are better prepared at the national level to take advantage of it.

Confusion about 27.3(b)

Although Article 27.3(b) is one of the most controversial articles of the TRIPs Agreement, negotiations are not explicitly mandated in the Ministerial Declaration. The TRIPs Council is merely instructed 'to examine, *inter alia*, the relationship between TRIPs and the Convention on Biological Diversity, the protection of traditional knowledge and folklore, and other relevant new developments raised by members pursuant to Article 71.1'. The CBD issue has been a long-standing demand of Brazil and India, while Peru, some Central American countries, Switzerland and Norway have sought clarification of the relationship between TRIPs and traditional knowledge.

However, as several issues related to Article 27.3(b), are also listed under outstanding implementation concerns, some Members now question whether negotiations have actually been launched (see related article on page 7). Confusion also reigns about the time-frame for discussions on 27.3(b) and 71.1, which will partly depend on resolving the question of interpretation mentioned above.

Despite the ambiguities, several developing countries expressed satisfaction with the Ministerial Declaration's provision covering the two Articles (para. 19). In particular, they welcomed unprecedented references to traditional knowledge and folklore, and the explicit linking of these issues to Article 27.3(b), which they see as a framework for discussions at the TRIPs Council. Other developing country representatives, however, doubted that those discussions would come up with a resolution. Some developed countries, including the US and EU, have previously resisted WTO discussions on these issues, which they argue should be covered by the World Intellectual Property Organization (WIPO).

Singapore Issues

Paragraphs 20, 23, 26 and 27 on investment, competition policy, government procurement and trade facilitation contain arguably the most confusing provisions of the Ministerial Declaration. In those provisions Members '*agree that negotiations will take place after the fifth Session of the Ministerial Conference on the basis of a decision to be taken, by explicit consensus, at that Session on modalities of negotiations.*' Many developed Members consider this as a mandate to launch negotiations at the fifth Ministerial or shortly thereafter, whereas most developing countries maintain that the negotiations may be years off, as a decision to launch them must be taken by *explicit consensus*. Much of this divergence arises from the – deliberately? – undefined word *modalities*, which Members choose to interpret in different ways.

In the last hours of the Doha Conference, India extracted a statement from the Chair of the negotiations, Yusef Hussain Kamal, who told the final plenary: '*In my view*, this would give each Member the right to take a position on modalities that would prevent negotiations from proceeding after the fifth Session of the Ministerial Conference until that Member is prepared to join in an explicit consensus'. As the clarification seems to express only a personal view, the legal status of the Chair's statement remains unclear. It is not formally attached to the Ministerial Declaration itself, but forms part of the official Conference proceedings.

The Singapore issues negotiating mandates explicitly recognise developing countries' technical assistance and capacity-building needs in these areas, and some developing country representatives have already made it clear that they regard effective assistance as a *sine qua non* for joining the consensus on launching negotiations.

Rules

In paragraph 18 of the Ministerial Declaration, Members agreed to negotiations 'aimed at clarifying and improving disciplines' in the Agreements on Anti-dumping and Subsidies and Countervailing Measures. However, the outcome must preserve 'the basic concepts, principles and effectiveness of these Agreements and their instruments and objectives'. These negotiations have major implications for all WTO Members, and particularly so for developing countries (see related article on page 7).

Finally, negotiations on clarifying and improving WTO disciplines and procedures applying to regional trade agreements are also included in the single undertaking.

Improving and clarifying the Dispute Settlement Understanding is the only area for negotiations that is slated to conclude in May 2003 rather than the single undertaking deadline of 1 January 2005.

The Doha outcomes on the environment and implementation are discussed in separate articles on pages 5 and 7 respectively.

Implementation: What, Where and When?

On implementation, even more than in other areas, confusion reigns in the aftermath of the Doha Ministerial. At present, little consensus prevails as to the relationship or hierarchy between the different layers of implementation-related negotiations and, more specifically, which items fall under which mandates and timelines laid out in the three relevant texts.

Implementation issues involve concerns raised by developing countries virtually since the coming into force of the Uruguay Round Agreements. On the whole, they address imbalances in the multilateral trading system that work against developing countries' reaping benefits from it. After the Doha Ministerial, as before it, the most contentious issues are market access for agricultural and textile goods, exemptions from subsidy prohibitions/reduction commitments, application of trade remedy measures, and technical requirements/impediments.

Another major area is special and differential treatment of developing countries. Many provisions in the Uruguay Round Agreements that are intended to benefit developing countries are couched in exhortatory language and, since they are not legally binding, industrialised WTO Members have mostly ignored these 'best endeavor' provisions.

The relevant documents and official texts adopted at the Ministerial address these concerns in a confusing manner. In addition to the Ministerial Declaration itself, two documents deal specifically with implementation: the Decision on Implementation-related Issues and Concerns, and the compilation of Outstanding Implementation Issues Raised by Members. The main points of these documents are addressed below.

The Ministerial Declaration

The Declaration deals with implementation issues in a number of areas. First, the specific paragraph on implementation (para. 12) affirms that 'negotiations on outstanding implementation issues shall be an integral part of the Work Programme we are establishing' and provides three different timeframes for action:

- 'where we provide a specific negotiating mandate in this Declaration, the relevant implementation issues shall be addressed under that mandate' (para. 12(a));
- 'the other outstanding implementation issues shall be addressed as a matter of priority by the relevant WTO bodies, which shall report to the Trade Negotiations Committee [...] by the end of 2002 for appropriate action' (para. 12(b)); and
- through the adoption of the Decision on Implementation-related Issues and Concerns, it endorses the timelines prescribed for various reviews and examinations.

It is within this framework that a great deal of uncertainty comes into the equation, namely surrounding what issues fall into which timeline. It would seem that, under 12(a), those 'relevant implementation issues' that appear in the Implementation Decision or the list of outstanding implementation issues will now be dealt with under the timeline specified in that mandate (not later than 1 January 2005) and removed from the earlier timelines.

It is extremely important to note here that, despite potentially differing times of completion, implementation concerns are part of the 'single undertaking' – i.e. nothing is final until negotiations have concluded in all areas – launched in Doha (para. 47).

Anti-dumping and Subsidies

The Ministerial Declaration launches immediate 'single undertaking' negotiations on anti-dumping and subsidy rules (para. 28). Long before the Seattle Ministerial Conference in 1999, a serious revision of trade remedy disciplines emerged as a top developing country priority, reflected in Doha in the 33 reform proposals – 13 for anti-dumping and 20 for subsidies – included in the list of outstanding implementation issues. These have now presumably been subsumed into the broader negotiations and thus will adhere to the longer timetable of January 2005 instead of the 'outstanding implementation issues' timeline, which instructs the relevant bodies to report to the Trade Negotiations Committee 'for appropriate action' by the end of 2002.

The mandate under paragraph 28 does limit the scope of these rule-making negotiations somewhat. While aimed at 'clarifying and improving disciplines', they are also bound to 'preserv[e] the basic concepts, principles, and effectiveness of these Agreements and their instruments' (emphasis added). Much will depend on what compromise Members will reach on the meaning of the word 'effectiveness' and the scope they will have to oppose any change that would alter the 'effectiveness' of trade remedy measures.

It is also clear that while developing countries will focus on reducing trade harassment and market access restrictions to the greatest extent possible, others, such as the US, will seek changes/clarifications that will make their trade remedy laws less vulnerable to dispute settlement challenges. Although these contradicting aims are likely to diminish absolute developing country gains, it is remarkable that trade defenses – which at one point could not even be mentioned in a negotiating room – now find themselves squarely on the agenda.

Special and Differential Treatment

Paragraph 44 of the Declaration deals with the cross-cutting issue of S&D. It states that 'all [S&D] provisions shall be reviewed with a view to strengthening them and making them more precise, effective and operational.' Again, because this item is mandated both here and in the Implementation Decision, it is unclear as to which timeline shall take precedence.

Another crucial area of ambiguity lies in the push for moving to mandatory S&D provisions. The Declaration, which appears to take precedence as noted above, uses the imperative 'shall' but does not explicitly mention the word mandatory. The Implementation Decision does explicitly call for the identification of 'those [provisions] that Members consider *should* be made mandatory' – but the language is notably of the non-binding variety.

Although the proposed Framework Agreement on Special and Differential Treatment (WT/GC/W/442; Bridges Year 5 No.7, page 7) only gets a passing mention, the fact that it figures on the Declaration at all may give developing countries an opening for pushing for its acceptance.

More generally, while the Doha texts drip with language that 'reaffirms', 'gives further consideration' and 'urges', they should still provide developing countries with leverage in seeking more

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mandatory language in the final agreements that are to result. From their perspective, more binding language in the documents launching the negotiations would certainly have been ideal, but as with other contentious provisions in the Ministerial Declaration, this does not 'prejudge the outcome of negotiations'.

Decision on Implementation-related Issues and Concerns

While anti-dumping and subsidies will now principally be dealt with under the single undertaking mandate, a few key issues fall within the scope of the Implementation Decision.

Anti-dumping (para. 7): A single 'best endeavour' clause responds to developing countries' effort to ensure that anti-dumping investigations are not used as trade harassment. In paragraph 7.1, ministers agree that investigating authorities 'shall examine with special care' any application for a repeat investigation where a similar investigation resulted in a negative finding within the preceding 365 days, and that 'unless this pre-initiation examination indicates that circumstances have changed, the investigation shall not proceed.' It remains to be seen how effective a barrier against trade harassment this obligation will prove in practice.

On other issues, the Committee on Anti-dumping is instructed to present recommendations to the General Council within 12 months. These include the operationalisation of Article 15 of the Anti-dumping Agreement; specifying the timeframe to be used in determining the volume of dumped imports; and guidelines for the improvement of annual reports.

Subsidies (para. 10): Paragraph 10.2 on subsidies and countervailing measures is one of the rare provisions that could be characterised as a 'space for development policy'. It 'takes note' of a proposal to treat as non-actionable subsidies measures implemented by developing countries with a view to achieving legitimate development goals. Para. 10.2 also 'urges' Members to 'exercise due restraint with respect to challenging such measures'. The positive impact of this provision, put forth by Venezuela, is two-fold. First, it keeps the issue on the table despite reports of strong US efforts to have it dropped. Second, it impacts the dynamics of negotiations by giving political weight to restraints on such challenges during the negotiating period.

This 'development exemption' proposal will be addressed under the 'outstanding implementation issues' mandate of the Ministerial Declaration, i.e. the SCM Committee must report on it to the Trade Negotiations Committee by the end of 2002 'for appropriate action'. One trade expert noted that the specific mention of treating as non-actionable developing countries' support measures geared towards the 'development and implementation of environmentally sound methods of production' could prove instrumental in facilitating the implementation of the Kyoto Protocol.

Another gain in Doha was that poor countries obtained some predictability with regard to export subsidies for industrial products. In addition to least-developed countries, developing countries whose GNP per capita is lower than US\$1000 may subsidise their industrial production and exports under Article 27.2 of the Agreement on Subsidies and Countervailing Measures (SCM Agreement). In paragraph 10.1 of the Implementation Decision, the qualification of requiring *three consecutive years* of GNP over US\$1000 in 1990 dollars before revoking this exemption was reinstated (it was removed from the draft that went to the Ministerial Conference), although the decision to allow up until

2003 for it to enter into effect was retained. Due to the ambiguous timeline the net effect of this is unclear.

Textiles (para. 4): Making textile-importing countries speed up the phase-out of import quotas, allowed until 2005 under the Agreement on Textiles and Clothing, was a major issue which developing countries had hoped to advance in Doha. Those hopes were entirely dashed: while early drafts of the Implementation Decision appeared ready to broach the issue, by instituting a compounding growth-on-growth calculation of enlarging textile quotas, the final Decision saw these gains removed, largely due to adamant US and Canadian resistance. Instead, the Council for Trade in Goods will 'examine' speeding up textiles liberalisation with the aim of making recommendations for action by July 2002.

With respect to anti-dumping measures on developing country textile exports, Members agree to 'exercise particular consideration before initiating investigations' – another 'best endeavour' clause that might carry some political weight, although less so with the removal of exercising 'restraint' as well as particular consideration.

Agriculture (para. 2): The Decision's section on agriculture deals most prominently with the 'green box' – an area of great concern for developing countries. Para 2.1 'urges [...] restraint in challenging measures notified under the green box by developing countries to promote rural development and adequately address food security concerns.' Despite its 'best endeavour' nature and lack of specifics, it does provide some clout for pushing for this in the negotiations.

SPS and TBT Measures (paras 3 and 5): The primary interest of these paragraphs is to add a specific timeframe to the SPS and TBT Agreements' 'best endeavour' clauses. Developing countries shall have 'not less than six months' to comply with changes in sanitary, phyto-sanitary and technical standards.

Trade-related Investment Measures (para. 6): This paragraph only 'urges' the Council for Trade in Goods to 'consider positively' requests made by developing countries for terms and conditions with respect to extensions of TRIMs implementation periods.

Outstanding Implementation-Related Issues

These items are compiled in a document coded JOB(01)/152/Rev.1, which outlines to some degree the remaining concerns raised by developing countries, although they have criticised the 'watered down' versions of the original complaints contained in the paper. According to Ministerial Declaration para. 12(b), the relevant WTO bodies shall address these issues 'as a matter of priority' and report to the Trade Negotiations Committee 'for appropriate action' by the end of 2002. While this does provide a framework for dealing with these issues, the pervasive ambiguity relating to timelines and items in the various texts being considered under the broader negotiations leaves much to be clarified.

Among items listed only in this paper are two TRIMs provisions, one on extending developing countries' deadline for phasing out domestic content requirements, and the other on the inclusion of flexibilities to implement development policies (tires 39 and 40). Tires 84 proposes that Article 9.1 of the Safeguards Agreement be amended so that developing countries are exempt from safeguard measures on imports which individually account for less than 7 percent of total imports (15 percent collectively). Tires 91 and 93 deal with transition and implementation timelines relating to TRIPs Articles 27.3(b) and 65.2 respectively. Least-developed countries propose that their transition period for full TRIPs compliance be extended 'so long as they retain the status of an LDC'.

Defining Environmental Goods: Implications for Sustainable Development

Paragraph 31 (iii) of the Doha Ministerial Declaration mandates negotiations on ‘the reduction or, as appropriate elimination of tariff and non-tariff barriers to environmental goods and services.’ The task of Members now is to arrive at a consensus on what is meant by ‘environmental goods’. The spectrum of views in both the trade and environment communities appear to range from a *narrow definition* that would regard environmental goods as equipment or technologies required for environmentally sound production of final goods and ‘end-of-the pipe’ pollution treatment equipment to *broader ones* based on environmental characteristics of the goods themselves and/or their production process. Some might expand the definition to include non-tradable natural goods (eg: forests and the ozone layer) and services these provide (absorption of CO₂ or ultraviolet radiation).

A WTO Secretariat note entitled *Environmental Benefits of Removing Trade Restrictions and Distortions* (WT/CTE/W/67/Add.1; 13 March 1998) offers the following definition of the environment industry as developed by the OECD and Eurostat:

The environment industry consists of activities which produce goods and services to measure, prevent, limit, minimise or correct environmental damage to water, air, and soil, as well as problems related to waste, noise and eco-systems. These include cleaner technologies, products and services which reduce environmental risk and minimise pollution and resource use although there is currently no agreed methodology which allows their contribution to be measured in a satisfactory way.

Broader definitions might include any good that is more environmentally benign than its ‘like’ competitor.

The definitions outlined above offer a starting point for defining ‘environmental goods’ for the purposes of paragraph 31. These goods and services are usually provided to general utilities projects and so have an important link with government procurement and national environmental policies and regulations, as well as their enforcement. They also depend on public environmental awareness, corporate liability and recognition of financial and quality gains from environment-related investments. According to the Secretariat note, a definition of the specific product coverage of environmental goods which tend to accompany environmental services has yet to be determined.

Other than by taking into account the end-use of goods which may accompany environmental services, such goods are difficult to isolate as they generally have multiple purposes. For example, the treatment and purification of water requires components such as pumps, industrial valves, pipes, and storage tanks – all products that are used for many purposes. Multiple purpose goods are estimated to account for a considerable share of environmental equipment and goods sales. The language in paragraph 31(iii) adds to the existing ambiguity in that it does not clarify whether ‘environmental goods’ include agricultural goods as well.

Broader definitions of environmental goods might include any good that would not have a negative impact on the environment as compared to seemingly ‘like’ goods. This might include goods that have a relatively less negative impact on the environment at the consumption/disposal stage or even in terms of being produced in an environmentally benign manner (i.e. sound process and production methods). In an even broader perspective they could well include naturally occurring environmental assets such as forests that perform ‘environmental services’ like the absorption

of CO₂. These goods and services have positive environmental externalities but usually cannot be priced in monetary terms or traded like agricultural and manufactured goods and therefore would not be included for the purposes of paragraph 31.

According to one delegate, arriving at a mutually agreed definition of environmental goods was a part of the negotiations to be launched under paragraph 31. Some delegates seemed to confine their interpretation to ‘goods whose use results in a beneficial environmental impact’; in other words capital goods and technologies whose use benefited the environment. To the extent that trade liberalisation in these goods enhances the ability of Members to frame and/or implement environmental protection policies these could benefit their efforts towards sustainable development.

One developing country delegate was of the view that ‘environmental goods’ meant goods that had inherently beneficial environmental aspects such as biodegradability. This interpretation might have positive implications for developing countries who could try and get jute products or natural dyes for instance classified as environmental goods to benefit from reduction or removal of tariffs/non-tariff barriers as compared to ‘like’ or substitutable products. One could even envision sustainably harvested forest products, for instance, being classified as an ‘environmental good’.

Developing countries, however, seem opposed to including goods produced in an environmentally benign way under this category for obvious fears of PPMs (process and production methods) being introduced into WTO rules through the backdoor. This would also imply that ‘environmental goods’ would be eligible for differentiated treatment as compared to otherwise ‘like’ products. Panels and the Appellate Body might have to uphold such differentiated treatment by considering these goods ‘unlike’, thereby evoking competitiveness concerns among developing countries at a disadvantage in their access to environmentally-friendly production methods and technologies. This could also apply to goods, whose use/consumption or disposal is beneficial/less negative for the environment, but requires expensive technology or one that is protected by intellectual property rights.

Interpretations of ‘environmental goods’ that go beyond environmental technologies/capital goods, while not likely at present, can prove to be a double-edged sword for developing countries especially with regard to goods whose environmental impact is manifest at the consumption and disposal stage. It could prove positive where products are those commonly found or used in developing countries (jute, vegetable dyes, natural resins and gums) but negative where their production mandates technical know-how (energy-efficient consumer goods). Broader definitions especially one based on PPMs seem highly unlikely at present although some delegates have evoked concerns to this effect.

In conclusion, to the extent that liberalisation of trade in environmental goods and services would enable Members, and developing countries in particular, to achieve their efforts at environmental protection at a lower cost without adversely affecting their development prospects, such liberalisation could be a significant milestone in the road to sustainable development.

The next issue of Bridges will look at defining environmental services.

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have the greatest positive impact on trade among themselves. For instance, one of the studies estimates that if all tariffs in the agriculture and industrial sectors were to be removed, the share of developing country exports to other developing countries, which stands around 25 percent at present, would shoot up to 45 percent, and the bulk of such exports would be in manufactured products.

Why estimated gains may not be fully realised?

The usefulness of macroeconomic studies in assessing existing national trade and economic policies and in policy-formulation for the future is, however, often hampered by the assumptions made, the hypotheses used and the quality of the data. Furthermore, they may not fully take into account the problems faced by their industries in developing countries in adjusting to import competition following liberalisation, because of the lack of physical and human resource infrastructure and other supply constraints. In most cases therefore the results of such studies have to be taken in national policy making with a degree of caution and healthy scepticism.

Global macroeconomics studies are also based on the assumption that if negotiations are launched, all countries would reduce tariffs to meet the adopted targets for overall reductions. In practice, however, this does not always happen as industries apprehensive about their ability to withstand import competition resulting from liberalisation build up pressures on governments to exclude their products from tariff reductions or, if this is not possible, to make less than agreed percentage reductions on these products.

The pressures which industries producing textiles and clothing, leather and leather products and footwear are building up on their governments in developed countries raise serious doubts as to whether substantial reductions would be made in high rates of duties applicable to such products. In past negotiation rounds, most of these products were either excluded from tariff reductions or less than average reduction was made on them. This explains why, while the average level of tariffs of developed countries has fallen to about 4 percent, peak tariffs exceeding 12 percent continue to be applied to a number of products.

It is likely that less than average reductions will be made on many products affected by tariff peaks in the new negotiations as well. In this context, it is important to note that 'elimination of the existing protection on textiles, clothing and footwear' is expected to result in annual income gains of around US\$40 billion. This is equal to nearly half of the gains that are expected to accrue from the liberalisation of trade in industrial products.³

Moreover, going by the reports on the thinking of industry associations in developed countries, it is possible that some countries may suggest that negotiations in certain product areas like textiles and steel, where there is 'structural over-capacity', should take place on a 'sectoral basis' covering both tariff and non-tariff measures. Many analysts now believe that the termination of the Agreement on Textiles and Clothing (ATC) will not result in the establishment of restriction-free trade in textiles. It may be replaced by an arrangement which would enable all countries (not as at present only developed countries) to take safeguard measures, restricting imports for temporary periods taking into account the flexibility available under the Agreement on Safeguards to apply such restrictions on selective basis. In

return for such an arrangement, developed countries could agree to reduce tariffs, provided developing countries, particularly those which are significant producers and exporters of textiles, also agree to reduce their tariffs.

Preferential trade of developing countries with developed countries: its relevance for future trade negotiations

It is also not clear how far it the macroeconomic studies described above have been able to fully take into account the possible negative impact which the envisaged cuts in MFN tariffs could have on trade that enters the markets of developed countries under non-reciprocal preferential arrangements, particularly under the Generalised System of Preferences (GSP).

Two trends are noticeable in relation to the implementation by developed countries of the preferential access under the GSP. As the systems are unilateral, they are being modified by countries extending such treatment to gradually deny preferential access to countries at a higher stage of development, particularly for products in which they are becoming competitive. At the same time, they are

being improved and broadened to extend under their umbrella duty-free preferential access to least-developed countries and, in some cases, other low-income countries.

Pursuing this approach, the European Union has adopted the Everything but Arms (EBA) initiative. It envisages imports of all products (both agricultural and industrial) from 49 least-developed countries being allowed in EU markets on a duty-free and quota-free basis. Other Quad countries (the US, Canada and Japan) are being urged to adopt similar systems for imports from these countries.

The United States has used GSP as a vehicle to promote trade of African countries, and at the same time to secure a market for its textiles fabrics in these countries. Under its Africa Growth and Opportunity Act (AGOA), it has broadened the coverage of its GSP to provide for duty-free and quota-free access to products that are of export interest to countries in Africa. However, one of the special features of the preferential advantage provided under its system is that it extends duty free/quota free treatment for apparels made in Africa from US yarn and fabric and for knit-to-shape sweaters made in Africa from cashmere and marino wools imported from the US. Special visa requirements have been adopted to ensure that only clothing made from specified textile materials imported from the US benefit from such treatment. The system, while providing benefits to African countries, serves two basic US objectives. It enables US industry to take advantage of low wages in Africa and thus ensure its competitiveness in the US market vis-à-vis competitors from Asia and other developing countries. Second, since not all clothing products produced from US fabrics will be re-exported back to the US, it allows US industry to get a foothold in the African market for clothing products made from US yarn and fabrics.

The indications are that both the EU scheme to provide duty- and quota-free access LDC imports under the EBA system and the US initiative to provide such treatment for selected products of interest to African countries (both least-developed and others) could lead to the establishment in these countries of processing industries from third countries. Recent reports indicate that to take advantage

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The Declaration on TRIPs and Public Health: A Step in the Right Direction

By Ellen 't Hoen

The fourth WTO Ministerial Conference in Doha affirmed in the Declaration on TRIPs and Public Health the sovereign right of governments to take necessary measures to protect public health. This is an important achievement because it gives clear primacy to public health over private intellectual property and clarifies Members' right to use the TRIPs safeguards. Contrary to proposals of certain developed country Members (see Bridges Year 5 No.7 page 1), the Declaration clearly speaks about 'public health' and does not limit the use of safeguards to crisis situations, HIV/AIDS and pandemics.

The most contentious section of the Declaration was paragraph 4. In a draft presented at the 19-21 September session of the TRIPs Council, a large group of developing countries proposed the following text for it: 'Nothing in the TRIPs Agreement shall prevent Members from taking measures to protect public health.' Some developed countries saw this wording as a new rule that would completely override present TRIPs disciplines in the field of public health. The Harbinson draft submitted to ministers in Doha thus contained alternative text (option 2), which would have limited the use of the TRIPs flexibilities to public health crisis, HIV/AIDS or pandemics. This was clearly seen as limiting Members' rights rather than clarifying them.

Developing countries and public interest NGOs welcomed the Doha compromise because it contained the key principle of primacy of public health over intellectual property rights. 'The TRIPs agreement *does not and should not* prevent members from taking measures to protect public health,' the Declaration says, adding that the Agreement should be interpreted and implemented in a manner 'supportive of WTO Members' right to protect public health and, in particular, to promote access to medicines for all.'

The Declaration gives a clear road map to the key flexibilities within the TRIPs Agreement that can be used to overcome IPR barriers to access to medicines and other measures to protect public health. Governments can decide the grounds for granting compulsory licenses. The discussions in Doha and the Declaration itself make it unambiguously clear that the use of compulsory licenses is in no way confined to cases of emergency or urgency. In Doha, some Members unsuccessfully tried to introduce language that would limit measures such as compulsory licenses to emergency situations or pandemics or certain diseases such as HIV/AIDS. The Declaration leaves Members free to determine what is a national emergency or urgency in which case the procedure for issuing a compulsory license becomes easier and faster.

The Declaration puts the question whether TRIPs authorises parallel imports to bed by stating clearly that 'The effect of the provisions in the TRIPs Agreement that are relevant to the exhaustion of intellectual property rights is to leave each Member free to establish its own regime for such exhaustion without challenge.'

The Declaration grants least-developed country Members an extra 10-years – until 2016 instead of 2006 – before they must implement the obligation to provide pharmaceutical patent protection. It also refers to the yet-unfulfilled commitment of developed-country Members to provide incentives to their enterprises and institutions to promote and encourage technology transfer to least-developed country Members pursuant to Article 66.2.

'After Doha, intellectual property has become a bit less private property and a bit more a public good.'

One key issue remained unresolved in Doha and that is how to allow another Member to produce for export to a country that has issued a compulsory license but does not have manufacturing capacity. Article 31(f) of the TRIPs Agreement limits manufacture under a compulsory license to 'predominantly for the supply of the domestic market'. Further clarification is necessary to ensure that countries without production capacity can make use of compulsory licensing provisions to the same extent as those who have that capacity. The Doha Declaration acknowledges the problem when it says in paragraph 6: '*We 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. We instruct the Council for TRIPs to find an expeditious solution to this problem and to report to the General Council before the end of 2002.*'

One solution to this problem could be to allow production for exports under an Article 30 exception. This option was proposed by the group of 60 developing countries at the TRIPs Council in September, but did not find its way into the Harbinson draft. In Doha, Peru unsuccessfully tried to bring it back on the negotiating table. An alternative approach to the Article 30 solution would be to amend the text of Article 31(f) so that cross border recognition of a compulsory license becomes possible.

It is not possible to fully predict how the Doha Declaration on TRIPs and Public Health will be used in practice, but commentators have indicated the following:

- the Declaration will play a role in dispute settlement procedures on TRIPs and public health related issues before the WTO. Panels and the Appellate Body will need to take the interpretation given in the Declaration into account;
- at national level, the Declaration will guide governments in implementing legislation that allows to address health needs;
- the Declaration can be used as a checklist in bilateral agreements which include provisions on intellectual property rights; and
- the Declaration should give WTO Members the confidence to make full use of the safeguards, including compulsory licensing to increase the availability of affordable medicines and increase generic competition.

Is it over and done with?

The Declaration gives a strong political message but it will become a useless piece of paper if countries do not enact and implement pro-public health IPR legislation and start using the compulsory license provisions to encourage the availability of more affordable medicines. It would help if the World Intellectual Property Organisation were to adapt its technical advice to countries to give legislative 'hands and feet' to the Doha Declaration on TRIPs and Public Health at the national level.

It also remains to be seen whether the Declaration will have an impact on bilateral or regional negotiations in which developing countries are often pressured to adopt higher levels of intellectual property protection than the TRIPs Agreement requires.

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of the preferential access under the US AGOA system, not only the American companies, but also those from Asia have shown interest in establishing plants for the manufacture of clothing, leather products, horticultural and food products in countries like Mauritius, Malawi, Senegal, South Africa, Kenya, Lesotho and Madagascar. The EU's EBA may also lead to increased investment by Asian and EU as it, like the existing GSP, allows diagonal cumulation of origin between LDC beneficiaries, as well as countries belonging to the ASEAN and SAARC regional groupings and the European Union.

Would this strengthening of the duty-free non-reciprocal preferential access result in increased trade and income gains for countries benefiting from such access? As regards the EBA, a recent macroeconomic study undertaken by the Commonwealth Secretariat in cooperation with UNCTAD found that the measures would result in 'non-negligible' gains for beneficiary countries coupled with negligible losses for preference-giving and third countries.⁴

The recent EU and US measures have thus made preferential access more meaningful in trade terms to least-developed and some other developing countries. This may influence these countries' attitude in any negotiations for tariff reductions on an MFN basis by developed countries extending such preferential treatment on non-reciprocal basis. It is also possible that preference-giving countries may use the pressures by beneficiaries for the continued maintenance of preferential access as an excuse for not making any substantial reductions in peak tariffs applicable to some of the labour-intensive products exported by developing countries.

Lessons of the recent empirical studies on the experience of liberalisation measures taken by developing countries

The macroeconomic studies emphasise that 'greater gains' for developing countries would accrue from 'their own liberalisation measures and trade reform'.⁵ The question is how far the estimated beneficial impact of developing countries' further liberalisation of trade on a MFN basis is supported by the empirical studies that have been undertaken on the experience of the liberalisation measures undertaken by these countries in the last two decade.

It would be necessary to note in this context the difference in the approaches to reducing tariffs adopted by developed and developing countries. Developed countries have reduced tariffs gradually over a period of nearly 50 years in eight rounds of trade negotiations. This gradual process contrasts with the way in which developing countries have liberalised. By and large they have liberalised unilaterally and not by participating in multilateral trade negotiations. Barring the exceptions of a few countries in Asia and Latin America, which are at a relatively high stage of development, tariff liberalisation was part of the conditions imposed by the World Bank's and the IMF's structural adjustment programmes or was suggested by them under their technical assistance programmes. As UNCTAD has chosen to call it, this was 'big bang type' liberalisation. Countries were required to make high percentage cuts over the entire range of tariffs periodically, without giving their agricultural and industrial producers enough time to adjust themselves to import competition.

The result was that in a number of cases, liberalisation, instead of improving the competitive strength of the industries which prior to liberalisation benefited from high levels of protection, has led

to what some economists have called a process of 'deindustrialisation'. This is well documented in case studies undertaken in recent years on the liberalisation experience of developing countries, particularly the low-income, least-developed and small economies. For instance, in their studies on the technological response to import liberalisation, Ganesh Wignaraja from the Commonwealth Secretariat and Sanjay Lal from Sussex University point out that in Tanzania, Kenya and Zimbabwe, a number of industries closed as they were unable to make the technological changes needed to face increased competition.

A recent study by Professor Edward Buffie contains what he calls 'most disturbing evidence' of the adverse impact of post-1980 liberalisation measures in the African region. In a number of countries such as Sierra Leone, Zambia, Zaire, Kenya, Uganda, Tanzania and Sudan, the surge in imports following liberalisation has adversely affected the few consumer industries in these countries producing beverages, tobacco, textiles, sugar, leather, cement and glass products. Many have closed down while others are struggling to survive. As a result, in almost all these countries, unemployment has increased instead of decreased, particularly as no investment is being made for the development of new industries.⁶

Compared to the large majority of countries in Africa, which adopted an 'across-the-board big bang' approach to reducing tariffs, a few of developing countries, which opted for a gradual approach, have done relatively well. These countries include India, China, Thailand and Malaysia in Asia and Argentina, Brazil and Mexico in Latin America.

What are the lessons that can be drawn from this experience of the liberalisation measures taken by developing countries in the recent past? In our view, they are the following:

- The countries which have liberalised slowly and on a selective basis have benefited more than those that have – either on their own or as a result of conditions imposed by financial institutions – cut tariffs across the board by high percentage rates.
- The relative success of the limited number of countries that have benefited modestly from liberalisation in promoting economic growth cannot be solely attributed to the gradual pace of liberalisation and to proper sequencing. Most of these countries were able to build up through government intervention during the period in which they were pursuing import substitution other policies that are necessary for the development of export-oriented production. These include
 - physical infrastructure (such as roads and railways, as well as public utilities producing water and electricity);
 - financial infrastructure (e.g. banking and insurance); and
 - human resource infrastructure (e.g. trained technical personnel).

Further, in most cases, these countries had decided to change over to export-oriented policies, by exposing gradually and on a selective basis their industries to foreign import competition, when basic conditions of 'economic growth' had been established.⁷

- Unless such preconditions exist or steps are taken – if necessary through governmental interventions – to develop infrastructure for promoting export-oriented growth, liberalisation by itself will not lead to economic growth and development. As UNCTAD's 1999 report points out, in such situations imports would only grow, resulting in greater import content of the products produced. Their costs of production would however re-

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The Environmental Significance of the Doha Declaration

By Steve Charnovitz

An agreement to launch new trade negotiations is itself significant for the environment. A failure at Doha would have pummeled the World Trade Organization and undermined global governance. The WTO has now recovered from the institutional and political failure that occurred at Seattle in 1999. The trade ministers were undoubtedly inspired by the successful climate change talks concluded in Marrakesh on the opening day of the Doha conference: the Conference of the Parties to the Climate Change Convention made a recovery from the poor negotiating outcomes at The Hague in 2000 and in Bonn in July 2001.

The Doha Ministerial Declaration contains far more language regarding the environment than was predicted a week before the meeting. This language seems to have emanated from bargaining over other issues, but how it got there is less important than what it says.

There are two key environmental achievements. First, the Declaration designates environment as an agenda item in the new trade round. Second, the ministers are encouraging efforts to promote cooperation between the WTO, the UN Environment Programme (UNEP), and other international environmental and development organizations. This may set in motion a WTO contribution to the World Summit on Sustainable Development, to be held next September in Johannesburg.

Green Negotiations

The agreement to initiate negotiations on the environment in the new round opens the door in the WTO to better integration of trade and environmental objectives. The movement in this direction began at the trade ministerial conference in 1990 when the late Austrian Ambassador Winfried Lang catalyzed an effort to put environment on the agenda of the Uruguay Round. That this goal took over a decade to accomplish illustrates the challenges of making global governance more coherent.

The approved areas for negotiation are limited, but perhaps may be expandable as the new trade talks get underway. The governments agreed to negotiate the reduction of trade barriers to the sale of environmental goods and services, and to clarify and improve WTO disciplines as they pertain to fishing subsidies. They also agreed to negotiate the relationship of WTO rules to the trade obligations in environmental treaties, but only the narrow issue of same-party membership in the WTO and the environmental treaty. Moreover, this negotiation must not add to or diminish the rights and obligations now in WTO Agreements, so the exercise will be more about clarification than reconciliation (see page 5).

The ministers also directed the WTO Committee on Trade and Environment (CTE) to make recommendations on other issues that might benefit from negotiation. However, the fact that the CTE has failed to make policy recommendations over the past seven years does not augur well for its future productivity. The problem, as many analysts have noted, is that the CTE is too narrowly constituted to produce anything that adds value to the debate; it needs the input of environmental officials and civil society. Although the CTE has had the advantage of some very good chairpersons and a high quality staff, it has not been able to overcome its inherent flaw of narrow composition (see page 7).

This weakness of the current CTE structure will diminish the usefulness of Paragraph 51 of the Doha Declaration which directs the CTE and the Committee on Trade and Development to “act as a forum to identify and debate developmental and environmental aspects of the negotiations, in order to help achieve the objective of having sustainable development appropriately reflected.” The fact that the trade ministers recognize that the new round needs such a forum and that negotiators should be working to reflect an environmentally sustainable outcome is a very important step forward for the WTO. The epistemic community working on trade and environment – which includes government officials, UNEP, many non-governmental organizations in the North and South, a few business groups, and of course the International Centre for Trade and Sustainable Development (ICTSD) – will need to intensify efforts in the next three years to assist the WTO in thinking through the complex interactions.

Institutional Cooperation

The ministers have given a go-ahead for much-needed institutional cooperation between the WTO, UNEP and other international environmental organizations, especially in the lead-up to the World Summit. Numerous beneficial activities could be undertaken. For example, in the Doha Declaration, ministers “recognize the importance of technical assistance and capacity-building in the field of trade and environment to developing countries, in particular the least-developed among them” (para. 33). Some constructive capacity-building has already occurred, most notably by the UN Conference on Trade and Development, the UN University and ICTSD, but the levels delivered are far below what is being sought. The developing countries need assistance in securing new environmental technologies through trade, improving coordination within their own governments, and assessing the benefits of trade liberalization. The need for such capacity-building will soon grow as governments and the private sector take actions pursuant to the new Marrakesh accords. The WTO General Council should start now to develop a package of activities that the WTO can present as its contribution to the Johannesburg Summit.

One possibility in that regard will be the new WTO negotiations on dispute settlement, which are slated to conclude by May 2003. How the dispute settlement system should deal with environmental disputes has bedeviled the institution from the beginning. Almost all of the WTO panels hearing environmental or health disputes have availed themselves of scientific expertise, and the most recent decisions have been environmentally sound. But no progress has been made on providing a better interface between WTO dispute procedures and the dispute and arbitration systems that exist in environmental regimes.

In summary, the Doha Declaration provides a new beginning for the trade and environment debate. The trading system now looks at ecological issues in a more mature, less frightened, way that it did in the past. Environmentalists should support the new round and work hard to secure fair outcomes for developing countries.

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main high, because of the lack of basic infrastructure and the inability to reduce them through technological upgrades of the production process. This makes it difficult for firms producing such products to compete in the domestic markets with those offered by foreign firms or to market them in foreign markets.

The unsatisfactory experience of the liberalisation measures taken by a large number of developing countries (particularly by low-income, least-developed and small economies) has made some economists argue that the classical principle 'free trade benefits all countries' needs rethinking. Paul Krugman, for instance, points out that 'in its present state, trade theory provides little guidance as to the role of trade policy and trade strategy in promoting economic growth'. He goes on to observe that 'new thinking about trade makes one thing clear: the idealised theoretical model on which the classical case for free trade is based would not serve us any more'.⁸

These views should not be taken to imply that these economists are arguing in favour of a reversal to import substitution policies by developing countries, particularly by those at lower stages of development. As Helliener puts it, 'there are few reputable developing country analysts or governments who question the positive potential roles of international trade and capital inflow on economic growth and overall development. How could they question the inevitable need for participation in a considerable degree of integration with world economy. The real debate is not whether integration is bad, but over matters of policy (for liberalisation) and priorities.' In another context, he observes that 'it is not at all obvious that further external liberalisation is now in every country's interest and in all dimensions'.⁹

This view is further developed by Dani Rodrik from Harvard University, who points out that 'economic development is a lot more than just throwing borders open'. Trade policy is one of the array of policies which countries have to follow simultaneously. These include, apart from policies needed for infrastructure development, policies that aim at:

- reform of the tax structure to make up for loss in tariff revenues that would result from the reduction of duties;
- safety nets to compensate displaced workers;
- technological assistance to upgrade firms adversely affected by import competition;
- establishment of legal and administrative frameworks required for contingency protection measures to provide temporary additional protection to industries which are not able to withstand import competition and to protect them from unfair foreign competition, by imposing anti-dumping and countervailing measures; and
- training programmes to ensure export-oriented firms have access to skilled workers

Concluding observations

The success of the liberalisation would depend on how far these policies form a part of the reform process and complement the measures that are being taken for liberalisation. Further, in order to give sufficient time to industries to adjust to import competition, the determination of both the timing and the pace of liberalisation has to be left to the country concerned.

One of the major weaknesses of tariff negotiations that have taken place so far on a multilateral basis, is that they are based on the

principle that economic growth would follow automatically if a country reduces the level of its protection, irrespective of whether, given its stage of development, the country which is required to liberalise has the capacity to adopt the other complementary policy measures, which can ensure success of the liberalisation policy. An important issue that would therefore have to be addressed in the preparatory work for the negotiations would be the type of ground rules and negotiating modalities and techniques that could be adopted to ensure that in further liberalising trade, each developing country has sufficient flexibility to determine both the extent and the pace of reducing the protection it extends to domestic production. Towards this end, it is necessary that, prior to the adoption of ground rules for negotiations and negotiating modalities, in-depth studies are undertaken on the effects of previous liberalisation on trade and economic growth, and of their impact on domestic industries employment. Such studies would also need to cover the action that would have to be taken at national and international levels to assist industries likely to be adversely affected as a result of further liberalisation to build up their competitive position and for the development of safety nets to compensate displaced workers.

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ENDNOTES

¹ The relevant paragraph in the Doha Ministerial Declaration reads: 'We agree to negotiations which shall aim, by modalities to be agreed, to reduce or as appropriate eliminate tariffs, including the reduction or elimination of tariff peaks, high tariffs, and tariff escalation, as well as non-tariff barriers, in particular on products of export interest to developing countries. Product coverage shall be comprehensive and without a priori exclusions. The negotiations shall take fully into account the special needs and interests of developing and least-developed country participants, including through less than full reciprocity in reduction commitments, in accordance with the relevant provisions of Article XXVIII bis of GATT 1994 and the provisions cited in paragraph 50 below. To this end, the modalities to be agreed will include appropriate studies and capacity-building measures to assist least-developed countries to participate effectively in the negotiations.'

While the decision envisages negotiations also for the removal of 'non-tariff measures', due to space constraints issues relating to non-tariff measures are not dealt with in this article. Broadly speaking however, with the adoption of separate Agreements dealing with non-tariff measures under the WTO system, the scope for negotiations on non-tariff measures in the context of market access negotiations would be extremely limited.

² Kym Anderson et al, in their study based on the free competition assumption estimate total welfare gains of around US\$250 billion per year were all countries (developed, developing and transitional economies) to eliminate tariffs on industrial and agricultural products. Nearly one third of the gains would accrue from the establishment of free trade in industrial products.

Joseph François's study assumes monopolistic competition and estimates welfare gains of US\$384 billion if tariffs on agricultural and industrial products are reduced by 50 percent. Income gains for liberalisation of trade in industrial products is estimated to be around US\$189 billion.

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The Cotonou Waiver: An Unlikely Doha Deal Maker

By Melissa Julian

An unexpected deal-breaker arose at the Doha WTO Ministerial meeting with the surprise inclusion on the agenda of the ACP-EU Partnership Agreement's waiver request. The final consensus to grant the waiver, after more than a year's delay and arduous negotiations in Doha, is seen as a significant victory for the ACP (African, Caribbean and Pacific) group. Although the actual trade gains remain elusive, the success of the ACP countries in obtaining the waiver illustrates their political 'coming of age' as trade negotiators. The ACP arrived in Doha significantly better prepared than in previous WTO Ministerial meetings. From now on, their challenge will be to capitalise on their weight as a group within the WTO, and begin to actually influence the making of global trade rules.

Delays in considering the waiver

Unilateral trade preferences granted by the European Union to its ACP partners – which include 77 developing countries, 54 of which are WTO Members – have been an essential pillar of their co-operation for over 25 years. Under the ACP-EU Partnership Agreement (commonly referred to as the Cotonou Agreement) signed in June 2000, preferences were extended until the beginning of 2008, at which time they should be replaced by new WTO-compatible trade arrangements between the ACP and the EU.

As for all trade preferences discriminating between Members, a WTO 'waiver' is necessary to maintain preferences that violate the non-discrimination obligation under GATT Article I. A request for such a waiver was put by the EU to the WTO's Council on Trade in Goods in March 2000 (the previous waiver for the Lomé Convention had expired on 29 February 2000). For well over a year, Latin American banana producing countries effectively blocked consideration of the waiver, on largely procedural grounds due to their objections to the EU's proposed new banana import regime. The WTO Working Party – finally established in October to consider the waiver request – was unable to reach a consensus prior to the Doha meeting as Latin American and other countries such as Australia continued to raise questions of substance and principle with regard to the Cotonou Agreement.

ACP Co-ordination ahead of Doha

Against that background, signs of growing intra-ACP co-ordination appeared in Geneva and in Brussels. Gabon's Ambassador in Geneva, who was responsible for co-ordinating ACP positions towards the WTO, reported on the status of the waiver request and other debates of ACP interest to the ACP trade ministers meeting in early November in Brussels to agree their position ahead of the Doha meeting. Ministers determined that agreement of the waiver was now urgent and no longer a technical matter. It was a political issue, which must be resolved in Doha or risk 'seriously undermin[ing] the confidence of the ACP States in the Multilateral Trading System'. This point was included in the ACP's official declaration to the WTO Ministerial Conference, and the group's Chairman sent a letter to the Conference Chair requesting that the item be included on the Doha agenda.

In Doha, the ACP established and effectively used negotiating structures which included a ministerial spokesperson as well as a

vice spokesperson, spokespersons from each of the ACP sub-regions and co-ordinators on each of the major agenda items under discussion. The ACP also co-ordinated with other groups of developing countries, such as the Organisation of African Unity and the LDC group, as well as with individual countries such as India and – most importantly – with the European Union.

Waiver Approval Becomes a Major Issue

Under WTO rules, requests to have items placed on the Ministerial agenda must be made several weeks before the meeting. However, in spite of the short notice, at the opening ceremony of the Doha Ministerial, the Conference Chair – in response to the ACP letter – said that the waiver request would be added to the agenda as a sub-item under decisions to be taken by ministers. While this took many delegations by surprise, no one dared raise objections to the Chair's formal opening speech.

With the waiver request firmly on the agenda, the ACP group effectively made its adoption a precondition to agreeing to the Doha Ministerial Declaration. The EU took a special interest in the issue and worked exceptionally closely with the ACP to achieve consensus on the waiver.

Difficult Negotiations to Reach a Consensus

Negotiations on the waiver were long and arduous. Numerous meetings were held between the ACP, the EU and Latin American countries, and with two other countries opposed to the granting of the waiver or seeking concessions in return for their support.

Latin American banana exporting countries initially opposed granting the Cotonou waiver because its coverage extended to 2008, while the current EU tariff rate quota system for bananas is due to be replaced in 2006 by a tariff-only system, the tariff levels for which have yet to be defined (and could presumably be set higher than what the Latin Americans want). To accommodate these concerns, the EU eventually promised to enter into consultations with any interested party with respect to any difficulty or matter that may arise as a result of the implementation of the ACP's preferential tariff treatment and specifically with regard to the separate tariff rate quota for ACP bananas. If consultations prove unsatisfactory, parties may bring the matter before the General Council for recommendations.

The EU also promised to consult with the Latin Americans on the proposed new tariff structure. It accorded them the right to request independent arbitration to determine if the envisaged rebinding would at least maintain existing market access for MFN banana suppliers and, if necessary, to rectify the matter. If the EU fails to do so after two rounds of arbitration, the waiver shall cease to apply to bananas upon entry into force of the new EU tariff regime. Of course, as is customary, the waiver does not preclude the right of Members to have recourse to the dispute settlement mechanism.

Most Latin American banana exporting countries accepted this compromise and dropped their opposition to the waiver. Ecuador,

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however, was initially reluctant to accept the amendments, but was eventually convinced by EU assurances that its access to EU markets would not be negatively affected by access for ACP products.

Thailand and the Philippines also threatened to block the waiver due to their objections over the EC's import policy with regard to canned tuna within the Cotonou framework. They pressed for a *quid pro quo* in the form of better access to the EU for their tuna exports. A last minute letter from EU Commissioner Lamy to the Thai and Philippine representatives, promising to enter into consultations to address their concerns, removed these objections. Should the Philippines or Thailand consider the result of the consultations unsatisfactory, the EU would be open to a recourse to mediation.

An urgent meeting of the Working Party, followed by the Council for Trade in Goods, was specially convened on the morning of the 14th. Two waivers were adopted by consensus: the first granting the ACP non-reciprocal preferential access to the EU markets until 2008, and the second permitting the EU to maintain a separate quota for ACP banana exports beginning 1 January 2002 to the end of 2005.

Lessons Learned and Challenges for the Future

The ACP sees the WTO's granting of the Cotonou waiver – probably the last of its kind, as non-reciprocal trade preferences should be replaced by WTO-compatible arrangements in 2008 – as crucially important. It ensures continued preferential, non-reciprocal access to EU markets, free from legal challenge, until 2008. That said, although some sectors will continue to benefit from tariff preferences, their relative value is fast eroding as the EU lowers or abolishes its trade barriers within the multilateral framework, or through an increasing number of bilateral free trade deals. More importantly, ACP exports face ever-increasing non-trade barriers (i.e. sanitary, environmental or technical standards), and the countries have yet to tackle supply side constraints and improve the competitiveness of their products.

Arguably for the first time, the ACP have stood as a group in a negotiation forum other than Brussels. Thorough preparation, co-ordination within and outside the group, and negotiation tactics (having the item placed on the agenda at the last minute) were all crucial ingredients of success. Nevertheless, the role of other WTO Members was equally important: the EU was determined to avoid a repeat of Seattle, and achieving a consensus on the waiver won the support of the ACP group in achieving this goal.

Opportunities like this will always exist if the ACP is well prepared. In the real negotiations that begin now on implementing the commitments made to developing countries, the challenge for the ACP is to capitalise on its force as a group within the WTO. The new ACP office in Geneva will help co-ordination and with good communication between ambassadors there and in Brussels much potential can be realised.

Developing and developed countries alike realise, in the wake of Doha, how a global rules-based system might be made to work by in favour of those previously marginalised by the world trading system.

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A recent World Bank report estimated that further liberalisation of trade in goods by all countries, through the elimination of all barriers, would result in world income in 2015 being nearly US\$355 billion higher than in 1997, if measured in static terms. About 70 percent of these gains would accrue from the removal of tariffs and of trade distorting subsidies in the agricultural sector. The gain from the liberalisation of trade in industrial products would be limited to about US\$90 billion (see World Bank, *Global Economic Prospects and the Developing countries*, pp. 153-168).

³ See footnote above, p. 168. ⁴ UNCTAD/Commonwealth Secretariat Study, p.44

⁵ See note 2 above, p. 167

⁶ Edward Buffel (2001), pp. 190-191

⁷ Robert Wade (1989) pp. 346-381

⁸ Quoted in Robert Wade (1989) pp. 15

⁹ Quoted in Dani Rodrick (April 2001) pp.25

REFERENCES

- Kym Anderson, Joe Francois, Tom Hertel, Bernard Heckman, and Will Martin: *Potential Gains from Trade Reform in the New Millennium*, paper presented at the Third Annual Conference on Global Analysis, Monash University, Mt. Eliza, June 2001 (Mimeo)
- Joseph Francois: *The Economic Impact of New Multilateral Trade Negotiations: Report prepared for DGII of the European Commission*, May 2000 (Mimeo)
- Gerald K. Helleiner: *Markets, Policies and Global Economy, Can the Global Economy be Civilised*, Prebesch Lecture, UNCTAD, December 2000
- Martin Khor: *Globalisation and the South: Some Critical Issues*, Third World Network, 2000
- S. Lall: *The Technological Response to Import Liberalisation in Sub-Saharan Africa*, London Routledge, 1999
- Dani Rodrick: *The New Global Economy and Developing Countries: Making Openness Work*, John Hopkins University Press, 1999
- Robert Wade: *Governing the Market, Economics Theory and the Role of Government in East Asian Industrialisation*, Princeton University Press
- G. Wignaraja and G. Ikiara: *Adjustment, Technological Capabilities and Enterprise Dynamics in Kenya* in S. Lall (ed): *The Technological Response to Import Liberalisation in Sub-Saharan Africa*, London Macmillan, 1999
- UNCTAD: *Trade and Development Report*, 1999
- UNCTAD/Commonwealth Secretariat: *Duty and Quota Free Access for LDCs: An Analysis of Quad Initiatives*, United Nations, 2001
- WTO: *Market Access: Unfinished Business – Post Uruguay Round Inventory and Issues*, WTO Publications, 2001
- World Bank: *Global Economic Prospects and the Developing Countries*, 2002

'Developing Countries and Industrial Tariff Negotiations' is the first in a series of in-depth articles intended to provide a broader context for the sustainable development challenges facing the multilateral trading system as Members undertake negotiations on the nine issue areas mandated by the Doha Ministerial Conference.

The editor welcomes submissions and suggestions to future issues of Bridges.

Biotechnology and Patents: What Can Developing Countries Do About Article 27.3(b)?

By Graham Dutfield

Article 27.3(b) is an enduring subject for trade negotiations and NGO activism on TRIPs. Undoubtedly, this part of TRIPs is extremely important for developing countries. What is less clear is how they can take advantage of its provisions to further their sustainable development objectives. The situation is not helped by disagreement on what the paragraph actually means. In addition, many developing countries find themselves in circumstances that make it difficult to plan for the future and therefore to tailor their regulatory policies to attain specific development goals. So it is hardly surprising that they are still unsure about where their national interests lie with respect to the paragraph's provisions, and have barely implemented any part of it, except by default in the sense of continuing not to allow patents on plants and animals.

In this article I would like to reflect on what Article 27.3(b) means for developing countries and suggest ways to advance the debate over what to do about it.

First, it should be clarified that while TRIPs does not allow WTO members to exclude biotechnological inventions from their patent systems in any explicit sense, Article 27.3(b) allows them to use their discretion in determining the extent to which inventions in this technological field can be protected.

The problem facing developing countries is that if they lack a clear idea of how – and even whether – biotechnology can benefit their economies and improve the lives of their citizens, they are in no position to design an IPR system to promote welfare-enhancing biotechnological innovation. Moreover, many of these countries have no biotechnology industries to speak of, and there is every reason to be highly sceptical that such businesses will spring up just because life-forms and micro- and non-biological processes can be patented.

Biotechnology: good for developing countries?

It is frequently argued – or at least strongly implied – that biotechnology has nothing to offer developing countries. This view tends to be founded upon two convictions: first, that transnationals are aggressively promoting inappropriate and potentially dangerous genetic modification technologies in countries where biosafety regulations are either non-existent or cannot easily be enforced; and second that because GM crops are bad for developing countries, then so is biotechnology. Yet, it is not always clear that actors in international debates on biotechnology interpret the word in the same way. This is important, because it is difficult to see what is wrong with longer-established biotechnologies like beer brewing and bread making, or even tissue culture and plant breeding. Presumably, the critics are referring only to what I would prefer to call 'the new biotechnologies', such as recombinant DNA, monoclonal antibodies, and genomics. But the distinction is not always made clear, and it sometimes seems as if anti- and pro-biotechnology activists are talking past each other because they are applying the word 'biotechnology' differently.

It is not the purpose of this article to recommend that developing countries should learn to love the new biotechnologies or alternatively that they should reject them outright. The appropriate policy response should probably be based on a view somewhere between these two extremes. But until they have come up with an informed

decision, a rational and effective IPR system cannot possibly be developed.

Varied capacities

Another reason why it is difficult for developing countries to come up with a common position on the review of Article 27.3(b) is that they vary so much in their national capacities to generate biotechnological inventions.

Policy makers in the more technologically-advanced developing countries who believe that the new biotechnologies can be beneficial should design their IPR system with the goal of encouraging domestic innovation and technology transfer, and attracting funds for start-up firms. Developed country experience suggests that a carefully-designed IPR system could indeed stimulate innovation, although there is a real danger of a carelessly-designed one turning out to be worse than having none at all, for example, by over-protecting upstream research and thereby inhibiting more applied downstream research, or by allowing large companies to control markets, raise prices and distort research priorities. But for many, if not most, other developing countries, it is difficult to see how strong IPR protection will encourage innovation if the capacity to do the necessary research is barely existent anyway.

To define or not to define?

Logically, developing countries should take a TRIPs *de minimis* approach for now, excluding plants and animals, construing 'micro-organism' narrowly, and opting for a *sui generis* alternative to patents for plant varieties. This is not as straightforward as it may seem. These terms are open to different interpretations. The European Patent Office (EPO) considers 'micro-organisms' to include 'not only bacteria and yeasts, but also fungi, algae, protozoa and human, animal and plant cells, i.e. all generally unicellular organisms with dimensions beneath the limits of vision which can be propagated and manipulated in a laboratory.' This seems rather over-expansive since it is not at all obvious that a single cell from a multi-cellular organism is itself an organism even if it has been cultured in a laboratory. There is no reason why developing countries should not define the term in a more restrictive sense if they should consider it advantageous to do so.

To make matters even more complicated, the unclear meaning of 'micro-organism' means that drawing a distinction between micro- and macro-biological processes is hardly straightforward either.

Josef Straus of the influential Max-Planck Institute for Foreign and International Patent, Copyright and Competition Law shows us how much is at stake when he argues that 'if micro-organisms are mandatorily declared subject matter eligible for patent protection, naturally occurring biochemical substances, such as sequences of nucleotides (DNA), *per argumentum a maiore ad minus* are also to be regarded as subject matter, for which WTO Members have to offer product patent protection.'¹ He therefore links the stated obligation to protect micro-organisms to an unstated requirement to extend protection to DNA sequences, as if the latter falls within the scope of the former.

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This link does not seem very logical or for that matter scientific. Nonetheless, if we accept that DNA is not 'life' but merely a chemical, then one could make the following interpretation in favour of complementary DNA (cDNA) patenting: cDNA sequences are produced in the laboratory and differ from their naturally-occurring counterparts in that certain sections of the molecule are 'edited out'; therefore, as with any other synthetic chemical, they should be patentable provided they fulfil the criteria of novelty, inventive step and industrial applicability.

Alternatively, one can reasonably be sceptical that the deletion of 'junk DNA' is inventive enough to deserve the reward of a patent, in that a claimed cDNA molecule is likely to be obvious to somebody 'skilled in the art' who knew the sequence of its naturally-occurring equivalent. This is because techniques for isolating and purifying DNA sequences are well-known and no longer require much skill to use. But what if nobody knew about the naturally-occurring equivalent? Such a claim should still arguably fail on the basis of the techniques employed being routine. Nonetheless, several countries do allow 'purified' and 'isolated' DNA sequences to be patented as long as a credible use is disclosed.

It has also been argued that allowing patents on genes and gene fragments is inadvisable because, for the reasons given earlier, it is likely to raise the cost of doing research. Objections to such patents have also been raised on moral or religious grounds, as have patents on living organisms.

Such objections notwithstanding, the extent of patenting relating to DNA has increased tremendously in the last two decades. According to Giles Stokes of Derwent Information, '[DNA] sequences first began appearing in patents in 1980, just 16 sequences all year. By 1990 that figure had risen to over 6,000 sequences. Throughout the 1990s the growth in the patenting of sequences expanded exponentially, and this looks set to continue. In 2000 over 355,000 sequences were published in patents, a 5000 percent increase over 1990'.² It is far from easy to know how best to respond to such a phenomenon.

What about plants and plant varieties? It remains an open question whether an application relating to a genetically-engineered plant would necessarily include plant varieties within its scope or not. This is important because in some jurisdictions, plants can be patented but plant varieties cannot. In others neither can but there may be a separate IPR system exclusively for plant varieties.

Since the language follows quite closely that of the European Patent Convention, it may be useful to see how the EPO, which allows plants to be patented but not plant varieties, has addressed this complex issue. In 1995, the Technical Board of Appeal of the EPO³ determined that a claim for plant cells *contained in a plant* is unpatentable since it does not exclude plant varieties from its scope. This implied that transgenic plants *per se* were unpatentable because of the plant variety exclusion. But in December 1999, the Enlarged Board of Appeal of the EPO declared that 'a claim wherein specific plant varieties are not individually claimed is not excluded from patentability under Article 53(b), even though it may embrace plant varieties', but that 'plant varieties containing genes introduced into an ancestral plant by recombinant gene technology are excluded from patentability'.⁴ Of course, other WTO Members do not have to follow this interpretation.

Another big problem that is often overlooked is the huge task developing country patent offices face in processing large numbers of lengthy and highly technical patent applications. To give some idea of the potential difficulties here, in 2000, the U.S. Patent and Trademark Office received a biotech patent application that was the equivalent of 400,000 pages long! And courts having the knowledge and experience to adjudicate disputes between different patent holders and to determine the appropriate scope of a biotech patent may simply not exist.

What to do?

Developing countries are justifiably concerned that TRIPs furthers the interests of the advanced industrialised countries much more than their own. A good example of the built-in biases of the TRIPs Agreement is that while protection must be extended to high-technology fields such as semiconductors, biotechnology, pharmaceuticals and software, traditional knowledge and folklore are entirely excluded. Developing countries also find themselves pressured to raise their national standards even beyond those of TRIPs through bilateral agreements with the US and the EU, and through threats of trade sanctions. Consequently, they lack confidence in the Agreement to the extent that one can realistically envisage the possibility of a campaign among those countries and NGOs to have TRIPs taken out of the WTO. Therefore, it is in the interests of the developed countries that benefit from TRIPs (or at any rate believe that they do) to heed the concerns of developing countries and respond sympathetically.

Developed countries must give developing countries time to determine how to respond to the challenges and opportunities of the new biotechnologies, even if this means that they delay full implementation of Article 27.3(b) until several years beyond the official deadlines. It is unreasonable to pressure them to speed up implementation before they feel they are ready to introduce legislation that furthers their long-term interests.

Developed countries should also refrain from imposing their own interpretations of Article 27.3(b) based on their own legislation and jurisprudence, and their own economic interests. As long as developing countries see TRIPs as a legal straightjacket rather than a looser-fitting garment, they are bound to feel not only uncomfortable, but resentful. In the longer term this suits nobody.

As for developing countries, both biotechnology and IPRs are highly controversial subjects that have provoked a heated debate and propaganda, and been the focus of highly-committed advocacy campaigns both in favour and against. This is all the more reason for these countries to be sceptical about much of the advice they get from the developed world on both topics, even when its providers claim to be objective and non-partisan.

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¹ Straus, J. (1998) Biodiversity and intellectual property. *AIPPI Yearbook 1998. XXXVIIth Congress – Rio de Janeiro (May 24-29, 1998) – Workshops I-VII*. International Association for the Protection of Industrial Property, Zurich.

² http://www.derwent.com/ipmatters/2001_01/genetics.html.

³ In *Greenpeace v Plant Genetic Systems NV*.

⁴ EPO Decision G 01/98 – <http://www.european-patent-office.org/dg3/biblio/g980001ex1.htm>.

Environment: A Potential 'New Beginning', continued from page 5

Mixed Reactions

Developing countries – who have so far strongly resisted negotiations on environment at the WTO fearing that resulting provisions might be used for protectionist purposes – remain weary of the references to environment in the Ministerial texts and the 'qualitative jump' from a work programme in the CTE to explicit negotiations. While agreeing that the relationship between MEAs and WTO rules should be clarified, one developing country representative questioned why the WTO should be singled out as the forum for negotiations rather than the MEA Secretariats. Another developing country delegate said that the environmental provisions in the end were 'much less rigorous' than expected, but highlighted continued concern among developing countries that negotiations might expand to other issues, such as precaution.

The EU's assessment of the Doha results expressed satisfaction with the way in which the Ministerial Declaration reflected its calls for increased action on sustainable development and environmental protection, which the EU says will be 'mainstreamed throughout the negotiations'. While the Union claims that the Declaration also covers precaution and labelling, EU Trade Commissioner Pascal Lamy has assured USTR Robert Zoellick that the EU will not use the 'precautionary principle' to justify illegitimate trade barriers.

Klaus Töpfer, Executive Director of UNEP, called the Doha agreement a 'new beginning'. Another UNEP official cautioned that the outcome of the environmental negotiations will depend on how Members use their mandate; the body that will carry out the negotiations; processes and co-ordination at the national level; participation of civil society and other international organisations; and further clarification of the negotiating mandate.

Rémi Parmentier of Greenpeace, one of the strongest critics of the Conference's environmental outcomes, noted that 'the agreement on environment offers very little progress in defending environmental protections against trade concerns.' Maude Barlow of the Council of Canadians cautioned that negotiations on the reduction/elimination of tariff and non-tariff barriers to environmental goods and services (para. 31 (iii)) could in fact put access to fresh water at risk, promote the privatisation of the world's water resources and endanger international environmental treaties.

The Post-Doha Development-related Work Programme

The Doha Declaration contains a work programme relating to several development-related issues, including, *inter alia*, a fuller integration of small economies – notably without creating a sub-category of WTO Members – and a framework for the WTO's technical assistance activities (para. 38-41). Para. 41 confirms ministers' commitment to the technical co-operation and capacity-building references throughout the Declaration, including the Singapore issues, and trade and environment. The General Council is to meet on 19 December 2001 to adopt a plan that ensures the availability of adequate funding for such activities. Director-General Mike Moore is seeking a US\$2.8 million increase in the WTO's technical assistance budget.

The Declaration commits Member countries to the objective – but only the objective – of duty-free and quota-free access for products originating from LDCs, and requests the Sub-Committee on LDCs to design a work programme for LDCs. Members also agreed to establish working groups on debt and finance, and technology transfer, as had been repeatedly called for by various developing countries. The working groups are instructed to forward their results to the next Ministerial Conference in 2003. Future issues of Bridges will cover these 'non-negotiation' issues in greater detail.

On special and differential treatment, ministers agreed that all S&D provisions 'shall be reviewed with a view to strengthening them and making them more precise, effective and operational' (see separate article on page 7).

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Key Dates of the Post-Doha Work Programme

DATE	ISSUE AREA
After the Doha Ministerial	<p>'Single undertaking' negotiations on</p> <ul style="list-style-type: none"> • Implementation (Ministerial Declaration para. 12). • Agriculture (Ministerial Declaration para. 13). • Services (Ministerial Declaration para. 15). • Industrial tariffs (Ministerial Declaration para. 16). • Subsidies (clarifying and improving existing disciplines, including fisheries subsidies; Ministerial Declaration para. 28). • Anti-dumping (clarifying and improving existing disciplines; Ministerial Declaration para. 28). • Regional trade agreements (clarifying and improving existing disciplines, Ministerial Declaration para. 29). • Environment (WTO/MEA relationship; information exchange between the WTO and MEA Secretariats, and reduction/elimination of tariffs and non-tariff barriers for environmental goods and services; Ministerial Declaration para. 31). <p>Negotiations on a separate track</p> <ul style="list-style-type: none"> • Dispute Settlement Understanding (clarifying and improving the DSU; Ministerial Declaration para. 30).
December 2001	<p>Technical Assistance – Ministerial Declaration para. 40 General Council to adopt a plan ensuring long-term funding of WTO's technical assistance activities</p>
By January 31, 2002	First Meeting of the Trade Negotiations Committee – Ministerial Declaration para. 46
By June 30, 2002	Services – Submission of initial requests for specific commitments – Ministerial Declaration para. 15
By January 31, 2002	<p>Textiles – Implementation Decision paras 4.4 and 4.5 Council for Trade in Goods to report to the General Council on calculating quota levels for small suppliers and advancing growth-on-growth implementation.</p> <p>Special and Differential Treatment – Implementation Decision paras 12(i) and (ii) Committee on Trade and Development to report to the General Council on making special and differential treatment provisions more efficient and/or mandatory.</p> <p>Subsidies – Implementation Decision para. 10.3 Committee on Subsidies and Countervailing Measures to report to the General Council on its review of the SCM Agreement's provisions on countervailing duty investigations.</p>
By end 2002	<p>TRIPs: Compulsory Licensing – Declaration on TRIPs and Public Health para. 6 TRIPs Council to recommend solutions to the General Council on problems encountered by Members with an insufficient manufacturing capacity to make effective use of compulsory licensing.</p> <p>Anti-dumping – Implementation Decision paras 7.2-7.4 Committee on Anti-dumping Practices to draw up recommendations for the operationalisation of the obligation to give special consideration to developing countries' special situation before the application of anti-dumping measures, and the timeframe to be used in determining the volume of dumped exports. The Committee shall also present guidelines and recommendations for the improvement of annual reviews to the General Council for subsequent decision.</p> <p>Outstanding Implementation Issues – Ministerial Decision para. 12(b) Relevant WTO bodies to report to the Trade Negotiations Committee – for appropriate action – on their work on implementation issues for which the Ministerial Declaration does not provide a specific mandate.</p>
By March 31, 2003	<p>Agriculture – Modalities for further commitments to be agreed (Ministerial Declaration para. 14)</p> <p>Trade in Services – Initial offers (Ministerial Declaration para. 15)</p>
By May, 2003	End of Negotiations on Amending the Dispute Settlement Understanding – Ministerial Declaration para. 30
Fall 2003	<p>FIFTH WTO MINISTERIAL CONFERENCE Reports on full range of issues in the work programme agreed in Doha; including those relating to the trade of small economies; progress in the examination of issues related to trade, debt and finance; and trade and technology transfer.</p> <p>New Issues – Ministerial Declaration paras 20-27 Members to decide by 'explicit consensus' modalities (including whether/when) for launching negotiations on investment, competition policy, transparency in government procurement and trade facilitation.</p> <p>Environment – Ministerial Declaration para. 32 Committee on Trade and Environment to report to the Ministerial Conference on the need to clarify WTO rules – including the desirability of negotiations – with regard to the effect of environmental measures on market access; the relevant provisions of the TRIPs Agreement; and labelling requirements for environmental purposes.</p> <p>Agriculture – Ministerial Declaration para. 14 Members to submit comprehensive draft Schedules 'no later than the fifth Ministerial Conference'.</p>
January 1, 2005	<p>END OF SINGLE UNDERTAKING NEGOTIATIONS – Ministerial Declaration para. 45</p> <p>© ICTSD, 2001</p>