

### Stark Differences Emerge on the Value Added of the Johannesburg Summit

ICTSD aims to contribute to the debate on the purpose, prospects and outcome of the World Summit on Sustainable Development through covering relevant events, as well as offering space in *BRIDGES* for a wide variety of views. The article below is based on ICTSD reporting from Bali on the final official preparatory meeting before delegates head for Johannesburg next August.

Trade and development financing are emerging as a major battlefield for the World Summit on Sustainable Development next fall. The fourth and last official preparatory meeting, which concluded in Bali, Indonesia, on 7 June, revealed fundamentally different views of the purpose of the Summit and its relationship with the outcomes of the WTO Ministerial Conference in Doha and the International Conference on Financing for Development held in Monterrey last March (Bridges Year 6 No.3, page 15).

The World Summit on Sustainable Development (WSSD) will take place in Johannesburg, South Africa, from 26 August to 1 September 2002. World leaders are expected to issue a political statement on the goals of the conference, as well as agree to an action plan for attaining those goals.

#### Adding Value to Doha and Monterrey

Much of the debate in Bali focused on what value the Johannesburg Summit should add to what had already been achieved in other fora. At issue in particular were the trade and finance provisions in the 'Implementation' section of the draft action plan, as well as the relationship between multilateral environmental agreements (MEAs) and WTO rules, addressed in the section dealing with 'Institutional Framework for Sustainable Development'.

A North-South rift was evident on both issues, reflecting the different emphasis that industrialised and developing countries lay on the key elements of 'sustainable development'.

Developing countries want the Johannesburg Summit to focus strongly on poverty alleviation and sustained economic growth. In their view, the WSSD should address such issues as market access and debt relief, going beyond what was agreed in Doha and Monterrey.

In contrast, most industrialised countries are reluctant to revisit these issues in Johannesburg, suggesting the the Summit's 'value added' lies instead in addressing environmental concerns which, in addition to economic and social aspirations, forms

the 'third pillar' of sustainable development. Significantly, the European Union chose the opening day of the Bali preparatory conference to announce its ratification of the Kyoto Protocol.

#### Trade and Finance: A Familiar Bone of Contention

The US and Australia, and to a lesser extent Canada and Japan, appeared firm that the trade liberalisation agenda adopted in Doha, and the development assistance and debt relief commitments made in Monterrey, were as far as they were prepared to go on those issues. They argued that reopening either the Doha Ministerial Declaration or the Monterrey Consensus would upset the agreements' 'sensitive balance', and cautioned against prejudging the outcomes of the WTO negotiations.

Prior to the Bali meeting, South Africa's Minister of Environmental Affairs and Tourism said that debt relief, attracting investment, and acquiring more market access would be key themes for the Johannesburg Summit. Among trade-related questions, he singled out progress in the agricultural sector as 'one of the most important steps' that could be taken to promote growth in developing countries. Critical of the US farm bill adopted in May and other protectionist trade policies, Ethiopia's Prime Minister Meles Zenawi stressed that the removal of subsidies and tariffs by rich countries would bring benefits exceeding seven-fold the development assistance developing countries currently receive.

In Bali, the G-77 group of developing countries insisted that the trade and finance provisions in the Implementation section were 'possibly the most important chapter in the whole document' and strongly resisted extensive references to the Doha and Monterrey texts. To achieve the political objective of sustainable development, the G-77 maintained, more 'productive, ingenious and legitimate' language was needed to ensure that WSSD would 'build on' – rather than accept the status quo – of the Doha and Monterrey texts.

Attempting a compromise between the US and the G-77 positions, the European Union argued that the added value of the Johannesburg Summit should be to bring a sustainable development perspective into trade and finance issues by building on the outcomes of Doha and Monterrey 'as part of a process of achieving sustainable development'. Nevertheless, with regard to trade, the EU defended references to Doha language, arguing that the Ministerial Declaration was a 'complete package' with an 'internal equilibrium'.

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In addition, the EU again introduced the highly contentious issue of core labour standards in the context of trade despite a request by the chair of the contact group to avoid such references, leading some to suggest that this move should be seen as part of the EU's broader negotiating strategy.

Among key negotiating countries, Norway proved the most constructive and progressive, repeatedly stressing the need to go beyond Doha and Monterrey by including follow-up initiatives. Switzerland also made efforts to bridge the increasingly polarised positions of the United States and the G-77.

## Environment – Trade Link Sparks Resistance

Defying the view that environmental concerns should take the front seat in Johannesburg, developing countries resisted references to 'coherence' between the trade and environment regimes, fearing that such language might lead to new obligations for them or could be used by industrialised countries to justify protectionist measures. These concerns made them extremely reluctant to agree to a negotiations on the WTO/MEA relationship in Doha, and have guided their subsequent efforts to keep such negotiations as narrowly circumscribed as possible (see page 8). In Bali, they made it clear that any trade and finance-related provisions in the Johannesburg Summit outcomes must refer to the economic pillar of sustainable development and should aim to support economic growth.

## Civil Society Groups Critical

Non-governmental organisations are increasingly frustrated with the intransigent position of the US in the trade and finance negotiations, and some of them strongly criticised the text discussed in Bali as a 'trade document' that lacked sustainable development elements. The Worldwide Fund for Nature (WWF), Friends of the Earth and Oxfam attacked the EU for now being willing only to 'encourage reform of subsidies that have considerable negative effects on the environment', in contrast to a previous commitment to 'remove' such subsidies. The three environmental NGOs also urged governments to recognise in the text that trade liberalisation cannot be presumed to automatically lead to sustainable development and has in fact already led to negative impacts on the environment and poverty alleviation.

Regarding the political declaration of the Summit, WWF called on delegates to make a clear statement that trade measures taken pursuant to MEAs should be presumed consistent with WTO rules unless there was overwhelming evidence that their application involved arbitrary and unjustifiable discrimination, and to strengthen the dispute settlement, compliance and enforcement mechanisms in MEAs. WWF also stressed the need for governments to assert that 'global economic liberalisation' was a 'process driven and controlled by national governments' which governments must use, alongside other policy instruments, 'to deliver greater social and environmental well-being'.

## Kyoto Ratifications Could Supply Momentum for Progress on Environment

Governments did provide some good news on fulfilling the environmental promises of the 1992 Earth Summit in Rio. On the opening day of the Bali meeting, the 15 member states of the European Union simultaneously ratified the Kyoto Protocol, which binds them to reduce their collective greenhouse gas emissions by eight percent from 1990-levels by the year 2012. Japan, whose target reduction is six percent, followed suit on 4 June.

While more than seventy countries have now ratified to Protocol, their combined share of greenhouse gas emissions (around 35.2 percent of the world total) is still too low for the treaty's entry into force. The United States – which alone counts for 36.1 percent of emissions – has opted out of the Kyoto process, and Australia and Canada (with 2.1 and 3.3 percent of world emissions respectively) are unlikely to ratify until the US does. To reach the 55 percent coverage of worldwide greenhouse gas emissions required for the Protocol's entry into force, virtually all other major industrialised countries would need to ratify it.



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# Access to Medicines: Solving the Export Problem under TRIPs

By James Love

This year the WTO is supposed to address paragraph 6 of the Doha Declaration on the TRIPs Agreement and Public Health, and perhaps the larger issue of the rules under which countries can export health care technologies. The issues that are imperfectly raised in the Declaration are important, as they involve the ability of a country to seek an efficient supplier for a medicine or other health care technology, when the domestic source is too expensive.

The significance of this may not be readily apparent, because today India and a handful of other countries can freely export copies of medicines that are patented in other countries. This exemption will expire in 2005, however. India has already modified its patent laws for medicines, and other countries are also under pressure both from WTO rules and bilateral trade negotiations to enact new and tougher patent rules. The major issue at stake is: will the so-called 'flexibilities' of the TRIPs accord, as they relate to government-sanctioned non-voluntary use of a patent, be meaningless except in a handful of countries with large domestic markets?

Paragraph 6 of the Doha Declaration on TRIPs reads:

We recognize that WTO Members with insufficient or no manufacturing capacities in the pharmaceutical sector could face difficulties in making effective use of compulsory licensing under the TRIPs Agreement. We instruct the Council for TRIPs to find an expeditious solution to this problem and to report to the General Council before the end of 2002.

The first sentence is of course true, but incomplete. First, this is not only a problem of access to pharmaceuticals, but also to medical devices and other technologies. Second, countries without patents on medicines also face difficulty, if patents exist in potential export countries. There may also be scarce know-how or trade secrets needed to manufacture a specific product, even when a country has capacity to manufacture other products. Finally, even if a country could manufacture a specific product, the domestic market may be too small to justify production for domestic use only. Thus, to characterize the issue as the 'capacity' to manufacture is much too narrow.

Nor it is this only an issue for the poorest countries. Korea, for example, is currently facing a request for a compulsory license on Gleevec, a drug that is very effective against two rare forms of cancer. Korea has a world-class pharmaceutical industry, and is now the most efficient global supplier for some important medicines. It would be possible, but not efficient, for Korea to manufacture Gleevec for its domestic market alone. This is so because, although it accounts for 15 to 20 percent of all adult Korean leukemia cases, chronic myelogenous leukemia afflicts only about 500 people each year. A much more efficient solution would be to allow generic producers to make Gleevec for sale in several countries, where the combined markets would justify the fixed costs of production.

Gleevec is not an isolated case. There are many products where it would be very costly to have autarky in domestic production. Even wealthy countries like Sweden, Denmark, Canada, Australia,

New Zealand, Singapore or Spain could not justify manufacturing products such as Ceredase, Epogen, or other countless other products, for the domestic market alone. A typical treatment of Epogen – used, among other applications, to treat chronic anemia in kidney dialysis patients – may cost US\$10,000 per year, but some patients may need far more. Gleevec is priced at nearly US\$50,000 per year, as a chronic treatment. Ceredase can cost more than US\$500,000 for a single year of treatment. In situations of excessive pricing, where a government determines it needs to override a patent owners' exclusive rights, and authorize the use of a generic product, it is essential that it is both technologically feasible and economically efficient to find an alternative source.

**The fundamental problem is the right to export and overcoming the importing country's difficulty of finding a source of affordable drugs.**

There is also much evidence that the number of suppliers is quite important in determining prices. The WHO has a 'rule of five,' which means it gets the best price on a drug when there are at least five suppliers. When Brazil began to purchase generic copies of 3TC, an important HIV drug, it was paying US\$20,000 per kilo for the imported raw materials for the drug. Today there are more suppliers, and

Brazil pays around US\$500 per kilo for the raw materials, only 2.5 percent of the original price. This is important since it is almost impossible for most countries to develop even one domestic supplier for certain products, let alone several.

## TRIPs Restrictions to the Right to Export

Most WTO Members would benefit from rules that would permit them to buy medicines or other health care inventions from any efficient supplier, no matter where they are located, and even domestic suppliers would be better off if they could also export. The TRIPs Agreement, however, presents problems.

The problem is not on the import side, as TRIPs clearly permits imports, both in cases where the product is off patent in the importing country, or where the government overrides the patent rights under government use, emergency or compulsory licensing provisions. The difficulty for the importing country is to find a source. This is the so-called 31(f) issue.

Under the TRIPs Agreement, a country may authorize non-voluntary non-exclusive use of an invention, but if this is done under Article 31 of the TRIPs, it must adhere to certain conditions, including paragraph 31(f), which reads:

f) any such use shall be authorized predominantly for the supply of the domestic market of the Member authorizing such use;

Article 31(f) is a general rule that limits exports when the product is manufactured under a compulsory license. The limitation is not complete; a non-predominate amount may be exported. There is also an exception to 31(f) in Article 31(k) which says that 'Members are not obliged to apply the conditions set forth in . . . (f) where such use is permitted to remedy a practice determined after judicial or administrative process to be anti-competitive.' The primary reason for concern over 31(f) is that few developing countries have implemented Article 31(k) in a way that would easily allow

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compulsory licenses to be issued, and some government officials mistakenly believe that Article 31(k) can only be used after expensive and time-consuming antitrust litigation.

### Possible Solutions

In the current WTO negotiations, several different proposals have been made to deal with the paragraph 6 issue. The US has lobbied the WTO to adopt a time-limited, conditional moratorium on WTO challenges to such exports of drugs for public health crises, a rather meaningless gesture because the problems for such exports are mostly a future issue, since India can already export older products.

The EU has raised the possibility of either amending Article 31(f), or accepting a limited exception to patent rights under TRIPs Article 30, but only under a set of restrictive conditions. The EU has also discussed approaches that involve a third country honoring a compulsory license in another country and, in its internal consultations, has even discussed liberal definitions of the term 'predominately,' to include members of a trade union, which would of course, benefit the EU itself.

Developing countries have raised a number of different strategies for dealing with the export issue, from the use of the principle of the exhaustion of rights to overcome the restrictions in Article 31(f), to modifications of Article 31(f) – under less restrictive conditions than those proposed by the EU – as well as the use of Article 30. Another approach being considered by some countries is to use the existing language under Article 31(k) to authorize exports, unencumbered by the restrictive provisions proposed by the EU for a modified Article 31(f) or a new Article 30 exception.

When the TRIPs Agreement was first proposed, it was understood that Article 31(f) would present problems for compulsory licensing of medicines, and most of the early attention focused on the ways that Article 31(k) might be used to authorize exports. The operative provision that Article is that 'Members are not obliged to apply the conditions set forth in subparagraphs (b) and (f) where such use is permitted to remedy a practice determined after judicial or administrative process to be anti-competitive.' Many developing countries do not have effective competition authorities, and are uncertain about both the type of evidence necessary to justify issuing a license to remedy an anticompetitive practice, and the role of the WTO in reviewing such actions. To many, the prospect of bringing an antitrust case against a patent owner is a daunting, expensive and time consuming prospect.

Another view of 31(k) is that governments can create purely administrative procedures and craft fairly simple tests to justify 31(k) licenses. Some of the grounds that have been proposed focus on the need to authorize exports in order to obtain sufficient economies of scale to encourage entry and create competition.

### History of Article 30 Proposals

In April 1999, the Canadian Drug Manufacturers Association (CDMA) asked the Canadian Parliament to allow a generic drug manufacturer to export its product to other jurisdictions where patent protection was not in place, as a limited exception to patent rights under Article 30.

The issue of exports was also featured in the recent Canadian 'bolar' case, the first WTO review of Article 30. The EU sought to

overturn Canada's use of Article 30 to permit both pre-expiration testing and the warehousing of products, both designed to speed introduction of generic drugs once a patent expires. The WTO upheld the pre-expiration testing, but rejected warehousing.

Importantly, the US raised concerns about the Canadian provisions allowing the export of products to obtain foreign registrations. Canada responded by noting that in smaller countries, generic industries had to 'export in order to be able to manufacture in sufficient quantities to achieve economies of scale, so that domestic consumers could receive the benefits of cost-effective generic products'. Canada noted that 'exceptions that had the effect of confining all activities to a single country were of little use to countries that, unlike the United States, depended on international trade to obtain generic products.' Canada also noted that the US 'bolar' exception permits the import or export of medicines for pre-expiration testing that is related to US regulatory requirements.

A broader use of Article 30 was proposed in the United States right before Doha in November 2001, in response to the Anthrax crisis. H.R.3235 would allow generic companies to 'export medicines or other health care products that are needed to address global public health emergencies, when the legitimate rights of the patent holder are protected in the export market.'

### NGOs Seek Article 30 Approach

In May 1999, NGOs held discussions with WIPO to explore how Article 30 might be used to address the export issue. Article 30 was considered an important approach, because a typical Article 30 exception to patent rights was automatic, and did not require time consuming or expensive litigation. The argument to WIPO was that there existed significant differences between medicines and other inventions, which would justify the Article 30 approach.

Specifically, while patent owners can face difficulty in protecting rights for products sold through unregulated distribution channels, sales of medical inventions are typically regulated, at least in markets of economic significance. This makes it much easier to protect patent owners' rights.

Under the Article 30 approach, patent owners would have incentives to obtain patent protection where the invention would be consumed, providing the economic incentives for investments in new inventions, while ensuring a practical framework for countries to find efficient generic supplier when needed for public interest or to address abuses of patent rights.

NGOs have continued to push governments to accept Article 30 as a vehicle for exports of medicines. One example is the Trans-Atlantic Consumer Dialogue, a trade dialogue for 65 consumer groups in the United States and Europe, which has passed several resolutions to support the use of Article 30 for exports, and told the US and EU that such exports are needed for both rich and poor countries, to allow countries to obtain more efficient supplies of products.

In 2001, developing countries took the lead in pushing for the Doha Declaration on TRIPs and Public Health. They suggested several strategies for addressing the export issue, including a September 2001 proposal to use TRIPs Article 30 to permit exports of medicines, but did not embrace a single strategy, and the issue was deferred for negotiations this year.

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## Special and Differential Treatment: A Litmus Test for the Doha 'Development Agenda'

Members remain deeply divided on the scope of the review of special and differential treatment provisions in WTO Agreements currently underway in special sessions of the Committee on Trade and Development. Most developing country delegates doubt OECD countries' commitment to the review while, off the record, many of the latter are frustrated over what they see as an attempt to create a 'two-tier' WTO, increasing their obligations while providing developing countries with a less onerous set of rules. To complicate matters further, there are little-publicised but real differences among developing countries themselves on what the review should ultimately deliver.

The review is mandated in paragraph 44 of the Doha Ministerial Declaration, which states that provisions for special and differential treatment are an integral part of the WTO Agreements and 'shall be reviewed with a view to strengthening them and making them more precise, effective and operational'. Para. 12 of the Doha Decision on Implementation-Related Issues requests the Committee on Trade and Development (CTD) to look into ways this could be done and to report to the General Council with 'clear recommendations for a decision' by 31 July 2002.

#### Review Does Not Equal Negotiations, Developed Countries Maintain

In spite of the tight deadline, the CTD's special sessions have up to now spent far more time arguing about whether the special and differential treatment review is part of the single undertaking negotiations launched last November, than actually reviewing the provisions in question (Bridges Year 6 No.3, page 11).

The issue flared up again at the 16 May special session, where the Quad countries (Canada, the European Union, Japan and the United States) reiterated their view that the S&D review was not a 'negotiation' and furthermore objected to circulating amendment proposals under the TN-symbol denoting trade negotiations. China, India, Kenya, Malaysia and Pakistan countered that they did indeed regard the review as a negotiation aimed at changing some WTO Agreements. This disagreement notwithstanding, after an informal meeting on 27 May, the Secretariat was instructed to reissue all review submissions under a different document code.

Although both sides in the debate can claim legal underpinnings for their positions in the ambiguous wording of paragraph 12 of the Doha Ministerial Declaration, hard-nosed trade politics underlie the different interpretations. Several delegates contacted for this article thought that this issue was likely to be resolved only through last-minute bargaining just before the end-July meeting.

Many developing countries regard strengthening the special and differential treatment regime as a litmus test of political will to address development issues in more than rhetoric. Should this test prove negative, they predict that any hope of broad-based support for the Doha 'development agenda' will evaporate, causing a loss of momentum across the different negotiating tracks.

#### Mandatory Technology Transfer for New SPS/TBT Measures

While the status of the S&D review remains unresolved, the Committee on Trade and Development finally started an agreement-by-agreement examination of the provisions at issue on 16 May.

Members addressed, *inter alia*, a new submission jointly tabled by Cuba, the Dominican Republic, Egypt, Honduras, India, Indonesia, Kenya, Mauritius, Pakistan, Sri Lanka, Tanzania and Zimbabwe, which proposed the establishment of a direct link between compliance with sanitary and phytosanitary measures/technical standards and the provision of technology to assist developing countries in complying with new regulations.<sup>1</sup>

The Agreement on Sanitary and Phytosanitary Measures (SPS) currently requires importing countries to *consider* providing technical assistance to developing countries to allow them to 'maintain and expand market access opportunities' when fulfilling the importer's standards involve 'substantial investments' (Article 9.2). To make this provision operational, the proponents suggested changing it so that importing countries *shall provide* such assistance. They also added an important new clause:

'If an exporting developing country member identifies specific problems of inadequate technology and infrastructure in fulfilling the sanitary or phytosanitary requirements of an importing developed country Member, the latter *shall provide the former with relevant technology and technical facilities on preferential and non-commercial terms, preferably free of cost*, keeping in view the development, financial and trade needs of the exporting developing country' (editor's italics).

A similar mandatory link between technological assistance and compliance with technical standards was proposed to render operational the requirement in Article 12.3 of the Agreement on Technical Barriers to Trade (TBT) that Members take into account the 'special development, financial and trade needs of developing country Members' in the preparation of technical standards so as not to create unnecessary obstacles to their exports.

These proposals go beyond previous attempts to link compliance with technical assistance by specifying that such assistance *shall include the transfer of relevant technology and technical facilities on a non-commercial basis*.

Industrial countries acknowledged that many developing countries did have difficulties in complying with SPS measures, but pointed out their right to high SPS standards, as well as the huge budgetary implications of making technical assistance mandatory.

#### SPS Timelines and Notifications

Other proposals dealt with changes to Article 10 of the SPS Agreement on special and differential treatment.

Cuba et al. proposed to change Article 10.1 so as to make it obligatory for industrial countries to enter into consultations with developing country exporters when the latter have identified specific problems in complying with proposed SPS measures. In notifying such measures Members would be required indicate 'systems and/or equivalent systems' that could be used to comply with them, as well as name the developing and least-developed country Members that could be affected by the applied measure.

Furthermore, the twelve developing countries proposed that under SPS Article 10.3, the Committee on Trade and Development 'shall'

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upon request grant developing countries specific and time-limited exceptions from the obligations of the SPS Agreement, rather than just be 'enabled' to do so, as the article currently provides.

In an earlier informal submission, India had proposed that the longer timeframe for compliance with regard to export products of importance to developing countries provided for in Article 10.2 be understood to mean 'no less than six months' as a matter of 'duty' rather than exhortation. India suggested a similar binding interpretation of Article 10.4, which currently exhorts Members to encourage and facilitate the active participation of developing countries in relevant international organisations. In the SPS context these include the Codex Alimentarius Commission, which sets the food safety standards that are considered WTO-compatible, and the Office International des Epizooties, which does the same with regard to animal health.

### Mandating 'Special Attention' in Dispute Settlement

India also proposed two changes to S&D provisions in the Dispute Settlement Understanding (DSU).

First, Article 4.10 should mandate Members to give special attention to developing countries' particular concerns and interests (i.e. use *shall* rather than *should*). In particular, a developed country engaged in dispute settlement proceedings with a developing country should be obliged to explain how it had paid 'special attention' to such concerns, and the ensuing panel report should rule on the fulfilment of this obligation as well.

Second, Article 21.2 should make it mandatory for the Dispute Settlement Body (DSB) to pay particular attention to developing country interests in the implementation of rulings. Thus, developing countries should have as long as three years to comply with adverse rulings won by developed countries when these involve changes to 'statutory provisions' or 'long-held practices' in such areas as quantitative restrictions and balance-of-payment provisions. Currently, the standard 'reasonable period of time' for implementing rulings is most often set at 15 months.

The timeframe for completing compliance panel procedures involving developing countries under Article 21.5 should be extended from 90 to 120 days, and status reports on the implementation of DSB rulings should only be required at one out of two of the body's sessions.

On the other hand, when a developed country loses a WTO dispute to a developing country, the current timeframes (15 months for implementation and 90 days for completing Article 21.5 proceedings) should be strictly adhered to. Any delay should entail an 'obligation to compensate for continuing trade losses to the developing country complainant.'

In their submission, Cuba and the 11 other developing countries put forward a proposal aimed at ensuring that developing countries would, upon request, automatically be granted longer timeframes in dispute settlement consultations (between 15 and 30 days) and the preparation of their first submission when defending themselves in disputes initiated by developing countries (15 days). This change would involve putting mandatory wording and timeframes into DSU Article 12.10.

While India still expects further detailed responses to these proposals, some developed country Members have suggested that the DSU review slated to conclude in a year would be the appropriate forum for addressing them (see related article on page 10). So far, the Like-minded Group has strongly resisted this approach, arguing that Committee on Trade and Development special session is *the* WTO forum designated for the review/negotiation of all S&D provisions even when the subject matter is also discussed in other WTO bodies.

### Other Proposals

The twelve developing countries, as well as Egypt, also submitted a proposal that would confirm the important role that subsidies play in the economic and development programmes of developing country Members.<sup>2</sup> The current wording of Article 27.1 of the Agreement on Subsidies and Countervailing Measures recognises that subsidies *may* play such a role. In initial comments, some Members objected that not all subsidies were necessarily beneficial for development.

India proposed that Article 3.5(i) of the Agreement on Import Licensing Procedures, which deals with 'non-automatic' allocation of licences, be amended to make it mandatory to give special consideration to importers who import products originating in developing or least-developed country Members.<sup>3</sup> The US pointed out that such a change would have implications to the agriculture negotiations, while Sri Lanka noted that import licenses went hand in hand with quantitative restrictions, which most countries should already have phased out.

Two other proposals were not addressed at all as they were tabled at the meeting itself. They deal with cross-cutting issues (Africa Group) and special and differential treatment of least-developed countries, submitted by the LDC Group. The latter reiterates LDCs' call for duty- and quota-free market access, and proposes that technical assistance should focus on diversifying their export base. In addition, an assessment should be conducted of LDCs' participation in the multilateral trading system, and the General Council should hold annual special sessions on the subject. The LDC Group also proposes changes to enhance special and differential treatment under the Agriculture, Subsidies and TRIMs Agreements.

The African and LDC proposals, not yet circulated officially at press time, will be discussed at an informal session on 10 June.

The next formal CTD special session is scheduled for 14 June.

### ENDNOTES

<sup>1</sup> TN/CTD/W/2. Proposals on S&D Provisions of the DSU and the SPS and TBT Agreements. Together with Malaysia and Jamaica, the proponents are informally known as the Like-minded Group, whose positions often command support from a large number of developing country WTO Members.

<sup>2</sup> TN/CTD/W/1. Proposal on S&D Provisions in the SCM Agreement. Cuba, the Dominican Republic, Honduras, India, Indonesia, Kenya, Mauritius, Pakistan, Sri Lanka, Tanzania and Zimbabwe

<sup>3</sup> The Indian proposals (on the DSU and the SPS and Import Licensing Agreements) were made in a non-paper.

## Textiles Implementation Lacks Momentum

Progress on textiles-related implementation issues has been quasi non-existent in the WTO's Council for Trade in Goods (CTG). By 31 July 2002, the CTG is to present recommendations to the General Council based on its examination of paragraphs 4.4 and 4.5 of the Doha Decision on Implementation.

These paragraphs deal with clarifications of the Agreement on Textiles and Clothing (ATC) regarding the use of the most favourable methodology for calculating the expansion of textile quotas for small suppliers and least-developed countries; and the advance expansion of quotas for developing countries.

After two informal Goods Council meetings on the issue in May, CTG Chair, Malaysian Ambassador Suppermaniam, called the latest exchange of views 'constructive' and expressed hope that the next informal session on textile issues, scheduled for 28 May, would see more detailed progress. An independent developing country source, however, said that the EU, the US and Canada had shown no flexibility so far, and that the only hope for progress lay in the mounting pressure provided by the 31 July deadline.

*Few Signs Point to Success*

Such progress seems compromised, however, by the US election year and the powerful pressure its textile industry is applying to the Administration. The Secretary of Commerce, Donald Evans recently reassured representatives of textile states that 'with respect to existing trade arrangements, particularly the WTO's Agreement on Textiles and Clothing (ATC), we intend to implement the ATC integration as scheduled. We have declined all requests to negotiate an accelerated schedule for elimination of existing quotas and intend to continue to do so.' Secretary Evans also stressed that the Administration would focus on opening foreign markets in future trade agreements, adding that 'given the other cost advantages most foreign producers have, particularly in terms of lower wage rates, there is no excuse for the support they receive from their governments in the form of high tariffs, subsidies and other barriers to trade.' Finally, he emphasised the government's commitment to 'enforcing our trade remedy laws generally, and on behalf of our textile industry in particular.'

In related news, the American Textile Trade Action Coalition in May issued a 'legislative agenda', opposing, *inter alia*, trade preferences in the textiles sector under the Andean Trade Preferences Act (see related article on page 16), as well as further liberalisation in the WTO and calling on the Administration to define 'specific negotiating objectives for textiles under the Doha Round and the FTAA.' An international coalition of European, US, Canadian and Mexican textile industry associations has also announced a campaign against all textile-related proposals in the Doha Implementation Decision (Bridges Year 6 No.2, page 10).

Furthermore, there are some signs that the Mexican government is not entirely opposed to a push from the country's National Chamber for the Textiles Industry to leave the International Textiles and Clothing Bureau, which promotes developing countries' textiles exports. The industry group advocates that Mexico align its negotiating position with its NAFTA partners, the US and Canada. Mexican textile producers are wary of the 'unilateral and non-reciprocal reduction or elimination of tariffs and textiles quotas' when it faces stiff competition from Asia, and China in particular.

## General Council Addresses Transparency

At its 13-14 May meeting the General Council decided that the fifth WTO Ministerial Conference would be held in Cancún, Mexico, from 10 to 14 September 2003.

- Responding to a paper from the Like-minded Group (LMG) of developing countries on transparency and participation leading up to and during Ministerial Conferences (WT/GC/W/471), many industrialised countries said some the proposed procedures would impose too much of a 'straight jacket' on the consultation process. Among the proposals were: (i) making all consultations transparent and open-ended; (ii) basing the draft ministerial declaration on consensus, and where this is not possible, reflecting the differences fully and appropriately through square brackets; (iii) the Director-General and the Secretariat should remain impartial on the specific issues in the declaration; (iv) chairpersons at Ministerial Conferences should be identified by consensus in the preparatory process in Geneva and consultations by chairs should be only at meetings announced 'at least a few hours in advance' and open to all Members; (v) negotiating texts and draft decisions should be introduced only in open-ended meetings; and (vi) late night meetings and negotiating sessions should be avoided. The LMG also suggested that future Ministerial Conferences after Mexico could be held in Geneva to save cost and effort. Chair Sergio Marchi will hold consultations on the proposals and the issues will stay on the General Council's agenda.

- The Council also agreed to shorten the timelines for the release of many restricted papers (WT/GC/W/464/Rev.1). Where a delegation specifically requests that a document produced by the Secretariat be restricted, the waiting time for derestriction has been reduced from approximately eight months to 6-8 weeks. Under the new provisions, documents produced by the Secretariat can be restricted by the issuing body, and will be derestricted 60 days after the date of circulation. They can remain restricted for a further 30 days if so requested by a Member. Derestriction time for minutes of meetings has been reduced to 45 days. Members retain the right to restrict their own submitted documents, although they must renew their restriction requests monthly after an initial period of 60 days or until first consideration by the relevant body. The previous procedures – outlined in the 18 July 1996 document WT/L/160/Rev.1 – will however remain in effect for documents circulated prior to 14 May 2002.

WTO Members are at odds over when modalities for industrial tariff reductions should be agreed. India, Egypt, Kenya and the Philippines have rejected the Chair's initial proposal to reach agreement on reduction formulas by 31 March 2003, as well as a compromise date of 30 April 2003.

The matter was referred to the Trade Negotiations Committee, but agreement remained equally elusive. While Japan in particular expressed disappointment in the delays, India proposed that Members could submit proposals until December 2002, and that a decision on modalities should be taken only in July 2003.

The TNC also failed to resolve the question of observers to the negotiations, largely due to Egypt's request for observer status for the Arab League. This has implications for many negotiating bodies, including the Committee on Trade and Environment, where environmental treaty secretariats could play a useful role.

**'There is no excuse for the support most foreign textile producers receive from their governments.'**

*US Commerce Secretary Donald Evans*

### Rules Group: Focus on Anti-dumping

The Negotiating Group on Rules met for the second time from 6-8 May. Seven formal submissions have been made, but talks have not progressed beyond preliminary reactions.

In Doha, ministers agreed to negotiations aimed at 'clarifying and improving disciplines' under the WTO's Anti-dumping and Subsidies Agreements, 'while preserving the basic concepts, principles and effectiveness of these Agreements and their instruments and objectives, and taking into account the needs of developing and least-developed participants'. This was a victory for developing countries, which seek to raise the threshold for anti-dumping actions and broaden their latitude to use subsidies.

#### *Most Amendments Proposed to Anti-dumping Rules*

Brazil, Chile, Colombia, Costa Rica, Hong Kong, Israel, Japan, Mexico, Norway, Singapore, South Korea, Switzerland, Thailand and Turkey submitted a detailed proposal dealing with several aspects of the Anti-dumping Agreement, including 'public interest' (TN/RL/W/6). The US said this paper went beyond what was agreed in Doha. Instead, it said the negotiations should adhere to the core principles of maintaining the strength and effectiveness of existing WTO disciplines, ensuring the transparency of trade remedy laws and addressing trade-distorting practices (see page 14).

With regard to implementation-related issues, Brazil and India proposed raising the *de minimis* limit under which dumping is not considered to have occurred; India also suggested a number of changes in favour of developing countries to Article 27 of the Subsidies Agreement (TN/RL/W/7 and TN/RL/W/4 respectively).

Brazil argued for changes in current WTO disciplines on export credits, as these were outdated and introduced 'asymmetries' in Members' capacity to 'compete on an equal footing' (TN/RL/W/5). Brazil's interest in this question stems from its long-running dispute with Canada regarding export subsidy regimes for aircraft.

#### *Friends of Fish and Japan Still at Odds over Subsidies*

The 'friends of fish' group – Australia, Chile, Ecuador, Iceland, New Zealand, Peru, the Philippines and the United States – submitted a paper outlining the rationale for reducing fisheries subsidies but did not make specific proposals for changes in WTO rules (TN/RL/W/3). Japan again argued that subsidies were not the major cause of fisheries over-exploitation (Bridges Year 6 No.3, page 10).

In related news, the European Commission on 28 May proposed radical changes to the EU's Common Fisheries Policy (see page 13).

#### *Regional Trade Agreements*

An Australian proposal on regional trade agreements (TN/RL/W/2) was welcomed as a good starting point for clarifying and improving WTO disciplines (para. 29 of the Doha Declaration). Australia contended that the increasing tendency of governments to conclude bilateral and plurilateral agreements represented a threat to the multilateral trading system, and proposed holding separate talks on procedural and systemic issues. These negotiations are particularly important to African, Caribbean and Asian countries, which are in the midst of reforming their former relationship – based on unilateral preferences – with the European Union (see page 15). The WTO Secretariat was requested to update its paper on RTAs by the 8-10 July Rules Group meeting.

### Touchy Debates in Store for TRIPs Council

The TRIPs Council will meet on 25-27 June to continue deliberations on how countries without drug manufacturing capacity could still make use of the flexibilities in compulsory licensing confirmed by the Doha Declaration on TRIPs and Public Health (see related article on page 3). The Council must come up with an 'expeditious solution' to this problem by the end of this year. Switzerland has requested the Secretariat to prepare a background paper on developing countries' manufacturing capacity and levels of patent protection.

Discussion will continue on a controversial least-developed country argument, broached at an informal meeting on 17 May, that – in line of the extended deadline they obtained in Doha for the establishment of patent protection for pharmaceuticals and agricultural chemicals – they should also be exempted from the obligation to establish a 'mailbox' system for patent applications until 2016.

In addition, the impassioned debate on extending strong protection to geographical indications is likely to dominate the Council's regular session (see article on page 17), leaving little time to address such issues as patenting life forms or harmonising the TRIPs Agreement with the Convention on Biological Diversity.

Difficult negotiations on the establishment of a multilateral registration system for wines and spirits will continue in the Council's special session on 28 June.

### Argentina Seeks Narrow Environment Negotiations

At the head of the 11-12 June special session of the Committee on Trade and Environment (CTE), Argentina has circulated a proposal seeking to delineate the scope of WTO negotiations on the relationship between trade rules and multilateral environmental agreements (TN/TE/W/2). In March, many Members reacted strongly to EU proposals, which they saw as an attempt to stretch the negotiating mandate, particularly with regard to possible implications on the rights and obligations of non-parties (Bridges Year 6 No.3, page 9).

Among Argentina's main points is that negotiations should only cover *specific trade obligations* in environmental treaties *in force*. This stipulation would effectively carve out the most trade-relevant environmental agreement concluded in recent years, i.e. the Cartagena Protocol on Biosafety, which has so far collected only 19 of the 50 ratifications necessary for its entry into force. The Biosafety Protocol lays down procedures for the safe transfer, handling and use of living modified organisms resulting from modern biotechnology 'according to the precautionary approach contained in Principle 15 of the Rio Declaration'. The Protocol's relationship with WTO rules was a major sticking point during the negotiations, and most biotech exporters consider it too restrictive to ratify (Bridges Year 4 No.1, page 17). As non-parties they would be free to challenge trade measures taken under the Protocol as violations of the WTO's SPS Agreement.

The non-application of any clarification of the WTO/MEA relationship to non-parties is another major point put forward by Argentina. That is, any agreement to waive WTO rights in cases where these conflict with 'specific trade obligations' in an MEA would only apply to those WTO Members that are party to it, while non-parties would 'enjoy more extensive rights [...] since they would not be affected by the outcome of the negotiations'.



# The Award of Damages under WTO Law: An African Take on the Debate

By Victor Mosoti

The system of remedies under WTO law is receiving deep attention in the Dispute Settlement Understanding (DSU) review currently going on within the WTO (see page 10). One of the primary fronts on which scholars and delegates have hinged their criticism has been the system of remedies available to Members who successfully litigate disputes. In particular, the proposal that classical remedy of damages should be included in the DSU often meets with a whiff of skepticism. Critics argue that it would be too difficult to assess what exactly should be paid.

The involvement of developing countries in the WTO's dispute settlement process is of particular importance to the sustenance of credibility of the system itself. Of the 42 or so disputes that have gone before the Appellate Body, none has involved an African country, although other developing countries such as India and Brazil have been heavily involved in the process. Our sympathy with proponents of the inclusion of damages hinges on this absence of African litigants; awarding damages would make the WTO's dispute settlement process significantly more attractive to African countries due to the promise of direct and immediately resulting benefit.

## Remedies under WTO Law

An important feature of any rule-based system is the way in which the system tackles a failure to respect the rules. The WTO dispute settlement system responds to such a failure through a series of remedies that are set forth in the Dispute Settlement Understanding (DSU) and in other covered agreements. The first measure under the DSU is the option of 'bringing the measure into conformity'. Although the DSU does not dictate how this should be done, panels and the Appellate Body may 'suggest ways' that the recommendations could be implemented.

While Article 3.7 of the DSU uses hortatory language ('usually') to indicate that the preferred means of implementation is the 'withdrawal' of the measure, that is not the sole means of achieving conformity. A Member may, for instance, modify a measure so that the WTO-inconsistencies are removed, without it being necessary to withdraw the measure in its entirety.

The second remedy (under DSU Article 22) is compensation. If a Member fails to bring its measure into conformity, it may agree to provide 'satisfactory compensation' to the injured Member(s). Under Article 3.7, compensation is a 'temporary measure'<sup>1</sup> to be offered only if 'immediate withdrawal' of the measure is not possible and it may only be provided pending proper implementation. Compensation under WTO law is voluntary and does not therefore address the past effects of the measure. Further, the level of 'satisfactory compensation' is usually measured by reference to the level of the 'nullification or impairment' resulting from the failure to bring a measure into conformity. Additionally, compensation under the DSU usually takes the form of granting additional concessions rather than the payment of money.

Another remedy available to a WTO Member is the suspension of concessions under Article 22 of the DSU. In the event of a failure to comply fully with the Dispute Settlement Body (DSB)'s

recommendations, and if compensation is not agreed, a Member may seek authorization from the DSB to suspend concessions or other obligations owed to it by the non-compliant Member. The requirement for DSB authorization is mandatory as unilateral action is disallowed. On the whole, it is accepted that the DSB's authorization of suspension of concessions must follow dispute settlement proceedings under Article 21.5 of the DSU.<sup>2</sup> While the suspension of concessions is antithetical to the free trade objectives of the WTO, it is a primary right of Members to withdraw concessions should circumstances leave that as the only feasible option.

Withdrawal of concessions is effective when it hits the author of WTO-inconsistent measure enough to make it want to reconsider the measure. The majority of African countries, like many others in the developing world, are dependant on a continuing trade relationship with the rest of world. The bulk of unprocessed goods such as agricultural produce, which are the primary export commodity of African countries, end up in one developed nation or another. These countries do not have much of an alternative with which to retaliate. Their own economies stand to suffer if they do.

**The damage award to an LDC winner of a dispute could be packaged as a form of WTO-sanctioned development aid.**

## A Comparison with Remedies under Public International Law

It is easy to see that the remedies under the WTO system are ideal in situations where the disputing countries are at par economically. In this situation, the specter of potentially hurtful retaliation will drive both to the negotiating table where a compensation package can be worked out, or a withdrawal of the measure can be secured. When disputes pit the poorest against the richest nations, the WTO's current system of remedies proves less attractive. This scenario contributes to the timidity of African countries in taking disputes before a WTO panel. Why should they, when the potential incidence for economic loss is 100 percent?

Public international law provides alternative avenues in such a situation. The primary one considered here is compensation according to the principles of customary international law. Compensation requires the author State, if requested, to compensate the injured State for damage caused by the wrongful act (to the extent that the damage is not properly compensated by restitution in kind).<sup>3</sup> According to Article 44 of the International Law Commission's Draft Articles on State Responsibility, compensation covers 'any economically assessable damage', including loss of profits resulting from the wrongful act. The compensable damage includes losses sustained by natural or legal persons connected with the injured State, which is not the case under the WTO system. Further, the fact that under the WTO compensation is voluntary and usually non-monetary clearly waters down the effectiveness of such a remedy especially from the perspective of a poor litigant.

As the principles for the payment of damages have been fairly well developed under public international law, they should be applicable to WTO disputes involving least-developed countries. With deeper thought, tempering and gradual modifications, the remedy of damages holds the key to the integration of African countries into the dispute settlement process of the WTO.

*Continued on page 18*

## Amicus Brief Proposal Finds Scant Support in the Dispute Settlement Review

Meeting on 14 March and 21 May, Members of the Dispute Settlement Body commented positively on proposals to amend the ‘sequencing’ of compliance reviews and trade retaliation, but expressed reservations about major systemic changes, including opening up dispute settlement proceedings to the public.

Members must complete negotiations on ‘improvements and clarifications’ of the Dispute Settlement Understanding (DSU) not later than May 2003 (para. 30 of the Doha Ministerial Declaration).

So far, Members have mainly focused on a number of amendment proposals submitted by the European Union<sup>1</sup> and a joint paper by 14 countries specifically on the sequencing issue.<sup>2</sup>

*Compensation*

The EU made the case that where ‘immediate compliance’ with dispute a settlement ruling was not possible, Members should give preference to ‘temporary trade-enhancing compensation (i.e. more market access, *ed.*) over trade-restricting suspension of concessions or other obligations’. The EU acknowledged that the first objective of the dispute settlement mechanism was to secure the withdrawal of WTO-inconsistent measures, but argued that suspension of concessions ran against a ‘basic principle of the WTO, i.e. the predictability of the trading system’.

Several developed and developing countries pointed out that favouring compensation over trade sanctions could

- give the richer Members a possibility to ‘buy’ compliance, which poorer countries could not afford (Chile and Thailand);
- act as a disincentive for the withdrawal of WTO-inconsistent measures (Japan);
- raise issues of how the level of compensation would be calculated, as well as possibly lengthen dispute settlement procedures (US); and
- discriminate between Members as only the complainant would benefit from compensation while the withdrawal of inconsistent measures would benefit all Members equally (India).<sup>3</sup>

*Permanent Panelists*

The EU argued that, to improve the quality of dispute settlement reports and to ensure their timely delivery, fifteen to twenty-four permanent full-time panelists would be necessary. Currently panelists are drawn from a roster of experts, most of whom have other important commitments. According to the EU, a change is warranted due to the ever-increasing number and complexity of disputes, as well as the growing difficulty of finding qualified panelists who are not nationals of Members involved.

While not necessarily dismissing the EU proposal, many countries raised concerns about the costs and selection process of establishing a permanent structure.

*Amicus Briefs and Other Transparency Issues*

As expected, opening up some aspects of the dispute settlement procedures to observers was easily the most contested proposal put forward by the EU.

The EU acknowledged that sometimes keeping panel or Appellate Body proceedings closed to the public could expedite the resolution of a dispute, but nevertheless suggested that the DSU ‘should provide sufficient flexibility for parties to decide whether

certain parts of the proceedings before the panel or the Appellate Body should be open to the public for attendance. At the same time, third parties should also have the right to decide whether their interventions should take place in open or closed sessions.’

In addition, the EU said it was ‘necessary’ to better define the framework and the conditions for allowing *amicus curiae* (friend-of-the-court) briefs ‘in potentially all cases’. It also advocated retaining the procedural two-stage approach described by the Appellate Body in November 2002 (Bridges Year 4 No.9, page 1), specifying that *amicus* briefs should be ‘directly relevant for the factual and legal issues under consideration by the panel, or the legal issues raised in the appeal.’

India and Malaysia were among the most stringent critics of these proposals, which they consider would threaten the inter-governmental nature of the WTO; give non-Members greater rights than Members or even third parties to the dispute in question; and disadvantage developing countries as far fewer non-governmental entities based there would have the capacity to file acceptable briefs. India directed twelve questions to the European Union regarding *amicus* briefs, including how the legitimacy of the submitting entity would be verified, and how its ‘direct interest’ in the case would be determined.

*Sequencing*

Much less controversial – and likely to be approved by the May 2003 deadline – are proposed changes to ensure compatibility between provisions that deal with timeframes for actions before trade retaliation can take place. As things stand, the timeframe for awarding trade sanctions under Article 22.6 is much shorter than that afforded to the Article 21.5 ‘compliance’ panel, which determines whether the defendant’s implementation of the ruling was indeed faulty. It is thus possible for a Member to start imposing trade sanctions on the basis of an Article 22.6 ruling months before the compliance panel constituted under Article 21.5 has delivered its verdict on whether the sanctions are justified.

In this context, the fourteen-country submission was favourably received.<sup>2</sup> It spells out that Article 21.5 proceedings – including an eventual appeal – must be complete before authorisation can be sought to impose sanctions. A party found to be in non-compliance with a dispute settlement ruling would not be given additional time for implementation, but could seek arbitration of the amount of sanction under Article 22.6 as is currently the case.

In the Committee on Trade and Development, developing countries have also made proposals aimed at enhancing the special and differential treatment provisions of the DSU (see page 6).

The next formal special session on DSU reform is scheduled for 15-16 July 2002.

## ENDNOTES

<sup>1</sup> TN/DS/W/1 Contribution of the EC to the Improvement of the WTO Dispute Settlement Understanding, 13 March 2002.

<sup>2</sup> TN/DS/W/6 Submission from Bolivia, Canada, Chile, Colombia, Costa Rica, Ecuador, Guatemala, Japan, Norway, Peru, South Korea, Switzerland, Uruguay and Venezuela.

<sup>3</sup> TN/DS/W/5 India’s Questions to the EC on Their Proposal Relating to Improvement of the DSU, 7 May 2002

## First Nations Bring Unresolved Land Claims and Subsidies to the WTO

By Kevin R. Gray

The dichotomy between human rights and international trade has only recently gathered attention in trade advocacy circles. Somewhat distinct from labour rights, it was difficult to see how a human rights violation would be equivalent to an unfair trade practice under WTO law. The recent acceptance of an *amicus* brief by the Interior Alliance Indigenous Nations in the Canada-US Softwood Lumber Dispute<sup>1</sup> resolves this dilemma, placing the human rights-trade linkage at the forefront of dispute settlement.

At issue is whether Canada's failure to internalise into the price of logging rights the cost of land claims compensation to First Nations amounts to an illegal subsidy. Although this case may advance further understanding of the Agreement on Subsidies and Countervailing Measures (SCM Agreement) through the panel's and potentially the Appellate Body's interpretation, its main significance may be the introduction of human rights concerns in international trade dispute settlement, bringing under eventual WTO scrutiny other national policies dealing with disenfranchised peoples.

The history of this dispute precedes the inceptions of both the World Trade Organisation and the NAFTA. At issue are the 'stumpage fees' levied on trees that are harvested from publicly owned lands in Canada. The fees are set by Canada's provincial governments, at what the United States alleges to be less than market value and therefore constituting an illegal subsidy under the SCM Agreement.

Recently, the United States imposed an average 27 percent countervailing duty on Canadian timber following an investigation by national authorities and a ruling by the US International Trade Commission that domestic industry was 'threatened with material injury' by the subsidised softwood lumber imports. This followed a preliminary countervailing duty of 19.3 percent imposed in August 2001 after a US Commerce Department investigation found that the provincial governments had provided a good or service and effectively a financial contribution to Canadian producers amounting to a subsidy. Under Article 1.1(a)(1)(ii) of the SCM Agreement, a financial contribution can be seen where there is government revenue that is otherwise forgone or not collected.

In response to the preliminary duty, Canada requested the establishment of a panel at the Dispute Settlement Body, arguing that the US measure violated the SCM Agreement. Canada alleges that stumpage fees are paid in exchange for a right to exploit an *in situ* natural resource, termed 'profit a prendre', and a license to harvest standing timber. This does not constitute a provision of a good and therefore cannot be countervailable. Others have argued that this is not a good nor a service but a tax.<sup>2</sup>

### Domestic Obligations under Constitutional Law

In its unsolicited *amicus curiae* brief submitted to the panel, the Interior Alliance asserted that the Canadian stumpage fees violated both Canadian constitutional law regarding aboriginal peoples and international trade law. The Alliance is composed of several First Nations in the south central part of British Columbia, who contend that they have never ceded nor surrendered their rights to their traditional territories. Canada's refusal to compensate them for timber extracted from their lands, the Alliance argues, places the timber below market value due to the British Columbia

government's failure to recognise aboriginal title. By not meeting its constitutional fiduciary duty to indigenous peoples to collect money in order to compensate them for the extraction of timber from their lands, the government confers an unfair benefit to forest companies in British Columbia.

What is interesting is that the Canadian constitutional law component of the Alliance's contention is stronger than its basis in international law. There is the general position that the undervaluing of forest resources on aboriginal lands violates international commercial law although no treaty or customary law is presented to support this. Some attention in the brief is directed towards Article 8(j) of the Convention on Biological Diversity (CBD), which requires that the use of knowledge, innovations and practices of indigenous and local communities are to be done with the approval and involvement of the holders of such knowledge, innovations and practices. The parties are required to encourage the equitable sharing of the benefits arising from this utilisation. However, the wording of Article 8(j) is merely hortatory, carrying no specific obligation to compensate indigenous peoples. In addition, Article 8(j) is subject to national legislation, affording countries with an avenue to opt out of this commitment.

Overall, there is no pinpoint violation of the CBD to warrant the existence of any illegal subsidy. In the *amicus* brief, the petitioners make no specific reference to any international legal obligation to compensate aboriginal peoples when natural resources are removed from their traditional lands. There is no mention of the 1989 ILO Indigenous and Tribal Peoples Convention nor other instruments, which would form the basis for ruling that an international legal obligation has been breached. The ILO Convention does not establish a right to compensation although there is a limited right to compensation upon indigenous peoples'

*Continued on page 12*

### 'First Time Indigenous Voice Heard by the WTO'

'This sends a direct message to [British Columbia's] Premier Gordon Campbell that the economic, as well as the human and Aboriginal rights of Indigenous Peoples are not something he can administer like a 19<sup>th</sup> century colonial Governor. The economic rights of our nations can no longer be marginalized and ignored,' Chief Manuel of the Shuswap Nation said. In a letter to Premier Campbell on April 6, he urged the Premier to ensure that any adjustment to the forest tenure system take into account his peoples' title and rights. He also pointed out that the US Department of Commerce already holds that the fair market price for timber 'takes indigenous proprietary interests into account'

'The acceptance of our brief by the WTO panel on the softwood lumber dispute ensures that our voice will be heard by the decision-makers in this affair. The Premier has to recognize he cannot keep indigenous land users from the Interior of B.C. out of the room and try to vote down our rights through the referendum, because our rights are protected internationally and our standing is now even recognized by the WTO'

*Interior Alliance press release, 29 April 2002.*

removal from their territories, including for loss or injury.<sup>3</sup> A constructive violation of the obligation to resolve land disputes is also possible although this requirement is limited to a general obligation to establish adequate procedures within the national legal system.<sup>4</sup> Governments are required to ensure indigenous peoples' participation in the use, management and conservation of natural resources pertaining to their land.<sup>5</sup>

### Potential Pitfalls

Lacking a violation of a specific international obligation, Canada's failure to meet its domestic legal requirements emerges as the core issues in the Interior Alliance brief. This can have a grave impact for the future resolution of disputes. Using the multilateral dispute settlement process to enforce Canadian law – which, at least on paper, may operate at a high standard of rights towards aboriginal peoples – would place Canada at a competitive disadvantage as the government would be required to acquire more revenue from timber producers because of a previous grant of greater rights to First Nations. In turn, other WTO Members may move away from any land distribution or compensation initiatives, or at minimum from making any formal guarantees in their national legal systems.

Another concern is that wholly domestic issues such as land redistribution and expropriation for public purpose will fall within the ambit of the ruling to be made by the panel. Countries that have arduously negotiated or reached an agreement with their own displaced citizens may have such arrangements revisited by a panel, asked to review whether such an agreement was truly internalised when determining the price of a government resource. Sovereign economic decisions will be traced to the adequacy of the settlement with dispossessed native peoples. The resolution of previous injustices would now be put on a comparative standard with other countries. The Interior Alliance brief projects that a comparison between Canadian stumpage rates and average market prices on Indian lands in the US would reveal a great discrepancy. However, such comparisons are problematic considering the unique historical nature of a land settlement dispute, which WTO panels lack the experience and background to rule authoritatively on.

Panels may be called upon to determine questions of compatibility with domestic law, without having the appropriate background to make such determinations. The Interior Alliance clarifies that it is not asking the panel to resolve a land dispute but to factor in indigenous arguments when interpreting and applying the WTO Agreements. This distinction may not be maintained by a panel, which must determine the breach of domestic law before ruling that the foregone revenue under the SCM Agreement would be monies normally owing under domestic law.

The Interior Alliance brief refers to the evolutionary nature of subsidies in the Dispute Settlement Body. With references to WTO jurisprudence, the brief mentions that the 'restrictive interpretation' advocated by Canada is no longer applicable since a direct subsidy can be found in payments in kind.<sup>6</sup> This takes actionable subsidies under WTO law into a new direction since government inaction rooted in the absence of a final legal determination by the country's legal system can now be challenged. The domestic legal process is therefore circumvented in order to reaffirm Canada's constitutional responsibilities to aboriginal peoples by a dispute settlement process unfamiliar with the nuances of Canadian law.

### Unprecedented WTO Action

The panel has agreed to entertain the submission. In an unprecedented move, it asked the parties to the dispute to comment on the *amicus* brief. The latter expressed a general unwillingness towards having the panel issue a ruling on a domestic legal matter between the Canadian government and aboriginal peoples. The difficulty for the panel is trying to make a distinction between ruling on the international trade law dimension of the *amicus* brief and on the exclusive matter of Canadian constitutional law. It will be problematic to make a ruling on an illegal subsidy based on non-compensation of aboriginal peoples when this matter is something within the exclusive domain of Canadian law and still subject to ongoing discussion at the political level and a continuing matter before domestic courts.

A final point worth a mention is that the brief has paved the way for more rights-based advocacy at the WTO. Groups that are impacted by a particular case can raise their concerns to a panel if the parties fail to pick up their arguments in their submissions. This can effectively address criticism that Member is attempting to enforce its own human rights through the use of trade measures, but it also calls into question the 'exhaustion of local remedies' rule in international law requiring that all domestic avenues must be pursued before

a case can be brought at the international level. However, facilitating rights-based advocacy at the WTO, based on the injury to the petitioner, lends proper context to the human rights/trade dialogue since an individual right can be traced to a trade-distorting measure.

The unique perspective and information provided by the Interior Alliance, including Canadian legal issues otherwise unseen by the panel, underscored the need for submitting the brief. The Interior Alliance considers the panel's acceptance of its submission as a form of 'standing', well beyond the scope of protection afforded by the British Columbia government.<sup>7</sup> Establishing 'standing' as a criterion for *amicus* briefs might be the progenitor of a consensus, as it could reduce the participation of groups that have no direct interest in the dispute. Whether other advocacy-based human rights groups will now seek WTO dispute settlement as an alternative or complementary strategy to their domestic campaigns remains to be seen.

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### ENDNOTES

<sup>1</sup> United States – Preliminary Determinations with Respect to Certain Softwood Lumber from Canada, WT/DS236.

<sup>2</sup> W. D. Nordhaus. July 1999. *An Economic Analysis of Whether Long-Term Tenure Systems in British Columbian Provincial Forests Provide Countervailable Subsidies to Softwood Lumber Imported into the United States*; [www.wcel.org/wcelpub/2001/13567.pdf](http://www.wcel.org/wcelpub/2001/13567.pdf)

<sup>3</sup> Art. 16(4)(5).

<sup>4</sup> Art. 14(3).

<sup>5</sup> Art. 15(1)).

<sup>6</sup> Direct ref. was made to the Appellate Body in *Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products*, WT/DS103/AB/R, WT/DS113/AB/RR, 13 Oct. 1999.

<sup>7</sup> Interior Alliance, *Press Release – Interior Alliance Breaks New Ground in Geneva as W.T.O. Accepts its Softwood Lumber Dispute Submission*, (April 30, 2002).

## Indigenous People Pay the Price for Rejection of Commercial Whaling

The International Whaling Commission (IWC) ended its annual meeting in Shimonoseki, Japan, on 24 May in a virtual stalemate as most initiatives – whether pro- or anti-whaling – were defeated. The only marked development was the rejection of two requests for indigenous subsistence whaling quotas, which previous IWC meeting had renewed as a matter of routine. The outcome of the meeting reflects a high level of politisation and increasingly bitter divisions within the Commission, leading many to doubt whether it can function effectively in the future.

### No to Commercial and Indigenous Whaling

The host country failed yet again to muster the three-quarters majority required by the 48-nation Commission to end the moratorium on commercial whaling in force since 1986. Japan also suffered defeats in its bids to make IWC voting secret and to resume coastal hunts, which would have led to the taking of an additional fifty minke whales.

Angered by what it called a ‘double standard’ – one for indigenous whalers and another for communities that have strong whaling traditions and an economic dependence on the trade – Japan successfully led the pro-whaling camp in a tit-for-tat rejection of whaling quotas for US and Russian indigenous people. The two governments had requested approval for an annual catch of fifty-six bowheads for the Alaskan Inuit, and 120 gray whales for the Chukotka people living in the Russian Northeast. It was the first time in the Commission’s history that indigenous subsistence quotas were refused, sparking strong condemnations from the communities, as well as the governments involved. The US in particular finds itself in an awkward position, as it has a legal obligation to grant the Inuit a whaling quota, which can now only be done by contravening the IWC decision.

### ‘Scientific’ Whaling to Continue

Each year, Japan takes about 550 minke whales, as well as a smaller number of Bryde’s and sperm whales for research purposes. Environmentalists are skeptical of the need for research on such a scale, particularly as most of the meat ends up in shops and restaurants, where it fetches high prices. In Shimonoseki, Japan was seeking the IWC’s consent for expanding its scientific quota to include, *inter alia*, 50 sei whales, which figure on the World Conservation Union’s ‘red list’ of endangered species. Due to the time-consuming controversy about indigenous subsistence whaling, the issue was not addressed, and the expanded hunt is likely to take place in June.

### Trade Ban May Be Ignored

More generally, respect for multilateral decisions on whaling seems on the wane. Norway, which has allowed commercial whaling for its domestic market since 1993 despite of the IWC ban, announced in 2001 that it would resume international trade in whale blubber and meat in spite of the total trade ban on whale products imposed by the Convention on International Trade in Endangered Species (CITES) Appendix I listing.<sup>1</sup> Trade with Japan was set to resume, but the plan has been delayed due to tests showing dangerous levels of pollutants such as PCPs or DDT in stockpiled blubber. The Norwegian government is now offering a reward for whalers to destroy the more than 500 tonnes of blubber that once looked like a pot of export gold. However, Norway still hopes to resume whale meat exports, with or without CITES’ blessing.

Iceland, which stormed off the IWC meeting in a rage after its full membership application was turned down, has also hinted that it may restart commercial whaling.

### Background

The IWC, set up 54 years ago to monitor international whaling activities, imposed a moratorium on commercial whaling in 1986. The moratorium was set to run until the adoption of an international management regime that would set sustainable quotas and other rules for whaling activities. The regime is yet to be agreed, but whaling nations’ calls for lifting the moratorium grow louder every year. They claim that certain minke and gray whale populations are now so abundant that they actually threaten the stability of some fish stocks. The clash has spilled over to the CITES arena, where the conservation status of these whale populations was one of the issues most bitterly fought over in April 2000 (Bridges Year 4 No.3, page 10 and No.2, page 9). Japan and Norway will again request their removal from Appendix I at this year’s meeting of CITES Parties next November.

### ENDNOTE

<sup>1</sup> Species listed in CITES Appendix I are considered threatened by extinction and international trade in them/products thereof is prohibited.

## EU Outlines Fisheries Policy Reform

On 28 May, the European Commission (EC) unveiled a package of policy changes aiming to make the EU’s next Common Fisheries Policy (CFP) more responsive to problems related to over-fishing, ineffective controls and job losses in the sector. The Council of Ministers is expected to adopt a reformed CFP by the year’s end.

First, the Commission proposes replacing the ‘annual political horse-trading’ about total allowable catches (TACs) by multi-annual catch targets based on scientific advice. Only the first-year catch target would be set by the Council. After that, the Commission would set the TACs according to a long-term management plan designed to keep catches within safe biological limits. Member states have frequently approved higher catch quotas than those recommended by the Commission (Bridges Year 6 No.1, page 12).

Second, the Commission plans to stop subsidising fishing boat construction or the modernisation of the existing fleet, although public money would be available for improving safety on board. Some of the freed-up funds would be used to assist fishermen leaving the sector. In addition, no vessel would be allowed to enter the fleet until an equivalent capacity has been withdrawn without public aid. Through these means the EC hopes to achieve the decommissioning of some 8.5 percent of the EU’s fishing fleet.

The Commission also proposes an action plan, designed in collaboration with developing countries, to ensure that the EU’s distant water fishing operations stay within sustainable limits.

France has already indicated that it does not share the Commission’s ‘vision’ for restructuring the European fisheries sector. Spain, Italy, Greece, Portugal and Ireland are also reported to oppose the plan.

Three recent US policy developments – largely attributable to the mid-term congressional elections next fall – have the potential to compromise if not obliterate substantive gains for developing countries from the multilateral trade negotiations launched in Doha. The first of these was the imposition of safeguard tariffs on steel on 20 March. The second was the 15 May passage of the largest agricultural spending bill in six years. The Senate provided the final straw by adopting a Trade Promotion Authority that would carve out US trade remedy laws from the President's authority to negotiate new trade agreements.

### On the Brink of a Steel War

The US decision to impose tariffs ranging from eight to thirty percent on a variety of steel products has sparked an array of retaliatory measures. The EU, Japan, China and Korea have requested WTO panels, and many more countries, including Brazil, are in preliminary dispute settlement consultations. China, Colombia, Japan, the EU and others have established safeguard steel tariffs of their own, and the latter two are poised to apply trade sanctions against US imports if compensation talks fail. Meanwhile, WTO negotiations on industrial tariff reductions appear stalled (page 7).

### Farm Bill Defies Free Market Rhetoric

The 2002 farm bill ups government agricultural support by some 80 percent from the level of the previous relevant legislation, the 1996 Freedom to Farm Act, which admittedly led to massive government bailouts in recent years as farmers' income fell due to a world-wide drop in commodity prices. According to the Congressional Budget Office, the bill will increase agricultural spending by US\$82.8 billion over the next ten years, bringing the total of farm payments somewhere in the region of US\$190 billion for the period.

The new bill offers increased direct per bushel payments for corn, sorghum, barley, oats, wheat, soybeans, oilseeds, cotton and rice. Critics say the payments will provide incentives for production and thus further depress world prices for these commodities, many of which are of great export interest to developing countries.

Even more worrying for competitors is the revival of countercyclical payments, which will make up for the gap between the going market price and the guaranteed per bushel rate. These payments will insulate US farmers from fluctuations in world prices and thus remove any market-based incentives they might have to limit production.

The bill also continues a system of 'loan deficiency payments', which act in a similar way to the countercyclical payments, as they are calculated to make up the difference between a pre-determined loan rate and the market price.

Administration officials insist that despite the trade-distorting nature of many of the payments, the new support measures will not exceed the country's US\$19.1 billion annual cap in 'amber box' subsidies under the WTO Agreement on Agriculture. The farm bill also allows the President to modify it if the WTO cap is surpassed.

In addition, the Administration has pointed out that the historically-high environmental component of the bill would be counted as 'green box' support, which is not subject to caps or reduction commitments. This support includes US\$5.6 billion for the Environmental Quality Incentives Programme, as well as smaller appropriations for other conservation-related programmes.

### 'This not for Rural Mexico or Rural Europe'

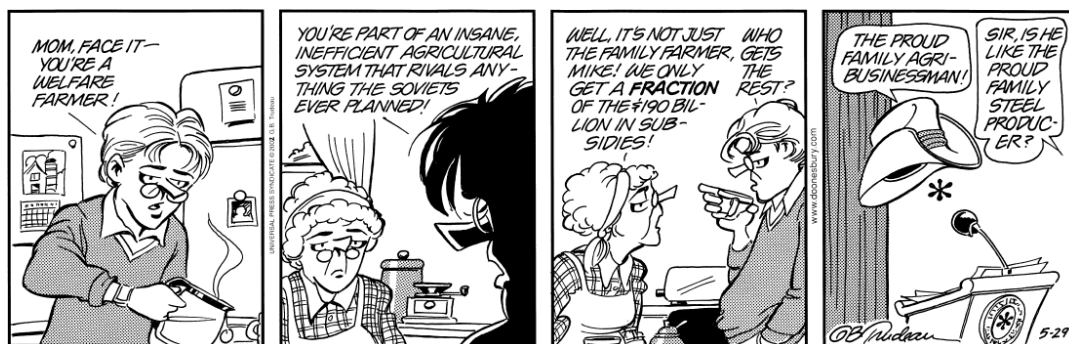
Despite official US assurances, the passage of the farm bill has shaken the outside world's confidence in Washington's commitment to the liberalisation of agricultural trade. Reactions from other major agricultural exporters have been scathing, including threats from Brazil and Australia to challenge some of the subsidies in the WTO as incompatible with existing US obligations.

There are dissenting voices in the United States as well. Republican Representatives Cal Dooley and John Boehmer issued a statement calling the bill a 'giant leap backward in federal agricultural policy', which would 'stimulate overproduction, lead to lower prices and force excessive government outlays'. Others critics, reflected in the tongue-in-cheek Doonesbury cartoon below, have focused on the fact that large-scale agribusiness rather than the family farmer stands to reap the lion's share of the new benefits. Sophia Murphy of the Institute for Agriculture and Trade Policy wrote in *Foreign Policy in Focus*: 'This subsidisation of US agribusiness while at the same time demanding liberalisation of farm trade abroad is indeed an outrageous and duplicitous strategy.'

Beyond US borders, some developing – and developed – trading partners regard the bill as a cynical upping of the ante just as negotiations are starting in the WTO on the modalities for reducing domestic and export agricultural subsidies. These views are reinforced by commentators such as Ed Gesser of the Progressive Policy Institute, who was quoted in the *Washington Post* as saying that by the end of the WTO round of trade negotiations 'the end of the farm bill may be in sight, and we'll be in a good position to say "We'll phase all this out".' Reduction of support on such a basis would obviously not have a major incidence on the subsidy levels that prevailed when the Doha round was agreed last November.

Many governments, including ministers of the Cairns Group of agricultural exporters, have issued statements condemning the bill's disregard for other nations that depend on agricultural trade, particularly in the developing world. Larry Combest, Chairman of the House Agriculture Committee, brushed aside such criticism by quipping: 'This is for rural America. This is not for rural Mexico, and this is not for rural Europe.'

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DOONESBURY © 2002 G. B. Trudeau. Reprinted with permission of UNIVERSAL PRESS SYNDICATE. All rights reserved.

## New Negotiating Guidelines for Economic Partnership Agreements Raise Tricky Questions

On 9 April, the European Commission (EC) adopted negotiating guidelines for the establishment of Economic Partnership Agreements with the African, Caribbean and Pacific (ACP) countries, to which the EU used to extend preferential market access under a succession of Lomé Conventions. The last of these expired in February 2000, but ACP countries obtained a waiver at the WTO Ministerial Conference in Doha for the continuation of the Lomé preferences until new, WTO-compatible trading arrangements will gradually replace them after 2008. The negotiating guidelines must still be approved by EU member states.

### Guiding Principles

The proposed EC mandate reaffirms the 'overarching objective' that the Economic Partnership Agreements (EPAs) must constitute an 'instrument for development'. They will be based on the principles of fully WTO-compatible reciprocal free trade agreements with ACP regions while providing for differential and asymmetric treatment. The agreements should also contain appropriate ACP flanking policies and EU support measures.

As fostering regional integration is one of the major objectives of the ACP-EU Partnership, the Commission states that 'EPAs will, as a matter of principle, be established with groupings engaged in a regional integration process' while maintaining 'the solidarity and the unity of the ACP Group of States'.

The EU affirms that flexibility of trade liberalisation is essential to the success of EPAs. In addition, the Cotonou Agreement confirms that 'economic and trade co-operation shall take account of the different needs and levels of development of ACP countries and regions, having particular regard to the specific situation of the least developed countries.'

### Contents of the EPAs

The proposed EPAs are to cover trade in services, as well as trade in goods. Article 41.4 of the Cotonou Agreement specifies that flexibility should be applied 'in accordance with the provisions of GATS and particularly those relating to the participation of developing countries in liberalisation agreements'. The EC suggests that the EU should be prepared to postpone the start of the services negotiations 'where this is effectively required by specific constraints which the ACP countries concerned are facing'.

In addition, the EPAs should aim at identifying constraints and introducing improvements in import licensing, customs valuation, pre-shipment inspection, transit rules and other issues 'with a view to ensuring the transparent and harmonised application of these instruments'.

### Commodity Protocols

What will happen to the commodity protocols that have guaranteed access to European markets for many key products? The EC proposes to 'review them in the context of the new trading arrangements, in particular as regards their compatibility with WTO rules, with a view to safeguarding the benefits derived therefrom, bearing in mind the special legal status of the Sugar Protocol.'

The fate of the commodity protocols is likely to hinge on the outcome of the negotiations on regional trade agreements in the

WTO negotiations. Should such arrangements be deemed non-compatible, how could their benefits still be safeguarded?

### WTO Compatibility

One of the key goals of the EPAs is moving from unilateral trade preferences to WTO-compatible arrangements consisting of reciprocal commitments. The WTO compatibility of the future EU-ACP trading arrangements will largely depend on the results of the parallel multilateral negotiations regarding

- the revision of GATT Article XXIV on regional agreements (important for the product coverage, transition periods and possible asymmetry and differential treatment of EPAs);
- review of special and differential treatment provisions;
- negotiations on agriculture (and their potential impact on the CAP and on the Commodity Protocols);
- negotiations in services;
- progress on other issues, such as investment, competition, government procurement, the environment, sanitary and phytosanitary measures, etc. and their relevance for developing countries; and
- technical assistance.

### Membership of the EPAs

Currently, all least-developed countries – including the 40 LDCs among the 76 countries eligible for EPAs in the ACP group – qualify for completely duty-free and quota-free access by 2008 under the 'Everything But Arms' (EBA) initiative. Furthermore, under the Cotonou Agreement, ACP LDCs may opt to stay out of an Economic Partnership Agreement and keep their EBA preferences.

Under the circumstances, what would in fact be the benefit of an EPA to a least-developed ACP country? This is a thorny question particularly for any LDC that belongs to a regional grouping that does form an EPA with the EU. Even those LDCs that decide not to join the EPA will be vulnerable to an upsurge of EU imports via neighbouring countries. This of particular concern in Africa, where many regional arrangements overlap in a complex fashion.

On the other hand, less favourable treatment for non-LDC ACP countries could threaten the group's cohesion. While the European Commission had earlier hinted at the possibility of extending EBA treatment to all ACP countries, the proposed EC mandate simply states that 'the Community should further improve current access to its market for products originating in the ACP countries.'

### Alternatives to EPAs

While the Commission's mandate makes it clear that the EU would prefer to negotiate with 'groupings engaged in a regional integration process', Article 37.6 of the Cotonou Agreement mentions that, in 2004, the Community 'will assess the situation of the non-LDCs which, after consultations with the Community decide that they are not in a position to enter into economic partnership agreements, and will examine all alternative possibilities in order to provide these countries with a new framework for trade which is equivalent to their existing situation and in conformity with WTO rules.'

The mandate proposed by the European Commission is silent on a possible alternative trade framework should some ACP countries not be in a position to enter EPAs.

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### Negotiating Timetable

The questions above help explain why the ACP group has yet to formally indicate how it wishes the regional groups to be constituted, although this should have been done in December 2001. The ACP now envisages a two-stage approach. In the first phase, starting in September 2002, the Commission would negotiate with the entire group not only on the format, structure and principles for the negotiations, but also on issues of common interests to the ACP (scope for differential treatment, LDC status, WTO-compatibility, rules of origin, general framework for trade in services, etc.). Negotiations would be conducted at a disaggregated ACP level only at a later stage.

The Commission's guidelines see a formal opening of negotiations at an all-ACP level in September 2002 'with a view to finding a common understanding on the basic structure and content of economic partnership agreements'. 'Effective negotiations' on regional level should start in January 2003 at the latest. If the ACP group holds fast to the broader scope of talks involving all ACP countries prior to regional negotiations, the January 2003 deadline may be compromised.

In 2006, a Joint Ministerial Trade Committee will carry out a comprehensive review of the arrangements planned for all ACP countries. According to the Cotonou Agreement, the negotiations must conclude by 2008.

### FTAA Snag on Modalities Mirrors WTO Round Challenges

Mirroring the difficulties in the WTO about determining negotiating modalities, a May meeting of vice trade ministers of the Americas failed to reconcile different views regarding the basis for market access negotiations in agriculture, investment, government procurement and services scheduled to start next December within the context of the Free Trade Area of the Americas (FTAA). The FTAA is slated for conclusion in 2005, as is the latest round of multilateral trade negotiations launched in Doha last November.

The baselines and modalities are of crucial importance to the final outcome, and similar differences exist in the WTO between those who oppose a 'two-tier' multilateral trading system and those who believe that weaker economies should have less stringent commitments rather than just longer transition periods for compliance with common rules (see related article on page 5).

The most serious rift concerns agricultural tariff negotiations. CARICOM countries want to base these on the tariffs they have bound in the WTO rather than the far-lower rates they actually apply, as NAFTA and Central American countries are advocating. Mercosur and Andean Pact countries agreed to start tariff reduction negotiations from applied rates when they were granted an extra six-month period during which they may adjust individual applied tariffs upwards. CARICOM countries rejected this approach, insisting that smaller economies be allowed to use their WTO bound tariffs as a baseline.

In services, Brazil leads most South America in opposing the North and Central American view that negotiations should be based on a 'negative list' approach, i.e. all sectors should be

### News in Brief



Andean countries' future access to the US market depends crucially on how the House and Senate versions of the Andean Trade Preferences Act (ATPA) will be reconciled. While both would provide duty- and quota-free access to apparel made from US fabric and yarn, the House bill would allow more access for textile products made without US input. It would also allow limitless duty-free access to tuna products, while the Senate bill would only grant duty-free treatment to a limited amount of canned tuna harvested by US or Andean vessels. The House bill is also more generous on footwear imports and rules of origin requirements.

ATPA is part of a larger trade bill that also contains trade promotion authority legislation (formerly called fast-track, see page 14). The differences between the House and Senate versions of the package will be reconciled in a conference committee, and the resulting compromise must be passed by both chambers of Congress. The US textiles industry, strongly opposed to extending ATPA preferences is likely to lobby hard for curtailing them (see page 7).

The Act aims to provide Andean countries with sources of export revenue that would provide incentives not to cultivate illegal cash crops. Some WTO Members, such as Paraguay, have argued that trade preferences for developing countries should not depend on non-trade-related conditions such as fighting drug trafficking, or adherence to environmental or social standards (TN/CTD/W/5).

covered with the exception of specifically negotiated reservations. Mercosur and the Andean Pact countries want to negotiate on a bottom-up 'positive list' basis, where countries specify the services sectors they wish to open up. The WTO's General Agreement on Trade in Services (GATS) is built on the latter model while the NAFTA uses the 'negative list' approach.

FTAA negotiators differ along similar lines on whether service providers with a physical presence in a country should be covered by the investment agreement, as is the case in the NAFTA, or by the services agreement as in the WTO. Another bone of contention is whether investment provisions should cover only investors already established in a country or also those that are in a 'pre-establishment' phase.

With regard to government procurement, most Latin American countries are trying to overcome US resistance to extending the future agreement's scope to sub-federal levels of government. So far, the US has cited constitutional reasons for not taking on commitments that would bind state or local legislatures.

Vice trade ministers will attempt to reconcile these differences at their next meeting in August.

While not on the May meeting's agenda, FTAA countries are also divided on how to treat the environment and civil society involvement in shaping the future free trade zone extending from Tierra del Fuego to Alaska.

The next full FTAA Ministerial Meeting will take place in Quito, Ecuador, in October.



## Extension of Stronger Geographical Indications Protection: Against the Interests of Developing Countries?

By Dara Williams

The issue of the extension to other products of the additional protection provided under the TRIPs Agreement for geographical indications (GIs) for wines and spirits has for some time been one of the most passionately debated topics in the WTO. Its characterization in the Doha Development Agenda Declaration as an ‘outstanding implementation issue’ necessitates a balanced assessment of issues related to extension in light of its potential impact on the interests of developing countries.

The aim of developing country extension *demandeurs* to protect from misappropriation terms describing products to which they attach a particular commercial, traditional, national or other significance is legitimate. However, the question that must be asked is whether extending TRIPs Article 23 would actually achieve the outcomes developing country *demandeurs* seek, or whether it would simply increase their TRIPs obligations without conferring any corresponding benefits. There is good reason to believe that the latter is the case.

Before turning to examine why this is so, it is important to address the assertion that TRIPs’ ‘discrimination’ between GIs for wines and spirits and other products is reason in and of itself to extend Article 23 to other products. This argument is dangerously flawed and is rebuttable from two different angles. First, it is now well-known that the distinction resulted from an EC/US bilateral deal done at the end of the Uruguay Round, when the EC’s interest in additional protection was limited to wine and spirits, as it did not yet have in place Community legislation for GIs for other products. Article 23’s inclusion in TRIPs was the result of a last-minute trade-off between two individual WTO Members, and its objectives and content simply reflect the narrow vested interests of the European wine and spirit industry. The provision was not a negotiating goal of the wine and spirit sectors in other WTO Members nor does it reflect an acknowledgment that the balance struck in Article 23 is an ideal one for wine and spirits, let alone other products.

Second, it is not clear how many WTO Members differentiate in practice between the two different levels of protection, and, if so, the practical difference that any such differentiation has made to the effectiveness of protection. The lack of practical examples of failed attempts to enforce GI protection (let alone examples that distinguish between the two levels of protection) has made it difficult to evaluate whether there are in fact any shortcomings in the existing rules. Without this information, it is hard to judge whether extending Article 23 would deliver any of the benefits expected by *demandeurs*, further militating against the argument that elimination of the current ‘discrimination’ is by definition in developing countries’ interests.

### How is extension likely to impact on developing countries’ interests?

The extension debate has often overlooked the practical operation of the rules on the eligibility for protection of certain terms. Yet this issue is absolutely central to determining whether extension would benefit developing countries. It is helpful to consider the rules in light of some practical examples.

### Definitional issues

The TRIPs definition makes it clear that not every geographical term will qualify as a GI under TRIPs - there must also be a certain quality, reputation or other characteristic attaching to the product that is essentially attributable to its geographical origin. A Member claiming a term as a GI would bear the burden of proof to show that this was the case. While it seems that the definition may encompass terms that are not geographical place names, this has never been tested and cannot be assumed. Members seeking to protect terms such as ‘basmati’ and ‘jasmine rice’ would have to show that they fall within the definition, and are not simply names for a particular type of plant that can be grown in a variety of geographical locations.

In addition, certain WTO Members are of the view that country names do not generally qualify as GIs, raising questions as to whether terms such as ‘Thai silk’ and ‘Colombian coffee’ would be considered eligible for GI protection.

### The exceptions

TRIPs provides a number of important exceptions to GI protection, the application of which can render a claimed GI ineligible for protection.

The first key exception concerns ‘generics’. If a term has become ‘customary in common language as the common name for [particular] goods or services’ in a WTO Member, it is ineligible for protection. Many well-known indications that may originally have had a geographical connection, such as Ceylon or Darjeeling tea have been used for so long to describe a type of product that they may have become generic in many WTO Members.

The second important exception is the ‘grandfathering’ clause. The effect of this provision is that GIs that have been used by producers in other WTO Members for at least 10 years or in good faith will *not be eligible for protection* irrespective of whether they are protected in the country of origin. Terms such as Darjeeling tea and Colombian coffee could be affected.

### Market access issues

In light of many countries’ diverse production profiles, none would be assured of being only on the winning side of an extension of Article 23. For example, while India may, theoretically, gain exclusive use of ‘basmati rice’, it may lose the right to export ‘mozzarella cheese’ and other products with which its fledgling dairy industry has had export success. Such closing-off of market access opportunities for emerging and future export industries could be a serious and difficult to anticipate consequence of extension.

Nor would additional GI protection in and of itself guarantee access to export markets or increased sales. In particular, protection of a term as a GI will have no effect whatsoever on existing market access barriers, such as tariffs and technical regulations, which will still require compliance.

*Continued on page 18*

### Diffuse production models

The applicability of the current rules to products manufactured under a geographically diffuse production model is another issue. The rules appear to be most appropriate for goods for which the entire production chain (from the production of raw materials to packaging and labelling) occurs in the same location. In these circumstances, it is clear that the claimed 'quality, reputation or other characteristic' is essentially attributable to the product's geographical origin, and issues concerning the application of rules of origin do not arise. However, where, for example, tea grown in Sri Lanka is shipped to another country for blending with other tea varieties, and then labelled and packaged in a third country, it may not be legitimate to term the end product 'Ceylon tea'. In addition, trademarks for many well-known geographical terms may already be registered by multinational companies, which would prevent their use by local developing country producers.

### Administrative burden

*Demandeurs'* arguments that extension would involve minimal additional administrative burden are a gross oversimplification. GIs are, at the multilateral level, a relatively new category of intellectual property right. Aside from Europe, where the concept originated, few countries have experience with GI protection and enforcement regimes and there has been little examination of the effectiveness of the various frameworks used by WTO Members to fulfil their GI obligations (including the status of implementation in many developing countries). However, wealthy countries with large commercial interests in GIs and established domestic methods of protection are likely to take a keen interest in assessing the effectiveness of trading partners' GI regimes. Given the lack of common understanding regarding appropriate methods for protecting GIs, this question may be left for determination under WTO dispute settlement proceedings. The bottom line is that it cannot be assumed that extension would involve minimal administrative burden. Some new world countries' experience in the area of wine GIs in fact suggests that it would be the opposite.

### Conclusion

An examination of the practical application of the current TRIPs rules to the kinds of terms that developing country extension *demandeurs* would seek to protect suggests that they stand to gain very little. Definitional issues, application of the customary use and grandfathering exceptions, and the questionable applicability of the GI provisions to products manufactured under geographically diffuse production models – all of these may render the claimed GIs of interest to them ineligible for protection under TRIPs. At the same time, they may find that extension reduces their market access opportunities for certain products, and that compliance with the new TRIPs obligations that extension would involve requires them to invest considerable resources domestically in providing effective protection for the potentially thousands of GIs claimed by other WTO Members.

In light of the evidence that extension of additional GI protection is likely to have an overall negative impact on the interests of developing countries, demands to extend TRIPs Article 23, and thereby increase the level of obligations under an already much-criticised Agreement, should be handled with extreme caution. How unfortunate it would be for developing countries to sign on to new obligations only to discover, too late, that they have been sold another pup.

*Dara Williams is Second Secretary at the Australian Permanent Mission to the WTO.*

### Some Thoughts on Implementation

This is a potentially divisive topic, not least because some WTO Members object to the applicability of principles of public international law to questions of breach of WTO Agreements. They are likely to argue that those principles were not part of the package they signed up for at the conclusion of the Uruguay Round. This is not an altogether untenable position.

A further reason why the proposal for damages may meet objection is the question of quantum. In our view, this unattractiveness could be circumvented if the damage award was packaged as some form of WTO-sanctioned development aid. The strict principles of assessment therefore should not be used to defeat the objective. Additionally, the award of damages should only feature as an alternative remedy in circumstances when a dispute involves a least-developed country as the complaining party. The underlying objective therefore should be seen to be an additional avenue of providing further assistance to poor countries.

Unlike voluntary development aid, once a panel or the Appellate Body recommends a damages award, satisfactory payment should be mandatory. To allow for the creation of an atmosphere of goodwill, the parties should be given the leeway to negotiate on the nature and period of payment. The panel that made the recommendation, or the Appellate Body, should provide the guidelines and oversee the process.

### Conclusion

The success of the WTO's dispute settlement system is not in question, especially when one compares it with the former GATT or with other international tribunals. However, the fact that no African country has ever been involved in a dispute before the Appellate Body as an appellant or appellee should be enough to prompt trade experts and the WTO leadership into reflection. There is clearly a reason as to why this should be so. African countries should not be absent in the DSU review, an important legal process that clarifies and advances the institutional jurisprudence of the WTO. It behooves the rest of the global community to make an effort to integrate the African continent into the dispute settlement process by accepting damages as a remedy under WTO law.

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### ENDNOTES

<sup>1</sup>See also Article 22.1 of the DSU.

<sup>2</sup>There is some disagreement as to whether the DSB can authorize the suspension of concessions on the basis of a unilateral assessment of non-implementation or whether this must be established through dispute settlement proceedings under Article 21.5 of the DSU. In *European Communities – Regime for the Importation of Bananas* (WT/DS27), the United States maintained that the DSB could authorize the suspension of concessions, even if the EC's implementation measures had not been reviewed by an Article 21.5 panel. In subsequent disputes the parties have agreed that, should it prove relevant, the implementation measures should be reviewed under Article 21.5 before authorization for suspension of concessions is requested from the DSB.

<sup>3</sup>Restitution in kind requires the author State, if requested by the injured State, to restore the situation that existed prior to the occurrence of the wrongful act.

US Trade Policy, continued from page 14

### *Developing Countries Stand to Loose Most*

Poor African and Asian countries are likely to be more profoundly affected by the bill than NAFTA members Canada and Mexico, or the EU. First, its contribution to continuing and perhaps worsening agricultural terms of trade will prevent their farmers from getting a fair price for their export products, cotton and rice in particular. Second, the countercyclical and loan deficiency payments will make US exports extremely competitive and capable of flooding developing country markets with cheap subsidised imports.

World Bank officials have roundly (if anonymously) criticised the bill for just such effects, with one senior staff member noting that: 'A few American farmers will benefit, but at the expense of a very large number of poor people in developing countries.'

### **Trade Remedy Carve-out Threatens WTO Outcome**

The Trade Promotion Authority adopted by the US Senate on 23 May also has far-reaching potential consequences on the WTO talks, as well as any future trade negotiations the US might undertake.

The proposed legislation contains an unprecedented provision that carves out changes to US trade remedy laws from the negotiation authority the bill otherwise confers on the President. Under the Dayton-Craig amendment – so called after its sponsors – Congress would retain the power to modify any concessions negotiated on anti-dumping and other trade defense laws, while the rest of the trade deal would only be open to a yes-or-no vote.

The agreement to include anti-dumping, subsidies and countervailing measures in the single undertaking WTO negotiations was the only significant concession made by the US government in Doha last November. Without it, developing countries would in all probability have refused to join the consensus to launch a new round of trade talks. The possibility that an essential part of a negotiated package could be lost through last-minute Congress modifications is likely to further erode their confidence in the potential benefits of the Doha 'development agenda'.

Although the Ministerial Declaration specifies that any 'clarification or improvement' of trade defense disciplines must preserve 'the basic concepts, principles and effectiveness' of the relevant Agreements, many interest groups in the United States were incensed that the country's negotiators had put such disciplines on the table at all. They, and their representatives in Congress, view the Dayton-Craig amendment as damage control. For the Administration, the amendment spells major embarrassment.

President Bush has announced that he will veto the legislation if the Dayton-Craig amendment emerges intact from the conference committee that will now attempt to reconcile the House and Senate versions of the bill. Supporting the President, the Secretaries of Commerce and Agriculture, as well as the US Trade Representative, have stressed that the original Senate TPA bill already contained strong provisions on US trade laws, including a potential withdrawal of the trade promotion authority if the President fails to uphold them.

The final legislation must pass both chambers before going to the President for signature. In the run-up to the new congressional vote, most observers expect the majority of Democrats to side strongly with the Dayton-Craig amendment, as they were disappointed at what they considered weak trade remedy protection provisions in the trade package adopted with a one-vote margin by the House of Representatives last December. In contrast, most Republicans are likely to campaign for the removal of the amendment from the President's trade promotion authority.

See separate story on page 16 on the Andean Trade Preferences Act, which is also part of the trade package.

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**SPECIAL (NEGOTIATING) SESSIONS OF WTO BODIES**

June 5-6	Council for Trade in Services <i>Decision expected on structure of future meetings</i>
June 11-12	Committee on Trade and Environment <i>MEA/WTO relationship</i>
June 14	Committee on Trade and Development <i>Amending S&amp;D provisions</i>
June 28	Committee on Agriculture <i>Export subsidies and restrictions</i>
June 28	Council for TRIPs <i>Multilateral register for wines and spirits</i>
July 2	Committee on Trade and Development <i>Reporting procedures</i>
July 8-10	Negotiating Group on WTO Rules <i>Subsidies and countervailing measures</i>
July 11-12	WTO Negotiating Group on Market Access <i>Modalities for negotiations</i>
July 15-16	Dispute Settlement Body <i>Amending the Dispute Settlement Understanding</i>
July 17	Committee on Trade and Development <i>Reporting procedures</i>
July 18-19	Trade Negotiations Committee <i>Co-ordination of negotiations</i>
July 23-26	Council for Trade in Services

**KEY 2002 DATES IN THE NEGOTIATION PROCESS**

June 30	Services: due date for submission of initial requests for specific commitments
July 31	Implementation: Committee on Trade and Development to report to the General Council with 'clear recommendations for a decision' on strengthening special and differential treatment provisions (page 5) Council for Trade in Goods to make recommendations to the General Council for 'appropriate action' on textiles-related concerns (page 7)
August 31	Dispute Settlement: Proposed deadline for submission of proposals in the DSU review (page 10)
December 31	Public Health: TRIPs Council to report to the General Council with an 'expeditious solution' to the problem of effectively using compulsory licensing encountered by Members lacking domestic manufacturing capacity (page 3)
December 31	Implementation: relevant WTO bodies to report to the Trade Negotiations Committee for 'appropriate action' on implementation issues for which the Ministerial Declaration provides no specific mandate.

**REGULAR MEETINGS OF WTO BODIES**

June 11	Working Group on Transfer of Technology
June 13-14	Committee on Trade and Environment
June 13 & 21	Council for Trade in Goods
June 24	Dispute Settlement Body
June 25-27	Council for Trade-related Aspects of Intellectual Property Rights
June 28	Committee on Agriculture
July 1	Committee on Trade and Development
July 1-2	Working Group on the Interaction between Trade and Competition Policy
July 3-5	Working Group on the Relationship between Trade and Investment
July 8-9	General Council
July 10	Committee on Trade-related Investment Measures
July 11-12	Working Group on Trade, Debt and Finance
July 15-19, 22	Council for Trade in Services
July 16	Sub-Committee on Least-developed Countries
July 22	Council for Trade in Goods
July 29	Dispute Settlement Body
July 31	General Council

**OTHER UPCOMING MEETINGS**

June 3-20 Geneva	90 <sup>th</sup> Session of the International Labour Conference Contact: ILO, Official Relations Branch, tel: (41-22) 799-7732, fax: 799-8944, e-mail: <a href="mailto:reloff@ilo.org">reloff@ilo.org</a>
June 10-13 Rome	World Food Summit: Five Years Later See <a href="http://www.fao.org/worldsummit">http://www.fao.org/worldsummit</a>
June 13-14 Montreal	Sustainable Justice 2002: Implementing International Sustainable Development Law Contact: CISDL, tel: (1-514) 581-4984, fax: (1-514) 581-8197, e-mail: <a href="mailto:conference@cisdl.org">conference@cisdl.org</a>
Jun. 30-5 Jul. Geneva	25 <sup>th</sup> Session of the Codex Alimentarius Commission Contact: Secretariat, fax: (39-065) 705-4593, e-mail: <a href="mailto:codex@fao.org">codex@fao.org</a>
July 14-19	World Civil Society Forum Contact: WCSF, fax: (41-22) 959-8851, e-mail: <a href="mailto:forum@mandint.org">forum@mandint.org</a>
Aug. 26-Sep. 4 Johannesburg	World Summit on Sustainable Development Contact: Andrei Vasilyev, UN/DESA, tel: (1-212) 963-5949, e-mail: <a href="mailto:vasilyev@un.org">vasilyev@un.org</a> , internet: <a href="http://www.johannesburgsummit.org/">http://www.johannesburgsummit.org/</a>