

Access to Medicines: WTO Members May Snatch Defeat out the of Jaws of Victory

'We affirm that the Agreement can and should be interpreted and implemented in a manner supportive of WTO Members' right to protect public health and, in particular, to promote access to medicines for all,' trade ministers stated in the Declaration on TRIPs and Public Health adopted in Doha. Now those very Members are poised to concede defeat on the only point that ministers left for further deliberation: finding a way for countries with insufficient domestic manufacturing capacity to take advantage of the leeway the Declaration provides to Members to use compulsory licensing. The TRIPs Council must find an 'expeditious solution' to this problem and report to the General Council before the end of 2002.

Most developing countries consider fulfilling this mandate as a litmus test of political will to address their concerns in the multilateral trading system, and a key indication of whether the much-touted Doha 'Development' Agenda will ever deliver more than a feel-good phrase. Should the effort fail, the entire negotiations will be seriously affected.

Despite the high stakes, as this issue of Bridges went to press the TRIPs Council had reached an impasse on the question and positions were hardening, as well as diverging further, rather than converging. In an ultimate attempt to reach consensus before the last scheduled General Council meeting of 2002 on 10-11 December, TRIPs Council Chair Eduardo Pérez Motta of Mexico had suspended negotiations on his draft legal text spelling how the mechanism would work in practice in order to allow delegations to seek instructions from capitals.

What Was Agreed in Doha

The Declaration on TRIPs and Public Health is widely regarded as the most positive outcome of the Doha Ministerial Conference from the perspective of sustainable development. The result of an unprecedentedly unified developing country effort, the Declaration affirms that the WTO Agreement on Trade-related Aspects of Intellectual Property Rights 'does not and should not prevent Members from taking measures to protect public health.'

It recognises 'the right of WTO Members to use, to the full, the provisions in the TRIPs Agreement' and specifies that each Member has 'the right to grant compulsory licences and the freedom to determine the grounds upon which such licences are granted.' Members also have the right to 'determine what constitutes a national emergency or other circumstances of extreme

urgency, it being understood that public health crises, including those relating to HIV/AIDS, tuberculosis, malaria and other epidemics, can represent a national emergency or other circumstances of extreme urgency.'

While some developing countries have advanced pharmaceutical industries capable of making cheap generic versions of patented medicines, many others do not. The only way the latter can acquire such drugs is by importing them from another country that has the capacity to manufacture them. This possibility is compromised, however, by the requirement in TRIPs Article 31(f) that manufacture under compulsory license must be 'predominantly for the domestic market of the Member authorising such use.' It is precisely because ministers recognised the difficulties this obligation could cause for countries without sufficient manufacturing capacity in finding a 'WTO-compatible' supplier, that they instructed the TRIPs Council to 'find an expeditious solution to this problem and to report to the General Council before the end of 2002.'

Meeting in Sydney in mid-November, trade ministers of a dozen WTO Member countries stated their confidence that a solution would indeed be found and affirmed their commitment to meeting the deadline. However, only week later in Geneva it became apparent that a widening gulf separated Members' interpretations of the Doha mandate's scope and coverage.

Public Health vs Epidemics

In the Declaration's opening paragraph, ministers recognised 'the gravity of the public health problems afflicting many developing and least-developed countries, especially those resulting from HIV/AIDS, tuberculosis, malaria and other epidemics.'

For developing countries, the operative concept here is 'public health' and the diseases specifically mentioned are merely illustrations of the type of medical urgency that could justify the granting of a compulsory license.

Under intense pressure from its powerful pharmaceutical industry, the US is now taking a much more restrictive view. Instead of accepting Doha formulation, it insists that any mechanism allowing the export of generics manufactured under compulsory license must be limited to treatment for AIDS/HIV, malaria, tuberculosis and other 'infectious epidemics of comparable gravity and scale that may arise in the future', as proposed by pharmaceutical CEOs in a letter to US Trade Representative Robert Zoellick.

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Echoing this view, US Ambassador Linnet Deily said in November that WTO Members 'should not endanger the progress achieved at Doha and the careful balance that was successfully struck by being diverted away from helping poor countries[...] towards non-epidemic "lifestyle" health issues.'

The focus on grave epidemics only is unacceptable to developing countries, as it would narrow the original Doha mandate considerably. Referring to the Doha commitment to 'promote access to medicines for all', the Africa Group stated on 28 November that 'if discussions continue on the same line as they have been conducted to date, then it is unlikely that the desired solution will be forthcoming, particularly one meant to address the public health problems afflicting Africa.'

While some speculate that the US intransigence could be a negotiating ploy, representatives of the pharmaceutical industry publicly assert that the Administration has assured them that its position on disease coverage is 'the bottom line'. In widely-circulated letters, several members of Congress have urged Mr Zoellick to remain firm on the restrictive language as 'an open-ended or unclear exception to the standards of patent protection would seriously undermine our interests and long-term public health objectives.'

Which Drugs and Who Should Benefit?

The diseases covered are not the only bone of contention. Countries with powerful patented medicines manufacturers are also attempting to limit the type of product that could be manufactured under third party compulsory license. Just as researchers are racing to develop an AIDS vaccine, Japan has proposed to exclude vaccines while the US is trying to limit the availability of compulsory licenses for diagnostic test kits to only those related to AIDS.

Other main points of conflict revolve around which countries would be eligible to import generics under the new arrangement. While Members agree that all least-developed countries would be qualified to issue licenses for manufacture in third countries, the United States, the EU, Japan and Switzerland – so far to no avail – are seeking a commitment from relatively high-income developing/transition countries such as Singapore, Korea, Hong Kong and Hungary not to import generics that override patents from other countries.

The Battle over Trade Diversion

Countries with large research-based pharmaceutical sectors are worried about trade diversion, i.e. the re-export of low-cost medicines from a beneficiary country to OECD members, where they would erode the market share of brand-name drugs. To avoid this to the greatest extent possible, Switzerland and the EU – backed by other major producer countries – are seeking explicit packaging requirements, which developing countries regard as unnecessarily burdensome. As it stands, the Chair's text would impose distinctive packaging only if it is 'feasible and does not have a significant impact on prices'.

Major patented medicine producing countries are also seeking other conditions for the manufacture and export of generics under compulsory license. Among these are that the entire production be exported to the country granting the license, as well as prior notification of the quantity required and the period for which it will be needed. Developing countries retort that it would be impossible to guess beforehand the severity and duration of the public health problem they seek to address.

Divisive Legal Questions

Also at issue is the legal mechanism for allowing the export of medicines produced under compulsory license. The easiest short-term solution would be to agree on a waiver on dispute settlement cases when a Member actually resorts to the mechanism. Most Members are inclined to agree to on such a waiver, but developing countries and the European Union are also seeking a more permanent solution in the form of an amendment to the TRIPs Agreement itself. The US,

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GATS Negotiations on Specific Commitments: Issues for Consideration by Developing Countries

By Luis Abugattas Majluf

The Guidelines and Procedures for the Negotiations adopted by the Council for Trade in Services, and later reaffirmed in paragraph 15 of the Doha Ministerial Declaration, set the request-offer approach as the main method for negotiating specific market access commitments in services. It was agreed that Members should submit initial requests by 30 June 2002 and initial offers by 31 March 2003.

Some countries met the deadline while other presented their initial requests afterwards. The majority of developing countries, however, have yet to present their initial requests to their trading partners. These countries are currently confronting a complex challenge. While some Members are already calling for bilateral market access negotiations, developing countries need first to carefully analyse – and then react to – the initial requests received, but more importantly to elaborate and submit their initial requests in order to effectively promote their own trading interests in the negotiations. Bilateral negotiations must not be launched until both parties have submitted their requests. No ‘early harvest’ should be accepted in this process.

Three main factors explain why a significant number of developing countries are experiencing difficulties in the elaboration of their initial requests: a lack of human resources; the complexities involved in identifying concrete trading interests at the national level; and, in some cases, lack of adequate understanding of the General Agreement on Trade in Services (GATS).

The elaboration of initial requests, even when facing some limitations, is a priority issue for developing countries as it is the only means through which they can ensure an increased participation in trade in services. The main challenge confronting them in the request-offer negotiations is making the ‘*best endeavour clause*’ contained in Article IV of the GATS effective.

Implementation of GATS Article IV

The objectives of Article IV of the General Agreement on Trade in Services (on increasing the participation of developing countries) will only be fulfilled if the Doha Round negotiations result in a strengthened domestic services capacity in developing countries, in improved access to distribution channels and information networks for services suppliers of developing countries, and in a commercially meaningful liberalisation of developed country services markets and modes of supply of interest to service suppliers of developing countries.

An active participation of developing countries in the process is a necessary condition for achieving these objectives. Requesting market access in sectors and modes of supply that would effectively translate in increasing exports of services, and attaching the necessary conditions to foreign services suppliers when granting market access – as provided by GATS Article XIX:2 – would contribute to a positive outcome. Furthermore, developing countries should pay special attention to the conditions that could be attached when granting market access to ensure that the participation of foreign suppliers does not jeopardise policy

objectives, provides positive externalities and promotes the development of domestic capacities.

Six Focal Points for Request and Offer

In addressing the request-offer negotiations developing countries should address, *inter alia*, the following issues:

An Adequate Institutional Framework

At the national, level special attention should be paid to domestic arrangements for intra-governmental coordination, including strengthening interaction between capital- and Geneva-based delegations, as well as consultation with stakeholders. Only through adequate institutional arrangements will it be possible to ensure that the requests submitted to other Members properly reflect the country’s real trading possibilities, and that the offers made take into consideration the needs of the domestic services suppliers and the regulatory limitations that the country may face.

The identification of *best practices* in this regard could contribute to consolidating domestic mechanisms for managing services negotiations and addressing some of the problems that currently confront a significant number of developing countries. Those among them that are involved in preferential services trade liberalisation schemes should evaluate co-ordination mechanisms in order to adequately manage the interface between the multi-lateral and the regional processes. Some integration groupings between developing countries have already established mechanisms for joint action, and they are co-ordinating their initial offers in order not to jeopardise their regional programmes and objectives.

The Type of Requests

In elaborating their initial requests and when analysing the requests received, developing countries should evaluate the different levels of commitment entailed in the requests. In this regard the following kind of requests could be considered to further particular negotiating objectives:

- seeking clarification and technical improvement in the scheduling of existing commitments (clear description of market access and non-trade restrictions, sectoral identification, and definition of concepts, terms and conditions);
- seeking full implementation of existing commitments;
- seeking binding of existing limitations;
- seeking the adoption of further liberalisation commitments, elimination of scheduled limitations, or new commitments binding unbound modes and the scheduling of unscheduled sectors or sub-sectors;
- seeking the elimination of MFN exemptions; and
- seeking additional commitments under Article XVIII.

Developing countries should seek additional commitments as a way of implementing GATS Article IV. Such commitments could be of particular importance in assuring that any market access

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that is granted is not compromised by other measures that could eliminate meaningful commercial opportunities. For example, pro-competitive commitments adopted by trading partners could assist in avoiding the nullification or impairment of expected market access benefits through questionable business practices. Additional commitments regarding entry, work permits or economic necessity tests could make Mode 4 (i.e. movement of natural persons as services providers) commitments truly effective. Furthermore, additional commitments – which would need to be analysed at the sectoral level – could help, *inter alia*, with transfer of technology and managerial know-how, address public policy concerns and asymmetry in access to information and information networks, as well as the sustainability of services activities.

Balance between Bilateral and Multilateral Negotiations

Some of the initial requests that have been submitted could infringe upon issues that are being dealt with in the Working Party on Domestic Regulations, the Working Party on GATS Rules and in the Committee on Specific Commitments. These requests address, *inter alia*, such areas as subsidies, domestic regulation and the classification of some services. Some of these issues could not be resolved multilaterally and have been transferred to the bilateral process. These requests should be carefully evaluated in the light of their possible implications for the work being done in the subsidiary bodies. Also, some requests suggest the adoption of definitions of important concepts, terms and conditions used in the scheduling of specific commitments. It should be carefully considered whether these discussions and decisions should be undertaken in the bilateral process or whether a multilateral approach could best serve the interests of all participants.

Equal Progress in Market Access and Rule-making

According to the Guidelines and Procedures for the Negotiations, rule-making negotiations should be completed prior to the conclusion of the negotiations of specific commitments. Rule-making and negotiations of specific commitments are integral parts of a single whole, and the commercial value or the sensitivity of the commitments that could be adopted by Members would differ according to the multilateral rules and disciplines applicable to safeguards, subsidies and government procurement. For example, there is significant empirical evidence that some services are highly subsidised and at the same time are among those on which some Members are seeking deep liberalisation commitments.

With the launching of the request-offer negotiations there is a real concern that rule-making will advance at an even slower pace than in the past. In light of the negative experience so far with rule-making negotiations under the GATS, developing countries should assure that both processes evolve in a synchronised manner, and that in rule-making the particular interests of developing countries are adequately taken into account. The work programme adopted by the WPGR on 22 July 2002 should be fulfilled as agreed. On the contrary some decisions should be made concerning future progress in the request-offer negotiations.

Progress Review and Evaluation of the Negotiations

According to the Guidelines and Procedures for the Negotiations, the process shall be subjected to reviews and evaluations prior to its completion. These are aimed at assuring the effective

implementation of the objectives and goals established in GATS Articles IV and XIX:2. Paragraph 14 of the Guidelines establishes that ‘negotiations shall be adjusted in the light of the assessment of trade in services’, which is an ongoing activity of the Council. Therefore the assessment should have a firm deadline for completion, after which the Council should decide the extent of the adjustment required in the negotiations.

Moreover, Paragraph 15 of the Guidelines introduces clear guidance for the kind of evaluation that the Council in Special Session (i.e. negotiating sessions) should embark upon during the negotiating process. The Council should undertake two different exercises pertaining to the review and evaluation of the negotiations. First, it must review the progress in the negotiations to assess the extent to which Article IV is being implemented through the negotiated specific commitments. Then, before the completion of the negotiations it shall conduct an evaluation on the results attained in terms of the objectives of Article IV. An adequate implementation of the review of progress in the negotiations and the overall evaluation prior to the completion of negotiations should be a priority issue for developing countries. Through these exercises they should ensure that special and differential treatment under the GATS is fully implemented.

A group of developing countries has presented an interesting proposal for the implementation of Paragraph 15 of the Guidelines.¹ The proposal advances some ideas on the mechanisms and the

benchmarks that the Council should use in undertaking the negotiations progress review. Developing countries should ensure that the Council seriously considers this issue, and that the review is included as a standing agenda item. With respect to the evaluation mandated in Paragraph 15, developing countries should address and seek clarification about the relationship between that evaluation and the overall assessment of trade in services and the possible adjustment of the negotiations called for in paragraph 14.

Possible ‘Multilateralising’ of Key Issues

The Guidelines and Procedures for the Negotiations do not exclude the possibility that some issues could be negotiated multilaterally. Developing countries could consider promoting the evolution of certain sectoral negotiations to a multilateral setting taking into account that in the bilateral process the outcome would depend on the negotiating strength of individual countries. A multilateral negotiation might enhance the possibility of achieving the negotiating objectives of developing countries in some crucial areas.

The Council for Trade in Services could adopt such a ‘multilateralisation’ approach to the negotiations if the progress review mandated by paragraph 15 of the Guidelines concludes that the objectives of Article IV are not being met. For example, the movement of natural persons as services suppliers is an area of particular importance for developing countries that might not be adequately addressed in the bilateral process. Should that be the case, developing countries could seek to re-launch the negotiations under the Annex on the Temporary Movement of Natural Persons at the multilateral level.

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¹ Communication from Bolivia, Barbados, Colombia, Cuba, Ecuador, Nicaragua, Peru and Trinidad and Tobago, TN/S/W/7, 28 October 2002.

Technology Transfer and Intellectual Property Rights: The Korean Experience

By Linsu Kim

The protection of intellectual property rights (IPRs) has become an increasingly important issue in multilateral trade negotiations. The current debate is polarised, pitting advocates for strong IPR protection – who argue that it is an effective instrument for facilitating technology transfer to developing countries – against those taking the opposite view.

Recent studies, including one commissioned by UNCTAD and ICTSD¹, have found that the effects of IPRs on technology transfer to – and local innovation in – developing countries will vary according to the country's level of economic development and to the technological nature of its economic activities, and that countries can reap long-term benefits from strong IPRs only after they reach a certain threshold level in their industrialisation. Indeed, strong IPRs would thwart developing countries from attempting industrialisation at the very early stage. And under such an IPR environment, few are likely to emerge as newly industrialising economies.

This position is confirmed by the experience of South Korea. This article summarises a case study conducted by the author based on a long period of research on the behaviour of firms in technology transfer and local capacity-building in that country.

Under a strong IPR regime few developing countries are likely to emerge as newly industrialising economies.

Technological Development of Newly Industrialising Economies

During the early stage of industrialisation, developing countries acquire mature foreign technologies from industrially advanced countries. Lacking local capability to establish production operations, local entrepreneurs develop production processes through the acquisition of 'packaged' foreign technology, which includes assembly processes, product specifications, production know-how, technical personnel and components and parts. Production at this stage is merely an assembly operation of foreign inputs to produce fairly standard, undifferentiated products.

Once the acquisition task is accomplished, production and product design technologies are quickly diffused within the country. Increasing competition from new entrants spurs indigenous technical efforts in the assimilation of foreign technologies to produce slightly differentiated products. The relatively successful assimilation of imported technology and increased emphasis upon export promotion, together with the enhanced capability of local scientific and engineering personnel, lead to the gradual improvement of mature technology. Technological emphasis during this stage is duplicative imitation, producing knockoffs and clones.

In the face of rising wages and increasing competition from the second tier newly-industrialising economies (NIEs) like Thailand and Malaysia, firms in the first tier NIEs such as Korea and Taiwan, which have successfully acquired, assimilated and sometimes improved mature foreign technologies, aim to repeat the same process with higher-level knowledge in the intermediate technology stage. Technological emphasis at this stage is creative imitation, generating facsimile products but with new performance features. It involves not only such activities as technology

transfer and benchmarking but also notable learning through substantial investment in research and development (R&D). Many industries in Taiwan and Korea have arrived at this stage.

If successful, some of these industries may eventually accumulate sufficient indigenous technological capabilities to generate emerging technologies and challenge firms in advanced countries. Innovation is the watchword in these industries. When a substantial number of industries reach this stage, the country may be considered to be a member of the advanced countries.

This oversimplified model provides a fairly accurate explanation of the evolutionary process that took place in the first tier NIEs in East Asia. In the 1960s and 1970s when the local technological base was very primitive, Korea and Taiwan first acquired and assimilated mature technologies to undertake duplicative imitation of existing foreign products with their skilled but cheap labour force. Consequently, the accumulation of technological capability through learning-by-doing, together with the quality upgrading of the educational system, enabled these countries to undertake creative imitation in the face of rising labour costs and increasing competition from the second tier NIEs.

Many East Asian economies such as Thailand, Malaysia, Indonesia, Vietnam and the Philippines are at the mature technology stage, undertaking duplicative imitation of existing foreign products with cheap labour forces. In contrast, other countries such as coastal China and some of the East European economies may not evolve in the same way, as they had a longer history of technological accumulation before they opened their economies. Some of the sectors in these economies may have enough capability to enter the intermediate technology stage at the outset. If they evolve from the mature technology stage, the speed of evolution to the intermediate technology stage should be relatively fast.

The Korean Experience

Korean firms entered the mature technology stage in the 1960s and 1970s by acquiring, assimilating, and improving generally available mature foreign technology through various mechanisms based on duplicative imitation. As the industrialisation process unfolded and Korean firms mastered manufacturing competencies in the duplicative imitation of standardised, low-cost products, they needed to upgrade their indigenous capabilities and manufacture more value-added products in the face of increasing local wages and emerging competitive threats in the labour-intensive production from the second-tier developing countries. This forced Korean firms in the 1980s to shift their emphasis from strategies focusing on labour-intensive mature technologies to those focusing on relatively more knowledge-intensive intermediate technologies across all the sectors.

To tackle challenging new technological tasks, which were beyond their existing capabilities, Korean firms across industrial sectors largely focused their technological efforts on three major areas:

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foreign technology transfer through formal mechanisms, the recruitment of high calibre human resources from abroad, and local R&D efforts. In addition, the government invested heavily in upgrading university research and diversifying its research institutions.

Foreign technology transfer played a vital role in building the existing knowledge base of Korean firms. Simple, mature technologies could be easily obtained free of charge through informal mechanisms, because they are readily available in various forms. Even if such technology was patented, foreign patent holders were lenient in controlling such duplicative imitation, as it was no longer useful in sustaining their international competitiveness.

Technologies at the intermediate stage were a lot more complex and difficult to acquire and adopt. Foreign patent holders were much more determined to control imitation by developing countries, because such technologies continued to play a pivotal role in expanding their international business activities and sustaining their competitiveness. Thus, Korean firms had increasingly to resort to formal technology transfer such as foreign direct investment (FDI) and foreign licensing (FL). This is evident from statistics. FDI increased from US\$218 million in 1967-1971 to US\$1.76 billion in 1982-1986, while royalties associated with FL increased from US\$16.3 million to US\$1.18 billion during the same period. Capital goods imports also increased drastically from US\$2.5 billion to US\$50.9 billion during the same period.

In parallel with enhanced efforts in acquiring knowledge-intensive technologies through formal mechanisms and the mobility of high calibre human resources, Korean firms intensified their own R&D activities to strengthen their bargaining power in technology transfer, expedite learning from acquired technology, and to mitigate foreign technological dependency. R&D investment has seen a quantum jump in the past three decades from US\$28.6 million in 1971 to US\$ 4.7 billion by 1990, and to US\$ 12.2 billion by 2000. The Korean economy recorded one of the world's fastest growth rates, yet R&D expenditure rose faster still. As a percentage of GDP, R&D increased from 0.32 percent to 2.68 during the same period, surpassing that of many West European countries.

Consequently, there has been significant structural change in R&D investment. The government played a major role in R&D activities in the early years, when the private sector faltered in R&D despite the government's encouragement. More recently, domestic firms have assumed a much larger role in the country's R&D efforts in response partly to increasing international competition and partly to a supportive policy environment. While the private sector accounted for only 2 percent of the nation's total R&D expenditure in 1963, this had risen to over 80 percent by 1994. This is one of the highest among both advanced economies and NIEs.

The R&D growth rate is the highest in the world. The average annual growth rate in R&D expenditure per gross domestic product (GDP) in 1981-1991 was 24.2 percent compared to 22.3 percent in Singapore, 15.8 percent in Taiwan, 11.4 percent in Spain, and 7.4 percent in Japan. The average annual growth rate of business R&D per GDP is also the world's highest at 31.6 percent, compared to 23.8 percent in Singapore, 16.5 percent in Taiwan, 14.0 percent in Spain, and 8.8 percent in Japan. Private sector R&D is conducted almost entirely by domestic firms. As of 2000, only 39 multinational corporations – or 1.4 percent of the total number of MNCs manufacturing in Korea – have established R&D centres in the country,

accounting for less than one percent of the total number of corporate R&D centres in Korea. Most of these R&D centres are small and involved largely in adapting products to local market needs. This is a common practice of MNCs operating in developing countries.

In addition to intensified in-house R&D, Korean firms began globalising their R&D activities. LG Electronics, for instance, has developed a network of R&D laboratories in various developed countries. These outposts monitor technological change at the frontier, seek opportunities to develop strategic alliances with local firms, and develop state-of-the-art products.

Developing countries should work to change the trend towards standardised and all-encompassing IPR systems.

The government invested heavily in expanding and deepening university research in the intermediate technology stage. The Korean government and the POSCO steel corporation founded three new research-oriented universities specialising in science and technology. The government also enacted the Basic Research Promotion Law in 1989, targeting universities to upgrade their research capabilities.

As a result, university research has expanded substantially. The Korean government also increased the number of government research institutions (GRIs) from just one to over twenty, and these began to play an important role in strengthening the bargaining power of local enterprises in acquiring increasingly sophisticated foreign technologies. For instance, when Corning Glass refused to transfer optical fibre production technology to Korea in 1977, two large local copper cable producers entered a joint R&D project with a GRI. The locally-developed optical cable was tested successfully on a 35-km route in 1983. Although this effort eventually ground to a halt due mainly to slow progress in R&D, it nonetheless helped local firms gain bargaining power in acquiring foreign technology on favourable terms.

Thus, Korea has rapidly evolved from the mature technology stage, undertaking duplicative imitation through reverse engineering, to the intermediate technology stage, undertaking creative imitation through formal technology transfer, the recruitment of higher calibre scientists and engineers, and intensified local R&D activities. In this intermediate technology stage, IPRs became important even for local firms. This is evident in patent statistics. Patent activity in Korea has increased significantly in the last two decades compared to the first two, increasing a mere 48 percent in the first 14 years (1965-1978), but almost tripling in the next 11 years (1979-1989), and almost tripling again in the next four years (1989-1993). Furthermore, the share of Koreans in local patent registration also increased from 11.4 percent in 1980 to 69.2 percent by 1999. Korean firms also became active in registering foreign patents. For instance, Korea jumped from 35th in terms of the number of patents in the US in 1969, to 11th with 538 patents in 1992, representing an average annual growth rate of 43.32 percent. By 1999, Korea had jumped to 6th position with 3,679. Samsung Electronics was ranked 4th with 1,545 US patents, only after IBM, NEC and Cannon, indicating Korea's seriousness in securing patent rights at home and abroad.

Over the decades, a significant number of local firms have managed to grow dynamically from primitive small firms to large modern ones. This is particularly the case for most large local pharmaceutical and cosmetic firms and some paper and chemical firms, which imitatively developed their own primitive production processes to become large innovative firms over decades.

For instance, leading local pharmaceutical firms first started as importer/dealers of packaged finished drugs and later entered the

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Mining Certification: A Field of Growing Trade Interest

By Marcos A. Orellana

Certification schemes for natural resource extraction have received considerable attention during the last decade. Aware of such schemes' potential restrictions to market access and their influence on the development of non-governmental standards, the trade regime has a particular interest in illuminating the angles of these initiatives, particularly as the applicability of the WTO's Agreement on Technical Barriers to Trade to non-governmental certification schemes still remains the object of debate.

This brief will not attempt to answer these more general questions, but will present two certification designs for mining: the voluntary UNEP Cyanide Code and the governmental certification scheme for raw diamonds. First, however, a short overview of the problems associated with mining and the drivers of certification schemes.

Mining in the Global Economy

Globalisation is visible in the contemporary mining industry. Satellite and engineering technology has enabled mining operations in remote areas, usually inhabited by local communities that depend on a clean environment for water, livelihoods, and survival. Although a source of wealth and value, the extraction of minerals and metals has high impacts on the environment and surrounding communities.

Water pollution by acid mine drainage, sulfuric acid, cyanide, and mercury is dangerous to humans, even in trace amounts. Road construction through pristine forests, with its influx of settlers and alien values, customs and diseases disrupts the social fabric and the conservation of biodiversity. The contamination of the air by dust and fumes from smelters affects agriculture and human health. The forced resettlement of communities, usually without adequate compensation, represents a denial of livelihoods and culture.

These negative impacts have encouraged affected communities to mobilise opposition to mining, many times impeding access to the areas and to the minerals. Mining companies' need for a social license to operate provides the context for the current debate over the appropriate tools in advancing standards and roles. Recently, the limitations of legal strategies arising from bureaucracy, corruption, and from the lack of information and material resources, have placed the focus on alternative mechanisms, such as certification.

To date, certification initiatives include the ISO 14000 series, which deals more with environmental management systems than with substantive standards for mining, certification under the Cyanide Code, and the Kimberly raw diamonds certification scheme. Two NGO-driven initiatives are also underway: WWF Australia is working with Placer Dome on a pilot certification system, and ELI, OXFAM America and SPDA are conducting a project to explore adequate mechanisms of community-based control, including certification, in the Andean Region.

Raw Diamonds Certification

In 1998, the United Nations Security Council imposed sanctions against the purchase of Angola diamonds as the diamond trade was fueling increasing instability and conflict in the region, which resulted in huge losses in life and limb.

A coalition of human rights groups led by Global Witness, Amnesty International, OXFAM, Physicians for Human Rights and Partnership Africa first focused on an explicit consumer education campaign based on hard-hitting action research. Then in May 2000, South Africa, Namibia and Botswana, worried that the campaigns would negatively impact their industries and economies, initiated the Kimberley process by organising a meeting for governments, industry and NGOs. Through a series of ten meetings around the world, this process evolved into an attempt to develop a certification of origin scheme for raw diamonds. Civil society organisations were instrumental in pushing the process forward. In fact, concerned about the slow pace of the process, approximately 200 NGOs signed a petition to speed up the process and threatened to walk out. Soon, the important players in the global diamonds trade, including the World Diamond Council, came to realise that the diamonds industry lives off reputation and stepped up the pace.

Mining companies' need for a 'social licence' to operate has placed the focus on alternative mechanisms such as certification.

In March 2002, 37 countries and the European Union concluded a certification scheme for rough diamonds. This model requires each shipment to be accompanied by a certificate expedited by the competent authority of a participating party. Certificates and containers must be tamper-proof and reveal such information as dates, authorising official, and statements accrediting the validity of the load. In turn, participating states must comply with certain obligations, including the implementation of the certification scheme through domestic laws, and the maintenance of information systems on production, imports, and exports of rough diamonds. More significantly, mining States should set up control systems over mines and mining companies, designed to exclude traffic of conflict diamonds.

The outcome of the Kimberley Process was certainly influenced by other campaigns, including prominently the US campaign led by Amnesty International (AI). The goal of the AI campaign was to draft legislation that would use the market to leverage reform and that would support the Kimberley process. In November 2001, the House of Representatives of the US Congress passed the *Clean Diamond Trade Act* by a vote of 408-6, prohibiting the import of conflict diamonds, establishing reporting requirements and funding for capacity-building of international arrangements, including the Kimberley Process and UN Security Council resolutions. However, the Act has met with the strong opposition from the current Bush administration. In any event, the Kimberley certification scheme is to be implemented on January 1, 2003.

Effectiveness of UNEP's Cyanide Code Questioned

In January 2000, an overflow of mine tailings from Aurul Gold smelter's dam in Baia Mare, Romania, released 100,000 cubic metres of cyanide-tainted waste water within 11 hours into the Lapus and Somes rivers, before crossing the border into Hungary. The cyanide was carried downstream to the Danube in Yugoslavia, devastating local ecosystems. Then in October 2001, villages in western Ghana were also hit by a spill of thousands of cubic meters of mine wastewater contaminated with cyanide when a mining dam ruptured. Earlier similar accidents have been recorded in Guyana, Colorado, and Kyrgyzstan.

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The Baia Mare accident produced widespread trans-boundary contamination and sparked public outrage in Europe, setting the stage for discussions on how to elaborate standards on cyanide management and emergency response. To address these concerns, in May 2000 the United Nations Environment Program (UNEP) and the International Council on Metals and the Environment (ICME) took the lead and chose the members of a Steering Committee for the elaboration of the Code. The Committee consisted of participants mainly from the mining industry, and only some from government, academia, NGOs, labour and financial institutions. For the couple civil society organisations that engaged in the discussions, however, it was soon clear that industry had hijacked the process. The Cyanide Code has been criticised since as greenwash, 'giving the appearance that the regulatory inadequacies have been addressed, without actually requiring the changes necessary to protect communities and the environment.'

The Cyanide Code is not intended to derogate from laws and regulations, but to complement them. Also, compliance is entirely voluntary and does not create enforceable rights or obligations. To administer the Code, a non-profit corporation controlled by the gold mining industry was established: the International Cyanide Management Institute. Gold companies that become signatories to the Code are not required to have all of their operations certified, only those that they have specifically requested. In turn, cyanide suppliers and transporters can become Code supporters and may conduct audits, but cannot become signatories.

The Code is comprised of principles that broadly state voluntary commitments, and standards of practice for the management of cyanide. Independent third-party audits, including site inspections and review of records, will verify every three years whether operations meet the standards of practice and will certify compliance if warranted. Only a summary of the audit report will be made available to the public on the Code's website. Operations that are only in partial compliance will be conditionally certified, subject to the successful implementation of an action plan to be posted on the Code's website. The Institute will develop a procedure for the resolution of disputes regarding auditor credentials or otherwise arising from the certification scheme.

Conclusion

Many questions remain open in the mining certification debate, such as who would set the standards and in what process; how standards would incorporate public participation and access to information; what monitoring and oversight roles for communities; who would verify compliance; what kind of markets could provide a preference for certified products, facilities or companies; and the role of financiers and insurers in a certification scheme. More generally, certification schemes raise issues regarding market access, eco-labelling and the applicable terms of the WTO's TBT Agreement. What is clear is that mining certification is being discussed in a variety of fora. Industry retains a clear interest in distinguishing leaders from laggards, and certification is viewed as a tool for accomplishing this. In contrast, communities are wary of a tool that may serve to green-wash unfulfilled promises by an industry with a meager record of compliance and respect for human and environmental rights.

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drug manufacturing business by packaging imported bulk drugs. Then, they gradually extended into more intricate operations, first by formulating imported raw materials and later, through backward integration, by producing the chemical components. Through this process, they grew in size and in technological capabilities. As a result, local firms accounted for almost 90 percent of the domestic drug market in Korea as compared to 22 percent in Brazil, 47 percent in Argentina, and 30 percent in India in the early 1980s.

During this period, Korea honoured only process patents but not product patents in the chemical, cosmetics, and pharmaceutical industries, opening an avenue for local producers to work around patented processes to produce relatively well known chemical and pharmaceutical products. Were it not for such lax IPRs, it would have been impossible for the local pharmaceutical firms to have achieved so much. Some of them have now advanced technologically to a level where they can undertake serious R&D activities and discover new drug compounds.

Some Lessons

The study offers four important lessons. First, strong IPR protection will hinder rather than facilitate technology transfer and indigenous learning activities in the early stage of industrialisation when learning takes place through reverse engineering and duplicative imitation of mature foreign products. Second, only after countries have accumulated sufficient indigenous capabilities with extensive science and technology infrastructure to undertake creative imitation in the later stage that IPR protection becomes an important element in technology transfer and industrial activities. This suggests that Japan, Korea and Taiwan could not have achieved their current levels of technological sophistication if strong IPR regimes had been forced on them during the early stage of their industrialisation. The same applies to the United States and Western Europe during their industrial revolutions. This article explains how these conclusions were reached.

Third, if adequate protection and enforcement of IPRs is genuinely intended to enhance development, policy makers should seriously consider differentiation in terms of the level of economic development and industrial sectors. Otherwise, the 'one size fits all' approach is a recipe for disaster for developing countries, particularly for the least-developed ones. Fourth, developing countries should work together to change current trends towards a standardised all-encompassing multilateral IPR system. They should strive to make IPR policies more favourable to them in the short term. But they should also strengthen their own absorptive capacity for a long-term solution that would enable them to identify relevant technology available elsewhere, strengthen their bargaining power in its transfer to them in more favourable terms, assimilate it quickly once transferred, produce creatively imitative new products around IPRs, and generate their own IPRs.

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ENDNOTE

¹ Sanjaya Lall and Manuel Albaladejo. 2001. *Indicators of the Relative Importance of IPRS in Developing Countries*. ICTSD/UNCTAD; <http://www.ictsd.org/unctad-ictsd/docs/Lall2001.pdf>. For a summary, see Bridges Year 6, No.3, page 13.

Textile Quota Phase-out: The Final Countdown

By Debapriya Bhattacharya

In the early 1980s, the Multi-Fibre Arrangement (MFA) emerged as a major impediment to the full realisation of textiles and clothing exporters' potential in many developing and least-developed countries. Dismantling the MFA consequently became a common demand of a large number of developing countries during the Uruguay Round multilateral trade negotiations, and many of them consider the Agreement on Textiles and Clothing (ATC) – which will phase out quotas by 2005 – the most significant of all the agreements resulting from those negotiations.

Anticipated Impact

Various studies analysing the possible impact of the total phase-out of the MFA were more or less consistent regarding anticipated changes in market shares of the major apparel exporters. While suggesting that the vast majority of developing countries stood to gain from the removal of trade restrictions on textiles and clothing, these studies warned that the distribution of welfare gains would be skewed because of trade diversion and quota level transfer. The mainstream prediction was that the higher-cost exporting countries (i.e. Hong Kong, South Korea and Taiwan), which controlled the largest share of exports to developed country markets under the MFA, were expected to cede ground to lower-cost suppliers such as China and India. There was also an apprehension that relatively new and low-cost sources such as Bangladesh and Sri Lanka would be squeezed out of the market because of their small size, lack of product diversification and low productivity.

Intermediate Results

With the integration experience under the first and second phase of the Agreement on Textiles and Clothing in hand, we now have concrete indications on the emerging effect of the MFA phase-out on the sourcing structure of global textiles and clothing imports.

The ATC stipulated that the MFA-maintaining countries must integrate a minimum of 16 percent of textiles and clothing imports in the first phase of the ATC (January 1995 - December 1997). Furthermore, non-liberalised products either under quota or otherwise restrained were to have their quota rates increased during the first phase by 16 percent. While the US, the EU, Canada and Norway – the four quota-imposing countries – did integrate the quantity of tariff lines on textiles and clothing required by the ATC during the first phase, in terms of value the rate of integration was much less. For example, the value of the products integrated by the EU in the first phase was a little above the half of the volume level, i.e. 8.7 percent of total textiles and clothing imports, and only 7.8 percent of the imports originating from the developing countries. For the US, in value terms the share was only 6.62 percent.

Interestingly, in order to meet the integration target for the first phase, the EU and the US included in their schedules a number of non-textile and non-clothing products, which contained textiles components, such as umbrellas.

During the second phase of integration (January 1999 - December 2001), another 17 percent of imports of all specified textiles and clothing products based on 1990 volumes were to be derestricted. Quotas for non-liberalised products were to grow by 25 percent.

The EU made marginal progress during the second phase of ATC and integrated products accounting for 12.92 percent of the benchmark value, whereas the matching figure for the US was only 10.73 percent. There were, however, substantial changes in Norway's and Canada's patterns of product selection during the second phase as these countries derestricted both clothing and made-up textile products.

With the third phase of the ATC, some textiles exporters are already under competitive pressure.

By the end of the second phase of the ATC, it became obvious that – thanks to the backloaded schedule followed by the exporting countries – commercially meaningful integration had not in effect taken place. Such a situation is underwritten by Article 2.6 of the ATC which identifies four product groups (i.e. tops and yarns, fabrics, made-up textile products and clothing), but does not specify the proportion of each of the groups at each stage of integration. In other

words, while integration targets have been honoured in a technical sense, the spirit – if not letter of the ATC – has not.

Although the ATC established the minima for integration at various points in time, the restraining countries treated these as ceilings. There have even been instances of new restrictions on ATC products in violation of the provisions of the Agreement, including new US curbs on Turkey's underwear exports and Turkey's own restrictions on a number of exporting countries following its customs union with the EU. Thus, 'full and faithful implementation' of the ATC was not in fact carried out during the first two phases as the obligation to sustain the 'progressivity of the phase-out process' was not fulfilled.

However, some countries, including Bangladesh, emerged as beneficiaries of this default situation. As a quota-free regime is fraught with many uncertainties, a backloaded integration schedule allowed these countries to protect their market share in the interim.

Early Signals from the Third Phase

The third phase of integration, which commenced in January 2002, is supposed to derestrict another 18 percent of the 1990 level of textiles and clothing imports. This should couple with a 27 percent quota expansion. The phase three integration plan submitted by the US to the WTO's Textiles Monitoring Body reflects the approach that informed the selection of products during the earlier stages. For instance, the major part of clothing products on which US restrictions are currently at their highest, will be integrated only to the extent of 2.56 percent out of the planned 18.13 percent to be derestricted under the third stage.

However, early signals from the implementation of the third phase show that exporting countries like Bangladesh, for which the global regime of apparel market has so far remained unchanged, have started to feel the impact of competitive pressure. For example, only two textiles and clothing categories of export interest to Bangladesh (gloves and silk trousers) have been derestricted in the US since the beginning of 2002. A comparison of the first nine months of 2002 data with the preceding year shows a 32 percent drop in Bangladesh's glove exports to the US. Concurrently, China's glove exports have gone up by more than 67 percent; whereas

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Services Negotiators Positive on New Developing Country Proposals

After a quasi-exclusive focus on the bilateral request-and-offer market opening process since June, services negotiators in October took up two 'horizontal' issues of major importance to developing countries: 'credits' for autonomous liberalisation, and review of the implementation of GATS Article IV (facilitating developing countries' integration into global services trade; see related article on page 3).

At the 28 October special session of the Council for Trade in Services, a group of 24 developing countries tabled a list of possible alternative options for establishing modalities for granting 'credits' for autonomous liberalisation – a move welcomed by several other Members as a 'positive step forwards'. And, tackling the contentious issue of conducting a general evaluation of the services liberalisation process (assessment), eight Central American and Caribbean Members put forward a proposal on how to conduct an effective review of the implementation of GATS Article IV with a view to increasing the participation of developing countries in the global services trade. According to observers, this proposal should meet with a 'high degree' of political support from industrialised countries. Commentators also noted that the formal tabling of this paper could be seen as a developing country attempt to bring certain elements of the services negotiations from the bilateral to the multilateral level.

Autonomous Liberalisation

The 24 developing countries circulating the 'list of questions' responded to the CTS Chair's draft modalities by adding 'some ideas to move forward' on the still unresolved issues in the autonomous liberalisation (AL) debate. One of these open questions is whether all Members or only developing countries should be eligible for 'credits' for AL. While 'not prejudging any position', a trade source said, the document argued that when granting or requesting credits for unilaterally-undertaken services liberalisation, it should be borne in mind that paragraph 2 of the Doha Declaration calls for placing developing countries' 'needs and interests at the heart of the Work Programme', now officially dubbed as the Doha Development Agenda.

The paper was tabled by Argentina, Bolivia, Brazil, Ecuador, the Dominican Republic, Guatemala, Honduras, India, Indonesia, Malaysia, Mexico, Nicaragua, Pakistan, Panama, Paraguay, Peru, the Philippines, Senegal, Sri Lanka, Thailand, Venezuela and Uruguay.

GATS Article IV Monitoring Mechanism

Bolivia, Barbados, Colombia, Cuba, Ecuador, Nicaragua, Peru and Trinidad and Tobago tabled a proposal outlining options on how to implement the 'reviews and evaluation agreed upon by Members' in paragraph 15 of the services negotiation guidelines, a provision which the group views as 'an integral part of the principle of special and differential treatment for developing and least-developed countries'.

Paragraph 15 provides that to ensure the effective implementation of GATS Article IV (dealing with increasing participation of developing country Members in world trade) and Article XIX.2 (containing special and differential treatment-related provisions for developing countries in the market access negotiations), the CTS 'when reviewing progress in negotiations, shall consider the extent to which Article IV is being implemented' and it should

suggest 'ways and means of promoting the goals established therein'. Furthermore, it 'shall conduct an evaluation, before the completion of the negotiations, of the results attained in terms of the objectives of Article IV', such as strengthening services capacity and competitiveness, improving access to distribution channels and information networks, and greater market access in areas of special interest.

The eight developing countries proposed to conduct the 'progress review' as a standing agenda item in the CTS for which 'benchmarks' should be established, such as reviewing the offers received in response to requests tabled (offers will be handled multilaterally as opposed to the bilateral initial requests); the degree of flexibilities developing countries could retain based on the offers made; and the 'special priority to be given to the LDCs as mentioned in Article IV.3 and to the needs of small service suppliers of developing countries' as mandated in paragraph 15 of the Guidelines.

The review mechanism should be based on relevant information provided by Members and on the analysis of offers by the WTO Secretariat, UNCTAD and other relevant agencies. The group further suggested taking stock of the progress 'in negotiations related to the implementation of Article IV' at the WTO's Ministerial Conference next September in Cancún, Mexico.

'Review of progress' continues to be an item on the CTS's agenda. A developing country source predicted that 'some Members' would get increasingly concerned about the fact that the good progress in the services market access negotiations was not matched by a similar degree of movement in other sectors such as agriculture. In the context of the 'single undertaking' design of the Doha Round negotiations, the pace of the different negotiating fora should be synchronised, the source added.

Small Economies

Mauritius tabled a proposal (TN/S/W/8) addressing the particular problems of small economies faced in increasing their participation in world services trade due to their 'comparative disadvantage' in competitive core services such as transport, financial services and telecommunications. The prospects of focusing more intensely on the tourism sector in small economies were 'constrained by the consideration to preserve the ecological balance and prevent environmental degradation' the Mauritian paper added (see also the WTO Secretariat's recent *Discussion Paper on the Environmental Effects of Services Trade Liberalisation* (WT/CTE/W/218)). Mauritius argued that a one-size-fits-all approach was not capable of recognising the unique circumstances of small economies.

In line with its approach to the agriculture negotiations, Mauritius proposed that special consideration be granted to small economies in order to overcome their vulnerabilities and difficulties. To that end, according to Mauritius, GATS Article IV should be 'effectively operationalised'; small economies should only be expected to 'take commitments that are commensurate with their capacities, levels of development, and size of economies'; and, among other things, they should be 'provided with market access in sectors and modes of supply of specific interest to them'. Finally, Mauritius suggested setting up a monitoring mechanism reporting to the CTS on the implementation of Article IV 'for the benefit of the small service suppliers of the small economies'.

Agriculture: No Closer to a Common Negotiating Approach

Stuart Harbinson, who chairs the WTO negotiations on agriculture, will circulate on 18 December a preliminary overview of Members' positions regarding a framework for negotiating reductions in domestic and export subsidies, as well as tariffs on agricultural products. The draft overview is unlikely to show any trend towards consensus beyond an 'emerging convergence' on the need to elaborate disciplines on export credits. The debate on subsidies/tariff reductions remains highly polarised, and the lack of a detailed proposal from the European Union is further slowing down momentum. According to the Doha Ministerial Declaration, negotiating modalities must be agreed by end-March 2003, but Members increasingly question whether that deadline can be kept.

US, Cairn Propose Export Credit Disciplines

The United States surprised many when it tabled a proposal on WTO export credit disciplines at the November agricultural negotiating session. The US, which has the world's most comprehensive and generous array of government-guaranteed credit schemes for farm exports, has long claimed that export credits and export loan guarantees distort trade far less than outright subsidies, which are the European Union's and Japan's weapon of choice for export support. However, tabling the proposal was necessary, US chief agriculture negotiator Allen Johnson said, to counter charges of avoiding talks on a domestically-sensitive issue while strongly criticising the EU and Japan for not submitting specific proposals on negotiating goals and methods.

The US proposed, *inter alia*, that farmers in developed WTO Member countries should repay their loans within 180 days, while developing country farmers could have up to 30 months or more to repay theirs. The European Union, Switzerland and Norway said that a 30-month repayment period for developing countries was too long, while Canada argued that all Members should have a 180-day repayment limit, as suggested by the Cairns Group in a separate proposal on export credits. Cairns members said, however, that they would table a complementary paper on special and differential treatment measures for developing countries.

Japan Shows No signs of Changing Tack

In keeping with the approach of the 'Friends of Multifunctionality' group – which includes the EU and Switzerland – Japan said it could not agree to use the 'Swiss formula' for tariff reductions as proposed by the US and the Cairns Group. That approach, used in the non-agricultural market access negotiations during the Uruguay Round, uses a mathematical formula designed to cut the highest tariffs more deeply than lower ones. Japan also reaffirmed that the current basic framework of Green, Blue and Amber Boxes should be maintained and that the Uruguay Round formula (i.e. an average reduction for all products and a minimum reduction for each product) should be used when reducing trade-distorting support. The US and the Cairns Group urged Japan to present specific reduction targets instead of focusing on the formula to be used.

Many WTO Members seriously criticised Japan's proposal to lower its current minimum rice import quota from 7.2 percent to 5 percent of domestic consumption. Japan also said it should no longer be required to provide 'additional access volume due to delayed tariffication' as it committed to do at the end of the Uruguay Round in exchange for an exemption from converting all border measures into ordinary customs duties for its sensitive rice sector.

Developing Country Proposals on Tariffs and Subsidies

The Like-Minded Group (LMG) of developing countries tabled a paper compiling and detailing previous proposals. The group proposed, *inter alia*, to bring down all tariffs to 50 percent within three years, with further reductions on an average basis of another 50 percent and a minimum rate of 20 percent starting from this threshold. Developing countries, however, should be able to exclude certain agricultural products from reduction commitments in order to address food security, rural development, poverty alleviation and rural employment objectives. Otherwise, they should be allowed to apply lower reduction rates than developed Member countries.

On domestic support, the LMG suggested capping support in all three boxes at 10 percent of the value of agricultural production. Any support provided by a developing country should be deemed to be only minimally trade-distorting, provided the country's productivity was less than world average and exports of the supported product presented less than 3.25 percent of world trade in the product for five consecutive years.

The LMG also proposed the elimination of the Blue Box (subsidies related to production-limiting schemes) and the reduction of Amber Box (trade-distorting subsidies) support on a disaggregated basis. In contrast, developing countries should be allowed to maintain Amber Box commitments at the aggregate level. The Group further detailed its suggestion to replace the special agricultural safeguard with a new mechanism only available to developing countries.

An innovative proposal was made at an ICTSD/FES roundtable on agriculture and sustainable development in November to negotiate during Doha Round the inclusion of a financial mechanism within the Agreement on Agriculture, through which OECD countries would contribute a share of their total domestic support to 'assist farmers and rural communities in developing countries in the conservation of agro-biodiversity and the adoption of sustainable development practices in the agricultural sector.' Such payments would mitigate/compensate for the environmental damage resulting from the increasingly intensive agricultural practices that developing country farmers are adopting in the face of subsidised competition. As the payments would be proportional to the amount of subsidies disbursed, they would not compromise the long-term objective of fully eliminating agricultural subsidies in developed countries.

Searching Consensus for Cancún

Switzerland urged Members to 'examine and build on what we already have as an emerging consensus', pointing to certain 'common understandings', i.e. that new disciplines should be developed for export credits and that the 'essentials' of the Green Box should be maintained. Other points of convergence could include leaving intact eligibility criteria for the Special and Differential Treatment Box. Several negotiators saw only a small chance for agreeing on the concept of a new special safeguard mechanism for developing countries as proposed by the LMG or the idea of a Special and Differential Countervailing Measure as brought up by countries such as Argentina and the Philippines.

Japan will host a mini-Ministerial in mid-February in Tokyo, bringing together both agriculture and trade ministers from a selected group of Members in an attempt to foster consensus before Mr Harbinson issues his first modalities draft at the end of February.

US, 'Friends' Submit Contrasting Anti-dumping Proposals

At the meeting of the WTO Negotiating Group on Rules on 25-27 November, New Zealand suggested establishing a platform on fisheries subsidies in 2003, an idea seen as 'premature' by Japan. The Group also discussed contrasting proposals on anti-dumping put forward by the 'Friends of Anti-Dumping' and the United States.

'Friends of Anti-dumping' Table a Counter-proposal on AD

In response to EU and US papers tabled at earlier meetings (Bridges Year 6 No.7, page 12), Japan presented a general 'concept paper' on behalf of the 'Friends of Anti-dumping' (TN/RL/W/28 by Brazil, Chile, Colombia, Costa Rica, Hong Kong, China, Israel, Japan, Korea, Mexico, Norway, Taiwan, Singapore, Switzerland, Thailand and Turkey). The proponents noted that anti-dumping measures were often used as an excessively protective mechanism to shield domestic industries from international competition instead of countering injurious dumping, despite efforts made during the Uruguay Round to improve such measures. The proposal called for negotiations to clarify and improve rules in three areas, i.e. to prevent damaging and excessive anti-dumping actions; prevent excessive burdens on respondents; and increase transparency, fairness and predictability of the overall system. The Friends also tabled another paper with eight suggestions on how to modify the WTO Anti-dumping Agreement. The Group has now made 31 suggestions for proposed changes.

While Canada supported much of the Friends' concept paper, the US felt that it failed to include an important element of the Doha mandate, i.e. that of strengthening the Anti-dumping Agreement. The EU noted that some points raised overlapped with its own paper, including the reduction of the cost of investigation.

US Focuses on 'Procedural Fairness'

In contrast to the substantive Friends' proposals, the long-awaited US submission (TN/RL/W/35) focused only on procedural requirements. It called for greater 'procedural fairness' in anti-dumping and countervailing duty investigations, stressing the importance of making available all relevant information from national governments to interested parties and clarifying verification procedures used by authorities to submit information during investigation. According to the US, such procedural fairness is 'central to the "rule of law" in the legal and administrative systems of civil societies to ensure a fair and open decision-making process.'

While Chile acknowledged that a balance should be found to improve both procedural issues and substance, another Latin American official found that the paper simply reflected current US practices.

New Zealand Proposes Action on Fisheries Subsidies

New Zealand proposed the establishment of a 'negotiating platform' in 2003 to initially discuss the categorisation or classification of fisheries subsidies. Supporting New Zealand, Norway cited an OECD report showing that 30 percent of such subsidies were directed to financially supporting fishing fleets.

Again insisting that the causal link between subsidies and stock depletion had yet to be proven, Japan rejected New Zealand's proposal as 'premature'. It also noted that the 'Friends of Fish' still had not convinced the Group that the current Subsidies Agreement was insufficient for dealing with problems in the fishing sector.

Textile Quota Phase-out, continued from page 9

India exports grew by almost 62 percent. Similar trends may be observed for silk trousers.

Containing the Fallout

As the transition from the MFA to a quota-free textiles and clothing global trading regime is coming to a close, some fallout is becoming increasingly evident, thus making it imperative to think about mitigating measures.

Although some countries may wish to further prolong the transition period, an extension of the ATC beyond 2005 does not seem to be a viable proposition. Alternatively, one may consider measures to contain supply surges from a limited number of sources, leading to serious disruption in market shares, particularly those accruing to low-income countries. One way of dealing with the situation would be to protect the quota of the least-developed countries, as well as small suppliers for a certain period. A capping mechanism may also be thought of for large suppliers. A case in point is the capping imposed on China's textile exports to the US (at 7.5 percent annual growth until 2008), which has been included in China's WTO Accession Protocol.

However, the emerging situation may be more effectively addressed by immediately granting fully quota- and duty-free market access to all products originating in any least-developed country, as some WTO Members already do. As we well know, tariff rates for textiles are usually among the highest in the developed countries. Precisely because of this, if France with its US\$24 billion of diversified exports to the US pays US\$331 million as import duties per annum, Bangladesh with its ready-made garment exports of only US\$2.4 billion ends up paying almost the equal amount. However, the proposed special and differential market access for LDCs, particularly for textile products, should not be made part of the Doha Round and may come as 'early harvest' in Cancún.

One also needs to keep in view that a large part of the global textiles trade currently takes place outside the MFA regime. The recent spate of regional and bilateral free trade agreements has created a serious diversionary effect on textile trade as well. For instance, thanks to its NAFTA membership, between 1996 and 2000 Mexico's share of US imports increased from about 9 percent to 13.7 percent and from 8.3 percent to 10.4 percent for clothing and textiles respectively.

With or without any post-MFA market protection arrangement, apparel exporting LDCs and other small suppliers will definitely have to address their domestic supply-side constraints. In particular, there is a need to link the textiles and clothing sector of these countries to the 'new economy' driven by e-commerce, i.e. the use of web-based supply chain management systems. On the other hand, this group of countries will have to actively pursue a market diversification strategy, particularly targeted to the East and focussing on Japan.

In this context, it will be very interesting to observe to what extent the much-hyped trade-related technical assistance is made available to textiles-exporting LDCs and small suppliers to meet the post-MFA challenges.

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Members Not Convinced by US Market Access Proposal

Much of the 2-3 December session of the Negotiating Group on Market Access was spent debating a US proposal to eliminate all tariffs on non-agricultural goods by the year 2015. While Australia and New Zealand offered support, many developing countries were critical, and the EU and Japan called the proposal 'unrealistic'. The latter two, as well as India, Korea and Mexico, are among the more than dozen Members that have also submitted proposals on industrial tariff reductions so far.

The US proposal (TN/MA/W/18) would reduce tariffs in two phases. The first of these, to run from 2005-2010, would eliminate tariffs at or below five percent *ad valorem* on all products, and apply a 'Swiss formula' with a coefficient of eight to tariffs above five percent. Phase two, to end in 2015, would see the elimination of the remaining tariffs through linear cuts. The proposal covers all sectors of industrial goods, including textiles and footwear, but offers no *a priori* derogations to developing countries, many of which depend on import tariffs as the main source of government revenue and where tariffs play an important role in protecting domestic industries.

At an earlier meeting in November, the EU had proposed compressing all tariffs into a flatter range, thereby eliminating tariff peaks (normally viewed as tariffs in excess of 15 percent) and high tariffs and 'streamlining' tariff rates (TN/MA/W/11). In an attempt to include developing country interests, the EU proposal advocated 'significantly reducing tariff escalation [i.e. higher tariffs on products of higher value-added] on products of particular interest to developing countries.' It also urged that Members should agree to deeper cuts for textiles and footwear, with a view to bringing these tariffs within a narrow range as close to zero as possible. The EU also recognised that developed, developing and least-developed countries might follow different timetables for the implementation of their tariff commitments.

Several developing country Members have criticised most industrialised country proposals for aiming at uniform reduction commitments (although most would grant developing countries longer periods to phase out tariffs) even if the the Doha Ministerial Declaration specifically states that the negotiations 'shall take fully into account the special needs and interests of developing and least-developed country participants, including through less than full reciprocity in reduction commitments.'

India submitted a paper (TN/MA/W/10) in November aimed at ensuring that market access modalities and ensuing negotiations would result in substantial gains for developing countries. It stated that any market access approach should fully integrate the 'less than full reciprocity' concept in all aspects, not merely in longer implementation periods, as the EU had proposed. India supported dealing effectively with tariff peaks, escalation and non-tariff measures in products of particular export interest to developing countries, while a provision should be made for developing countries to keep tariffs for certain domestically sensitive products unbound or without a maximum tariff threshold.

Now that most initial proposals on industrial tariff negotiations have been submitted, the Negotiating Group Chair Pierre Girard of Switzerland will draft a consolidated overview for the Group's first meeting in 2003 (no exact date available yet). Members agreed in July to reach a common understanding on a possible outline of negotiating modalities by the end of March 2003, with a view to finalising agreement by 31 May 2003.

CTD Issues Bleak Draft Report

After months of intense meetings and informal consultations, the Committee on Trade and Development on 6 December issued an inconclusive draft report to the General Council, with three options for action and an empty annex entitled Agreement-specific Proposals on Which Recommendations for Clear Decision Could Be Made by December 2002.

According to paragraph 44 of the Doha Ministerial Declaration, the Committee was to review all special and differential treatment provisions in WTO Agreements 'with a view to strengthening them and making them more precise, effective and operational'. Paragraph 12.1 of the Decision on Implementation-Related Issues and Concerns directed the CTD to report to the General Council with 'clear recommendations for a decision' by July 2002. As no consensus could be reached on such recommendations, the deadline was extended until 31 December.

Special and differential treatment refers to various clauses that give developing and least-developed countries longer transition periods for compliance and other temporary derogations, as well as 'best endeavor' provisions urging Members to take into consideration their special circumstances or development needs.

The draft report (TN/CTD/W/25) makes it clear that the Committee is no closer now than in July to making clear recommendations on strengthening S&D provisions. The draft does no more than recognise that Members' positions diverge on virtually every issue raised and note the need for further discussion (see Bridges Year 6 No.7, page 9 for more details on the divisions).

The draft report contains three options for recommendations to the General Council. The first states simply that 'Members could not agree on whether, or what recommendations to make on further work. Accordingly, the direction of the General Council is sought.' The second recommends that 'the General Council note that the Special Session has not been able to fulfil its mandate in accordance with the instructions given in July 2002 and extend the deadline until [date] for the Special Session to fulfil its mandate.'

The third asks the General Council to instruct the CTD to continue its analysis and examination of Agreement-specific proposals and issues, ordering these proposals in the following three categories:

- proposals that may be amenable to possible recommendations in the short term; and proposals for which there appears to be a significant measure of support, but where 'further process-related work involving the assistance of other bodies is required';
- proposals that require substantial work in the CTD in Special Session in the period after January 2003; and
- proposals on which the Special Session could benefit from ongoing discussions in other bodies, since either the issues raised are already under consideration in those bodies, or because it would be difficult to take a decision in isolation of the ongoing negotiations in those areas.

It also recommends that the CTD be instructed to continue its work on both 'the various cross-cutting issues and proposals that have been raised' and on 'the functions, structure and terms of reference of the Monitoring Mechanism' proposed by Members to track the implementation of S&D provisions.

The CTD had only a few days to choose between these minimalist options before the General Council's December 10-11 meeting, where it was due to present its report.

Trade, Debt and Finance Working Group Hears Calls for Improved Market Access

The WTO Working Group on Trade, Debt and Finance will meet on 17 December to discuss coherence between the multilateral trading system and international financial institutions such as the World Bank and the IMF. The Group is still finding its way to fulfilling the Doha Ministerial Declaration's mandate to examine the relationship between trade, debt and finance, and come up with 'possible recommendations on steps that might be taken within the mandate and competence of the WTO' to address these issues. The General Council must report to the WTO's fifth Ministerial Conference next September on the Working Group's progress.

So far, only the EU (WT/WGTDF/W/8) and the Africa Group (WT/WGTDF/W/16) have submitted proposals on the way to proceed. Other documents discussed at the Working Group's meetings have been submitted by UN regional commissions, regional development banks, the World Bank, the IMF, the OECD and UNCTAD. The Secretariat has also prepared background notes on the three areas that the Group is working in, i.e. the relationship between trade and finance; the relationship between trade and debt; and coherence. The Group discussed the first cluster in July. A detailed report (WT/WGTDF/M/2) is available on the WTO website.

Some market access flexibility could be conceived for highly-indebted developing countries.

Trade and Debt

On 30 September, the Group examined the relationship between trade and debt. José Antonio Ocampo, Executive Secretary of the Economic Commission for Latin America and the Caribbean, highlighted five steps that might be taken within the competence of the WTO to contribute to a durable solution to the problem of external indebtedness of developing countries. These were: increased market access for countries affected by debt overhang; flexibility in the use of balance-of-payment restrictions by highly indebted countries; limits to the use of contingency measures against the exports of countries with debt overhang; greater availability of trade financing and compensatory financing during debt crises; and safeguarding WTO Members' authority to maintain or apply capital account restrictions.

Members' Interventions

Virtually all delegates and speakers singled out market access as the prime instrument for resolving external indebtedness. Venezuela, Brazil, India and Egypt pointed out that developing countries comparative advantages and competitiveness were impaired by both tariff and non-tariff measures.

Mr Ocampo noted that external debt was only one form of external financing (together with foreign direct investment and portfolio investment), which can be reduced through re-payment, financial assistance or debt relief programmes (such as the HIPC initiative of the World Bank and the IMF for Highly Indebted Poor Countries). The rationale behind the close monitoring of countries' debt-over-exports ratios is that exports must increase to generate the foreign exchange needed to service the debt.

He cautioned, however, that export growth alone would not suffice to solve a debt problem, and that an unsustainable level of debt should be tackled primarily through financial and macroeconomic measures to restore confidence in the economy. In particular, debt-overhang has three main – usually cumulative – effects: a substantial

increase in the financial requirements due to the rigidity of debt servicing; an increased vulnerability of the domestic financial sectors in light of the bad debt ratios; and limited freedom to intervene in macroeconomic policy.

Argentina recalled that negotiations on market access and agriculture were in progress, but added that those did not preclude Members from thinking of a scheme whereby some flexibility to market access could be conceived for highly-indebted developing countries. Cuba concurred adding that this preferential access could be granted to less-developed countries that benefited of a HIPC program and that had adopted a Poverty Reduction Strategy Programme with the World Bank. Paraguay warned that any flexibility could imply discrimination and injury to the exports of other developing countries.

Developed countries, on the other hand, pointed out that increased market access would be useful only if it was coupled with an increased supply capacity. To that aim, the EU and Canada pledged additional technical assistance, while the United States underlined the importance of pro-competitive internal reforms, border liberalisation and stable macroeconomic rules. Malaysia and Cuba pointed out that the WTO was not the proper forum for discussing internal economic policy issues.

Regarding flexibility in the use of balance-of-payments restrictions and limits on the use of contingency measures (anti-dumping, safeguards, compensatory duties) in favor of highly-indebted countries, the US and Argentina said that the appropriate fora to discuss these issues were the Committee on Balance of Payments Restrictions and the Negotiating Group on Trade Rules.

Brazil perceived an asymmetry between developed and developing countries regarding export credits, consecrated in Annex I, item K of the Agreement on Subsidies and Countervailing Measures of the WTO and the existing OECD scheme.

Brazil and Malaysia supported safeguarding Members' authority to apply capital account restrictions. Mr Ocampo pointed out that this subject was increasingly included in the investment chapter of bilateral and regional agreements, and that Members should make sure that the WTO stayed out of this discussion, especially in case an agreement on investment was reached.

Among additional topics that surfaced were: the need to interpret and apply the different Ministerial Decisions on least-developed countries and the Marrakech Mandate on Coherence at the multilateral level (Cuba); the importance of financial markets supervision and prudential regulation (Colombia, South Korea); the necessity to address the particular case of dollarised economies and dollar-peg monetary strategies in general (Ecuador); and the complementarity between HIPC, official development assistance and trade disciplines (Brazil).

Closing the session, the Group's Chair Ambassador Gómez of Colombia asked Members to identify themes and issues to be included in the report to be presented to the Cancún Ministerial Conference. Argentina warned that it would lose interest in the discussions if the Group limited itself to a simple examination of issues at stake and avoided drawing recommendations; and that it should 'work as a meeting of governments, rather than a seminar'.

Mexico Seeks to Force 'Prompt Compliance' with Dispute Settlement Rulings

At a 13 November special session of the Dispute Settlement Body, Mexico proposed changes to the Dispute Settlement Understanding (DSU), aimed at resolving the 'fundamental problem' of the WTO's dispute settlement system, which Mexico sees as the 'period of time during which a WTO-inconsistent measure can be in place without the slightest consequences' to the offending party (TN/DS/W/23). The proposal was made in the context of the Doha Ministerial Declaration's mandate to negotiate 'improvements and clarifications' to the DSU. The negotiations must conclude no later than May 2003.

Comply or Face Immediate Retaliation

Mexico claims that it may take up to three years before a complaining party can obtain compensation or apply trade sanctions against a measure ruled WTO-inconsistent by a panel or the Appellate Body. It estimates the average value of trade lost while a case winds its way through the dispute settlement process close to US\$370 million per case. To speed matters up, Mexico proposes giving WTO panels the authority to determine the level of retaliation that may be imposed on a Member for non-compliance once it has issued an interim ruling determining that the measure in question is in violation of WTO rules. Retaliation could then be applied as soon as the ruling is formally adopted by the DSB.

Under current rules, arbitration proceedings on possible retaliation can only be initiated after a ruling is issued and after the 'reasonable period of time' for complying with a ruling (usually up to 15 months) has expired.

Mexico argues that the change it proposes would provide a powerful incentive for prompt compliance, as well as for avoidance of protracted compliance procedures. It would also 'foster and facilitate negotiations, since Members would be aware of the level of nullification and impairment *even before* the original Panel/AB report was adopted.'

Retroactive Sanctions and Preventive Measures

The Mexican submission also suggested that WTO rulings be made retroactive to the date when the illegal measure in question was adopted or when dispute proceedings against the measure were initiated. This would prevent Members from delaying proceedings through tactics such as blocking the establishment of panels on first request, Mexico said, adding that if a measure targeted in a dispute was 'causing or threatening to cause damage which it would be difficult to repair', the complaining Member should have the right to request that the panel ask the defendant country to suspend the measure while the proceedings take place. If the defendant refuses to do so, the panel should, under 'exceptional circumstances', allow the complainant to 'take measures to prevent the damage'. Mexico said this idea was consistent with numerous WTO agreements (including those on antidumping, safeguards and textiles) that contain provisions on the application of preventive measures.

Reactions: Too Radical a Transformation

US officials called the proposed changes a 'radical transformation' of the DSU that needed 'thorough consideration'. While sharing Mexico's concerns regarding the underlying problems related to non-compliance, Canada argued that the

focus should be on getting Members to comply rather than on bolstering mechanisms for retaliation. Canada also noted that the notion of retroactivity was widely condemned by Members when a panel applied it in the US-Australia dispute over Australian automotive leather subsidies (WT/DS126). In addition, Canada disagreed with allowing the imposition of preventive measures in dispute proceedings, calling it 'close to permitting a unilateral determination' of non-compliance by the complaining Member.

Brazil observed that the proposal's merit was to bring to the centre 'difficult, complex and debatable issues', which were nevertheless important. Chile was more tentative, noting that the proposal 'raised more questions than answers'. Uruguay said the ideas outlined by Mexico were so far-reaching that they should not be considered within the context of the current negotiations on dispute reform.

The next negotiating session is scheduled for 16-18 December.

Appellate Body to Answer Questions on New Procedures

In related news, the Appellate Body will 'sooner rather than later' provide information requested by the Chair of the DSB's regular sessions, Ambassador Carlos Pérez de Castillo of Uruguay, as well as answer questions raised by Members regarding new procedures for the participation of third parties in Appellate Body hearings.

At a 23 October DSB meeting, a number of Members criticised the AB for not properly consulting the membership before adopting new procedures, which make it possible for third parties to make statements at Appellate Body hearings without prior written notification to the AB or the WTO Secretariat, as previously required. However, the AB would retain the right to determine whether or not to allow third parties to make oral statements on a case-by-case basis.

The new procedures were a response to the dispute between Peru and the EU over the trade description for sardines. The final AB ruling on that dispute was formally adopted at the 23 October meeting.

In the sardines case, Colombia had been barred from making a statement at an AB hearing – despite its participation in the panel process – due to its failure to submit an advance written request. However, the Appellate Body did accept a friend-of-the-court brief from Morocco. At the 23 October meeting, many developing countries criticised the AB for accepting the submission, with India again stressing that *amicus* briefs should not be allowed, as they gave those parties more rights than third parties in disputes. Ecuador reproached the Appellate Body for its 'preoccupation' with *amicus* briefs 'even though they know perfectly well the opinion of the majority of Members'. In its defense, the AB countered that nothing in the DSU prevents WTO Members from submitting *amicus* briefs.

Canada, the EU, India, Japan and Mexico said that while they did not object to the Appellate Body's new procedures, they questioned its discretion to accept or reject requests for oral statements. The US said that some confusion could have been avoided if Members had been previously consulted on the issue.

According to DSU Article 17.9, working procedures for the Appellate Body 'shall be drawn up in consultation with the DSB Chair and the [WTO] Director-General, and communicated to Members for their information'. Members are meeting informally to draft guidelines on the extent to which the DSB Chair should consult them before the Appellate Body can make changes to its working procedures.

Sugar Dispute: 'Devastating Impact' on the ACP?

A group of African, Caribbean and Pacific (ACP) developing countries has sided with the European Union in the WTO dispute launched against the latter's sugar regime by Australia and Brazil. Adding a further twist to an already complicated case, these signatories of the EU-ACP Sugar Protocol expressed 'serious concern' that the dispute settlement proceedings could lead to a 'devastating impact' on their preferential agreements and 'pose serious threats to the economies of the ACP countries'.

According to Australia and Brazil, the EU's quota system is arranged in a way that allows the surplus of heavily subsidised sugar produced within the Union – sold at higher than world market prices in the European common market – to be exported at less than production cost into third country markets. This, they allege, amounts to a hidden export subsidy in violation of Articles 8, 9 and 10 of the Agreement on Agriculture, as well as Article 3 of the Agreement on Subsidies and Countervailing Measures.

The fourteen ACP members – Barbados, Belize, Congo, Côte d'Ivoire, Fiji, Guyana, Jamaica, Kenya, Madagascar, Malawi, Mauritius, St. Kitt and Nevis, Swaziland and Zimbabwe – made their statements on 21 November as third parties at the first consultation held between the EU, Australia and Brazil. They claimed, *inter alia*, that Brazil's share of the world market had exceeded 30 percent in recent years and, as a result, 'this country dictates world market conditions. In this regard, Brazil is the source of the problems which the Australian industry has been faced with in the recent past.'

The complainants were at pains to emphasise that their case was not intended to erode ACP sugar producers' European market access. Rather, they wished to address distortions in the EU's pricing system, which they alleged made it possible for the EU to dump sugar in third countries thus reducing market access for unsubsidised sugar from countries with a *bona fide* commercial advantage. The ACP countries countered that they were 'not convinced by the assurances given by Brazil and Australia to the effect that this challenge is not directed against the ACP preferential agreements, the more so as the questions raised by these two countries were essentially focussed on the preferential access of ACP states.' Australia and Brazil argued that it was the EU's responsibility to guarantee that ACP countries would not be affected by the challenge to its the sugar regime, and urged the EU to provide such assurances as a matter of priority.

The EU contended that its regime involved a complex mix of tariffs, export subsidies and domestic support, and that disturbing any of those elements would affect the entire programme, particularly as some ACP sugar refined in Europe was exported along with sugar originating wholly in the EU.

Brazil and Australia said that the consultations failed to shed light on the EU pricing system, including the cost of production of EU sugar and the amount exported as an ingredient in other products. Both complainants stated they needed more time to study the information provided by the EU before deciding whether to request a dispute settlement panel on the matter. Complainants may request the establishment of a panel sixty days after the consultation process has been initiated. The request will be automatically accepted the second time it is made.

In addition to the ACP countries listed above, Canada, Colombia and India have joined the case as third parties.

CTE: Overall Approach Agreed on MEA- WTO Links

At a 12 November meeting of the WTO Committee on Trade and Environment (CTE), Members agreed on the way to structure the Committee's work under paragraph 31(i) of the Doha Declaration (relationship between WTO rules and specific trade obligations in MEAs, see box below).

The approach accepted by the Committee breaks an impasse between the EU and most other Members, which had supported addressing 31(i) from a specific trade obligations standpoint, such as that advocated by Australia last spring or, more recently, New Zealand (TN/TE/W/12). The EU favoured discussing conceptual issues before moving on to specifics (Bridges Year 6 No.7, page 13).

The compromise offered by Chair Yolande Biké (Gabon) adopts the specific trade obligations angle while leaving some leeway to discuss issues of principle regarding the WTO-MEA relationship as these arise in the course of negotiations. Members will focus on the 31(i) mandate with this approach at their first CTE special session of 2003 in February. Many – though not all – Members would like to base discussions on a revised June 2001 WTO Secretariat matrix on MEA trade obligations (see WT/CTE/W/160/Rev.1).

Information Exchange and Observership

While the question of MEA observership in the CTE's negotiating sessions is still blocked due to political reasons, the CTE agreed earlier this year to convene an informal special session on MEA information exchange where MEA secretariats could interact with WTO Members on relevant aspects of the Doha mandate (para. 31(ii), see box below). No concrete decisions on information exchange were taken, although there was some support for sessions to be held on a regular basis. Members suggested that future meetings could focus on such topics as policy coherence and document exchange, technology transfer, capacity-building, specific trade obligations in MEAs, and environmental goods and services.

Many of the MEA secretariats, as well as some Members, expressed frustration over the difference between the relatively transparent observership criteria in most multilateral environmental agreements and the current blockage over the issue at the WTO (the WTO Secretariat participates in many MEA meetings, requiring only an expression of interest to attend). The EU continues to press for *ad hoc* observership for MEAs, but resistance from Egypt, Malaysia and others means that the issue is likely to remain on hold until a resolution is found at the level of the Trade Negotiations Committee and the General Council.

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

CITES Assumes New Role in Regulating Economically Valuable Species

The Convention on Trade in Endangered Species of Wild Flora and Fauna (CITES) has assumed a new role in regulating international trade in endangered wildlife with a number of landmark decisions related to economically valuable species, including mahogany and sharks. While the approval of limited ivory sales from certain African countries was applauded by organisations advocating 'sustainable use' as a powerful incentive for community-based conservation, it disappointed many more preservation-oriented conservation groups. The latter, however, hailed victory on a number of fronts, such as the rejection of Japan's proposals to downlist certain species of whales and to regulate the trade in seahorses for the first time. These decisions were taken at the 12th CITES Conference of the Parties held in Santiago, Chile from 3-15 November 2002.

Increased Protection for Mahogany and Sharks

Parties adopted Guatemala's and Nicaragua's proposal to list big-leafed mahogany in Appendix II (limited trade under strict controls) of the Convention, thereby requiring each of the mahogany range states to ensure that all exports are sustainable and covered by CITES export permits. The listing only applies to countries where mahogany is native (i.e. Central and South America), but not to countries that grow introduced mahogany trees, such as Indonesia or Malaysia. It is significant that governments sought stricter CITES controls over the mahogany trade in an attempt to support national-level efforts to stem the depletion of a commercially – as well as environmentally – valuable species under pressure from illegal harvesting and export.

Many conservation groups saw this decision as a sign of growing realisation among countries that CITES was not just about trade bans, but about managing resources. 'Contrary to popular belief, such a listing does not mean that the species is endangered or that trade will stop, but rather that international action is being taken to reduce over-harvesting and illegal logging,' said Ximena Buitron of TRAFFIC South America.

The strong focus on marine species was also widely seen as part of this shift in opinion. In particular, delegates voted to place basking and whale sharks on CITES Appendix II – a move which many regarded as a landmark decision as CITES has not traditionally played an important role in global fisheries. Also, while the proposal by Australia to list commercially valuable Patagonian and Antarctic toothfish was withdrawn, CITES Parties agreed to assist the Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR) in its efforts to eliminate illegal fishing of toothfish. The Australian proposal had been strongly opposed by Chile where Patagonian toothfish is often served in restaurants. Instead, Parties adopted a voluntary resolution to improve international monitoring of harvest and trade of toothfish, which Ginette Hemley of WWF welcomed as a 'a small, but significant step toward reducing the rampant pirate fishing that is wiping out whole populations of this species across the Southern Hemisphere.'

One-off Ivory Sales Allowed for Three Countries

Countries adopted proposals by Botswana, Namibia and South Africa to allow one-off sale of ivory stockpiles, collected from

elephants that died of natural causes or as a result of government control of problem animals. Botswana and Namibia had withdrawn their request to institute annual sales of ivory in addition to the one-off sales. Any future one-off sales will be supervised through a rigorous control system and will not occur before May 2004 to allow for the gathering of baseline data on population and poaching levels. The CITES Standing Committees can suspend trade if they find the importing or exporting countries to be in non-compliance with their regulations. Parties, however, rejected Zimbabwe's request for a one-off sale and Zambia's proposal to down-list its elephant population from Appendix I to II (species listed in Appendix I cannot be traded internationally except in carefully circumscribed cases without commercial significance).

Governments sought stricter CITES controls on mahogany trade to support their own efforts to conserve a commercially valuable species.

Conservation groups' reactions to these decisions were divided. Many expressed anger with the approval of the one-off sales of Botswanan, Namibian and South African ivory stocks, describing it as a 'death warrant' for elephants. 'Poachers, smugglers, and profiteers are not interested in the fine print that outlines the conditions attached to

future ivory sales, nor in the 18-months delay before any sale can take place', said Will Travers, president of the Born Free Foundation and chairman of the Species Survival network.

Other groups, however, saw the decision as an African solution to an African problem, which tried to strike a balance between conserving elephants and the growing needs of local communities. 'If [these conditional sales] are successful, we may achieve a significant advance in how elephant populations are managed and, in particular, how ivory is traded in a way that limits impacts on wild populations,' said Tom Milliken, director of TRAFFIC East/Southern Africa. However, while CITES had tried to address the issue of sustainable livelihoods in this and other decisions, the problem had not been given the attention it needed, Sabri Zain of TRAFFIC International noted. Instead, questions regarding the motivations and forces behind illegal trade and poaching were often overshadowed by Appendix listings and media coverage of 'charismatic megafauna', he added.

Whale Proposal Rejected

All whale species are currently listed in CITES Appendix I (no trade allowed except in exceptional circumstances). Delegates voted against renewed Japanese proposals to transfer most Northern hemisphere populations of Minke whale and the Western North Pacific population of Bryde's whale to Appendix II, which would have opened the door for regulated trade in related products.

These and other whale species are also protected under the International Whaling Commission, which established a moratorium on commercial whaling in 1986. Many Parties regarded Japan's proposals as weakening the primacy of the IWC and an attempt to bypass the IWC moratorium. 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 moratorium and the CITES listing, which allows them to legally resume whaling.

The next CITES Conference of the Parties will be held at the end of 2004 or early in 2005 in Thailand.

Intellectual Property in the FTAA: New Imbalances and Small Achievements

By David Vivas Eugui

In November, ministers negotiating the Free Trade Area of the Americas received preliminary drafts from the FTAA's nine sectoral negotiating groups, including a chapter on intellectual property rights. This draft chapter contains proposed language, which, if adopted, would constitute the most ambitious and diverse intellectual property agreement ever written and an important potential precedent for all multilateral negotiations.

It would revise some general intellectual property provisions, incorporate new treaties, and expand the coverage and scope of existing intellectual property rights (IPRs). Proposed new provisions include some achievements for developing countries regarding public health measures, the relationship with the Convention on Biological Diversity (CBD), the protection of traditional knowledge and folklore, and technology transfer. However, following the draft chapter's publication,¹ civil society groups are starting to voice concern about its potential to limit the pursuit of public policy objectives and the small gains for sustainable development.

The new draft chapter is a compilation of a number of undisclosed country proposals over the last six years. Currently almost the entire text is in brackets – meaning not agreed – and some of the issues under discussion might never be part of the final outcome.

Aiming for TRIPs Plus

The minimum negotiating floor that FTAA negotiators set for the Americas was the TRIPs Agreement. Many of the draft's proposed general provisions are based on, or copied from, TRIPs Articles, including objectives and principles.

Some relevant changes, however, can be found in relation to the nature and scope of obligations and to national treatment. On the scope and nature of obligations, the chapter would require a clear commitment to provide adequate and effective protection and enforcement of IPRs, thus limiting space for any interpretation of the rest of the chapter. As for national treatment, the TRIPs obligation to provide no less favourable intellectual property protection would be expanded to the enjoyment of rights and any benefits derived therefrom, following the path of the broader coverage commonly found in bilateral investment agreements.

Turning Negotiators to Legislators?

Some provisions in the draft chapter would result in the highest intellectual property protection standards ever adopted. In addition to the TRIPs Agreement, many new international treaties could be directly incorporated in the FTAA's intellectual property chapter, including nine treaties, one set of rules, and two recommendations adopted under the auspices of World Intellectual Property Organisation (WIPO), as well as one non-intellectual property treaty: the Convention on Biological Diversity.

More worryingly, four IPR treaties that are being or *could be* negotiated under WIPO might be included within the FTAA's scope. This raises serious concerns about potentially giving intellectual property negotiators a 'blank check' to actually write – during

possible future WIPO negotiations – the IPR protection obligations that FTAA members would have *a priori* committed to enforce.

Expanding Coverage

The substantive coverage of the draft chapter calls the attention of the reader. The scope of many IPRs could be expanded by the reduction or elimination of some exceptions like the ones contained in article 27.3(b) of the TRIPs Agreement or by limiting the grounds on which compulsory licensing could be exercised. The periods of protection could also be expanded directly or indirectly. For example, the period of trademark protection could pass from seven to ten years. Indirect expansion would follow from the prohibition to use information on the safety and efficacy of protected pharmaceutical or agricultural/chemical products for the purposes of marketing generic products without the right owner's authorisation for five years from the date of approval. Among new rights not currently covered by the TRIPs Agreement, the draft chapter includes proposed provisions related to Internet domain names, measures against technological circumvention, satellite signs, specific regulations on biotechnology, relationship with genetic resources, traditional knowledge, folklore, technology transfer, utility models and plant variety protection in accordance to Union for the Protection of Plant Varieties (UPOV).

Advances towards a Sustainable Development

Among the new issues that might be incorporated in the chapter, five are linked to sustainable development. Those are flexibility for public health measures, the relation between intellectual property and genetic resources, the protection of traditional knowledge and folklore, and technology transfer. The main merit of the draft chapter on these issues is not only their inclusion in a potential regional agreement but to textually reflect the proposals of developing countries on these matters.

In the general provisions section of the draft chapter an article has been proposed calling for flexibility to protect public health. This article links the FTAA work with the latest WTO results in the IPR field, although there is no express mention of the Doha Declaration on TRIPs and Public Health. The article states that no provision of the IPR chapter prevents, and should not prevent, any Party from adopting measures to protect public health, and it should be interpreted and implemented in a manner that takes into account each Party's right to protect public health and, in particular, to promote access to existing medicines and to the research and development of new medicines. This article could facilitate favourable legal interpretations on the relationship between IPRs and public health policies if accompanied and operationalised through flexible provisions regarding compulsory licensing and the extent of the rights of the patent holder.

One of the draft chapter's main achievements could be the acknowledgement that '[t]he relationship between the protection of traditional knowledge of indigenous communities and local communities and intellectual property, as well as the relationship

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How Do They Love Free Trade Agreements? Let Me Count the Ways

Countries in all parts of the world – including traditionally reticent Asia – are feverishly pursuing free trade agreements, with new deals underway within and across continents. Big players, such as China, the US and the EU are forging alliances beyond traditional negotiating blocks, which could change the dynamics of the WTO's Doha Round or serve as fall-back positions should the round fail. This heavy negotiation load on multiple fronts adds further complexity to an already crowded international trade agenda, stretching the resources of the smaller partners to the utmost. At the recent mini-Ministerial in Sydney, WTO Director-General Supachai Panitchpakdi again emphasised his view that developing countries in particular 'should realise that the multilateral process would give them the best deal.'

FTAA: Market Access on Track

Trade ministers of the Americas (except Cuba, which is not part of the process) agreed in November in Quito on timeframes for market access negotiations, which are at the core of the Free Trade Area of the Americas (FTAA). All 34 members must submit initial tariff reduction offers on agricultural and non-agricultural products, services, investment and government procurement by 15 February 2003, with revised offers due by 15 July. Reductions will be based on applied rather than bound tariffs. The target is to establish a final accord during a summit in Brazil at the end of 2004.

In addition to agreeing the market access negotiations schedule, ministers received reports from the nine working groups that are elaborating the rules and obligations of the future agreement. The rules negotiations cover the five areas above, as well as subsidies, anti-dumping and countervailing duties; dispute settlement; competition policy; and intellectual property rights (see page 18).

Agricultural Subsidies on the Table

Despite US reluctance to tackle agricultural subsidies in the regional context, pressure from Latin American partners prevailed in Quito, where trade ministers reaffirmed their commitment to the 'elimination of export subsidies affecting trade in agricultural products in the Hemisphere and to the development of disciplines to be adopted for the treatment of all the other practices that distort trade in agricultural products, including those which have an equivalent effect to agricultural export subsidies, and to make substantive progress in the market access negotiations'.

Venezuelan Trade Minister Ramón Rosales called the inclusion of agricultural subsidies in the Quito Declaration an 'explicit recognition that we will not begin cutting farm commodity tariffs without previously resolving the problem of subsidies and other forms of domestic assistance to the farming sector.'

It is questionable, however, how substantive the FTAA's agricultural subsidy negotiations turn out to be in practice. The US clearly prefers to deal with the subject in the multilateral WTO talks, scheduled to conclude simultaneously with the FTAA by 2005. In Quito, US Trade Representative Robert Zoellick emphasised that the subsidy reduction proposal already submitted by the US to the WTO would eliminate US\$100 billion in domestic agricultural subsidies globally, and in the process reduce US domestic agricultural subsidies by 50 percent. Other countries made clear that the entire FTAA process would be at risk if by its end US agricultural subsidies were not cut significantly.

Concern over Brazil's commitment to regional trade liberalisation under the leadership of President Luis Inácio Lula da Silva proved at least partly unfounded when the country agreed to co-chair with the United States the final two-year stretch of the FTAA negotiations. All is not plain sailing, however. Brazil, which represents almost 50 percent of Latin American economic activity, indicated that it would consider joining a regional free trade arrangement excluding the US if the latter refused to cut import tariffs and farm subsidies. Without such concessions, Minister Sergio Amaral said there would 'obviously' be 'no reason to have an FTAA'.

Special and Differential Treatment

In Quito, Ministers adopted a set of *guidelines or directives for the treatment of differences in the levels of development and size of the economies*, which spell out that such treatment provisions must: provide a flexible framework that accommodates the characteristics and needs of each participating country; be transparent, simple and easily applicable, while recognizing the degree of heterogeneity among the FTAA economies; be determined on the basis of case-by-case analysis (according to sectors, topics and country/countries); include transitional measures, which could be supported by technical co-operation programmes; take into account existing market access conditions among the countries of the Hemisphere; and consider longer periods for compliance with obligations.

In addition, a comprehensive hemispheric trade capacity-building programme (HCP) was launched to 'assist small and developing countries in the region in obtaining the potential benefits of the FTA'. The US will seek to increase the amount dedicated to this initiative by 37 percent, to US\$140 million.

Ministers agreed to meet next in Miami in late 2003. They also announced three meetings of the FTAA Trade Negotiations Committee for next year, in Trinidad and Tobago, El Salvador, and Mexico. The second draft FTAA Agreement, released to the public after the Ministerial, is accessible at <http://www.ftaa-alca.org/>.

Other Developments Involving Latin America

Mercosur (Argentina, Brazil, Paraguay and Uruguay) and EU negotiators met in mid-November to revitalise the languishing process toward a free trade area between the two blocs totalling nearly 600 million people. Both sides agreed to work toward a first common draft text for the Bi-regional Negotiations Committee's next meeting on 17-21 March 2003. However, some commentators speculate that the EU's continuing struggle with the reform of its Common Agricultural Policy and its enlargement to 25 members in 2004 will keep the Mercosur deal on the backburner. In addition, presidential hopeful Carlos Menem of Argentina has announced that his priority would be a bilateral agreement with the United States.

Negotiations for a Central American Free Trade Area with the US (CAFTA) are to be launched in January 2003 and conclude within a year. Costa Rica, El Salvador, Guatemala, Honduras and Nicaragua intend to first negotiate among themselves so as to reach a common position on most major issues. According to Costa Rica's Trade Minister Alberto Trejas, 'everything is on the table', including the environment, which could result in deal mirroring that of the Costa Rica – Canada free trade agreement (Bridges Year 5 No.4, page 17).

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Regional Trade Agreements, continued from page 19

On 8 October, the Secretary-General of the Andean Community (CAN, i.e. Bolivia, Colombia, Ecuador, Peru and Venezuela) proposed that CAN and the United States sign a loose framework agreement that would allow individual members to join a free trade area at their own pace.

On 18 November, the EU and Chile signed an Association Agreement, which establishes a free trade area that goes well beyond both parties' WTO commitments, covering goods, services and government procurement, liberalisation of investment and capital flows, the protection of intellectual property rights, co-operation for competition and a binding dispute settlement mechanism. Most of the agreement will enter into force once it has been adopted by the Chilean Congress, but provisions related, *inter alia*, to services, current payments and capital movements, and intellectual property require ratification by both the European Parliament and the national parliaments of the EU member states.

A free trade area between Chile and the US also scheduled for completion before the year's end, and negotiations are underway between Chile and the EFTA countries, as well as Korea.

Japan started free trade negotiations with Mexico on 18 November. Mexico also has bilateral FTA with the European Union since 2000.

ASEAN Targeted for Major Alliances

At the ASEAN summit in early November, members of the 10-country Association of Southeast Asian Nations and China signed a framework agreement to begin negotiations next year that will create the world's largest free trade agreement worth US\$1.2 trillion and covering 1.7 billion consumers. The target is to conclude a free-trade agreement with the more developed ASEAN nations by 2010 and by 2015 for newer members, such as Cambodia, Laos, Vietnam and Myanmar. Tariffs on some farms products could be cut in an 'early harvest package' as early as next year. A day after the Chinese deal was announced, India and ASEAN issued a joint statement saying that the leaders had agreed on 'the importance of enhancing their close economic co-operation and to work towards India-FTA linkages'. Japanese and ASEAN leaders agreed to draw up a framework for a trade and investment agreement by the end of next year, and to create a Japan-ASEAN economic partnership within ten years at the most.

President Bush unveiled in October the 'Enterprise for ASEAN Initiative', which aims to create a network of bilateral FTAs between the US and ASEAN countries that are also WTO Members and have signed Trade and Investment Framework Agreements (TIFAs) with the US. So far, that is the case for Indonesia, the Philippines and Thailand. Thailand could begin free trade area negotiations shortly.

On 19 November, the US and Singapore reached agreement 'in substance' on a bilateral free trade agreement, which puts Singapore on par with other US free trade partners Canada, Israel, Jordan and Mexico. The only outstanding issue is the free transfer of capital during financial and economic crises. The deal virtually eliminates tariffs on Singapore's exports – mostly electronics and chemicals – to the US. Access to Singapore's services sector, particularly banking and finances, is expected to be the main benefit for the US. Singapore also accepted a US proposal for labour/environment dispute settlement. Earlier in November, Australia concluded a free trade agreement with Singapore, its first in nearly 20 years.

Negotiations for a US/Australia free trade area will start next February.

New Opportunities – or Threats – for Southern Africa?

The US will launch negotiations for a free trade agreement with the South African Customs Union (Botswana, Lesotho, Namibia, South Africa and Swaziland) in February 2003. The initiative responds to the African Growth and Opportunity Act's mandate to 'initiate negotiations with interested beneficiary countries to serve as the catalyst for increasing free trade between the United States and sub-Saharan Africa and for increasing private sector investment in the region.' According to a letter from US Trade Representative Robert Zoellick to Senator Robert Byrd, the United States will 'seek to eliminate non-tariff barriers in SACU countries to US exports, including [...] unjustified trade restrictions that affect new US technologies' and eliminate SACU 'practices that adversely affect US exports of perishable or cyclical agricultural products'.

Larry J. Goodwin of the Africa Faith & Justice Network believes that the language indicates the Bush Administration's intent to use the agreement to facilitate access of genetically modified organisms (GMOs) to Sub-Saharan Africa. He also suspects that the Administration's goal to pursue a mechanism with SACU countries that will 'support achieving the US objective in the WTO negotiations of eliminating all export subsidies on agricultural products, while maintaining the right to provide bona fide food aid and preserving US agricultural market development and export credit programs' really means that SACU subsidies could be dismantled while the vast US export credit scheme would be kept intact. According to Mr Goodwin, the reference to 'bona fide food aid' could also relate to GMOs, as Zambia and some other African countries have angered US authorities by refusing offered food aid on the grounds that it may contain/be contaminated by GMOs.

The US is also pursuing a 'comprehensive' free trade agreement with Morocco.

ACP, EU Search Common Ground for Cotonou Negotiations

ACP and EU ambassadors disagreed in November on the issues to be included in Phase I of the negotiations for Economic Partnership Agreements between the EU and African, Caribbean and Pacific countries. Phase I – slated to last for about a year – will be conducted at an 'all-ACP' level prior to more specific negotiations between ACP regions/countries and the EU. The process is to conclude by 2008 with 'WTO-compatible trade arrangements'.

ACP negotiators had identified six issues for Phase I: market access, agriculture and fisheries, trade in services, trade-related issues, development co-operation and legal issues. The EU proposed only four areas: market access, trade and investment rules; procedural issues; and a so-called 'toolbox' (a cluster which addresses the requirements and merits for strengthening regional integration). The EU argued that 'development' should be seen as an issue cutting across these four areas, while the ACP said it should be looked at separately as well in order to address a number of specific issues such as capacity-building, infrastructure and debt alleviation.

In addition, the ACP sees the first phase as part of the negotiations, which should conclude with a formal agreement, while the EU views this period more as clarification.

The next meeting will take place in the first week of December.

Global Integration, Sustainable Development and the Southern African Economy

By Rashad Cassim

In September 2002, Trade and Industrial Policy Strategies (TIPS) – an economics research institute based in Johannesburg, South Africa – held its Annual Forum on the topic of *Global Integration, Sustainable Development and the Southern African Economy*. More than 350 economists, policy makers and academics from South Africa and abroad attended the event, which focused on a number of timely issues, especially given that trade and finance figured prominently at the World Summit on Sustainable Development, which concluded the previous week in Johannesburg.

Among the issues covered by the Forum were agriculture, standards and the environment; industrial tariffs and market access; financial architecture and the exchange rate; liberalisation and poverty; trade and the environment; agricultural trade; services and GATS negotiations; and regional issues. Of particular note, and the focus of this article, were contributions from Kym Anderson (University of Adelaide, Australia), John Whalley (University of Western Ontario, Canada), Bernard Hoekman (World Bank) and Bijit Bora (World Trade Organisation).

Gains from Trade

One of the overarching questions at the Forum was: What do changes in the global trade architecture – specifically those pertaining to multilateral liberalisation – mean for developing countries? Both presentations and discussions revealed that if one reviews the economic models used to evaluate the likely global impact of a new round, the size of gains is debatable. There is growing recognition that these gains will generally not amount to more than one percent of world GDP. Moreover, gains for developing countries were shown to be even more modest.

A corollary question was: where would most of the gains come from – domestic reform or improved access to foreign markets? It was observed that empirically, if countries were fairly open, most gains from trade would come from improved access to foreign markets. However, *if domestic tariffs are high, access to foreign markets is unlikely to generate these gains*. An important point that was highlighted was that in order to maximise the gains from a new round – specifically for poor regions such as Sub-Saharan Africa – improved market access and domestic reform in these regions would have to be equally significant.

Another critical point that was highlighted was that static gains are also considered institutional gains, i.e. gains from participating in a rules-based system where there is a framework and consensus regarding multilateral reductions in tariffs, with transparency preventing the likelihood of back-sliding. Moreover, small countries that rely heavily on export markets are better off than large countries, and this is particularly true for developing countries.

Market Access

It was also pointed out during Forum deliberations that reasons for low export performance in the Southern African region relate to either the demand side or the domestic side. In the former case, major problems include: increasing volatility in export markets; declining terms of trade in commodities; increasing market access problems that relate specifically to protection in developed country markets in products that matter; and increasing threats of non-

tariff barriers to trade. Regarding the supply side or the domestic level, there is low investment and productivity, high anti-export bias, and exchange rate mismanagement.

Key questions in this regard were: to what extent has the current global market access regime impacted on the export potential of developing countries? Has tariff escalation in developed countries in fact negatively affected the exports of developing countries, or more specifically, their ability to diversify exports? In other words, how significantly would African or Asian exports benefit from unrestricted market access?

Despite the conclusion that better market access would indeed increase exports, more dramatic export growth will depend less on market access than on the domestic incentive system, coupled with improvements in human capital, infrastructure and overall supply-side measures. Market access matters, but less so where supply-side and trade facilitation problems are overwhelming.

Another important factor identified was the security of access: a large part of market access is not only establishing low or no duties, but ensuring that access is secure and predictable. This implies that, along with more serious market access problems, non-tariff barriers pose a serious potential threat, as they are increasingly used as a smokescreen for protection.

Forum participants also discussed overall tariff rates, which are lower in developed countries than in developing countries; in fact, regions with the highest average tariffs are South Asia, followed by Sub-Saharan Africa. However, residual protection in the form of peaks and tariff escalation exist in developed countries, and developing countries can only realise the benefits of better market access if there is some domestic reform of their economies.

Changing Distortions in Agriculture for Developing Economies

The importance to developing countries of changing the current global agricultural regime is well-known. As Kym Anderson pointed out, a large portion of the gains from global liberalisation will come from a reduction of agricultural distortions and protection in developed countries. The consequences of agricultural reform for different African countries are, however, mixed and depend on the following factors:

- how much supply-side capacity a country can take advantage of in terms of market openings abroad;
- the presence of tariff preferences, specifically for countries that enjoy relatively privileged access to restricted markets; and
- whether the country is a net food importer or exporter.

In addition, speakers noted that agricultural reform at home may reduce food security. Two implications in particular were identified: first, reduction of agricultural subsidies and the likely increase in agricultural prices may have negative effects for food-importing countries in the short run, although there will likely be some benefits in the long run, as well as positive effects for food-exporting countries. Furthermore, the increase in international food prices as a result of a reduction in world distortions in agriculture may induce agriculture-led export growth.

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Global Integration, continued from page 21

At the domestic level, it was suggested that changes in long-run global prices can have significant allocative effects in developing countries. For example, increases in food prices can shift resources away from some agricultural sectors and into others.

Does Doha have a ‘Development’ Agenda?

The call for a ‘development’ round stems from the fact that developing countries participate in global trade policy amidst high incidences of poverty, severe discrepancies in income and stagnant growth levels. Despite frequent criticism of the post-Doha negotiations, many delegates acknowledged this round’s potential to further development objectives. First, more consideration has been given to the bias that developing countries experience with regard to the world trading system, especially regarding market access issues. Second, developed countries increasingly recognise the link between WTO implementation commitments and supply-side capacity in poor countries.

Successful export growth is integral to the growth prospects of a small open economy. From this perspective, trade is very important – but certainly not the panacea to major development problems. For example, further trade reform or slow reform is not a solution to eradicating poverty and unemployment. Rather, in addressing some of the most pressing problems in developing countries, we need to use the right policy instruments to target specific distortions.

There was overall agreement that there is great scope for a large exchange of concessions in favour of developing countries during the Doha Development Round. Critical ingredients for success include a combination of better market access, improved capacity to participate effectively in WTO processes (such as dispute resolution) and domestic reform in developing countries.

If developing countries do not participate aggressively in the Doha Round, they will forego benefits from participating in the WTO. Kym Anderson argued that even Sub-Saharan African countries had several reasons to take part in the round. First, they would otherwise forego economic efficiency gains from reforming their own policies while still suffering the terms of trade losses from others’ reforms. Second, they would forego the opportunity to gain better market access. Finally, these negotiations hold the promise that participating poor economies losing from taking part in multilateral liberalisation could secure much more compensation than in previous rounds in the form of technical assistance and funds for trade policy capacity-building.

Key Challenges

Delegates identified a number of key challenges for the future. For example, how best can developing countries reconcile their national priorities with WTO disciplines? According to Hoekman, a major exercise would include looking at how to improve the prospects for export growth by identifying what matters most in foreign market access terms and for our own reform agenda.

It was recommended that developing countries should use the negotiations as a means to pursue reforms that are difficult to implement unilaterally. Lastly, we need to recognise that the WTO revolves around ‘policy bindings’, which can be a useful (pre-) commitment device.

Rashad Cassim is the Executive Director of TIPS in Johannesburg. For more information about the Annual Forum, see: <http://www.tips.org.za>.

Intellectual Property in the FTAA, continued from page 18

between access to genetic resources and intellectual property shall comply with the provisions of the Convention on Biological Diversity [...]’ Some defensive mechanisms to prevent illegal access to/use of genetic resources are included in the draft chapter, which establishes an obligation ‘safeguarding and respecting biological and genetic heritage’ when granting intellectual property rights. In this line of ideas, the granting of patents on inventions that have been developed on the basis of material obtained from genetic resources, or from traditional knowledge of indigenous and local communities ‘shall be subject of the legal acquisition of that material in accordance to the national laws of the country of origin of such knowledge and resources’.

The draft chapter includes provisions on traditional knowledge, defensive mechanisms in the intellectual property filing process, similar to those applied to genetic resources. For the first time in a IPR text, specific obligations to establish national *sui generis* systems to protect traditional knowledge and recognition of the right of indigenous and local communities of decide over their knowledge are proposed for inclusion. Parties would also have to protect effectively expressions of folklore and artistic expressions of traditional and folk culture as a general obligation. A ‘moral right’-type clause has been integrated in the chapter mandating that any fixation, representation, publication, communication or use in any form of literary, artistic, art-folk or craft work shall identify the community or ethnic group to which it belongs.

Technology transfer clauses are common in international agreements whether commercial or not. They are important to the fulfilment of the substantive obligations contained in the agreements, especially for developing countries, but lack of political will and effective mechanisms/incentives for assuring the transfer have limited the practical success of technology transfer provisions. The FTAA chapter on IPRs shows a clear tension between the need for mandatory vs best endeavour clauses in this field. While some FTAA countries advocate basing technology transfer on voluntary co-operation among IPR authorities and the promotion of the use of intellectual property, for most the existence of effective mechanisms/incentives will be essential for achieving the core objectives of the IPR chapter and actual technology transfer.

Civil Society Concerns over the FTAA IPR Chapter

Civil society organisations are starting to express concern over the content of the draft FTAA chapter on intellectual property rights. During the November Ministerial Meeting in Quito, participants in a workshop on intellectual property and biodiversity – jointly organised by the CEDA, CIEL, SPDA and ICTSD – concluded that any chapter on intellectual property rights in the final FTAA agreement would only make sense if such issues as genetic resources, traditional knowledge, technology transfer, flexibility in plant variety protection, and competition regulations against abuse of rights were included and fully developed. Some even considered that the FTAA should not deal with IPR issues at all, but that they should be left to discussions and negotiations at the multilateral level where more balanced results for developing countries and the public interest might be obtained.

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¹ See FTAA.TNC/w/133/Rev.2. The entire Second Draft FTAA Agreement is posted at: www.ftaa-alca.org

Access to Medicines, continued from page 2

Japan and Canada are not willing to consider an outright amendment as yet, preferring instead to see the results of the waiver agreement for a so-far undetermined period. Ambassador Pérez Motta has proposed that Members agree on a waiver by the TRIPs and Public Health Declaration's deadline of 31 January 2002 and conclude work on a permanent amendment by the end of next June. To allay developing country fears that the amendment could become a bargaining chip in the Doha Round negotiations, Ambassador Pérez Motta's disputed draft text specifies that negotiations on the text would not be part of the 'single undertaking' launched in Doha.

Another point under intense discussion is compensation to patent holders. TRIPs Article 31(h) requires that the right holder be paid 'adequate remuneration in the circumstances of each case' of unauthorised use of the patented product. Although in situations of 'national emergency or other circumstances of extreme urgency' prior consultation may be waived, compensation must still be provided to the right holder 'taking into account the economic value' of the compulsory license. The Chair's text provides that only the importing country should pay when the product is patented in both the importing and exporting Member countries, but pharmaceutical companies are pushing hard for additional compensation from the producer country in case the importing Member is unable to provide satisfactory payment for the market share lost by the rights owner due to the compulsory license.

Conflicting Pressures

Brand-name manufacturers are also lobbying hard to make the packaging requirements much more specific, even insisting that the colour and shape of the medicines themselves be different from their patented versions. Shannon Herzfeld, Senior Vice President of the Pharmaceutical Research and Manufacturers of America, said in November that the industry was suspicious of 'the notion that having medicines of a different colour and shape are an impediment to getting medicine', adding that 'people seem[ed] to want a fast passage through Africa up to the lucrative markets in order to confuse people there.'

Harvey Bale of the International Federation of Pharmaceutical Manufacturers Associations summed up the hard-line view in November: 'The proposal as it now stands would allow compulsory licenses to be issued in any country, for any product, for any disease without any review mechanism and without any discipline being imposed. [...] This text will not solve anyone's problems except for the companies in some countries that want to do business forever copying drugs.'

On the other end of the scale, Celine Charveriat of Oxfam International called limiting the scope of an amendment to grave infectious diseases an 'outrageous' attempt to rewrite the Doha Declaration, while James Love of the Consumer Project on Technology said it was 'shocking' on the part of the US and others to exclude asthma, diabetes, cancer and other public health concerns from the amendment's scope.

James Love warned those seeking a broad scope for exports of medicines under compulsory license against 'desperation' regarding the need to find a solution by the end-2002 deadline. Other strategies could be used to achieve the same end, he said, including TRIPs Article 31(k), which requires no prior negotiations with patent holders as compensation could be dealt with through a purely administrative process. Even the source of the trouble, Article 31(f), would not prevent 49 percent of the production under compulsory license from being exported thus allowing 'a fair amount of spill-over for several countries'. In addition, under paragraph 7 of the Doha Declaration on TRIPs, least-developed countries 'can do whatever they need to authorise exports, until 2016 at the earliest. Generic suppliers from anywhere can simply locate factories in these countries. This will do more for technology transfer and economic development in LDCs than anything else in the current drafts on technology transfer.' As a parting shot, he warned delegates against a *Bridge on the River Kwai* scenario, where the bridge gets built even though it helps the enemy.

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MEETINGS OF WTO BODIES

Dec. 10-11	General Council
Dec. 12-13	General Council
Dec. 16-18	Dispute Settlement Body, special session*
Dec. 17	Working Group on Trade, Debt and Finance
Dec. 19	Dispute Settlement Body, regular session

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

The 2003 WTO meeting calendar was not available at press time.

OTHER MEETINGS

Dec 7-17 Geneva	Fourth Session of the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore Contact: WIPO, tel: (41-22) 338-9111, e-mail: WIPO.mail@wipo.org
Jan. 10-24 Geneva	UNCTAD Commission on Investment, Technology and Related Issues Contact: UNCTAD, tel: (41-22) 907-1234
Jan. 23-28 Porto Alegre	World Social Forum Contact: WSF Secretariat, tel: 55-11 3258-8914 E-mail: fsm2003@uol.com.br Internet: http://www.forumsocialmundial.org.br/
Jan 23-28 Davos	World Economic Forum Contact: WEF, tel: (41-22) 896-1212, E-mail: contact@weforum.org , Internet: http://www.weforum.org/
Feb. 3-7 Nairobi	22 nd UNEP Governing Council and Global Ministerial Environment Forum Contact: UNEP, tel: (254-2) 623-431/623-411, e-mail: beverly.miller@unep.org

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