

From Doha to Johannesburg: Who Will Decide Our Common Future?

As governments and civil society have finally started to bestow priority attention to the World Summit on Sustainable Development in Johannesburg next September, ICTSD will contribute to the debate by offering space in *BRIDGES* for a wide variety of views. Below, Victor Menotti, Environmental Director of the International Forum on Globalisation, looks at the stakes from the perspective of civil society movements opposed to trade-led globalisation.

By Victor Menotti

In November of 2001, trade ministers from 140 nations gathered in Doha, Qatar to give the World Trade Organization (WTO) a historic new mandate that could intensify the burning of fossil fuels, the logging of native forests, the depletion of fisheries, the use of toxic chemicals, and the release of genetically-modified organisms. Despite public opposition worldwide, WTO has obtained even more powers than before, declaring itself the institution that will unilaterally answer fundamental questions about the fate of planet's natural systems and the billions of poor people who depend on them for survival.

Despite rhetoric about poverty alleviation and sustainable development, the WTO's official statement (known as the Doha declaration) gives the WTO new powers to restrain citizens from using their governments to regulate the behavior of global corporations. By declaring itself the arbiter of planetary natural resource crises and the forum for resolving conflicts between international agreements on trade and environment, the Doha agenda throws down a direct challenge to preparations for the 2002 United Nations World Summit on Sustainable Development in Johannesburg, South Africa.

The Doha agenda empowers the WTO to:

- intensify export-based farming, forestry, fishing, as well as fossil fuels burning, mining, and other natural resource exploitation;
- eliminate more conservation and community development policies as unfair 'barriers' to trade and investment;
- determine who captures the remnants of the world's collapsing natural resources, starting with the planet's depleted fisheries;
- subordinate multilateral environmental agreements (MEAs) to the rights of corporations.

New Mandates Advance an Anti-Sustainable Development Agenda

Multilateral Environmental Agreements (MEAs): In perhaps the WTO's most direct threat to sustainable development and the entire Rio/Johannesburg process, the Doha declaration expands the WTO's mandate to unilaterally

determine its relationship to the trade measures enforcing MEAs, such as in the Cartagena Protocol on Biosafety (GMOs), the Straddling Stocks Agreement, among many others. The Doha mandate to 'clarify' the relationship between two international systems of law can only be understood as a move to subordinate MEAs to the rights of corporations in WTO. First, trade, not environment, ministers will lead negotiations; and second, MEA Secretariats are given only 'observer' status, apparently so they can watch while the treaties they administer are eviscerated.

Clashes between the two bodies of international law have become increasingly apparent, and trade ministers want to 'resolve' the conflicts. The implications for international environmental governance are profound: the trade measures that form the very teeth of MEAs violate core GATT principles. For anyone who believed that free trade rules would never directly threaten the process of international environmental policy-making, Doha should not be read as simply a smoking gun, but a declaration of war. The Johannesburg process will be a critical vehicle to challenge the WTO's attempt at usurping global governance.

Market Access: The WTO's market access agenda combines two dangerous impacts that undermine natural resource conservation and sustainable livelihoods: 1) the expansion of exports to wasteful consumers; 2) the elimination of legal protections that ensure sustainable use of natural resources and local communities who depend on them. The forestry, fishing, farming, sectors are particularly impacted.

WTO could eliminate both tariffs and non-tariff measures. NTMs are considered to be almost any government measure, policy, or practice that has the effect of 'distorting' trade. Fishing NTMs might include measures such as harvesting restrictions, bans on destructive gear, embargoes on species suspected of disease or illness, residency requirements (fish here, live here), or even eco-labels. The NTM agenda is the final push to remove all government control from regulating natural resources, where any policy objective, such as conservation or community development, is made subservient to expanding trade.

Lowering tariffs in the absence of adequate safeguards for marine ecosystems and fisher peoples could accelerate the devastation of the world's fish stocks and fishing communities. Although the UN Food and Agriculture Organization reports dire news about dwindling stocks, no assessment has been done on the health impacts on fish stocks that are being prioritised for tariff elimination. Nor has anyone even consulted the

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fishing communities themselves, such as the National Forum of Fishers in India, or the Pacific Coast Federation of Fishermen's Associations in the US, about what issues they want addressed in trade policy. It seems the only ones who are aware of the WTO fisheries agenda are the importers, processors, and distributors who drive the trade agenda. In addition to forest and fish products, tariff cuts are being discussed for minerals, fuels, chemicals, and other 'non-agricultural products.' Without any assessment of the impacts of expanding trade in these controversial commodities, the WTO is putting the planet's future at risk.

Anti-dumping: It is no secret that the international trading system is currently seeing a proliferation of complaints about dumping, which is the practice of exporting a product at a price lower than it can be produced. As global recession deepens, governments are intensifying their promotion of exports to keep their national economies afloat. In reaction, importing nations are imposing tariffs and quotas to control the flood of cheap products that are driving domestic producers out of business. But the WTO sets strict rules on what measures governments can take, and under what conditions, to stem the tide of damaging imports. While loathed as 'protectionist' by free traders (indeed, the thrust of the Doha declaration's opening paragraph is to 'reject the use of protectionism') anti-dumping measures are also sometimes necessary for protecting the sustainable livelihoods and the environment. Though today's anti-dumping headlines focus on the conflicts in steel and textiles, millions of people around the world who depend on directly accessing natural resources (for their own subsistence or for small-scale commercial production) are threatened by cheap imports. The expansion of global trade and investment overseen by WTO has created a crisis in rural communities everywhere, as fluctuating commodity prices destabilize communities and make long-term planning for natural resources impossible.

Subsidies for Fisheries: This item on the Doha agenda, which at first glance may appear innocuous or helpful, could turn out to be the tip of an iceberg bound for capturing the remnants of the planet's collapsing resources. While governments need to cut subsidies and reduce overcapacity in the fishing industry (too many boats chasing too few fish), the WTO is not the appropriate venue to handle this subject. Letting a trade body, whose main constituents are global trading firms, and not people tied to the land and sea, decide which subsidies are allowable almost ensures that what happened to small farmers under WTO's last round will now be repeated with the world's small fishers.

Few NGOs wanted to give the WTO anything that would expand its powers over new areas of policy making, let alone allow WTO to greenwash its image. Yet that is exactly the spin out of Doha, as WTO claims a 'win-win' for trade and environment.

Conclusions

The intrinsic contradictions between the Doha and Johannesburg agendas have become clear: WTO's mission of removing governments (which are supposed to be the expression of popular will) from shaping their economies runs counter to the original mission of the 1992 Rio Earth Summit, where heads of state deemed 'changing course' toward sustainable development to be the new global imperative. Member nations can no longer claim to 'serve two masters.'

The Doha deal may some day come to be known as a declaration of silent war against the rights of people and the planet. It threatens poor peoples' access to and control over the very resources upon which their survival depends, deepening the spiral of exclusion that drives so many to insecurity and acts of desperation.

To have meaningful impact, Johannesburg must initiate a people-driven process to transform international economic institutions. Otherwise, its future decisions could be subject to review by the WTO and the global corporations it serves.

The Johannesburg summit will be just one of a number of convergences required to replace the WTO's bid for a corporate utopia with an international citizen's agenda that protects the poor and the planet. If not, Doha will be known as a pivotal point in history where global governance was truly usurped.



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

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The Pros and Cons of Stronger Geographical Indication Protection

By Dwijen Rangnekar

While it is clear that geographical indications (GIs) are on the agenda of the new round of WTO negotiations, Members strongly disagree on the extent of the mandated discussions. In particular, deep divisions exist on the issue of extending to other goods the strong level of protection provided for wines and spirits under Article 23 of the Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPs, see page 11). Some countries, developed and developing, emphasise that a clear mandate for negotiations on GI-extension exists. Others, such as Argentina, insist that there is no such agreement, either with respect to conducting negotiations or with respect to what 'appropriate action' might be warranted.¹

Naturally, questions arise as to the applicability and effectiveness of widening the scope of application of higher-level GI protection. The most important of these is: will GI-extension deliver the economic returns that *demandeurs* consider exist? A detailed study of the pros and cons of GI-extension is urgently required. This article is a brief attempt to address the open questions.

What Are Geographical Indications?

'Geographical indications' (GIs) as an instrument of intellectual property protection are very much an invention of the TRIPs Agreement reflecting the negotiating success of the European Communities. Even while other WTO Members, notably Switzerland and some developing countries, were interested in including GIs within TRIPs, the power-play of deal-making saw the GI text within the 'Dunkel Text' eventually reflect many of the provisions of an EC proposal submitted already in 1990.

The notion of GIs is closely connected to previous WIPO treaty-based instruments of protection, notably 'indications of source' (under the Madrid Agreement) and 'appellations of origin' (under the Lisbon Agreement). The former remains narrowly focused as a border measure seeking to stall the false or deceptive use of indications of a product's country of origin. In contrast, 'appellations of origin' is a concept that connects a geographically-designated place (country, region or locality) that serves as a product's name to aspects of the product's quality. Consequently, 'appellations of origin' are considered to be a mark that requires quality (i.e. product characteristics) to be essentially attributable to the geographical region of origin of the product (i.e. soil, climate, specific human skills). Yet, the Lisbon Agreement remains limited to establishing an international registration system of appellations that are protected in the country of origin. Various shortcomings have been noted at pre-TRIPs discussions at WIPO.² For example, it was pointed out that the separation of 'indications of source' and 'appellations of origin' was a false dichotomy and that a narrow focus on denominations that were 'direct geographical names' was biased against other denominations. Consequently, TRIPs Article 22.1 defines geographical indications more broadly as

indications which identify a good as originating in the territory of a Member, or a region or locality in that territory, where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin.

A careful reading clarifies the broadness of the notion³:

- GIs are to be understood as a general concept that point to the 'geographical origin' of a product in a given country, region or

locality: in other words, the notion now focuses on 'indications which identify a good'. Denominations that are not 'direct geographical names' (such as Basmati) are also feasible.

- 'Reputation' is an additional element constituting the notion of GI, thus going beyond the Lisbon Agreement's focus on 'quality and characteristics' of a product.

The euphoria and interest of specific Member countries connect to two key features of GIs: the link between GIs and agricultural products and the possibility of protecting products with specific qualities to location-specific skills. These possibilities are considered potentially useful for protecting the knowledge and rights of communities.

Even while the TRIPs Agreement has made important advances in developing the notion of GIs, the scope of application of the notion is circumscribed by the explicit hierarchy of protection:

Basic Protection: All GIs must be protected against use which would *mislead* the public or constitute an act of unfair competition (as defined in the Paris Convention).⁴ Members must provide a legal mechanism (undefined in the Agreement) for interested parties to prevent the use of any designation that indicates the origin of a good. Further, the obligation is contingent on the continued existence of GI-protection in the country of origin (Art. 24.9).

Additional Protection for Wines and Spirits: Wines and spirits enjoy three additional elements of protection: (a) the protection is 'absolute' and prohibits the translation of GIs or the attachment of expressions such as 'kind', 'type', 'style' or 'imitation'; (b) obligation to refuse or invalidate the registration of trademarks which constitute or consist of GI (Art. 23.2); and (c) obligation to enter into negotiation to increase protection (Art. 24.1). Two additional (and highly contentious) obligations require the protection of each GI in the case of homonymous indications⁵ and the establishment of a multilateral system of notification and registration of GIs for wines.

It is the above hierarchy that is at the heart of the current debate at TRIPs. Although many developing countries see themselves as having (yet again) 'missed the boat', the GI debate cuts across the traditional North-South divide on IPRs and is equally reflective of a divide between the 'new' and the 'old' worlds. It is the complicated divisions on the subject that raise two broad sets of questions. First, what are the reservations of those opposing GIs and is there any merit in these reservations? Second, what are the virtues and pitfalls for GI-extension?

Key Elements of the Debate

At the outset, it is crucial to acknowledge the *discriminatory* and *interlinked* nature of the current impasse on GI. The existence of a double system for the protection of GIs – one for wines and spirits and another, weaker one for other goods – is considered discriminatory. Many countries with well-known GIs have failed to secure 'additional protection' under the TRIPs Agreement. Instead, ironically, they are obliged to provide a higher level of protection for wines and spirits even while these very same indications are deemed 'generic' or 'semi-generic' in key markets such as the United States and Canada.

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Moreover, there is a strong perception that well-known indications are 'misappropriated' in external markets (see box below). Given the branding of the new WTO negotiations as a 'development round', it is crucial that perceptions like these are addressed.

Reflecting the bargaining of multilateral trade negotiations, any movement on GIs will necessarily hinge on concessions elsewhere.⁶ Bilateral relations are also relevant. Thus, Australia has repeatedly used the GI debate at the TRIPs Council to draw attention to its bilateral arrangements with the EU for the protection of wines and spirits.⁷ Any resolution of this issue will require consideration of the pros and cons of the gains and concessions on offer.

Arguments and Counter-arguments

Among the main reasons for opposing GI-extension, some WTO Members cite the potential costs and burdens, such as new administrative rules, trade implications and obvious potential conflicts between producers from different regions⁸. In assessing these points, the following factors should be kept in mind:

- These concerns apply to almost any rule emerging from multilateral trade negotiations. It is very rare that a new trade rule will result in benefits accruing to every participant. It is also important to distinguish between the one-off fixed costs associated with establishing new administrative rules from the on-going costs of running the system.
- Members are already obliged to provide legal means for interested parties to prevent misleading use of GIs. Consequently, extending strong GI protection to other products should not involve any significant additional administrative burden. Effective enforcement of GIs will be contingent on action initiated by *demandeurs*. To explain: to enforce protection in external markets *demandeurs* will have to set up domestic systems for GI protection – a prerequisite for securing GI protection in external markets – and actively engage in enforcing the same in external

The Basmati Controversy

This controversy was initiated by the 1997 grant of a US patent on a rice variety to RiceTec. The patent, which was subsequently challenged by the Indian government and had many of its claims rejected, concerned the development of a semi-dwarf variety with 'characteristics similar or superior to those of good quality basmati rice'. Moreover, the patent stated that certain basmati plant and grain characteristics were not dependent on the growing environment. This view, which suggests that 'basmati' is a type of aromatic rice, is repeated by the USA Rice Federation, the industry lobby group, in a 1998 Communiqué and later confirmed by rulings of the US Department of Agriculture and the US Federal Trade Commission in response to petitions filed by a collective of US-Indian civil society organisations. The petitions sought to establish a rule that would prevent US-grown rice from being advertised with the word 'basmati'. While a strategically important move, the petitions were not well documented and consequently rejected. Neither the US FTC nor USDA considered the labelling of rice as 'American-grown' basmati misleading, moreover, both authorities deemed 'basmati' a generic term. This ruling sharply contrasts with marketing regulations that exist in UK and Saudi Arabia where only particular aromatic rice varieties from the Indian subcontinent are accepted as basmati. One of the lessons of this experience is the need for effective enforcement of GI protection in external markets, an effort that requires legal skills.

markets. Moreover, as an UNCTAD study notes, TRIPs does not mandate a particular system of protection, thus allowing Members to exploit possible cost variations associated with different options, such as a government-run administrative system or alternatively a juridical system based on private initiative.⁹

- The level and frequency of use of GIs will tend to increase with time – as it does with any other IPRs. However, given their circumscribed nature, the number of GIs will probably remain limited (consider, for instance, the roughly 770 appellations of origin in 1999 with the estimated six million trademarks in existence).
- This leaves the final ground for opposing GI-extension: 'obvious potential conflicts between producers from different regions'. Given the long history of movement of agriculture-based products, this is a pertinent issue that has been repeatedly raised (almost exclusively in the context of wines) by countries from Latin America and Australia. The enforcement of GI will lead to some trade/production disruption as well as constraints on market access. This adverse consequence for select producers is one 'cost' of intellectual property protection, be they patents, trademarks or GIs. In the latter case, the long history of human migration and associated movement of plant genetic resources makes this a grave and thorny problem. The case of wines is pertinent since there are regions in the 'new' world that have an identical name to regions in the 'old' world (cf. footnote 7 above). There is no clear WTO rule on 'homonymous GIs', though Article 23.3 provides protection for each indication. It is hoped that the Doha-mandated negotiations on establishing a multilateral system of notification and registration will provide an acceptable solution to this problem. Clearly, the 'old' world – 'new' world impasse on GIs for wine remains a significant stumbling block for the concerns of other WTO Members seeking GI extension.

Would GIs Offer Effective Protection?

This leaves us with the fundamental question underlying the *demandeurs'* keen interest in securing GI extension: will the inclusion of products other than wines and spirits within the scope of Article 23-like GI protection be effective and economically beneficial? Referring to the existing operation of Article 22, extension opponents suggest that 'free and fair imitation of the product often enhances the intrinsic value (and premium) of the genuine GI' (IP/C/W/289). In some countries opposing extension, such as the US and Canada, certification trademarks allow a diverse range of GI goods to be protected, including Darjeeling tea, Stilton cheese, Swiss chocolate, Ceylon tea and Florida oranges. Nonetheless, the regulations in these countries also allow expressions such as 'style', 'kind', and 'American-grown', which dilute the GI and raise the risk of reclassification as a generic, as has happened with basmati.

Moreover, there are exceptions to the obligations under Articles 22 and 23, which include those related to transitional periods, the 'grandfather clauses' and Article 24. The latter permits the reclassification of a GI as generic on grounds of customary use or where use exists prior to the entry-into-force of the Agreement. While these exceptions are necessary to balance divergent interests, *demandeurs* for GI-extension need to carefully consider the net effect. In this respect, the EU's experience with the US and Canada is telling. Canada has used exceptions in Article 24 to classify 22 wine names and 15 spirit names as generic (cf. IP/Q2/CAN/1). No doubt, the possible benefits to those seeking GI-extension will depend on the use of these exceptions by other Members and on how a dispute settlement panel might interpret the exceptions. Securing GI extension for other products will not automatically protect external markets.

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Why the Development Box Marks a Radical Break with the Past

By Duncan Green

The Development Box proposal first surfaced at the WTO in 2000, as a proposal from the 'Like-minded Group' of developing countries, including Pakistan, Kenya and the Dominican Republic. A similar proposal (for a 'food security box') was put forward by India. These governments were concerned that the direction of existing WTO rules for agriculture was undermining their efforts to ensure food security and livelihoods for their people, especially small farmers. The proposal offered new ways to think about exceptions to the trade rules, tailored to countries with few resources and particularly urgent food security concerns.

In October 2001 a dozen countries formed the 'Friends of the Development Box' group, chaired by Pakistan. In Doha, the group lobbied unsuccessfully for the proposal to be mentioned in the Ministerial Declaration, but generated enough momentum to ensure the proposal was discussed as an agenda item for the first time at the February Agriculture Committee special session (see Bridges Year 6 No.2, page 1). At the time of writing it is not clear how the Development Box proposal will be dealt with in the next phase of the agriculture negotiations.



Wheat harvesting in the United States

The Development Box has also won widespread support from NGOs who, in typical NGO fashion, have set up a network, with dedicated listserve and website.¹ The Development Box has also made the transition from policy to campaigns work, with European Agriculture Commissioner Franz Fischler, and the UK and Irish governments currently on the receiving end of thousands of postcards and emails from NGO supporters calling on them to support the proposal.²

A Poverty Focus in the WTO

For NGOs, the Development Box is much more than a minor readjustment of the rules governing special and differential treatment for developing country agriculture at the WTO. It is an attempt to counter some of the profoundly negative impacts of trade liberalisation. It also represents a paradigm shift in the approach to designing trade rules, placing poor farmers and development needs at the heart of the negotiating process. Proponents of the Development Box believe that open borders may not be the most developmentally-sound policy for all countries in the area of agriculture.

The starting point for NGOs is that trade and trade reform are not ends in themselves but a means to an end. The purpose of international trade should be human development, and in particular the achievement of the UN's 2015 Millennium Development Goals (notably halving the proportion of people living in poverty). This provides governments with a litmus test with which to judge proposals for reform – are they a help or a hindrance in the fight to reduce poverty?

This over-arching goal also provides the intellectual basis for a rethink of special and differential treatment (S&D), which in the

Uruguay Round was watered down until it meant little more than longer implementation time frames and exemptions for the poorest countries.

- S&D and graduation from it should be determined by development benchmarks, not arbitrary timetables. If development is the basis for S&D, then a country should be eligible until it achieves a certain level of development, as shown by relevant development indicators.
- Special and differential treatment should be a permanent and integral feature of WTO rules, not an 'exception' to the most favoured nation principle. Talk of 'level playing fields' in the WTO is too often a self-serving tactic which ignores the massive disparities between players – whether between rich and poor countries, or between rich and poor people within them. Equal treatment of unequal players generally leads to unequal outcomes and can prevent progress towards achieving international development goals.
- Trade rules should be redesigned to distinguish among social groups, not just countries. If the goal is poverty reduction, then the appropriate target group for S&D is poor people, not entire countries. The Development Box is an attempt to design trade rules specifically to benefit some of the world's most vulnerable citizens, in this case small farmers. If it works, there is no reason why similar approaches should not



and in Syria

be applied in other WTO negotiations, or in other trade fora, such as regional trade agreements. Indeed, coherence would require that the approach be applied elsewhere. If governments can help small farmers under WTO rules, but remain obliged by regional trade or IMF agreements to ignore them, the new flexibilities will be useless.

For Poor Farmers, Domestic Markets Count Most

The Box responds to some critical gaps in the WTO agenda. Developing country governments already have considerable flexibility on their domestic spending, allowing them to support agriculture in general, and small farmers in particular (article 6.2). There is also a well-established debate on improving access to Northern markets for developing country exporters. However these two issues may not significantly benefit small farmers: cash-strapped governments are often unable to support them, while most small farmers find that issues such as access to information and credit prevent them from breaking into export markets.

Instead, other issues are often more important to small farmers, but largely ignored by the WTO. For most small farmers, the most important market is their own national or local market. Yet their ability to sell their products to local markets at a reasonable price has been undermined by two linked processes. Firstly, trade liberalisation in the last two decades has removed non-tariff barriers to imported foods, and lowered tariff barriers. The WTO is just

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part of a multi-pronged drive for liberalisation, involving regional trade agreements such as NAFTA, IMF structural adjustment programmes, and bilateral pressures. Lowered barriers at the border mean exposing small farmers to competition from foreign imports. Moreover, these imports are often extremely unfair competition, since Northern governments have continued to spend billions of dollars on agricultural programmes that drive down world prices and leave commodity markets flooded with unwanted production.

The FAO,³ among others, has charted the result – surges of artificially cheap foodstuffs from the North have seriously endangered the livelihoods of millions of small farmers around the developing world. Maize farmers in Mexico; rice farmers in Haiti; dairy farmers in South Africa, Brazil and Jamaica have all suffered as a result. A number of NGOs are currently preparing case studies for the development box website showing how the proposal would help address these problems.

What Does the Development Box Propose to Do About It?

The Development Box works at two levels – it gives developing country governments the right to exempt ‘food security crops’ from tariff reductions. These crops, mainly staple foods, are grown by small farmers, often women, and are vital to the way most developing countries feed themselves. Secondly, the development box links trade liberalisation in the South to a reduction of dumping in the North. Until developed countries control the sale of their production by agri-business at less than cost of production prices, developing countries need to protect their agriculture from the market distortions that prevail in most commodity sectors today.

The proponents of the Development Box realise that it is not a ‘silver bullet’. A single trade proposal cannot solve the problems of resource-poor farmers. Governments will still face external constraints in the shape of other regional trade agreements, and bilateral pressures, which try and prevent them from protecting their farmers. Internal pressures also exist – in most countries, large farmers are a much more organised political force than small farmers and lobby hard to ensure government policy reflects their needs, rather than those of the poor.

But the symbolic importance of the Development Box should not be underestimated. Its approval would send important signals – that developed countries and the WTO are serious about putting development at the centre of the ‘Doha Round’; that trade rules can be designed specifically to address the needs of the poor; and that developing country governments can no longer hide behind their international trade commitments when they fail to address the needs of small farmers.

Duncan Green is a trade policy analyst at CAFOD, the Catholic Agency for Overseas Development in England and Wales.

ENDNOTES

¹ Trade Observatory. For documents on agriculture, see http://www.iatp.org/tradeobservatory/library/index.cfm?c_id=42#

² See, for example, <http://www.cafod.org.uk/tradefjustice/saveourmaize.shtml>

³ See *Agriculture Trade and Food Security: Issues and Options in the WTO Negotiations from the Perspective of Developing Countries*, FAO, 1999. The FAO is currently planning further work in this area.

Pros and Cons of Geographical Indications, continued from page 4

A final criticism of the demand for GI-extension is that failure to protect a GI in the country of origin removes the obligation to provide GI protection in external markets. This is clearly a fundamental hurdle facing the *demandeurs*, many of whom are developing countries. Unfortunately, little is reliably known about the status of GI regulations in developing countries (very few of them reported on the status of GI regulation in the last review conducted by the WTO Secretariat in April 2001 (IP/C/W/253)). Further, *demandeurs* need to recognise that exploiting potential benefits within WTO depends substantially on proactive measures. In the case of GIs, it will be useful to devote resources to setting, maintaining and enforcing product standards, creating a brand and policing its use in external markets. Factors like these are prerequisites for the development of a valuable GI. The availability of GI will not automatically lead to economic success. Just as there are a large number of useless patents and trademarks, there will be many GIs that do not result in economic return.¹⁰

To conclude, there is a strong case for responding to the demand for GI extension as the existing system is discriminatory and the new round has been branded as a ‘development round’. However, the *demandeurs* must face up to two key points: (a) domestic protection of GIs is a crucial pre-requisite and (b) exploiting the GI option requires significant investments. Only some GIs are likely to result in economic returns. In addition, the impasse regarding homonymous GIs between the ‘old’ and the ‘new’ worlds remains a stumbling block for taking the negotiations forward.

Dr Dwijen Rangnekar is a Senior Research Fellow, School of Public Policy, University College London, London, UK.

ENDNOTES

¹ See WT/MIN(01)/W11 by the EU et al.; WT/MIN(01)/W/9 by Bulgaria, Kenya and Sri Lanka; and WT/MIN(01)/W/8 by Argentina.

² See WIPO (1993), Symposium on the International Protection of Geographical Indications, Funchal, Portugal.

³ Sergio Escudero (2001), International Protection of Geographical Indications and Developing Countries, TRADE Working Papers No. 10, South Centre.

⁴ The use of a GI that does not *mislead* the public will not be considered as contravening the Agreement.

⁵ Discussion at WIPO’s Standing Committee on Law of Trademarks, Industrial Designs and Geographical Indications would suggest that this term refers to (identical) indications for similar products that originate in different places, a classic example being Rioja wine produced in identically named regions in Spain and Argentina.

⁶ For example, Bulgaria warned at a recent TRIPs Council special session on GI that movement on the GI debate has implications on other elements of the Doha Agenda, in particular agriculture.

⁷ The EU has succeeded in stopping South Africa from using the words ‘port’ and ‘sherry’, despite its historical use of these terms for domestic products (see also footnote 5).

⁸ This, and other, questions concerning GI-extension are taken from a June 2001 TRIPs Council submission by Argentina and seven other countries (IP/C/W/289).

⁹ UNCTAD (1996), The TRIPs Agreement and Developing Countries, New York and Geneva.

¹⁰ Many trademarks and patents granted and maintained are not effectively used. However, many of the ‘useless’ patents are part of larger portfolios, either as ‘overlapping patents’ or ‘patent fences’, which ultimately enable the exercise of control across a broad technological landscape. Whether similar strategic use of GIs is possible is difficult to state in the absence of detailed studies of the existing use of GIs in wines and spirits.

New Funds and Programme for Technical Assistance and Capacity-Building Approved

• Doubling the projected budget, governments pledge US\$18 million to new WTO technical assistance fund

On 11 March, nearly 30 WTO Members pledged more than thirty million Swiss francs (about US\$18 million) to the Doha Development Agenda Global Trust Fund, which is to finance the bulk of the capacity-building activities called for in the Doha Ministerial Declaration. This sum more than doubles the amount targeted for technical assistance in the WTO budget adopted in December 2001.¹

• Members endorse plan for 2002 but will keep TA activities under constant review

On 6 March, Members conditionally endorsed a plan of activities for 2002. While the adoption of such documents is usually a matter of routine, the long debate – and the resulting changes – concerning this year's plan reflect the importance that developing countries in particular attach to the content and orientation of trade-related capacity-building in the post-Doha landscape.

Assistance for Singapore Issues Delinked from Negotiations

Nearly 500 activities, covering 22 issue areas, are sketched in for this year in a 69-page Co-ordinated WTO Annual Technical Assistance Plan (WT/COMTD/W/95/Rev.3). WTO Members 'took note of' rather than officially adopted the document, which was elaborated and thrice-revised by the Secretariat in light of comments from delegates in numerous meetings of the Committee on Trade and Development (CTD).

The latest version of the document – characterised as a 'work-in-progress' subject to regular reviews by the CTD – takes into account some points forcefully made by developing countries. The most important is the integration of technical assistance for the Singapore issues (see box) in the overall framework rather than keeping such activities in a separate Annex.

In the original version of the technical assistance plan, the Secretariat had justified the Annex by 'the importance attached in the Ministerial Declaration to the Singapore issues'. Many developing countries objected to this approach as it seemed, *inter alia*, to indicate that assistance would be targeted to areas that do not necessarily reflect their needs or priorities.² The Annex has now disappeared and the Singapore issues have been incorporated in the overall plan. However, a relatively high number of capacity-building activities (28) are planned for both investment and competition policy.

Disagreement over the Doha Mandate

The Ministerial Declaration provisions regarding the Singapore issues invariably state:

Recognising the case for [a multilateral framework/agreement on investment/competition policy/government procurement/trade facilitation] *and the need for enhanced technical assistance and capacity-building in this area [...], we 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'* (editor's italics).

On investment and competition policy, ministers also recognised: the needs of developing and least-developed countries for enhanced support for technical assistance and capacity building in this area, *including policy analysis and development so that they may better evaluate the implications of closer multilateral co-operation for their development policies and objectives, and human and institutional development* (editor's italics).

Many developing countries interpret these provisions to mean that future negotiations in the Singapore issues areas may be put off indefinitely if technical assistance proves insufficient or, presumably, if increased evaluation capacity reveals that 'closer multilateral co-operation' would *not* promote their development objectives.



In the context of the technical assistance plan, they successfully fought off language that would have made too obvious a link between capacity-building activities and the launch of negotiations on the Singapore issues. For instance, unlike the former Annex I, the revised text endorsed on 6 March no longer specifies that technical assistance in these areas is designed to support the efforts of developing and least-developed countries *to ensure that they build professional and institutional capacity that will prepare them for negotiations on trade and investment; trade and competition policy; trade facilitation; and, transparency in government procurement* (editor's italics).

Instead, the new plan simply states that the activities set out in the document are 'designed to focus and deepen the relevant technical assistance commitments of the Doha Ministerial Declaration.'

Main Elements of the Technical Assistance Plan

The bulk of the document consists of lists of planned activities in issues areas ranging from agriculture and services to market access, dispute settlement and rules, as well as trade and environment. There are also headings that correspond to 'traditional' developing country priorities such as implementation, textiles and clothing, accessions and trade negotiations skills.

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Technical Assistance and the Singapore Issues

In the Doha Declaration, ministers agreed to negotiations on:

- investment (para. 20);
- competition policy (para 23);
- government procurement (para. 26); and
- trade facilitation (para. 27).

'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.'

Each of the paragraphs on launching negotiations recognises 'the need for enhanced technical assistance and capacity-building in this area.'

On investment and competition policy, paragraphs 21 and 22 further recognise that capacity-building should include 'policy analysis and development' to assist developing countries in evaluating 'the implications of closer multilateral co-operation for their development policies and objectives.'

Technical Assistance, continued from page 7

Services tops the list with 62 activities planned for 2002. Implementation comes next (48 activities), followed by 43 'technical missions' foreseen within the Integrated Framework of Trade-related Technical Assistance to Least-developed Countries. The IF, which the Doha Declaration recognised as a 'viable model' for LDCs' trade development, is a capacity-building programme run by the WTO in partnership with the IMF, the International Trade Centre, UNCTAD, the UN Development Programme and the World Bank.

In general, the 2002 technical assistance plan relies more on inter-agency collaboration than its predecessors. The World Intellectual Property Organisation, the World Health Organisation and the International Development Law Institute will be involved in TRIPs-related activities. The FAO and regional organisations will co-operate on agriculture. UNCTAD is listed as a partner in all 28 activities planned under investment, and as the main organiser of regional-level workshops in competition policy, on which two 'intensive training courses' will be given by the World Bank.

Regional development banks and UN agencies are also expected to play a greater role. For instance – depending on the region – workshops on trade negotiations skills will be organised with the Secretariat of the Pacific Forum Countries, the Inter-American Development Bank, the UN Institute for Training and Research, and the African Economic Research Consortium – the only non-governmental partner identified so far. The UN Environment Programme and some multilateral environmental agreements will participate in conferences/briefings in the trade and environment field, in which the WTO will also organise seven regional seminars around the world.

One-off Seminars Unlikely to Have Lasting Impacts

In practically all issue areas, seminars and workshops – either at national or regional level – are by far the most common means of delivery, but the plan gives no details on the precise content or duration of most such events. Under implementation, for instance, nineteen activities are called simply 'WTO Agreements', three are on the 'multilateral trading system' and four on 'implementation and the Doha aftermath'. Based on past experience, recipients of technical assistance have criticised such seminars as too general and ineffective (see box opposite).

A more lasting impact may be achieved through the Advanced Training Programme for Government Officials, whose main purpose is to 'strengthen these countries' effective participation in the Doha negotiations and work programme through policy analysis, a deeper understanding of the issues involved and the range of options available.' The programme consists of five intensive regional two-week courses organised for 25-30 government officials each year in collaboration with 'academic centers of excellence, research institutions and policy-oriented think tanks.'

ENDNOTES

¹ The EU, the US, Canada and Japan, as well as Australia, the Czech Republic, Estonia, Hong Kong, Iceland, New Zealand, Nigeria, Norway, South Korea, Switzerland and Taiwan promised contributions to the Fund.

² Opposition to bringing the Singapore issues within the multilateral trading system comes in particular from the Like-minded Group, i.e. Cuba, the Dominican Republic, Egypt, Honduras, Mauritius, India, Malaysia, Pakistan, Tanzania and Zimbabwe.

Reactions and Critique

Many trade delegates, as well as non-governmental organisations, question the WTO Secretariat's ability to build capacity in some key areas of the 'Doha Development Agenda'. As the Secretariat's *forte* lies in the staff's intimate understanding of the functioning of the multilateral trading system, it is the obvious body to turn to for an explanation regarding rights and obligations inherent in WTO Agreements and procedural issues. This, however, may not be the most pressing need for technical assistance in the post-Doha setting, where negotiations have already started in a number of new areas and more are in the pipeline.

Critics have reservations about both the substance and the form of assistance proposed in the technical assistance plan. They point out that one-off seminars and workshops do not respond to their need to develop indigenous capacity to identify national priorities and to negotiate effectively.

Rather than knowledge transfer, developing countries need capacity for building trade policies that are integrated in their overall development strategies. This cannot be achieved through 'one-size-fits-all' general training modules for government officials. The involvement of local research institutions and other relevant non-governmental organisations, as well as the private sector, would build broad-based capacity, enrich the debate and help develop strategies that respond to the specific needs of each country.

In fairness, it would be difficult for the Secretariat to do more than provide technical information, particularly as any strategic advice to one Member may be contrary to the interests of another. In addition, although knowledgeable about WTO rules, the Secretariat staff are neither capacity-building professionals nor experts in the specific conditions prevailing in each and every Member country. This limits the scope of assistance that the WTO itself can offer effectively. Ideally, the Secretariat would act as resource persons within a larger and more independently-run technical assistance framework, which would involve many institutions, both at the receiving and the assistance-providing ends.

It is encouraging that other institutions have been associated with assistance efforts in many areas. UNCTAD, for instance, is the lead agency in activities planned on investment and competition policy. It is, however, questionable how much the two- to three-day seminars (by far the most common activities) will contribute to making developing countries better able to 'evaluate the implications of closer multilateral co-operation for their development policies and objectives, and human and institutional development.'

In a statement to the pledging conference on 11 March, a number of non-governmental organisations urged the donors to work more closely with other WTO Members and civil society stakeholders to 'define a programme for trade capacity-building that will strengthen the overall capacity of these countries to identify and pursue their own objectives in the context of a broader development plan.' They noted that important questions remained about how capacity-building would be delivered and by whom, and called for an independent assessment of the WTO plan's effectiveness.

Committee on Trade and Environment: Members Disagree on the Scope of Negotiations

The Committee on Trade and Environment (CTE) met on 21-22 March with an agenda unlike any in its inconclusive five-year existence. For the first time, the CTE has a negotiating mandate – mostly aimed at clarifications of WTO rules with regard to multilateral environmental agreements – as well as a more general watchdog role to ensure that the outcome of the ‘single undertaking’ negotiations appropriately reflects sustainable development objectives. The Committee is also to report to the fifth Ministerial Conference on the need for negotiations/clarifications on market access issues, relevant TRIPs provisions and eco-labelling.

First Special Session Reveals Familiar Faultlines

The first of the ‘special sessions’, where negotiations are to take place, focused largely on procedural issues. Two more meetings for 2002 were agreed (11-12 June and 8-9 October, back-to-back with the Committee’s regular sessions), with the possibility of holding a fourth special session, as well as informal meetings if necessary.

Members disagreed on how to structure the negotiations. Those generally opposed to negotiations on environmental issues in the WTO proposed a three-step strategy, starting with an analytical phase¹ followed by the submission of proposals and ending with actual negotiations. The EU – the main *demandeur* of negotiations on these topics – argued for a flexible approach without any formal ‘phases’. The question was not resolved and Members will return to it in the June special session.

Split Looms on Handling of Non-Parties to MEAs

According to the Doha Ministerial Declaration’s paragraph 31, the special sessions negotiations are to address three issues:

- (i) the relationship between existing WTO rules and specific trade obligations set out in multilateral environmental agreements (MEAs). The negotiations shall be limited in scope to the applicability of such existing WTO rules as *among parties to the MEA in question. The negotiations shall not prejudice the WTO rights of any Member that is not a party to the MEA in question* (editor’s italics);
- (ii) procedures for regular information exchange between MEA Secretariats and the relevant WTO committees, and the criteria for the granting of observer status;
- (iii) the reduction or, as appropriate, elimination of tariff and non-tariff barriers to environmental goods and services.

Regarding para. 31(i), the European Union submitted a discussion paper (TN/TE/W/1) aimed at providing a starting point for the negotiations through forging a common understanding of such concepts as ‘MEA’, ‘specific trade obligations’ and ‘among parties’. The EU concluded that ‘dialogue could usefully be orientated towards seeking consensus on the following points:

- WTO Members should agree on principles that should govern the relationship between WTO rules and MEAs;
- the extent to which ‘specific trade obligations’ should be considered to be automatically in conformity with WTO;
- the fact that we are currently only considering the applicability of WTO rules as among Parties to MEAs does not mean that MEAs should not be an important element of interpretation of WTO law in disputes involving non-Parties.’

A preliminary discussion on this proposal showed a deep division between the EU and most other Members. Australia, Malaysia and the US said the entire EU approach went far beyond the scope of the carefully-worded Doha mandate, particularly with regard to exemptions for trade measures taken pursuant to MEAs and the issue of non-parties. Australia made a strong statement expressing disappointment over the what it called the EU’s attempt to ‘gloss over the critical proviso’ that the negotiations be limited to the applicability of WTO rules among the parties to the MEA in question. In practice, a non-party to a given MEA would be most likely to mount a WTO challenge against trade measures taken under the environmental treaty.²

Regular Session Again Debates Fisheries Subsidies

According to paragraph 32 of the Doha Ministerial Declaration, the Committee is to give ‘particular attention’ to three further issues and to report to the fifth WTO Ministerial Conference – likely to take place in mid-2003 – on the ‘desirability of negotiations’ or ‘need for clarification’ on any of them:

- (i) the effect of environmental measures on market access and situations in which the elimination or reduction of trade restrictions/distortions would benefit trade, the environment and development;
- (ii) the relevant provisions of the TRIPs Agreement; and
- (iii) labelling requirements for environmental purposes.

The March regular session focused on the market access cluster (para. 32(i)). India made a substantive statement on how the removal of trade barriers would help achieve sustainable development. The Like-minded Group and Mexico warmly welcomed the paper. Discussion will continue in June.

Fisheries subsidies gave rise to a spirited exchange of views, but revealed no shifts in Members’ positions.³ Reduction of such support is the favourite ‘win-win-win’ proposal of a group of countries ranging from Iceland to the Philippines, which maintain that fewer subsidies would mean smaller fleets and thus slow the alarming depletion of fish stocks. Trade, development and the environment would all benefit. That is not the view of Japan and Korea, which took issue with a paper submitted by New Zealand under para. 32(i) on the environmental benefits of removing fisheries subsidies.

The paper (WT/CTE/W/204) highlights some of the key findings of a recent study,⁴ which argues, *inter alia*, that even seemingly beneficial subsidies used for decommissioning vessels can have highly negative impacts on fish stocks. Japan and Korea – both major providers of fisheries subsidies – have long argued that inadequate management regimes and uncontrolled or illegal fishing are the main causes of stock depletion and that subsidies specifically designed to reduce capacity will actually be beneficial. The two countries were also instrumental in ensuring that fisheries subsidies get no priority treatment in the Negotiating Group on Rules, which has the mandate to clarify and improve anti-dumping and subsidy disciplines (see page 10).

In addition to the areas outlined in para. 32, the CTE is mandated to report to the fifth Ministerial Conference on technical assistance in the field of trade and environment (para. 33) and to identify issues in the overall negotiations that reflect major sustainable development goals (para. 51).

Continued on page 10

Committee on Trade and Environment, continued from page 9

With regard to para. 33, Members commented positively on a UNEP trade and environment capacity-building workshop held just before the CTE meeting (see page 15). Many Members again emphasised the need to strengthen national-level co-ordination, as well as coherence between intergovernmental organisations. The Secretariat's own capacity-building efforts this year will include seven trade and environment seminars around the world, as well as 'trade 101' briefings to environmental negotiators.

Para. 51: Ensuring a Sustainable Outcome

Paragraph 51 of the Doha Ministerial Declaration mandates the CTE and the Committee on Trade and Development (CTD) to 'act as a forum to identify and debate [...] the developmental and environmental aspects of the negotiations, in order to help achieve the objective of having sustainable development appropriately reflected'. Seeking to jumpstart the debate, the EU offered some suggestions for addressing this mandate in a structured manner. It suggested to divide the subjects under negotiation in other bodies into two groups and to address them in special sessions next fall and spring. It proposed that the Secretariat provide check-lists of papers emerging from other committees, and introduced the idea of holding a joint meeting of the CTE and the CTD next year in order to contribute 'in a coherent manner to the pursuit of the single objective of sustainability.' Finally, the EU asked Members to consider whether 'some sort of public event' – perhaps convened by the Director-General – would be helpful in identifying issues for debate. Brazil stressed the importance of two-way information between the CTE and the other negotiating bodies.

The CTE's next meeting in June (11-14) includes an information session with relevant MEA Secretariats. Members will continue the negotiating process under para. 31 in a special session. The regular session will address TRIPs-related issues under para. 32(ii). These include patenting of lifeforms (TRIPs Article 27.3(b)), the relationship between the TRIPs Agreement and the Convention on Biological Diversity, as well as the protection of traditional knowledge.

The October regular session will look into eco-labelling, as proposed in para. 32(iii). At the March meeting, Canada re-submitted a paper on the subject (already tabled in the Committee on Technical Barriers to Trade; WT/TBT/W/174), proposing an informal workshop where Members could exchange experiences and concerns about labelling-related issues. Further discussion on the paper was deferred until the October session.

ENDNOTES

¹ Much analysis/study already exists. A *List of Working Documents on MEAs Circulated in the CTE* (TN/TE/INF/1) compiled by the Secretariat shows that, over the five years of the CTE's existence, nearly a hundred papers have been submitted, either by Members, the WTO Secretariat or MEA Secretariats.

² The Secretariat has issued a review (WT/CTE/W/203) on how dispute settlement panels have applied the environment- and health-related exceptions embodied in GATT Article XX(b), (d) and (g). Members are expected to discuss this document in June.

³ Actual negotiations on subsidies, including fisheries subsidies, take place in the Rules Negotiating Group, but parallel discussion is likely to continue in the CTE in the context of paragraph 32(i).

⁴ Gordon R. Munro and Ussif Rashid Sumaila. 2002. *Subsidies and their potential impact on the management of the ecosystems of the North Atlantic*

No Separate Negotiations on Fish Subsidies

Many WTO Members have identified the reduction of fisheries subsidies as the most important contribution that the multilateral trading system could make to sustainable development. This view is not shared by all Members, however. In Doha, Japan and Korea only reluctantly agreed to negotiations on fisheries subsidies and then only as a part of a wider mandate to clarify and improve subsidy and countervailing disciplines (Doha Declaration para. 28).

At a late February meeting of the Negotiating Group on Rules, the Friends of Fish – a coalition that includes Iceland and the United States, as well as Australia, Chile, New Zealand, Peru and the Philippines – made a concerted effort to push to put fisheries subsidies on the negotiating agenda as an item in its own right. Iceland argued that fisheries subsidies were mentioned specifically in the Doha Declaration and should thus be treated separately from the general subsidy reform debate. Welcoming Iceland's initiative, the World Wide Fund for Nature (WWF) expressed hope that the inclusion of fisheries subsidies as a distinct agenda item would broaden the scope and modalities of the discussion. The conservation group also argued that discussions on fisheries subsidies should include experts in order to address environmental and sustainable development-related aspects.

These hopes were dashed, however, at the Negotiating Group's first formal meeting on 11 March. Due to strong resistance from Japan and Korea, Members agreed to deal with fisheries subsidies under the general heading of 'subsidies' rather than as a stand-alone item. Iceland was disappointed with the decision, but said it was willing to accept this arrangement in a 'spirit of compromise' on the understanding that fisheries subsidies would nevertheless be treated as a distinct issue with its own particularities. Korea repeated its call for discussing fisheries subsidies in the context of general subsidies, while Argentina, Australia, Brazil, Peru, New Zealand, Malaysia and the US supported Iceland's proposal.

Neotiating Structure Agreed, Proposals Due in April

In addition to subsidies, the Negotiating Group on Rules will address anti-dumping disciplines and WTO provisions on regional trade agreements. All three items will be addressed on the same footing in meetings held, where possible, back-to-back with those of the relevant WTO bodies.

Chair Timothy Grose of New Zealand made clear that the negotiation process would be driven by proposals tabled by Members, whom he urged to provide clear, as well as detailed information and argumentation, and to avoid 'Geneva-speak' so as to enable a wider range of officials to participate in the negotiations. In March, the Group agreed that proposals on subsidies, anti-dumping and other WTO rules should be tabled by 12 April this year.

Brazil, India and Pakistan emphasised the importance of an 'early harvest' on implementation issues, which include dozens of proposals for amending both the subsidy and anti-dumping regimes. Colombia, supported by Norway, the US, New Zealand, Switzerland and Canada, suggested that Members should update their previous implementation proposals with additional information and explanations, and then present them back to the Group.

The next meeting of the Group will take place on 6-8 May (back-to-back with the Subsidies Committee). Subsequent sessions are scheduled for 8-10 July, 16-18 October (back-to-back with the Anti-Dumping Committee) and 25-27 November.

TRIPs Council Tackles Access to Medicines

No meeting of the minds emerged from the lively debates that occurred on a number of topics of interest to the sustainable development community at the 5-8 March TRIPs Council meeting.

- **Public Health:** The Doha Declaration on TRIPs and Public Health recognises that countries lacking sufficient manufacturing capacity 'could face difficulties in making effective use of compulsory licensing under the TRIPs Agreement', whose Article 31(f) requires production under compulsory license to be authorised '*predominantly for the supply of the domestic market*'. The TRIPs Council must 'find an expeditious solution to this problem' and report to the General Council by the end of 2002.

The US proposed that, instead of modifying existing TRIPs provisions, Members agree on a moratorium on dispute settlement when a Member grants a compulsory license 'under circumstances clearly delineated by this Council.' This solution would only apply to poor countries that lack manufacturing capacity rather than countries that 'choose not to manufacture certain drugs' for policy or economic reasons. Second, it would only address diseases specifically mentioned in the Doha Declaration, i.e. HIV/AIDS, malaria, tuberculosis and other epidemics. Third, Members would have an obligation to ensure that the drugs are not diverted into other countries.

Developing countries rejected the US approach, partly because a moratorium would not offer a permanent solution and partly due its restrictions. They were more positive about the EU's concept paper, which offered two options. Either Article 31(f) could be amended by adding an exception stating that it does not apply to 'compulsory licenses granted for a purpose of supplying a poor country with a product needed to address serious public health problems.' Like the United States, the EU stressed that safeguards against re-export would be necessary.

Alternatively, Members could adopt a declaration stating that 'a WTO Member may, in accordance with TRIPs Article 30, provide that the manufacture on its territory of a patented product, without the authorisation of the right holder, is lawful when it is meant to supply another country which has granted a compulsory license for the import and sale of the product concerned in its territory in order to deal with a serious public health problem.' The US objected to this approach, saying that such exceptions to patent rights would 'seriously prejudice the rights and obligations of Members under the TRIPs Agreement.'

- **Geographical indications:** The EU and other advocates of extending strong protection for geographical indications (GIs) for other products than wines and spirits – which already have it – called on the TRIPs Council to agree on 'negotiating modalities' and to submit them to the Trade Negotiations Committee by the end of the year. Leading the opposition, Australia argued vehemently against stronger GI protection (for a survey of arguments in the GI debate, see article on page 3, and Bridges Year 6 No.1, page 15). Together with other opponents, it said no negotiating mandate existed and accused the EU of pressuring developing countries to seek negotiations that would be detrimental to their long-term interests.
- **TRIPs/CBD:** No significant progress was made on the reviews of TRIPs Articles 27.3(b) and 71.1, the protection of traditional knowledge or technology transfer. Developments on these issues will be reported after the Council's next session on 25-28 June.

Special and Differential Treatment Review off to Timid Start

WTO Members spent a considerable part of the first post-Doha session on special and differential treatment for developing countries arguing about whether the 'special sessions' of Committee on Trade and Development (CTD) on the subject constituted a negotiating forum or only an occasion to review relevant provisions in WTO Agreements. This disappointed many developing countries, as the Committee must report to the General Council in just four months (by July 2002) with 'clear recommendations' for a decision.

Members disagree on the scope of the Doha mandates on public health, geographical indications and S&D review.

In paragraph 44 of the Doha Ministerial Declaration, ministers agreed that 'all special and differential treatment provisions shall be reviewed with a view to strengthening them and making them more precise, effective and operational'. The Decision on Implementation-related Issues and Concerns further instructed the CTD to:

- identify provisions that are already mandatory in nature and those that are non-binding in character; to consider the legal and practical implications of converting S&D measures into mandatory provisions; and to identify those that Members consider should be made mandatory;
- examine additional ways in which special and differential treatment provisions can be made more effective; and
- consider how special and differential treatment may be incorporated into the architecture of WTO rules.

Instead of addressing these substantive questions, it quickly became evident that the stakes were elsewhere. Many developing countries regard special and differential treatment as an integral part of the single undertaking negotiations launched in Doha. At the March special session they fought hard to make that interpretation prevail, as the acknowledgement of S&D as a negotiating subject on par with others would strengthen their ability to negotiate trade-offs against industrialised country priorities. Not surprisingly, most of the latter regard the special and differential treatment review as part of the non-negotiating work programme agreed by ministers. Ambassador Ransford Smith of Jamaica, who chairs the special sessions, will conduct informal consultations in an attempt to move the process forward.

Substantive debate at the first special session was also hampered by the lack of concrete proposals for amending the provisions. Thus, as a starting-point for the discussions, Members are using information provided by the Secretariat in a series of documents entitled Implementation of Special And Differential Treatment Provisions in WTO Agreements and Decisions (WT/COMTD/W/77/Rev.1, not yet available online). The documents offer lists of measures, identified as either mandatory or voluntary, as well as an evaluation of the provisions' effectiveness. The Secretariat also proposed two ways in which the provisions could be made more effective: either through changes in the Agreements themselves, or through an interpretative statement clarifying how the provisions should be applied.

Ambassador Smith proposed five more meetings, the first of which could be used to submit proposals on S&D provisions deemed to be mandatory. At the next two, Members could address the question of effectiveness, and the final two could focus on how the CTD special session could report to the General Council.

The remaining CTD special sessions are tentatively scheduled for 9 April, 16 May, 14 June, 2 July and 17 July.

WTO News in Brief

- **Services:** WTO Members agreed in March to delay – yet again – a decision on whether or not to establish an emergency safeguard mechanism for trade in services (ESM), which Southeast Asian countries in particular have been advocating for several years (Bridges Year 5 No.7, page 4). The latest deadline of 15 March 2002 has now been pushed to March 2004.

No consensus was found on how to credit autonomous services liberalisation in the current negotiations. One of the divisive issues is whether all WTO Members or only developing countries would be entitled to such credits. The special session Chair, Ambassador Alejandro Jara of Chile, will draft a preliminary paper on how to take account of autonomous liberalisation in the negotiations before the next special session in late May.

Disagreement continued on how to handle the assessment of trade in services that the Council for Trade in Services is mandated to carry out as part of the negotiations. While Peru, Pakistan and Cuba underscored the importance of such as an assessment to developing countries, the discussion was inconclusive.

- **Agriculture:** On 26 March, agricultural negotiators adopted a one-year work programme that is to lead to agreement on the ‘modalities’ according which Members are to make commitments on reducing domestic and export support, and increasing market access. The ‘modalities’ phase will involve defining formulas for subsidy/support reductions and other technical questions. An overview document based on Members proposals is due by the end of the year, with a view to agreeing ‘modalities for further commitments’ by 31 March 2003. Only a few months after this, by the fifth WTO Ministerial Conference, Members are to submit their comprehensive draft Schedules (i.e. liberalisation offers), which will be the basis for the last phase of negotiations until 1 January 2005.
- **SPS/TBT:** Meeting on 19-21 March, the Committee on Sanitary and Phytosanitary Measures (SPS) adopted revised notification guidelines for implementing the transparency obligations set out in Article 7 of the SPS Agreement (G/SPS/7/Rev.2). A number of developing countries supported a last-minute proposal by Egypt to include a box in the notification form for countries to state what special and differential treatment measures were included to facilitate compliance with the notified SPS measure. The issue will be taken up again during an informal meeting on transparency prior to the Committee’s next meeting.

In the March meetings of the SPS Committee and the Committee on Technical Barriers to Trade, several countries raised concerns regarding China’s and the EU’s biotechnology regulations. The US – supported by Canada and Argentina – said that they were considering their options in the WTO with regard to the EU’s continued *de facto* moratorium on the approval of new genetically modified organisms (GMOs). The three pointed out that the European Commission had the authority and responsibility to convince EU member states to restart the approval process.

They also questioned the WTO-compatibility of China’s new regulations on the import of GMOs, scheduled to enter into force on 21 March, but temporarily waived allowing for a transition period of nine months. China argued that it was responding to growing consumer concerns over food safety. It remained unclear whether the measure had by now been notified to the WTO, as China’s accession agreement requires it to do.

EU Opens Dispute Settlement Understanding Review

The European Union submitted the first concrete proposal on amending the Dispute Settlement Understanding (DSU) to an informal special session of the Dispute Settlement Body held on 14 March. The paper will be discussed at the first formal special session of the DSB, scheduled for 16 April 2002.

Paragraph 30 of the Doha Ministerial Declaration mandates negotiations on ‘improvements and clarifications’ of the DSU, which spells out the WTO’s dispute settlement procedures. The negotiations are to conclude ‘not later than May 2003’.

The EU contribution (TN/DS/W/1) reflects proposals it put forward in the inconclusive DSU review that petered out after the Seattle Ministerial Conference. Among its main elements are: sequencing of procedural steps required under DSU Articles 21.5 and 22 on trade retaliation; appointing full-time, permanent dispute settlement panelists; outruling ‘carousel’-type trade sanctions, i.e. periodical changes in products targeted by sanctions in order to effect maximum pressure in form of damage to the non-compliant Member’s economy; and increasing the role of compensation as a means of resolving disputes where the non-compliant party is unwilling to change the laws/measures condemned by the DSB.

While the sequencing issue is likely to garner considerable support, the carousel and compensation proposals are controversial. Based on past experience, two other sets of proposals, related to the transparency of the dispute settlement process, have no chance of attracting consensus, which is the only way the DSU can be changed. These proposals pertain to the possibility of opening at least some panel and Appellate Body hearings to the public, and to better defining a ‘framework and conditions for allowing *amicus curiae* briefs in potentially all cases’.

Due to the tight timeframe, special session Chair Ambassador Pèter Balás of Hungary proposed that Members submit their proposals by next August, so as to achieve a consolidated draft text for amendments by the end of this year. In order to make the May 2003 deadline, which most Members believe is too soon to reach agreement on systemic issues, a consensus text should be ready for final legal and linguistic review by March 2003.

Very Briefly: Members Multiply Actions on Steel

A large number of both industrialised and developing WTO Members – including heavyweights such as China, the EU, Korea, Japan and Brazil – and have initiated (or joined as third parties) dispute settlement proceedings against the safeguard steel tariffs imposed by the US on 20 March. The EU will probably request the establishment of a panel in early May. It has also requested separate consultations with regard to claiming compensation from the US on the amount of trade affected by the tariffs – estimated at US\$2.5 billion by the European Commission.

The US, on the other hand, will determine after WTO consultations whether to pursue a dispute of its own against the safeguard quotas that the EU imposed as of 1 April to avoid a surge of cheap imports diverted from the US market. The quotas will be in force until October, while the EU conducts an investigation on the need to adopt more permanent safeguard measures. The US argues that the quotas are WTO-incompatible, as the EU has not demonstrated ‘clear evidence’ of import surges resulting from the US tariffs.

Indicators of the Relative Importance of Patents to Developing Countries

By Sanjaya Lall

A fair amount of uncertainty remains on the economic impact of the TRIPs Agreement in developing countries, and the new round of WTO negotiations adds considerable interest to this controversy. It is widely accepted that the effects of TRIPs on industry and technology will vary according to countries' levels of economic development. The need for, and benefits of, stronger patent protection seem to rise with incomes and technological sophistication.

In theory, society reaps *four kinds of benefits* from granting temporary monopoly rights to innovators through patents. These are: (i) the stimulation of private innovation; (ii) the use of the new knowledge in productive activity; (iii) the dissemination of new knowledge; and (iv) the stimulation of innovation by other enterprises. But the importance of patents fluctuates considerably according to two variables: the technological nature of the activity, and the nature of the economy.

Taking the first of these variables, the role of patents in stimulating research and development (R&D) depends on the activity. In industries where it is relatively easy to copy new products – fine chemicals and pharmaceuticals are the best examples – patents are vital for sustaining the large and risky R&D expenditures needed for product innovation. In industries where copying is very difficult and expensive (these industries account for the bulk of manufacturing in most countries), patents *per se* are not important for appropriating the benefits from innovation.

Turning to the second, the significance of patents varies by the level of development. The main beneficiaries of TRIPs are the advanced countries. There are few benefits in terms of stimulating local innovation in developing countries. Technological activity in the latter consists mainly of learning to use imported technologies efficiently rather than to innovate on the technological frontier. Weak patents can help local firms in early stages to build technological capabilities by permitting imitation and reverse engineering. This is certainly borne out by the experience of the Asian 'tigers', such as like Korea and Taiwan, that developed strong indigenous firms in an array of sophisticated industries.

The available historical and cross-section evidence supports the presumption that the need for patents varies with the level of development. Many rich countries used weak patent protection in their early stages of industrialisation, increasing protection as they approached the leaders. Econometric cross-section evidence suggests an inverted-U shaped relationship between the strength of patents and income levels. The intensity of patenting first falls with rising incomes, as countries slacken patents to build local capabilities by copying, then rises as they engage in more innovative effort. The turning point is \$7,750 per capita in 1985 prices, a fairly high income level for the developing world.

In short, assessing the impact of TRIPs in the developing world requires one to distinguish between levels of development. There is no clear case that most developing countries below the newly-industrialising economy stage will gain in net terms from TRIPs; the least-developed ones are most likely to lose. The gains that might accrue through increased technological inflows are likely

to be realised over the long term, while the costs will accrue immediately. In present value terms, therefore, one can expect a significant net loss. Indisputably, a differentiated approach to intellectual property rights is called for.

Classification of Countries by IPR Relevance

For the ICTSD-UNCTAD capacity-building project on intellectual property rights,¹ we sought to identify indicators of the relative importance of patents for developing countries. This work involved categorising countries according to different schema, based on *technological activity, industrial performance and technology imports*.

The classification based on national technological activity was derived from two variables: *research and development financed by productive enterprises* and the *number of patents taken out in the United States*, both deflated by population to adjust for economic size. The two variables were standardised and averaged to yield an index of 'technological intensity'. We derived four groups from the index values.

- The world *technological leaders*, with intense technological activity and considerable innovative capabilities as shown by international patenting.
- Countries with *moderate technological activity*. These countries conduct some R&D, have medium levels of industrial development and are likely on balance to benefit from stronger patents. However, some countries in this group may bear significant adjustment costs in changing patent regimes.
- Countries with *low technological activity*. These countries are likely to have both significant costs and potential long-term benefits from stricter patents, depending on the level of domestic technological capabilities and their reliance on formal technology inflows. Those that are building their innovation systems on the basis of local firms copying foreign technology and importing technologies at arm's length would gain less than those with a strong transnational corporation (TNC) presence.
- The fourth level comprises countries with *no significant technological activity*. These – the least-industrialised countries with the simplest technological structures – are likely to gain least, and lose most, from strict patent rules. They will tend to pay the costs (higher prices for protected products and technologies) but gain little by way of technology development or transfer.

Average technology effort/country by technology groups, 1997-98

Technology groups	R&D per capita (US\$)	Total R&D (US\$ b)	Patents/1000 people	Total Patents
High	293.25	14.93	0.99	6,803
Moderate	14.01	0.41	0.02	50
Low	0.24	0.08	0.00	11
Negligible	0.00	0.00	0.00	0

Source: Calculated from UNESCO, Statistical Yearbook; OECD, Science, Technology and Industry Scoreboard 1999; Iberoamerican Network of Science and Technology Indicators; various national statistical sources.

Note: R&D is only that financed by productive enterprises. Patents are those taken out in the US. Total R&D and patents are average for each country.

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Indications of Importance of Patents, continued from page 13

We considered technological effort at the national level based on the data we generated for productive enterprise R&D and international patents. The 87 countries were surveyed could be subdivided as follows: 22 industrialised economies, seven economies in transition, and 58 developing economies. The data revealed the existence of four groups of countries as follows:

Group 1: This group has most industrialised countries, but there are interesting inclusions and exclusions. Perhaps the most important for the present discussion is the presence of the four mature Asian Tigers, Taiwan, Korea, Singapore and Hong Kong. These technological newcomers have followed different strategies to build up their capabilities. Weak IPRs played a vital role in the technological development of Korea and Taiwan, the two leading Tigers. They are the best recent examples of the use of copying and reverse engineering to build competitive and innovative technology-intensive industrial sectors. However, unlike many other developing countries with weak IPRs, they were able to use the opportunities offered because of investments in skill development, strong export orientation, ample inflows of foreign capital goods, and strong government incentives for R&D.

Group 2: This group of moderate technology performers includes the European economies in transition such as Russia, Poland and Hungary. From the developing world it has the main Latin American economies: Brazil, Argentina, Chile and Mexico.

Group 3: The group of low technology performers is very diverse. It has large countries with heavy industrial sectors like China, India and Egypt, along with dynamic export oriented economies like Thailand and Indonesia. But it also has countries with small industrial sectors and weak industrial exporters. In this group, the implications of stronger IPRs are likely vary.

Economies with significant technological effort and/or strong local enterprises (e.g. India, China or Thailand) are likely to benefit from slack IPRs in some aspects and gain from strong IPRs in others. Those with little 'real' innovative capabilities or competitive enterprises may not be able to utilise slack IPRs to build up local technology, and may gain from FDI inflows by strengthening IPRs. At the same time, TRIPs may lead to net costs for some countries with no corresponding benefits. At this stage it is difficult to discern the net outcome.

Group 4: This group has no meaningful technological activity by either measure (and the countries are not ranked individually). It contains all the least-developed countries in the sample, and developing countries like Pakistan, Albania and El Salvador.

Industrial Performance

As expected, there generally is a strong relationship between the technology and industrial performance indices. Technological effort is intimately related to levels of industrialisation, success in export activity, and the sophistication of the production and export structures.

There is clearly a positive correlation between patents, industrial performance and technological effort. This does not mean, however, that patents are *causally* related to growth and development: each

rises with development levels. Moreover, there is probably a strong *non-linearity* involved. Strong patents are probably beneficial *beyond a certain level* of industrial sophistication, while *below* this level their benefits for development are unclear.

In addition, the further down one goes in the scale the less evident the benefits become. In terms of the performance index, the 'very low' and 'low' performance groups are, on average, unlikely to benefit from TRIPs. In both 'medium' groups there is probably a mixture of beneficial and non-beneficial effects depending on the country, with a case for strengthening IPRs in the medium term. In the 'high' performance group the benefits are clearer.

There is one important factor here that may have a bearing on IPRs: the growth of '*international production systems*'. While transnational corporations (TNCs) have had export platforms in developing countries, the emerging trend has been for them to locate (tightly linked) processes in different countries to serve global or regional markets.

This trend is particularly marked in high-tech activities, led by electronics. The emergence of international production systems has enabled countries to move up the production, export and technological complexity ladder rapidly without first building a domestic technology base. Again, the East Asian economies bear this out. With the exception of Korea, Taiwan and Singapore, none has a strong domestic technology base in electronics. The electronics production system, however, only encompasses a limited number of

developing countries.

Does the promise of integrated systems mean that developing countries should adopt stronger IPRs in the hope of attracting export-oriented TNCs?

The short term answer is probably 'no'. Most TNC assembly activity has been attracted to developing countries without changing the national patent regime by isolating export-processing zones from the rest of the economy. China is a good example. For the longer term, however, the answer is likely to be 'yes' – at least for those countries seeking to attract high-tech production systems. Inducing TNCs to invest in such activities when competitors are offering stronger IPRs would force all aspirants to also have equally strong protection. Moreover, countries that already have high-tech assembly operations would need to strengthen IPRs to induce TNCs to deepen their operations into more advanced technologies and functions like R&D and design. At the highest end of TNC activity, where developing countries compete directly with advanced industrial countries, the IPR regime would have to match the strongest one in the developed world.

However, as integrated systems are highly concentrated geographically, these considerations may not apply to many developing countries. Countries far from centres of activity, and with low technological capabilities, may continue to be marginalised from most TNC activities. The strengthening of IPRs may actually reinforce the tendency to concentrate high-value functions in a few efficient, well-located sites, implying that these other countries would, as a result of TRIPs, have fewer tools to build local capabilities in the future.

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Very Briefly: Regional News

Integration



The Third African Development Forum (ADF III) concluded on 8 March with a consensus statement outlining steps toward the establishment of a pan-African free trade area. African governments agreed last July to replace the Organisation of African Unity (OAU) with a more deeply integrated African Union (AU), modeled loosely on the European Union. Among the highlights of the statement were that civil society participation in the African Union should be a priority at annual meetings; that Africa must take rapid, sequenced, realistic and irreversible steps toward accelerated integration; that the AU should commission the UN Economic Commission for Africa to draft a report on how to rationalise the proliferation of regional economic communities; that regional negotiation capacity needs to be strengthened to enable Africa to effectively participate in the global trading system; and that countries will have to cede some sovereignty in economic policy for collective interest.

Critics, however, questioned the potential usefulness of the AU, pointing to the difficulties that the OAU and other regional organisations have had in trying to resolve the continent's many conflicts.

According to a USTR report published in January, less than ten countries have significantly increased their exports to the United States under the African Growth and Opportunity Acts (AGOA). Nigeria's first semester 2001 exports accounted for more than two-thirds of the US\$3 billion total, followed by Gabon and South Africa, Ghana, Cameroon and Kenya. Energy products far outclassed all other goods, including textiles and minerals.

Investment



In the context of its free trade negotiations with Chile, the US is taking a fresh look at investment provisions that could have wider repercussions in the region-wide negotiations on the Free Trade Area of the Americas. Under consideration are some limits to investor-state litigation, particularly to weed out frivolous lawsuits; increasing governments' role in dispute settlement procedures; and providing guidance to arbitrators on what type of measures could be considered 'expropriation or tantamount to expropriation'. Investors have successfully sued foreign governments' environmental regulations as 'tantamount to expropriation' under the North American Free Trade Area treaty (see related article on page 17).

Biotech



A parliamentary vote on Brazil's new biotechnology regulations has been postponed after a brawl broke out during a March meeting of the Congressional Committee on Genetically Modified Organisms. A judicial moratorium currently in place makes it illegal to plant GM crops. Brazilian authorities acknowledge, however, that GM soy beans are planted on a grand scale, particularly in the country's Southern states, where they are thought to account for more than half of the total. The disputed regulations would provide a legal framework for approvals and cultivation. Greenpeace has vowed to take the case to the Supreme Court if the GMO ban is overturned by the new legislation.

In related news, the possibility of a WTO dispute on GMO approval processes appears to have receded between the US and the EU or China. Bowing to US pressure, China waived implementation of its GMO import regulations for nine months while it finalises GMO certification procedures. On the EU case, dispute threats continue to surge here and there, but no formal proceedings have been initiated so far, perhaps due to industry fears of backlash (see also page 12).

ODA Increases Promised for Development Financing

The United Nations Conference on Financing for Development closed on 22 March in Monterrey, Mexico, with pledges from the European Union and the United States to increase official development assistance (ODA), which has been steadily falling for more than a decade.



This was welcome news, as many had predicted that the summit-level event would amount to nothing more than a photo opportunity, particularly as the Monterrey Consensus – the final document agreed last January and adopted by 51 heads of state attending the summit – is weak on binding commitments (Bridges Year 6 No.1, page 1). At least some hope of increased development financing is now on offer through the autonomous EU and US initiatives.

EU members states committed themselves to increasing their average level of ODA from the current 0.33 percent to 0.39 percent of the Union's gross domestic product by 2006. While this is a far cry from the decades-old UN target of 0.7 percent, it would nevertheless represent an increase of US\$7 billion a year by 2006 (individually, four EU members have already reached the 0.7 percent target).

The EU also announced that it would immediately untie all aid to least-developed countries, and reminded the participants that it had already committed more than 60 percent of the total amount pledged for trade-related capacity-building through the WTO's Doha Development Agenda Global Trust Fund (see page 7).

Trade was also somewhat of a leitmotiv of President Bush's address to the conference. To the surprise of many, he accounted a 50 percent increase in US official development assistance over the next three years. In dollar-terms, this would mean US\$15 billion a year by the year 2006 instead of the current US\$10 billion. The ODA/GDP ratio, however, would only reach 0.15 percent.

To qualify for US aid, countries must fulfil several conditions. The new funds will go into a Millennium Challenge Account, 'devoted to projects in nations that govern justly, invest in their people and encourage economic freedom.' The money will only become available once 'clear and concrete objective criteria' – to be applied 'fairly and rigorously' – have been developed for the Millennium Account. In addition, it is not certain that Congress will approve the 50 percent increase in the development assistance budget.

WTO Director-General Mike Moore also weighed in in defence of the poverty-reducing effects of trade liberalisation. Citing World Bank and IMF estimates, he stressed the 'basic message' that the new trade round launched at Doha could bring huge benefits. 'It is this immense magnitude of the benefits of trade liberalisation, which makes the work your governments are doing in implementing the Doha Development Agenda so potentially important as a source of finance for development,' he said.

Critical of the conference outcome, non-governmental organisations and trade unions dissociated themselves from the Monterrey Consensus, which they said was not a 'sufficient basis for combating poverty or for advancing economic, social and cultural rights'. Civil society organisations denounced the continued low level of ODA, particularly in the United States, as well as the lack of progress on debt alleviation. Others questioned the US commitment to reducing trade barriers in light of the Bush administration's recent decision to raise steel tariffs (see page 12).

Codex Biotech Group Agrees on Traceability

After **three** years of deliberations, delegates at the Codex Task Force on Foods Derived from Biotechnology agreed in March to include the 'tracing of products' and food labelling as *risk management* tools. 'Traceability' – i.e. a system for tracing all foods and food components from their origin to the point of final consumption – was one of the key issues that held up adoption of the standards at the last meeting of the Task Force. It continues to cause disagreement between the US and EU in the context of proposed EU labelling and traceability requirements for genetically modified organisms (GMOs), which the US regards as 'not workable' and unnecessarily trade restrictive. Some observers believe that the agreement reached at the Codex meeting might mark a breakthrough in international negotiations on the use of traceability systems, and at least partially vindicates the EU's insistence on introducing a labelling and traceability system for GM foods.

While not explicitly mentioning precaution, the principles for *risk analysis* would require authorities to take into account uncertainties identified in safety assessments and allow them to implement appropriate risk management measures. Also of interest are references to 'substantial equivalence' (i.e. the safety assessment should include a comparison between the biotech food product and its conventional counterpart), which is described as a 'starting point' for safety assessment, rather than a safety assessment in itself. More importantly, the standards recognise that 'in the foreseeable future, foods derived from modern biotechnology will not be used as conventional counterparts.' This statement was included despite US efforts to define conventional counterparts as including GMOs based on the assumption that the process of genetic modification *per se* does not make the resulting food product different from conventional foods. The standards will now be submitted to the Codex Alimentarius Commission at its next meeting in July 2003 in Rome, Italy, where countries can make further comments. The Commission will then adopt the standards (with minor changes if required) or send them back to the Task Force for further debate.

The agreement reached in the biotech Task Force augurs well for the 15-19 April meeting of the Codex Committee on General Principles, which will, once again, try to reach consensus on working principles for risk analysis in general. Last year, the Committee requested the Codex Secretariat to undertake a comprehensive redraft of the Draft Working Principles after countries failed to agree on how to handle the concept of 'precaution' in risk analysis (Bridges Year 5 No.4, page 13).

The revised draft (CX/GP 02/3) avoids the politically-charged term of 'precaution', but its proposed paragraph 29 nevertheless states that: 'The conclusions of the risk assessment, including a risk estimate if available, should be conveyed to risk managers in a readily understandable form. They should indicate any constraints, uncertainties, assumptions and their impact on the assessment, and minority opinions. The responsibility for resolving the impact of uncertainty on the risk management decision lies with the risk manager, not the risk assessor.'

According to draft paragraph 32, the risk manager's decisions should be based on the risk assessment, 'taking into account, where appropriate, other legitimate factors for the health protection of consumers and for the promotion of fair practices in food trade.'

The revised draft, together with members' comments, is available on the Codex website at <http://www.codexalimentarius.org>.

UNEP Focuses on Fisheries and Capacity-building

On 15 March, a Workshop on Impacts of Trade-related Policies on Fisheries and Measures for Sustainable Fisheries Management organised by the UN Environment Programme (UNEP) brought together 80 government and non-governmental participants to address some of the most difficult and politically sensitive issues in the trade and sustainable development interface.

Participants discussed a working definition of the term 'subsidy' in the fisheries sector; establishing causal links between types of subsidies, conditions of management and the state of fish stocks; and special treatment for developing countries on subsidies reform. Among the benefits of a clearer definition of subsidies in the fisheries sector, some participants identified the improvement of the framework for notifications in the WTO. While most seemed to favour a narrower definition that built on the current definition in the WTO's Subsidies and Countervailing Measures Agreement (perhaps extended to sector-specific clarification), there was little support for expanding the definition of subsidies to include the costs of fisheries management services or of inadequate enforcement. Several participants also expressed concern for the treatment of artisanal fisheries and their particularly sensitive role in providing food, employment and broader development.

Although attendees generally favoured addressing subsidies that were harmful for fisheries and trade, they were divided on how to approach them, with some participants calling for advancing a broad-based understanding of the specific factors that impacted individual fisheries (referred to as a matrix approach). Others called for a targeted approach of studying a few key areas where subsidies were thought to be particularly distortive or beneficial.

As a critical factor in addressing both sustainability and trade with regard to distant water fishing, participants pointed out the impact of unregulated foreign fleets on fisheries where management agreements exist, as well as the ability of governments to assess the benefits and drawbacks of access agreements.

Three UNEP-commissioned country case studies were presented (for Bangladesh, Mauritania and Uganda), as well as a study performed by Japan on management and macroeconomic factors affecting fisheries. These were complemented by presentations from collaborating international organisations and NGOs. Participants called for UNEP to continue conducting case studies and providing an open forum for discussion. Many participants also supported continued coordination between intergovernmental organisations and NGOs working in the fisheries area.

The main message of the more than 200 attendees at a UNEP/ WTO workshop on Capacity-building on Environment, Trade and Development (19-20 March) was that to improve the effectiveness of capacity-building, service providers must acknowledge gaps in programme effectiveness and be prepared to address them. Participants suggested that UNEP convene regional workshops to promote the integration of workshop recommendations into ongoing and planned capacity-building programmes and activities; develop and implement collaborative activities to enhance synergies between MEAs and the WTO; and develop a database of ongoing environment, trade and development capacity-building activities. Another UNEP workshop, scheduled for 5 April in Geneva, was to address assessing agricultural trade liberalisation.

For further information on these and other UNEP activities on trade-related matters, visit <http://www.unep.ch/etu/etp/index.htm>.

International Investment Rules: Is the GATS Campaign Becoming a Red Herring?

By Luke Eric Peterson

The NGO campaign which has raised awareness about the WTO's General Agreement on Trade in Services (GATS) is in some danger of doing its work too well.

To be sure, this campaign should be applauded for bringing greater scrutiny to bear upon the GATS. A number of vague and untested features of the agreement have been identified; areas of concern have been highlighted in the ongoing negotiations to further open up the global services marketplace; and critics have forced the advocates of the GATS to defend the agreement, its rationale, its efficacy, and its potential evolution.

Precisely because so many eyes are now focused upon the GATS, however, the agreement is in some danger of becoming a red herring for the sustainable development community. In the coming year, at least some of the resources and energy devoted to the GATS might be better deployed elsewhere: notably upon the existing international regime.



Critics of the GATS have painted elaborate hypothetical scenarios whereby service providers might use that agreement to prevent states from reversing ill-considered liberalization commitments.

A favorite example is the disastrous water privatization experiment in Cochabamba, Bolivia, which saw the water service put back under public ownership, and the investor sent packing. Critics of the GATS warn that if Bolivia had scheduled commitments under the GATS – extending market access and national treatment to foreign service-providers – they would have been unable to reverse course without having to proffer crippling compensatory concession to the investors' home states; something which most developing nations cannot possibly afford.

It's a fair point. However, an exclusive focus upon the GATS causes us to overlook an important fact: The investor who was sent packing from Bolivia, is already pursuing redress – not through the multilateral trading system – but through the international investment regime.

A dispute between Aguas del Tunari and Bolivia was lodged on February 25 of this year at the World Bank's International Centre for the Settlement of Investment Disputes (ICSID) under the terms of a bilateral investment treaty between Holland and Bolivia.

Although the international investment regime – a patchwork of bilateral and regional investment treaties – receives little scrutiny, investors are flocking to it, taking their cue from the successful investor-state litigation pioneered under NAFTA's infamous Chapter 11. There are several reasons why this is the case.

While members wrangle over whether the WTO will launch full investment negotiations in 2003, a growing number of investors are becoming aware of the attractive status quo under the global investment regime: literally hundreds of long-ignored investment treaties offer investors access to an investor-state dispute settlement mechanism, allowing them to take their disputes directly to international arbitration – leapfrogging domestic legal systems (and, thus, any safeguards designed to protect important public goods).

What's more, there is ample evidence that service-providers are using these levers to launch disputes on their own, without needing to enlist the advocacy of their home-states (as would be required under WTO rules) or attract the attention of the media and the broader public.

In recent months, well-known multinational firms such as Enron and Vivendi have taken their cue from the high-profile litigation launched under the NAFTA where various environmental and health regulations have been challenged by foreign investors. Other major investors are using bilateral investment treaties to challenge treatment of foreign investments in various sensitive areas, including water and sewage provision, oil and gas exploration and mining concessions. Indeed, major law firms are now touting these hitherto obscure agreements as the tool of choice for challenging host state regulation of public services.

In short, many of the core sustainable development concerns that are at the heart of the debate over the GATS may well be expected to emerge under this form of investment treaty litigation.



Moreover, a glance at these international investment treaties shows that many of them mandate a much deeper liberalization – and across a broader spectrum of sectors – than occurs under the GATS.

Under the GATS, service-providers are accorded National Treatment only in those sectors where the host state has expressly chosen to schedule commitments. Conversely under most bilateral investment treaties, National Treatment is typically extended across-the-board to investments (subject only to explicit reservations or carve-outs by the signatories) once the investment is established in a given territory.

Likewise, the GATS provisions on market access do place certain specific limitations on government action – for instance, forbidding limits on the number of service suppliers or the total value of service transactions – but, again, these apply only for those sectors of the economy where the host state has expressly scheduled commitments.

Meanwhile, a number of bilateral investment treaties – including modern US and Canadian BITs – offer a much broader right of entry and establishment; all sectors of the economy can presumed to be covered, subject only to express reservations made in the annexes of the investment agreement.

A further salient difference between the Services regime and the Investment regime is the differing manner in which violations of the terms of the agreement are remedied. Countries failing to live up to their GATS commitments could face a dispute under the WTO's dispute settlement mechanism. A ruling against the host state might trigger damages which would be in the form of "substitute compensatory commitments". Critics rightly note that less developed, poorly diversified economies would be hard-pressed to grant further trade concessions – and thus would be unable to bear the cost of making future changes to earlier GATS commitments which are proving ill-considered or onerous.

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Technology Imports

The lack of correlation between technology effort and technology imports is not surprising. There is no *a priori* reason to expect that countries that do more R&D would also receive larger amounts of FDI relative to their economic size or spend more on foreign technology than other countries. In some cases, there is good reason to expect the opposite – a strong technology base may

There is no *a priori* reason to expect that countries that do more R&D would also receive larger amounts of foreign investment.

lead to more outward rather than inward FDI relative to GNP and to greater royalty receipts than payments. In other cases, strong FDI inflows and royalty payments may go with a weak local technology base.

This reinforces the conclusion that countries will face different outcomes from strengthening IPRs, not just at different levels of development but even at similar levels of income,

depending on their pattern of technology development and imports. It may, of course, be argued that *all* countries should in the future be more receptive to FDI and licensing and that stronger IPRs will promote both. In fact, countries with exceptionally low levels of technology inflows should make special efforts to raise them. More evidence is needed, however, before we can say with certainty that FDI and licensing respond positively to intellectual property rights.

When we consider technology imports in the form of capital goods, we find that the pattern is very similar to other forms of technology imports: group averages change in line with the technology index, but with large variations between individual countries. Much of the variation has to do with the size of the economy (apart, obviously, from the level of development), with larger countries less dependent on imported equipment than smaller ones.

Food for Thought

This review illustrates the significant differences both between rich and poor countries and within the developing world itself in the variables that may affect the technological impact of TRIPs: domestic technical effort, industrial performance, and foreign technology imports. It has sought to put empirical flesh and bones on the intuition that different countries may face different outcomes by strengthening their patent regimes, without trying to measure what the costs and benefits might be.

A word of caution: it is impossible to pick the countries that will lose or gain from TRIPs from indices generated from the indicators identified. Their use lies mainly in illustrating just how wide the differences are between developing countries in practically every aspect of technological and industrial performance.

Sanjaya Lall is Professor of Development Economics at Oxford University. This article is a summarised version of his ICTSD-UNCTAD paper on 'Indicators of the Relative Importance of IPRs in Developing Countries', prepared with the assistance of Manuel Albaladejo. The longer paper may be downloaded from <http://www.ictsd.org/unctad-ictsd/docs/Lall2001.pdf>

ENDNOTES

¹ For more information on the ICTSD-UNCTAD project on Building Capacity on Intellectual Property Rights, launched in August 2001, see <http://www.ictsd.org/unctad-ictsd/>

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However, it bears notice that violation of the terms of many existing investment treaties also typically triggers demands for compensation – this time in cold hard cash, usually running into the tens or even hundreds of millions of dollars, to be paid by the host state directly to the affected investor. This does not represent, needless to say, a particularly feasible avenue for poorer nations seeking to modify earlier commitments.

While the discussion here does not purport to be a comprehensive comparison of the GATS and investment treaties, it should be clear that many bilateral investment treaties can provide rights and commitments which are co-extensive – and sometimes far in excess – of those which can be had under the GATS (where states are typically far more parsimonious and guarded in their liberalization commitments).

Thanks to the long-standing obscurity of these bilateral investment treaties, coupled with the assiduous attention paid by most to the GATS, investors have had a free ride – using these treaties with remarkably little public scrutiny. For instance, there has been no real media coverage or public notice of the proliferation of disputes lodged by foreign investors against the debt-racked Argentina.

Of course, investors are also abetted in their desire for secrecy by the traditional features of international commercial arbitration. The rules of the World Bank's ICSID allow arbitrations to proceed *in camera*, with only a minimal disclosure of the names of the parties involved and a terse indication of the subject matter. Worse, the other major set of rules used for purposes of investor-state arbitration, i.e. those of the UN Commission on International Trade Law (UNCITRAL), require no public disclosure whatsoever!

In other words, investors can mount multi-million dollar challenges to host state regulations – in any number of sensitive sectors – without having to make any public disclosure of their legal arguments, the damages sought, nor even the dispute's existence.

In the coming months we shall see vigorous efforts to multilateralize the investment regime, through negotiations of a multilateral agreement on investment which could be launched in 2003.

Such negotiations could represent either an opportunity to reform and replace those existing investment agreements which are proving problematic, or a further extension of what appears to be a flawed, imbalanced network of bilateral treaties. The sustainable development community needs to do far more to apprise itself of the constellation of existing investment agreements, as well as to monitor those investor-state disputes which are now proliferating under these treaties. Should this not happen, it seems unlikely that any forthcoming multilateral agreement on investment would be an improvement upon the status quo.

Already, there are more than 2000 bilateral investment treaties worldwide. Astonishingly, the number of these treaties quintupled worldwide during the 1990s, with next to no scrutiny. There is every indication that investors are waking up to the existence and utility of these long-overlooked treaties. While critics have long had the GATS fixed firmly in their sights, they must ensure that the agreement's more worrying objectives are not being pursued quietly through other channels: notably, through the existing investment treaty regime.

Luke Peterson is an Associate at the Winnipeg-based International Institute for Sustainable Development.

The Emerging Southern Agenda on Trade and Environment

The context of the trade and environment debate changed significantly for developing countries after all WTO Members agreed to negotiations directly and indirectly affecting their developmental and environmental concerns at the Doha Ministerial Conference.

On Wednesday 1 May, ICTSD and the International Institute for Sustainable Development (IISD) will convene a roundtable for participants at the WTO Public Symposium to present for discussion elements of a possible agenda on trade and environment reflecting developing country concerns. These elements have been drawn from several months of consultations and discussions with developing country negotiators in Geneva and Brussels, as well as with southern-based research institutions. The objective of such discussions and the associated research and analytical work has been to support the articulation of 'developing countries' interests in the multilateral trading system through increased awareness of what is at stake in the trade and environment debate, and to elicit concrete feedback from key developing countries with regard to their interests and priorities with a specific focus on the agenda for negotiations contained in the Doha Declaration's paragraph 31 and the CTE work programme outlined in the Declaration's paragraph 32.

Declarations made by developing countries in several global fora in the past few months, as well as actions at the domestic level, indicate a new eagerness to engage in the debate and a willingness to move from mistrust and resistance to discussing trade and environment issues to a proactive and positive approach focused on advancing their own environmental well-being in the international trade policy framework.

The May event at the WTO Symposium will be divided into two parts. At the outset, Dr Adil Najam from the Institute for Environment-Development Action Research of Pakistan will make an analytical presentation of the elements identified for an emerging Southern agenda and Ambassador K.G. Anthony Hill, former representative of Jamaica in Geneva and currently ICTSD's Senior Fellow for Trade and Sustainable Development Agendas, will respond with his views on the nature and prospects of the present debates at the WTO. The presentations will be followed by debate among participants on the key elements resulting from the consultations.

The work on the Southern Agenda on Trade and Environment is carried out under a joint ICTSD-IISD project, guided by a Steering Committee formed by Ambassadors Munir Akram (Pakistan), Alejandro Jara (Chile) and Natham Irumba (Uganda), as well as the Director of Trade and Investment of IISD and ICTSD's Executive Director. Ambassador Hill has provided intellectual leadership and guidance to the project and has led the diplomatic consultations.

The project will now move into a second phase, to be mostly carried out by policy research institutions in developing countries, associated under the RING network.¹ The resulting findings will be the basis for a resource publication aimed at enhancing developing countries' capacity in handling trade and environment issues in international trade frameworks.

The ICSTD/IISD workshop will take place on Saturday 1 May from 9.00 - 11.30 am in WTO Room W.

For further information contact: Marianne Jacobsen, ICTSD, tel: (41-22) 917-8492; e-mail: mjacobsen@ictsd.ch

¹ Members of the Regional and International Networking Group (RING) are based in Africa (ACTS – Kenya, ENDA Tiers Monde – Senegal, NEST – Nigeria and ZERO – Zimbabwe); Asia (BCAS – Bangladesh, Development Alternatives – India and SDPI – Pakistan), Latin America (CIPMA – Chile, IIED-LA – Argentina and Vitae Civilis – Brazil), the Middle East (CENESTA – Iran), Europe (IIED – UK) and North America (IISD – Canada and SEI – US).

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Editor: Hugo Cameron
Tel: (41-22) 917-8492
Fax: (41-22) 917-8093
E-mail: hcameron@ictsd.ch

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TENTATIVE SCHEDULE OF WTO NEGOTIATIONS

Special Sessions on Agriculture 2002

June 19-20 Export subsidies and restrictions
 September 2-4 Market access
 September 23-27 Domestic support
 November 18-22 Follow-up
 By 18 December Circulation of overview document of discussions

Special Sessions on Agriculture 2003

January 22-24 Comprehensive review based on overview paper
 Drafting: first draft of modalities document
 February 24-28 Comments on first draft
 Redrafting: second draft of modalities document
 March 25-31 Consideration of final text
 March 31 Deadline for agreeing modalities

Special Sessions on Services in 2002

June 3-7 Decision expected on structure of future meetings
 (currently scheduled for July 23-26, October 28 –
 1 November and December 9-13)
 June 30 Deadline for submission of initial requests for
 specific commitments

Negotiating Group on Rules Meetings in 2002

By 12 April Negotiating proposals to be submitted
 May 6-8 Subsidies
 July 8-10 Subject not specified
 October 16-18 Anti-dumping
 November 25-27 Subject not specified

Negotiating Group on Market Access Meetings in 2002

April 10-11, July 11-12, September 12-13, November 4-7 and Dec. 2-3

Committee on Trade and Development Special Sessions 2002

9 April Proposals on S&D provisions deemed mandatory
 16 May The effectiveness of S&D provisions
 14 June The effectiveness of S&D provisions
 2 and 17 July Reporting procedures
 31 July Deadline for reporting to the General Council on
 special and differential treatment
 September 16, October 7-9 and December 6 – Subject no specified

Committee on Trade and Environment Special Sessions 2002

June 11-12 Negotiations on para. 31; regular session on 13-
 14 June in TRIPs-related issues and MEAs
 October 10-11 Negotiations on para. 31; regular session on 8-9
 September on eco-labelling

Dispute Settlement Body Special Sessions 2002

April 16, May 21, July 15-16, September 10-11, October 14,
 November 13-15 and December 18 – subjects not specified
 31 August Deadline for submissions of proposals
 By 31 May 2003 End of negotiations on DSU reform

TRIPs Council Regular and Special Sessions 2002

June 25-28 Regular meeting followed by special session
 September 17-20 Regular meeting followed by special session
 November 25-28 Regular meeting followed by special session

WTO DOCUMENTS

Committee on Trade and Development. 8 March 2002. Co-ordinated WTO Secretariat Annual Technical Assistance Plan (WT/COMTD/W/95/Rev.3) Note by the Secretariat

Committee on Trade and Environment. 8 March 2002. GATT/ WTO Dispute Settlement Practice Relating to GATT Article XX Paragraphs (b), (d) and (g). (WT/CTE/W/203) Note by the Secretariat, updating document (WT/CTE/W/53/Rev.1)

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Committee on Trade and Environment. 19 March 2002. Fisheries Subsidies. (WT/CTE/W/204) Submission from New Zealand on paragraph 32(i) of the Doha Declaration

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