

A Debatable Outcome for Trade and Sustainable Development

The World Summit on Sustainable Development (WSSD) ended on 4 September amid serious doubts about the limits of summitry. Even if expectations for the event were low, most civil society organisations – and many governments – agreed that it was another missed opportunity to set the world on a more sustainable course.

Officially, government representatives attempted to put a positive spin on the conference outcome. In their political declaration, heads of state recognised that poverty eradication, changing consumption and production patterns, and protecting and managing the natural resource base for economic and social development were ‘overarching objectives of, and essential requirements for sustainable development’. However, the 78-page plan of implementation, meant to address those concerns in practice, lacks concrete targets and timeframes for achieving these goals. Mirroring the rifts separating governments on major issues ranging from biodiversity and energy to trade and finance, the implementation plan adds little to earlier international agreements, from which much of its language is borrowed.

Those taking a less pessimistic view pointed out that developing countries and civil society were successful in reinforcing development concerns in the final texts, reflected in particular in the equity-focus of the globalisation chapter, as well as the political declaration, which refers to the ‘deep fault line that divides human society between the rich and the poor and the ever-increasing gap between the developed and developing worlds’.

While the jury is still out on the overall significance of the Johannesburg Summit, there is little doubt that trade and globalisation played a far greater role than ten years ago in Rio. The following is a short summary of the outcome on trade-related issues (for environmental and other outcomes, see page 23).

Trade and the WTO

Some optimistic commentators saw the Summit outcomes as a strong signal to governments to integrate sustainable development considerations into WTO negotiations. Others, however, noted that the conference was unlikely to have a significant influence on the Doha Round as the implementation plan essentially repeated commitments made at the WTO’s Ministerial Conference in Doha. Nevertheless, with the recognition of trade as a ‘means’ of implementing a wider sustainable development objective, the trade agenda has now become more political and better integrated with the global agenda.

Most trade- and finance-related issues are addressed in the implementation plan’s section on ‘Means of Implementation’. Paragraph 91(a) calls on the WTO’s Committees on Trade and Environment, and Trade and Development, to promote the objective of ‘achieving an outcome [of the Doha negotiations] which benefits sustainable development’, a mandate issued less emphatically by WTO Members in the Doha Declaration, which instructs the two bodies to ‘identify and debate developmental and environmental aspects of the negotiations, in order to help achieve the objective of having sustainable development appropriately reflected.’ Other paragraphs stress the need for the WTO talks to focus on developing country concerns, address the deficiencies in the current WTO Agreements identified by developing countries as ‘implementation issues’, and to provide preferential treatment to least-developed countries and small and vulnerable economies. The plan also emphasises the need to reinvigorate the Agreements’ ‘special and differential treatment’ provisions. In addition, paragraph 95 unequivocally states that ‘unilateral actions to deal with environmental challenges outside the jurisdiction of the importing country should be avoided.’

The Johannesburg documents encourage efforts to ensure ‘open and transparent’ decision-making processes and institutional structures at the WTO, and urge the WTO to cooperate with United Nations agencies in implementing Agenda 21, as well as encourage international financial institutions to support countries engaged in regional trade and cooperation processes to strengthen their agreements with a view to achieving sustainable development.

Subsidies

While many developing countries had made clear that they regarded a commitment to eliminate agricultural subsidies the key contribution the Summit could make to sustainable development, the Johannesburg plan of implementation simply reiterates the intentionally ambiguous language of paragraph 13 of the Doha Ministerial Declaration.

In addition, the implementation plan contains a general provision to ‘support the completion of the work programme of the Doha Ministerial Declaration on subsidies so as to promote sustainable development and enhance the environment, and encourage reform of subsidies that have considerable negative effects on the environment and are incompatible with sustainable development’ (para. 91(b)).

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The Doha Declaration instructs Members to negotiate reductions in agricultural subsidies, and to 'clarify and improve' other WTO subsidies disciplines, but these mandates contain no references to promoting sustainable development or enhancing environmental protection. While the Johannesburg language could be used to guide the WTO's subsidy discussions in a direction that supports such goals, Members' different interpretations of 'sustainable development' may instead lead countries on the opposite ends of the debate to refer to it in order to reinforce their existing positions on subsidies in the WTO negotiations.

The implementation plan calls for a phase-out of 'harmful subsidies' related to energy 'to reflect their environmental impacts', as well as fisheries subsidies that 'contribute to illegal, unreported and unregulated fishing and to over-capacity' while completing the reform of fisheries subsidies in the WTO (see also page 23). This language goes beyond the mandate on fisheries subsidies agreed at Doha, which simply instructs WTO Members to begin negotiations with the 'aim to clarify and improve WTO disciplines on fisheries subsidies'. These negotiations are currently underway in the WTO Negotiating Group on Rules.

MEA-WTO Relationship

Language on the relationship between the Convention on Biological Diversity (CBD) and WTO rules had already been agreed at PrepCom IV in Bali when delegates settled on 'enhancing synergy and mutual supportiveness' between the CBD and agreements related to trade and intellectual property rights. Regarding the relationship between the multilateral trading system and multilateral environmental agreements (MEAs) more generally, the plan of implementation refers to the promotion of 'mutual supportiveness' (para. 92).

While not explicitly calling for trade measures taken pursuant to MEAs to be presumed consistent with WTO rules, as demanded by many civil society groups in the lead-up to the Summit, the plan recognises the 'importance of maintaining the integrity of both sets of instruments' (i.e. MEAs and the multilateral trading system). This phrase could provide a safeguard for the integrity of MEAs in the current negotiations at the WTO on clarifying the MEA-WTO relationship, counter-balancing the safeguard for WTO rules already included in the Doha Ministerial Declaration, which stipulates that the negotiations 'shall not add to or diminish the rights and obligations of Members under existing WTO agreements' (para. 31).

The Eco Equity Coalition of NGOs, including WWF, Consumers International, Danish 92 Group, Greenpeace, Oxfam International, Friends of the Earth International and ANPED, strongly criticised paragraph 92 for stating that the promotion of mutual supportiveness should be 'in support of the work programme agreed through the WTO', which they said provided 'a cowardly reinforcement of the WTO's dangerously unbalanced Doha mandate.' Others, however, noted that 'in support of' could also be interpreted more broadly as leaving room for action that was different or went beyond Doha, as well as an invitation for other institutions to promote mutual supportiveness in their work programmes.

Environmentally Friendly Goods and Services

The implementations plan calls on countries to support the creation and expansion of domestic and international markets 'for environmentally friendly goods and services, including organic products'. This paragraph might be of relevance in the ongoing negotiations at the WTO on the 'reduction or, as appropriate, elimination of tariff and non-tariff barriers to environmental goods and services', in particular as an input to shaping the interpretation of environmental goods and services to include organic products. It remains debatable, however, whether 'environmentally friendly' could be equated to 'environmental'. In addition, this call could be used at the WTO talks as leverage to bring criteria based on process and production methods (PPMs) to the definition of 'environmental goods and services'. Observers noted positively the approach based on incentives rather than sanctions emphasised on this issue.

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Can the GSP Survive the Doha Round?

By Juan C. Sánchez Arnau

The creation of the Generalised System of Preferences (GSP) was one of the few ideas which managed to take concrete shape as a result of the so-called 'international strategy for development' conceived by the United Nations (and especially by Raúl Prebisch) in the early Sixties. It was created in a context where the cold war dominated a large part of international relations and the non-aligned countries – increasingly aware of the massive inequality that existed between themselves and industrialised nations – tried in vain to find a niche for themselves in the international arena. Within this framework, the idea of an interrelated package of trade policy and financial measures, which could help bridge the gap between rich and poor nations, seemed worth pursuing to many of the international players on the scene.

Unfortunately, and perhaps inevitably, ideological differences and persisting protectionist tendencies fanned by lobby groups in industrialised countries, as well as diverging interests among developing countries, eventually reduced the potential scope of the General System of Preferences. The final result was a set of different national schemes, generally frugal and paltry, characterised by a common fear that, as a result of preferential treatment, developing countries (or at least the main ones) could become efficient competitors *vis-à-vis* domestic industries in developed countries. Six schemes are still applied today to imports from more than 160 developing countries, but they expire between the years 2004 and 2007.¹ The European Union's scheme alone covers around 63.6 percent of GSP trade, followed by those of Japan (16.7 percent), the United States (15.8 percent), Canada (2.3 percent) and Switzerland (1.5 percent), all of them with important differences in terms of preferential margins.²

An Uneven Picture

Despite the scheme's limitations, industrialised country imports from developing countries, which benefited from preferential treatment under the GSP, rose from US\$10.4 billion in 1976 to more than US\$102 billion in 1997 and even reached almost US\$109 billion in 1995. This amounts to 2.8 percent of total industrialised country imports ranging from 1.16 percent for Canada to 5.02 percent in the case of Japan.

Turning to the beneficiaries, 165 of the 187 developing countries and territories for which the United Nations keeps statistical records benefited from GSP-covered preferential treatment in 1997.³ The value of GSP trade was equivalent to 6.8 percent of their total exports and to 12 percent of their exports to industrialised nations. However, the available data shows that five main beneficiaries account for 59.7 percent of all GSP-covered trade, while ten main beneficiaries account for 76.3 percent of the total, and the top twenty cover almost ninety percent. China, Indonesia, India, Thailand, Brazil, Malaysia, the Republic of Korea, the Philippines, South Africa, Taiwan (China) and the Russian Federation appear as the main beneficiaries of the six GSP schemes reviewed. With US\$28.4 billion worth of trade benefiting from five of the six schemes, China accounts for just over 28 percent of all preferential trade originating from the GSP (China is excluded from the US scheme).

Several former centralised economies have also carved out a niche as beneficiaries of existing schemes. The most notable example is the Russian Federation, with more than US\$1.8 billion of GSP exports, with most going to the European Union, and also to the United States and Canada. This figure puts the Russian Federation twelfth among GSP beneficiaries. Russia is very closely followed by Vietnam, which sends more than US\$1.7 billion worth of GSP-covered exports to five of the six main preference-giving countries (it is not included among the beneficiaries of the United States scheme). The remaining important beneficiaries, former members of COMECON or the USSR, include the Ukraine, Poland, Hungary, the Czech Republic, Belarus and Romania.

Available data points to an important conclusion: benefits to least-developed countries have been limited despite the increased number of clauses introduced into the different schemes in their favour. In 1997, Bangladesh managed to export US\$930 million under the protection of these benefits, which is equivalent to 61.3 percent of all LDC exports within the framework of the different schemes. Only Nepal and Mauritania, with exports worth US\$210 million and US\$146 million respectively, managed to get past the one hundred million dollar mark that year.

Positive Effects

This picture does not imply, however, that the GSP has not played a positive role in the development of exports or the industrialisation of developing countries as a whole, and many of them individually. The positive aspects can be seen at four different levels.

The first relates to the discrimination that a large number of developing countries in Asia and Latin America, as well as South Africa, would have suffered as a result of the progress made in regional trade integration among industrialised nations and in other preferential schemes between them and certain developing countries. The successive expansions of the EEC/EU, the creation of EFTA and the constitution of the EEA; the Lomé Agreement and its preferences for the ACP countries; the agreements of association between the EEC and the Mediterranean countries; and more recently the different types of trade agreements drawn up between the EU and the countries of Eastern Europe and the Balkans, have created a network of preferential trade to which many developing countries have no access. On the other hand, with the creation of the NAFTA a sizeable area of free trade as emerged from which they are also excluded.

From this viewpoint, the GSP would appear to be a partial and restricted means of re-establishing a certain equality in this group's access to the large markets of industrialised nations. At the same time, the special treatment given within the EU's GSP scheme to least-developed countries also seeks to compensate them for disadvantages in the terms of access, bearing in mind that these particularly vulnerable countries have had to face unfair competition from the ACP countries in the EU market in the few sectors in which they are competitive.

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The second positive aspect of the GSP is linked to the anticipated breaking down of trade barriers in sensitive sectors. Even before the Agreement on Textiles or the reduction in barriers applied in the footwear and some other sensitive sectors were reached during the Uruguay Round, the GSP – albeit with major limitations and precautions – contributed towards the removal of some of the barriers that most affected developing countries efficient in those sectors.

The creation of trade over the years by the majority of the schemes is the third positive aspect of the GSP. We have already seen that this trade generation is limited even for countries that are among the major beneficiaries of the scheme. Nevertheless, there are a couple of positive points here. First, in most preference-giving countries, imports benefiting from preferential schemes grew more rapidly in the long-term than total imports: the yearly average growth rate for preferential imports of OECD countries (between 1976 and 1991) reached 14.5 percent, while total imports (i.e. from any source) to the OECD countries had increased to an annual rate of 8.9 percent. Aggregate imports from GSP-beneficiary countries in the same period had reached an annual rate of increase of 7.9 percent, but those that had benefited from preferential treatment had increased to a rate of 13.4 percent.

This seems to indicate that, absent the GSP, the growth rate of exports from the beneficiary countries would have been much lower during this prolonged period when many of them saw their exports taking off, even though the global effect of the GSP was less significant. The second positive note relates to the GSP's contribution to consolidating infant trends in trade. This would seem to emerge from the analysis carried out on the exports from countries such as Malaysia or Thailand, as well as opinions of individual exporters.

The fourth positive aspect of the GSP is less well-known but no less important. During the Tokyo Round, and more commonly during the Uruguay Round, some of the concessions negotiated bilaterally between developing countries and industrialised nations, especially in the agricultural sector, were implemented through the inclusion of certain products or the extension of quotas or ceilings in the GSP schemes of the latter. In view of the confidential nature of such negotiations and the tools used to make them a reality, such concessions are not reflected in the attached lists of the countries involved. These are thus referred to as 'non consolidated' concessions, normally only recorded on a 'memorandum of understanding' drawn up between the parties, which is difficult to invoke through the bodies of the WTO in cases of non-compliance or disputes. However, it is undeniable that, without the existence of the GSP, this type of concession would never have taken place.

Is there a future for the GSP?

The progressive erosion of the preferential margins of manufactures as a result of the reductions agreed within the context of GATT or more recently through the Information Technology Agreement in (ITA) in WTO, has reduced the original scope of the GSP. Some estimates from UNCTAD maintain that in 1997 the preferential margin of the GSP (i.e. for products benefiting from preferential treatment) had already been reduced to 2.5 percent in the EU; 2.4 percent in Japan; 2.0 percent in Canada and 1.8 percent

in the United States. Only in Norway was it held at 5 percent. These benefits are too insignificant to generate a deviation or creation of trade.

Therefore, if the GSP is to have a role to play in the future, it will have to be extended to cover those sectors, which are today excluded from preferential treatment. These are much more numerous than we would be led to believe. To start with, approximately 43.2 percent of dutiable industrialised country imports from developing countries were not eligible for GSP-covered preferential treatment in 1997/98. This is equivalent to some US\$157 billion per year.

Of this figure, US\$63,231.6 million correspond to EU imports from beneficiary countries; US\$53,447.6 million for Japan; US\$29,701.8 million for the United States and US\$1,575.3 million for Switzerland (Canada includes 100 percent of dutiable products in its GSP scheme). Furthermore, almost 50 percent of GSP-covered dutiable imports to the donor countries do not actually benefit from preferential treatment, due to the limitations of the schemes. This represents nearly another US\$105 billion worth of donor countries' imports, which could be covered by preferential treatment if the provisions of these schemes were more liberal.

The role played by agricultural products is very relevant in this set of figures. The inclusion of these products in the GSP has been practically taboo for certain industrialised nations (the EU, Japan, Switzerland, Norway). However, the tariff structure for agricultural products agreed at the Uruguay Round would facilitate their incorporation into the GSP, at least when dealing with special treatment in terms of tariff margins and as a first step towards the liberalisation of trade in a sector that cannot be passed over indefinitely. Another path to be explored in this sector, which would probably meet with less resistance in some industrialised nations, is the opening up of tariff schedules for organic or 'ecological' products, granting them a higher preferential margin or including them in the GSP, even though they do not qualify as conventional products.

The possibilities of expanding GSP cover can be seen very clearly from the data obtained from a joint study carried out by UNCTAD and the WTO into the tariff peaks and tariff escalation remaining after the tariff reductions of the Uruguay Round.⁴ Out of the 10,807 EU tariff headings, 1,263 have MFN customs duties higher than 12 percent, of which 1,221 correspond to agricultural commodities and processed agricultural products. Furthermore, tariffs of over 30 percent are applied in 346 cases. The remaining cases correspond to vehicles (15 tariff headings), chemical products, footwear and textiles.

Japan applies customs duties higher than 12 percent to 893 of its 8,971 tariff headings, of which 760 belong to the agricultural sector, 82 to footwear, 38 to textiles and 11 to clothing (only 53 headings, however, have duties higher than 30 percent). In the case of the United States, only 545 of the 10,085 tariff headings have customs duties higher than 12 percent, but the majority belong to the textiles and clothing sector (354) and only 138 to the agricultural sector. Duties higher than 30 percent are applied to 260 tariff headings.

The table on page 14, drawn from another UNCTAD study, gives an even clearer idea of the possibilities of expanding the GSP for beneficiary countries not included in the least-developed category.

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The GSP will only have a role in the future if it is extended to cover sectors now excluded from preferential treatment.

The GATS, Domestic Regulation and What It All Means

By Scott Gallacher

In the context of the international services trade, the World Trade Organisation is currently exploring whether any regulatory disciplines should be developed to ensure that measures relating to qualification procedures, technical standards and licensing requirements do not constitute unnecessary barriers to trade.

This work is being undertaken in the Working Party on Domestic Regulation (WPDR), pursuant to Article VI:4 of the General Agreement on Trade in Services (GATS). Unfortunately, its scope and nature have often been misunderstood by some commentators.

Background

Domestic regulations were one of a number of services areas that were left to be resolved by trade negotiators in the period after the Uruguay Round. The others included emergency safeguard measures, subsidies and government procurement. They are sometimes referred to as the 'outstanding framework issues'.

GATS Article VI:4 establishes a work programme aimed at developing any necessary disciplines to 'ensure that measures relating to qualification requirements and procedures, technical standards and licensing requirements do not constitute unnecessary barriers to trade in services'. The rationale is that non-transparent, unfair or unduly burdensome regulations can potentially undermine the value of market access commitments.

The Main Policy Issues

At present, the WPDR is grappling with four main policy issues:

- necessity;
- transparency;
- equivalence; and
- international standards.

Necessity: This concept is derived from the text of Article VI:4 itself which identifies one of the main objectives of the disciplines as being to ensure that domestic regulation measures 'do not constitute *unnecessary* barriers to trade in services' (emphasis added). The *Disciplines on Domestic Regulation in the Accountancy Sector*, elaborated in the first few years after the Uruguay Round, developed language to cover this:

'... Members shall ensure that [regulatory] measures are not more trade-restrictive than necessary to fulfil a legitimate objective.'²

Countries have been considering whether this language could be further developed in the context of the WPDR's work programme.

For example, the European Communities (EC) has argued that the concept could be strengthened and has referred in this regard to the concept of 'proportionality', which already has standing in the European Union. According to this principle, a measure should not be considered more trade-restrictive than necessary if it is proportionate to the objectives being pursued.³ Up until now, this idea has not been endorsed by many countries because it is somewhat unclear where the EC would like to go with it.

Transparency: GATS Article III establishes general rules on transparency for trade in services (eg publishing promptly all relevant measures of general application which pertain to or affect

the operation of the GATS) and the *Accountancy Disciplines* contain a number of provisions dealing with transparency.⁴ Countries are considering whether it would be desirable to develop additional rules on transparency.

Some, like the United States, regard transparency as an integral part of the WPDR's work programme. Indeed, the US has argued for the 'widest possible application of transparency commitments' in domestic regulation, including in the area of prior comment.⁵ This has not, however, found a receptive audience, particularly amongst developing and least-developed countries, because they believe it more appropriate to clarify the objectives of any new transparency disciplines and assess compliance with existing notification requirements before embarking on the development of additional obligations.

Equivalence and international standards: While the relevance of these concepts to the WPDR's work is still under discussion, some developing countries see them as paving the way for better market access into developed countries.

For example, disciplines on equivalence would help ensure that any tests imposed on foreign service suppliers in relation to the equivalence of foreign and domestic qualifications are not more trade-restrictive than necessary.

Is It All Worth It?

The discussions in recent years have usefully clarified a range of ideas and concepts in relation to necessity, transparency, equivalence and international standards, as well as some more generic issues (eg the scope of Article VI:4, administrative burden). But the discussions have been in the abstract, with no grounding in the practical reality.

This is, however, starting to change. The WPDR has agreed to adopt a more focussed approach to its work – an approach that will focus on the concrete, on examples of actual regulatory issues and problems.

The limited progress that has taken place on the Article VI:4 disciplines has been due to a number of reasons, ranging from a lack of ambition of some countries, particularly the US, to the fact that this work has not been regarded as being a priority when compared to one of the other outstanding framework issues that negotiators have been grappling with – namely, emergency safeguard measures.

The key reason for this lack of progress, however, is that most countries, particularly developing and least-developed, are still coming to grips with what they would like to achieve in terms of the Article VI:4 regulatory disciplines. Indeed, it would be fair to say that, for most of the WTO membership, expectations are quite low in terms of what can or should be achieved.

This is not to deny the importance (or significance) of the Article VI:4 mandate, but it is an acknowledgment that there are some inherent limitations on how far some of the work can go. This is particularly the case when it is recalled that the preambular

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language of the GATS explicitly recognises a country's right to regulate and pursue national policy objectives.

It is also clear that for those countries that have been able to develop a position on the Article VI:4 work programme their ambitions vary markedly. For example, in the initial stages of the services negotiations, US requests have said nothing about 'necessity' but have strongly urged trading partners to develop disciplines on 'transparency'. Australia and the EC, by contrast, have requested the development of disciplines that encompass both necessity and transparency, whilst other countries, particularly developing and least-developed, have tended to emphasise that equivalence and international standards should also be addressed.

Additionally, the US has also made it clear that it favours the development of disciplines in specific sectors, as opposed to the development of disciplines that would be horizontal in nature (eg apply across all sectors). In other words, the precedent of the Reference Paper on Regulatory Principles for Basic Telecommunications is something that the US would like to see replicated in other selected sectors.

The Reference Paper was used in the post-Uruguay Round negotiations on basic telecom services (1994-1997) resulting in the Annex on Telecommunications, which later became an integral part of the GATS text of 1994. As trade negotiators did not consider the Telecom Annex to be explicit enough to ensure access for foreign telecoms companies, they used the Reference Paper as a tool to determine what additional commitments to undertake in areas such as competition safeguards, interconnection guarantees, transparent licensing processes, and the independence of regulators. Although the Reference Paper has no legally binding nature, created new commitments for those Members, which inscribed it in their schedules on basic telecoms.

There are also some countries who argue that Article VI:4 does not prejudice where the discussions might end up because its language is not mandatory in the sense of setting out the end game. It only refers to the development of 'any necessary disciplines' – wording which indicates that countries could agree that disciplines will not actually be required.

On the latter point, this will not mean that there will be no disciplines for certain regulatory practices if countries cannot agree on the development of Article VI:4 disciplines because Article VI:5 already contains some general language which applies until such time as more specific disciplines are developed under Article VI:4. And this language is aimed at ensuring that a country does not apply licensing and qualification requirements or technical standards that nullify or impair its specific commitments. It should, however, be noted that the Article VI:5 disciplines only apply to measures in sectors which a country has undertaken specific commitments.

The Road Ahead

As the WPDR continues its work it will be important for it to continue to actively encourage all countries, particularly developing and least-developed, to engage more substantively in a review of actual regulatory issues and problems that might exist. It will only be with a better appreciation of these issues and problems that countries will be able to fully consider the need for any disciplines. And it will only be at that time that countries will be able to fully determine whether, amongst other things:

- the language of Article VI:5 needs to be made more precise;
- the existing transparency requirements in Article III need to be reinforced;
- stronger disciplines will unduly curtail national regulatory freedom; and
- the disciplines should apply to all sectors or be limited to a few.

As countries work through these issues, it will be vital for *all* countries to be comfortable with where discussions are heading. It would be counter-productive and unacceptable for some countries to get ahead of the field and start contemplating the imposition of regulatory disciplines that would go beyond the technical capacity of most of the countries participating in the discussions.

Horizontal Disciplines Preferred

On this, it is my view that the Article VI:4 work should be conducted on a horizontal basis, as opposed to a sectoral basis for four essential reasons.

- it would economise on negotiating effort – something that will be particularly important for developing and least-developed countries as the negotiations under the Doha Development Agenda start to take shape. To contemplate a raft of negotiations on separate sectors would simply be beyond the technical capacity of most countries;
- it would avoid the possibility of there being the development of a range of different regulatory disciplines for different sectors – a scenario that would no doubt add to the administrative burden of developing and least-developed countries, as well as make the GATS more complex;
- it would reduce the possibility that the work of the WPDR would be captured by sectoral interest groups or weighted in favour of those sectors that are the more significant (or acceptable) for the big players (eg the EC and the US); and
- the end results would be more general in nature, which would mean that the disciplines would not be as prescriptive as might be the case for any sector specific disciplines. This would assist developing and least-developed countries in implementing the disciplines.

Conclusion

Article VI:4 is designed to address the fact that non-transparent, unfair or unduly burdensome regulations can potentially undermine the value of market access commitments. The work programme is slowly, but surely building up a momentum. Thankfully, it is being progressed in such a way so as to ensure that that *all* countries feel comfortable about it. This is to be welcomed and encouraged, but countries and commentators should keep a close watch on developments so as ensure that the interests of the few do not become the obligations of the many.

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ENDNOTES

- ¹ S/L/65, dated 17 December 1998, para 2.
- ² S/WPDR/W/14, dated 1 May 2001.
- ³ See, for example, S/L/65, dated 17 December 1998, paras 3-7.
- ⁴ S/WPDR/W/4, dated 3 May 2000, paras 10-11.

Europe's Services Negotiating Proposals: Requesting the Limit

By Clare Joy

On the 4 July 2002, as part of ongoing negotiations on the General Agreement on Trade in Services (GATS), the European Union submitted its initial negotiating requests to 109 other World Trade Organisation (WTO) Members. The EU insists that the requests 'have been formulated in such a way as to ensure the liberalisation of trade in services contributes to sustainable development'¹ However, information gleaned from leaked versions of 29 draft European Commission negotiating proposals in April 2002, raise considerable doubts about this claim.

Despite growing public and parliamentary concern, the EU's current negotiating requests remain secret. Yet unofficial sources confirm that the EU's current proposals have not substantially changed since the April leaks. As well as wanting to expand the GATS to cover new sectors (energy and water distribution), the EU is demanding market access it did not achieve in the last set of negotiations. It is also targeting for removal a range of regulatory conditions that many developing countries chose to maintain in the original services negotiations. For the EU 'progressive liberalisation'² seems to mean 'aggressive liberalisation'.

As Members consider the tabled requests in preparation for the initial March 2003 response date, it is time to consider the very nature of GATS, services liberalisation and the EU's 'commitment' to sustainable development.

GATS and Government Ability to Regulate Investors

Since the launch of the current round of GATS negotiations in February 2000, much of the civil society spotlight has been on the agreement's coverage of basic service sectors, such as the provision of health, education and sanitation. This concern has highlighted the potential conflict between a country's unlimited GATS commitments and their ability to ensure universal access of these services by all citizens. With the exception of an education request to the United States, initial EU proposals do not contain education or health. However, there is major concern about the EU's comprehensive requests (including two so-called 'reclassification proposals') in energy services and environmental services – the latter including water for human use.

Besides the above mentioned basic services, the GATS also covers non-basic sectors such as retail, tourism and construction services. Less mentioned in debates is the restraining impact that a country's increased level of GATS specific commitments can have on overall economic development policy, in particular that affecting Foreign Direct Investment (FDI). The GATS covers FDI via 'Mode 3', the so-called 'commercial presence' mode of delivering services. A GATS commitment in this mode is designed to limit the regulations a government may impose on foreign investors in a particular service sector. By affecting domestic regulatory frameworks for investment, the GATS intrudes into much needed domestic policies central to economic development.

The current EU request proposals offer examples of how increasing commitment to the GATS can have such effects. By accepting full commitments under GATS Article XVII, National Treatment, a country may lose the ability to discriminate between local and

foreign companies. Yet such regulations are designed to empower local industries or tie investors to the local economy. Entering into full commitments under the GATS Market Access provisions (Article XVI) will affect government measures which reserve certain portions of the market for domestic operators such as requirements that foreign companies form joint ventures. These measures are crucial when protecting fragile industries and building up local economic capacity.

In light of the major concerns emerging about the impact that unlimited GATS commitments could have development policy options, it is hard to see the benefits for developing countries in acceding to current EU negotiating requests.

It is hard to see the benefits for developing countries in acceding to the EU's negotiating requests.

General EU requests for unrestricted market access. The European Commission has stated that, 'for the EC, the principal aim of the services negotiations is to improve market access for European services exporters.' Unsurprisingly, therefore, their specific GATS negotiating objective is summed up as 'both seeking improved commitments and clarification of existing commitments'.³

At the end of the Uruguay Round, many Members were careful not to make specific commitments in a wide range of service sectors from health and education to distribution (including retail) and tourism. The leaked draft of initial EC requests revealed that increasing other Members retail commitments (i.e. that they schedule 'none' under market access and national treatment), is a core EU negotiating objective. This is perhaps unsurprising given that three of the world's largest retail multinationals are European (Carrefour, Tesco, Royal Ahold).

Thailand, one country targeted in the EC requests, offers an instructive example of why the EC's request for full liberalisation under GATS should be questioned. A recent Communication from Thailand on Assessment of Trade in Services⁴ describes how the retail trade in Thailand (as is the case in many other countries), has gradually been liberalised since the late 1980s. Yet to date, Thailand has not locked these domestic policy changes to legally binding GATS commitments. The submission, while supporting liberalisation as an overall model, notes the negative impact that opening up the Thai retail market has had on small traditional retail shops and local employment. It acknowledges the latter as 'a very hot potato for the current administration' which has led the Government to consider regulating the retail sector more tightly than before. As is the case in many European countries, regulating can mean limiting market access for new investors by taking into account considerations such as the number of existing stores, population density, geographic spread, impact on traffic conditions and creation of new employment.

If Thailand had made retail commitments in GATS, such legislation could be deemed trade restrictive and thus 'illegal' - even if the measures in question do not contain any explicit element of discrimination against trading partners. Fortunately, in the case of Thailand, the government is able to implement such policy changes. The GATS restrictions on regulation, and the fact that GATS

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Europe's Services Negotiating Proposals, continued from page 7

commitments are effectively irreversible, are incompatible with the kind of iterative policy process that countries such as Thailand are constantly going through.

Retail trade is one of the many examples highlighting the need to exercise caution when considering the EU's GATS proposals. As with other service sectors covered by the GATS agreement, there is no evidence that the liberalisation enshrined in the GATS provisions delivers balanced economic or social benefits. This is particularly pertinent given the more recent nature of global trade in areas such as retailing. This lack of evidence only further highlights the need for governments to maintain their policy flexibility, to be able to respond to and control the market accordingly as problems arise.

Targeting specific limitations

In the GATS commitments negotiated by Members during the Uruguay Round, many listed 'limitations' (or 'conditionalities') on their GATS commitments which could oblige companies to, for example, work through a local counterpart when operating in the country concerned. Well defined limitations grant governments the right to put in place certain otherwise prohibited policies, for example:

- To limit the amount of local borrowing by companies with more than 25 per cent non-resident shareholding (South Africa).
- To subject foreign corporate take-overs to government approval (Malaysia).
- To place strict rules on multinationals, obliging them to form joint ventures when they set up inside the country (Indonesia).⁵
- To regulate profit repatriation, for example through procedures that enable the central bank to restrict transfer of funds abroad by foreign companies (Brazil).
- To limit foreign ownership of land along coastlines (Mexico and Chile).

Such restrictions in a Member's schedule of GATS commitments guarantees their 'policy space' to effectively regulate foreign investors to deliver development benefits. Yet, the EU's negotiating requests explicitly seek the removal of these limitations. Aggressive, instead of progressive, liberalisation.

A common EU defence of its negotiating approach is that their proposals merely seek to bring Members GATS commitments in line with current levels of market opening. For example, in May 2001, the Indian Government introduced a new policy which allows 100 percent foreign participation in the hotel industry. However, the Indian GATS schedule under 'Tourism and Travel Related Services - Hotels and Restaurants', still obliges local incorporation with a foreign equity ceiling of 51%. The EC now requests that the GATS limitation be removed.

This EU defence fails to acknowledge the 'binding' and 'locked-in' nature of GATS commitments. GATS is a binding trade treaty, with the WTO's legal dispute procedures to enforce its rules. Yet government domestic policies are subject to change over time as different stakeholders raise concerns, new evidence emerges about impacts and government's conduct their own policy reviews. This is a key tenet of sensible policy-making and democratic decision making. To use the previous example, in five years time, the Indian Government may choose to review its 100 percent foreign participation policy in the light of new evidence and/or public concern. A binding GATS commitment would make this much harder, if not impossible.

Beyond Limitations

Effective regulation of the services economy, as broadly as it is defined by the GATS, demands more than the scheduling of limitations when specific GATS commitments are made. Achieving universal access to services, such as banking and water delivery, is a core function for all governments. There is currently no evidence that this is achieved through market mechanisms. In the financial service sector for example, a recent World Bank report, notes that evidence on the relationship between competitive market structures and wider access to services is mixed. Evidence shows that 'financial services liberalisation in some countries has had an adverse effect on access to credit for rural areas and the poor.'⁶

In theory, when scheduling GATS commitments for financial services, a Member could list a limitation which allows regulators to oblige investors to set up facilities in rural as well as urban areas. Even if a Member had the foresight to schedule such a requirement, the problems associated with the removal of limitations in future negotiations, have been mentioned already. However, there is a more fundamental problem. The WTO itself noted in March 2001 that 'a requirement that foreign banks wishing to establish in the country should set up branches in every village, for example, would ... be perfectly legitimate, though *perhaps self-defeating* [emphasis added]'.⁷ Such a restriction would be considered self-defeating because when faced with such a requirement in the current investment climate, companies would be unlikely to invest.

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Challenges in WTO Negotiations

Concern about the regulatory impact of GATS goes beyond the current specific commitments, and is linked to the design of new rules and disciplines in the ongoing negotiations. As well as increasing levels of specific GATS commitments, Members are currently negotiating new rules in the areas of Subsidies (Article XV), Government Procurement (Article XVIII) and Domestic Regulation (Article VI.4).

In particular, Members have recently discussed a proposed timeframe which includes coming up with initial elements of Domestic Regulation disciplines by March 2003. This is a tight timetable and raises the stakes. For a start, Members have not yet comprehensively analysed whether or not these new disciplines will be at all beneficial, in particular for developing countries. Already, a central concern is the proposal to apply a so-called 'necessity test' to non-discriminatory domestic regulations. If in the future a necessity test would be applied to all service sectors in the form of general disciplines it would significantly constrain governments regulatory prerogatives. These disciplines are set to cover regulations relating to qualification requirements, technical standards and licensing requirements. The potentially far-reaching consequences for domestic policy-making are yet to be realised. A necessity test in future Domestic Regulation disciplines would effectively place the WTO dispute settlement body in a position similar to a global regulatory review agency, second-guessing domestic regulatory trade-offs in services regulations *regardless of whether there is any element of protectionism*.⁹ Given the questions that this raises about the role of WTO tribunals, and this proposed extension as judge and jury over domestic regulatory prerogatives, in services legislation, there are serious concerns about the designing of such rules.

Fate of S&D Review Still Unclear, Could Become Part of Larger Negotiations

As expected, WTO Members missed the 31 July deadline to forward 'clear recommendations' to the General Council on ways to strengthen special and differential treatment (S&D) provisions in WTO Agreements. The General Council agreed to extend the S&D review until 31 December 2002.

Members have disagreed from the start on whether the S&D mandate from Doha actually amounts to negotiations, and how any possible recommendations would be acted upon. Many developing countries have deplored industrialised countries' lack of political will to engage in the review, stressing that they have no intention to let strengthening ineffective provisions become a bargaining chip for concessions on agenda items which they do not feel will benefit them, such as environment, investment or competition rules.

However, there are signs that industrialised countries will attempt to factor S&D amendments into the many decisions to be taken at the WTO's 5th Ministerial Conference (and thus tie them to decisions in more contentious areas). Speaking to the WTO's Trade Negotiations Committee in July, EC Director General for Trade Peter Carl said that he expected this matter to 'be an important element in the ensemble of decisions to be taken at Cancun.'

Developing countries have warned that a lack of meaningful progress on S&D will result in a slowdown of all negotiating tracks of interest to developed countries, and most likely make it impossible to complete the Doha Round by the 1 January 2005 deadline.

Only Two Proposals Conditionally Endorsed So Far

Far from presenting 'clear recommendations for a decision', the report of the Committee on Trade and Development (CTD) to the General Council (TN/CTD/3) reflects the deep rifts that have characterised the S&D review since it started in March 2002.¹

Very few items from the many proposals put forward by developing countries received explicit mention in the report, and those that did were wrapped in ambiguity. The only proposed element to receive outright support was that of a monitoring mechanism, although this was tempered by the fact that Members remained far apart on the functions and structure that such a mechanism would have. According to the report, Members will elaborate at future special sessions of the CTD 'the functions, structure, and terms of reference' for the General Council's approval.

The Africa Group's proposal to include some criteria for 'technical and financial assistance and training' in future technical assistance plans also received qualified support (TN/CTD/W/3/Rev.2). Further submissions on the topic are to be tabled at the CTD's regular sessions, but they will be 'without prejudice to further discussions of the relevant Annexes in the Special Sessions of the CTD.'

Switzerland Tables Plan for Organisation of Future Work

When this issue of Bridges went to press, the Committee on Trade and Development (CTD) was meeting informally to see how to take the review further. With almost 90 proposals on the table, and only three formal meetings scheduled between October and December, Members will be hard-pressed to look at which issues must be prioritised and which may perhaps have to be left until later in the process (perhaps even until 2003).

Responding to these constraints, Switzerland has tabled a proposal for a future work plan (TN/CTD/W/14), grouping discussions on existing S&D proposals in five categories:

- Where the Doha Work Programme addresses the issue specifically as a negotiating item, the proposal should be directed to the negotiating group for discussion as part of the negotiating agenda. This would concern about 35 proposals in agriculture, services, rules (anti-dumping, subsidies and regional trade agreements), market access and dispute settlement.
- A cluster on proposals for better trade opportunities for developing countries, to be discussed by the CTD in Special Session.

This concerns some ten proposals and could include those regarding the Enabling Clause and import licensing, but not those relating to the future of the GSP, which would 'require a separate agenda'.

- Another cluster would group roughly 15 proposals for safeguarding developmental policies, i.e. those related to GATT Article XVIII, Trade-Related Investment Measures and waivers from general trade obligations and from obligations under specific Agreements. 'As some of the reforms pursued could alter substantially the present rule system, it might become necessary, when discussions are well advanced, to seek guidance from the WTO Ministerial Conference.'
- Proposals to ensure the availability of technical assistance and flexible transition periods. This might concern close to 20 proposals, such as those related to SPS measures, Technical Barriers to Trade and Customs Valuation.
- Finally, a few technical proposals remain that would not require changes to existing trade rules. This concerns procedures of notification and consultation (including consultations on Balance-of-Payments Measures).

Controversial Elements

Some developing countries are likely to strongly oppose sending S&D proposals to the relevant committees – as proposed in the first bullet point – due to fears that they would *de facto* become subsumed in the larger negotiations and thus prey to tradeoffs, as well as a much longer timeframe. The suggestion to seek guidance from the WTO Ministerial Conference for certain other proposals could well run into trouble for similar reasons.

In addition, the Swiss paper argues that the CTD should 'reconsider and simplify the various existing and requested categories [of countries entitled to different benefits] and agree on a transparent differentiation among developing countries based upon per capita income and trade participation. [...] Members could move up the scale as their capacity improves, implying more specific graduation criteria.' Some developing countries oppose the concept of 'graduation', which leads to the loss of special treatment benefits.

The next issue of Bridges will report in detail on the September special session, where the Swiss proposal was discussed.

The CTD's next formal special session will take place on 7 October. Informal meetings are currently scheduled for 23 October and 13 November, and more formals on 25 November and 2-3 December.

ENDNOTE

¹ For previous Bridges reports on the S&D review, see the 2002 issues of March/April (page 11); May (page 5) and June (page 13).

Little New on Health in TRIPs Council, but Traditional Knowledge Gets a Look from a Fresh Angle

The Council for Trade-related Aspects of Intellectual Property Rights (TRIPs) at its meetings on 24-25 July and 17-19 September continued its discussions on how to deal with the problem that Members with insufficient or no manufacturing capacities in the pharmaceutical sector could face in making effective use of compulsory licensing, as mandated by paragraph 6 of the Doha Declaration on the TRIPs Agreement and Public Health. Countries mainly elaborated on previously-made proposals, with no major shifts in positions expected until negotiations begin later this year.

The debate on extending the higher level of protection for geographical indications to products other than wines and spirits also remains deadlocked, which, as one trade source speculated, was unlikely to be broken in the TRIPs Council, but would require some bargaining in the agriculture negotiations (see page 11).

New Proposals on Leakage Prevention and Eligibility Criteria

Regarding the debate on insufficient manufacturing capacity, TRIPs Council Chair, Ambassador Eduardo Pérez Motta (Mexico), noted that the Council was no further than it had been before the summer break and that more flexibility was needed on all sides. Members maintained their positions on the possible legal mechanisms (see Bridges Vol.6 No.5, page 12), but showed a general willingness to consider alternatives. Several Members raised the possibility of combining the different proposals. The EU, for instance, which had previously advocated amending Article 31, would now also like to see a waiver of the obligation in Art. 31(f) until the amendment was finalised, approved at the Ministerial Conference and ratified by Members. Some African countries that had focused mainly on Article 31 as part of a comprehensive solution suggested both interpreting Article 30 (as proposed by the Brazil-led group of developing countries) and amending Article 31.

Switzerland put forward a proposal outlining various conditions on exports covered by paragraph 6. In particular, Switzerland proposed that manufacturers should only be allowed to produce the quantity needed by the recipient country, all of which should be exported to that country. Measures should be implemented to prevent diversion away from, as well within, the recipient country, with the responsibility resting on the exporting and importing countries. Such measures could include clear labelling, colouring or shape of the packaging.

Regarding eligibility for importation, Switzerland proposed a general exemption for least-developed countries, while the rest of the membership, in particular developing countries, should assess their own eligibility on a case-by-case basis using objective criteria developed by the TRIPs Council. Developing countries generally advocated that the solution should apply to any country with insufficient manufacturing capacity. Others said they would like to set some sort of criteria, such as development, income or size, to determine eligibility.

WSSD Outcomes Cited in Support of Moving on 27.3(b) and TK

In the Council's discussions on TRIPs Article 27.3(b) (patentability of life forms), the relationship between the TRIPs Agreement, the Convention on Biological Diversity (CBD) and traditional knowledge (TK), WTO Members addressed many of the points raised in a 'concept paper' submitted by the EU. Some Members, including Brazil and Colombia on behalf of the Andean countries, cited the recent decision at the World Summit on Sustainable

Development (WSSD) to negotiate an international regime on benefit-sharing as reflecting the high priority that should be given to these issues (see page 23).

In its paper, the EU signalled its willingness to discuss the inclusion of disclosure requirements in patent applications, as repeatedly called for by a number of developing countries and most recently reiterated in the report of the UK Commission on Intellectual Property Rights (see page 19). To this end, the EU proposed the inclusion of a 'self-standing' requirement to include information on the geographic origin of the genetic resources and traditional knowledge. Such a requirement, however, should not constitute an additional formal or substantial patentability criterion. Thus, failure to disclose should lie outside the patent law, but should, for instance, be regulated by civil or administrative law.

The next regular session of the TRIPs Council session will be held on 25-27 November. Issues related to paragraph 6 will also be addressed at an informal meeting on 17 October as well as informal consultations in an effort to reach a final decision by the November TRIPs Council meeting. An informal meeting has also been scheduled for 10 November to discuss GI extensions.

Change of Guards at the WTO

On 1 September 2002, Supachai Panitchpakdi took over as new Director-General of the WTO for a three-year term. Dr Supachai, who is the first WTO DG to come from a developing country, was most recently Thailand's Deputy Premier and Minister of Trade.

Taking up his new position, Dr Supachai said one of his most urgent priorities would be to 'see to it that we move into the phase of substantive negotiation under the Doha Development Agenda', promising to lend 'all his assistance to guarantee that progress helps us to meet all the deadlines'.

He also outlined four management priorities for the WTO. The first was legal affairs, where he saw a need for a more intensive use of the pre-panel consultation process to 'prevent the conflicts from becoming too costly and too time-consuming to solve'. Second was strengthening the WTO Secretariat, the staff and 'also the trading system'. Third was technical assistance, which Dr Supachai said should be 'continued beyond the Doha Development Agenda'. And finally, 'in order to be able to make real use of trade for sustainable development', policy coherence should be strengthened between the WTO and relevant United Nations agencies and the Bretton Woods institutions.

Dr Supachai has appointed four Deputy Director-Generals to oversee these issue areas:

- Roderick Abbott, (UK) who until recently was deputy Director-General of the European Commission's Trade Directorate and former head of the EU delegation in Geneva
- Aly Azad Rana (Kenya), a former Ambassador/Permanent Representative to the UN in Geneva and currently a senior representative at the WTO and the United Nations
- Francisco Thompson-Flôres (Brazil), a former chief trade negotiator during the creation of MERCOSUR and currently Brazil's ambassador to Uruguay and
- Rufus H. Yerxa (US), former deputy US Trade Representative and former permanent representative to the GATT.

Split on GIS Overshadows Market Access Talks at WTO'S Agriculture Committee

The Committee on Agriculture met in early September to continue talks on market access, as well as to prepare for the negotiating session on domestic support scheduled for the end of this month. Summing up progress so far, Chair Stuart Harbinson said that 'lack of specificity in some areas' might make him unable to deliver a first draft of the modalities that Members will use for further farm trade liberalisation, as scheduled by the end of February 2003. The EU and Switzerland added to doubts about keeping the deadline when they indicated that they would only move in the agriculture talks if 'sufficient progress' was made on highly contentious issues such as the precautionary principle, mandatory labelling and expanding the protection of geographical indication (GIs). These subjects are currently being discussed (and/or negotiated upon) in various WTO Committees.

Market Access

Precaution, labelling and geographical indications appear on the agricultural negotiations menu.

Following up last July's 'intersessional consultations' on market access, Members at the 2-3 September informal special session turned to the topics of special agricultural safeguards (SSG – a mechanism that protects some, mostly developed, countries from sudden surges in imports of certain agricultural products); state trading enterprises (STEs); and 'other market access issues'. Many developing countries indicated that they wanted to address the technicalities leftover from the Uruguay Round that prevented them from using the SSG. The 18-member Cairns Group of agricultural exporting nations said that it would be willing to accept a new safeguard mechanism for developing countries under agreed circumstances, but reiterated its call for eliminating the SSG for developed countries. Japan, Korea and Switzerland proposed a new and additional safeguard for perishable and seasonal products, a suggestion that was clearly rejected by some Members, including those from the Cairns Group.

'Alternative Modality' Suggested by the Philippines

The Philippines proposed interlinking tariff reductions with reductions in export subsidies and domestic support, as well as setting up a 'responsive mechanism that penalises the persistence of trade distorting support'. Pursuing a two-stage approach on tariff reductions, the Philippines suggested bringing down tariff peaks and tariff escalation (the existence of higher tariff levels on certain products) to a harmonised level within an initial three-year phase, with further reductions from this level during a second three-year period. However, developing countries would only be required to enter the second phase of reductions if all developed countries had eliminated export subsidies and 'substantially reduced their production- and trade- distorting support'. Another element of the proposal was a detailed formula for additional duties that would be available to developing countries importing products from developed countries that provided 'trade-distorting export competition and domestic support measures' to such products. This latter provision is based on a proposal from last October on a special and differential countervailing measure.

Where Should Non-trade Concerns Be Addressed?

The European Union and Switzerland threw a major spoke in the modalities talks by insisting that non-trade concerns (NTCs) such as food safety and consumer information needed to be duly taken into account in defining the negotiating framework. Switzerland went as far as to say that 'only a minimum result appears to be

attainable in the agricultural negotiations' if Members failed to reach agreement on these related concerns in other WTO Committees. The EU called for an interpretation of the Agreement on Agriculture that would allow the use of precautionary measures instead of seeking an amendment of the Sanitary and Phytosanitary Agreement (SPS) or relying on dispute rulings to address the issue. The EU suggested that the agricultural negotiations should clarify under which circumstances precautionary measures could be imposed. Norway, Korea and Japan supported this proposal, while others, such as the US, Cairns Group members and China said that precaution was an SPS issue. The latter also insisted that labelling was to be discussed at the Technical Barriers to Trade Committee, while the EU, Norway and Japan maintained that mandatory labelling should be allowed under WTO rules as it was needed to provide information for consumers, and to cover issues like production methods (e.g. 'organic' products) and product tracing.

Geographical Indications

The EU also called for negotiating – as a direct market access issue – the extension of the level of protection of geographical indications (GIs) in the agriculture talks, with the aim to include an index of additionally protected agricultural GIs in the Agreement on Agriculture. While agreeing that the 'issue also entails a market access dimension', Switzerland indicated that it would prefer to leave this non-trade concern as part of the ongoing discussions in the Council for Trade-related Intellectual Property Rights (TRIPs) as long as progress was made there. Fellow 'Friends of Multifunctionality' Norway, Japan and Korea remained silent on the GI issue, while Thailand and Bolivia were reported as giving some support for extending GI protection. Nevertheless, the latter agreed with Switzerland that this should rather be handled at the TRIPs Council. At the TRIPs Council, Members are currently at odds over whether Article 18 of the Doha Declaration contains a negotiating mandate on GI extension or not (see page 10).

Domestic Support: Green Box Spending

Members started to exchange views on the five key domestic support issues identified by the Chair: the Green Box, Article 6.2 (so-called Special and Differential Treatment Box), the Blue Box, the Amber Box and 'other domestic support issues'. Mainly addressing the Green Box, Members discussed, *inter alia*, whether its eligibility criteria needed to be revised and whether a maximum level for each Member's spending under the Green Box should be established. While it was reported that China and the Philippines supported the idea of capping Green Box spending, the EU, Switzerland and Japan suggested expanding it so that non-trade objectives such as animal welfare and rural development could be better pursued. Nevertheless, according to a European delegate, there was general consensus among Members that the 'Green Box remains green.' Thailand, on the other hand, proposed to revise the general requirement that Green Box subsidies have 'no, or at most minimally trade-distorting effects' by removing the words 'or at most minimally'. A developed country source noted, however, that such a change was not likely in the current agriculture talks.

The discussions on domestic support were to continue in an informal session on 23-25 September and a formal special session on 27 September. A mid-November meeting will provide Members with the opportunity to address so-called inter-pillar issues.

Developing Countries Seek to the Level Playing Field through Reform of Dispute Settlement Rules

Developing countries are participating actively in negotiations to 'improve and clarify' the WTO's Dispute Settlement Understanding (DSU). Their major goal is to introduce alternatives to current rules, which they perceive as inadequate to the equitable settling of disputes between Members of unequal economic weight. The negotiations must be completed by May 2003.

At a 10-11 September negotiating session of the Dispute Settlement Body (DSB), proposals were tabled by the Africa Group and jointly by India, Cuba, Malaysia and Sri Lanka. Members also discussed a US proposal aimed at achieving a 'more open and transparent process' by opening dispute settlement procedures to the public, providing timely access to submissions and reports, as well as formalising procedures for dealing with *amicus curiae* (friend of the court) briefs. The submission met stiff resistance from many developing country Members.

Developing Country Proposals

In its joint proposal (still restricted), the Africa Group noted that the dispute settlement mechanism was 'complicated and overly expensive' and that its enforcement rules had a developed country-bias. The Group suggested setting up a permanent fund financed by Members to enable developing countries to better engage in dispute settlement proceedings. On enforcement, African Members proposed introducing retrospective remedies providing compensation even if a measure was withdrawn prior to the establishment of a panel. The Group also suggested that affected developing countries should have the right to retaliate collectively against a developed country maintaining an illegal trade measure.

India, Cuba, Malaysia and Sri Lanka tabled a proposal (not derestricted) asking for more flexibility to be provided to developing countries retaliating against a developed country in order to level out 'tremendous imbalances' in trade relations between developed and developing countries. Additionally, the four proposed that developing countries be reimbursed for incurred legal costs in the event of a successful challenge to a developed country measure or if they fend off a case against them initiated by a developed country. Jamaica announced that it would put forward a detailed proposal on DSU review.

In the context of the special and differential treatment review underway in the Committee on Trade and Development, India has proposed, *inter alia*, that DSU rules should make 'special attention to the particular concerns of developing countries' mandatory in dispute settlement proceedings involving them, as well as obliging panels to rule on whether this obligation was adequately fulfilled by the developed country party. These and other proposals have scarcely been discussed in the CTD, where developed countries have urged Members to take DSU-related concerns to the Dispute Settlement Body negotiations (Bridges Year 6 No.4, page 6).

US Proposal

The US proposal (TN/DS/W/13) argued that many key international dispute settlement fora, such as the International Court of Justice, were open to the public, and that the WTO should also allow public observers in all substantive panel, Appellate Body (AB) and arbitration meetings, although 'those portions dealing with confidential information' should be excluded from this rule. In addition, the US said that all parties' submissions and statements not containing confidential information should be made public,

and that final panel reports should be immediately available to all Members and the general public once they had been issued to the parties to the dispute. Finally, the US suggested setting up 'guideline procedures for handling *amicus curiae* submissions', while taking into account 'procedural concerns' that have been voiced by Members, dispute settlement panels and the AB.

Efforts to institutionalise the WTO's treatment of *amicus* briefs have traditionally drawn developing country opposition. Responding to the US proposal, Brazil, Chile, India, Indonesia, Mexico, Malaysia, the Philippines and Uruguay reiterated their chief argument that it would undermine the intergovernmental character of the WTO, and that acceptance of *amicus* briefs would provide third parties with more rights in dispute settlement proceedings than Members themselves. Malaysia said that opening dispute settlement meetings to the public would go beyond the Doha mandate, and India cautioned that such practice would result in 'miscarriages of justice' through 'trials by media'. Mexico reproached the US for attempting to 'multilateralise' an issue that should be addressed at the domestic level.

The EU, which made a proposal along similar lines in March (TN/DS/W/1, see Bridges Year 6 No.4, page 6), supported the US submission, but other European countries such as Norway and Switzerland were more hesitant regarding both opening dispute settlement meetings and formalising *amicus* brief submissions. Japan admitted that it was 'still ambivalent' on certain external transparency issues, and went on to stress that it attached great importance to 'what kind of realistic consensus we could achieve by May next year' when the DSU negotiations are to be concluded.

The next DSU special session is scheduled for 14 October.

Brazil to Challenge EU, US Agriculture Subsidies

Brazil is poised to challenge the EU's subsidy regime for sugar, as well as the increase of US subsidies for cotton at the WTO. Brazil alleges that the EU provides a trade-distorting subsidy through government support that allows domestic producers to maintain artificially sugar high prices in EU markets, which are also protected against imports by 140 percent tariffs. The high domestic price makes it possible for European producers to export sugar at little more than half the price charged in the home market, thus undercutting even their lowest-cost competitors in the developing world.¹

In its case against the United States, Brazil alleges that although the US promised, as part of its Uruguay Round commitments, not to increase subsidies to its cotton farmers above 1992 levels, figures for 2001 show that cotton subsidies have increased by about a third, now reaching US\$3 billion per annum.

Other developing countries, such as Argentina, may join the Brazilian complaint at the WTO. If the cases go forward, they are likely to become a new flash-point for the WTO's dispute settlement system, and the first time a developing country has taken on the burden of proving that major trading powers' agricultural subsidies infringe their WTO obligations.

¹ Oxfam International. 2002. The Great EU Sugar Scam: How Europe's sugar regime is devastating livelihoods in the developing world.

NAFTA Panel Rejects the Methanex Case

An international tribunal has declined to rule on a dispute involving a California health regulation contested by the Methanex Corporation under the investment chapter of the North American Trade Agreement (NAFTA). In its 1999 suit, Methanex alleged that California's ban on the use of the methanol-based gasoline additive MTBE amounted to an 'expropriation of its business interests'. Methanol is the sole product of Methanex, which had invested in a factory in California. California banned MTBE when it was found that the additive, which is classified as a potential human carcinogen by the US Environmental Protection Agency, was leaking into groundwater supplies from underground storage tanks (Bridges Year 4 No.7, page 11).

The case aroused intense civil society interest as it seemed another instance of a company's spurious interpretation of NAFTA's chapter 11, which allows businesses to sue host governments for actions 'tantamount to expropriation' of their investment.

The tribunal headed by former US Secretary of State Warren Christopher ruled that it had no jurisdiction to hear the case, because there was no 'legally significant connection between the [California] measure and the investor or the investment', as required by NAFTA Article 1101. The fact that the California ban applied to MTBE, of which methanol was only one of the components, was too indirect a connection for the case to fall under the scope of NAFTA chapter 11, the tribunal ruled.

Methanex's only chance now to get a NAFTA ruling is to present credible new evidence that the US political campaign contribution system led California's then Governor to enact the measure as a favour to US-based Archer-Daniels Midland, which produces ethanol – a non-toxic alternative for cleaner gas additives.

FTAA Market Access Modalities Agreed

Negotiations on establishing the Free Trade Area of the Americas (FTAA) got a boost when the participating governments agreed in late August on an overall approach to tariff reductions. According to the agreement, reductions will be based on applied 'most-favoured-nation' rates rather than bound tariffs, although CARICOM countries may use the rates they have bound in the WTO for certain products. The resistance of the CARICOM group to using applied tariffs for agricultural products led to a breakdown in the talks in May (Bridges Year 6 No.4, page 16). The new agreement will allow the 'request and offer' phase of market access negotiations to start on schedule on 15 December 2002. The phase is slated to conclude in June 2003.

It is not plain sailing yet, however. While its Latin American partners are keen to progress on agricultural subsidies reductions, the US wants to keep these talks in the WTO, and even in FTAA market access (tariff) negotiations is likely to seek an exemption for 'sensitive' products such as steel, textiles and orange juice. Other countries are likely to seek similar carve-outs for their own 'sensitive' sectors.

A meeting of trade ministers in Ecuador next November will review progress and provide guidance in a number of areas ranging from agricultural and industrial goods to services, investment and government procurement, as well as intellectual property protection.

Proposed CAP Reform Goes too Far, EU Ministers Say

EU ministers of agriculture are likely to severely scale down the reforms suggested in the European Commission's mid-term review of the EU's Common Agricultural Policy (CAP) released in July. Among the main features of the review was a proposal to cut the link between production and direct payments by replacing the current system with a single income payment capped at •300,000 per individual farm. The payments would be conditional to environmental, food safety, animal welfare and occupational safety standards, which the Commission says would offer support to 'traditional and high-nature value farming systems'. The Commission also foresees a gradual decrease in direct payments by three percent annually until an overall 20 percent reduction has been achieved (payments to small farmers would be exempt from reductions).

On market policy, the Commission proposed, *inter alia*, to cut the cereal intervention price by five percent and set in place a new border protection system; decrease payments for durum wheat growers from •344.50 to •250 per hectare.

While Agriculture Commissioner Franz Fischler argued that the reforms would help gain acceptance for the EU's position on food safety, animal welfare and labelling standards in the WTO agricultural negotiations (see page 11), more than half of the 15 member governments said in July that the Commission had exceeded its mandate. Instead of providing a standard mid-term review, they said the Commission's proposal amounted to radical and fundamental CAP reform coming too soon on the heels of the 1999 reform. The harshest criticism came from France and Spain, with the latter insisting that the proposals were poorly timed in view of the recent US decision to increase production-linked support. Any future moves in support regimes should be tied the WTO negotiations, French government officials said.

Germany, Denmark, the UK and the Netherlands supported the proposal, as did many non-EU trading partners, who cautiously called it a 'step in the right direction'. Discussions continue between EU governments – and between the Commission and the membership – on the proposed reforms, as well as the controversial Common Fisheries Policy reforms put forward by the Commission in May (Bridges Year 6 No.4, page 13).

Very Briefly

- The new Andean Trade Preferences Act (ATPA) was signed into law on 6 August 2002 by President Bush (see also Bridges Year 6 No.4, page 16). It includes, *inter alia*, eight new eligibility criteria, which countries must fulfil to qualify for the enhanced GSP benefits. Among these is the 'demonstrated commitment' to undertake WTO obligations 'on or ahead of schedule', IPR protection on par with or surpassing TRIPs, and the provision of 'internationally recognised worker rights'. US labour unions have been considering asking the President to deny the eligibility of Colombia, Bolivia, Peru and Ecuador on the grounds that they do not provide the level of worker protection required by the new criteria.
- The European Union and the ACP countries will kick off a cycle of negotiations on 27 September 2002, with a view of concluding a series of WTO-compatible Economic Partnerships Agreements that are to replace the Cotonou Agreement as of 2008.

Can the GSP Survive, continued from page 4

As we have seen above – and as the table below confirms – there is significant scope for expanding the GSP to cover those products with high levels of protection, with possibilities for increasing exports from the beneficiary countries. However, this information also shows that these possibilities exist precisely in those sectors where the protectionist pressure is greatest in the industrialised countries.

Saving the GSP

There are, therefore, two roads open to us. The first is that the GSP and all the trade policy tools into which it is included and by which it is conditioned, continue to evolve as they do now, in such a way that the system would slowly erode away.

The second should be an attempt to renegotiate, not the basis of the system, but rather some of its more important elements, so as to make the GSP a more effective trade promotion mechanism than it has been up to now. This would only be possible within the framework of the new round of multilateral trade negotiations. To have any chance of success, GSP reform must be tackled realistically, which means taking past experience into account in matters of trade policy and the constraints imposed on any initiative of this type by the pressure that can be exerted by certain sectors in industrialised countries. Furthermore, it must be made clear from the outset that this is a spill-over from the negotiations rather than a matter of maintaining high tariff levels in order to be able to grant preferences. Developing countries should endeavour to eliminate and reduce tariffs in the industrialised world as far as possible and only request for preferential treatment to those that remain.

In this respect, it should be recalled that the Doha Ministerial Declaration stresses that the WTO seeks to place the needs and interests of the developing countries ‘at the hearth’ of the Work Programme adopted by the conference and that the Work Programme itself includes several references to the ‘provisions for a special and differentiated treatment’ for developing countries to be adopted as part of the commitments to be agreed as a result of the forthcoming round of negotiations, therefore opening the door to the utilisation of the GSP as one of the instruments for the implementation of such commitments.

The pivot of any future negotiations must be two-fold and centered, on one hand, in the inclusion in the preferential treatment of sensitive products that remain outside any general tariff

reduction exercise or which continue to have high tariff levels, and on the other hand, in the tariff margins that will be applied to them.

Finally, there is another aspect of the GSP that has received little attention up to now and justified to be considered in the future: namely, preferences granted by former socialist countries. The national schemes of Poland, Hungary and the Czech Republic will be rolled into the EU scheme once these countries join the Union, but others will remain. At the demise of the socialist era, most of those countries maintained preferential treatment, although they adapted it to their new economic circumstances.

Thus, for example, the Russian Federation now grants a preferential margin of 25 percent on its MFN tariff, although this is not consolidated (Russia is not yet a member of the WTO) and retains the right to modify this unilaterally. Under the current price system of the Russian economy and in view of the relatively high level of its customs tariff, this preference has a certain impact on trade relations with the beneficiary countries. In the future it would be appropriate to ‘incorporate’ these preferential schemes into the others, thus attempting to give them a larger institutional framework to achieve greater transparency and stability.

Nevertheless, for this revitalisation of the GSP to be possible, two factors must work in unison: agreement between preference-giving industrialised countries and a conviction among developing countries that this is a valid option which will help them increase their exports. This conviction cannot currently be found. This is partly due to the evident insufficiency of the schemes launched by industrialised countries and the consequent limited results of the GSP, as well as the waste of time negotiators felt in the past about endless and ultimately fruitless discussions on improving the system.

In addition, the emergence of other ways of increasing exports (regional integration, agreements reached in parallel to the GSP, the liberalisation of trade itself as a result of multilateral negotiations) have induced them to postpone (if not forget) the GSP from their agenda. However, we believe the GSP could still play a useful part in increasing exports from developing countries. A window exists for a new debate that will enable these countries to add the Generalised System of Preferences – with a different vision – to the agenda of their present negotiations with the industrialised world.

Juan Carlos Sánchez Arnau is Argentina's Ambassador to the Russian Federation.

Tariffs for non-LDC GSP Beneficiary Countries

Country	Dutiable tariff lines excluded from GSP	Tariff lines excluded from GSP with duties of 5% or more	Tariff lines excluded from GSP subject to non <i>ad valorem</i> duties
EU	9081	621	649
Japan	5282	1057	322 ¹
US	8293	2212	481
Canada	5737	1204	93
Switzerland	7773	None higher than 5%	375 ²

¹ Half of these apply to textiles and clothing.

² 329 of Switzerland's non *ad valorem* duties apply to the agricultural sector

Source: UNCTAD document TD/B/C.1/20 Add.1 Table 9

ENDNOTES

¹ The six schemes are those of the European Union, Japan, the United States, Canada, Switzerland and Norway. The Russian Federation, Poland, the Czech Republic and Hungary also give preferential tariff treatment to their imports from developing countries.

² For sources and a more detailed analysis of data see our *The Generalised System of Preferences and the World Trade Organisation*. Cameron May, London, 2002

³ 1997 is the latest year for which disaggregated and comparable data is available.

⁴ UNCTAD/WTO, *The post Uruguay Round Tariff Environment for Developing Country Exports*. A joint UNCTAD/WTO study. Table 9. Geneva, October 1997.

New Peruvian Law Protects Indigenous Peoples' Collective Knowledge

By Manuel Ruiz and Isabel Lapeña

Peru – a megadiverse country with a high degree of cultural diversity (peasant and native communities) – has become the first country to establish a comprehensive legal system for the protection of indigenous communities' traditional knowledge associated with biodiversity.

In force since 10 August 2002, Law No. 27811 provides a regulatory framework through which indigenous peoples can assert their rights over collectively-held knowledge related to biological diversity, including the right to prevent unauthorised use of such knowledge. Some of the elements of this new legal instrument could serve to assist in the development of other international, regional or national system on this issue.²

The UN Food and Agriculture Organisation, the Convention on Biological Diversity (CBD), the World Intellectual Property Organisation, the Andean Community, the Organisation of African Unity and many other institutions and forums have been discussing how to protect indigenous peoples traditional knowledge for some time. Recently, the Doha Ministerial Declaration addressed this particular issue in light of the relationship between the TRIPs Agreement and the CBD.³ Clearly, traditional indigenous' peoples knowledge and the need to find legal means to adequately protect it, are firmly established on the international, regional and national policy agendas.

Scope: Collective Knowledge over Biological Resources

The new Peruvian legislation seeks to implement article 8(j) of the CBD and article 63 of the national Industrial Property Law of 1996. However, it only refers to the knowledge of indigenous communities (related to uses and properties of biodiversity) and not to their practices and innovations. Moreover, the protection provided by the law does not extend to all knowledge that could be developed inside a community. It is limited to knowledge held collectively, i.e. knowledge that belongs to the community as a whole rather than the individuals who are part of it (article 10).

The law also provides that knowledge is to be freely exchanged among communities. The system will not only benefit the communities that undertake negotiations for the use of their knowledge, but also those who share that knowledge without taking part in the negotiations. Prior informed consent and thus the authorisation for the use of traditional knowledge will be provided by representative community organisations (article 6).

Objective and Main Principles

The law's general objective (article 5) is the protection of collective knowledge for the benefit of its holders (communities). It recognises that collective traditional knowledge is part of the cultural patrimony of indigenous communities, and that it results from a social learning process transferred by past generations to the present ones, who are its custodians (article 12).

Several instruments – such as contracts, trade secrets, registers and measures to prevent unfair competition – can be used to achieve the overall objective. Inter alia, the law

- obliges interested parties to obtain the prior informed consent of communities providing the biodiversity-related knowledge;
- promotes mutually agreed terms by recognising the need to sign licenses (contracts) for the use of the knowledge when a commercial or industrial application is intended (whether or not in the public domain);
- includes unfair competition procedures to defend the rights recognised in the regime (in the case of misappropriation or unauthorised use);
- calls for the establishment of different types of registers to document collective knowledge and make it more or less (depending on the type of register) available to third parties;
- creates a Fund for the Development of Indigenous Peoples (article 37); and
- associates the protection of traditional knowledge with intellectual property regimes by imposing the obligation of presenting a license when applying for a patent. This requirement is also an obligation under Decision 486 of the Andean Community on a Common Regime on Industrial Property (see Bridges Year 4 No.9, page 9).

The law requires the written consent of indigenous people for use of their knowledge.

Prior Informed Consent

Article 1 of the law recognises the right of indigenous and local communities to decide whether or not to authorise the use of their knowledge for commercial, industrial or scientific aims by third parties. Any person/institution interested in such use must enter into a negotiation with an organisation representing the communities that hold the relevant knowledge, and the representative organisation must inform the widest possible number of communities that might share this knowledge about the negotiation process so that their interests and concerns can be taken into account (article 6).

The utilisation of the collective knowledge for industrial or commercial purposes will require a license, which must be signed by both the communities' representative organisation and the interested party. Article 27 spells out the minimum content of these licenses. These include, inter alia, a minimum compensation in favour of indigenous communities (5 percent of gross sales of commercial products derived from collective knowledge), as well as providing information on research results and assisting in the strengthening of indigenous communities' organisations. Monetary benefits will go to the National Fund for the Development of Indigenous Peoples (article 37). All indigenous communities will have the right to access the Fund's financial resources.

The law also establishes that the license should

- adopt a written format;
- be in Spanish and the appropriate native language;
- be in force for a maximum period of three years; and
- be registered with the competent national authority (in this case INDECOPI, the national patent and unfair competition authority).

The confidentiality of the license is guaranteed. This will not impede other non-exclusive licenses being granted over the same knowledge by different communities, nor will it affect the right of present or future generations to use and develop it further.

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New Peruvian Law, continued from page 15

Registers

The law establishes three types of registers (article 15) with the specific purpose of preserving and safeguarding traditional knowledge and of providing the competent national authority with the necessary information to defend indigenous communities' interests associated with their collective knowledge. These are: the National Public Register, the National Confidential Register and Local Registers. Their specific features will depend on the level of confidentiality of each one. The public register will certainly assist in defending knowledge which is clearly in the public domain against patents.

Unfair Competition Rules

On a procedural note, the law foresees legal mechanisms for the defence of rights recognised in the new regime (article 67). It creates a special recourse called *acción por infracción de derechos de los pueblos indígenas*, which can be presented before the national authority against anyone who could have revealed, acquired or used the collective knowledge in bad faith or without the prior consent of the indigenous community or its representative organisation. It also applies where the user might have made collective knowledge public without authorisation or while under obligation to maintain the information secret or confidential. In addition, this action is useful in cases where no formal infringement of the regime has (yet) taken place but where an imminent risk of rights being violated exists. The competent authority itself which can also initiate action, as well as take precautionary measures. In all cases, the burden of the proof belongs to the defendant.

Institutional Structure

INDECOPI is the competent national authority to register licences, manage the national public and confidential registers and oversee administrative procedures (article 64). The law establishes a Consejo especializado en la protección de los conocimientos indígenas (article 63), a council formed by national experts and representatives of indigenous and local communities tasked with monitoring the operations of the system; providing legal and technical assistance to indigenous peoples' representatives and supervising the committee responsible for the national fund, etc.

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ENDNOTES

¹ For background and a more detailed review of the Peruvian regulation, see Ruiz, Manuel: *Protecting Indigenous Peoples' Knowledge: A Policy and Legislative Perspective from Peru*. Policy and Environmental Law Series. SPDA. No. 3, May 1999. Lima.

² Paragraph 19 of the Doha Declaration: 'The Council for TRIPs, in pursuing its work programme including under the review of Article 27.3(b), the review of the implementation of the TRIPs Agreement under Article 71.1 and the work foreseen pursuant to paragraph 12 of this Declaration, to examine, *inter alia*, the relationship between the TRIPs Agreement and the Convention on Biological Diversity, the protection of traditional knowledge and folklore, and other relevant new developments raised by Members pursuant to Article 71.1. In undertaking this work, the TRIPs Council shall be guided by the objectives and principles set out in Articles 7 and 8 of the TRIPs Agreement and shall take fully into account the development dimension.'

Europe's Services Negotiating Proposals, continued from page 8

Regulations designed to achieve universal access, such as cross subsidisation between different end-users, are not achievable using the kind of market-based mechanisms that the GATS supports. For as the World Bank study points out, 'eliminating restrictions on market entry imply an end to cross subsidisation, because it is no longer possible for firms to make extra-normal profits in certain market segments'. In fact, the very nature of liberalisation threatens arrangements with the potential to ensure universal supply. Not until EU trade policy makers acknowledge this and adjust their GATS negotiating position accordingly, can they claim to be supporting 'sustainable development'.

Conclusion

Following WDM's critique of the current GATS negotiations, a key industry figure, during a meeting with UK Government officials asked why certain sectors were being singled out by civil society organisations. The UK government's response was that it was because they 'were seen as basic services which people had the right to receive from their Governments'.⁸ At the heart of much objection to the current GATS negotiations is the agreement's enormous scope and the subsequent impact that commitments will have on a range of domestic regulations integral to government decision-making.

With a significant number of request proposals on the table, this is an opportune moment to step back and review negotiating intentions, particularly those of the EU. The World Development Movement, along with civil society groups around the world, has been calling for an independent and thorough assessment of service liberalisation based on potential social, economic, environmental and cultural impacts, before further negotiations continue. Key to this is the publishing of current negotiating documents.

Clare Joy is Campaigns Policy Officer at the World Development Movement in London.

ENDNOTES

¹ 'EU tables market access requests to inject momentum into WTO services negotiations', EU press release, Brussels 4/7/02.

² General Agreement on Trade in Services (GATS): Article XIX.

³ 'EU tables market access requests to inject momentum into WTO services negotiations', EU press release, Brussels 4/7/02.

⁴ WTO, Council for Trade in Services, 'Communication from Thailand, Assessment of Trade in Services', TN/S/W/4, 19/7/02.

⁵ Indonesia's GATS restrictions state that foreign companies can only control 49 percent of a joint venture and must work through a local representative when setting up branches inside Indonesia.

⁶ Mattoo, A, quoted in, World Trade Organisation, Council for Trade in Services Special Session, 'Communication from Cuba, Senegal, Tanzania, Uganda, Zimbabwe and Zambia – Assessment of Trade in Services', S/CSS/W/132, 6/12/01

⁷ World Trade Organisation, 'GATS Fact and Fiction'. Quoted in a version issued on the 16/3/01. The emphasised section was removed from later versions.

⁸ World Development Movement, 'UK Government colludes with business to defeat campaign on the General Agreement on Trade in Services', November 2001.

⁹ Howse, R and Tuerk, E: *The WTO negotiations on services (GATS): The regulatory state up for grabs*, paper presented at the conference, 'From Doha to Kananaskis: The Future of the World Trading System and the Crisis of Governance', York University and University of Toronto, Ontario, Canada, 1-3/3/02.

WIPO's Move toward a World Patent System: A Revolution in the Making?

By Genetic Resources Action International

Around the turn of this century, the World Intellectual Property Organisation (WIPO) started to put into place the pieces for a universal patent system, i.e. one bureau issuing 'world patents' automatically valid in all countries. Such a system would replace the current situation where each country has its own laws, patent office and courts – all of which must be dealt with separately if you want your patent to have effect in more than one country. The new system will take some time to complete, if indeed it pushes through. Should it do so, it would totally revolutionise intellectual property systems as we know them today.

The Building Blocks

WIPO's work currently focuses on the development of three primary building blocks for a new world patent system.

A uniform set of procedures

The first component was put into place in 2000, when WIPO member states adopted the Patent Law Treaty (PLT). This treaty harmonises the formalities that patent offices undertake to administer patent applications. The PLT is not yet in force, because 40 governments have not yet ratified it.

One of the controversies in the negotiation of the PLT was whether or not disclosure of the country of origin of genetic material or traditional knowledge, and proof of prior informed consent in their acquisition, would be required. These issues were brought into the discussion by developing countries, which are searching for means to implement the Convention on Biological Diversity (CBD) in the context of patent law.¹ Developed countries and industry defy most attempts to see this happen. They say that the CBD provisions should not be construed as criteria for patentability and would be an administrative burden. During the Patent Law Treaty negotiations, the industrialised countries rejected such proposals, arguing that they pertain to the substance of patent law, not procedure.

A single international search tool

The second building block is being pursued through the reform of the Patent Cooperation Treaty (PCT). The PCT was originally adopted in 1970. It provides a common facility to conduct international searches of prior art for patent applications.

While patents are national documents granted under national rules and procedures, the PCT allows patentees who want international protection to shortcut some of that process through a preliminary examination of the application. This system gives great leverage to patentees because it establishes the priority of a patent application at the international level. It also gives them a generous amount of time to assess the market potential of their patent in the different countries, and to rethink their strategy before proceeding with national filing.

The PCT is being reformed at present, ostensibly to streamline the process and make it a lot simpler. However, the reform process is an opening for the PCT to adjust to new policy objectives and

needs of WIPO's overall harmonisation agenda. One of those is likely to be the incorporation of a database of traditional knowledge for international searches. A more speculative question is whether a revised PCT would extend WIPO's involvement to the full examination and grant of 'world' patents.

A uniform patent law

Once the PLT was finalised, the WIPO member states agreed to move on to harmonisation of the core rules of patenting. This will be achieved through the Substantive Patent Law Treaty (SPLT). A first attempt to harmonise substantive patent law floundered ten years ago because the US refused to give up the 'first-to-invent' principle in determining who has the right to a patent (most of the rest of the world uses a 'first-to-file' rule.) But the US has now indicated that it is ready to give up this principle if the rest of the negotiations look promising.

The SPLT is a serious concern, and could make the patent provisions of the World Trade Organisation's Agreement Trade-related Aspects of Intellectual Property Rights (TRIPs) obsolete. TRIPs 'only' spells out the minimum required elements of national patent laws. SPLT, by contrast, will spell out the top and the bottom line. It will be a fixed set of rules on what can be patented under what conditions: the political substance of a potential world patent system.

A first draft of the treaty was tabled by WIPO in November 2001. It is important to be aware that there are vested interests at play: the bulk of WIPO's finances comes from the private sector, which makes use of WIPO's external services. Building up a role for WIPO in actually administering patents, under a single world patent law, could be a key to the institution's future.

A few other elements are also at play in the current patent harmonisation process. For example, there is talk of revising the Budapest Treaty on the Deposit of Microorganisms for the purpose of patent protection, which is administered by WIPO. According to WIPO, there is a need to expand this treaty to the registration of DNA sequences in a central database to facilitate gene patenting. TRIPs makes no reference to the Budapest Treaty, but the United States and Europe both push accession to it through their bilateral trade agreements with developing countries. It may therefore earn an important function in any harmonised system.

What seems to be taking shape slowly, then, is a single world patent law relying on agreed procedures which could be readily administered by WIPO.

Core Controversies in the SPLT

As stated, the Substantive Patent Law Treaty is in its early stages of drafting and negotiation. The committee working on it is presently focusing on criteria for patentability and other issues that lead to the grant of a patent. The most contentious matters at this point include the following:

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WIPO's Move Toward a World Patent system, continued from page 17

The 'technology' factor

The TRIPs Agreement, like the European Patent Convention, states that patents shall be available for inventions 'in all fields of technology'. Will the SPLT retain this condition or not? This question hits an important point of discord between the US and Europe. In the US, business methods are patentable. In Europe they are not, because they are not considered to represent 'technical progress', but this does not prevent the US from issuing patents on business methods. US rights holders seek broader enforcement of such patents in order to expand their commercial opportunities. What was not achieved in TRIPs, the US would like to secure through WIPO by avoiding reference in the SPLT to 'all fields of technology.' The US has even stated that it will leave the negotiations if this matter is not settled in its favour. The EU, along with the European Patent Office, and Brazil are holding out against this.

Exclusions from patentability

Patent laws usually indicate what is considered an invention and what is considered patentable. They also usually state what is excluded from patentability as a matter of policy. TRIPs, for example, says that members may stop patents from being granted if commercialisation of the invention would offend morality or public order. TRIPs also allows countries to exclude plants and animals from patentability as a matter of policy.

The SPLT was drafted with no real proposal on this matter. All WIPO did was to suggest, in a footnote somewhere, that countries may wish to incorporate the provisions of TRIPs Articles 27.2 and 27.3 or make some kind of reference to them. The US position is that there should be no exclusions to patentability in the SPLT. They are supported on this by corporate bodies such as the Biotechnology Industry Organisation. Europe and the developing countries, on the other hand, are arguing to at least retain the exclusions offered in TRIPs.

No further conditions allowed

As presently drafted, countries which sign the treaty will not be allowed to make any further demands on patent applicants than those found in the treaty. This has become a major bone of contention between industrialised and developing countries around the table. Brazil, the Dominican Republic and Peru, among others, are adamant that disclosure of country of origin of genetic materials, and proof of prior informed consent in their acquisition, must be enforced. As mentioned earlier, the whole question is whether or not international patent law will allow developing countries to secure financial benefits from access to genetic resources as prescribed by the CBD. The developed countries, however, vainly insist that implementing the CBD should be dealt with under the CBD, not under the SPLT.

What Is at Stake?

The setting up of a world patent system has huge implications. It means the end of patent policy as a tool for national development strategies. It is also likely to overtake TRIPs, both in form and in substance. Any deviation from its rules would be subject to some kind of sanction: it would be the final word.

The negotiation of the SPLT is largely a debate between the US and Europe. The first draft of the treaty singularly reflected US patent law, and the US has made it clear that it is willing to go as far as it can to secure the adoption of this new treaty. The Americans' big negotiable is the first-to-invent principle, and the related matter of grace period. Their big non-negotiables appear to be business methods and biotechnology. Europe is so far defending the *status quo* of TRIPs, with Japan following its line. The developing countries are hardly in the discussion at all, with a few exceptions led by Brazil. In the words of one developing country negotiator:

'The ones harmonising are the US and Europe. We developing countries would be fine if things stayed the way they presently are. But if they make a harmonised patent law, there is no way that they can avoid the need to be coherent and respect the sovereign rights of states over biodiversity. This means that they must include provisions to require proof that genetic resources were not acquired illicitly. And this must be accomplished through disclosure of country of origin of genetic resources and proof of prior informed consent as conditions for patent grant.'

Parties to the SPLT would not be allowed to make any further demands on patent applicants than those found in the treaty.

While the disclosure issue is clearly an important fight for developing countries, this position suggests a defeatist attitude towards patents on life. For it presumes that the SPLT – and developing countries participating in the negotiations – will cede to the 'no exclusions to what is patentable' approach of the United States. TRIPs leaves it to each country to decide, as far as plants and animals are concerned.

If the SPLT moves forward on its present course, it is bound to run into the waters of the WTO and its TRIPs Agreement. Whether the two can co-exist or will conflict is a question mark. We may even see critics turn around and defend TRIPs, as it may suddenly appear a lesser threat compared to what WIPO comes up with. The SPLT will also run into the waters of another corner of WIPO itself: the Intergovernmental Committee on Genetic Resources, Traditional Knowledge and Folklore. It is not known if SPLT will act upon this Committee's considerations and eventual agreements or not. Further still, it is unknown whether WIPO's overall trajectory toward patent harmonisation will cross paths with the potential outcome of the Hague Convention negotiations on jurisdiction of court decisions.

All of these issues – and many more – make the road to a uniform world patent system fraught with dangers and unknowns. But there is no doubt that what appeared until recently as something of a pipe dream is starting to take on real proportions.

Genetic Resources Action International (GRAIN) is based in Barcelona, Spain. The authors adopted this article for Bridges from a longer paper entitled 'WIPO Moves Toward World Patent System', available at <http://www.grain.org/publications/wipo-patent-2002-en.cfm>

ENDNOTE

¹ The CBD is a legally binding international treaty which came into force in 1993. It says that genetic resources are national sovereignty, making access to them subject to several conditions. One is that countries should grant access to biological material through prior informed consent. Another is that access must give rise to benefit-sharing. Developing countries now demand that compliance with these rules form part of the patent grant process.

Commission on Intellectual Property Rights Urges Rethinking of IPR Regimes

By Graham Dutfield

The development-related impacts of the Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPs) make it the most controversial of all WTO Agreements. Many developing countries consider TRIPs unbalanced in that it favours the developed countries and transnational corporations while being unhelpful or even harmful to their own interests. In addition, concerns have been raised about moves outside of the WTO to ensure that developing countries accept higher-than-TRIPs standards of intellectual property protection even before they have determined how best to implement TRIPs itself in ways that support economic development and poverty alleviation. Non-governmental organisations have also criticised TRIPs on the grounds that it imposes costs on developing countries in the form of more expensive drugs, agricultural inputs and foreign-owned technologies without producing sufficient longer-term gains in areas like trade and investment to offset these costs. Unfortunately, critical views on TRIPs and other processes such as the World Intellectual Property Organization's new patent agenda are often dismissed on the grounds that they are based on ignorance or on ideological hostility to private property (see related article on page 17).

This makes the new report on *Integrating Intellectual Property Rights and Development Policy* by the Commission on Intellectual Property Rights extremely timely. The UK government-sponsored Commission was mandated to look at how intellectual property rights might work better for poor people and developing countries by providing balanced, evidence-based policy recommendations. Launched in Geneva on 16th September, the 178-page document contains quite far-reaching recommendations (55 in all) directed at the global IPR system including the institutions within it (such as the WTO and WIPO), national IPR policy-making, and covering the following six areas: intellectual property and development; health; agriculture and genetic resources; traditional knowledge, access and benefit sharing and geographical indications; copyright, software and the Internet; and patent reform.

Overall, the Commission expresses serious doubts that the international IPR regime in its present form, and current processes to further strengthen IPR protection, are in the interests of the poor. It also considers that the TRIPs Agreement imposes onerous costs on most developing countries. In raising these doubts and concerns, the Commission does not break new ground; what is truly significant is their source. This is a high-level Commission established by a developed country government which also appointed the six members. These members, headed by Professor John Barton of Stanford University, are all eminent and widely-respected authorities on intellectual property from developed and developing countries with expertise covering science, law, ethics and economics, and working in industry, government, academia and the legal profession. As such, the Commission can hardly be accused of bias against the intellectual property system. Moreover, their findings drew upon not only their own varied backgrounds but also on fact-finding missions to developing countries on three continents, consultations with stakeholders, eight expert workshops, a series of study papers authored by international authorities, and an international conference.

The report makes many telling points. It makes an overwhelming case that a one-size-fits-all approach to IPR protection simply does

not work, especially when the required levels of protection are as high as they are today and are likely to become in the near future (which is even higher). At certain stages of development, weak levels of IPR protection are more likely to stimulate economic development and poverty alleviation than strong levels. The Commission presents well-documented historical evidence to support this view. Present-day empirical data is, as the Commission reveals, somewhat lacking. But what there is points to the same conclusion. A clear inference of the Commission's findings in this regard, is that the TRIPs Agreement can be regarded as an experiment being conducted on the poor to see whether the lessons of history are applicable to the present-day situation or not. It would appear that TRIPs is a risky experiment indeed!

The report makes an overwhelming case that a one-size-fits-all approach to IPR protection simply does not work.

The Commissioners present strong evidence for their critical stance with respect to the international intellectual property regime, but at the same time avoid the error of treating developing countries as a homogeneous group. Rather they argue that due to their different scientific and technological capacities and social and economic structures, an optimal IPR system is bound to vary widely from one country to another. For example, developing countries that have relatively advanced scientific and technological capacities like India and China may well benefit from high levels of IPR protection in some areas, whereas the least-developed countries almost certainly will not.

Among the specific recommendations relating to particularly controversial matters are that developing countries should establish workable laws and procedures to allow them to use compulsory licensing and to provide for government use in order to improve access to urgently needed medicines. As for the patenting of life, the Commission recommends that developing countries should not provide patent protection for plants and animals and should be permitted to develop *sui generis* systems for plant varieties that suit their agricultural systems. With respect to traditional knowledge and genetic resources, the Commission recommends that all countries should provide in their legislation for the obligatory disclosure in patent applications of the geographical source of genetic resources from which the invention is derived. Interestingly, in the very week that the report was published, the UK government dropped its opposition to an EC offer in the Council for TRIPs to consider the introduction of a multilateral system for disclosing and sharing information about the geographical origin of biological material used to support patent applications in order to help prevent 'biopiracy'. One important recommendation relates specifically to least-developed countries, who the Commission believes should be granted an extended transition period for implementation of TRIPs until at least 2016.

The report has been widely welcomed albeit with various degrees of enthusiasm. And yet, all stakeholders should be grateful to the Commission. In explaining in such an authoritative fashion why a rebalancing of the global IPR regime is absolutely essential, especially at a time when the imbalances are becoming even more acute, the Commission may end up helping to save the global IPR regime from itself.

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Environmental Labelling, Extra-territoriality and Technical Equivalence

By Tom Rotherham

The Doha Development Agenda called on the WTO Committee on Trade and Environment (CTE) to refocus its discussions on environmental labeling and to prepare recommendations for the next WTO Ministerial, which will be held in September 2003 in Cancun, Mexico. Despite the post-Doha momentum, it looks like the CTE's discussions will go neither as fast nor as far as optimists had hoped. This should come as no surprise as the Committee has discussed environmental labeling since September 1994. What is needed is not a wave of political compromise within the CTE, but a sea-change of political commitment outside the WTO.

A number of the obstacles to resolving environmental labeling in the Doha Round are internal. First, there are many non-environmental labeling issues being debated in the WTO and so, quite rightly, the Committee on Technical Barriers to Trade (CTBT) has taken control of the discussions from the CTE. Second, a number of the other labeling issues in the CTBT – like GMO labeling – are hot political topics that make it difficult for delegates to do what is needed (i.e., propose long-term solutions) rather than what comes naturally (i.e., protect short-term interests). Third, some delegates believe that the EU will sacrifice environmental labeling for the sake of the Singapore issues: investment and competition. So, if skeptics wait long enough, the main impetus behind environmental labeling may ride away on a freshly traded horse.

But, even if the CTE eventually did resolve any inconsistencies between environmental labeling requirements and international trade law, this would not ensure that they do not unfairly restrict trade. Market access does not depend only on clear legal rights and obligations – it also depends on capacity to take advantage of one's rights and to live up to one's obligations. The real problem is that developing countries cannot imagine a world where their access to OECD markets is not restricted, intentionally or incidentally, not by environmental labeling requirements, *per se*, but by their inability to find out about, influence, understand, implement, and demonstrate credibly that they comply with them.

This must change. But this "change" cannot come from trying to change developing countries' *perception* of the present situation through more discussions in the CTE; it can only come from governments' efforts to actually change the situation on the ground. Two things are needed.

First, investments must be made in developing countries' standards institutions. At the moment, developing countries do not have the capacity to take advantage of their rights under the TBT Agreement. This is important for all types of standards and technical regulations. Fortunately, there is a significant degree of awareness of the investments needed in developing countries' national standards bodies, conformity assessment services and accreditation agencies. While financial commitment from OECD countries is still insufficient, a comprehensive international effort to tackle these problems is beginning. In particular, the WTO and ISO have undertaken a comprehensive needs assessment to identify priority areas for action, and are actively targeting the donor community with their recommendations. UNIDO, the World Bank, UNCTAD and many others are also quite active.

Second, a facilitated, informal dialogue must be convened to give trade and environment ministries the opportunity to discuss environ-

mental labeling outside of formal trade negotiations. It may even be worth dropping environmental labeling from the Doha agenda if it triggers a more comprehensive and cooperative dialogue outside the WTO. These discussions – perhaps in the OECD – should address two issues in particular: the inherent difference between trade promotion standards and public-policy promotion standards, and the impact of extra-territoriality on sustainable development.

Trade promotion vs. public-policy promotion

The TBT Agreement is a legal document that helps countries to avoid and address technical barriers to trade. Among other things, its web of rights and responsibilities creates a policy framework that promotes the harmonization of standards – including labeling requirements – in particular through the development and use of international standards. While sometimes appropriate, this bias towards international standards is not appropriate for environmental labeling requirements.

Consider the example of paper size. ISO has published a number of standards that define dimensions for paper size and, as a result, the terms "A1, A2, A3, A4, ..." can now be used to communicate precise dimensions clearly and consistently across distances. Without international standards for paper size, international trade in paper, printers, fax machines and photocopiers would be very difficult. But if A4 paper was defined as 8.25in x 11.65in, instead of as it is, 8.27in x 11.69in, this would not reduce the benefit of the international standard.

This is not at all the case for environmental labeling requirements. Consider labels for sustainable forest management (SFM), which are increasingly important for trade in forest products. In this case, the actual specifications in the standard are extremely important because they must be suited to the local conditions (e.g. forest-type, soil characteristics, hydrology, land-rights, ...). Although an international SFM label that replaces many different national labels may facilitate international trade, it will not necessarily achieve the public policy objective that it was created to address if the specifications are not appropriate. Ten countries may, in fact, need ten slightly different standards for SFM.

The Impact of Extra-territoriality on Sustainable Development

Principle 11 of the 1992 Rio Declaration, states:

"Environmental standards (...) should reflect the environmental and development context to which they apply. Standards applied by some countries may be inappropriate and of unwarranted economic and social cost to (...) developing countries."

Sustainable development requires a balance between the competing priorities of environmental conservation, social development and economic development. Because so few developing countries have the technical or institutional capacity to assess the suitability of foreign environmental labeling requirements, it is very difficult for them to ensure that they are appropriate, and not of unwarranted economic or social cost. Also, because so few of them are able to develop their own environmental labels, and to have them recognized in export markets, they are left with little choice but to adopt what may actually be inappropriate standards developed by others.

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Phytosanitary and Phyto-genetic Governance

By Urs P. Thomas

In the fragmented field of multilateral environmental and trade negotiations related to biodiversity/agricultural plants, it is essential to distinguish clearly between two distinct domains. On one hand we have regulations which aim at the *phytosanitary protection* of this biodiversity – as well as human health – against potential threats from genetically modified (GM) seeds and crops. A wider discussion would have to include animals, especially GM fish. On the other hand there are attempts to ensure the *phyto-genetic conservation* of biodiversity through the imposition of conditionalities on the exercise of intellectual property rights (IPRs).

These regulations are situated at the crossroads of agri-business and increasing concern over the world's biodiversity. The state of negotiations is far more advanced with regard to the protection of biodiversity than with its conservation. This does not mean that, from the perspective of saving biodiversity, phytosanitary measures are more urgent or important than phyto-genetic regulations. Rather, the greater time pressure for the former is explained by the fact that phytosanitary regulations are an immediate condition for international trade, whereas the latter are required for trade in the medium- and long-term in the sense that IPRs provide the financial incentives that are necessary for the development and commercialisation of GM seeds.

Not surprisingly perhaps, we find that the WTO, the UN Food and Agriculture Organisation (FAO), and the Convention on Biological Diversity (CBD) are the three intergovernmental organisations which provide the most important fora for the negotiations in both these domains:

Institution	Phytosanitary Aspects: emphasis on science	Phyto-genetic Aspects: emphasis on law & finance
WTO	SPS, TBT and the GATT	TRIPs
FAO	<ul style="list-style-type: none"> Codex Alimentarius Commission (jointly w/ WHO) International Plant Protection Convention (IPPC) 	<ul style="list-style-type: none"> International Treaty on Plant Genetic Resources for Food and Agriculture
CBD	<ul style="list-style-type: none"> Cartagena Protocol on Biosafety Biosafety Clearing House 	<ul style="list-style-type: none"> Bonn Guidelines on Access to Genetic Resources and Fair and Equitable Sharing of the Benefits (ABS) Ongoing negotiations esp. on Articles 8-11 and 15-18 (w/ WIPO)

The introduction of the comprehensive concept of 'phytosanitary and phyto-genetic governance' is suggested in the hope that it may facilitate the understanding of the relationship between these two issue areas.

Different Perspectives: Science and Law

These two domains represent two sides of the same coin, namely of the stewardship of agricultural plant biodiversity. The underlying nature or emphasis of the negotiations is quite different, however. In the case of the phytosanitary negotiations we are dealing with an approach based on scientific methods of risk assessment. The phyto-genetic negotiations, on the other hand, are characterised by their more explicitly legal nature and by an emerging framework

for the sharing of financial benefits. Four multilateral agreements are at the centre of these negotiations:

Phytosanitary issues: The protection of biodiversity is based on the *Cartagena Protocol on Biosafety to the CBD*¹ which represents to some extent an elaborate system of consensus-based scientific information exchanges between exporting and importing countries. The Biosafety Protocol has achieved an historic importance in international law by breaking new ground in operationalising the precautionary approach as part of the scientific process underlying the assessment and management of risk. In spite of its voluntary nature, the Codex Alimentarius Commission is a particularly interesting organisation with regard to environment-related food safety because it has been adopted by the SPS Agreement as its food safety standard. As a result it contains and addresses uncertainties both of a legal and of a scientific nature. Its *Ad hoc Intergovernmental Task Force on Foods Derived from Biotechnology*² is expected to conclude its mandate of elaborating regulations governing trade in GM food by the next spring.

Phyto-genetic issues: These largely focus on IPRs over plant genetic resources located in areas inhabited by indigenous and local communities. The conservation of this biodiversity depends largely on endeavours to make the introduction of new plant varieties compatible with the conservation of *in situ* and *ex situ* seed banks through FAO's *International Treaty on Plant Genetic Resources for Food and Agriculture*.³ The CBD has responded with the recent adoption of the so-called '*Bonn Guidelines*' on *Access to Genetic Resources and Fair and Equitable Sharing of the Benefits Arising out of their Utilisation*⁴ which are voluntary and rely on prior informed consent, mutually agreed terms, and on incentive measures. Unlike the Biosafety Protocol and the International Treaty, these guidelines include pharmaceuticals.

The recent effervescence of negotiations around this highly dynamic interface of legal and scientific issues reflects both the large economic stakes involved and the rapid advancement of biotechnology research. In fact none of the instruments mentioned above are ratified yet and, in the case of the Codex Taskforce, negotiations have not even concluded.

The Chilling Effect

The 'Chilling Effect,' also called 'Regulatory Chill,' refers to a phenomenon that is in a more or less pronounced form quite ubiquitous in the trade and environment negotiations, i.e. the dampening effect which is exercised by WTO and other trade agreements on the negotiations of environmental measures. In view of the fact that conflicts with WTO rules can be assessed only after litigation before its Dispute Settlement Body, there is often a considerable legal uncertainty at the time of the negotiations regarding the compatibility of agreements. This uncertainty over the threat of politically and financially costly disputes can be used strategically by delegations who wish to water down environmental measures.

The Cartagena Protocol and the FAO International Treaty arguably represent the most illustrative case studies of the chilling effect because of the conflicts with the SPS, TBT, and GATT agreements

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Phytosanitary and Phylogenetic Governance, continued from page 21

in the first case, and with the TRIPs Agreement in the second. As a matter of fact, these conflicts resulted in an interesting parallel – both negotiations broke down in acrimony in the first attempt to achieve a compromise solution: the Biosafety Protocol in Cartagena in February 1999 and the FAO International Treaty in Neuchâtel in November 2000!

The reasons for this initial breakdown were different, but the relevant WTO Agreements were at the centre of the disputes in both cases. In Cartagena the question of developing scientific risk assessment and management procedures in compliance with SPS and TBT provisions concerning crops that are destined not for planting but for consumption caused the main impediment. In Neuchâtel, on the other hand, the implications and ramifications of a potential review of TRIPs Article 27.3(b) and its compatibility with the FAO Treaty's benefit sharing provisions were at the core of the disagreements. Similar obstacles plague the continuation of the ABS negotiations in the aftermath of the Johannesburg Summit, especially the politically, legally and scientifically thorny question as to what criteria should constitute the requirements for granting a patent on plant genetic resources. The main issues here are the disclosure of the country of origin and of traditional knowledge used in the invention, equitable benefit sharing arrangements, and properly documented prior informed consent.

Conclusion

Conflicts over agriculture have bedevilled international trade negotiations for a long time, and the more recent inclusion of the protection and conservation of biodiversity and of the implications on North-South equity are certainly not making these negotiations any easier. This explains why the Biosafety Protocol and the FAO International Treaty may well be the most sensitive flash points in the debates over the relationship between the WTO and multilateral environmental agreements. Not surprisingly, both contain important infringements on sovereign policy-making prerogatives.

What is required here like in many other instances is a *balanced* approach to dealing with the interface between commercial and environmental interests or between the sciences of ecology and economics (*ecolomics!*). There is a real danger in the various phytosanitary and phylogenetic negotiations that trade priorities will marginalise and jeopardise the efforts of safeguarding agricultural plant biodiversity due to their politically much more powerful ministerial constituencies!

Last but not least, these conflicts illustrate the very different nature and clout of international (environmental and economic) law depending on whether it is administered by the UN or by the WTO. These differences are reflected in the results of the 2001 Doha ministerial conference which directly and indirectly arguably have a greater impact on the global ecosystem than those of the recent Johannesburg Summit.

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ENDNOTES

¹ (2000) <http://www.biodiv.org/biosafety/protocol.asp>

² (expected 2003) ftp://ftp.fao.org/codex/alnorm03/AI03_34e.pdf

³ (2001) <ftp://ext-ftp.fao.org/waicent/pub/cgrfa8/iu/ITPGRe.pdf>

⁴ (2002) <http://www.biodiv.org/decisions/default.asp?lg=0&dec=VI/24>

Environmental Labelling, continued from page 20

The segment of the sustainable development community that silently questions developing countries' opposition to environmental labeling on the basis of "extra-territorial" infringements on sovereignty must reconsider the issue from this perspective: extra-territorially imposed environmental requirements are unlikely to strike the right balance between environmental conservation, and social and economic development. Without a balance suited to the domestic context, environmental labeling requirements will pursue environmental conservation at the cost of sustainable development.

This does not suggest that environmental labeling should not be required of companies in developing countries. Consumers have the right to make informed decisions on the products that they consume, and the WSSD's declaration on sustainable production and consumption can be expected to refocus policymakers' attention on the role of environmental labeling. The more important point is that environmental labeling programs will not promote sustainable development if they fall prey to the TBT Agreement's bias towards international standards. But how then to promote harmonization and reduce barriers to trade?

The TBT Agreement mentions only one alternative to harmonization through international standards: technical equivalence agreements (Art. 2.7). A technical equivalence agreement is a formal recognition that, although the specifications contained in two standards may differ, they nonetheless fulfil the same objective. A policy framework that supports technical equivalence would respect the fact that different countries need to apply different standards to achieve the same public policy objectives: similar to what Dani Rodrik refers to as "peaceful coexistence"¹. Technical equivalence agreements could help to ensure that environmental labeling requirements drafted by developing countries would be suited to their domestic context, and would be recognized in developed country markets.

Limited experience suggests that the negotiation of technical equivalence agreements is very difficult, perhaps partly because there are no formal structures to facilitate the process: no rules of procedure; no guideline documents; no forum for discussion; no enabling framework at all. Five years ago the same situation applied to the mutual recognition of conformity assessments, which is the analogous alternative to international standardization when harmonizing conformity assessment procedures. Since that time, the CTBT has published guidelines to facilitate the negotiation of mutual recognition between governments, and the International Accreditation Forum (IAF) has developed a multilateral recognition agreement between national accreditation bodies. The international community has begun to create a supportive framework for mutual recognition of conformity assessments, and it is making a big difference.

An international framework to support technical equivalence agreements would certainly be more complicated. But they could be equally successful, particularly if such efforts focused on a single area of standardization, such as environmental labeling. Until this can be done, many countries will continue to oppose environmental labeling in the WTO, environmental labels developed in OECD countries will continue to distort the pursuit of sustainable development in developing countries, and the CTE may go on discussing environmental labeling for another eight years.

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¹ Rodrik, Dani: *The Global Governance of Trade – as if development really mattered*, p. 29.

A Debatable Outcome, continued from page 2

Technical Assistance

The implementation plan contains various references to trade-related technical assistance, including for the examination of the relationship between trade, environment and development; the effective and full participation of developing countries in trade negotiations; economic diversification, sustainable resource management and addressing the instability of commodity prices and declining terms of trade. While these provisions are likely to impact on the design of technical assistance programmes by the relevant agencies, it remains up to WTO Members – rather than the Secretariat – to interpret the text when requesting technical assistance.

Other Outcomes at a Glance

From an environmental/social point of view, the biggest disappointment was the absence of new benchmarks, targets or timelines in the areas addressed in the action plan except for water/sanitation and, more tentatively, fisheries.

Water and sanitation: 'We agree to halve, by the year 2015, the proportion of people who are unable to reach or to afford safe drinking water [...] and the proportion of people who do not have access to basic sanitation.'

Fisheries: Action should be taken to 'maintain or restore [fish] stocks to levels that can produce the maximum sustainable yield with the aim of achieving these goals for depleted stocks on an urgent basis and where possible not later than 2015' (see page 2 for fisheries subsidies language).

Poverty and hunger: The implementation plan reaffirms the UN's Millennium Declaration targets to halve by the year 2015 the proportion of the world's people whose income is less than \$1 a day, as well halving the proportion of those who suffer from hunger by the same date (also confirmed by the June 2002 Food Summit, Bridges Year 6 No.5, page 21). Other 2015 Millennium Declaration targets, such as improving access to education or reducing infant mortality, are also confirmed.

International regime on benefit-sharing: The implementation plan calls on countries to 'negotiate within the framework of the Convention on Biological Diversity, bearing in mind the Bonn Guidelines, an international regime to promote and safeguard the fair and equitable sharing of benefits arising out of the utilization of genetic resources'. The negotiated instrument – be it a legally binding protocol or voluntary guidelines – will build on the Bonn Guidelines which provide guidance to Parties in the development of access and benefit-sharing regimes at the national level. Implications of this provision are likely to come up at the 7th Conference of the Parties to the CBD in 2004.

Energy: Fossil fuel producers succeeded in avoiding a target for increasing the share of renewable energy. Instead of agreeing that a defined percentage of global energy needs should be covered by renewable sources by a certain date, the implementation plan rather limply calls on governments to 'improve access to reliable, affordable, economically viable, socially acceptable and environmentally sound energy services and resources [...] such as enhanced rural electrification and decentralized energy systems, increased use of renewables, cleaner liquid and gaseous fuels and enhanced energy efficiency'.

However, the high-profile event induced Russia to announce that it would ratify the Kyoto Protocol 'in the nearest future', thus paving the way for its entry into force. Canada also said it might ratify before the year's end.

WSSD documents are available at <http://www.johannesburgsummit.org>.

This summary was adapted from the analysis provided in BRIDGES Trade BioRes – WSSD Special Updates No.5, published by ICTSD in Johannesburg. The Updates are available (in English, Spanish, French and German) at <http://www.ictsd.org/issarea/wssd/wssdmain.htm>.

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MEETINGS OF WTO BODIES

Oct. 3-4	Trade Negotiations Committee
Oct. 7-9	Committee on Trade and Development, special session* followed by regular session
Oct. 8-11	Committee on Trade and Environment; reg. session followed by special session*
Oct. 10-11	Working Group on Transparency in Government Procurement
Oct. 14	Committee on Trade-related Investment Measures
Oct. 14	Dispute Settlement Body; special session*
Oct. 15-16	General Council
Oct. 16-18	Negotiating Group on Rules
Oct. 17	Committee on Technical Barriers to Trade
Oct. 21- Nov. 1	Council for Trade in Services; regular session followed by special session*
Nov. 6	Negotiations Group on Market Access
Nov. 7	Sub-Committee on Least-developed Countries
Nov. 11	Dispute Settlement Body
Nov. 12	Committee on Regional Trade Agreements
Nov. 12	Seminar on the special session of the Committee on Trade and Environment
Nov. 13-15	Dispute Settlement Body; special session*
Nov. 14-15	Working Group on the Relationship between Trade and Investment

*Special sessions denote negotiations mandated in the Doha Ministerial Declaration.

OTHER MEETINGS

October 9-11 Rome	First meeting of the Interim Committee of the International Treaty on Plant Genetic Resources for Food and Agriculture Contact: José Esquinas-Alcazar, tel: (39-06) 570-54986; email: Jose.Esquinas@fao.org; Internet: http://www.fao.org/ag/cgrfa/
Nov. 3-15 Santiago	Twelfth Meeting of the Conference of the Parties to the Convention on International Trade in Endangered Species (CITES) Contact: CITES Secretariat, tel: (41-22) 917-8139, e-mail: cites@unep.ch , Internet: http://www.cites.org/eng/news/meetings/cop12.shtml
Nov. 14-15 Sydney	'Mini-ministerial' in preparation for the WTO's fifth Ministerial Conference in Cancún, Mexico

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