

### Living up to Doha's 'Development' Promise: Too Many Slipping Deadlines

Amidst slow progress and slipping deadlines, WTO Director-General Panitchpakdi Supachai urged Members at the 15 October General Council meeting to 'move rapidly away from defensive positions', emphasising they no longer had the time to wait for someone else to make the opening move. In particular, Members should quickly engage in real give-and-take in the sensitive areas of agriculture, special and differential treatment for developing countries, as well as intellectual property rights and public health.

While Australia will host a 'mini Ministerial' for about two dozen countries in mid-November to inject some of the lacking political will to the process, the next meeting of the Trade Negotiations Committee in December will be a crucial yardstick for measuring progress across the board on the road to Cancún, Mexico, where the WTO's fifth Ministerial Conference will be held in September 2003. As the survey below makes clear, the task is daunting.

#### Agriculture

Bringing down barriers to agricultural trade is *the* key issue of the Doha Round for most WTO Members. So far, despite a large number of proposals on the table, Members have not progressed beyond pre-negotiation positions. Many lay the blame on the European Union, which still has not submitted a proposal on negotiation 'modalities' due to bitter divisions between EU member governments (see pages 11 and 18). On the other hand, the EU has focused strongly on controversial environmental and other non-trade concerns, insisting that these must be adequately taken into account during the negotiations (Bridges Year 6 No.6, page 11).

According to para. 14 of the Doha Ministerial Declaration, 'modalities for further commitments' in agricultural reform must be agreed by 31 March 2003. These 'modalities' are generally expected to spell out which formula/approach will be used in reducing tariffs, domestic support and export competition, as well as benchmarks/targets to ensure that the negotiations will be concluded on schedule by 1 January 2005 (see also page 11).

Stuart Harbinson, who chairs the WTO agriculture negotiations, has warned that he may not be able to issue a draft modalities paper in December, as was planned, leading to the March deadline slipping as well. Expressing the feelings of many frustrated WTO Members, the Cairns Group on 21 October urged 'parties who have the major backlog of reforms to table proposals consistent with the agreed objective of a fair and market-oriented trading system. We recognise that countries may have legitimate non-trade objectives. But these do not constitute an excuse for

lack of engagement.' Cairns ministers also issued a stern warning that failure to live up to the 31 March deadline would have 'serious consequences for the negotiations as a whole.'

#### Special Treatment and Other Implementation Issues

Discussions are virtually stalled on implementation-related issues, which encompass developing country aims both to 'operationalise' existing 'best-endeavour' clauses in WTO Agreements on special treatment and to correct what they see as imbalances in the Agreements themselves. Developing countries have warned that a failure to resolve

these issues will result in strong negative consequences for the success of the multilateral trade negotiations launched a year ago (see page 9).

In Doha, ministers agreed that 'all special and differential treatment provisions shall be reviewed with a view to strengthening them and making them more precise, effective and operational' (para. 44 of the Ministerial Declaration). They further instructed the Committee on Trade and Development (CTD) to identify those special and differential treatment provisions that Members consider should be made mandatory, and to 'report to the General Council with clear recommendations for a decision by July 2002'. The Committee was also to come up with 'clear recommendations for a decision' on ways in which S&D treatment provisions could be made more effective.

Due to utterly deadlocked talks in the CTD, the July date came and went with no decision except that of extending the deadline to 31 December (Bridges Year 6 No.6, page 9). Broadly speaking, OECD countries are advocating that Members first agree on the principles and purpose of special and differential treatment, and only then examine the more than 80 agreement-specific proposals

put forward by developing countries. The latter counter that the foundations of S&D treatment are outside the review's mandate, which they maintain clearly points to an agreement-specific approach.

Industrialised country reluctance to alter the 'balance of rights and obligations' in existing Agreements has coloured all discussions on issues related to implementation. Thus, due to ongoing 'fundamental differences' between Members, the Council for Trade in Goods was unable in July to even submit a report – let alone make recommendations – to the General Council on two textiles-related implementation proposals referred to its *consideration* by

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ministers in Doha. It has yet to decide how, where, when or even whether to continue consultations.

### Access to Medicines and Geographical Indications under TRIPs

The Doha Ministerial Conference agreed that the TRIPs Council should find an 'expeditious solution' to the difficulties faced by countries with insufficient pharmaceutical manufacturing capacities in making effective use of compulsory licensing under the TRIPs Agreement. Now it no longer seems a foregone conclusion that the negotiations will conclude by the December 31, 2002, deadline. A significant rift has opened between developed and developing countries on several counts, most notably on the nature of measures to prevent re-export of drugs manufactured under compulsory license from the beneficiary countries to rich country markets. Recent discoveries of large quantities of cut-price anti-retroviral drugs re-exported to European countries from some parts of Africa have highlighted the concern. In addition, Members have not agreed on criteria for 'insufficient manufacturing capacity' – a condition that WTO Member must fulfil before issuing a compulsory license for manufacture in another country – or on whether enterprises in developed countries could also supply the drugs (see page 11).

Old and new world wine/spirit producing countries are battling over whether a multilateral system of notification and registration of geographical indications [GIs] for wines and spirits should be mandatory or voluntary in nature and what exactly the register should cover. According to para. 18 of the Doha Declaration, the system should be ready for adoption by the WTO's fifth Ministerial Conference. A similar old-world/new-world struggle continues over the need for stronger protection for other GIs than those denoting wines and spirits. The EU provided a further complication when it sought in September to link the extension of GI protection to agricultural market access (Bridges Year 6 No.6, page 11).

### Other Issues on the Doha Agenda

**Environment** According to para. 31 of the Doha Ministerial Declaration, the Doha Round's environmental negotiations – which most Members only reluctantly agreed to – must neither 'prejudge the outcome' nor 'prejudice the WTO rights of any Member that is not a party to the MEA [multilateral environmental agreement, *ed.*] in question'. To date, the majority of WTO Members are still to be convinced on the need to clarify the relationship between WTO rules and MEAs. Progress is equally slow in determining how regular information exchange should be organised between the WTO and MEA secretariats (see page 13). In addition, the Committee on Trade and Environment has made little headway in responding to the mandate in Ministerial Declaration's para. 51 to act as a forum to identify and debate the environmental aspects of the negotiations 'in order to help achieve the objective of having sustainable development appropriately reflected' (Bridges Year 6 No.6, page 15).

**Rules** While negotiations aimed at 'improving and clarifying' the WTO's anti-dumping, subsidy and countervailing disciplines are still at the stage of initial positioning, Ambassador Groser of New Zealand, who chairs the Rules Group, told the Trade Negotiations Committee in October that talks so far showed 'measurable progress'. There are, however, deep divisions between Members. The inclusion of anti-dumping and subsidy rules in the new Round was a victory for developing countries and the greatest US concession in Doha. Unlike the 'Friends of Anti-dumping', which are pushing for rule changes to curb recourse to trade remedies (i.e. anti-dumping/countervailing investigations and duties), the US Administration is under pressure to ensure that examination of trade remedy rules results in a regime under which the US loses fewer anti-dumping, countervailing and subsidy disputes at the WTO. Talks on fisheries subsidies are split between the 'Friends of Fish', who want the Doha Round to lead to commitments to reduce government subsidies, and Japan and Korea, which insist that poor fisheries management rather than subsidies is the root cause of stock depletion (see separate article on page 12).

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# Non-voluntary Licensing of Patented Inventions: History, TRIPs, and Canadian and United States Practice

By Jerome H. Reichman and Catherine Hsenzahl

The term ‘non-voluntary’ or ‘compulsory’ licensing refers to the practice by a government to authorise itself or third parties to use the subject matter of a patent without the authorisation of the right holder for reasons of public policy. In other words, the patentee is forced to tolerate the exploitation of his invention by a third person or by the government itself. In these cases, the public interest in broader access to the invention is considered more important than the private interest of the right holder to fully exploit his exclusive rights.

Historically, non-voluntary licensing arose to ameliorate the patentee’s risks of forfeiture that derived from numerous restrictions on the use of patented inventions in early domestic and international laws. The first major improvement of the patentee’s status in this regard was the abolition of forfeiture for merely importing patented articles into countries that practised this restriction. Once the risk of forfeiture for imports had been attenuated, the most important obligation that the laws of many countries imposed on patentees was the duty to ‘work’, i.e. exploit the invention in the countries granting patents. Obliging foreign patentees to work each and every patent locally is often economically inefficient. Nevertheless, most countries opted for a local working requirement to favour domestic development and the protection of national industries.

However, forfeiture of patents as the sanction for non-working often generated still other social costs, especially when investment or know-how was insufficient to enable competitors to produce the disclosed invention by their own means. For these and other reasons, states gradually adopted a system of compulsory licensing as the primary sanction for non-working instead of forfeiture.

As states familiarised themselves with the remedy of compulsory licensing in cases of abuse, especially of non-working, another unintended consequence was that they increasingly resorted to this same remedy to restrict the powers of the patentee even in the absence of abuse. They did this for a variety of reasons that were generally supposed to promote the public interest. Compulsory licensing was of particular interest to countries seeking to regulate patents covering medicinal products and food products. About one hundred countries recognised some form of non-voluntary licensing in their patent laws by the early 1990s.

## Non-voluntary Licenses and TRIPs

During the Uruguay Round, when it came to determining the rules applicable to non-voluntary licensing of patented inventions under TRIPs, the negotiators found it difficult to reach a consensus. The principal limitations on a patentee’s exclusive rights are the relatively narrow set of exceptions covered by Article 30 and the rather broad possibilities for imposing non-voluntary licenses under Article 31. Account must also be taken of Article 27.1, which requires patents to be available ‘and patent rights enjoyable without discrimination as to the place of invention, the field of technology, and whether products are imported or locally produced.’ This non-discrimination provision lies at the centre of the debate regarding

the continued legitimacy of the working requirements under TRIPs, which remains controversial and unsettled.

Apart from questions pertaining to either the grant of a compulsory license for failure to work or the grant of such a license to prevent abuses of the patentee’s exclusive rights, strenuous efforts were made to formulate some criteria that might limit the Members’ powers to grant non-voluntary licenses on other grounds, particularly the broad and generic ground of promoting the public interest. However, every attempt to narrow these grounds during the Uruguay Round negotiations ran afoul of the state practices of leading developed countries, including those of the United States where the government and its contractors are broadly authorised to make use of patented inventions without the patentee’s permission and without access to injunctive relief to prevent infringement.

The final text of Article 31 indirectly vindicated the public interest as a ground separate from the category of abuse, and leaves considerable leeway to impose non-voluntary licensing of patented inventions for any legitimate purpose and without undue constraints. In particular, any government that seeks to bring a patentee’s practices into line with its own policies, especially with regard to disciplining the prices at which the patented articles are to be locally distributed, can achieve its aims within the confines of Article 31. Indeed, as recent experience in both Brazil and the US demonstrate, the mere threat of a non-voluntary license may obviate the need to issue it in practice.

A number of cautionary observations are in order, primarily because the flexibility embedded in Article 31 is not boundless, and other provisions in TRIPs may further constrain it. For example, care must be taken to work around the requirement of non-discrimination in Article 27.1, which seems to impede the imposition of non-voluntary licensing on unreasonably broad subject-matter categories. Thus, a government presumably could not impose compulsory licensing on medicines in general without some compelling justifications; but it could impose such licensing on medicines reasonably deemed to be ‘essential’ if other requirements of Article 31 were satisfied.

The practical ramifications of Article 31 may ultimately depend on a combination of state practice at the local and regional levels and subsequent legislative or judicial action at the international level. The Doha Declaration on the TRIPs Agreement and Public Health is a case in point. The Declaration attempts to clarify the flexibility already embodied in the TRIPs provisions concerning the use of non-voluntary licenses to address public health problems, and may help to alleviate certain misunderstandings that previously clouded these issues. For example, the drafters ‘reaffirm the right of WTO members to use, to the full, the provisions in the TRIPs Agreement, which provide flexibility ... to protect public health, and, in particular, to promote access to medicines for all.’ To this end, they expressly declare that, ‘each Member has the right to grant compulsory licenses and the freedom to determine the grounds upon which such licenses are granted.’

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*Non-voluntary Licensing, continued from page 3*

The Declaration also rectifies the misguided notion that states must proclaim a full-fledged national emergency in order to grant non-voluntary licenses for patented pharmaceutical products. On the contrary, the Declaration expressly recognises the right of each Member ‘to determine what constitutes a national emergency or other circumstances of extreme urgency.’ This characterisation, when made in good faith, triggers the waiver of any duty to negotiate with the right holder under Article 31(b) prior to the granting of compulsory licenses.

Unfortunately, the Declaration does not resolve one important question concerning the right of importing states to treat products initially sold under a compulsory license in the exporting state as parallel imports covered by paragraph 5(d). Because these patented products were initially sold without the consent of the patent owner, one line of authorities holds that the doctrine of exhaustion cannot technically apply. If so, the exported goods produced under a non-voluntary license abroad could infringe the local patentee’s exclusive right to import the goods in question under territorial law.

If it turns out that patented pharmaceuticals distributed under a compulsory license cannot be exported as parallel goods within paragraph 5(d) of the Declaration, then they remain subject to Article 31(f), which literally limits such exports to 49.9 per cent of the total supplies distributed under the compulsory license in the local market. Since only a few developing countries can manufacture technically advanced medicines, these legal impediments hamstringing the ability of these countries to assist other poor countries lacking local manufacturing capacity that issue compulsory licenses to acquire essential medicines.

Can developing countries with manufacturing and export capabilities impose compulsory licenses on patented medicines for the purpose of assisting other developing countries that lack manufacturing capabilities to import essential medicines under compulsory licenses of their own, without violating the patentee’s rights under the TRIPs Agreement? Unfortunately, the Declaration provided no clear legal machinery for resolving this dilemma and merely ‘instructed the Council for TRIPs to find an expeditious solution to this problem’ before the end of 2002.

As a result, the Declaration did not expressly empower states capable of manufacturing generic drugs under compulsory licenses to act as the agents of states lacking such capacity. It did not authorise the former to meet the latter’s needs by imposing compulsory licenses for this purpose notwithstanding the export limitations of Article 31(f), nor did it concede that the exceptions to the patentee’s exclusive rights under Article 30 may implicitly allow the exporting state to impose compulsory licenses in order to assist other states for such purposes. Instead, the Declaration leaves these and other possible options, including a US proposal for a moratorium on dispute settlement actions for violations of TRIPs standards incurred when states address public health crises, to future action by the Council for TRIPs which must adopt an enabling solution before the end of 2002.

### The Canadian and US Approaches

Since both Canada and the US have a rich and interesting experience in the use of non-voluntary licensing, a survey of this experience might shed light on the opportunities and challenges that countries generally face in the actual use of this legal instrument.

Canada made extensive use of non-voluntary licensing of patented inventions in the recent past, when it still regarded itself as a not fully-fledged industrialised country. Moreover, Canada pursued this strategy vigorously with respect to pharmaceutical and food patents, and it was instrumental in the establishment of a generic medicine industry in that country. Indeed, a compulsory licensing scheme was used aggressively to promote the production of generic pharmaceuticals, and this scheme reportedly produced some of the lowest consumer drug prices in the industrialised world. Between 1969 and 1992, 613 licenses were granted to import or manufacture medicines under such licenses.

Also of interest is Canada’s reliance on statutory regulation of non-voluntary licensing, with particular regard to both abuse of patent rights and public interest objectives. In practice, however, the only type of ‘abuse’ that consistently drew attention prior to the 1990s was a failure to work patents locally. Otherwise, non-voluntary licensing of patents in the public interest was largely confined to food and medicines under the special legal regimes that were repealed in the late 1980s and early 1990s. Even in the past, in other words, Canada largely refrained from using non-voluntary licenses to address other forms of abuse or competition law issues generally. Since the 1990s, moreover, Canada has made little use of compulsory licenses for any purpose, and in line with its more pro-patent policies has lately advocated caution in the use of such licenses by other countries.

Historically, the situation in the US differed widely from that of Canada. To begin with, the US never adopted a general statute to regulate non-voluntary licensing of patented inventions either on grounds of misuse or on public interest grounds. On the contrary, courts and commentators frequently express pro-patent sentiments hostile to the very concept of non-voluntary licensing.

In practice, however, the federal courts made aggressive use for most of the twentieth century of non-voluntary licensing to regulate misuses of patent rights and antitrust violations involving the exercise of such rights. Since 1988, though, the federal appellate courts have imposed relatively few non-voluntary licenses under either rubric. However, the Federal Trade Commission has made extensive use of such licenses, often in consent decrees bearing on corporate mergers and acquisitions.

The US has also made far less use of non-voluntary licensing on public interest grounds than Canada, although limited statutory and common-law bases for issuing such licenses continue to exist. At the same time, the US has always relied heavily on the non-voluntary licensing of patented inventions to facilitate public, non-commercial uses by the government and its agents, a practice that the Canadian authorities have less frequently emulated. The bulk of the non-voluntary licenses issued for government use pertain to national defence. Nevertheless, the US has also used this same legal tool to reduce the costs of certain medicines and to advance both environmental and economic development goals, including major projects to dam rivers and generate electricity.

### Non-voluntary Licensing: A Two-edged Sword

Policymakers should bear in mind that the issuance of a non-voluntary license cannot normally impede a patent holder from entering the market in competition with the licensee. So long as the former complies with local competition law, he may possess

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**Developing countries must remain vigilant in order to curb the excesses of overly protectionist IPR policies.**

# Fisheries Subsidies: Casting a Net too Small

By Roman Grynberg

After almost five years of discussion at the Committee on Trade and Environment, WTO Members have embarked this year upon negotiations on fisheries subsidies as a result of the decision reached by ministers at the 5<sup>th</sup> Ministerial Conference of the WTO at Doha. The ministerial decision was couched in language that explicitly recognised the importance of the sector to developing countries and clearly implied the development of appropriate special and differential treatment rules.<sup>1</sup> Yet despite that language, there has been no substantive call for special and differential treatment from any developing country<sup>2</sup> including the ‘Friends of Fish’, the majority of which are developing countries.<sup>3</sup>

## Background

For over two hundred years developed countries have provided subsidies to this sector as part of a mercantilist policy of development of fisheries, maritime transport, food security and national defence.<sup>4</sup> Now these subsidies, correctly or otherwise, are seen as undermining fisheries sustainability and hence are about to be subjected to possibly entirely new disciplines.

At the end of the Uruguay Round, fisheries – normally part of the agricultural sector – were excluded from the subsidy reduction commitments of the *Agreement on Agriculture*.<sup>5</sup> Even now, WTO Members continue to disagree on whether new disciplines are needed or whether the provisions of the Agreement on Subsidies and Countervailing Measures (ASCM) are adequate. Japan, for instance, has argued that the current rules are sufficient and that the matter should be addressed at the FAO, which possesses the fisheries expertise to address such a complex issue.<sup>6</sup> New Zealand, on the other hand, maintains that given the heterogeneous nature of fish stocks, it is not possible to use existing ASCM disciplines to challenge the actions of WTO Members offering what are viewed as illegal subsidies.<sup>7</sup>

## What Architecture for Fisheries in the WTO?

The question now arises as to precisely what type of architecture, if any, will evolve in order to accommodate the perceived shortcomings of the ASCM in the area of fisheries. This depends in large measure on political, as well as technical considerations. With most WTO issues, it is the commercial interests that count when issues are traded off at the end of the round. In the case of fisheries, the proponents are a mixed collection of countries with commercial interests and those who believe that fisheries subsidies disciplines will constitute an important step towards an environmental objective, i.e. sustainability. The only two developed countries where a substantial and clearly demonstrable commercial interest is at stake are Iceland and New Zealand, both nations with highly efficient and competitive fishing fleets, but neither a political heavy-weight. In the case of Iceland, fisheries constitute 75 percent of export earnings and hence the government simply cannot compete with other WTO Members on subsidies. New Zealand also opposes such subsidies on ideological grounds. Both countries and their fishing industry would benefit substantially from the exit of less efficient suppliers that currently rely on subsidies.

The United States is a key player backing this initiative. It has now tabled a paper on fisheries subsidies<sup>8</sup> which generally supports WTO negotiations on the subject (see page XX). However, given the very wide diversity of US fisheries interests (New England, Gulf, Pacific west coast and distant water fleets all have quite different interests), its long-term support may depend less on direct commercial interests than upon how much the Bush Administration wishes to demonstrate to Democrats in Congress that it does have an environmental agenda in multilateral trade negotiations. Similarly, Australia appears to have strong political – as opposed to strictly commercial – interests in the subject. The developing country members of the ‘Friends of Fish’ all have substantial international fisheries trade interests, but are unlikely to be willing or able to ‘pay’ for fisheries disciplines when the crunch comes. The real powerhouses behind the initiative are environmental NGOs, Greenpeace and WWF backed by UNEP.

**An Annex to the Subsidies Agreement would have scant commercial importance and do little or nothing to protect fish stocks.**

During the Uruguay Round, political opposition came from the EU and countries called the ‘Friends of Fisheries’.<sup>9</sup> However, if recent proposed changes to the EU Commons Fisheries Policy actually succeed then the EU will be removed as an active obstacle to fisheries subsidies reform at the WTO. If, on the other hand, the CFP reform is blocked by the ‘Friends of Fisheries’ then the EU – so far uncharacteristically silent in the Negotiating Group – will certainly become a more active protagonist. The political opposition now comes from Japan and

other North Asian countries. For most OECD countries fish is just one alternative to beef or lamb, but in Japan with its long mercantilist tradition in the fisheries sector – and where an older generation still vividly remembers the hunger at the end of World War II – food security issues for the nation’s main source of animal protein remain a concern of high priority. It is Japan’s vital fisheries interests that will create the single largest barrier to a new architecture with enhanced disciplines.

WTO Members in the Negotiating Group on Rules have not yet resolved or even openly discussed the technical issues pertaining to this architecture. However, the environmental NGOs and UNEP have a much clearer picture and are well ahead of most WTO Members in terms of enunciating architecture for future disciplines. If there is to be a new architecture it will employ a methodology that would be related to the one employed in the Uruguay Round agricultural negotiations, i.e. countries disclose their support measures to fisheries and then make appropriate reduction commitments. This approach resulted in the WTO Agreement on Agriculture, where support is classified under three categories based on trade-distortiveness – the so-called blue, green and amber boxes – with different spending caps and reduction commitments. If WTO Members are unable to agree on a new architecture along these lines, then what is likely to emerge is an Annex to the ASCM, which will have scant commercial importance and do little or nothing to protect fish stocks. Given the opposition from Japan and the relative weakness of its principal proponents, a new architecture is by no means a ‘done deal’ unless the environmental NGOs are able to exert their considerable pressure on both the United States and the European Union.

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Against this backdrop, what should be the concerns of the developing world with regard to the development of possible new disciplines on the fisheries sector?

**Avoiding the Problem of By-Catch**

Developing countries' experience with WTO disciplines over the last five years warrants a highly precautionary approach to any new disciplines. Few developing country missions in Geneva have had time to consider fisheries subsidies, which they widely see as a peripheral issue to their principal trade interests. In the past, and often quite unintentionally, small developing countries have found themselves as third party 'by-catch' in trade disputes between larger WTO Members. The experience with the banana panels, the ensuing pressure on tuna margins of preference<sup>10</sup> and the current dispute over the EU sugar regime<sup>11</sup> have all resulted in developing countries experiencing the consequences of 'judicial activism' in the multilateral trading system between much larger players. It is precisely the interaction of past disciplines – which catch 'big fish' as well as unintentional 'small by-catch' – with *ad hoc* judicial activism, that has created much of the developing world's discomfort with further disciplines. The problem is the WTO's net has been cast far too small and too wide and without adequate consideration of the *development* as opposed to *adjustment* needs of its Members.

However, tightened subsidies rules have consequences for several fisheries issues in developing countries. These include:

- **Access fees:** The position of UNEP and WWF, which have been key players in the fisheries subsidies debate, is that developed countries' subsidised access sends fishing fleets in and thus pushes developing countries to increase access to unsustainable levels, eventually depleting the fisheries. While this may be an accurate scenario in some countries, in others fish stocks are not being depleted because they are prudently managed. In the South Pacific, for example, where tuna stocks are abundant and the most common species are not in decline, some of the poorest and most vulnerable of the least-developed countries are threatened by possible WTO disciplines over which they have no say. In the case of Kiribati and Tuvalu, which are not WTO Members, upwards of 40 percent of GDP comes from fisheries access fees.<sup>12</sup> Much of this is in the form of development assistance linked directly to access and could be construed as subsidy if the disciplines are written with inadequate consideration of the concerns of the most vulnerable.
- **Export subsidies and domestic measures intended to facilitate localisation:** Small developing coastal states apply a host of measures to help develop their fisheries sector. These include exemptions from access fees, domestic taxes and excise for petroleum. Unless disciplines are defined to exclude measures used by small coastal states to domesticate their fisheries sector in accordance with their rights under UNCLOS, they could easily be struck down in any fisheries subsidies negotiations or in a subsequent dispute.
- **Subsidies to artisanal fishers:** In many small coastal developing states governments provide direct financial support to artisanal fisheries, which is frequently a subsistence activity, to make the transformation to small-scale development for the local market and export. Governments often provide assistance that could also be construed as violating ASCM provisions.

All these matters can conceivably be addressed if the size of the WTO's net is cast large enough to provide for appropriate escape for the by-catch. The judicious use of appropriate *de minimis* and special and differential provisions could provide a genuine development space. The question is whether in the rush to write yet more disciplines the genuine and legitimate concerns of the WTO's most vulnerable Members will be taken on board.

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## ENDNOTES

<sup>1</sup> WTO Ministerial Declaration WT/MIN(01)/DEC/1, para 28: 'In the context of these negotiations, participants shall also aim to clarify and improve WTO disciplines on fisheries subsidies, taking into account the importance of this sector to developing countries.'

<sup>2</sup> China has called for special and differential treatment provisions in very broad terms without specifying the content of such provisions. Negotiating Group on Rules TN/RL/W/9, 20 June 2002.

<sup>3</sup> The principal proponents of enhanced disciplines on fisheries subsidies, dubbed 'Friends of Fish', are Australia, Chile Ecuador, Iceland, New Zealand, Peru, Philippines and the US.

<sup>4</sup> Indeed Adam Smith, in the Wealth of Nations criticised bounties provided by Britain to its own whaling fleet but in the end recognised the key role the subsidies played in the national defense. Japan and France used subsidies in the 19<sup>th</sup> century to develop their own distant water fleets.

<sup>5</sup> The agricultural sector normally includes the first twenty-four chapters of the Harmonised System. See *Agreement on Agriculture*, Annex 1, para 1(i). The failure to include fisheries in the disciplines in the Agreement was a result of EU objections.

<sup>6</sup> Negotiating Group on Rules, TN/RL/W/11, 2<sup>nd</sup> July, 2002 and TN/RL/W/9, 8-10 July, 2002.

<sup>7</sup> Negotiating Group on Rules, TN/RL/W/12, 2<sup>nd</sup> July, 2002

<sup>8</sup> Negotiating Group on Rules, TN/RL/W/21, 10 October, 2002

<sup>9</sup> This is a group of European countries who have substantial fisheries interests and includes, amongst others France, Spain and Portugal.

<sup>10</sup> In response to demands from the ACP Group for a waiver for the trade provisions of the Cotonou Agreement (under which most ACP exports enter European markets duty-free), Thailand and Philippines placed considerable pressure on the EU at the Doha Ministerial Conference to obtain a lower import tariff for their exports of canned tuna than the Union's 24 percent most-favoured-nation tariff rate. After subsequent bilateral negotiations failed to solve the issue, Thailand and the Philippines took the complaint to the WTO, where Deputy Director-General Rufus Yerxa has been appointed as a mediator. Should this mediation fail, Thailand and the Philippines may request the establishment of a dispute settlement panel.

<sup>11</sup> Australia Request for Consultations, European Communities – Export Subsidies on Sugar, WT/DS265/1, 1<sup>st</sup> October, 2002, Brazil Request for Consultations, European Communities – Export Subsidies on Sugar, WT/DS266/1, 1<sup>st</sup> October, 2002. See page XX for more details.

<sup>12</sup> Asian Development Bank, R. Gillet and C. Lightfoot, *The Contribution of Fisheries to the Economies of the South Pacific*, 2001.



# The Legal Basis for a New Regime of Differential Treatment

By Francis Mangeni

The compatibility of the arrangements under the Cotonou Agreement and WTO rules has usually been determined on the basis of Article XXIV of GATT 1994, which lays down the requirements for regional free trade agreements. Little thought has been given to potential alternative regimes that might be better suited to the special circumstances of the Cotonou arrangements, which are a form of development co-operation between developing and developed countries. This article surveys other provisions that could be the basis for WTO compatibility.

## Part IV of GATT

The aim of Part IV, introduced into the GATT in 1965, was to provide developing countries with a special regime for policies and programmes to promote economic development. Part IV has featured in Article XXIV agreements and other programmes for economic integration involving developing countries. It provides for co-operation between developed and developing countries, and among developing countries, through individual or joint action, which could take the form of Regional Trade Arrangements (RTAs). A good example here was the Lomé Conventions between the European Union and African, Caribbean and Pacific (ACP) countries under which ACP-country products received preferential market access in the EU.

Part IV introduced the principle of non-reciprocity, i.e. developing countries were not expected to make concessions in return for advantages offered by developed countries. The problem was that reciprocal concessions from all parties, including developing countries, was considered essential for compliance with Article XXIV. It was consistently argued that Part IV was not an exception to the reciprocity requirements under Article XXIV. Not even an invocation of both Article XXIV and Part IV yielded consensus.

In the mid-1970s support for Part IV non-reciprocity benefited from the drive towards the New International Economic Order (this might explain why that support waned in the face of increasing economic liberalism). GATT Working Parties expressed sympathy for arrangements between developed and developing countries, which incorporated Article XXIV agreements while fully involving financial and technical cooperation. However, while the *EC-Algeria*, *EC-Morocco* and *EC-Tunisia* agreements generally went down well with working parties, they still raised the issue of the exact nature of the relation between Part IV and Article XXIV, and of whether in fact Part IV permitted developed countries to grant preferences to some developing countries other than under a generalised system.

Developing countries may eliminate duties and other restrictive regulations if they voluntarily waive their non-reciprocity right under Part IV, but they should not be required to do so. If the requirements under Article XXIV are not satisfied, and developing countries do not waive their non-reciprocity right, the waiver under paragraph 10 should be resorted to. This paragraph empowers the WTO Council for Trade in Goods to approve agreements not complying with Article XXIV rules provided that the agreements lead to the formation of customs unions or free trade areas.

The rather mandatory provisions of paragraph 1 of the Understanding on Article XXIV – that customs unions, free trade areas and interim agreements, in order to be consistent with Article XXIV must conform with its paragraphs 5, 6, 7 and 8 – do not affect the rights under Part IV, for those paragraphs only apply when the agreement is brought under Article XXIV. The mandatory provisions of the Understanding could be seen as addressing the controversy on the relation between paragraph 4 and the subsequent paragraphs of Article XXIV. The position taken here is that Article XXIV is inapplicable due to the non-reciprocity principle, unless waived. Such a waiver would have to be explicit, for it is in part due to lack of express waivers by developing countries that these inconclusive debates have been generated.

The problematic application of Part IV led to decisions to clarify issues. In 1971, the contracting parties adopted the *Decision on the Generalised System of Preferences* [GSP Decision] and in 1979 the Enabling Clause. The GSP Decision waived GATT Article 1, permitting contracting parties to accord advantages to developing countries without extending them to all contracting parties as otherwise required under the most-favoured-nation principle.

## The Enabling Clause

The Enabling Clause put the *Decision on the Generalised System of Preferences* on a firm basis. Understood by developed countries as only temporary in nature, the GSP Decision took the form of a waiver for 10 years expiring in 1981, entailing general preferential treatment granted by developed countries within the wide scheme of more favourable treatment for developing countries.

The Enabling Clause contains a complete regime for regional trade agreements (RTAs) among developing countries. Conditions for the differential and more favourable treatment under the Clause include that the treatment ‘shall be designed to facilitate and promote the trade of developing countries and not to raise barriers to or create undue difficulties for the trade of other contracting parties’. The treatment ‘shall not constitute an impediment to the reduction or elimination of tariffs and other restrictions to trade on a most-favoured-nation basis’. The Enabling Clause expressly provides for notification and consultation. Thus, like Article XXIV, it addresses the major concerns, albeit with relatively less rigour, for in the Clause the detailed obligations specified regarding plan and schedule and trade coverage, are lacking. Those were troublesome provisions.

Regarding Part IV principles, the Enabling Clause is mainly about providing a basis for the preferential treatment, now called differential and more favourable treatment. The non-reciprocity principle is provided for. However, difficulties exist about the extent of non-reciprocity. The Clause does not provide a blank exemption but is relative to the ability and needs of the developing country, and subject to graduation of the recipient countries, first from the category of least-developed and then that of developing. Thus the first sentence of paragraph 5 interprets non-reciprocity in the

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sense that ‘developed countries do not expect the developing countries, in the course of trade negotiations, to make contributions which are inconsistent with their individual development, financial and trade needs’. Paragraph 6 of the Clause then provides for ‘utmost restraint’ by developed countries in seeking concessions or contributions from least-developed countries.

In practice, therefore, where concessions are considered an appropriate policy to promote economic development, the non-reciprocity principle will be derogated from. Indeed, in the era of deregulation since the early 1980s, developed countries and international financial institutions have increased pressure on developing countries to remove barriers to trade and to liberalise as means of promoting economic recovery. Developing countries have been forced to grant concessions upon arguments that would *appear* to be consistent with the qualification in the non-reciprocity principle. In substance, however, the pressure is a derogation from that principle, at least to the extent that developed countries have demanded the concessions as conditions for funding development programmes.

The Enabling Clause is a ‘whole’ instrument for RTAs among developing countries, drawing on the traditional rules in Article XXIV and on Part IV considerations for developing countries, although the rigorous requirements about a plan and schedule and trade coverage are absent.

### Article XXV Waivers

A number of regional trade agreements were notified under Article XXV, using the paragraph 5 waiver. These agreements did not aim for customs unions or free trade areas as such, but involved reduction or elimination of barriers to products from developing countries. In addition, they generally had provisions on trade, finance and development. Perhaps the most notable of these agreements were the Lomé Conventions between the EC and African, Caribbean and Pacific countries, and US laws granting preferential treatment to Caribbean and Andean countries.

Article XXV, headed ‘joint action by the contracting parties’, has two aspects. The first regards meetings of contracting parties to apply or implement provisions for joint action, and generally for the operation and furtherance of the objectives of GATT 1947.

The second aspect is provision for waivers from GATT obligations. The waiver is available in ‘exceptional circumstances not elsewhere provided for in this Agreement’, and where the decision is approved by a majority of two-thirds of the contracting parties if consensus is not forthcoming. The Enabling Clause (in footnote 2 to paragraph 2) introduced further aspects to Article XXV, by providing that it would remain for contracting parties to ‘consider on an *ad hoc* basis under the GATT provisions for joint action any proposals for differential and more favourable treatment not falling within the scope of this paragraph.’

Three questions raised concern: the meaning of exceptional circumstances, whether the footnote refers to action under paragraph 1 or 5 of Article XXV, and whether in fact Article XXV is still necessary given the provisions of Article IX of the WTO Agreement and of the Understanding in respect of waiver of obligations under GATT 1994.

### Exceptional Circumstances

‘Exceptional circumstances’ falling within the scope of paragraph 5, are those not expressly covered by other provisions of GATT. Where other GATT provisions permitting a waiver or a derogation from obligations govern the exceptional circumstances at hand, paragraph 5 does not apply, but action would have to be taken under those express provisions by the contracting parties acting jointly. Exceptional circumstances, ordinarily meaning unusual or extra-ordinary circumstances, refer, as used in article XXV: 5, to exceptions to the primary obligations under GATT, for which no directly applicable or enabling provisions are available. Exceptional circumstances will therefore be of a legal character, though arising out of economic, political or other considerations.

An early trend was that though the contracting parties had a general power under article XXV:5(a) to waive any GATT obligation, the waiver was subject to certain conditions. Its application would have to conform to the GATT objectives and not injure the trade of others. Arrangements for the protection of the trade of others included notification and consultation requirements, and provisions for dispute settlement and reviews.

Under the WTO, however, ‘exceptional circumstances’ regarding RTAs under Article XXV:5 of GATT 1947 arose in respect of agreements involving developing and developed countries, for then neither Article XXIV nor the Enabling Clause – when it came into effect – were applicable and it was a situation clearly not governed by an express GATT provision.

### Footnote 2 of the Enabling Clause

Because of the general and hortatory nature of Part IV provisions, and of lack of precise and detailed provisions on the manner of implementing the commitments, decisions for specific programmes followed, such as the *GSP Decision* and the Enabling Clause. These decisions, though following from GATT provisions and GATT-based action, could stand by themselves and be the basis for measures taken by developed countries for differential and more favourable treatment for developing countries. But the ultimate source of these decisions – GATT provisions, remained available for further and new decisions, and for other action. So the effect of the second footnote on paragraph 2 of the Enabling Clause, was to make an alternative or additional provision to GATT 1947. All GATT provisions for joint action, as defined in Article XXV: 1, remained available as and when applicable, as well as the waiver provisions under paragraph 5 thereof.

The role played by the footnote is that action for differential and more favourable treatment do not need to be based on instruments taking the form of temporary waivers, such as the *GSP Decision*, for the Clause has unlimited duration, and a blanket waiver from obligations under Article I is provided for under joint action. With the Enabling Clause, there can be no doubt that derogations from Article I can be made in any situations where differential and more favourable treatment is considered appropriate. There are provisions for joint action under the GATT which do not specify that such action is for differential and more favourable treatment for developing countries. Article XXV:1, for instance, makes provision for joint action ‘with a view to facilitating and furthering the objectives of this Agreement’. Although this Article does not specify that it is a basis for differential and more favourable

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## S&D Review: Developing Country Frustration Grows as No Proposals Get Positive Response

Progress remains elusive in the review of special and differential treatment (S&D) provisions, already months past the 31 July 2002 deadline set by ministers in Doha for presenting the General Council with 'clear recommendations for a decision'. While a new deadline has been set for 31 December, meetings between 17-23 October showed no narrowing of the gap between developing and industrialised countries. The latter again commented on the inefficiency and/or impracticality of developing country proposals aimed at enhancing the S&D provisions in a number of WTO Agreements. Despite the Doha mandate that the provisions be reviewed by the WTO's Committee on Trade and Development (CTD), developed countries continue to advocate that the relevant WTO bodies are best suited to deal with agreement-specific proposals (see also page 1).

On 7 October, Members agreed that the post-July work programme would deal with agreement-specific proposals by clustering them into three categories:

- provisions aimed at increasing the trade opportunities of developing country members;
- provisions under which WTO Members should safeguard the interests of developing country Members; and
- 'flexibilities of commitments and use of policy instruments.

Another cluster involves so-called cross-cutting issues, such as the principles and objectives of special and differential treatment. Most industrialised countries see the aim of S&D as the integration of developing countries into the multilateral trading system. This would entail discussions on whether the WTO should be single- or multi-tiered, as well as the controversial notion of 'graduation', according to which developing countries would lose S&D benefits as their economic and trading capacity improves (Bridges Year 6 No.6, page 9). Most developed countries argue that this should, at least initially, be the focus of the review in the CTD, as only a coherent overall vision on S&D will provide a basis for reviewing any of the more than 80 specific proposals on the table.

### Lack of Progress Will Have 'Strong Negative Impacts'

During the 17-23 October meetings, developing countries expressed great disappointment at the seemingly 'intractable' stance of developed country Members. Commenting on the outlook, one delegate saw movement by the 31 December deadline as 'unlikely'. Should that be the case, the impact on the overall progress of the Doha Round would be 'negative and strong', he added.

Major trading powers (the US, the EU, Canada, Switzerland, Australia and Japan) continued to argue that agreement-specific issues were not mandated for the CTD and thus should be relegated to the relevant 'negotiating' bodies (whether the CTD special sessions are in fact a negotiating body is also debated by Members). Haiti, Kenya, Pakistan and Zambia staunchly maintained that the CTD was indeed the appropriate forum for reviewing specific provisions.

### Subsidies and Countervailing Measures

Members addressed two proposals from groups of developing countries on subsidies and countervailing measures (SCM). One of them (TN/CTD/W/1) involves removing the word 'may' from Article 27.1 of the SCM Agreement, which reads 'Members recognise that subsidies may play an important role in economic development programmes of developing country Members', and lays down the basis for S&D in the SCM Agreement.

Australia, the US, Switzerland and Japan disagreed with the assumption that subsidies are useful for development, and stated that the proposed change would change the rights and obligations of Members. A delegate from Pakistan reportedly commented that he would certainly welcome such a position from the developed countries in the agriculture negotiations. The EU agreed in principle with the developed country view, but indicated that it would be willing to consider removing 'may' if 'certain' were included before the word 'subsidies'.

In response to a proposal in the Africa Group's comprehensive submission (TN/CTD/W/3/Rev.2) – relating to various mechanisms for subsidy reduction exemptions and transition periods found in SCM Article 27 – most developed countries stated that sufficient mechanisms were already in place and that the proposed transition periods were too long to be given to all developing countries. Developed country Members stated unequivocally that all of these elements belonged in the Negotiating Group on Rules and not the CTD. Most developing countries disagreed.

### Anti-dumping

Members dealt with two elements from the Africa Group proposal (TN/CTD/W/3/Rev.2). Both concern Article 15 of the Anti-dumping Agreement, which deals with the special treatment that developed countries are to show developing countries before imposing anti-dumping duties. The proposal asks for substantive and procedural elaboration of the provision, and specifically for the definition of key terms. Developed countries (the EU, Switzerland and the US) replied again that the proper forum for this was the Negotiating Group on Rules and/or the Anti-dumping Committee. Switzerland also noted that the proposals on this article were not very clear and would not contribute to the objective of operationalising the provision. Zambia reportedly queried whether the CTD special session was merely there to discuss proposals without taking any action, and expressed frustration that it had nothing concrete to report to its least-developed country constituents.

### Technical Barriers to Trade (TBT)

On the two proposals for discussion under TBT (TN/CTD/W/2 & W/3/Rev.2), developed countries felt that the first, on mandatory and preferential technical assistance for developing countries to meet technical standards, was unreasonable and undesirable. They also opposed the Africa Group's requests for a new fund to provide technical assistance specifically for TBT obligations and for impact assessments of technical standards on developing countries before implementation. Switzerland, Canada and the EU felt that these matters were better taken up in the TBT Committee.

### Preferential Trading Schemes

Hungary introduced a concept paper on preferential trading schemes (TN/CTD/W/16). Paraguay has previously strongly argued that any benefits under Members' generalised systems of preferences (GSPs) should be available to all developing countries on an equal basis (Bridges Year 6 No.5, page 14).

The deadline for submitting detailed responses to the agreement-specific proposals is of 31 October. A large number of meetings are scheduled for November-December, see back page for dates.

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the economic and technical power to make life difficult for the latter. Moreover, so long as domestic competition laws do not impede it, the foreign patent holder can purchase or merge with his local competitor, in which case all strategy conflicts will soon vanish.

A state's ability to use local competition laws to regulate IPRs otherwise protected under TRIPs could eventually be called into question. In negotiations on the intersection between trade and competition policy, developing countries must remain vigilant in order to preserve the autonomy they need to curb the excesses of overly protectionist IPR policies.

Other variables must also be taken into account. One is the continued extra-legal pressures that may be exerted against those who resort to non-voluntary licenses. Developing countries that wish to retain their autonomous powers to exploit the flexibility inherent in the TRIPs standards will sooner or later have to devise appropriate national and regional strategies for sustaining and enhancing this autonomy.

Another particularly worrisome variable derives from ongoing initiatives to harmonise the substantive rules of international patent protection. Developing countries must take the steps necessary to gear up for the current substantive harmonisation exercise. There is a considerable risk that the flexibility residing in the TRIPs standards that now favours those developing countries which know how to exploit it could be squeezed out by high-protectionist standards incorporated into a new international treaty on patents. Beyond these technical considerations, there lie deeper, unanswered questions about the relative social costs and benefits of compulsory licensing of patented inventions as an instrument of economic development. The customary assertion of some economists that the use of compulsory licensing will depress investment in needed R&D requires careful and sceptical evaluation. Many inventions emanating from the technology-exporting countries today still respond to short-term needs and incentives primarily operative in OECD markets. Their sales to developing countries may represent windfall rents, which selective compulsory licensing could reduce with little impact on foreign R&D investment decisions.

At the same time, firms hit by compulsory licences may decide not to make future technology available in developing-country markets, which could lessen the possibilities for growth that voluntary imports, licensing or direct foreign investment might otherwise provide. Moreover, one propelling goal of an integrated global market is to provide incentives for R&D investments that could benefit all participating countries. Undue distortion of market forces could discourage aggregate investments in R&D, especially investment that might yield particularly big payoffs in developing countries. With these risks in mind, however, one should not assume without further investigation that the compulsory licensing of any particular patented inventions will necessarily or automatically discourage any particular investment in R&D.

What seems clear is that compulsory licenses may be used more effectively in some circumstances than in others. Selected non-voluntary licenses can yield positive results when used to address emergencies or to remove specific technology supply bottlenecks. They can be used to root the production or adaptation of appropriate technologies in qualified local facilities and to prod particular foreign companies into negotiated transactions involving IPRs that adequately respect local needs and conditions.

But even these presumptively beneficial uses of non-voluntary licenses impose social costs of their own, and policymakers must take these into account. For example, aggressive use of compulsory licenses to address emergencies may obscure other possible courses of action, such as regulatory and cooperative measures, that might persuade foreign producers to invest in local production facilities with greater long-term prospects. Similarly, any short-term benefits ensuing from the use of compulsory licensing as an instrument of technology transfer must be weighed, not just against the costs of imports, but also against the possible loss of licensing agreements or direct investments that might ensure continued access to better technology over time. The ability to grant non-voluntary licenses does not necessarily mean such licenses should actually be granted, at least without taking stock of the social costs that may, in the end, outweigh the benefits of this action. Excessive reliance on non-voluntary licensing could also adversely affect the interests of budding domestic inventors who fall afoul of rules prohibiting discrimination or of the government's own eagerness to intervene in the domestic market place. Above all, there are very real risks that ill-considered resort to non-voluntary licensing could discourage foreign investment and the transfer of advanced technologies by making other economic environments more attractive to firms in technology-exporting countries.

On balance, policymakers should view non-voluntary licensing of patented inventions as but one item in an arsenal of tools that may be used to promote national systems of innovation. What matters is not so much the use made of any particular tool, but rather the overall coherence and effectiveness of any given system. Absent a coherent strategy for promoting national and regional systems of innovation, excessive reliance on compulsory licensing of patented inventions may simply mask deeper structural problems and make them harder to solve in the long run.

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### Problem Areas on Compulsory Licensing under TRIPs

Summing up discussions so far, the Chair of the TRIPs Council on 17 October identified areas where further work is needed in order to address the difficulties faced by countries, which lack sufficient capacity to manufacture medicines making 'effective use' of compulsory licensing under the TRIPs Agreement. According to paragraph 6 of the Declaration on the TRIPs Agreement and Public Health, the Council must find an 'expeditious solution' to this problem by 31 December 2002 (see also page 11).

Areas of disagreement include the scope and coverage of the compulsory licenses (i.e., which drugs to treat what diseases and the inclusion of diagnostics); eligibility criteria for beneficiary countries, particularly transition and high-income developing country Members; whether developed, as well as developing countries could supply the drugs; safeguards against diversion in both exporting nations (through mandatory controls on the quantity manufactured and exported, as well as labelling/presentation) and importing countries (through – perhaps mandatory – controls on distribution); as well as provisions related to notifications and information to rights holders. Also pending is whether the solution would come under TRIPs Article 31(f) or Article 30.

The Chair specified that the summary note was issued under his 'exclusive responsibility' and did not commit any delegation. The next formal Council meeting is scheduled for 25-27 November.

## TRIPs Council Split on Compulsory Licensing

Meeting from 14-17 October, delegates from both Geneva-based trade missions and capitals were unable to reach a compromise around compulsory licensing options for developing countries under the WTO's Doha mandate on Trade-related Aspects of Intellectual Property Rights (TRIPs) and public health. TRIPs Council Chair Edouardo Pérez Motta tabled a chairman's draft that attempted to put forward 'possible elements' of a solution, as well as identify areas requiring further work (see box on page 10).

Many developed countries considered the paper as a good starting point for negotiations, but dissatisfied developing countries led by South Africa, Brazil and India issued a counter-proposal seeking far fewer conditionalities for the manufacture of drugs under compulsory license in a third country. This possibility is currently limited by TRIPs Article 31(f), which says production under compulsory licensing must be 'predominantly' for the domestic market.

The Chair proposed, *inter alia*, that least-developed countries would be automatically eligible to import medicines manufactured elsewhere under compulsory license, while other developing countries could use the system if they proved they did not have adequate pharmaceutical industries of their own. This was rejected by the Africa Group, Brazil and India, who said that each Member should have the discretion to 'determine whether it has insufficient or no manufacturing capacity with respect to a product(s) in the pharmaceutical sector'.

Hong Kong and Singapore – classified as developing countries at the WTO – said they would oppose eligibility criteria based on such things as income levels, while Hungary and Bulgaria expressed concern that transition economies with lower incomes should not be excluded from access to cheap medicines.

Brazil criticised industrialised countries for 'trying to put in language that would be more restrictive than what now exists under TRIPs'. For example, the US, the EU, Canada and Japan are seeking to restrict foreign suppliers of medicines produced under compulsory licenses to only those located in developing countries. They argue that prohibiting industrialised country producers from manufacturing under compulsory license for export would limit the possibility of such medicines finding their way to rich country markets, as has already happened to cut-price drugs voluntarily supplied by pharmaceutical companies (see page 2).

The developing country counter-proposal also took issue with the Chair's proposal that the system should cover only products needed to address the diseases referred to in the Doha Declaration on the TRIPs Agreement and Public Health, i.e. HIV/AIDS, malaria tuberculosis and 'other epidemics'. This list was 'merely illustrative', developing countries charged, and did not 'in any manner' limit the public health problems falling under the Declaration's scope.

Ambassador Pérez Motta will continue to hold consultations with interested Members, with the aim of producing a proposal by the next formal TRIPs Council meeting on 25-27 November (the last meeting scheduled for this year).

The issue of insufficient manufacturing capacity is intended to be resolved by the end of this year, and developing countries warned that a delay could stall overall negotiations. The General Council, to which the TRIPs Council must report on its progress on compulsory licensing, is currently scheduled for 13 December.

## SOS Agriculture

On 27 September, Stuart Harbinson, who chairs the WTO agricultural negotiations, called on Members to 'reflect deeply and urgently on what your delegation can contribute' to reaching an agreement on negotiating formulas 'acceptable to all' by the end of next March. Mr Harbinson again warned that the 'continuing lack of specificity' and Members' tendency to repeat 'maximal' positions would jeopardise his efforts to come up with an overview paper summarising all tabled modalities options by the end of the year (see page 1).

The European Union, which is under strong pressure to table a proposal on reduction goals and methods, is reportedly working on a general paper indicating its approach, but this is unlikely to include specific numbers or percentages as member governments are far from agreement on the reform of the Union's Common Agricultural Policy (see page 18).

### *Cairns Group and Canada at Odds on Domestic Support*

The Cairns Group and Canada – increasingly at odds with the coalition of agricultural exporters to which it belongs – tabled papers at the formal session concluding talks on domestic support.

Largely confirming oral statements presented at earlier informal meetings, the Cairns Group called for eliminating the Amber Box (trade-distorting support) within five years and nine years for developing countries, with reductions and an eventual elimination of *de minimis* support (below 5 percent of production) for developed countries. In addition, Amber Box reductions should be disaggregated and product-specific, and developed countries should make an initial downpayment of 50 percent.

In contrast, Canada proposed that the reduction commitments should be calculated on an aggregate basis, and the downpayment should be apply to all Members. Further, the *de minimis* levels should remain unchanged for all. Canada also suggested tightening the applicability of the Green Box (only minimally trade-distorting support), for instance by requiring the amount of compensatory payments under environmental programmes to be 'less than the extra costs involved in complying with the government programme' and decoupling these from the volume of production.

### *Special and Differential Treatment*

Sri Lanka and other developing countries argued that, as a special and differential treatment (S&D) measure, their domestic support programmes should be covered by the Green Box. They also requested a revision Annex 2 of the Agreement on Agriculture, because the special and differential treatment provisions it contains are too vague and too complex to implement. Along the lines of a developing country February submission on the establishment of a Development Box (Bridges Year 6 No.2, page 1), Sri Lanka proposed that the revised Annex should allow developing country governments to support increased food production for domestic consumption, and that all measures aimed at enhancing food security, poverty alleviation, rural development or employment and diversification should be exempt from reduction commitments.

Touching on the controversial issue of who should be eligible for special and differential treatment (see related article on page 9), Bulgaria called for criteria based on per capita income and the level of development, as some developing countries are richer and have more developed agricultural sectors than countries in transition.



## Camps Are Firmly Established in Negotiations on Anti-dumping and Fisheries Subsidy Rules

Negotiations on the WTO's anti-dumping, subsidy and countervailing disciplines are gaining momentum. Key Members such as Brazil, India and the United States tabled substantive papers at the 16-18 October session of the WTO Negotiating Group on Rules. However, Members are still offering initial positions on the changes they would like to see rather than negotiating on specific provisions (see also page 2).

### Anti-dumping

A 14-country coalition favouring tighter disciplines to constrain the (ab)use of anti-dumping measures has taken the lead in addressing these concerns. Dubbed the 'Friends of Anti-dumping', the group comprises Brazil, Chile, Colombia, Costa Rica, Hong Kong, Israel, Japan, Mexico, Norway, Singapore, Korea, Switzerland, Thailand and Turkey. An initial paper (TN/RL/W/6) proposed 12 anti-dumping provisions for negotiation, followed by a further 11 in a later proposal (TN/RL/W/10). The Friends have also offered a response to detailed questions from Australia (TN/RL/W/18) while the EU has submitted its own queries concerning the group's proposals (TN/RL/W/20).

The US has consistently maintained that the Friends' approach – aimed at tightening disciplines – goes beyond the Doha mandate (see page 2). At the October session of the Rules Group, the US finally offered its own concept paper on what the negotiations should cover and aim at. In a submission entitled Basic Concepts and Principles of the Trade Remedy Rules (TN/RL/W/27), the US outlined four 'core principles' to guide the Group. These are: that 'the strength and effectiveness of the trade remedy laws' should be maintained; that 'trade remedy laws must operate in an open and transparent manner'; that the focus in the negotiations should be on the 'underlying trade-distorting practices'; and that dispute settlement panels and the Appellate Body should refrain from 'impos[ing] on national authorities obligations that are not contained in the Agreements'. The Administration will issue a more detailed proposal for the Rules Group's November meeting.

Chile and the EU expressed doubts that the US emphasis on addressing the 'underlying trade-distortive practices' rather than trade remedy disciplines would be productive. Referring to the 'core principle' of standard of review, a Japanese official said that WTO panels and the Appellate Body had been 'working properly'.

### Fisheries Subsidies

The Doha Ministerial Declaration specifically mentions that the rules negotiations 'shall also aim to clarify and improve WTO disciplines on fisheries subsidies, taking into account the importance of this sector to developing countries'. However, at the October negotiating session, Members continued to debate whether WTO subsidy rules in fact needed to be improved with respect to government support granted to the fishing sector.

Joining arguments previously put forward by Japan (TN/RL/W/11), Korea maintained that the existing WTO Subsidies Agreement was sufficient to deal with trade practices in fish as 'no reasoned determination' had so far been made on the 'causality between fisheries subsidies and the depletion of stocks'. According to Korea, inadequate fisheries management is the principal cause of stock depletion (TN/RL/W/17).

The US submitted a long-awaited paper of its own (TN/RL/21), which pointed to OECD and APEC studies showing that global fisheries subsidies amounted to 'between 15 and 20 percent of aggregate dock-side revenues'. The paper contains no specific proposals, but bolsters the case that global fisheries subsidies stimulate 'excess investments in harvesting capacity', which in turn encourages a tendency to 'free ride' and 'cheat', thus undermining effective management. The US nevertheless admitted that 'subsidies that do not promote effort and capacity have not had these undesirable outcomes'. The US and 'Friends of Fish' – Argentina, Australia, Iceland, New Zealand and Peru – also stressed that the World Summit on Sustainable Development in September called for the elimination of harmful fisheries subsidies 'exacerbating the over-exploitation of fish stocks'.

Japan said that the subject of fish stock depletion included in the US paper was not covered by the Doha mandate. The EU – which is currently working on reforming its common fisheries policy (see page 21) – stated that it was still not persuaded that fisheries subsidies really were the root cause of stock depletion. Canada, which is concerned that technical debates on fisheries subsidies could have 'spillover effects' on its provincial softwood lumber programmes, said that it was still uncertain about the need for sector-specific disciplines. China stated that the Rules Group should recognise the important part that aquaculture plays in sustainable development.

In anticipation of the Rules meeting, the Worldwide Fund for Nature (WWF) released an issue brief entitled *Turning the Tide on Fishing Subsidies: Can the WTO play a positive role?* in which it set out six key principles for making the negotiated fisheries subsidy disciplines supportive of conservation and sustainable development. These include: phasing out harmful subsidies, while taking account of developing countries needs; including 'fishing access agreements' in the negotiations; promoting co-operation with relevant UN agencies; and emphasising transparency and public participation (see related article on page 5).

**Countervailing Measures** Brazil tabled a comprehensive first submission (TN/RL/W/19) calling for improving WTO rules on countervailing measures to the same level as the Anti-dumping Agreement.

### Regional Trade Agreements

No discussion took place in October on regional trade agreements, which also fall under the Doha rules negotiating mandate. A July meeting revealed, however, a rift between countries widely engaged in RTAs, such as the EU, Norway, Brazil and Hungary, and Members such as India and Pakistan, who have engaged very little in RTAs and who are thus concerned that a proliferation of regional agreements could weaken the multilateral trading system. A third group with a major interest in the RTA debate are the African, Caribbean and Pacific (ACP) countries which are currently gearing up for negotiations with the EU on WTO-compatible Economic Partnership Agreements (see page 18). Sources commented, however, that at the June meeting ACP states made unexpectedly few interventions on the relationship between special and differential treatment provisions for developing country RTAs and GATT language on customs unions and free trade areas (Art. XXIV, see related article on page 7). Proposals on RTAs have so far been tabled by the EU (TN/RL/W/14), Australia (TN/RL/W/15) and Chile (TN/RL/W/16).

## Going Nowhere Fast: Environmental Negotiations in the Doha Round

Environmental negotiations at the WTO are largely – albeit not exclusively – split between the EU and Japan on the one hand, and rest WTO Members on the other. The third meeting of the special session of the Committee on Trade and Environment (CTE) on 10-11 October showed a faultline on how to examine the relationship between the WTO and multilateral environmental agreements (MEAs). Major discussions took place – but yielded no conclusions – over whether to adopt a ‘top-down’ approach, as advocated by the EU and Japan, or a ‘bottom-up’ approach, as called for by Australia and a number of other Members.

At the CTE’s June special session (see Bridges Year 6, No.5, page 15), many Members supported an Australian proposal that the MEA-WTO negotiations be undertaken in three phases: analysis, discussion and negotiations. After the October negotiation session, Members were still in the study, or analysis, phase. It was not clear when this would graduate to the next stage.

### Top-down...

Japan proposed grouping trade obligations under MEAs depending on their specificity, according to whether or not they should be considered compatible with WTO rules (TN/TE/W/10). Japan proposed four categories for trade-related MEAs. As examples, it looked at the Convention on International Trade in Endangered Species (CITES), the Basel Convention on Transboundary Movement of Hazardous Wastes, the Montreal Protocol on Substances that Deplete the Ozone Layer, and at a number of regional fisheries agreements. It further stated that a possible outcome of negotiations could be the adoption of a binding interpretative understanding on MEAs and WTO rules.

The European Union, Norway and Switzerland welcomed the Japanese proposal. The EU emphasised that the WTO should first discuss principles and parameters, and only when these were clear, look at applying them to specific trade measures in MEAs.

### ... or Bottom-up?

Australia questioned the EU-Japan perspective, arguing that Members should first identify specific trade obligations in MEAs and the corresponding WTO rules and then discuss these provisions with the relevant MEA secretariats, before moving on to a negotiating phase. The Australian approach was supported by the US, Brazil, China, India, South Korea and Taiwan. It dovetails neatly with the US view that the Doha mandate points to talks that simply examine the relationship between the two sets of rules and then describe it without any attempts at interpretation. In Doha, the US – which is not party to such trade-relevant MEAs as the Kyoto Protocol, the Biosafety Protocol or the Basel Convention on Hazardous Wastes – successfully resisted negotiations on MEAs that could lead to changes in the WTO rights and obligations of non-parties to MEAs.

In an effort to move the debate forward, a submission from New Zealand (TN/TE/W/12) compiled existing information on trade provisions under the Basel Convention, the Montreal Protocol and CITES, together with existing information regarding WTO rules that are potentially relevant to these MEAs.

Approximately 40 delegations made substantive interventions on top-down vs bottom-up perspectives. According to one observer, the EU’s assertion that it only intended to ‘complement’ the

Australian approach showed that substantive discussions were possible on both perspectives. Norway, however, cautioned that the CTE should be careful that the negotiations would not lead to a weakening of multilateral environmental agreements.

The issue of agriculture, which many see as the make-or-break issue of the Doha negotiations, cropped up frequently in Member interventions, particularly with reference to messages emerging from the World Summit on Sustainable Development advocating progress on reducing agricultural subsidies. Indeed, it looks increasingly likely that the trade and environment negotiations will eventually be linked with talks on agriculture (see page 11).

### Environmental Goods and Services

WTO Members agree that negotiations on environmental goods are to be addressed in the Negotiating Group on Market Access, while environmental services should be addressed in the services negotiations, with the CTE adopting a clarification and monitoring role. However, Members are not yet decided on how this role will be exercised. The US proposed joint sessions between the CTE and the Market Access Negotiating Group, while Qatar suggested including goods involving natural resources on an eventual list of environmental goods. A combined list of environmental goods (TN/MA/S/6), elaborated by both the Asia Pacific Economic Cooperation (APEC) forum and the Organisation for Economic Cooperation and Development (OECD), was forwarded by the WTO Secretariat to the Negotiating Group on Market Access.

### MEA Observership Still Blocked

Together with other WTO observer status requests, participation of MEA secretariats in the CTE’s deliberations – addressed in the Doha Ministerial Declaration’s para. 31(ii), see box below – remains blocked at the General Council. Referring to ‘the spirit of Johannesburg’, the EU at the October CTE meeting proposed an early decision to grant observer status to MEAs and to the UN Environment Programme as the CTE negotiations could affect their future. Although interventions from the CITES Secretariat (see page 20) and UNEP at the 8-9 October regular CTE session reinforced the EU’s arguments, no decision was reached.

An informal special ‘MEA information session’ of the Committee on Trade and Environment is scheduled for 12 November. This, however, remains an informal meeting, and MEA representatives reportedly remain sceptical that it can replace substantive input in a formal session.

In paragraph 31 of the Doha Ministerial Declaration, Members agreed to negotiations, ‘without prejudging the outcome’, on:

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

*The Legal Basis, continued from page 8*

treatment, reference in the footnote to joint action has the effect of placing differential and more favourable treatment within its scope.

The relationship, then, between footnote 2 and GATT provisions is as follows: the footnote refers generally to GATT provisions for joint action by the contracting parties, i.e. it permits *ad hoc* action if it is for differential and more favourable treatment.

Consequently, the first port of call in GATT must be Article XXV which deals specifically with joint action. The two arms of joint action in Article XXV will be available for differential and more favourable treatment. First, there will be treatment which comes under the express GATT provisions for joint action. Second, there will be treatment not provided for under those provisions, save Article XXV. In these cases the treatment will fall under a Article XXV:5 waiver. But if the sub-paragraphs in paragraph 2 of the Enabling Clause apply, resort to GATT will be unnecessary in the first place.

The relation between Article XXV, GATT Part IV and the Enabling Clause, regarding agreements between a developed country and some developing countries for purposes of promoting economic development in the latter, was addressed in the US request for a waiver for the 'United States Caribbean Basin Economic Recovery Act' of 1983. The US brought the request for a waiver under both footnote 2 to paragraph 2 of the Enabling Clause and paragraph 5 of Article XXV. During the proceedings of the working party, various alternative provisions under which the agreement could have been brought were also considered by delegations.

However, several members of the working party determined that a paragraph 5 waiver would better provide 'adequate guarantees to all contracting parties that their rights would not be impaired'. This was unfortunate especially due to the presumption that action under other provisions would lack basic guarantees against the impairment of benefits, when such guarantees had been fully provided for under all the alternative provisions. The basis for choice, then, had to be some other ground.

Such choice should have depended on a determination of the provisions which best covered the situation at hand. The development aims of the agreement were those under Part IV, and the most appropriate provisions were therefore Article XXV:1 in conjunction with Articles XXXVI, XXXVII and XXXVIII:1, under which a contracting party can move other contracting parties to take action in pursuance of the general objectives of GATT.

According to the legal advisor to the GATT Director-General, the intention of the drafters was that footnote 2 refer to the waiver provision (Article XXV:5). But his view was that the footnote should refer to joint action under paragraph 1, in which case supporting GATT provisions would have had to be found. If the footnote referred to the general GATT objectives, then Part IV would have covered the development objectives in respect of developing countries. In either case Article XXXVIII [on implementation of Part IV objectives] would have applied.

However, Article XXXVIII:2(a) applies where joint action is to be taken. In cases of action by a contracting party, where this Article is inapplicable, resort can be had, say under Article XXXVIII:1, to moving the contracting parties to act under the second arm of Article XXV:1, that is in furtherance of GATT objectives with reference in this case to Article XXXVI. The legal advisor's opinion

thus seems valid in respect of paragraph 1 of Article XXV, but perhaps questionable in respect of Article XXXVIII.

When Lomé III came up, the parties had not proceeded under the paragraph 5 waiver on the grounds that the convention was in full conformity with the GATT, including Part IV. However, no consistency was subsequently maintained and Lomé IV was brought under the paragraph 5 waiver. After the *Caribbean Basin Economic Recovery Act*, the US again requested for a waiver under footnote 2 in respect of the *Andean Trade Preferences Trade Act*, and this time the contracting parties granted it before a working party had examined the request. This procedure came in for heavy criticism during the working party proceedings, the preferred solution being that examination by the working party should precede the grant of the waiver – naturally, one would have thought.

The practice so far, then, seems to be constrained under an interpretation of Article XXV that is not entirely comprehensive in that paragraph 1 has hardly been used for regional trade agreements; paragraph 5 waivers have been preferred instead.

*A New Regime for Waivers*

Changes to waiver provisions were introduced to the WTO Agreement, largely at the instigation of the European Community. The Understanding in respect of waivers of obligations under GATT 1994 provides that a waiver in existence at the entry into force of the WTO Agreement will terminate at its expiry or two years after the entry into force of the Agreement, whichever is earlier, unless renewed according to the new procedures, which require – among other things – that the request describe the proposed measures, the policy objectives, and the reasons why the objectives cannot be attained in a way consistent with the Member's obligations.

According to Article IX of the WTO Agreement, the request must first first be submitted to the relevant Council established under the GATT 1994, GATS and the TRIPs Agreements. Any waiver granted must state the exceptional circumstances, terms and conditions, and the date of termination. Waivers for more than one year are subject to exacting annual reviews, where it is considered whether the exceptional circumstances still prevail and whether the terms and conditions have been complied with. Waivers may be terminated where the exceptional circumstances cease, or they may be extended or modified.

These extensive provisions substantially alter GATT Article XXV. The basic consultation procedure and the primacy of the multilateral system, however, will continue to be part of the terms and conditions required to be stated in the waiver decision. Decisions under Article XXV are likely to be of valuable guidance. The terms and conditions regarding regional trade agreements are likely to reflect the (aforesaid) standard considerations.

Although the Doha Ministerial Conference granted an MFN waiver to the Cotonou Agreement, the coverage of regional trade agreements by the WTO's various differential and more favourable treatment instruments remains high on ACP countries' agenda as they pursue negotiations with the European Union on WTO-compatible Economic Partnership Agreements, which are to replace the Cotonou arrangements in 2008.

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# EC Sardines: A New Model for Collaboration in Dispute Settlement?

By Gregory Shaffer and Victor Mosoti

On September 26, 2002, Peru prevailed in WTO dispute settlement against the much more formidable legal services of the European Community. In the case *EC-Trade Description of Sardines*, the WTO Appellate Body for the first time held a WTO member to be in violation of its obligations under the WTO Agreement on Technical Barriers to Trade (TBT). The case is important for three systemic reasons. First, it demonstrates the potential importance of the Codex Alimentarius Commission in WTO disputes, since the Appellate Body based its holdings on the EC's failure to base its regulations on Codex international standards. Second, it demonstrates how even a small developing country such as Peru can prevail against a great power in WTO litigation. Third, the case exhibits how, in certain circumstances, and despite some developing countries' fears, a more transparent WTO dispute settlement system can work to developing countries' advantage through helping forge North-South NGO-government partnerships in WTO litigation.

## The Importance of Codex Alimentarius Standards

In the EC-Sardines case, Peru challenged an EC regulation that maintained that only the species *Sardina pilchardus Walbaum* could be marketed in the EC under the name 'sardines'. This species swims in European waters and is largely fished by EC vessels, and in particular those of Spain. Because of the EC regulation, similar fish species, such as *Sardinops sagax sagax* which inhabits the Pacific Ocean, could not be sold under the name 'sardines' in the vast EC market, even though this species is sold as sardines in most other world markets.

An international standard set by the Codex Alimentarius Commission, however, maintains that this species can be sold throughout the world under the name 'sardines' provided that a modifying phrase proceeds the designation, specifying 'a country, a geographic area, the species, or the common name'. Under Codex Standard 94, Peru should have been able to sell its product in EC markets under the designation 'Pacific sardines', 'Peruvian sardines' or 'sardines – *Sardinops sagax*'. In fact, the fish had been sold in Germany as 'Pacific sardines' until the Commission challenged that under the EC regulation, which triggered the WTO dispute.

In the EC-Sardines case, the WTO panel and Appellate Body both found that the EC failed to comply with Article 2.4 of the TBT Agreement because the EC did not base its internal technical regulations on the Codex standard, and failed to demonstrate that this international standard would not be 'effective' or 'appropriate' in fulfilling the EC's 'legitimate objectives' of ensuring 'market transparency, consumer protection, and fair competition'.<sup>1</sup> For reasons of judicial economy, the panel and Appellate Body did not address Peru's claims concerning a violation of GATT Article III.4 (involving discrimination against 'like products' and other TBT provisions).

The Appellate Body decision demonstrates the importance that Codex standards can play in WTO disputes, raising issues about the accountability of this international body. The AB ruling held that, under the TBT Agreement, countries must modify pre-

existing technical regulations to be based on international standards, unless a legitimate objective cannot otherwise be met.<sup>2</sup> Whether a 'consensus' decision is required for adoption of an international standard depends on the rules of the relevant international standard-setting body.<sup>3</sup>

The EC maintained in its submissions that the WTO panel was turning Codex into 'world legislators'. Developing countries, in particular, have complained in the past about their inability to meaningfully participate in Codex standard-setting procedures. However, the WTO panel's decision demonstrates how Codex standards can be of great importance for developing countries to gain access to EC and US markets, especially where large countries have lowered their tariffs, but adopted other technical methods to foreclose market access.

## The Role of the Advisory Centre

The sardines case raises a second systemic issue that has received less sustained analysis – the ability of smaller developing countries to meaningfully participate in the WTO dispute settlement system. Developing countries clearly are at a disadvantage against the United States and EC before the WTO's legalised system. Given the legal and factual complexity of bringing a successful complaint, countries often must hire lawyers and other consultants at great expense. The EC-Sardines case, for example, required a review of Codex Alimentarius standard-setting procedures, the history and application of relevant EC regulations, expert publications on fish species, and legal interpretation of the TBT Agreement in the context of GATT and WTO jurisprudence. The panel and Appellate Body addressed a number of legal issues under the TBT Agreement for the first time, including what constitutes a 'technical regulation', what constitutes a 'relevant international standard', what does it mean to 'base' a regulation on a standard, whether TBT obligations are retroactive in light of public international law, what are legitimate exceptions to international standards, and the burden of proof on these issues. Peru also had to rapidly respond to the European Commission's sophisticated arguments and numerous questions from the WTO panel, all within the stringent time constraints of the Dispute Settlement Understanding (DSU). Peru's legal counsel readily admitted that his country never would have even been able to bring, much less win, this case without outside assistance.

Fortunately for Peru, an Advisory Centre on WTO Law now exists in Geneva, with a corps of seven lawyers under the directorship of Frieder Roessler, former head of the GATT legal division. The Centre's rates, which vary depending on a country's membership status, share of world trade and per capita income, are typically much less than those of private law firms. In this case, Peru was charged a fee of only US\$100 an hour for legal advice, since Peru is a category C country under the Centre's rules. The Centre's success could spur other developing countries to consider joining it or otherwise use its services.

The Advisory Centre represents a major advance for developing countries. In regularly participating in WTO litigation, the Advisory Centre will gain significant WTO expertise that individual developing

*Continued on page 16*

*EC Sardines, continued from page 15*

countries cannot acquire cost-effectively on their own. The Centre eventually could provide services to developing countries in a manner somewhat analogous to the way in which the European Commission's legal services division assists EC member states. It could develop a reservoir of WTO expertise into which developing countries could tap as needed. By working on WTO cases with the Centre's lawyers, national officials can develop their own internal resources.

**The Need for North-South Consumer NGO-Government Alliances**

The largest European consumer group and its lawyers also supported Peru in the sardines case. Peru thereby overcame the tremendous resource disadvantage it initially faced in WTO litigation against the EC. Largely serendipitously, the Advisory Centre's director, Mr Roessler, and a senior member of the UK Consumers' Association had spoken at a conference in London concerning WTO law. There, the Consumers' Association agreed to support Peru's submissions in the EC-Sardines case.

The UK Consumers' Association worked with a UK law firm, Clyde & Co, on a *pro bono* basis, to prepare a letter (like an *amicus curiae* brief) in support of Peru's submissions to the panel. The Association's ten page letter addressed how the EC regulation 'clearly acts against the economic and information interests of Europe's consumers', and rather constitutes 'base protectionism in favour of a particular industry within the EU', and, in particular, the Spanish fishing industry. Peru attached the letter to its panel submission and cited it with approval. For example, Peru used the letter to point out how a 'wide variety of tuna or bonito species can be marketed in the Community under a common standards regime', rendering it 'difficult to understand why sardines should be marked out for a particularly restrictive regulatory regime.'

The opinion of the Consumers' Association clearly had an impact on the WTO panel, which cited it concerning European consumer views.<sup>4</sup> When the EC challenged the panel's use of the Consumers' Association letter during interim review, the panel confirmed that it justifiably considered the letter in 'determining whether the European consumers associate the term 'sardines' exclusively with *Sardina pilchardus*', and found that they did not do so, in contradiction of the EC's position. The Appellate Body affirmed the panel's use of the Consumers' Association letter as evidence.

**Amicus Briefs Redux**

The WTO controversy over *amicus curiae* briefs took a new twist in the EC-Sardines case. The Appellate Body received two such briefs, one submitted by the government of Morocco and one by a US law professor. The Appellate Body found both of them to be 'admissible', although it maintained that 'their contents do not assist us in deciding this appeal.'<sup>5</sup> The Appellate Body thereby put WTO Members on notice that, despite the fervent opposition of most Members, the Appellate Body retains the authority to admit amicus briefs and to refer to them in deciding future appeals.

The Appellate Body further stretched its interpretation of the DSU in maintaining that Morocco could submit its amicus brief even though Morocco was not a third party to the dispute. The DSU expressly limits the conditions under which a WTO member can

participate as a third party. However, once the Appellate Body agreed to admit amicus briefs from private persons, it had little choice but to accept Morocco's brief; otherwise it would have subjected itself to the charge of granting private parties greater participatory rights than WTO members.

**Transparency Measures Can Benefit Developing Countries**

Developing countries have been extremely wary that opening the dispute settlement process to the general public could exacerbate the imbalances that they now face, since they would have to defend their positions not only against resource-rich US and EC trade bureaucracies, but also largely northern-based NGOs and multinational companies advancing northern priorities and interests. Southern delegates fear that an alleged 'stakeholder model' for WTO dispute settlement would operate to their disadvantage in a world of asymmetric power not only among states, but also among interest groups.<sup>6</sup> Of the myriad transparency issues, the issue of *amicus curiae* briefs arguably raises the greatest risk of bias against them.

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**The EC Sardines case underlines that a panel's acceptance of an amicus brief attached to a party's submissions can work to a developing country's advantage.**

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The EC-sardines case demonstrates that some modes of increased transparency can benefit developing countries. First, a panel's acceptance of an *amicus* brief attached to a party's submissions can work to a developing country's advantage. Second, by posting its submissions on a web site, a developing country can forge closer relations with private groups that can provide them with valuable assistance, whether behind-the-scenes, in the media or through a legal brief. The UK Consumers' Association and its lawyers provided significant free research to Peru and the Advisory Centre.

The Advisory Centre's policy on transparency is 'to offer its Members and the least-developed countries the possibility to post their submissions on the ACWL website. The public can therefore be informed already during the course of a WTO dispute settlement proceeding of the all the facts and arguments presented by a Member or a least-developed country assisted by the Centre.' In the EC-Sardines case, the Centre posted Peru's briefs thus facilitating its work with Europe's largest consumer group to counter a number of the EC's arguments. Had Peru attempted to keep its position completely 'confidential' on the grounds that the WTO is an intergovernmental organisation for Members only, or had it attempted to keep its submissions from the public, Peru would not have benefitted from the key support of Europe's largest consumer association and a British law firm.

Anyone aware of how WTO litigation works in practice knows that it is incorrect to think that WTO disputes are purely intergovernmental. Even the largest WTO Members confirm that they need to work with private organisations and their lawyers to enhance their chances of prevailing in WTO litigation.<sup>7</sup> If developing countries are to make effective use of their WTO rights, they too will have to increasingly work with outside assistance. The new WTO Advisory Centre and its alliance with Europe's largest consumer group in the EC-Sardines case point to an effective way to proceed. Over time, non-governmental groups increasingly will visit the Centre's web site, reading developing country submissions and other postings. Over time, the Centre will also learn which groups can be of assistance in specific matters. The Advisory Centre thereby can build closer relations with private groups that can be of assistance to developing country challenges

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## Developing Countries Propose Many Changes to the WTO's Dispute Settlement Rules

Developing countries introduced a number of new proposals bringing new ideas to the table for the review of the Dispute Settlement Understanding (DSU) at the latest meeting of the special (negotiating) session of the WTO Dispute Settlement Body (DSB) on 14 October. Negotiations on improvement and clarifications to the DSU, according to paragraph 30 of the Doha Declaration, must conclude no later than May 2003.

### Like-minded Group Looks into Amicus Briefs and S&D

India submitted two proposals on behalf of Cuba, Honduras, India, Indonesia, Malaysia, Pakistan, Sri Lanka, Tanzania and Zimbabwe. The first of these (TN/DS/W/18) covers a range of issues from *amicus curiae* ('friend of the court') briefs to the term of appointment of Appellate Body Members. *Inter alia*, the proposal states that 'there is no need for making any provision for accepting *amicus curiae* briefs. It would, however, be necessary and useful to address this issue during the review.' This could be done through a footnote stating that 'seek' in Article 13 of the DSU shall mean 'any information that is sought and asked for, or demanded or requested by the panels. Unsolicited information shall not be taken into consideration by the panels.' According to Article 13, dispute settlement panels may 'seek information from any relevant source', but many Members have contested previous panel and Appellate Body rulings confirming that the two bodies may not only 'seek' information but can also accept spontaneously submitted briefs if they find them pertinent.

**'Unsolicited information shall not be taken into consideration by the panels.'**

TN/DS/W/18

The second proposal (TN/DS/W/19) deals with 'Special and Differential Treatment for Developing Countries' within the DSU. Among other changes, it proposes that a complaining developing-country party should have the right to cross-retaliate against a developed-country Member, which has failed to bring its measures into consistency with WTO rules. It further suggests that when a developing country wins a dispute against a developed country, the cost of litigation should be borne by the latter.

As India has already proposed in the context of the review of special and differential treatment provisions underway in the Committee on Trade and Development, the Like-minded Group's DSU submission advocates replacing *should* by *shall* in Article 4.1, thereby making it mandatory for Members to give special attention to the particular problems and interests of developing country Member during dispute settlement consultations. It also proposes that developed countries involved in disputes against developing countries should explain in their panel requests and other submissions how they carried out the obligation, and that the panel 'should give a ruling on this matter'.

In addition, developing countries should be given more time to prepare their submissions, and timeframes for compliance with rulings and reporting back to the DSB should be made more lax (Bridges Year 6 No.4, page 6).

### New Ideas from the LDC Group and Jamaica

Least-developed countries put forward a number of new ideas. Their proposal (TN/DS/W/17) calls on Members to recognise that 'the difficulties faced by LDCs are often more debilitating than those faced by the rest of the WTO Membership. As a result, a level of specificity is needed in addressing their concerns within

the textual provisions of the DSU. Some of the key provisions conferring rights and containing other structurally fundamental provisions of the DSU need to be made LDC specific.' To this end LDCs propose a modification of DSU Article 8.10 so that it would mandate at least one panelist from a developing country in any dispute involving a developing country

LDCs also criticised panel and Appellate Body decisions for having displayed an 'excessively sanitised concern with legalisms, often to the detriment of the evolution of development-friendly jurisprudence.' This 'stifling approach' could be reduced if panel or Appellate Body members were allowed to issue dissenting opinions. In addition, LDCs called for recognition of collective retaliation as a remedy within the DSU.

Jamaica's proposal (TN/DS/W/21) asserts that 'an independent mechanism needs to be developed to ensure that developing countries not only obtain legal advice but also obtain assistance in arguing their case before a panel at a cost which these countries can afford.' In addition, Jamaica would like third parties' rights enhanced to ensure that they receive all written submissions, and receive the decision at the same time as parties to the dispute. Jamaica also called for technical assistance for interested Members.

### US Proposal Still Expected

The US, apparently still undecided on what overall tack to take, has so far only submitted a proposal on increasing the transparency of dispute settlement proceedings (TN/DS/W/13, Bridges Year 6 No.6, page 12). One aspect that the US is likely to seek is language to refrain dispute settlement panels and the Appellate Body from 'impos[ing] on national authorities obligations that are not contained in the Agreements', as the US wrote in its concept paper for the rules negotiations (see page 12). Senator Max Baucus thundered in late September that the WTO was increasingly acting as a 'kangaroo court', and called for an 'aggressive' proposal to make sure that panels apply the proper 'standard of review' instead of being swayed by an 'abiding dislike on the part of our partners for some aspects of US trade policy'. According to Administration officials, a proposal could be tabled in December at the earliest.

This slew of late proposals makes it virtually impossible for the review to conclude by next March (see also page 22). The DSB's next special session is scheduled for on 13-14 November.

Sixteen countries – mostly members of the African, Caribbean and Pacific (ACP) group – have requested third-party status in the dispute launched by Australia and Brazil against the EU's sugar export subsidies. The challengers allege that the high prices for sugar produced in the domestic market allow European producers to sell out of quota sugar on the world market at prices below the cost of production. Brazil further charges that the EU's export subsidy programme effectively transfers the cost of the ACP preferential trade arrangement to other countries.

Argentina, India and Zimbabwe have joined the Brazilian dispute on US subsidies for upland cotton as third parties, while the eight-member West African Economic and Monetary Union is weighing the possibility of launching a case of their own.



## EU Battles with Agriculture, Biotech and Fisheries Reform

The European Council agreed on 25 October not to exceed the level of direct payments to farmers prevailing in 2006 until the year 2013, when the ten new members joining the Union in 2004 should reach the 'support level then applicable' among the EU's current 15 members. As of 2007, payments to current members will need to be reduced so as to make up for gradually increasing support for the newcomers. EU countries now receiving large subsidies are thus likely to stiffen their opposition to reducing or capping the EU's farm budget before 2006, making it even more of an uphill battle to rally support for the European Commission's proposed reforms of the EU's Common Agricultural Policy (CAP).

CAP reform is considered vital for the EU's ability to make significant concessions in the WTO's agricultural negotiations. The Commission has proposed decoupling support from production, as well capping and eventually reducing direct payments to farmers (Bridges Year 6, No.6, page 13). However, divisions between EU members remain so severe that the Commission has so far been unable to present its overall negotiating approach to the WTO's agriculture talks (see page 11). No decision on CAP reform is expected before next spring.

Earlier in October, the EU's Council of Agricultural Ministers failed to reach agreement on the Commission's proposed labelling and traceability regulations for genetically modified organisms (GMOs), instead postponing the debate to their November meeting. Ministers disagreed, *inter alia*, on how strict the labelling requirements for GMOs should be. While the UK opposed labelling of products derived from GMOs, others called for the proposed regulations to be tightened even further by including labelling for meat and dairy products from animals fed on GM feed.

Countries also disagreed over the labelling threshold for the accidental presence of GMOs. The European Commission had proposed a threshold of one percent, which was amended to 0.5 percent by the European Parliament in July 2002. However, some countries and civil society groups regard even these thresholds as too high, instead calling for zero percent.

These dissensions mean that the *de facto* four-year-old moratorium on approving new genetically modified organisms will not be lifted in practice before sometime next spring at the earliest, although the EC Directive on deliberate release of GMOs in the environment entered into force on 17 October. A number of EU members insist that all GMO-related regulations be in place before restarting the approval process. The United States is again considering challenging the moratorium at the WTO.

Although Agriculture and Fisheries Commissioner Franz Fischler expressed confidence that members would agree by the year's end to reform the Common Fisheries Policy (see Bridges Year 6 No.4, page 13), there are few signs of a common stance emerging. At the October Agriculture Council meeting, Hervé Gaymard, French Minister of Agriculture and Fisheries said: 'Brussels doesn't have to decide how many fishermen and boats there will be. We need to maintain and modernise our fleet'. France was also particularly opposed to the quotas recommended by the Commission for total allowable hake and cod catches (TACs) for 2003. Commissioner Fischler defended the proposed deep cuts as North Sea cod stocks had declined by 30 percent in a year despite reduced TACs for 2002. He also called for fishing bans covering large areas during spawning seasons and better monitoring of illegal fishing.

## ACP and EU Launch Neogotiations

Negotiations on new Economic Partnership Agreements (EPAs) between the EU and African, Pacific and Caribbean (ACP) countries under the Cotonou Agreement were formally launched on 27 September. WTO-compatible EPAs – mandated by the Cotonou Agreement – will replace the current non-reciprocal preferential trade arrangements, which have formed the cornerstone of ACP-EU co-operation under the Lomé Conventions. The negotiations are set to conclude by the end of 2007, but long transition periods beyond that date are foreseen for ACP countries.

The two sides agreed on the division of the negotiations in two phases, as been proposed by the ACP (Bridges Year 6 No.5, page 19). The first phase – lasting approximately one year – will discuss broad principles regarding the negotiations between the entire ACP group and the EU.

The second phase will involve negotiations between sub-regions of the ACP and the EU on the specifics of individual trade arrangements. The EU had aimed to begin the more specific negotiations at a regional level immediately. Despite the agreement to first hold a round of talks at the all-ACP level, the European Commission indicated in subsequent discussions with civil society organisations that it would negotiate with any sub-region of the ACP whenever that region was ready, rather than waiting for a final agreement with the entire ACP Group on a general framework on the trade arrangements before beginning the next phase.

The negotiations will be conducted at ministerial, ambassadorial and technical (lower civil servant) levels. The technical group discussions have already started and a Joint Ministerial Trade Committee should meet early next year to review progress made.

According to the European development NGO *Eurostep*, 'sufficient time in the first phase would allow for a focus on discussions on how the trade arrangements could advance sustainable development and poverty eradication in the ACP as a whole. It would also allow time for results of impact assessments on the merits of different forms of trade arrangements with specific regions to be fed into the more detailed discussions on regions' (see related article on page 19). The Commission told NGOs on 3 October that mid-term reports of its Sustainable Impact Assessments of the trade arrangements should be available by February/March 2003. Final reports are expected by May/June 2003.

At the launch of negotiations, the EU rejected the ACP's reiterated request for an immediate cancellation of all of its debt to the EU, nor did it formally commit to ensuring that no ACP country will be worse off as a result of the new trade arrangements, as required by ACP's negotiating guidelines. Citing Article 37.5 of the Cotonou Agreement, the co-chair of the ACP-EU Trade Committee Minister H.J. Keil (Fiji), reminded the European Union that ACP countries had a significant role in determining new trade arrangements:

'Negotiations of the Economic Partnership Agreements will be undertaken with ACP countries, which *consider themselves* in a position to do so at the level *they* consider appropriate and in accordance with the procedures agreed by the ACP Group.'

He also stressed that the word *reciprocal* was not used to describe the new trade arrangements in the Cotonou Agreement, although the EU seemed to interpret Article 36.1 as meaning reciprocity:

'The parties agree to conclude WTO-compatible trade arrangements, removing progressively barriers to trade between them.'

## The EU's EPA Proposals Are Likely to Be Detrimental to Poverty Alleviation

By Bob van Dillen

On the eve of the negotiations on future trade arrangements between the European Union and sub-Saharan Africa, the Caribbean and the Pacific (ACP), European development NGO networks have called on the negotiators to agree to the following principles in order to ensure that the negotiations are set on a path that leads to trade arrangements which foster sustainable forms of poverty reduction in the ACP:

- The EU should at the outset of the negotiations commit itself to granting full duty-free and special duty-free access for all products originating from ACP from 2008, regardless of the framework for ACP-EU trade relations to be established.
- The external effects of CAP reform should be fully taken up and addressed in the forthcoming negotiations, with a view to maintaining and enhancing the value of existing ACP agricultural preferences and ensuring effective protection of ACP markets from unfair competition from EU agricultural and food product exports.
- Regardless of trade framework established, and as an integral part of the negotiation process, the EU should establish targeted and extensive programmes of assistance, designed to address in a systematic and comprehensive way the supply side constraints faced in ACP countries.
- If free trade area agreements are to be pursued, then the EU should make a clearer commitment to working with the affected ACP countries in designing and implementing viable and poverty sensitive programmes of fiscal reform.
- The negotiations should be based on well designed and participatory impact assessment studies on the likely effects of the specific measures being proposed on the poor men and women who constitute the majority of ACP citizens.

**It is difficult to see how EPAs as presently conceived will benefit ACP economies.**

European NGOs working within the Cotonou Monitoring Group believe that EU proposals for reciprocal preferential trade arrangements are likely to be detrimental to the realisation of the overall goal of ACP-EU co-operation, namely poverty eradication.

Underlying the European Commission's proposals for fundamental change is the belief that the past system of non-reciprocal trade preferences has failed to deliver the expected results in terms of broader economic and social development in ACP countries. The European Commission believes this is caused primarily by policy failings on the part of ACP governments and is now seeking trade arrangements that will 'lock in' policy reforms.

While undoubtedly the ACP has declined in importance as a trading partner of the EU, this is largely the result of the pattern of ACP traditional exports (basic commodities with stagnant demand growth and declining price trends), rather than the failure of preferences. Indeed, where ACP countries have enjoyed margins of tariff preference greater than 3 percent compared to other suppliers, exports have expanded by 62 percent in volume terms – an export performance 17 times better than the general export performance. This suggests that trade preferences played an important role in slowing down the marginalisation of ACP economies within the world economy.

The EU's case for fundamental change on development grounds is thus less than convincing. This is also the case with regard to the other areas where the EU maintains that ACP countries will

benefit from concluding Economic Partnership Agreements based on Free Trade Areas. Indeed, overall it is difficult to see how EPAs as presently conceived will benefit ACP economies. In contrast it is clear that EU exporters will gain considerably vis-à-vis US and Japanese exporters, if they can secure duty-free access to ACP markets, while their competitors still have to pay duties. Already in 1995, the European Commission wrote about Free Trade Areas:<sup>1</sup>

'FTA's are economically beneficial, especially where they help the EU to bolster its presence in the faster growing economies of the world, which is our overriding interest. (...) More recently, this economic justification has also been supplemented by strategic considerations regarding the need to reinforce our presence in particular markets and to attenuate the potential threat of others establishing privileged relations with countries which are economically important to us. (...) FTAs are coming to be seen as an indicator of the strength of our relationship with a country or region. They promote the principle of open regionalism and can generate trade liberalisation that subsequently spreads to the multilateral field.'

Many ACP economies, particularly least-developed countries (which account for 60 percent of the population in the ACP) are poorly placed to face free trade with an economic giant like the EU. Major constraints exist on the ability of ACP enterprises to compete effectively with EU enterprises. These range from the unreliable provision of public utilities (electricity and water supply) and poor public infrastructure (run-down roads and railways) through weak institutional and policy frameworks (leading to fluctuating exchange rates, high inflation and interest rates) to low labour productivity (arising from poor education, health and housing provisions). Unless these supply side constraints are effectively addressed prior to the introduction of free trade with the EU, ACP countries are likely to find themselves facing the adjustment costs arising from increased competition from EU producers, without gaining any of the theoretical benefits from free trade.

In particular the ongoing reform of the CAP is likely to have substantial impact on ACP producers. On the one hand, CAP reform – including the switch to direct aid programmes – will result in cheap EU products flooding ACP markets. ACP agricultural sector producers will thus face increased competition on their own national and regional markets. On the other hand, bringing down EU prices to world market levels by increased direct aid payments will reduce the value of preferential access to the EU market.

Given the magnitude of what is at stake for the ACP and the inevitable conflicting interests between the two parties, it is crucial that the negotiations are set up in a way that allows each party to be well informed and explore all the options that they believe are most suitable to achieve poverty eradication in the ACP.

*Bob van Dillen is Trade and Food Security Officer at International Co-operation for Development and Solidarity (CIDSE) in Brussels.*

### ENDNOTE

<sup>1</sup> SEC (95) 322 final of 8 March 1995.

## CITES Faces New Challenges as It Considers Heavily Traded Commodities

The upcoming Conference of the Parties to the Convention on the International Trade in Endangered Species of Wild Flora and Fauna (CITES) on 3-15 November in Santiago, Chile, might mark an important milestone in CITES' history, paving the way towards extending the Convention's scope to increasingly regulate trade in species with high economic value. The meeting will also provide an opportunity for Parties to complement the work at the WTO on clarifying the relationship between multilateral environmental agreements (MEAs) and WTO rules. In addition, Parties will address the recurring question of whether conservation should primarily be achieved through restrictions or through sustainable use.

**Heavily-traded Commodities: Mahogany and Toothfish**

While CITES has so far mainly dealt with rare species of limited economic interest, the scope of the Convention's application might be significantly broadened at this year's meetings, with several proposals on the table targeting heavily-traded commodities, such as timber and fish. The high economic value of these species and the welfare impacts that can be expected from implementing trade regulations further increase the need for CITES to adopt a more holistic approach that takes into account sustainable livelihoods aspects, as well as financial mechanisms.

Of particular interest is an Australian proposal to list the Patagonian and Antarctic toothfish in Appendix II, which would strictly control the commercial trade.

The proposal is opposed by Chile and Japan who do not believe that the fish species meet the CITES criteria for listing in Appendix II. Japan also notes that toothfish should not be managed by CITES, but by the Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR), a regional fisheries management organisation. This latter objection is likely to raise a number of issues that go beyond species-specific considerations, in particular the role of CITES in the international management of fisheries and its relationship with other relevant bodies and agreements (see related article on page 5).

Also of relevance in this context is a proposal by Guatemala and Nicaragua to include neotropical populations of bigleaf mahogany in Appendix II. While this species is not currently at risk of extinction, it is in great demand for timber trade and many populations are seriously threatened and their genetic variation has been depleted. Domestic management initiatives are further undermined by illegal international trade.

**CITES-WTO Relationship**

The possible restrictions on trade in economically valuable species are likely to step up the debate on the WTO-compatibility of CITES measures. To address this issue, the CITES Secretariat is taking a proactive role in promoting the 'harmonious coexistence and mutual understanding' of the objectives of CITES and the WTO, an issue which is currently being discussed more broadly in the WTO Committee on Trade and Environment in the context of ongoing negotiations on the relationship between MEAs, like CITES, and WTO rules (see related story on page 13).

In particular, the CITES Secretariat has put forward a draft resolution, which calls on Parties to avoid the use of stricter domestic measures (SDMs, i.e. domestic legislation with trade

controls stricter than those required by CITES, see Bridges Vol.2 No.2) and to favour instead the adoption of incentive measures at the international level. In cases where Parties decide to take SDMs, they should do so 'in a manner which would not constitute a means of arbitrary or unjustifiable discrimination between Parties, or a disguised restriction on international trade'.

Also of relevance in the trade context are efforts to increase the use of economic incentives to complement the traditional command and control regulations. As set out in the background document prepared by the Secretariat (COP12 Dec. 8), these could include tradable catch and export quotas, well-defined property rights to local communities or positive incentives such as compensation schemes. Parties might also choose to mitigate perverse incentives, such as environmentally perverse subsidies or environmental externalities.

**Conservation through Sustainable Use or Restrictions?**

Countries will again discuss the listing of various elephant and whale species, and more broadly the question of whether conservation can best be achieved through restrictions or also through the sustainable use of the species. The latter approach was highlighted in particular by Norway's draft resolution submitted to the COP, which stresses the importance of conservation through sustainable use. This move is likely to be motivated by Norway's interest in reopening trade in certain populations of whales.

This difference in approach has become apparent in the discussion on trade in African elephant ivory. Botswana, Namibia, South Africa, Zambia and Zimbabwe are proposing to export specific quantities of ivory under controlled conditions. India and Kenya oppose this proposal, instead favouring to transfer all African elephant populations back to Appendix I, thereby excluding them from international trade except in very special circumstances.

Countries are similarly divided over the issue of whaling, in particular a proposal submitted by Japan to transfer most Northern hemisphere populations of Minke whale and the western North Pacific population of Bryde's whale from Appendix I to Appendix II. These and other whale species are currently protected under the International Whaling Commission, which established a moratorium on commercial whaling in 1986. At the IWC, whaling nations such as Iceland, Norway and Japan have been pushing hard for a lifting of the moratorium to allow for limited whaling activities. Both Norway and Iceland hold a reservation on the IWC moratorium, which allows them to legally resume whaling. Iceland, which rejoined the IWC at a special meeting on 14 October, is reportedly planning to restart whaling for scientific purposes in 2006.<sup>1</sup>

For relevant documents, see <http://www.cites.org/eng/cop/>

**ENDNOTE**

<sup>1</sup> It was not made sufficiently clear in the Bridges article on the IWC's previous session (Year 6 No.4, page 13) that Iceland, Japan and Norway also hold an objection to the CITES listing of Minke whales in Appendix I. They may thus to engage in commercial whaling even though they are CITES Parties.



Patagonian Toothfish



# International Wildlife Trade and Sustainable Rural Livelihoods

By Dilys Roe and Teresa Mulliken

**R**egulations governing international trade in wildlife may be international or domestic, imposed by the exporting or importing country, and may be direct (i.e. export controls) or more indirect (i.e. resource access or harvest restrictions). Regardless of their origin or application, such regulations affect the ability of local people to trade on international markets. This article reviews the impact that trade regulations can have on the rural poor and in particular examines the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES).

CITES is the key international agreement relevant to controlling the international trade in wildlife. The trade controls established by the Convention require Parties to ensure that exports of species covered by the Convention are maintained within levels that do not threaten species survival, and that species considered to be endangered are not imported for 'primarily commercial purposes'. CITES Appendix I (no international trade) currently lists over 800 species while Appendix II (limited international trade) contains over 4000 animal species and around 25,000 plant species.

## The Nature of International Trade in Wildlife

Wild species are traded internationally in many forms in order to produce a wide variety of products including: medicines, food, ornaments, clothing, pets and collectors' items, ornamental plants; manufacturing and construction materials. In general, however, the international trade in wildlife is very poorly documented in terms of the species or products involved, trade volumes or trade values with the exception, by virtue of the annual reporting requirements of CITES, of *legal* trade in CITES-listed species. The value of the international wildlife trade in the early 1990s was estimated at approximately US\$11 billion for trade in non-wood forest products, US\$15 billion for all wildlife products – forest-related or not, and nearly US\$160 billion if timber and fisheries are included.

The general direction of wildlife trade flows is from developing to developed countries. Amongst those countries for whom wildlife trade is commercially significant are included some of the poorest countries and some of the countries richest in biodiversity resources. Major exporters of non-wood forest products include China, India, Indonesia, Malaysia, Thailand and Brazil while the EU, the United States and Japan are among the major importers.

## Importance of International Wildlife Trade to Rural Livelihoods

Most rural livelihood strategies in developing countries depend to a large extent on the use and sometimes the trade of wildlife products. Wild species provide food, medicine, building materials, fuel, fodder and other basics of human survival. Harvest of wildlife for sale can be an important and even primary source of revenue in some areas, but this generally makes a smaller contribution to livelihoods than other forms of wildlife use.

As far as international trade is concerned, it is important to note that the value of the trade in fisheries and timber products far exceeds the value of most other wildlife resources. For the poorest groups, wildlife trade may be one of the few opportunities for

earning cash income which, even in small amounts, can make a critical difference to livelihood security.

## Impacts of Trade Regulation on Rural Livelihoods

Despite the dependence of many rural populations on wildlife few attempts have been made to investigate the effects that restricting trade in wildlife can have on local livelihoods. For some species, even if trade is banned, livelihood impacts are limited since the benefits of the trade were previously captured by the state. However, in cases where communities are deriving income from trade, increased national or international trade controls can have significant impacts.

Well-controlled trade can often generate a win-win situation for both conservation and for livelihoods if the conditions are right for producers to capture a significant share of the rents from the sale of wildlife: a limited number of producer countries; limited scope for domestication or cultivation; market access with limited reliance on middlemen; knowledge of markets, as well as trade restrictions and opportunities. However, trade controls are usually associated with increases in bureaucracy and transaction costs – particularly with respect to the need for permits and licences for harvesting or collecting of resources and for exports.

The general lack of information regarding the livelihood benefits of harvest for export of wild species precludes any quantitative assessment of the impacts on livelihoods of a shift in production strategies toward more highly managed and concentrated systems, i.e. captive breeding. However, such systems often result in a change in beneficiaries. Captive breeding programmes tend to be developed in consumer states rather than producer states and the benefits are thus captured by Northern entrepreneurs rather than developing countries. There is no requirement that source countries for species produced in non-range states benefit from captive breeding or propagation programmes, and the issues of access to genetic resources and benefit sharing – which are at the core of the Convention on Biological Diversity (CBD) – have yet to be addressed in any significant way within CITES.

## CITES and Improved Rural Livelihoods

Discussion is intensifying on the potential of CITES to increase livelihood contributions associated with trade in wild species. This reflects the evolution in thinking that has taken place between the agreement of CITES in 1973 and the CBD 20 years later, in 1992. Although CITES and the CBD have a different emphasis and scope, they also have much in common, and do not conflict in some of their basic premises: that wild species are important to development and when used, should be used sustainably, are best conserved at the local and national levels, and international co-operation is required in this regard. Key points of departure regard sovereignty of rights over the use of biological resources and the treatment of genetic resources. Realising CITES' potential for improving rural livelihoods while securing conservation of species in trade requires actions on a number of fronts:

- Sensitising the 'CITES community' and consumers to the livelihood issues associated with the international wildlife trade.

*Continued on page 22*

*International Wildlife Trade, continued from page 21*

- Modifying CITES decision-making processes to take into account livelihood issues – for example: providing information on the socio-economic aspects of harvests and trade in the supporting statements of CITES-listing proposals, and consideration of that information in discussions of those proposals; increasing attention to the socio-economic dimensions of the wildlife trade within CITES policy discussions and work programmes under the Animals and Plants Committees; increasing the voice of rural communities engaged in harvest of CITES-listed species within CITES decision-making processes and broadening the application of the precautionary principle within CITES to take socio-economic factors into account in decision-making.
- Avoiding blanket bans on trade in certain species without taking into account the differing status of national populations and management regimes.
- Expanding the linkages between implementation of CITES and the CBD: increasing the attention paid to wildlife trade issues within CBD policy discussions and work programmes and within national biodiversity action plans developed under the CBD; developing national trade controls and reporting mechanisms that support both CITES and CBD objectives; using CITES to support the CBD through increasing the transparency of the international trade in biodiversity, including the products resulting from the use of genetic resources, and to prevent unsanctioned export of genetic resources.
- Where appropriate to meeting conservation and livelihood objectives, increasing capacity for intensive management to increase production (i.e. ranching, enrichment planting, captive breeding, cultivation, etc.) within range States, and encouraging technology transfer among range States and from consumer countries to range States in this regard.

Many of the above recommendations are equally applicable to species that are not subject to CITES proposals or listings. In fact, ideally, steps should be taken to ensure sustainability in sufficient time to eliminate the need for CITES listings, using both market and regulatory forces.

*This article is based on the report 'Making a Living or Making a Killing? Wildlife Trade, Trade Controls and Rural Livelihoods' by Dilys Roe (International Institute for Environment and Development), Teresa Mulliken (TRAFFIC) and others.*

*EC Sardines, continued from page 16*

of US and EC measures, as happened for Peru in the EC-Sardines case.

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## ENDNOTES

<sup>1</sup> The Appellate Body held that Peru had the burden of proof on both of these issues. See AB decision, par. 259-291.

<sup>2</sup> *Id.*, par. 196-216.

<sup>3</sup> *Id.*, par. 219-227.

<sup>4</sup> See par. 7.131-7.132 and par. 6.13-6.15.

<sup>5</sup> See par. 153-170 & 315.

<sup>6</sup> See Gregory Shaffer, *The WTO Under Challenge: Democracy and the Law and Politics of the WTO's Treatment of Trade and Environment Matters*, 25 *Harvard Env'tl L. Rev.* 1 (2001).

<sup>7</sup> See Gregory Shaffer, *The Public and The Private in WTO Law* (forthcoming Brookings Institute Press).

*Living up to Doha's Development Promise, continued from page 2*

**Dispute Settlement** Negotiations on improving and clarifying the WTO's Dispute Settlement Understanding (DSU) are slated to conclude by 31 May 2003 and are thus not part of the 'single undertaking' scheduled to end on 1 January 2005. However, it is increasingly unlikely that the May 2003 deadline will be met, as amendment proposals are still being submitted. The negotiations Chair, Ambassador Peter Balás of Hungary, suggested in March that Members table their proposals by August so as to have draft amendments by the end of the year, and a consolidated text ready for final legal and linguistic review by March 2003. While developing countries have recently submitted a number of proposals, many of which aim at strengthening special and differential treatment under the DSU, the United States – under Congressional pressure to ensure that panels keep a strict 'standard of review' – has not yet tabled its views beyond a paper advocating more public and transparent dispute settlement procedures (see separate article on page 17).

**Market Access** Members agreed in Doha to negotiations which 'shall aim, by modalities to be agreed, to reduce or as appropriate eliminate tariffs, including the reduction or elimination of tariff peaks, high tariffs, and tariff escalation, as well as non-tariff barriers, in particular on products of export interest to developing countries' (Doha Ministerial Declaration para. 16). The negotiations will conclude on 1 January 2005 at the latest.

Progress was stalled in the Negotiating Group on Market Access for many months as Members wrangled over the deadline for agreeing negotiating modalities. In July, it was finally decided that proposals should be tabled by the end of 2002 so as to come up with a 'possible outline on modalities by the end of March 2003, with a view to reaching agreement on modalities by 31 May 2003'.

Although no sectors/products will be *a priori* excluded, Members will seek to protect their sensitive sectors from reduction commitments while opening markets to their exports. Their choice of modalities will depend on which approach will best further that aim. Using the so-called Swiss formula – which produces deeper reductions in the highest tariffs – the Uruguay Round lowered average tariffs from 6.3 percent to 3.8 percent during, but still left high tariff peaks for 'sensitive' products, as well as steeply escalating rates according to degree of processing (see related articles in Bridges Year 5 No.9, page 3 and Year 6 No.5, page 5).

**Services** Bilateral bargaining started in the services negotiations after 30 June, the cut-off date for tabling initial market access requests. Since then, little has happened on the multilateral front. Questions of major importance to developing countries are still unanswered regarding, *inter alia*, credits for autonomous liberalisation, how – or whether – to conduct an assessment of the effects liberalisation of trade in services so far, or whether an emergency safeguard mechanism should be established, allowing temporary measures to protect the interests of domestic services providers threatened by serious injury from surges of imported services. The next services negotiations deadline is 31 March 2002, by when Members must table their initial market opening offers.

**New Issues** Five non-negotiating working groups are also meeting on issues related to the Doha Work Programme. Some regard the working groups on investment, competition policy and transparency in government procurement as pre-negotiation fora, as one of the major decisions the Cancún Ministerial Conference must make is when to start negotiations on these issues. Many developing countries, however, consider these areas outside the WTO's scope and will seek to delay negotiations as far as possible. The two new groups established in Doha – on trade debt and finance, and trade

## Fisheries Subsidies: WWF Responds

WWF welcomes the article written by Dr Roman Grynberg entitled *Fisheries Subsidies: Casting a Net Too Small* (see page 5, ed.) because it helps raise the profile of the fishing subsidies issue and encourage parallel action within countries and in the international community.

WWF recognises that there are a number of causes of overfishing and overcapacity, not least of all the failure to manage fishing effort. We strongly agree with Dr Grynberg that improved disciplines on fishing subsidies in the WTO are not a panacea for the problem of fisheries depletion, and that negotiations on fishing subsidies must take account of the particular needs of developing countries, including food security, the need to develop their own domestic fisheries industry (in conjunction with good management) and the reliance of many developing countries on income from access agreements.

Dr Grynberg's article emphasises in particular the threat new WTO disciplines pose to access payments to coastal States in return for access to their fishery resources. WWF does not oppose payments for access in principle. However, in some instances, these fees contribute to fleet overcapacity in the waters of developing countries and can lead to overfishing. In these cases, they should be considered a harmful subsidy and phased out. Where the access fees fail to capture the value of the economic rent of access to the fishery, and where fishing under the access agreement leads to the long-term degradation of the resource, then this is another harmful subsidy – from poor to rich. The point of reforming access payments is to ensure that developing countries are getting a fair fee in return for access to their waters and that vessel owners are paying a fair price for the fish they take. In other words, WWF is advocating reform that would get developing countries more money for their resources, not deprive them of foreign aid.

The international community should use every tool reasonably available to reduce unsustainable fishing effort. The present scale of subsidisation unavoidably raises the level of industry-wide capitalisation and fishing effort, with consequent pressures on the resource base. Even the best-managed fisheries will be subject to problems of compliance and long-term political stability if overcapitalisation of the fishing sector through subsidies is left unchecked.

Dr Grynberg's article raises examples of some payments which are vital to small countries. WWF fully recognises that it will neither be desirable nor politically feasible to seek the elimination of all fishing subsidies. We have argued that positive subsidies exist for conservation purposes and to encourage the development of sustainable fishing practices.

The paper also argues the need to negotiate global disciplines to limit access to fisheries to sustainable levels in an appropriate forum, such as the FAO or UN. The FAO International Plan of Action aimed at addressing excess fishing capacity is an important first step, but effective rules to discipline subsidies will require an effective enforcement regime and would have to be reconciled with current WTO rules disciplining subsidies. Given the trade-related nature of fisheries subsidies, it is likely that any disciplines on fisheries subsidies would require the engagement of trade agencies and of the WTO.

The only solution is one that gives competent bodies dealing with fisheries, marine conservation and development outside the WTO a role in crafting and implementing improved disciplines. If the negotiation on new disciplines on fisheries subsidies in the WTO helps to catalyse the development of effective and binding norms regarding excess fishing capacity in the FAO or the UN, then this will be an additional positive outcome of such negotiations.

We refer readers to our recent publication *Turning the Tide on Fishing Subsidies: Can the WTO play a positive role?* where we identify minimum benchmarks to ensure that WTO negotiations not only address economic distortions, but also improve resource conservation and livelihood security.

*Claudia Saladin, Director, Sustainable Commerce Programme, WWF*

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## MEETINGS OF WTO BODIES

Nov. 8	Council for Trade in Goods
Nov. 11	Dispute Settlement Body
Nov. 11-12	Committee on Trade and Development, regular session followed by special session*
Nov. 13-15	Dispute Settlement Body; special session*
Nov. 14	Working Group on Trade and Technology Transfer
Nov. 18-21	Committee on Trade and Development, regular session followed by special session*
Nov. 20-21	Working Group on the Interaction between Trade and Competition Policy
Nov. 21-22	Committee on Agriculture; reg. session followed by special session*
Nov. 22	Council for Trade in Goods
Nov. 25-27	Negotiating Group on Rules
Nov. 25-28	Council for TRIPs, regular session followed by special session*
Nov. 26	Committee on Trade and Development
Nov. 28	Dispute Settlement Body
Nov. 28	Working Group on Trade and Technology Transfer
Nov. 29	Working Group on Transparency in Government Procurement
Dec. 2-3	Negotiating Group on Market Access
Dec. 2-3	Committee on Trade and Development, spec. sess.
Dec. 3	Working Group on the Relationship between Trade and Investment
Dec. 4-5	Council for Trade in Goods
Dec. 4-5	Trade Negotiations Committee

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

## OTHER MEETINGS

Nov. 14-15 Sydney	Informal Meeting of Trade Ministers, i.e. 'mini-ministerial' in preparation for the WTO's fifth Ministerial Conference in Cancún, Mexico See: <a href="http://www.dfat.gov.au/trade/doha_informal_ministers_nov02.html">http://www.dfat.gov.au/trade/doha_informal_ministers_nov02.html</a>
Nov. 15-16 Mexico City	Social Movements Meeting in Preparation for the WTO's Ministerial Conference in Cancún Contact: Operational Secretariat, Via Campesina, Honduras, e-mail: <a href="mailto:viacam@gbm.hn">viacam@gbm.hn</a>

## DOCUMENTS FROM THE WTO

Council for Trade in Services. 28 October 2002. Implementation of Paragraph 15 of the Guidelines and Procedures for the Negotiations on Trade in Services. Communication from Bolivia, Barbados, Colombia, Cuba, Ecuador, Nicaragua, Peru and Trinidad and Tobago (TN/S/W/7)

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## Electronic Resources

ACP-EU-trade – A website hosted by the European Centre for Development Policy Management, the EU-LDC Network and the Overseas Development Institute, offering access to key official documents, reports, informal papers, analytical studies and other relevant documents. <http://www.acp-eu-trade.org/>

EPA Watch – A website hosted by the Coalition of the Flemish North-South Movement to monitor the negotiations on Economic Partnership Agreements between the EU and ACP countries. <http://www.epawatch.net/general/start.php>

TRIPs Update – A regular bulletin on recent developments from the Australian Department of Foreign Affairs and Trade, available at: [http://www.dfat.gov.au/ip/trips\\_update\\_index.html](http://www.dfat.gov.au/ip/trips_update_index.html)

UNCTAD-ICTSD Capacity Building Project on IPRs – several new papers available at: <http://www.ictsd.org/unctad-ictsd/index.htm>