

Midterm Review Reveals Development in Peril in Doha Round

DOHA ROUND BRIEFINGS

The International Centre for Trade and Sustainable Development in collaboration with the International Institute on Sustainable Development has prepared a 'midterm review' of the current WTO negotiations consisting of a series of 13 Doha Round Briefings on:

- Agriculture
- Services
- Special and Differential Treatment
- Implementation-related Issues and Concerns
- Intellectual Property Rights
- Market Access for Non Agricultural Products
- Negotiations on WTO Rules
- The Singapore Issues
- Trade and Environment
- Dispute Settlement Rules
- Technical Assistance
- Trade and Transfer of Technology
- Trade, Debt and Finance

The Briefings provide a comprehensive overview of the current status of the negotiations, as well as other mandates arising from the Doha Ministerial Conference. They are available on the ICTSD and IISD websites (www.ictsd.org and www.iisd.ca). Hard copies will be mailed to Bridges subscribers shortly.

This issue of Bridges complements the information in the Briefings with the latest updates in those areas where negotiations have resumed in the WTO.

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The WTO ended the year 2002 with a sigh rather than a bang. The stocktaking of progress achieved during first of the three years allotted by ministers for concluding the Doha Round revealed an uneven picture consisting of unmet deadlines on key issues, persistent fundamental differences on others, as well as some headway in the less controversial areas. Developing countries' trust in the Round's ability to deliver a meaningful result was particularly shaken by Members' failure to agree by the December 31 deadline on how to proceed with strengthening special and differential treatment provision in existing WTO Agreements or to find a solution to the difficulties faced by countries with insufficient pharmaceutical manufacturing capacity in taking advantage of compulsory licensing.

TRIPs and Public Health

While the Doha Declaration on the TRIPs Agreement and Public Health confirms Members' right to issue compulsory licenses overriding patent rights in certain circumstances, many poor countries and small economies cannot take advantage of that flexibility due to insufficient capacity to manufacture copies of patented medicines. Their only solution is to import such drugs from other countries that have the necessary infrastructure and know-how. This possibility is compromised, however, by TRIPs Article 31(f), which requires production under compulsory licensing to be 'predominantly for the supply of the domestic market of the Member authorising such use'. It was to overcome this limitation that ministers instructed the TRIPs Council to "find an expeditious solution to this problem and to report to the General Council before the end of 2002" (para. 6 of the Declaration on the TRIPs Agreement and Public Health).

Intense discussions in the TRIPs Council broke down just before the General Council's last meeting of the year on 20 December. At that point, all Members except the United States, were ready – if not overly keen – to endorse the latest Chair's draft, which spelled out in considerable detail how the 'expeditious solution' would work. The US ultimately rejected the Chair's text as the scope of diseases that the solution would cover went too far beyond what its pharmaceutical sector was prepared to accept.

While debates in the TRIPs Council since then have shown no signs of a swift conclusion, the General Council agreed on 10 February to give Members another 10 days to break the deadlock (see article on page 3).

Special and Differential Treatment

Fundamental divisions between Members prevented the Committee on Trade and Development (CTD) from presenting 'clear recommendations for action' to the General Council on which special and differential treatment provisions in WTO Agreements should be made mandatory, as well as additional ways in which such provisions could be strengthened, as required by the Decision on Implementation-related Issues and Concerns adopted by ministers in Doha.

The Chair of the CTD negotiations made a short statement to the General Council's 20 December session explaining why the Committee was not in a position to submit a report. Ambassador Ransford Smith (Jamaica) noted that he had identified 22 Agreement-specific proposals on which

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he considered it “possible to make immediate recommendations for a decision”. Out of these, Members had agreed on four and were “very close to agreement” on several others. However, despite intense consultations, they were not able to “go the extra yard”. Regarding the way forward, Ambassador Smith simply stated that Members could not agree “either on the referral of Agreement-specific proposals to other WTO bodies, or on the timelines for completion of the remaining work.” The General Council agreed that the Committee on Trade and Development should report to its 10-11 February session with the elusive ‘clear recommendations for action’ but this (third) deadline was missed as well due to differences among Members regarding the contents of the CTD’s report. In addition, negotiations on most other implementation-related issues have also reached an impasse (see page 6).

Agriculture

Most WTO Members consider liberalisation of agricultural trade as the ultimate yardstick of the Doha Round’s success. By the end of 2002, only marginal progress had been made in determining the parameters for the negotiations, which are to conclude by 1 January 2005 with “substantial improvements in market access; reductions of, with a view to phasing out, all forms of export subsidies; and substantial reductions in trade-distorting domestic support” (Doha Ministerial Declaration para. 13).

Vast differences persist on all three ‘pillars’ of the negotiations, and the Agriculture Committee’s first session in 2003 revealed no substantial narrowing of the gaps despite the fact that the European Union – the key market targeted by the ‘liberalisers’ – at long last submitted a proposal outlining its negotiating goals and the ‘modalities’ it proposed to adopt to achieve them (see page 5).

To spur some life into the stagnating negotiations, the Chair of the Agriculture Committee’s special sessions was expected to issue a draft report on negotiating modalities outlining his ‘best assessment’ of possible avenues of convergence on 12 February. However, most Members doubt that the 31 March deadline for adopting the modalities can be met (see page 5).

Services

Negotiations on the further liberalisation of services have largely gone underground with the confidential bilateral consultations currently taking place between those (developed and advanced developing country) Members that have made market opening requests and the large number of countries that have received them. The requests cover nearly a dozen sectors ranging from construction and communications to environmental services, tourism and transport. Initial market opening offers are due on 31 March (see page 10).

In contrast, hardly any progress has been made on ‘horizontal’ issues, such as an assessment of trade in services, the establishment of an emergency safeguard mechanism and how to credit autonomous liberalisation (see page 15).

Singapore Issues

Singapore issues (so called after the WTO Ministerial Conference that launched a work programme on them) are probably the best bargaining chip up developing countries’ collective sleeve. They comprise investment, competition policy, transparency in government procurement and trade facilitation, all of which are largely perceived to be of most interest to developed countries. After six years of analysis in working groups and the Council for Trade in Goods, Members are to decide at the WTO’s next Ministerial Conference when to launch negotiations leading to binding multilateral disciplines on these issues. The trump card for developing countries is that the decision must be made by ‘explicit consensus’, and they have already warned that lack of progress in implementation-related concerns will have ‘negative consequences’ on the entire Doha Round. To avoid a point-blank refusal of new negotiations, the US has recently signalled considerable flexibility on transparency in government procurement (see page 10).



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Please see inside back cover for information on other publications in the *BRIDGES* series.

TRIPs Council Gets Another Opportunity to Solve Manufacturing Capacity Problem

On 10 February, the WTO's General Council agreed to give Members another week to forge consensus on the circumstances under which countries unable to copy patented medicines themselves could import such drugs from abroad without violating the provisions of the Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPs). This was the second extension to the Doha-mandated deadline of 31 December 2002.

At issue is finding an 'expeditious solution' to the problems countries may face in making use of compulsory licensing (i.e. allowing the use of a patent without the consent of the rights-holder under certain conditions) if they have insufficient or no pharmaceutical manufacturing capacity of their own. The principal point of contention is the scope of diseases for which drugs produced under compulsory license could be exported to Members without manufacturing capacity. Article 31(f) of the TRIPs Agreement requires countries to limit such production 'predominantly' to the supply of their domestic markets (see page 1).

Prior to the 10 February meeting, Members seemed headed for a recognition that consensus was out of reach. However, the General Council decided to give another chance to TRIPs Council Chair Ambassador Pérez Motta of Mexico, who stated that he had sensed "a certain momentum towards finding a solution" in recent days and felt that it was "important that advantage should be taken of this". He requested the General Council to provide "an additional period for further deliberations in capitals and consultations in Geneva", adding that he aimed to have "something more concrete" to report by the end of the TRIPs Council meeting scheduled for the week of 18 February.

Conditional Support Despite Doubts over Legal Status

The solution Ambassador Pérez Motta is trying to broker would consist of adopting the 16 December draft (which the US rejected) together with a Chairman's statement recognising the importance of patent protection in providing incentives for pharmaceutical innovation and the right of governments to protect public health. In a key passage, it would also note that WTO Members regard the solution as "essentially designed to address national emergencies and other circumstances of extreme urgency."

While a number of both developed and developing countries are inclined to accept this formulation, many have concerns over the legal standing of the proposed statement. The US may reject it if ongoing consultations with industry show that manufacturers consider the statement too weak for comfort. Kenya, on the other hand, is worried that a binding legal status would limit the right of governments to determine what constitutes a public health problem. Médecins sans Frontières has already issued an open letter to WTO Members urging them to reject the statement (see page 4).

The Long Road Toward Non-Consensus

In the final hours of the 2002 negotiations, the US suggested the inclusion of a footnote expanding its previously proposed list of diseases from three (HIV/AIDS, malaria and tuberculosis) to 23 plus "other epidemics of comparable gravity and scale", including those that might arise in the future. Developing countries rejected this proposal, arguing that it would restrict the mandate given by

the Doha Declaration, which – according to their interpretation – acknowledges Members' right to address 'public health problems' and only points to the three diseases as examples of such problems afflicting many developing and least-developed countries.

On 10 January, the European Union put forward a proposal, which included a list of 'at least' 22 infectious diseases, mostly endemic in African countries. The EU suggested that the list could be further expanded based on advice from the World Health Organisation (WHO) which, when requested by a Member, should "give advice on the occurrences in an importing Member or the likelihood thereof, of any other public health problem". The WHO's advice on whether a disease was covered by the solution would prevail in case of a dispute. EU Commissioner Pascal Lamy pointed out that trade officials had neither the credibility, nor the capacity or the competence to determine what constituted a public health problem. "When there's too much mistrust in the game, then you have to call on a third party, and the WHO is a trusted party," he said.

On the brink of an impasse, the TRIPs Council now has a third chance to fulfil its Doha mandate on public health.

Objecting to any narrowing of the scope of the Doha Declaration on TRIPs and Public Health, the Africa Group, Brazil and India rejected the EU proposal as a basis for further negotiations at an informal TRIPs Council session on 5 February.

A late proposal from Japan – also advocating a list-based approach – was rejected as well. Like the EU, Japan suggested that Members approve 22 diseases as examples of public health problems to which the 'solution' would apply 'at minimum'. Rather than naming the WHO directly, the proposal would allow the TRIPs Council to confirm 'as necessary' the inclusion of other diseases with the advice of outside experts, also 'as necessary'. Kenya said the proposal was unacceptable as only the government had the right to decide what constitutes a public health problem in a given country.

Declining to comment on these proposals, Deputy US Trade Representative Peter Allgeier focused on the need to rebuild the confidence of the pharmaceutical industry, which had been shaken by attempts to interpret the Declaration in a way 'other than what was intended' in Doha.

Members Close to Admitting Impasse on Disease Coverage

On 5 February, many Members appeared ready to concede that consensus on disease coverage would not be found. Although concerned about the consistent trend of developed countries' falling short of fulfilling the development-related mandates adopted in Doha, the majority of developing countries made it clear that they would prefer no 'solution' at all to accepting an additional decision that would limit the disease coverage. One Latin American delegate noted that additional time to reach consensus would only make developing countries more vulnerable to bilateral pressure, and thus possibly splinter the united front they had presented since June 2001 when the Africa Group took the lead in placing the issue on the Doha Ministerial agenda.

South Africa, 'wholeheartedly' supported by Norway, believed that it was time to focus energy on other core issues in the negotiations, as continued discussions on the scope of the

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paragraph 6 solutions were a waste of time with little hope for consensus in sight. Efforts to address TRIPs and health should rather focus on working with the pharmaceutical industry directly in an effort to appease concerns that the 16 December draft decision could weaken intellectual property protection. The need to build confidence was also acknowledged by Chile and Bulgaria, while Thailand echoed South Africa's view that efforts to settle the disease coverage of the solution were 'non-starters'.

Health Activists and Industry Slam Proposals

Research-based pharmaceutical companies – which generally view the compromise proposals as too broad – were particularly alarmed at the thought of putting decision-making power in the hands of the WHO, which they claimed had in the past been hostile to drug companies' interests. In contrast, health activists have been strongly critical for opposite reasons. According to James Love from the US-based Consumer Project on Technology, the EU proposal showed that it might be time to take the medicines issue out of the WTO, which was "clearly out of its depth", and to hand it over to the WHO. Médecins sans Frontières, which also deemed the EU proposal 'unacceptable', has now called on WTO Members to reject Ambassador Motta's proposed statement (see box).

Moratorium in Force, for Now

Following the breakdown of the talks in 2002, the US announced that it would not challenge any WTO Member "that breaks WTO rules to export drugs produced under compulsory license to a country in need". This moratorium covers patented pharmaceutical products needed to treat HIV/AIDS, malaria, tuberculosis and other infectious epidemics, as well as HIV/AIDS diagnostic test kits (IP/C/W/396). It does not, however, apply to high-income developing countries (such as Singapore and Korea, for instance). The US also attached a number of conditions to the moratorium, including measures to prevent diversion, requirements to inform the TRIPs Council of the grant of the licence, and an opportunity for the patent holder to supply the needed product.

Expressing sympathy with the overall US position, Switzerland has joined the moratorium, which is to remain valid until a multilateral solution is decided in the WTO. The EU has also agreed to an interim moratorium (not limited to HIV/AIDS, malaria, tuberculosis and other infectious epidemics), stressing however that this is "a purely stop-gap, temporary measure" which does not provide a stable permanent solution.

What Next?

While Ambassador Pérez Motta noted after the 5 February meeting that discussions on disease coverage were back at the stage they had been before the Doha Ministerial meeting in November 2001, his statement to the General Council was more optimistic. The issue is likely to be addressed at the next "mini-Ministerial" on 14-16 February in Japan and then at the TRIPs Council, scheduled for 18-21 February. Some sources, however, see no solution emerging until the Cancun Ministerial Conference next September.

For a comprehensive overview of the background, issues, positions and progress in 2002, please see *Doha Round Briefing on Intellectual Property Rights*, available at the ICTSD website <http://www.ictsd.org>.

**MSF Open Letter to WTO Members
on Ambassador Motta's Draft Statement on Paragraph 6**

"We urgently call upon the WTO Members to reject this statement for the following reasons:

- Paragraph 6 was never meant to only address national emergencies or other circumstances of extreme urgency, whether "essentially" or otherwise. The objective of paragraph 6 was to ensure that countries without production capacity could make effective use of compulsory licensing which is a key TRIPs safeguard. Anyone who claims otherwise is re-writing the history of the Doha negotiations.
- The adoption of this text would mean that countries without the possibility to produce medicines are at a major disadvantage over countries that do have the capacity. The Doha declaration confirms the right of countries to issue compulsory licenses in paragraph 5 (b): *Each Member has the right to grant compulsory licences and the freedom to determine the grounds upon which such licences are granted.*
- The proposed Chairman's statement would constitute two different classes of Members. First class Members with manufacturing capacity will be able to use compulsory licensing to address whichever public health problems they have identified. Second class Members without manufacturing capacity will be able to use compulsory licensing to address public health problems only in case of a national emergency or other circumstances of extreme urgency.
- The proposed text would indicate that the 'solution' cannot be used for the production and purchase of products meant for the prevention of an emergency. How long would a country attempting to prevent an outbreak of an infectious disease by vaccinating have to wait? It is unacceptable that a subset of developing countries may only provide pharmaceutical care after a public health situation has gone out of control.
- There is a near absence of innovation for diseases that affect people in developing countries. [...] The financing of the research and development of new medicines for neglected diseases will require additional and alternative global approaches. To therefore hail the importance of the IP system for the development of new drugs for people in developing countries might not be entirely appropriate in this context.
- Let no delegation be under the illusion that a Chair's note, reflecting an agreement amongst all negotiating parties, can have no legal effect. The Chair would not be making the note if it had no legal effect and there are grave grounds to worry that under the Vienna Convention it could be held to have legal effect. If the Motta text were used outside emergency situations, the exporting Member would open itself to dispute settlement for breach of its obligations under Art. 31(f) TRIPs.
- We therefore propose that the Members of the WTO take into consideration the following alternative wording for the Chair's statement:

Delegations have made it clear that they see the system that is being established under this proposed solution as being designed to promote access to effective treatments to address public health problems afflicting countries with insufficient or no manufacturing capacities in the pharmaceutical sector as called for in paragraph 6 of the Doha Declaration on the TRIPs Agreement and Public Health."

Extracts from the 8 February letter to WTO Members from Ellen 't Hoen, Campaign for Access to Essential Medicines, Médecins sans Frontières.

Chair to Shock Members into Starting Real Negotiations

The January negotiating session on agriculture failed to build bridges over the wide gaps prevailing between Members' positions. While Chair Stuart Harbinson has expressed 'serious concern' about the prospects of reaching agreement on negotiating modalities by the end-March deadline, he nevertheless expects to issue a first draft of outlining the possible scope, tariff and subsidy reduction formulas and other overall goals for the negotiations prior to the mini-Ministerial meeting to be held from 14-16 February in Tokyo, Japan.

The draft modalities are sure to be controversial, as Mr Harbinson has announced that he will present his 'best assessment' of where consensus could be reached on the way forward rather than list options reflecting Members' diverging positions. This approach was chosen to stimulate negotiations, whereas an open-ended options paper would give Members another opportunity to camp on their positions rather than search compromise, as happened (again) at the Agriculture Committee's first meeting in 2003.

No Progress on Bridge-building

At that session, Members focused on the Chair's 18 December 'overview' paper, which summarised the main negotiating issues and included a 77-page annex listing various modalities options. Members largely ignored Mr Harbinson's call to refrain from simply "identifying the option that corresponds to their position but to think creatively about avenues of convergence". Instead, they mostly reiterated previously-stated aspirations for the forthcoming modalities paper, as well as exchanged familiar arguments on who was to blame for the current standstill.

For instance, several Cairns Group countries, including Uruguay, Argentina, Brazil, Chile and Thailand, expressed consternation over the lack of proposals from developed countries such as the EU, Japan and Switzerland, while the latter again emphasised that they could not table concrete numbers without prior agreement on agriculture rules, as well as the treatment of non-trade concerns (NTCs) such as environment, food safety, and geographical indications (GIs). The EU has in fact now submitted a negotiating proposal – including both targets and NTCs – but this has not yet been discussed at the WTO (see opposite).

At the January session, developing countries repeated their views on special and differential treatment (S&D) to be granted to poorer countries. Far from consensus, these range from no discrimination between developing countries (e.g. Thailand and Malaysia) to calls for special preferences for the most vulnerable, as proposed by small-island state Mauritius. China and other newly acceded Members, as well as economies in transition, brought up their demands to receive differentiated treatment. The Cairns Group, India, China and some others suggested linking the three pillars under the Agriculture Agreement (market access, export competition, domestic support) so as to arrive at equitable negotiation results.

Showing some flexibility, Cairns Group members Chile, Malaysia and Thailand indicated willingness to agree to a new special safeguard mechanism (SSG) for developing countries, adding, however, that they could only accept a formulation that would strictly limit its applicability to certain products under carefully circumscribed conditions.

EU Submits WTO Proposal, Continues CAP Reform Battle

On 27 January 2003, EU member states finally approved a WTO negotiating proposal presented by the European Commission last December. The proposal has not yet been discussed at the WTO, as it was submitted after the Agriculture Committee's last session.

The key elements of the proposal include: cutting WTO Members' import tariffs by 36 percent; reducing Amber Box, i.e. trade-distorting domestic subsidies, by 55 percent; and cutting export subsidies by 45 percent. It also includes earlier EU suggestions to address contentious issues such as food labelling, the precautionary principle, animal welfare and the extension of the additional protection for geographical indications (GI) to products other than wines and spirits directly through the agriculture negotiations.

Among the paper's development-friendly aspects are proposals for a 'food security box' (including a special agricultural safeguard and additional flexibilities granted to developing countries to pursue food security and rural development objectives); duty-free access to developed country markets for at least 50 percent of their imports from developing countries, as well as free access to all imports from least-developed countries.

Due to stiff resistance from France and Ireland, the paper no longer proposes the eventual elimination of EU export subsidies on wheat, oilseeds, olive oil and tobacco, which the Commission's December draft had singled out as products of particular export interest to developing countries.

Among initial reactions, the Cairns Group and the US criticised the EU proposal for not going far enough on export subsidy reductions and for not making suggestions on dismantling the Blue Box, which allows government subsidies for production-limiting schemes.

CAP Reform Remains Controversial

Despite their endorsement of the new WTO negotiating proposal, EU member states remain far apart on the Commission's reform plans for the Union's Common Agricultural Policy (CAP). France, Spain, Italy, Portugal, Greece and Belgium in particular oppose EU Agriculture Commissioner Fischler's proposal to further decouple CAP support from production requirements. While the new proposal is mostly derived from an earlier reform plan presented by Fischler in mid-2002 (Bridges Year 6 No.6, page 13), it contains several modifications, including less emphasis on rural development in CAP spending, as well as shelving the previously-proposed ceiling of €300,000 per farm in annual support. Agreement on the reform is not expected until mid-2003 at the earliest.

EU Trade Commissioner Pascal Lamy and, more recently, Agriculture Commissioner Fischler have been at pains to stress that agreement on CAP reform is not a prerequisite for the EU's engaging in serious negotiations at the WTO. They insist that the proposal now on the table (based on a mandate agreed by EU members in October 2000) provides the Commission enough negotiating flexibility and should not be considered as an opening bid.

While stressing the EU's readiness to work towards meeting 31 March modalities deadline, Mr Fischler has expressed doubts about reaching agreement by that time due to persisting 'serious divisions' between Members. However – in contrast to comments made in December – he no longer speaks of the Cancun Ministerial Conference in September as the likely deal-making forum.

Action Deferred on Request to Clarify Doha's Special and Differential Treatment Mandate

At the 10 February session of the WTO's General Council, Members were too divided to adopt a report from the Committee on Trade and Development (CTD) requesting the General Council to 'clarify' the Doha mandates dealing with special and differential treatment for developing countries. The report also proposed that the CTD suspend further work on the issue until the General Council had provided guidance.

While industrialised countries had not formally opposed the clarification request at the CTD, they told the General Council on 10 December that the mandate was in fact clear, but that developed and developing countries disagreed on the substance of the proposals on the table. The General Council "took note" of the debate and decided to revert to this issue at its next meeting, currently scheduled for 15-16 May.

Is Clarification Necessary?

Specifically, the unadopted report (TN/CTD/7) requested the General Council to provide clarification 'as it considers appropriate' regarding paragraph 44 of the Doha Ministerial Declaration and paragraph 12 of the Decision on Implementation-related Issues and Concerns. The former states that "all special and differential treatment provisions shall be reviewed with a view to strengthening them and making them more precise, effective and operational." Paragraph 12.1 of the Decision on Implementation instructs the Committee on Trade and Development

to identify those special and differential treatment provisions that are already mandatory in nature and those that are non-binding in character, to consider the legal and practical implications for developed and developing Members of converting special and differential treatment measures into mandatory provisions, to identify those that Members consider should be made mandatory, and to report to the General Council *with clear recommendations for a decision by July 2002*.

Three deadlines have now been missed for handing in the 'clear recommendations for a decision'. Instead, the S&D talks have been bogged down by a persistent disagreement on whether Members should simply proceed with a systematic review of all proposals to improve the WTO's special and differential treatment provisions (as consistently held by developing countries) or whether the exercise in fact entails a review of the entire special and differential treatment framework, including its purpose, principles and objectives (as advocated by key industrialised countries). Profound disagreement also persists over whether the more than 85 Agreement-specific proposals tabled by developing countries since February 2002 should be addressed by the CTD or sent to other WTO bodies that deal with the relevant subject matter.

Developing Countries Revolt Against Lack of Progress

Seeking to prevent the third deadline on the S&D review from slipping away, the Committee on Trade and Development met frequently throughout early 2003. Frustrated over the lack of progress, a large number of developing countries¹ proposed on 7 February that, instead of submitting to the General Council a meagre crop of recommendations on a handful of provisions, the CTD should ask it to clarify the scope of the ministerial mandate.

While Australia, Canada, the EU and the US said they would prefer to 'harvest' the 12 specific proposals on which there was

an agreement – and to forward the rest of the proposals to the appropriate negotiating (or other) WTO bodies – they did not then formally object to the developing country proposal.

Heading for a Deadlock in Cancun?

The General Council's (non-)decision leaves the continuation of the S&D review in a limbo. No new deadline has been set and no decision made on either where Agreement-specific proposals should be discussed or whether to continue work toward an 'early harvest' of at least some of the proposed changes.

Yet more consultations are to take place before the General Council's next meeting. How the process would work in practice was still unclear at press time. Many (developing and developed) Members are unwilling to continue with the high-frequency CTD meetings, as they need to focus on other critical issues in the run-up to the Cancun Ministerial Conference seven months from now.

There is growing concern that Members will not reach consensus on the S&D review before Cancun. That would almost certainly make any advances on S&D subject to trade-offs, an outcome that developing countries averted in Doha through the establishment of the separate – now thrice-missed – 31 July 2002 deadline for the review's completion. It could also lead to a collapse in Cancun, as happened in 1999 when the Seattle Ministerial Conference ended in resounding failure partly due to an overcrowded agenda reflecting a deadlock in Geneva over most key issues.

ENDNOTE

¹ Bangladesh (on behalf of least-developed countries), Kenya (on behalf of the Africa Group), India, Pakistan, Cuba, Egypt, China and Paraguay.

Implementation: Supachai Proposes Assistance

Most proposals on 'outstanding implementation issues' – closely related to (although procedurally separate from) special and differential treatment – have died a quiet death in the various WTO bodies where ministers in Doha sent them for resolution. While developing countries consider a serious response to these concerns a quintessential element of righting the imbalances inherent in the multilateral trading system, Members are not only deadlocked on how to respond to the proposals on the table, but also on how to take the process forward.

At the 4-5 February meeting of the Trade Negotiations Committee (TNC), WTO Director-General Supachai Panitchpakdi – who chairs the TNC – told Members that he would work with the Chairs of the relevant bodies in an 'informal process' to scope the way forward. The Chairs will hold informal consultations with Members, and the TNC will meet on a monthly basis to monitor progress.

For a comprehensive overview of the different interpretations, Members' positions and key issues, see:

- *Doha Round Briefing No.1 on Implementation-related Issues and Concerns*; and
- *Doha Round Briefing No.13 on Special and Differential Treatment* at www.ictsd.org.

Dispute Settlement News

Appellate Body Condemns Byrd Amendment's 'Double Dip' Payments to Industry

On 27 January, the Dispute Settlement Body adopted an Appellate Body report (WT/DS217/AB/R), which condemned the key element of the US Continued Dumping and Subsidy Offset Act 2000. This Act, commonly known as the Byrd Amendment after its sponsor, requires the government to redistribute any anti-dumping and countervailing duties collected by the Treasury to the companies that petitioned for the investigations that led to the imposition of the duties.

The dispute involved eight complainants and four third parties, who argued that these payments violated the WTO Agreements on Anti-dumping, as well as on Subsidies and Countervailing Measures, which stipulate that “no specific action” shall be taken against dumped or subsidised imports beyond the imposition of anti-dumping or countervailing duties.

According to the complainants, the Byrd Amendment provides the petitioners (a) double protection, first in the form of an import barrier and then in the form of monetary compensation; and (b) an incentive to petition for investigations due to the possibility of a financial benefit from the redistributed duty revenue.

The Appellate Body confirmed the panel's ruling that the Byrd Amendment was a “non-permissible specific action against dumping or a subsidy”. The AB based its finding on the “adverse bearing” that the Amendment had on foreign producers/exporters “in that the imports into the United States of the dumped or subsidised products (besides being subject to anti-dumping or countervailing duties) result in the financing of [domestic] competitors – producers of like products – through the transfer to the latter of the duties collected on those exports.” Due to this “adverse bearing” and, more specifically, the Amendment's structure designed “so that it dissuades the practice of dumping or the practice of subsidisation, and because it creates an incentive to terminate such practices, the CDSOA [i.e. the Byrd Amendment] is undoubtedly an action ‘against’ dumping or a subsidy, within the meaning of Article 18.1 of the Anti-dumping Agreement and of Article 32.1 of the SCM Agreement.”

However, the Appellate Body reversed the panel finding that the Byrd Amendment provided a financial incentive for domestic producers to file or support applications for the initiation of anti-dumping and countervailing duty investigations, giving rise to a greater number of applications, investigations and orders. A conclusion that a measure could be “against dumping or a subsidy simply because it facilitates or induces the exercise of rights that are WTO-consistent” would give too broad a scope to the Anti-dumping and SCM Agreements, as such reasoning would, for instance, imply that “a legal aid programme destined to support domestic small-size producers in anti-dumping or countervailing duty investigations should be considered a measure against dumping or a subsidy [...] because it could be argued that such legal aid is a financial incentive likely to result in a greater number of applications, investigations and orders.”

Within 30 days from the adoption of the AB report (i.e. by 25 February), the US must inform the Dispute Settlement Body of how it intends to implement the report's rulings. While the original panel report (WT/DS217/R) suggested that the US bring the

Amendment into conformity by repealing it, the Appellate Body refrained from making any recommendations beyond the standard formula that the DSB should request the United States bring the law “into conformity with its obligations under the Anti-dumping Agreement, the SCM Agreement and the GATT 1994.”

To Repeal or Not to Repeal?

The Administration faces no easy task in choosing a course of action. The fiscal year 2004 budget unveiled on 3 February proposes a repeal of the Byrd Amendment, which averages US\$230 million a year in payments to complaining companies. The draft budget seems to indicate that the Administration is at least partly convinced by the AB arguments, as it admits that “these corporate subsidies effectively provide a significant ‘double dip’ benefit to industries that already gain protection from the increased import prices provided by countervailing duties.”

Approval of this ‘budget cut’ is far from a done deal, however. In a 4 February letter to President Bush, sixty-six Senators called the continuation of the payment programme under the Byrd Amendment “critical to preserve jobs that will otherwise be lost as the result of illegal dumping or unfair subsidies and to maintain the competitiveness of American industry.” The letter also noted that the WTO had “acted beyond the scope of its mandate by finding violations where none exists and where no obligations were negotiated.” Instead of repealing the Amendment, the Senators called on the President to “seek express recognition of the existing right of WTO Members to distribute monies collected from anti-dumping and countervailing duties.”

The contrasting views on pages 8 and 9 – written before the Appellate Body delivered its verdict – lay out some of the key arguments for both sides of the debate.

EU Faces a New GSP Challenge

The DBS agreed on 27 January to India's request for a panel to determine whether provisions under the EU's Generalised System of Preferences (GSP) relating to labour rights, the protection of the environment and combating the production and trafficking of illicit drugs are compatible with WTO rules. A number of Latin American countries, which benefit from the EU's illegal drugs programme, requested third-party rights in the panel proceedings. The US, which has a similar drug eradication incentive scheme, also reserved third-party rights. The EU warned that the Indian challenge could end up hurting countries in need, noting that the GSP scheme also aimed “at responding to the developmental, financial and trade needs of the developing countries.” India decided to bring the complaint to the WTO after Pakistan was included in the scheme in 2001, giving its textiles and clothing exports greater access to EU markets than that available to India.

Thailand lodged a similar challenge in December 2001 (WT/DS242), claiming that ‘measures’ under the EU's GSP scheme unfairly affected Thai exports and violated the GATT's most-favoured-nation treatment principle and the Enabling Clause. This dispute has not yet proceeded beyond consultations. See also page 11 for an update on the Thai-EU tuna dispute.

Why the Byrd Amendment Must Be Buried

By Jagdish Bhagwati and Petros Mavroidis

On 27 January, WTO Members adopted an Appellate Body report, which upheld the original panel finding that the 'Byrd Amendment' is inconsistent with the WTO's anti-dumping and subsidy/countervailing rules. The US government is currently considering its response to the ruling (see page 7). This article and the one opposite – written before the Appellate Body' verdict – provide different perspectives on the precedent-setting case.

Many outside the United States, who view anti-dumping practices to be protectionist, look to the Appellate Body to uphold the panel's finding. At the same time, the ruling has raised the hackles of those in the United States who resent the dispute settlement process, typically viewing it as an attack on national sovereignty. These critics complain that the WTO panel overreached and see in its finding a corroboration of their alarmist views. A legally sophisticated and unassailable appellate determination is therefore of extraordinary importance. This, we submit, requires the Appellate Body to find that the panel reached the correct conclusion, which the Appellate Body must uphold. But it must also reject the panel's method of argumentation as flawed.

Two aspects of the Byrd Amendment invite attention. The first, which the panel and all complainants focused on was the Amendment's compatibility with Article 5.4 of the Antidumping Agreement. This Article states that requests for initiation of investigation will not be processed by a member nation if they are not backed by at least 25 percent of the domestic industry producing like products to those alleged to be dumped. Evidently, this provision is what lawyers call a 'proportionality' test; it is there to ensure that investigating authorities dismiss all except substantial claims.

Now, the revenues are to be distributed under the Byrd Amendment only to those who joined the petition. Presumably the argument was that the others were not suffering from the dumping. But the incentive effect is obvious: it will persuade some to go bounty hunting by joining the petitioners.

The panel's decision turned on this narrow issue. But it hardly seems a compelling argument. The reward, in terms of shared revenue, is surely small (except in rare cases). And if firms are not joining in the anti-dumping petition to begin with, they are likely to have good economic reasons (such as possible disruption of their own export sales from retaliatory petitions abroad). The wrong incentive does not seem to meet a 'proportionality' test of its own.

But the truly critical question is whether such a ('cleaned-up') subsidy violates the WTO Agreement. This is the second aspect of the Byrd Amendment, which received short shrift despite an attempt by Mexico to raise it in some fashion. In fact, we submit that it does, which must be the reason why the Appellate Body must uphold the panel's conclusion of WTO-inconsistency.

To see this, we must first recognise clearly that the issue is not whether the Anti-dumping Agreement is 'sound' or 'good'; all economists and most lawyers agree that it is in fact an instrument of unfair, not fair, trade and hence a favoured tool of protectionists.

It would be tempting therefore for a 'creative' and activist Appellate Body to dismiss the Byrd Amendment as simply compounding the original error by piling on a revenue-subsidy on top of the countervailing anti-dumping duty.

But, a strictly constructionist Appellate Body is more likely to wish to judge the revenue-subsidy exclusively in light of the Agreement, no matter how objectionable the Agreement is from a social viewpoint. It must then ask what the aim and objective of the Agreement were. And it is manifest that this aim was to restore the conditions of competition among the plaintiff complainants and the foreign defendants to that which prevailed prior to the dumping. This clearly means that the antidumping duties would be defined by the dumping margin 'found'. In fact, the entire history of anti-dumping actions shows that this is the aim and practice in the field. Indeed, that is why the lawyers fight over what that dumping margin is: the plaintiffs using all the tricks at hand to raise the number and the defendants to reduce it.

So, the critical legal (and economic) objection to the Byrd Amendment is that it indulges in 'double dipping': the antidumping duty is allowed to be, and in fact will continue to be, set at the full dumping margin as determined, and the revenue subsidy will add yet more to the protection that is provided.

No legal sophistry, such as that nations are free to subsidise the industry under the Subsidies Agreement – actually, the Byrd subsidy would be actionable, in our view – should stand in the way of clarity on the matter. If an Anti-dumping Agreement is signed, legitimising countervailing duties and hence support to be determined in the ways set forth, it is unpersuasive to turn around and say that the Agreement only legitimates action but does not delimit it simultaneously.

This said, we must also note that, quite inadvertently, the flawed Byrd Amendment serves the purpose of reminding us that the GATT/WTO Agreements are often not informed by economic principles. The economists Robert Feenstra and Jagdish Bhagwati have shown that, if tariff revenues are used to bribe the protected industry into lowering the tariff, leaving the total protection provided unchanged, then generally that is a welfare-enhancing solution. A mix of an anti-dumping duty set at less than the dumping margin, combined with the use of the tariff revenue as a subsidy, so that the sum of the two incentives just offsets the dumping margin, is a better solution than the use of a tariff to fully offset the dumping margin.

So, if the Byrd Amendment were rejected by the Appellate Body, as it should be, the changes that should be recommended to the United States are obvious. The selective use of the tariff revenue to subsidise only the petitioners must go. And we should allow the anti-dumping tariff to be reduced and revenues to be used as a subsidy but only so that the joint support so provided does not exceed the dumping margin.

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The Byrd Amendment indulges in 'double dipping', allowing an anti-dumping duty at full margin and a revenue subsidy.

The Byrd Amendment Ruling Needs Careful Review

By Steve Charnovitz

On 27 January, WTO Members adopted an Appellate Body report, which upheld the original panel finding that the 'Byrd Amendment' is inconsistent with the WTO's anti-dumping and subsidy/countervailing rules. The US government is currently considering its response to the ruling (see page 7). This article and the one opposite – written before the Appellate Body's verdict – provide different perspectives on the precedent-setting case.

In the view of most trade analysts, the Appellate Body should have an easy time upholding the victory of the eleven complaining governments. Nevertheless, one should expect a more complex legal proceeding that will consider whether the WTO panel engaged in judicial overreaching.

The Byrd Amendment is a US law that provides cash to affected domestic producers who petition for or support a successful antidumping or countervailing duty petition. Two economic instruments can be envisioned for a government to help an industry injured by dumping. One is to impose an antidumping duty on the dumped product that will either prevent importation or lower the price advantage over the competing domestic product. The other is to make a compensatory payment to the domestic industry. As far as I am aware, until the Byrd Amendment was enacted in 2000, no government had sought to use the compensatory instrument.

If the Byrd Amendment had substituted a compensatory payment for an antidumping duty, either in whole or part, that would have been a commendable trade policy experiment. A payment to an industry that is a victim of dumping would be less trade distortive and inefficient than the antidumping duty permitted by WTO rules.

Instead, the Byrd Amendment adds the payment on top of the antidumping duty. This can have the effect of improving the competitive position of the victim industry, which acquires government funding plus the protective benefit of the antidumping duty. Thus, the WTO panel was perhaps right in characterizing the Byrd Amendment as providing 'a double remedy'.

Although this overshooting may be an unwise policy, that is a different matter from whether it violates international trade law. In general, WTO rules allow governments a high degree of freedom in granting domestic subsidies not contingent upon export performance. The panel's thesis that governments contracted away that freedom in negotiating the WTO Anti-dumping Agreement is a shaky assumption unsupported by the text of the Agreement or by its negotiating history.

Boiling down the panel's 335-page report, the crux of the judgment is that the United States is violating the provision of the Anti-dumping Agreement stating that "[n]o specific action against dumping of exports from another [WTO] Member can be taken except in accordance with the provisions of GATT 1994, as interpreted by this Agreement." Thus, the key issue in the case is whether the payment to victims of dumping is a 'specific action' against dumping.

According to the panel, whether a government action is "against dumping" depends on whether it has an "adverse bearing on dumping." The panel explains that the combination of the antidumping duty plus the Byrd payment transfers competitive advantage to the victims of dumping and has a dissuasive effect on dumping.

Even assuming that the panel is right that the law inhibits dumping, it is a leap to conclude that the governmental aid therefore violates WTO rules. Government policies may dissuade dumping without being either a specific action against the companies that dump or the products being dumped. A strong argument can be made that a special fund for victims of dumping is well outside the purview of the WTO's Anti-dumping rules.

The other major violation found by the panel arises from the so-called rule of 'standing' that a government take up a private antidumping petition only when it is supported by domestic companies who produce more than 50 percent of the affected output. The Byrd Amendment has triggered concerns because the payments are made only to companies that voice support for investigation.

By the panel's logic, it would be a WTO violation for the US Secretary of Commerce to give a 'Good Trade Citizen' award to successful anti-dumping petitioners.

According to the panel, the Byrd eligibility rule violates the WTO because it gives a financial incentive to file and support petitions. That the Byrd programme gives such an incentive is clear. But if a financial incentive itself is a WTO violation, then even a revised, neutral Byrd Amendment extending eligibility to all affected domestic producers could still remain WTO-illegal. That's because the Byrd payment cannot occur unless the domestic industry supports the investigation, and then dumping is verified.

The panel declares that the Byrd Amendment violates trade rules because it will induce more investigations, and thereby "disrupt the trading environment for foreign producers/exporters that may be engaged in dumping."

This holding is questionable because the panel seems to be saying that WTO Members have barred themselves from encouraging victims of dumping to file petitions. By the panel's logic, it would be a WTO violation for the US Secretary of Commerce to give a 'Good Trade Citizen' award to successful anti-dumping petitioners. It seems doubtful that the panel would characterize that hypothetical as being WTO-illegal, yet if not, then the panel has failed to draw a meaningful line.

The panel's decision can be summed up as holding that the Byrd Amendment is not listed in the WTO treaty as a permissible response to dumping. Yet this runs against the traditional orientation of trade law, which is that government actions are permitted unless they are prohibited. At a time when the WTO dispute system is under criticism for judicial activism, the Appellate Body should give careful consideration to the difficult issues in this case.

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EU Outlines Services Offer

On 5 February, EU Trade Commissioner Pascal Lamy outlined the EU's initial offer on further services liberalisation. According to Commissioner Lamy, the EU is willing to expand market access in areas such as banking and telecoms, but will not take on new commitments in public services such as health, education or audiovisual services. Additional market access is negotiable in areas such as computer services, postal services, distribution, environmental services, tourism and transport.

Responding to demands for more access to service providers by developing country WTO Members, including India, Mr Lamy said that the EU would allow professionals based overseas working in computer and engineering services to enter the EU market for up to six months.

In public consultations before the release of the Commission's draft offer, many European civil society groups expressed concern over the potential negative impacts of deregulated and privatised public services on access to basic services such as health, education, water and energy. While several European NGOs welcomed the Commission's proposal, some expressed disappointment over the further opening of postal, retail, environmental and transport services to foreign competition. A representative of the Third World Network called on the EU to withdraw its requests to developing countries to liberalise these same services, noting that the latter had far weaker services sectors than the EU countries, and were in even less of a position to make further commitments.

The Commission's proposal must still be approved by the European Council and the Parliament before it can be officially submitted to the WTO prior to the agreed 31 March deadline.

US Tries Charm Offensive on Government Procurement

In stark contrast to its categoric refusal to make technical assistance to developing countries mandatory before requiring them to live up to new human, animal and plant health-related regulations, the US has signalled willingness to make capacity-building a prerequisite for those countries' compliance with future WTO rules on transparency in government procurement.

In a communication (WT/WGTGP/W/38) circulated prior to the 7 February meeting of the Working Group on Transparency in Government Procurement, the US proposed that WTO Members consider a phased introduction of binding disciplines and refrain from the application of dispute settlement rules until Members have the capacity to fully comply with the new provisions.

This flexibility – aimed at alleviating many developing countries' mistrust over subjecting government procurement to dispute settlement proceedings – reflects the importance the US attaches to concluding a WTO agreement on the issue. Other main elements of the US proposal include an explicit acknowledgement that preferences for domestic suppliers/supplies would be excluded from dispute settlement, and that Members could not seek to overturn already awarded contracts through WTO litigation.

The September WTO Ministerial Conference in Cancun is to decide whether to launch formal negotiations on transparency in government procurement and other 'Singapore issues' (see page 2).

AGOA Benefits Remain Uneven in Sub-Saharan Africa

Stocktaking at the second US – Sub-Saharan African Trade and Economic Co-operation Forum revealed significant gains accruing to some, but not all, of the 38 sub-Saharan countries that qualify for benefits under the US African Growth and Opportunity Act (AGOA).

African leaders welcomed President Bush's message announcing that he would seek to extend the AGOA beyond its current expiry date of 2008, as well as secure a 50 percent increase in development assistance, much of which would target Africa. The announcement of a gradual ODA increase from US\$10 billion to US\$15 billion by 2006 was first made at the Summit on Financing for Development held in Monterey last March, but the amount must be approved each budget year by Congress (Bridges Year 6 No.3, page 15).

The AGOA, signed into law in May 2000, provides duty-free access to 'essentially all products' from those sub-Saharan countries that fulfil a number of conditions, including: continual progress towards establishing a market-based economy; elimination of barriers to US trade and investment; respect for internationally-recognised workers' rights; and providing no support to 'acts of international terrorism' or engaging in activities that undermine US national or foreign policy interests. Duty-free entry for textiles and apparel made with non-US yarn/fabric is capped (to reach 3.5 percent of all such US imports in 2008), and coffee and sugar are excluded from the product coverage (Bridges Year 4 No.8, page 11).

Despite these limitations, according to US government statistics, the country's imports from sub-Saharan Africa (excluding oil) have grown by 50 percent. However, benefits have been uneven depending on the sector and the country. For instance, Kenyan textile exports have quadrupled, but Senegal's textile industries are closing rather than flourishing. While more than a fifth of South Africa's exports are related to the AGOA, many other countries have difficulties making use of the provisions due to poor infrastructure, obsolete technology, and lack of capital and resources. The US points out, however, that the AGOA has brought Africa an additional US\$1 billion in investment, partly by Asian investors seeking to take advantage of the continent's low labour costs and to escape textiles quotas in Asia.

Some Summit participants questioned whether the economic growth spurred by the AGOA could be maintained when the African privileges are cancelled out by wider global deals under the WTO. For instance, the removal of all remaining textile quotas in 2005 (mandated by the WTO Agreement on Textiles and Clothing) and tariff cuts on non-agricultural goods to be negotiated during the Doha Round are likely to erode preferential margins significantly, not only for products under AGOA but also those benefiting from enhanced market access under other WTO Members' Generalised Systems of Preferences, as well as the Cotonou Agreement between the EU and sub-Saharan African countries.

At an NGO Forum held concurrently with the intergovernmental meeting, some African civil society groups again criticised the eligibility requirements for AGOA nations, claiming that US interests were limited to oil and fostering closer African links to advance its war on terror. Already in 2000, the Third World Network warned African governments against accepting conditionalities such as labour rights and investment liberalisation, calling them a trap "to concede to the wishes that the US government is having difficulty achieving in the WTO" (Bridges Year 4, No.8, page 11).

US 'Dolphin Safe' Tuna Label Back in Court

Yet another twist was added in December to the more than a decade-old controversy surrounding US labelling on tuna caught with methods that could injure dolphins.

The US Commerce Department's decision on 31 December 2002 to change the criteria for 'dolphin safe' tuna – a label that appears on most canned tuna sold in the country – was immediately challenged by conservation organisations, leading the Secretary of Commerce to suspend the new rules until the court has delivered its verdict.

The now-suspended standard would allow tuna fished with methods that involve chasing and encircling dolphins to be labelled 'dolphin safe' provided that no dolphins are killed or injured in the process. This is the second time that environmental groups have prevented the US government from introducing a 'dolphin safe' label that allows encircling. Such a change could pave the way for Mexican tuna to be sold under the US label and thereby end what Mexico calls a '*de facto* embargo'.

For reasons not fully understood, yellowfin tuna in the Eastern Tropical Pacific Ocean swim with dolphins. Many fishing vessels encircle the dolphins in wide nets as it helps them catch the less-readily visible tuna underneath the air-breathing mammals. Tuna caught with such methods was not eligible for the old 'dolphin safe' label. Under the new rules, tuna harvested by vessels using purse seine nets intentionally set on dolphins can be labelled as 'dolphin safe' even if dolphins are encircled, so long as an on-board observer certifies that no dolphins were killed or seriously injured in the process.

The Commerce Department first tried to introduce these changes in 1999 in response to the legally-binding Agreement on the International Dolphin Conservation Programme (IDCP), of which the US is a member (the IDCP sets overall dolphin mortality limits and other conservation measures, but does not prohibit any particular fishing technique). However, the Earth Island Institute, Defenders of Wildlife and other conservation groups successfully foiled that attempt when a US appeals court ruled that the Department of Commerce had failed to obtain and consider relevant scientific evidence (Bridges Year 5 No.6, page 13).

This time, the Bush Administration based its decision on recent NOAA Fisheries' findings that the practice of encircling dolphins to catch tuna had no significant adverse impacts on dolphin populations in the Eastern Tropical Pacific Ocean. The report, however, also concluded that dolphins in the Pacific were not recovering as quickly as could be expected given significant reductions in reported mortality associated with tuna fishing. In addition to environmental changes and a lag period before recovery begins, another hypothesis conjectures that the slow recovery could be due to effects of purse seine fishery beyond the reported bycatch, such as separation of mothers from calves and physiological effects of chase and encirclement ('stress') that affect subsequent survival and reproduction.

Opening the Door for Mexican Tuna?

Mexico is among the countries that would profit most from a weakening of the tuna label. Along with Ecuador, the country already has an affirmative determination from the Commerce Department confirming that it has an adequate system in place to track tuna down the production chain from fishing vessel to the

can. This determination, which is still pending for Spain and Panama, is a prerequisite for marketing their tuna as 'dolphin safe'. How the new rules would actually affect Mexico's tuna exports remains uncertain given that three of the major US tuna processors have vowed that they would not buy tuna caught by chasing and netting dolphins.

While use of the label is voluntary, Mexico saw the previous standard as a *de facto* embargo on its tuna, as nearly all US canners buy only 'dolphin safe' tuna and label their products accordingly. The Mexican government had previously threatened to leave the IDCP if the US did not change the labelling criteria, causing speculation that the US Commerce Department's decision was partly motivated by efforts to avoid Mexico and other countries pull out of the international compact. Already in 1991, Mexico had challenged the US regulations related to tuna fishing as incompatible with the national treatment requirement in the GATT.

While the dolphin-safe label was found to be compatible with the GATT, the Mexican government has continued to lobby for changes to the labelling requirements that would give its industry better access to the US market.



Conservation Groups Outraged

Conservation groups were quick to mount a renewed legal challenge of the amended labelling standards, filing a lawsuit shortly after the decision was announced. "The whole point of the 'dolphin safe' label is to give consumers a choice of tuna that wasn't caught by netting dolphins," said William Snape of Defenders of Wildlife, one of the groups trying to overturn the decision. "We have great confidence that the courts will strike down this blatantly illegal decision," he added. The Earth Island Institute, another plaintiff, called the revised labelling standards 'arbitrary and capricious', and contended that the successful federal 'dolphin safe' tuna programme was being jeopardised to accommodate tuna millionaires in Mexico and other countries in the name of 'free trade', not science.

EU, Thailand and Philippines Struggle to Solve Tuna Dispute

The EU, Thailand and the Philippines will continue talks in the coming weeks to resolve their disagreement over access to the EU market for Thai and Filipino canned tuna. Discussions will be based on a mediation report prepared by WTO Deputy Director-General Rufus Yerxa. When it became obvious that the dispute was heading for the WTO, the parties – for the first time in the institution's history – requested mediation rather than formal bilateral consultations, which are usually the first step of dispute settlement proceedings at the WTO. Mr Yerxa's report has not yet been released publicly, but trade sources say it proposes a figure for additional access to EU markets.

This would compensate the two countries for lost exports, which they claim have resulted from the Cotonou Agreement concluded in 2000 between the EU and the African, Caribbean and Pacific (ACP) Group of states. Within the Cotonou framework, ACP countries' tuna exports enter the EU tariff-free, while Thailand and the Philippines must pay a 24 percent duty. The dispute threatened to derail negotiations at the WTO Ministerial Conference in Doha, where the Philippines and Thailand refused to approve the Cotonou waiver request, a prerequisite for ACP countries' consent to the launch of a new round (Bridges Year 5 No.9, page 15).

EU Agrees on Fisheries Reforms

EU agriculture and fisheries ministers have adopted a revision to the Union's Common Fisheries Policy, which aims to respond to concerns over depleted fish stocks, overcapacity of the European fishing fleet, insufficient controls and limited stakeholder involvement. The ministers also finalised fishing quotas for 2003, including substantial reductions for a number of threatened stocks.

Phase-out Planned for Fleet Renewal Support

The objectives of the reformed Common Fisheries Policy (CFP), which entered into force on 1 January 2003, have been reviewed to focus more on the sustainable exploitation of living aquatic resources based on sound scientific advice and on a precautionary approach to fisheries, as well as on sustainable aquaculture. The CFP takes a long-term approach to fisheries management by setting multi-annual recovery plans for stocks outside safe biological limits. The Commission may take emergency measures in cases of serious threat to the conservation of resources, while member states can adopt conservation/management measures applicable to all fishing vessels within their 12-mile zones. To tackle the overcapacity of the European fishing fleet, aid for the renewal of fishing vessels will be phased out by the end of 2004. This is likely to herald a more active EU role in the WTO's negotiations on fisheries subsidies.

The new CFP also strengthens control and enforcement, *inter alia*, by reinforcing co-operation between member states so that each state can control vessels flying its flag throughout European waters, except in the 12-mile zone of another member state. Regarding the involvement of stakeholders, the Council will establish regional advisory councils, made up of fishermen, scientists and representatives of other interest groups, including environmental and consumer groups, which can submit recommendations and suggestions or inform the Commission or the relevant member state of problems concerning the implementation of the CFP in their area.

Ministers also established an emergency fund to encourage the decommissioning of vessels (the so-called 'scrapping fund').

While the environmental group WWF welcomed the decision to phase out subsidies to build new boats by 2004 as "a step in the right direction", it pointed out that the recovery plans for threatened stocks envisaged in the CFP would be "senseless" if they were not accompanied by an obligation to reduce fishing effort. WWF also criticised the policy for a lack of proposals for improving fishing deals with developing countries.

EU Fishing Quotas Slashed for 2003

Following long and difficult talks on fishing quotas for 2003, EU ministers agreed to cut cod and hake catches back by 45 percent compared to 2002 levels. Fishing will only be allowed for 15 days per month. Scientists had recommended a full fishing ban in order to preserve cod stocks for the future, while fishermen and nations with significant fishing fleets sought to save jobs and safeguard coastal economies and communities. Environmental groups consider the current agreement insufficient to save the cod, but fishermen's organisations claim the catch cuts – coupled with the subsidy reductions under the reformed CFP – will devastate their livelihoods. Scottish fishermen are particularly dissatisfied, maintaining that large concessions were made to Southern EU states, while the UK fleet is hit hard by the agreement.

EU-US Confrontation on GMOs Postponed

The US has backed off from an immediate WTO challenge of the European Union's approval process for genetically-modified crops despite growing pressure to launch a dispute. A 3 February decision-making cabinet-level meeting was cancelled at the last minute without setting a new date. Observers say the postponement was likely due to a US effort to ease tensions with the EU at a time when it is attempting to bring other countries on board for a potential conflict with Iraq.

Calls to mount a WTO challenge of the EU's *de facto* moratorium on the market approval of new genetically modified organisms (GMOs), in place since 1998, have gained in intensity since the EU Agriculture and Environment Councils adopted the European Commission's proposed labelling and traceability regulation late last year. Speaking to reporters on 9 January, US Trade Representative Robert Zoellick said he believed that there was 'broad support' in the Bush Administration for such a challenge and called for a case to be brought 'sooner rather than later'. His position was supported by a number of farm-state senators who in a 19 December letter to President George W. Bush urged the President to "take that step without delay".

European authorities have stressed that the US would lose out if it were to launch a WTO case, no matter the outcome. EU Commissioner for Health and Consumer Protection David Byrne acknowledged that the legal defences for the EU in case of a dispute would be 'very narrow', but also warned that even if the US won the challenge, there was a risk of consumer backlash, which would undermine the Commission's efforts to build public confidence in GM foods. Some US officials have also expressed doubt that a ruling against the moratorium would result in a change in EU policy.

Traceability and Labelling Rules a Step Closer to Finalisation

Another point of contention between the EU and US are the still pending labelling and traceability regulations for genetically modified organisms. The European Councils of Agriculture and Environment Ministers, meeting on 28 November and 9 December respectively, reached political agreement on the European Commission's proposed regulations, despite objections from Luxembourg, the UK, Austria and the Netherlands.

Specifically, ministers agreed on a 0.5 percent threshold for the 'adventitious' presence of GMOs that are unauthorised but have nevertheless been assessed as risk-free. The European Commission had proposed a threshold of one percent, which was amended to 0.5 percent by the European Parliament during the regulations' first reading in July 2002. In addition, ministers agreed on a minimum threshold of 0.9 percent below which GMO presence in processed products would be exempted from labelling requirements. The US and other biotechnology exporters regard these limits as scientifically unjustifiable and unnecessarily trade-restrictive.

Once the text has been finalised, a Common Position will be adopted at the forthcoming Council sessions. That position will then be forwarded to the European Parliament for the second reading. The regulations are expected to be finalised this year. Whether that will lead to a lifting of the *de facto* moratorium remains uncertain since some EU member states, most recently Denmark at the November meeting of the Environment Council, have hinted that they would await the finalisation of (far-from-agreed) liability regulations before agreeing to restart approvals.

Protecting Traditional Knowledge: Approaches and Proposals

By Graham Dutfield

In 2000, member states of the World Intellectual Property Organization agreed to set up an Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC). Perhaps the most important issue that has been discussed at the Committee's four meetings so far is the legal protection of traditional knowledge (TK).

Concerned IGC delegates have sought to come up with effective defensive and positive protection measures. 'Defensive protection' refers to provisions adopted in the law or by the regulatory authorities to prevent intellectual property right (IPR) claims to knowledge, a cultural expression or a product being granted to unauthorised persons or organisations. 'Positive protection' refers to the acquisition by the TK holders themselves of an IPR such as a patent or an alternative right provided in a *sui generis* system. Effective positive protection is likely to entail a completely new system whose development will require very active and committed participation of many governments. This is one reason why IGC discussions on positive protection have not progressed very far despite a considerable amount of interest. This article seeks to respond to this interest by describing some positive protection measures that have been proposed.

Basic Approaches

Entitlement theory and experience to date both suggest that existing legal systems for protecting knowledge and intellectual works tend to operate as either property regimes, liability regimes, or as combined systems containing elements of both. What is the difference between property and liability regimes? A property regime vests exclusive rights in owners, of which the rights to authorise and determine conditions for access to the property in question are the most fundamental. If these rights are to mean anything, holders must of course be able to enforce them.

A liability regime is a 'use now pay later' system according to which use is allowed without the authorisation of the right holders. But it is not free access. Ex-post compensation is still required. A *sui generis* system based on such a principle has certain advantages in countries where much of the traditional knowledge is already in wide circulation but may still be subject to the claims of the original holders. Merely asserting a property right over knowledge is hardly going to prevent abuses when so much of it has fallen into the public domain and can no longer be controlled by the original TK holders. A pragmatic response is to allow the use of such knowledge but to require that its original producers or providers be compensated.

There are different ways to handle the compensation payments. The government could determine the rights by law. Alternatively, a private collective management institution could be established to monitor use of traditional knowledge, issue licenses to users, and distribute fees to right holders in proportion to the extent to which their knowledge is used by others. They could also collect and distribute royalties where commercial applications are developed by users and the licenses require such benefits to go

back to the holders. Or, in jurisdictions in which TK holders are prepared to place their trust in a state or government-created competent authority to perform the same function, a public institution could be created instead.

Some people will oppose a liability regime on the grounds that we should not have to pay for public domain knowledge. There again, the 'public domain' is an alien concept for many indigenous groups. Just because an ethnobiologist described a community's use of a medicinal plant in an academic journal without asking permission, this does not mean that the community has abandoned its property rights over that knowledge or its responsibility to ensure that the knowledge is used in a culturally appropriate manner. Seen this way, a liability regime should not be considered an alternative to a property regime but as a means to ensure that TK holders and communities can exercise their property rights more effectively.

Let us now consider some of the more interesting proposals developed so far.

Database Rights

These days, there is tremendous interest in documenting traditional knowledge and placing it in databases. Nuno Carvalho of WIPO has suggested that such databases be protected under a special database right.¹ This would be necessary, Carvalho points out, because traditional communities and TK holders are rarely the ones responsible for compiling or holding the databases. Moreover, one presumes they wish to control access to and use of the information held in the databases rather than the way this information is presented or expressed. For these reasons, copyright law does not provide an adequate solution. As Carvalho explains: "It is necessary to establish a mechanism of industrial property protection that ensures the exclusivity as to the *use* of the contents of the databases, rather than to their reproduction (copyright)."

The basis for his proposal may be found in Article 39.3 of the WTO's Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPs), which deals with test or other data *produced with considerable effort* that must be submitted to government authorities as a condition of approving the marketing of pharmaceutical or agrochemical products. The Article requires governments to protect such data against unfair commercial use. It also requires them to protect data against disclosure except where necessary to protect the public. This allows for the possibility that certain information will have to be protected against unfair commercial use even when that information has been disclosed to the public.

To Carvalho, such additional protection could be extended to traditional knowledge in the form of a legal framework for a TK database system. The system would retain the following three features derived from Article 39.3 of TRIPs: the establishment of rights in data, the enforceability of rights in the data against their use by unauthorised third parties, and the absence of a predetermined protection term.

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Even if an ethnobiologist once described a community's use of a medicinal plant in an academic journal without asking permission, this does not mean that the community has abandoned its property rights over that knowledge.

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Carvalho suggests that such databases be registered with national patent offices and that to avoid the appropriation of public domain knowledge, enforcement rights be confined to knowledge that complies with a certain definition of novelty, which he calls 'commercial novelty'. In other words, knowledge disclosed in the past could be treated as 'novel' if the innovation based upon it has not yet reached the market.

Global Biocollecting Society

Peter Drahos of the Australian National University has suggested the creation of a Global Biocollecting Society (GBS). This property rights-based institution would reduce transactions costs while improving the international enforcement of rights over biodiversity-related TK. It would also generate trust in the market between holders and commercial users of TK.

The GBS would be a private collective management organisation of the kind that is common in the area of copyright and related rights. But, while the latter operate at the national level, the GBS would be an international institution. Another key difference is that its mandate would be to implement the objectives of the Convention on Biological Diversity (CBD), particularly those relating to TK. The GBS would be a repository of community knowledge registers voluntarily submitted by member groups and communities. While membership would be open to traditional groups, as well as companies anywhere in the world, the registers would be confidential except for identities of the groups or communities submitting them. A submission would trigger a dialogue between the community involved and a company interested in gaining access to information in the register in question. The result would be an arrangement to access traditional knowledge in exchange for certain benefits.

To improve the chances for successful transactions of benefit to communities, the GBS could provide a range of services in addition to serving as a repository of TK registers. It could, for example, assist in contractual negotiations and maintain a register of independent legal advisors willing to assist traditional communities. It could monitor the commercial use of TK including by checking patent applications. The GBS could also have an impartial and independent dispute settlement function. Its recommendations would not be legally binding but there would still be incentives to adhere to them. For example, failure to do so could result in expulsion from the GBS, in which case the excluded party, if a company, might face negative publicity that would be well worth avoiding.

Compensatory Liability Regime

The compensatory liability regime (CLR) idea proposed by Professor Jerome Reichman of Duke University seeks to protect certain TK that may be characterised as know-how, that is, knowledge that has practical applications but is insufficiently inventive to be patentable.

For such knowledge, a property regime is considered likely to afford excessively strong protection in the sense that it will create barriers for follow-on innovators. Such a regime will also intrude on the public domain. Reverse engineering ought to be permitted, but not improper means of discovering the know-how such as bribery or industrial espionage. However, know-how holders face

the problem of shortening lead time as reverse engineering becomes ever-more sophisticated.

So what is to be done? To strike the right balance between the reasonable interests of creators of sub-patentable innovations and follow-on innovators, a liability regime is needed to ensure that – for a limited period of time – users compensate the holders of the know-how they wish to acquire. Such a regime would apply to know-how for which lead times are especially short and which do not therefore lend themselves to trade secret protection. Compensation would not be paid directly but through a collecting society. The CLR would require know-how to be registered and in so doing would provide short-term legal protection during which all uses by second comers should be compensated. Royalty rates would be low and could be based on standard form agreements.

Strategic Considerations

The problem with having a national TK protection system in a world where few such systems exist is that no matter how effective it may be at the domestic level, it would have no extra-territorial effect. Consequently, TK right holders would not be able to secure similar protection abroad, and exploitative behaviour in other countries would go on as before.

There may be a way out of this problem. If several concerned countries decided to act strategically as a group, some interesting possibilities could emerge. Members of such a group could agree upon harmonised standards and then apply the reciprocity principle so that protection of TK would only be extended to nationals of other members. Of course, this should not be an exclusive club; other interested countries should be able to join subject to enactment of similar legislation.

An April 2002 International Seminar on Traditional Knowledge organised by the government of India in co-operation with UNCTAD implicitly addressed this very issue. At the Seminar, in which representatives from Brazil, Cambodia, Chile, China, Colombia, Cuba, Egypt, Kenya, Peru, Philippines, Sri Lanka, Thailand, Venezuela and India participated, a communiqué was issued which noted that although national *sui generis* systems provided "the means for protection and growth of TK within national jurisdictions", these were inadequate to fully protect and preserve traditional knowledge. But, as the participants went on to explain, the ability of patent offices in a national jurisdiction to prevent bio-piracy, as well as to install informed consent mechanisms to ensure reward to TK holders, "does not *ipso facto* lead to similar action on the patent application in other countries". An international framework for protecting TK would therefore be necessary.

The following components of a framework for international recognition of various *sui generis* systems, customary law and others for protection of TK were suggested:

- local protection to the rights of TK holders through national level *sui generis* regimes including customary laws, as well as others, and its effective enforcement *inter alia* through positive mutual reinforcement between protection systems for TK
- protection of traditional knowledge through registers of TK databases in order to avoid misappropriation;
- a procedure whereby the use of TK from one country is allowed, particularly for seeking IPR protection or commercialisation, only

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Credit for Autonomous Services Liberalisation: Benefits and Pitfalls for Developing Countries

By Elisabeth Tuerk and Robert Speed

At a 13 January 2003 informal meeting of the WTO Council for Trade in Services (CTS), Members again addressed the issue of credit for autonomous liberalisation (AL). While delegations failed to reach an agreement on all of the outstanding points, differences appear to be narrowing.

Credit for AL is an issue of crucial importance for developing countries. As the business end of market access negotiations approaches, it is hoped the 'AL-credit modalities' will offset the loss of negotiating clout some developing countries experience as a result of liberalisation undertaken autonomously. As Members move towards settling this long-outstanding issue, it is timely to consider the challenges this issue presents and its potential benefits and pitfalls for developing countries.

Credit for AL – Importance to Developing Countries

In economic terms, credit for AL is recognition of the need to 'credit' a country for the benefits which its autonomous liberalisation has brought about for other countries' services exporters. In practice, where liberalisation has occurred in developing countries, the winners in terms of market access have been northern multinationals and subsequently northern economies. Conversely, developing countries have generally been unable to benefit from changes to market access regimes in the North. With most of the benefit from AL accruing to the North, the issue of credit for AL thus remains a matter of utmost significance for developing countries.

In developing countries, liberalisation, especially in the services area, has often occurred in the context of policy reforms advanced by the International Monetary Fund (IMF) and other international financial institutions, notably via structural adjustment programmes and, more recently, poverty reduction strategies. Thus, in many cases, so-called autonomous liberalisation measures are far from being undertaken on a truly autonomous basis. Though many of these liberalisation policies parallel those advanced through the GATS, many developing countries have not yet formalised these reforms through market access or national treatment commitments. Therefore, while their markets are effectively open, their commitments under the GATS often remain limited.

This gap between a Member's market access commitments and how open its domestic market really is can weaken the country's bargaining position when negotiating further commitments. In a bilateral negotiating situation where one country requests opening of an otherwise closed market (that is, where it is requesting real changes in the domestic policy environment) the *demandeur* might be willing to offer significant market access in return. This is less likely to occur in a situation where the negotiating partner's market is already effectively open, and the only change will be to make access legally binding under GATS. Many developing countries, having unilaterally opened their services markets, are likely to face such a situation during the current GATS negotiations.

Loss of bargaining power due to AL is particularly problematic for developing countries. Because of the nature of their economies (often small and by definition undeveloped) and limited capacity (in terms of human, technical and institutional resources to devote to trade policy making), they often find themselves at a natural disadvantage in trade negotiations. In the present negotiations on trade in services, this disadvantage is exacerbated by the limited benefit to developing countries from services trade liberalisation in other countries, combined with the difficulty that undeveloped industries in developing countries face in competing with foreign services suppliers. Further, the bilateral nature of the GATS market access phase will open the door to power politics and thereby further increase the existing power imbalances.

The concept of credit for AL arose to ensure that developing countries are not even further disadvantaged in services negotiations.

The GATS Recognises AL Credit

The GATS legal framework recognises this situation and requires that 'negotiating credit' be granted to counter the loss of bargaining power due to AL. Paragraph XIX.3 of the GATS provides that modalities for the treatment of AL shall be contained in the Negotiating Guidelines, which were to precede the bilateral request offer negotiations. In turn, paragraph 13

of the Negotiating Guidelines provides that 'account shall be taken and credit shall be given in the negotiations for autonomous liberalisation undertaken by Members' (S/L/93). The GATS legal framework thus recognises that modalities on credit for AL should be established *before* Members enter into the substantive bilateral market access negotiations.¹ However, despite modalities not being established, bilateral negotiations on market access continue to move forward.

Based on the legal framework and the negotiations surrounding the GATS, developing countries have had a number of expectations with respect to the issue of credit for AL. Amongst others, these include that AL-credit modalities would be established before entering into market access negotiations; that developing countries would be the sole beneficiaries of such credit; and that credit (an issue linked to, but separate from, negotiating market access commitments) would be granted without binding the AL in question. To date none of these expectations have been realised.

Difficulties in the Process towards Adopting Credit Modalities

Granting credit for AL raises many complicated technical issues, and this has been a factor in the delays in developing the modalities. Functional modalities must determine, amongst other things:

- the different types of AL measures eligible for credit;
- whether credit could be given without binding the AL measures and whether binding an AL measure should have any impact on the amount of credit granted;
- how to measure the value of the autonomous liberalisation undertaken;
- the nature of the credit given; and
- how disputes arising from in application of the credit mechanism should be solved.

Yet technical complexity has not been the only stumbling block. Rather, it appears that some countries have tried to turn discussions

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on credit modalities to their advantage and away from the modalities' original purpose.

Turning the Table: Granting Credit to Industrialised Countries

In the May 2001 services session, industrialised countries such as the EU argued that they should also receive credit for AL (S/CSS/W/133) and that position subsequently found its way into the first draft modalities, prepared by the Council for Trade in Services (CTS) Chairman for the spring 2002 services session (JOB(02)/35).² The current version of the text (JOB(02)/35/Rev.2) and the most recent drafting suggestions laid out in a 9 January 2003 informal note of the Chairman accommodate some of the concerns developing countries had put forward (S/SCC/W/130). However, the draft stops short of making it clear that *only* developing countries can be beneficiaries of credit for AL.³

A Developing-Country-Only Issue

Several arguments support the position that receiving negotiating credit is a purely developing country issue. Most importantly, these include:

- There is a fundamental difference between the nature of the AL undertaken by developing and industrialised countries. The decision to open markets in the North has been guided purely by considerations of the benefits for the domestic economies in the North. Further, AL in the North has not been in services in which developing countries are likely to make requests, and the liberalisation that has been undertaken to date offers few opportunities for developing countries.
- Conversely, AL in developing countries has been predominately undertaken at the insistence of the IMF, the World Bank or other regional development banks, as a pre-condition to financial assistance. This liberalisation is thus, in fact, far from 'autonomous'. Further, this liberalisation has been undertaken on the understanding (based on the GATS, Article XIX.3) that credit would be granted for any such liberalisation.⁴
- As already noted, developing countries already enter services negotiations in a weak bargaining position compared to northern partners. The concept of credit for AL arose to ensure that they are not even further disadvantaged.

The status of autonomous liberalisation as a developing-country-only issue was already evident during the Uruguay Round. Similarly, the developing country aspect of the credit concept is evident when looking at the legal provisions in the GATS Agreement, where the text in Article XIX:3 on credit for AL mirrors that used for the LDC modalities and is located amongst other provisions addressing developing country issues.⁵

The same can be said of the Negotiating Guidelines. It was developing countries that pushed for the inclusion of a separate paragraph on 'credit' (S/CSS/W/7 and S/CSS/W/13) and paragraph 13 (which deals with credit for AL) is grouped with other provisions relating to developing country issues, namely assessment and technical support (S/L/93).

Discussions on credit for AL in the context of trade in goods also emphasise the developing country aspect of this issue. For example, the 1991 Chairman's Guidelines on recognition for AL measures clearly state that the guidelines aim at the liberalisation undertaken by developing countries (MTN.GNG/MA/W/13).⁶

It is thus remarkable that the current version of the draft modalities does not recognise credit as a developing-country-only issue.

Was It Worth It?

Parties on all sides have expended considerable time and effort in developing the AL-credit modalities. Developing countries have worked hard to present well-founded arguments in support of their position and to strengthen their efforts through forming alliances. While far from perfect, the current draft modalities offer a series of positive elements. The real value of this work however, remains to be seen, and will depend on two things in particular: the final wording of the modalities and the extent to which the modalities are applied in practice.

One risk of accepting a deal is that industrialised countries may use it as leverage to push for *quid pro quo* concessions in market access.

Important outstanding issues in the negotiations include the final wording, notably the relationship of the credit modalities to developing countries and the way special and differential treatment provisions are phrased (including for least developed countries), the situation of recently acceded Members (JOB(02)/75)⁷ and various issues in the draft Chairman's statement (which will accompany the adoption of the modalities).

In addition, there is a risk of history repeating itself with regard to the application of the guidelines. During the Uruguay Round, developing countries put much effort in developing guidelines on recognition for AL measures, which were never applied in practice. In the Doha Round, negotiators need to be aware of the danger of investing significant negotiating capital in developing modalities or multilateral benchmarks that subsequently are not used.

Risks and Challenges to Developing Countries

Developing countries will face pressure to accept modalities which do not deliver benefits (either in whole or in part) to them. Agreeing upon modalities may yet present additional, practical challenges for developing countries.

One risk of accepting a deal is that industrialised countries may use it as leverage to push for greater market access. They may argue that having met (at least in theory) developing country concerns on issues like credit for AL (and on other similar issues like capacity-building), there should be no further reason for developing countries to hold back on negotiating further liberalisation and that the North is entitled to a *quid pro quo* in other services negotiating areas.

Another risk is that the credit modalities be primarily used as an argument for deepening commitments. For developing countries however, it is of utmost importance to use the credit modalities as a defensive tool, supporting already existing developmental provisions in the GATS. This may assist them to withstand pressure for liberalisation commitments, which their nascent economic, regulatory and institutional frameworks could not support. While many developing delegations are considering such a defensive use of the credit modalities, proponents of deep liberalisation have suggested this would result in poor negotiating outcomes.

Agreeing to modalities that do not offer real and tangible benefits to developing countries may have many unintended negative consequences. Thus, before accepting any deal, developing countries may wish to take a deep breath and carefully evaluate all

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The Rise and Felling of Peruvian Mahogany

By Margaret Stern

Within one week in November 2002, two distinct and important elections for mahogany were held – one international, the other regional – the results of which suggest strongly contradictory implications for mahogany logging in Peru.

On November 13, in Santiago, Chile, the UN Convention on International Trade in Endangered Species, known as CITES, voted to endorse stricter controls on mahogany trade by listing big-leaf mahogany (*Swietenia macrophylla*) in Appendix II. An Appendix II listing acknowledges that the species is potentially threatened by trade, which must be strictly regulated through the use of export permits. Its endorsement requires a two-thirds majority of the countries voting at CITES: the vote passed 68-30.

The Appendix II vote was hailed as a victory for mahogany by international environmental organisations after ten years of frustrated efforts to obtain the listing. The United States, the world's largest importer of mahogany, voted in favour of the listing, as did the European Union, Malaysia and Indonesia (where mahogany plantations outside the species' native range are not affected by the listing), and Central American countries where populations of big-leaf mahogany are declining or already commercially extinct. Commercial extinction means that any remaining populations of the species are either too small or too remote, with limited access, to make their harvest and transport economically viable.

It is strongly hoped that the export controls required by CITES will prevent consumer countries from accepting shipments of illegally harvested timber while encouraging producer countries to employ sound forest management, discourage illegal logging, and enforce their own national forestry laws.

Brazil, which has the largest natural stocks of mahogany in the world, voted against the listing, as did Bolivia, a former major producer whose supply has dwindled to the point of commercial extinction.

Brazil argued that its own conservation policies and forestry control mechanisms were strong enough to protect mahogany while ensuring the sustainable use of forest resources, to the benefit of local communities in particular (Brazil imposed export quotas followed by a total ban on mahogany trade in October 2001, and impounded much illegally harvested mahogany timber). Further trade hindrances such as those implied by the Appendix II listing were seen as unnecessary and intrusive.

Although initially supportive of the listing proposal, when the vote was called, Peru simply recorded its opposition without further explanation. While opposition in itself does not exempt a CITES Party from complying with treaty obligations, Peru could obtain such an exemption through lodging a formal reservation before 14 February 2003, i.e. within 90 days from the day the decision was adopted.

The Situation of Mahogany in Peru is Critical

Largely due to Brazil's strengthened control measures, Peru overtook Brazil as the world's number one exporter of big-leaf mahogany in 2002. However, the Peruvian National Institute for Natural Resources (INRENA) estimates that up to 90 percent of the country's mahogany is illegally logged. National parks and other off-limit areas are frequently invaded, and legal harvest parameters and volumes are ignored. In Peru, it is well-known that

illegal mahogany is readily laundered under various strategies and mainstreamed at numerous points in its chain of custody between remote Amazonian felling sites and ports of export on the other side of the Andes. A formal reservation on the CITES listing would make illegally-harvested timber exports even harder to control.

The Peruvian government has adopted a new forestry law and will require concession-holders to implement a management plan for each year's timber harvest. INRENA urgently needs a credible control system and financial assistance to pay for infrastructure, vehicles and personnel to enforce that law in the field near the source of the valuable timber, particularly within the Madre de Dios region – a large, sparsely-populated Amazonian state where most of the remaining reserves of mahogany in Peru are located.

On November 17, regional elections were held throughout Peru. The overwhelming winner of the Madre de Dios regional presidency was Rafael Ríos López, who previously came into public view as the leader of the June 2002 loggers' strike in the state's capital Puerto Maldonado. The strike began peacefully but ended violently, with one dead and various government offices looted and arsoned. Political opponents, as well as local conservation and indigenous organisations, were threatened. A regional government led by Ríos López does not bode well for the implementation of forest management plans and is likely to open the last stands of mahogany in Madre de Dios to unrestricted, unmanaged and predatory extraction.

While conservation organisations hope that the Appendix II listing will assist Peru and other producer countries to combat illegal and informal harvest and trade, the listing alone will not stem the flow of illegal mahogany. Local politics have an overwhelming impact on conservation efforts. National laws must be enforced and alternative legal income-generating activities must be provided to local people. Even in countries such as Peru, Brazil and Bolivia that had previously listed their mahogany populations in the less stringent CITES Appendix III, the heightened listing will be perceived by loggers as yet another legal barrier to their livelihoods, imposed upon them by external parties.

For Peruvian mahogany in natural forest stands the CITES action is probably too late, as the measure will not go into effect until early 2004 when most commercial populations will already have been decimated. Certified mahogany from Central America may find an international niche market but in a short time most mahogany on the world market is likely to be supplied by timber grown in plantations or agroforestry plots.

International regulatory treaties and co-operative trade controls may, however, play an important role in the implementation of effective forest management that will prevent other forest species from reaching commercial extinction. There are many other strong, durable and beautiful timber species with commercial potential in the Amazon that remain little known in international markets. The conservation organisations and governments that support CITES and other regulatory mechanisms would do well to also encourage intensive silvicultural practices that help offset the decimation of valuable timber species in natural forests.

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possible consequences and in particular the potential pitfalls and challenges it may bring about. Having come a long way, they should persist in seeking modalities that will give credit where credit is due.

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ENDNOTES

¹ Paragraph 13 of the Negotiating Guidelines requires that: 'Members shall endeavor to develop such criteria prior to the start of negotiation of specific commitments' (S/L/93).

² Two elements of the draft modalities are particularly relevant: paragraph 2 on terminology specifies that 'that "[f]or the purpose of these modalities, Members seeking credit for an autonomous liberalisation measure undertaken since previous negotiations will be referred to as 'liberalising Members' and Members from whom the credit is being sought will be referred to as 'trading partners'." This suggests an application to *all* Members. Paragraph 14, under heading V 'Developing Countries' takes a similar line, stating that '[t]aking into account the particular interest of developing countries in seeking credit for autonomous liberalisation, special consideration shall be given to requests from individual developing country Members, in particular least-developed country Members.'

³ In paragraph 13 the current draft recognises that "these modalities shall be used as a means of promoting the economic growth and development of developing countries and their increasing participation in trade in services." Similarly, the most recent proposal for least-developed country modalities suggests in paragraph 13 that "LDCs shall not be requested to bind their autonomous liberalisation for the purpose of receiving credit" (JOB(02)/205).

⁴ For a discussion of the liberalisation-inducing effects of such an *a priori* credit rule see Mattoo Aaditya and Olarreaga Marcelo, *Should Credit be Given for Autonomous Liberalisation in Multilateral Trade Negotiations?* Development Research Group (DECRG) of the World Bank.

⁵ Paragraph 2 of Article XIX for example, relates to developing country issues, in particular the flexibility developing country Members shall be granted as a means to implement the developmental provisions enshrined in Article IV of the GATS.

⁶ See also Background Note by the Secretariat on Coherence in Global Economic Policy-Making: WTO Cooperation with the IMF and the World Bank: Autonomous Trade Liberalisation (WT/TF/COH/S/1) referring to the December 1991 guidelines. Note that the Contracting Parties developed these guidelines in the 'Negotiating Group on Market Access: Uruguay Round Market Access Negotiations and Developing Countries', a body which specifically aimed at meeting developing countries' needs.

⁷ By late spring 2001, these two issues had formed part of a larger package of outstanding issues, which also included the possibility of obtaining credits through concessions on trade in goods; and the relationship between autonomous liberalisation and bindings.

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after the competent national authority of the country of origin gives a certificate that source of origin is disclosed and prior informed consent, including acceptance of benefit sharing conditions, obtained; and

- an internationally agreed instrument that recognises such national level protection.

Unless flexible enough to encompass the diversity of customary laws and practices relating to access to and use of TK, any new international norms will fail.

This seems like a good way to move forward as the proposed framework would not only prevent misappropriation but also ensure that national level benefit sharing mechanisms and laws are respected worldwide. Concerned countries should not wait for solutions to emerge from Geneva. Rather they should also collaborate among themselves.

Harmonising national TK protection standards can only go so far. Any new international norms will have to be flexible enough to allow for the diversity of customary laws and practices relating to access

to and use of TK. If not, they will fail. Close collaboration with TK holders and their communities is essential in the design of the *sui generis* system. This point cannot be emphasised strongly enough.

But even this may not be enough. Groups and individuals empowered with rights to control access to their lands and communities have a better chance of preventing misappropriation of their knowledge and negotiating favourable bioprospecting arrangements. But indigenous groups and TK holders frequently suffer from extreme poverty, ill health, unemployment, lack of access to land and essential resources, and human rights violations. In the absence of measures to protect the basic needs and rights of groups facing such problems, developing systems to protect their knowledge, important as this is, may be a distraction from far more necessary tasks.

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ENDNOTES

¹ See Carvalho, N.P. (1999), *From the Shaman's Hut to the Patent Office: How long and winding is the road?* Review of the Brazilian Association of Intellectual Property Vols. 40/31.

² See Drahos, P. (2000), *Indigenous Knowledge, Intellectual Property and Biopiracy: Is a global bio-collecting society the answer?*, European Intellectual Property Review No. 6.

³ See Reichman, J.H. (2002), *A Compensatory Liability Regime for Applications of Traditional Knowledge*. Presented to the Cardozo Symposium on the Legal Protection of Traditional Knowledge, New York, February 23-24.

IPRsonline.org

ICTSD has recently updated its website dedicated to intellectual property rights and sustainable development. News, negotiating proposals and other documents, as well as links and an up-to-date calendar of events can be found at <http://www.ictsd.org/iprsonline/>

Differences Persist over Goal of Environmental Negotiations

On 11 February – in advance of the special session of the Committee on Trade and Environment over the following two days – the International Centre for Trade and Sustainable Development hosted an informal dialogue on the environment-related negotiations currently underway at the WTO. Four discussants from the delegations of Argentina, Canada, Malaysia and Switzerland briefed participants – many from the sustainable development community in and around Geneva – on the state-of-play and prospects for the WTO negotiations, which have got off to a slow start.

Paragraph 31(i) of the Doha Declaration mandates negotiations on the relationship between existing WTO rules and specific trade obligations set out in multilateral environmental agreements (MEAs), but specifies that the negotiations “shall be limited in scope to the applicability of such existing WTO rules as among parties to the MEA in question” and “shall not prejudice the WTO rights of any Member that is not a party to the MEA in question.”

The CTE spent the first year of the negotiations seeking a common negotiating approach. On 12 November 2002, Members decided to start with an examination of specific trade obligations in MEAs to determine whether any conflicts exist (Bridges Year 6 No.8, page 16).

Dialogue participants generally agreed that MEAs and WTO rules were mutually supportive, but differences still persist on the desired outcome of the WTO negotiations. One discussant spoke in favour of an interpretative decision based on the principles of no hierarchy, mutual supportiveness and deference. Another participant preferred an approach that would safeguard WTO disciplines so as to avoid creating room for distortive trade measures, adding that Members should not be negotiating around potential conflicts but should rather stick to current legal certainties. Some discussion was raised about the possibility of conflict between the Biosafety Protocol of the Convention on Biodiversity (dealing with transboundary movement of living modified organisms) and WTO provisions, with one participant saying that the WTO's Agreement on Technical Barriers to Trade would be best equipped to deal with such a challenge.

With regard to information exchange and observer status (Doha Declaration para. 31(ii)), participants discussed the potential for circumventing the ongoing political impasse on granting observer status in WTO negotiating bodies. There was general agreement that it was important for this issue to be resolved, both from a procedural and a ‘perception’ standpoint, as the impasse was putting the organisation in a poor light. One suggestion raised was inviting MEA secretariats as *ad hoc* ‘guests’ for informal question-answer sessions after each CTE meeting. Another participant emphasised the usefulness of establishing an MEA-WTO co-operation mechanism to resolve potential conflicts. There was some conjecture that progress could be made on this item at the 12-13 February CTE special session.

Regarding para. 31(iii) on liberalisation of environmental goods and services, participants addressed the potential for looking at environmental goods liberalisation from a technology transfer perspective. This was seen as useful, particularly as the environmental goods currently being defined in both the CTE special session and the Negotiating Group on Non-agricultural Market Access are primarily of an industrial, end-of-pipe nature, and liberalisation could help developing countries gain access to environmentally friendly technologies. There was little enthusiasm for including so-called process and production methods (PPMs) criteria to define environmental goods, although one discussant raised the idea of including products with ‘environmentally friendly physical characteristics’, such as bicycles, and solar energy cookers. Speakers indicated that there was little room for discussion on environmental services at this stage, as the services negotiations – of which those related to the environment are an integral part – had moved to the bilateral level (see page 10).

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MEETINGS OF WTO BODIES

Feb. 18-21	Council for TRIPs; regular session followed by a special session* on the multilateral register of geographical indications for wines and spirits
Feb. 19	Dispute Settlement Body
Feb. 19-21	Negotiating Group on Market Access
Feb. 20-21	Working Group on the Interaction between Trade and Competition Policy
Feb. 24-28	Committee on Agriculture, special session*
Feb. 28 to March 6	Council for Trade in Services, regular session followed by a special session*
March 3	Working Group on Trade and Technology Transfer
March 4-5	Trade Negotiations Committee
March 7-10	Committee on Trade and Development, including a session on small economies
March 10-11	Dispute Settlement Body, special session*
March 12-14	Council for Trade in Goods, incl. trade facilitation
March 18	Dispute Settlement Body
March 24-27	Negotiating Group on Rules
March 24-31	Committee on Agriculture, special session*
March 28	Working Group on Trade, Debt and Finance
March 31 & April 1	Working Group on the Interaction between Trade and Competition Policy

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

OTHER MEETINGS

Feb. 19-21 Paris	Twentieth Session of the Intergovernmental Panel on Climate Change Contact: IPCC Secretariat, tel: (41-22) 730-8208, e-mail: ipcc_sec@gateway.wmo.ch
March 10-14 Montreal	Eighth Meeting of the Scientific and Technological Subsidiary Body of the Biodiversity Convention Contact: CBD Secretariat, tel: (1-514) 288-2220, e-mail: secretariat@biodiv.org
March 17-18 Montreal	Greening the FTAA Contact: Environmental Law McGill, e-mail: elmftaa@hotmail.com
March 27-28 Mexico City	UNEP Capacity-building Meeting on the Environment, Trade and Sustainable Development Contact: UNEP-ETB, tel: (41-22) 917-8243, e-mail: etb@unep.ch

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