

### Special and Differential Treatment: Putting Development Back in the Doha Agenda

One after the other key deadlines in the multilateral trade negotiations launched in Doha in November 2001 have fallen on the wayside. Talks on improving special and differential treatment for developing countries ground to a halt in February, as did efforts to ensure that global trade rules do not hinder developing countries' access to affordable medicines. All but a handful of the more than 90 implementation demands – aimed at redressing the imbalances inherent in the post-Uruguay Round trade regime – remain at an impasse.

In March, WTO Members failed to agree on the scope of agricultural negotiations and are expected to only carry out some technical work while waiting for further guidance from the WTO's next Ministerial Conference in September 2003.

The spill-over effect of these failures to fulfil the mandates set by ministers in Doha has slowed momentum in negotiations on further liberalisation of trade in services and market access for industrial goods (see page 7). Few now believe that the 31 May deadline for concluding an overhaul of the WTO's dispute settlement rules can be met.

Despite this bleak picture, WTO Members reaffirmed their commitment to conclude the Doha Round on schedule at the April meeting of the Trade Negotiating Committee (TNC). However, a major breakthrough seems necessary to put the negotiations on track for completion by 31 January 2004. Meaningful progress on special and differential treatment (S&DT) could make a difference through restoring some of developing countries' flagging confidence in the Doha Round's ability to deliver. This issue of Bridges presents two views on what a revamped S&DT regime could look like (pages 3 and 5).

At the WTO, the first timid indication of a possible way forward in the stalled S&DT process came on 7 April, when General Council Chair Carlos Pérez del Castillo circulated a (still restricted) 'approach paper' based on two premises. The first is that all proposals are still on the table, and the second that the best way to proceed is to informally categorise (but not attempt to prioritise) the 80-plus proposals made to date. The General Council is scheduled to meet on 15-16 May 2003 to discuss the matter further.

#### Potential Categorisation of S&DT Proposals

The first category of the approach paper groups proposals with the best chance of success. These would include the 12 largely procedural changes identified as 'ripe for harvest' when the negotiations collapsed in

February (Bridges Year 7 No.1, page 6). Added to these would be others identified by the Chair as having potential for movement, as well as some identified as having 'real developmental value'.

The second category encompasses proposals that overlap with other negotiating areas and/or are already under consideration elsewhere. These proposals would be sent to the relevant bodies, which would be instructed to address them 'as a priority'. Proposals in this category relate to such areas as dispute settlement, subsidies, anti-dumping and agriculture, as well as to investment-related measures, technical barriers to trade, and sanitary and phytosanitary measures.

The third and final group comprises those proposals that, as they currently stand, would be difficult to move forward.

The first basket is essentially intended as a 'down-payment' for developing countries to accept moving ahead with the other two categories. While most developing countries feel strongly that any down-payment must include meaningful proposals and not just procedural items, several industrialised have reportedly indicated that they have already been as flexible as possible. Some, including Canada and Australia, are hesitant to proceed without looking at the controversial cross-cutting and systemic issues first, which include differentiating between developing countries, with some gaining more flexibilities than others (see article on page 5 for an alternative way to deal with differentiation).

The latter two categories pose a serious concern to developing countries, most of which have long opposed the second category in particular. All along the talks, they have been unwilling to relinquish the consideration of key issue areas to other bodies than the Committee on Trade and Development or the General

Council. The principal reason for this reluctance is the post-Doha experience with implementation proposals, the majority of which have ended in an impasse in the regular WTO bodies that were to address them 'as a priority'. There is concern that S&DT issues would follow a similar path, and that the Doha mandate that "all special and differential treatment provisions shall be reviewed with a view to strengthening them and making them more precise, effective and operational" will be rendered essentially worthless.

On the other hand, special and differential treatment proposals considered in negotiation bodies run the risk of simply becoming part of the trade-offs involved in the 'single

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undertaking'. It was precisely to prevent such an outcome that developing countries fought hard in Doha to secure a separate track for the S&DT review, which was originally scheduled to conclude in July 2002 – well clear of the March 2003 deadline for agreeing negotiating modalities in agriculture and services. In response to these concerns, Ambassador Pérez de Castillo has reportedly made attempts to ensure that the special sessions of the Committee on Trade and Development will retain oversight on all three baskets.

While many developing countries remain apprehensive about the impacts of categorisation, the three-basket approach suits industrialised countries quite well. From the very beginning of the S&DT talks, they have insisted that proposals requiring changes that would alter the 'balance of Members' rights and obligations' under existing WTO Agreements could not be achieved through an independent review of special and differential treatment provisions in the Committee on Trade and Development.

Should the approach suggested by Ambassador Pérez de Castillo be accepted by all Members, the key question for all sides in the debate clearly becomes which proposals would fall into which categories. As a starting point for an answer, the Secretariat is expected to circulate a draft categorisation of the proposals shortly.

### **S&DT, Generic Drugs Could Become Priorities for Cancun**

In the absence of any signs of flexibility in the all-important agricultural negotiations, there is some hope that two development issues fallen on the wayside may get a second wind in the run-up to the Cancun Ministerial: access to affordable medicines, and special and differential treatment. Both debates have faded from public view since last February, with no more meetings held on either topic. Recent announcements by EU and US officials seem to indicate that at least some political will exists to readdress these questions.

Speaking after the April TNC meeting, EU Director-General for Trade Peter Carl said the Cancun Ministerial Conference should agree to a significant number of "economically important S&DT and implementation issues" but did not go into any detail on the proposals that the EU would be willing to accept. However, he made it clear that the EU – like many other industrialised countries – favours making further outstanding issues part of the 'mainstream' of the negotiations. The EU may elaborate further on this concept at the General Council's mid-May meeting (no special sessions of the Committee on Trade and Development are currently scheduled).

With regard to access to medicines, US Deputy Trade Representative Mr Allgeier told the TNC that the US wanted to find a solution to the issue before Cancun. Last December, the US was the only WTO Member to reject a draft solution spelling out the conditions under which a country without domestic pharmaceutical manufacturing capacity could grant a compulsory license to a third party who would then export the production to the country issuing the license. Further efforts to make the draft solution acceptable also failed.

While some developing countries cautiously welcomed Mr Allgeier's statement, they nevertheless noted that the US had not showed any signs of accepting a solution that would limit neither the countries eligible for importing generic drugs nor the diseases that the solution would apply to (developing countries have thus far staunchly resisted restrictions on either one). Instead, US officials have emphasised rebuilding trust between pharmaceutical companies and developing country governments after the bitter debates in the Council for Trade-related Aspects of Intellectual Property rights (TRIPs) last fall. US pharmaceutical industry representatives' comments on this initiative vary. Some stress that they have been in constant touch with developing country governments throughout the debate and thus expect no breakthroughs. Others fear that the US Administration may be considering abandoning its so far unquestioning support to the powerful research-based pharmaceutical lobby.

The next TRIPs Council meeting takes place on 3-5 June 2003.



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# Special and Differential Treatment: Towards a New Bargain

By Bernard Hoekman, Constantine Michalopoulos and L. Alan Winters

The principle of ‘differential and more favorable treatment’ for developing countries is firmly embedded in the WTO. Generally captured in the term special and differential treatment (S&DT), the relevant provisions call for the granting of preferential access to markets for developing countries, exemptions (transitory and permanent) from certain rules, and development assistance.

The Doha Ministerial Declaration reaffirmed that ‘provisions for special and differential treatment are an integral part of the WTO agreements’. It called for a review of S&DT provisions with the objective of “strengthening them and making them more precise, effective and operational” (para. 44). Efforts in 2002 to agree on ways to strengthen S&DT provisions were not successful. Indeed, deep divisions were revealed between WTO Members on how to improve S&DT provisions (see related article on page 1, *ed.*).

A good case exists for S&DT, but to make it a more effective instrument it must be targeted more narrowly towards those that need it the most. One rationale for S&DT is essentially that very small and/or low income economies lack the institutional development or minimum scale to manage the full panoply of WTO rules or, at least, might find the returns to creating the institutions to apply them effectively far outweighed by the costs. Small and/or poor countries may also lack the resources to overcome natural obstacles to trade or to use policies that in principle would be the most efficient in addressing market failures, giving rise to a case for offering such countries preferential access to markets as well as financial and technical assistance.

In our view, efforts to enhance the development relevance of the WTO need to distinguish between ‘better than most-favoured-nation (MFN)’ treatment and the broader issue of ensuring that WTO rules and disciplines support development. We believe that the second dimension of the debate is by far more important and that this calls for a willingness to renegotiate certain existing rules and to accept that some agreements – in particular those requiring significant up-front investment and complementary, supporting actions to create or strengthen institutions – should not apply to the poorest countries.

This article proposes possible elements of a new ‘grand bargain’ on S&DT to focus on actions that will make a difference to poor countries and at the same time strengthen the trading system. We suggest that consideration be given to five types of action by developed countries, balanced by three major initiatives on the part of developing countries.

## 1 – Deepen trade preferences for the most disadvantaged countries

Developed countries should take unilateral action, before or upon the conclusion of the Doha talks, to extend duty- and quota-free market access for least developed countries (LDCs) and other small and poor countries that are not classified as LDCs. This would help target S&DT on those who need it most. Actions to simplify eligibility criteria, especially rules of origin, are a critical element of making preferences meaningful.

**A strong case can be made that significant MFN-based industrial and agricultural tariff reductions will have the greatest beneficial impact on development.**

Preferences are by definition discriminatory: to give some countries preferential access implies, and depends for its effects on, not giving such access to others. A major policy question that arises is which countries should be eligible for preferential market access. In practice there is a hierarchy of preferences, with the most preferred countries generally being members of reciprocal free trade agreements, followed by LDCs – which in principle often have free access to major markets – and other developing countries, which generally get preferences under Generalised Systems of Preferences (GSPs). In many jurisdictions, GSP status does not involve duty free treatment, instead being limited to a tariff reduction.

From a poverty reduction point of view – increasingly the one being taken at the global level in light of the Millennium Development Goals – a good case can be made that preferences should focus on the poor, wherever they are geographically located, and not on a limited set of countries. In absolute terms, most poor people live in countries that are not LDCs – e.g., China and India. Limiting preferences to the poorest countries – while appropriate in light of limited institutional and infrastructure weaknesses in these countries – ignores the majority of the poor in the world today. Given that deep trade preferences for large economies are not politically feasible without reciprocity, and because own liberalisation will benefit developing countries, action is required to liberalise trade on an MFN basis.

## 2 – Market access liberalisation on an MFN basis

A binding commitment by developed countries to abolish export subsidies, decouple agricultural support and significantly reduce MFN tariffs on labor-intensive products of export interest to developing countries should be an important element of a pro-development Doha outcome. Acceptance of ambitious benchmarks – e.g., to lower MFN tariffs on manufactures to no more than 5 percent in 2010, and to no more than 10 percent for agricultural products, and to abolish all tariffs on manufactures by 2015, the target date for the achievement of the Millennium Development Goals, would provide a strong signal of commitment to poverty alleviation by developed countries. A binding commitment by these countries to expand temporary access for developing country service providers by a specific amount – e.g., three percent of the workforce – and not to restrict cross-border trade in services would also bring substantial benefits.

MFN-based market access is not traditionally considered as an element of S&DT. However, a strong case can be made that this will have the greatest beneficial impact on development. One reason for this is that it involves an element of ‘rebalancing’ of the WTO as it implies that elements of ‘reverse S&DT’ – special opt-outs and exemptions that benefit interest groups in industrialised countries at the expense of developing countries – would be removed. Agricultural subsidy programmes, textile import quotas, tariff peaks and escalation that imply high rates of effective protection for developed country industries are examples. Such continued protection implies that products produced by poor people are subject to higher tariffs than products produced by the

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non-poor. Reversing this situation would not only be very beneficial to developing countries (and developed country consumers), but also help remove a major political bottleneck preventing further trade reforms in developing countries by providing a positive demonstration effect.

*3 – Differentiation in implementation of resource-intensive WTO rules*

S&DT involving derogations or exemptions from WTO rules should be considered for agreements and disciplines that are resource-intensive to implement. Here one size does not necessarily fit all – certain agreements may simply not be development priorities or they may require many other preconditions to be satisfied before implementation will be beneficial. These pre-conditions can be proxied by the attainment of a minimum level of per capita income, institutional capacity and economic scale. Some disciplines may not be appropriate for very small countries in that the regulatory institutions that are required may be unduly costly – i.e., countries may lack the scale needed for benefits to exceed implementation costs. Developing criteria to determine this for future agreements will be a necessary condition for the proposed approach to work.

*4 – Renegotiation of certain WTO disciplines*

Much of the S&DT debate in the WTO implicitly, if not explicitly, reflects a developing country perception that the rules in some WTO Agreements – notably, TRIPs, Agriculture, SPS and Customs Valuation – are not supportive of development. Rather than seek opt-outs under the guise of S&DT, a preferable approach in our view is to renegotiate these Agreements. For example, in agriculture, it may be useful *inter alia* to introduce a new special safeguard that protects poor farmers from import surges, as well as to ensure that developing countries have the freedom to pursue policies that support the rural poor. In TRIPs, the world community has an interest in ensuring that developing countries have the flexibility to provide their poor with access to drugs at affordable prices and that traditional knowledge is protected and properly remunerated.

*5 – More Aid for Trade*

Development assistance can play an important role in helping to build the institutional and trade capacity needed to benefit from better access to markets. While more funds are needed to address trade-related policy and public investment priorities, it is important to avoid a situation in which a desire by donor countries to see developing countries implement certain WTO agreements diverts assistance away from recipients' own priorities. For these reasons, we do not support suggestions to make technical assistance a mandatory requirement and to link implementation of WTO Agreements to the provision of such assistance. In our view the best approach is to embed the delivery of trade-related technical assistance in the national agenda and priority-setting processes that are used by governments and the donor community – e.g., the Poverty Reduction Strategy Paper (PRSP).

**The Quid Pro Quo**

Reciprocity is the engine of WTO negotiations. Reciprocity will be needed to move forward on S&DT. A major feature of the 1979 Enabling Clause is that it calls on industrialised countries not to seek reciprocal concessions from developing countries that are

'inconsistent with their individual development, financial and trade needs'. No one supports the making of inappropriate concessions, but the overuse of the 'nonreciprocity' clause has, in the past, excluded developing countries from the major source of gains from trade liberalisation – namely the reform of their *own* policies. Non-reciprocity is also a reason why tariff peaks today are largely on goods produced in developing countries. Both the MFN liberalisation in favor of developing country export interests and the deepening of trade preferences for the poorest countries therefore should be associated with trade liberalisation commitments by developing countries. A formula-based approach – as proposed by many WTO Members – deserves strong support.

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**Overuse of the non-reciprocity clause has excluded developing countries from the major source of gains from trade liberalisation.**

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Own liberalisation should be complemented by a second initiative – a willingness to accept that core WTO trade policy rules should apply to developing countries. The overwhelming tendency of the economic literature is to conclude that the case for using traditional trade policy instruments to achieve economic development objectives is weak. This does not imply that developing countries should

be forced to sign away their rights to use trade policies – countries have the right under the WTO to impose tariffs and export taxes if they desire to do so – but that these are not efficient tools to promote industrial development. Committing to abide by WTO procedural rules on the use of such instruments will benefit consumers and enhance welfare in developing countries. Doing so would be a major step for developing countries to take – but would in our view do much to help focus attention on areas where S&DT would make a real difference.

Finally, a key necessary condition both to mobilise needed increases in donor funding and to ensure this is appropriately allocated is to strengthen the mechanisms through which priorities are determined by developing countries. Scarce aid resources should be allocated to priority areas that will help mobilise growth. Trade-related areas will normally figure among these priorities, but not necessarily. Post-Monterrey, there is a clear international commitment to expand development assistance – what is needed is an equally clear articulation of trade-related demands by developing countries and the embedding of trade-related technical assistance and capacity-building needs in the national development plan or PRSP.

**Conclusion**

Realism suggests that it will take time to move in the direction suggested here. What can be sought relatively quickly – perhaps at Cancun – is agreement to establish a broad-based, high-level group operating under the auspices of the WTO General Council to explore different options, possible mechanisms and details of an alternative approach, with recommendations to be made before the end of the Doha Round. We would encourage the membership of this group to go beyond the community of trade officials and include both national economic policymakers and representatives of the international development community.

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*The views expressed in this paper are personal and should not be attributed to any of the institutions with which the authors are affiliated. This article is based on a paper entitled 'Special and Differential Treatment for Developing Countries: Towards a New Approach in the WTO', available from the authors on request.*

## Preserving and Creating Spaces for Development Policy: The Real Challenge for Cancun

By Werner Corrales

It is now widely acknowledged that a development strategy based exclusively on macro-economic stability and on trade and financial liberalisation does not by itself lead to long-term economic growth or to changes in production structures that developing countries need at the national level. This view is backed up by the experience of the dozen or so developing countries where trade liberalisation and integration in the global economy over the past two decades have resulted in significant increases in the employment rate, reductions in poverty levels and substantial improvements in income distribution. These countries combined an export orientation with a pervasive use of *active policies* directed towards promoting productive investment, technology transfer, enterprise development and the consolidation of productive chains. In other words, their success was largely due to a combination of an international trade integration strategy and policy intervention in the domestic economy, especially on the supply-side.

Elsewhere, even if the processes of global trade integration or trade liberalisation have not in themselves caused the persistence of development problems, something important has clearly been missing from the policy package that was sold in the eighties as a panacea for development and led to a neoliberal re-orientation of the rules of the multilateral trading system.

### Why Is Reform of WTO Rules Necessary?

While some WTO Agreements arguably offer more leeway for policy interventions than others, on the whole the space for the use of active policy instruments, particularly for building competitiveness and domestic linkages, and achieving export diversification has shrunk significantly in the post-Uruguay Round environment.

Furthermore, disciplines on the use of active policy instruments for enhancing supply-side capabilities and competitiveness are not balanced in terms of the countries' opportunities. With regard to industrial goods, where developed countries have a well-established market position, disciplines restricting the use of these instruments – which could help others develop legitimate competitive advantages – are stringent and apply to *all* WTO Members, allowing for very limited flexibility. The same can be said for access to technology and fostering innovation, limited by the monopoly rights provided to intellectual property rights (IPR) holders, which relate to existing advantages of developed countries. This strictness contrasts quite markedly with the lax disciplines governing subsidies in agriculture, where many developing countries have a comparative advantage and find their market access (and development prospects) restricted by developed countries' lavish support for production and exports.

Subsidies commonly used for supporting research and development (R&D), as well as small and medium-size enterprise development at regional levels (e.g. by the EU Structural Funds), are even more illustrative of the imbalances. Spaces for these policy applications did exist until 1999 in the Agreement on Subsidies and Countervailing Measures under the 'non-actionable' category of subsidies, which could not be challenged

under the WTO's dispute settlement procedure. However, this category of subsidies has since lapsed. The 'chilling effect' this has on developing countries' use of such subsidies is enormous, particularly as many of them have little resources to spend on dispute settlement.

Our last illustration refers to the obstacles that the WTO legal system poses to legitimate research initiatives involving reverse engineering, a tool widely used for successfully industrialising countries in the past. While reverse engineering is allowed in principle under the Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPs), in practice the Agreement limits the use of this mechanism and creates uncertainty for innovators because it provides for the reversal of the burden of proof in civil litigation involving process patents.

The need for a reform in WTO rules is evident to correct imbalances such as these and to allow developing countries to implement policies in their own economic, social and institutional contexts without fear of WTO challenges.

### Creating 'Spaces for Development Policies' through a Reform of Special and Differential Treatment

The 'development dimension' of multilateral trade rules has been under discussion in the WTO since its foundation and even before in the GATT. Many fundamental texts in the Agreements and Ministerial Declarations refer to making trade responsive to the needs of developing countries, but for all practical purposes development issues generally fall under the rubric of 'special and differential treatment'. However, what is taken for special and differential treatment (S&DT) in the current multilateral trade regime is quite different from what it was when the concept entered the trading system. This evolution parallels changes in international economic relations, as well as theories of development. It can be said to have evolved from an instrument for making trade liberalisation supportive of development under the GATT to its current manifestation in the WTO as an instrument for facilitating developing countries' domestic reforms towards trade liberalisation.

Regardless of why S&DT changed the way it did during the Uruguay Round, it is clear that its design is insufficient to address development concerns related to the loss of spaces for development policies. This state of affairs contradicts the often-made simplistic assumption by proponents of the current liberalisation model that WTO trade rules in and of themselves lead to sustainable development. Indeed, the merits of that development model and the Washington Consensus policy package upon which this assumption is based are increasingly being contested.

What is needed is special and differential treatment that tackles the development issues involved in trade rules, helping developing countries to make trade an effective instrument of development. Such S&DT has two essential dimensions: one with provisions addressing developing countries' market access concerns, including fair treatment for their exports, and the other addressing

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the need for policy spaces for development, mainly in the supply side of their economies.

*An Enabling International Framework*

'Spaces for development policies' comprise two essential components. The first is an international *enabling framework*, which allows developing countries to implement active policies on the supply-side of their national economies, including the use of trade instruments for protecting their markets when it may be essential. Current special and differential treatment, being merely an instrument for the implementation of present trade rules is a woefully inadequate mechanism for the job.

The second component involves positive international actions and coherence within the WTO and among multilateral institutions to support development objectives. Issues to be tackled by this component cannot be solved at the national level.

Some of the issues deserving attention in this context are: multilateral price support mechanisms for major primary commodities; financing for development, particularly for upgrading small and medium-size enterprises and R&D; ensuring that developing country producers' access to major trade channels and knowledge are not hindered by abusing WTO rules; ensuring coherence in the accession of new developing country members to WTO; and building up agreements with other multilateral institutions for securing coherence among them in policy matters affecting trade, as well as in delivering financial and technical assistance.

*Who Should Benefit?*

A number of problems arise from initiatives attempting to define additional categories of countries that would be eligible for S&DT benefits. The approach of 'graduation' or 'differentiation' and a simple classification according to economy-wide criteria such as GDP generally overlook the broader development disparities within countries and across sectors.

A more developmental response would rest on two pillars. The first would be accepting the principle that all developing countries have the right to access special and differential treatment, and the second would be a set of horizontal criteria serving for defining specific benefits taking into account the economic characteristics and levels of development of sectors and sub-national regions. Such a 'situational' approach could facilitate an S&DT regime that would not provide preferential treatment to a sector in a country that is already competitive in the international marketplace, but would provide it to sectors that are not (these sectors usually employ the more disadvantaged members of society), or to particularly depressed regions. Other criteria that look outside the purely economic realm, such as UNDP's Human Development Index or other types of vulnerability indexes, could prove suitable for such an approach as well.

We state unequivocally, however, that despite any benefits of using sub-national/sectoral versus national criteria, *there can be no differentiation or graduation on the principle of the need for spaces for development policy*. While not all developing countries require or seek the same kind of policies, nor, arguably, do they all need access to the same kinds of policy instruments, they certainly all need spaces to pursue active policies in the supply side of their economies.

*Monitoring the Effectiveness of S&DT*

A final broad institutional consideration related to re-orienting S&DT as a part of an enabling framework is ensuring that S&DT provisions are regularly monitored by a body that has sufficient understanding of the trade and development nexus (i.e. the WTO Committee on Trade and Development), as well as the requisite power to secure compliance with the various provisions. It is crucial to emphasise that agreeing on a 'monitoring mechanism' without having mainstreamed development criteria and re-shaped the structure of present S&DT could be self-defeating because adjustment and trade liberalisation, and not development achievements, would be subject to monitoring, assessment and judgement in that circumstance.

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**EU Proposes 'Investment for Development' Framework**

In an effort to overcome developing country resistance to elaborating a WTO 'framework agreement' on investment, the EU on 7 April issued a concept paper on "policy space for development" (WT/WGTI/W/154), which sought to demonstrate that if commitments on pre-establishment investments were based on a 'positive list' approach, Members would retain their ability to "preserve policy space for the purpose of regulating in the public interest and for development purposes." The Cancun Ministerial Conference next September is to decide "by explicit consensus" when – and whether – to launch negotiations on the 'Singapore issues', which include competition policy, transparency in government procurement and trade facilitation, as well as investment. The EU is a keen advocate of starting negotiations as soon as possible.

The 'positive list' concept is embodied in the General Agreement on Trade in Services (GATS), which leaves Members free to choose the sectors they wish to open to foreign competition. The EU submission maintains that, by including limitations to market access or national treatment, Members could retain control over domestic policies including those aimed at increasing employment, generating and transferring technology, and protecting minority groups. Subject to compliance with transparency requirements and the most-favoured nation principle, Members could even take measures violating the essential GATT principle of national treatment as long as they left the specific sectors unbound. In addition, the paper argues that increased foreign direct investment (FDI) under what the EU calls an *Investment for Development Framework* would be unlikely to have a 'crowding out' effect on domestic investment.

Commenting on the paper after the mid-April meeting of the Working Group on Trade and Investment, a developing country delegate noted that many countries remained uncomfortable with the idea of negotiating multilateral disciplines on pre-establishment commitments, while another pointed out that having an investment framework in place did not necessarily mean that investment flows would increase. The US made clear its preference for a 'negative list' approach, which assumes that all sectors not subject to a specific carve-out are covered by the agreement.

The Working Group will meet again on 10-12 June.



## Market Access Modalities Likely to Miss May Deadline

By mid-May, the Chair of the Negotiating Group on Market Access for Non-agricultural Goods is to issue a draft outline on how to structure negotiations on industrial tariffs. However, considering the wide range of options put forward by Members so far, it seems improbable that agreement on market access modalities will be reached by the 31 May 2003 deadline.

The April meeting of the group showed WTO Members still poles apart on the level of ambition for the talks, as well as the method to be used to lower tariffs. The US, supported by Australia and New Zealand, insists that its proposal to eliminate – rather than reduce – all tariffs by 2015 should be “kept alive”. Developing countries rejected the proposal when it was tabled last December, and Japan and the EU called it unrealistic (Bridges Year 6 No.8, page 13). Citing World Bank and IMF research, the US submitted an eight-page document aimed at convincing developing countries of the economic benefits of tariff removal to the group’s April meeting (TN/MA/W/18/Add.2). The paper argued, *inter alia*, that for most developing countries the share of import duties as a source of government revenue had declined from an average of 18 percent to about 15 percent in the past decade, but recognised that for least-developed African countries “dependence on import duties remains significant and has actually grown over the past decade.

The EU supplemented its November proposal that Members ‘streamline’ their tariffs by a mathematical formula that would result in compressing import duties in a flatter range (TN/MA/W/11/Add.2).

None of these approaches have won developing country approval. In April, Nigeria, on behalf of several African and Asian countries, again emphasised that the Doha Ministerial Declaration acknowledged the principle of ‘less than full reciprocity in reduction commitments’ regarding tariffs between industrialised and developing countries. This principle should be reflected in the level of commitments, as well as longer transition periods. Developing countries regard tariffs as an “instrument of domestic industrial policy” and governments need the revenue they provide, Nigeria stated. Total tariff elimination as the objective of the negotiations would be difficult to accept even in an extended timeframe, as alternative forms of taxation to replace lost customs revenue would take a long time to develop. Many developing country governments also fear that cheap foreign imports would lead to de-industrialisation, particularly in sensitive sectors such as textiles. According to Malaysia, tariff elimination would leave developing countries without any protection at all.

India submitted a paper showing the final bound duties that would result from using its proposed formula of an average 50 percent tariff reduction for developed countries and a 33 percent reduction for developing countries (TN/MA/W/10/Add.3).

Japan’s proposal to eliminate tariffs on a large number of consumer goods continues to face criticism from both developed and developing countries, not least because it covers mostly high-tech products that would offer no significant market access benefits to developing countries. At the April meeting, several Members also criticised Japan’s February proposal to deliberately exclude forestry and fisheries products from the zero-for-zero initiative. According to that paper, Members should retain substantive flexibility to restrict forestry and fisheries imports through both tariffs and non-tariff measures in order to advance sustainable development objectives (Bridges Year 7 No.2, page 11).

## WTO News in Brief

- The EU has tabled its long-awaited proposal on fisheries subsidies for discussion at the Negotiating Group on Rules on 5-7 May. The four-page document (TN/RL/W/82) proposes the prohibition of capacity-enhancing subsidies, i.e. those contributing to marine fishing fleet renewal (e.g. construction of vessels, increase in fishing capacity); and subsidies for the permanent transfer of fishing vessels to third countries, including through the creation of joint enterprises with third country partners.

On the other hand, subsidies necessary to achieve the objective of reducing fishing capacity, and to mitigate negative social and economic consequences of the restructuring of the fisheries sector should be permitted. Such subsidies would be geared to retraining fishermen, early retirement schemes and diversification; modernisation of fishing vessels to improve safety, product quality or working conditions or to promote more environmentally friendly fishing methods; supporting fishermen and vessel owners who have to temporarily stop their fishing activity due to unforeseeable circumstances such as natural disasters or permanent capacity reduction measures in the context of recovery plans for overexploited fish stocks; and scrapping vessels/withdrawal of capacity.

- Despite an informal Chair’s draft circulated earlier on ‘possible elements’ and ‘options’ for a multilateral notification and registration system for geographical indications (GIs) for wines and spirits, any narrowing of the gulf between Members’ positions regarding how the system would operate seems highly improbable at the 29 April meeting of the Council for Trade-related Aspects of Intellectual Property Rights (TRIPs). According to the Doha Ministerial Declaration, the negotiations must conclude by the next WTO Ministerial Conference in September.

- **ERRATUM** – Due to a printing error, the table on key figures of the latest draft agricultural modalities paper was sadly mangled in the March 2003 issue of Bridges. We regret any inconvenience to readers. The correct table is reprinted below.

## Key Figures of the Draft Modalities for Agricultural Negotiations

Market Access				
Tariffs	Present level	Average cut	Minimum cut per tariff line	Time period
Developed countries	Over 90%	60%	45%	5 years
	15-90%	45%	35%	5 years
	Under 15%	40%	25%	5 years
Developing countries	Over 120%	40%	30%	10 years
	60-120%	35%	25%	10 years
	20-60%	30%	20%	10 years
	Under 20%	25%	15%	10 years
Domestic Support: Amber Box (trade-distorting subsidies)				
Developed countries: reduce by 60 percent over five years				
Developing countries: reduce by 40 percent over ten years				
Domestic Support: Green Box (at most minimally trade-distorting support)				
Developed countries: No reductions/spending ceiling, but stricter eligibility criteria possible				
Developing countries: Maintain at least present flexibility under the Agreement on Agriculture				
Domestic Support: Blue Box (direct payments under production-limiting programmes)*				
Developed countries: capped and bound, reduce by 50 percent over five years				
Developing countries: reduce by 33 percent over ten years				
Export Competition: Subsidies*				
Developed countries: phase out 50 percent within five years, the rest within nine years				
Developing countries: phase out 50 percent within ten years, the rest within twelve years				

\* The draft also proposes a [bracketed] alternative: the immediate elimination of the blue box for developed countries and after five years for developing countries.

\* Unlike export subsidies, some export credits could be considered in conformity with WTO rules, while others would be “subject to specific financing reduction commitments.”

## Dispute Settlement News

## Defiant US to Appeal Steel Subsidy Ruling

US steel executives and politicians are enraged by an interim WTO panel report condemning the safeguard tariffs established last year on a large variety of steel products. The 26 March ruling – to be released to the public in late April – reportedly faulted the US for failing to show an increase in imports (according to the complainants, steel imports had decreased in the material period); as well as not adequately establishing the link between imports and injury to US domestic steel industry. In addition, the panel found that the US had included import figures from NAFTA countries in its injury investigation even though it had excused Canada and Mexico from application of the safeguard measures.

The ruling responds to separate complaints from Brazil, China, the EU, Japan, Korea, New Zealand, Norway and Switzerland.

US Undersecretary for International Trade Grant Aldonas accused the panel of “essentially eviscerating” the WTO’s Agreement on Safeguards by requiring “an exactitude in the way that you examine different factors that would effectively eliminate the prospect of anybody ever making use of the safeguard.” Thomas Usher, CEO of the United States Steel Corp., told a Senate hearing that the US “should make sure we are going to fight and not cave in to flagrantly unjust opinions from international bureaucrats who have demonstrated their hostility to legitimate trade remedy actions.” The government has already announced its intention to appeal the ruling.

The US has long held that, particularly in trade remedy cases, panel interpretations of WTO rules often “reach beyond what the negotiators negotiated.” It has made providing guidance on the proper ‘standard of review’ a top priority in the review of the WTO’s dispute settlement rules slated to conclude on 31 May 2003 (see page 9), but has not so far provided any specifics as to what such guidance would consist of.

## Benin Joins the Fray on Cotton Subsidies

Marking one of the very rare instances of a sub-Saharan African country involving itself in WTO dispute settlement procedures, Benin on 24 March requested third party rights in the case initiated by Brazil against the United States’ support to the production and export of upland cotton (see page 13).

Meanwhile, the US continues to resist the appointment of a WTO facilitator to assist Brazil in gathering information about its cotton subsidy programmes (Bridges Year 7 No.2, page 7). Although Annex V of the Agreement on Subsidies and Countervailing Measures (SCM) provides that a facilitator “shall” be established upon request in subsidy disputes, Chair Shotaro Oshima has refused to put Brazil’s request on the Dispute Settlement Body’s agenda until the two parties agree among themselves on the appointment first. So far, the US has refused to enter discussions on the subject on the grounds that prior to WTO litigation, Brazil must demonstrate that US cotton subsidies are not covered by the ‘peace clause’, which shields government support not exceeding 1992 levels from dispute settlement challenges. Brazil, on the other hand, contends that information of the relevant subsidy programmes is necessary for proving that present support levels exceed those permitted under the peace clause.

## In Brief

- [Anti-dumping: India Bed Linen](#) India has successfully appealed a key finding of a November 2002 panel ruling, which found the European Union’s continued anti-dumping measures against Indian bed linen to be in compliance with WTO rules. The Appellate Body ruled on 8 April that the EU’s methodology for determining the volume of dumped imports was not based on an ‘objective examination’ as it included all imports from non-examined sources even though two out of five examined producers were found not to be dumping (WT/DS141/AB/RW).

- [Anti-dumping: US Byrd Amendment](#) Appellate Body member Yasuhei Taniguchi has been appointed to determine the ‘reasonable period of time’ (RPT, usually 15 months) for US compliance with the January 2003 ruling that found the Byrd Amendment incompatible with WTO rules (Bridges Year 7 No.1, page 7).

Congress and government agencies are still at odds on what action to take. A draft 2004 executive branch budget suggests a simple repeal of the Amendment, but two-thirds of the Senate have formally requested its maintenance. Manufacturers are also urging the rejection of draft replacement legislation that would see antidumping/countervailing duties go to a fund for economic development projects in communities adversely affected by trade rather than distributed to petitioning companies, as is the case under the Byrd Amendment. Many US sources believe that non-compliance is unlikely to lead to trade sanctions due to the difficulty that complainants would have in calculating the financial damage caused by the Amendment.

- [Subsidies: US Foreign Sales Corporations](#) Controversy also surrounds draft legislation aimed at making US corporate taxation comply with a string of WTO condemnations of the foreign sales corporation (FSC) law and its successor regime, the Extraterritorial Income Exclusion Act (ETI). Both regimes were found to provide prohibited export subsidies. The latest ruling dates from January 2002, and the European Union has already secured – but not yet used – the authority to impose trade sanctions worth US\$4 billion against US exports.

Representatives Charles Rangel and Phil Crane have proposed to replace the ETI by a ten percent tax cut to those manufacturers whose entire production takes place in the US. Companies that have both US and offshore production would be entitled to smaller cuts. No decision is expected for several more weeks.

- [Subsidies: EU Sugar](#) Brazil has postponed requesting a dispute settlement panel on its challenge of the EU’s export subsidies for sugar until the completion of two studies the government has commissioned. Concerned about the dispute’s effects on their preferential market access, fourteen African, Caribbean and Pacific (ACP) countries have joined the consultations as third parties (Bridges Year 7 No.2, page 7).

- [Market Access: EU Tuna Tariffs](#) The EU has reportedly offered to halve its prevailing 24 percent tariff for an annual 25,000 tonne quota of canned tuna from the Philippines and Thailand. The two countries had alleged that the duty-free access granted by the EU to tuna from ACP countries was discriminatory (Bridges Year 7 No.1, page 11).



## Dispute Settlement News

## Litigation as Leverage for Negotiations

Two disputes aimed at undermining the defending party's negotiating position in the Doha Round are currently brewing at the WTO: the US has requested consultations on alleged EU discrimination in protecting geographical indications and the EU has challenged Australia's quarantine requirements for agricultural products as not being based on science.

*Quarantine Requirements*

On 9 April, the European Union requested consultations with Australia regarding the latter's quarantine system for agricultural products. "We believe this system flagrantly breaches WTO rules, despite Australia's constant claims to be the only beacon of free agricultural trade. The EU will use WTO procedures to ensure that Australia practises what it preaches on agricultural market access," EU Trade Commissioner Pascal Lamy said. He warned Australia against abusing its "privileged position" as an island free from many animal and plant diseases prevalent in the rest of the world "to unfairly protect its own market and producers by imposing quarantine rules which block imports for many years without scientific justification." There is more than little irony in this challenge, as the EU itself is under constant criticism at the WTO for its preventive measures to protect plant, animal and human health, as well as its advocacy for enshrining the 'precautionary principle' in WTO rules.

According to the consultation request (WT/DS287/1), the effect of the Australian quarantine regime "appears to be that the import of products is *a priori* prohibited, although there is no risk assessment. Risk assessments appear to be commenced, if at all, only once the import of a product has been specifically requested. In some cases, no risk assessment has been commenced despite such request. In other cases it has been commenced but not completed." The EU considers the Australian quarantine system to violate a large number of provisions set out in the Agreement on Sanitary and Phytosanitary Measures (SPS), including the requirements to base SPS measures on risk assessments and to refrain from establishing measures that are more trade-restrictive than necessary, as well as the obligation to maintain efficient control, inspection and approval processes.

Among market access problems, the EU noted an outright ban on the import of a range of agricultural products such as fruit and vegetables; extremely long and complex risk assessment procedures; and restrictive conditions applied to imports even after access is granted. Chile has requested to join the consultations as a third party. The Philippines and Thailand, requested their own WTO consultations in 2002 on the Australian quarantine system for pineapples and other fruit and vegetables.

*Geographical Indications*

Announcing the geographical indications (GI) dispute on 4 April, the Office of the US Trade Representative said that "the EU's failure to protect US trademarked geographic names" such as Idaho Potatoes or Florida Oranges was "of particular concern to the United States and other WTO Members as the EU is currently pressing for additional protection for EU geographical indications in the Doha Development Agenda while at the same time failing to meet its WTO obligations to protect the geographical

indications of other WTO Members." In the TRIPs Council, the US continues its stiff resistance to making stronger protection for agricultural GIs mandatory under WTO rules.

The US complaint targets in particular the reciprocity requirement of EC Regulation 2081/92 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs. The US alleges that "the EU does not allow the GIs of other Members to be registered to obtain protection unless the other Member provides the same TRIPs-plus protection as the EU." The US maintains that such provisions are inconsistent with the national treatment obligation under the TRIPs and GATT Agreements, including the TRIPs Article 4 requirement that WTO Members "accord *immediately and unconditionally* to the nationals of other Members any advantage, favour, privilege, or immunity that it grants to the nationals of any other country." In its consultation request (WT/DS174/1/Add.1), the US also reiterates its concerns that the EC regulation "undermines the legal protection for trademarks in a manner that appears to be inconsistent with [its] obligations under the TRIPs Agreement."

The dispute seems to be part of a wider US strategy aimed at preventing 'TRIPs-plus' protection for GIs from weakening protection for geographically-based trademarks. For instance, the US owner of the Budweiser brand could lose its exclusive right to use the name when the Czech Republic registers Budweiser beer as a protected GI upon joining the EU in May 2004. To avoid such erosion of trademark protection, the US strongly opposes the EU-led push for stronger GI protection in the WTO. The recently-concluded US-Chile Free Trade Agreement explicitly prohibits the parties from registering/protecting GIs that are 'confusingly similar' to pending or pre-existing trademarks. Identical draft language is included in the agreement the US is currently negotiating with Central American countries, and is likely in all future bilateral free trade agreements.

On 23 April, Australia – another key opponent of extending GI protection in the WTO – launched a similarly-argued case against the EU's regulation on the protection of GIs and trademarks. Argentina, Australia, Mexico, New Zealand and Sri Lanka have requested to join the US-EU consultations as third parties.

## Dispute Settlement Review: What Next?

Only one scheduled negotiating session – on 20-23 May – remains for the Dispute Settlement Body (DSB) to come up with improvements to the Dispute Settlement Understanding, which spells out the rules and procedures for WTO legal action.

The DSB's 10-11 April meeting showed no movement toward consensus. Argentina, Chile, Malaysia and New Zealand want the talks to focus on a list of core issues on which consensus is possible by the end-May deadline. While New Zealand and the US would be willing to continue discussing more controversial proposals beyond that date, Malaysia regards the deadline as final. The EU, supported by Canada, rejects the 'early harvest' approach, advocating instead that Members strive to agree on the greatest possible number of outstanding issues before the Cancun Ministerial, and try to define a mandate for further negotiations in order to ultimately reach an "ambitious, balanced package."

## WTO and Human Rights Bodies Reach Out to Each Other

By Caroline Dommen

'So near but yet so far,' has until recently been the most fitting way to describe relations between the WTO and the Human Rights world. A few minutes walk along the Geneva lakeside will take you from the WTO building to the Office of the High Commissioner for Human Rights (OHCHR), yet relations between the two have at times been so cold that the small distance seemed impassable.

### *Thaw in human rights-WTO relations*

However, as evidenced by the constructive discussions on trade-related issues during the annual session of the UN Commission on Human Rights (Commission) in March-April 2003, the tension has eased considerably in the last two years. Excellent reports of the High Commissioner for Human Rights, on the human rights impacts of liberalising agricultural<sup>1</sup> and services trade<sup>2</sup> have earned the respect of trade officials and public interest groups, and shown that the human rights perspective is a positive contribution to the debate on social impacts of trade liberalisation. The Commission's annual resolutions on access to medication as a human right,<sup>3</sup> which refer to efforts in the WTO to resolve this issue, have further shown the WTO-relevance of human rights.

The Commission on Human Rights' members are States: each of its 53 members is elected by ECOSOC. Thus any Commission resolution or decision is subject to intense political negotiation. In contrast, the Commission's Special Rapporteurs, appointed to focus on particular aspects of human rights, are experts independent from any government. Many of them deliver sharp and relevant analysis of key human rights issues.

### *Experts flag liberalisation impacts on education, housing and food<sup>4</sup>*

This article will limit itself to the extracts of the reports of those Commission's Special Rapporteurs that refer directly to the WTO,<sup>5</sup> although the human rights impact of international trade was a recurrent theme during the 2003 Commission, and discussions reflected the willingness of the human rights community and the trade policy world to seek mutually-beneficial solutions on trade and human rights.

In her report, Katarina Tomaševski (Special Rapporteur on the right to education) urged that education be upheld as a free public service. She commented how decreasing allocations for public education was part of a dangerous trend of privatising and liberalising education services, and appealed to trade negotiators to bear in mind their right to education obligations when defining the scope of liberalisation of education services.

The report of the Special Rapporteur on the right to housing, Miloon Kothari, refers to the negative impacts of water privatisation on the poor and their right to housing. It urges States to refrain from expanding agreements such as the NAFTA and GATS that open the way for large corporations to be sole providers of civic services such as water and sanitation services essential for the realisation of the right to housing.

The Special Rapporteur on the right to food, Jean Ziegler, noted that with globalisation, one government's actions can have repercussions on the right to food of people in another country and that States must avoid this. He added that States should take

account of their human rights obligations in their deliberations in multilateral organisations including the WTO.

### *Right to development mired in politics; right to health bounds forward*

People concerned with international economic policy often look to the right to development. The reports of the Commission's expert on this right, Arjun Sengupta, contains valid analysis and interesting proposals. Yet the Commission's right to development work may have little impact on international trade policy, as discussions are highly politicised and bogged down, year after year, in North-South disagreement over issues as basic as whether or not the right to development is a fundamental human right.

The Commission's Special Rapporteur on the right to health, Paul Hunt, is poised to take the most concrete steps to address possible conflicts between WTO-related policies and the enjoyment of human rights. His 2003 report sets out issues he plans to explore further during his three-year mandate. He has underlined his intention to focus on the right to health and poverty, as well as the right to health, discrimination and stigma.

Paul Hunt's report indicates his intention to consider the question of access to medication, with reference to the implementation of the Doha Declaration on TRIPs and public health, particularly in the lead-up to the WTO Fifth Ministerial Conference. He also plans to look at how services trade liberalisation under the GATS could affect enjoyment of the right to health. His report takes a human rights perspective on another topical WTO issue: assessment. It underlines that human rights require States to assess whether a new law or policy is consistent with its human rights obligations, including its distributional impact on the well-being of different groups in society, especially the most vulnerable. The Special Rapporteur on the right to health has requested to meet with WTO officials. 'I very much look forward to discussing with, and learning from, the WTO and its member States,' Paul Hunt says.

Developments at this year's Human Rights Commission have shown that the human rights movement can positively contribute to debates on trade and sustainable development, a contribution that should be welcomed by those concerned with economic justice worldwide. So as the spring sun warms up the lake in Geneva, the park between the WTO Secretariat and the OHCHR may yet become a common ground for discussions between the WTO and the human rights worlds rather than a barrier separating them.

*Thanks to Davinia Overt for assisting the preparation of this article. Caroline Dommen, formerly with ICTSD, is Director of 3D, focusing on trade, sustainable development and human rights. She is the author of 'Trading Rights? Human Rights and the World Trade Organization' (forthcoming, 2003).*

<sup>1</sup> Globalization and its impact on the full enjoyment of human rights, 15 January 2002

<sup>2</sup> Liberalization of trade in services and human rights, 25 June 2002

<sup>3</sup> See for instance Commission resolution 2003/29, Access to medication in the context of pandemics such as HIV/AIDS, tuberculosis and malaria.

<sup>4</sup> The reports of all the Commission's Special Rapporteurs and independent experts are available at [www.unhchr.ch/html/menu2/7/b/tm.htm](http://www.unhchr.ch/html/menu2/7/b/tm.htm)

<sup>5</sup> For more information, contact: [tradeandhumanrights@bluewin.ch](mailto:tradeandhumanrights@bluewin.ch)

## Towards a Definition of 'Subsidy' in the Services Trade

By Robert Prylinski and Dariusz Mongialo

WTO Members have recognised that in certain circumstances subsidies may have distortive effects on trade in services. The 'Guidelines' for the current services negotiations contain a 'best endeavour' deadline to develop multilateral disciplines for such subsidies prior to the conclusion of the Doha Round 'single undertaking' negotiations in January 2005. As discussions on services subsidies are still largely at the brainstorming level, we offer the observations below as a contribution to the debate.

### Background

While comprehensive information is lacking both with respect to the existence of subsidies in the services sector and the extent to which they may have adverse effects on international trade, there is evidence that many countries do grant subsidies to services providers in the audiovisual, construction, distribution, educational and environmental sectors, as well as financial, health, transport (maritime, air transport, railway, road), research and development services, and tourism.

From the perspective of the ongoing services negotiations the key question is less proving that trade-distorting subsidies do in fact exist than developing methods to identify, measure and discipline them in the General Agreement on Trade in Services (GATS). Any discussion on this matter should start from the clarification of the term 'subsidy' in the services context.

### The scope of the definition

We believe that the definition of subsidy in the services sector could contain all the basic elements of the definition contained in Article 1 of the WTO Agreement on Subsidies and Countervailing Measures (SCM Agreement). However, adjustments would be needed to reflect the particular nature of services trade. The following elements seem to need special consideration:

- who grants a subsidy;
- to whom a subsidy is granted;
- the form of the subsidy; and
- the benefit conferred to the recipient of the subsidy.

### Who grants a subsidy?

The SCM Agreement states that a subsidy is deemed to exist when there is a financial contribution by a government or any public body within the territory of a Member. This applies, *inter alia*, to cases where "a government makes payments to a funding mechanism, or entrusts or directs a private body to carry out one or more of the type of functions [...] which would normally be vested in the government and the practice, in no real sense, differs from practices normally followed by governments."

As far as trade in services is concerned, the GATS covers measures taken by:

- central, regional or local governments and authorities; and
- non-governmental bodies in the exercise of powers delegated by central, regional or local governments or authorities.

Bearing in mind this fact the following questions could be asked:

- Can one assume that the term "measures by Members" used in the GATS could be understood also as "subsidies granted"? In this case the GATS itself would offer a definition of the entity entitled to grant subsidies.
- To what extent are both definitions the same?

### To whom is a subsidy granted?

This matter is not regulated in the SCM Agreement. In the goods area, the subsidy granted to any producer (distributor, trader, etc.), private or state-owned, may affect competition. The fact that this is less obvious in the services sector is reflected in GATS Article I.3(c), which excludes from the scope of the GATS any service that is supplied neither on a commercial basis nor in the competition with one or more service suppliers.

Furthermore, the GATS covers measures which affect the trade in services in the form of consumption abroad (mode 2). The essential feature of this mode is that a service is delivered outside the territory of the GATS Member. In other words, a 'mode 2' service consumer moves to another country to consume the service concerned.

In this regard the following questions arise:

- How should one treat subsidies granted to a service supplier who acts neither on a commercial basis nor in competition with other service suppliers? (In some countries such subsidies can apply to a relatively wide range of services – for example a public health-care system).
- Should the recipient of the subsidy be reflected in the definition itself? Or should the issue be addressed while clarifying a matter of "trade-distortive effect" of the subsidy? Or somewhere else?
- Could a subsidy be granted not only to services suppliers but also directly to services consumers?

### The form of the subsidy

According to the SCM Agreement, a subsidy may be granted when:

- there is a direct or potential direct transfer of funds;
- government revenue is foregone or not collected; or
- a government provides goods or services other than a general infrastructure, or purchases goods.

In addition, "any form of income or price support" is considered to be a subsidy.

In our view, the rules concerning the forms of the financial contribution could be adopted for the purpose of the service sector's definition. However, adjustments seem necessary with regard to the second part of the definition since "income or price support" as a possible form of the subsidy may play an even more important role in the services sector than in the goods area.

On the basis of this analysis the following question arises:

- Should the future definition of a subsidy contain a list of those forms of "income or price support" that would be considered as a subsidy?

*Continued on page 12*



*Defining Services Subsidies, continued from page 11**Benefit conferred to the recipient*

In addition to the two basic elements mentioned above (i.e. an identification of the entity granting the subsidy and form of the support), the SCM Agreement contains a third element of definition, namely a reference to the benefit conferred to recipient of the subsidy. We think that this provision should also apply to the services sector. This approach, however, would require further guidelines concerning the calculation of the subsidy in terms of the benefit to the recipient arising from the various forms of support. Article 14 of the SCM Agreement provides a basis for developing such guidelines.

**Specificity of the Subsidy**

While the notion 'specific subsidy' is not explicit in the SCM Agreement's definition, it is clear that only specific subsidies are 'actionable' (Art. 1.2). This differentiation is based on the assumption that 'horizontal subsidies' (i.e. granted upon objective criteria to all recipients, including foreign ones) do not affect competition. However, the matter of a possible incorporation of this principle to the services area raises some questions:

- How to define 'specificity' taking into account the nature of the services sector (in particular the four modes of supply recognised by the GATS)?
- How to treat horizontal services subsidies which – taking into account the level of specific commitments of the GATS Member concerned – effectively close or severely limit market access for foreign suppliers? In this case a 'horizontal' subsidy is not exactly available to 'all'. However, this Member may still improve the competitive power of the beneficiaries – not necessarily on the domestic market (as there is no foreign competition there), but for example in respect to export of their services.

**Trade-distortive Effect of the Subsidy**

Taking into account the language of GATS Article XV, it seems that the 'trade-distortive effects' of subsidies must find a proper reflection in future multilateral disciplines concerning subsidies in services.<sup>1</sup> The question remains whether this issue should be addressed as a part of the definition of the subsidy (possibly as an additional element of the definition) or should be reflected in the further disciplines concerning countervailing procedures, for example.

The definition of subsidies in the SCM Agreement does not contain 'distortive effect on trade' as a condition for considering a particular measure as a subsidy. However, the Agreement authorises 'actions' (i.e. countervailing or antidumping duties) against subsidies only if they adversely affect the interests of another Member.<sup>2</sup> This means that the subsidies must:

- not result in an injury to the domestic industry of other Members;
- nullify or impair the benefits accruing directly or indirectly to other Member under GATT 1994, in particular the benefits of concessions bound under Article II of GATT 1994; or
- not result in a serious prejudice to the interests of another Member (further clarification of this notion is provided in Article 6.3 of the SCM Agreement).

As far as nullification/impairment of benefits is concerned, in the services sector the reference could in principle be made to specific commitments undertaken by WTO Members under the GATS framework.

Two questions, however, remain:

- Should the term 'trade-distortive effect of the subsidy' be a part of the definition?
- To what extent can the provisions of the Article 5 (adverse effects), Article 6.3 (serious prejudice) and Article 15 (determination of injury) of the SCM Agreement be used to clarify this term?

**Policy Objectives**

Most subsidies aim at stimulating economic development or growth, protecting employment and investments, reducing poverty/supporting the poor, or providing access to basic living conditions. The policy objective of the subsidy should be taken into account while working on the definition of 'subsidy' in the services sector. To some extent, GATS Article XV already addresses this concern, at least with respect to developing countries through the recognition of the role of subsidies in relation to development programmes. But the very nature of some services and services sectors – such as the social objectives of some subsidy programmes – may make it necessary to take this matter into more serious consideration. This begs the final question:

- Should the reference to policy objectives be a part of the definition or should it rather be addressed in the possible disciplines concerning 'non-actionable' subsidies?

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**ENDNOTES**

<sup>1</sup> "Members recognise that, in certain circumstances subsidies, may have distortive effects on trade in services. Members shall enter into negotiations with a view to developing necessary multilateral disciplines to avoid such trade-distortive effects." GATS Article XV.

<sup>2</sup> With the exception of prohibited subsidies.

The Council for Trade in Services is scheduled to continue discussions on items related to rule-making from 12-16 May.

Meanwhile, Members' initial services market opening offers in the 'single undertaking' negotiations launched in Doha are trickling in, although many missed the erstwhile deadline of 31 March 2003. Reportedly, fourteen Members have submitted their offers, but due to the confidential nature of the bilateral request/offer phase, the contents of those documents – or even the submitters' names – are not publicly available. However, Australia, Canada, Japan, New Zealand, Switzerland and the United States have opted for transparency. Their initial market opening offers can be consulted at <http://www.ictsd.org/issarea/services/resources/index.htm>.

The EU's conditional market opening offer, which according to Trade Commissioner Pascal Lamy "goes far in meeting developing countries' requests", was released on 29 April 2003. See: [http://europa.eu.int/comm/trade/services/pr290403\\_en.htm](http://europa.eu.int/comm/trade/services/pr290403_en.htm)

The next negotiating session will take place on 19-20 May 2003.

## Cotton Subsidies: Could More Be Gained through Negotiations than Litigation?

Cotton production and trade plays a central role in development and poverty reduction strategies in West Africa. For Benin, Mali, Burkina Faso and Chad, cotton represents around one-third of total export receipts and 60 percent (up to 90 percent in the case of Benin) of agricultural export revenues. The region produces good quality cotton with high yields at low prices and, unlike most of its competitors, exports 95 percent of its production. More than 10 million people in West Africa depend directly or indirectly on cotton.

While the region is one of the most competitive producers in the world, the sector suffers directly and substantially from the US\$3.6 billion of cotton subsidies provided by its main competitors, the United States, the European Union and China.<sup>1</sup> As Oxfam has pointed out, less than 30,000 American cotton farmers receive more in subsidies than the entire GDP of Burkina Faso – a country in which more than two million people depend on cotton production. Such levels of support are largely responsible for low world prices and deprive many small farmers of essential resources for their livelihoods in a region where diversification options are very limited.

The WTO is the most appropriate forum to address this issue. West African countries (WACs) could consider two mutually supportive avenues: the dispute settlement system and the negotiations on agriculture.

## The Dispute Settlement Option

Brazil has already initiated a dispute at the WTO essentially claiming that the United States, through its subsidies program on cotton, is causing the depression of world cotton prices and violates WTO rules, in particular sections 5(c) and 6.3 (c) of the Subsidies and Countervailing Measures Agreement. In an unprecedented move for a West African LDC, Benin has joined the dispute as a third party (see page 8). Even though third parties in WTO litigation have limited rights, Benin has the chance to make a powerful third party submission that the panel is obliged to take fully into account. This submission will provide an opportunity to highlight how it has been adversely affected by the challenged US measures and how a determination by the panel may impact on its cotton sector.

Beyond the third party status, however, the desirability of WACs' initiating a full dispute should be carefully examined. A procedure against a major trading partner such as the US is likely to be complex and costly and these countries remain particularly vulnerable to bilateral pressures. More importantly, from a purely legal perspective, the WTO incompatibility of US subsidies, is uncertain. In any event, WTO panel rulings ordinarily apply *erga omnes*. Therefore, assuming that Brazil wins the case, WACs will benefit from the removal of US cotton subsidies regardless of who initiated the procedure. If Brazil loses, WACs would still have a political case to make in the negotiations.

## The Negotiation Option

From a systemic point of view, however, dispute settlement can only solve part of the problem. Even if the US unilaterally removes its subsidies as a result of a panel ruling, which appears rather unlikely, West African growers might continue to suffer from subsidies provided by other Members. A parallel avenue therefore consists of pushing for a systemic solution through the elimination of all forms of trade distortive subsidies on cotton in the framework of the agriculture negotiations of the Doha 'Development' Agenda. This approach has the clear advantage of targeting – in a less

confrontational way – subsidies provided by all WTO Members. West African countries have a very strong economic and political case. They are not asking for special and differential treatment but merely the application of WTO principles to one of the few sectors where they have a strong comparative advantage and can derive immediate benefit from trade liberalisation.

WTO agriculture negotiations are currently at the crucial stage of defining the modalities for further liberalisation. These modalities will set targets, as well as rules-based elements for achieving the objectives set out in the Doha Declaration. In their present form, the draft modalities proposed by the Chair of the agriculture negotiations Stuart Harbinson (but rejected by Members) would not automatically result in significant cuts in cotton subsidies essentially because of the considerable flexibility left to Members to maintain high levels of protection for 'sensitive' sectors.

West African countries might want to push for a more disaggregated approach by requesting higher and accelerated cuts in subsidies specifically on cotton or, more generally, on export products of key interests to LDCs. In this perspective, the concept of 'special product' developed by Mr Harbinson could be further explored. So far, it essentially relates to defensive interests of developing countries by allowing them to protect products of strategic importance for their food security and rural development strategies through special safeguards and lower tariff reductions. A similar approach might be developed to defend offensive interests of LDCs by accelerated reduction in OECD countries' amber box and export subsidies for products such as cotton, which play a central role in development and poverty eradication strategies.

The major constraint associated with this option is obviously time. The Doha round is scheduled to conclude by 2005. Even if this deadline is met, cuts in subsidies would probably be implemented over several years. By that time, the West African cotton production may well have disappeared. A way of addressing this issue is to include cotton subsidy cuts as part of an early harvest at Cancun, to be implemented immediately as happened during the Uruguay Round regarding market access for certain tropical products.

Such a strategy would of course require strong political leadership, public awareness and coherent strategies. Cotton would have to become a major and unavoidable topic at Cancun. A positive sign came from the ECOWAS meeting on 24 April in Accra, Ghana, where West African trade ministers agreed to submit a joint submission to the WTO on cotton. *BRIDGES* will report on this submission more in detail in its next issue.

Over the last six months, ICTSD and the IDEAS Centre have provided a space for WAC negotiators in Geneva to interact with external experts, exchange ideas and explore possible strategies at the WTO on cotton subsidies. On 17 June, ICTSD, Oxfam and the IDEAS Centre will hold a half day dialogue on this issue within the framework of the WTO civil society symposium. (Contact: [ediouf@ictsd.ch](mailto:ediouf@ictsd.ch)).

<sup>1</sup> These three countries have the highest levels of cotton subsidisation. In 2001/2002 the US spent US\$2.291 billion through production programmes, China US\$1.196 billion and the EU US\$0.716 billion. For the same period the US provided export assistance to the sector in the amount of US\$130 million, and China, US\$14 million (see: Int'l Cotton Advisory Group: *Production and Trade Policies Affecting the Cotton Industry*, [www.icac.org/icac/Meetings/cgtn\\_conf/documents/icac\\_ccgtn\\_report.pdf](http://www.icac.org/icac/Meetings/cgtn_conf/documents/icac_ccgtn_report.pdf)).

The first round of discussions concerning a free trade agreement (FTA) between the US and the member countries of the Southern African Customs Union (SACU, which includes Botswana, Lesotho, Namibia, South Africa, and Swaziland) is scheduled to take place at the end of May or beginning of June this year. The two sides will meet every six to ten weeks until negotiations are concluded at the end of 2004. According to associate US Trade Representative Josette Shiner, this will be the first bilateral agreement that will “pair” trade and aid. As part of the trade negotiation process, a separate group – consisting of government and non-government trade experts – will be established to concentrate on issues surrounding the lack of trade expertise and infrastructure in SACU member countries.

Among sensitive negotiation topics will be agriculture, compulsory licenses and parallel imports to ensure access to essential medicines, South Africa’s black economic empowerment laws, transparency with regard to government procurement, and access to southern Africa’s telecommunications and financial services sectors. Some economists from the region assert that a SACU-US agreement could put a strain on the smaller SACU economies, as they would have to significantly increase exports in order to make up for lost tariff revenue. Another concern has been raised regarding potential US attempts to seek limits on SACU countries’ use of compulsory licences for pharmaceuticals similar to those in the US-Singapore FTA (Bridges Year 7 No.2, page 14).

On the other hand, civil society organisations and trade unions in the US have raised alarm regarding what they see as a major loophole in the US-Singapore agreement’s requirement that both sides uphold their labour and environmental regulations. According to Sandra Polaski of the Carnegie Endowment for International Peace, the Integrated Sourcing Initiative included in the FTA allows products produced on the Indonesian islands of Bintan and Batam to be treated as if they were of Singaporean origin without either Indonesia or Singapore being required to assume any of the obligations of the agreement with respect to production on those two islands. Adherence to labour laws, environmental protections and/or any other provisions requiring effective law enforcement simply would not apply. Ms Polaski argues that this loophole must be closed before President Bush signs the FTA into law in May in order to honour the congressional mandate to include such protections in all US trade agreements. She cites State Department data showing little enforcement in Indonesia of minimum wage, child labour and other labour laws, as well as credible evidence of collusion between employers and police and military in intimidation of workers who try to exercise their rights.

Meeting in Mexico in early April, the Trade Negotiations Committee for the Free Trade Area of the Americas (FTAA) instructed the negotiating group on agriculture to “intensify its discussions on all issues on its agenda.” The focus, however, remained firmly on the elimination of export subsidies and other US priorities in the WTO’s agricultural negotiations (Bridges Year 7 No.2, page 14).

In addition, negotiators were urged to draft an “architectural framework” for the agreement and to streamline the chapters covering the different areas of the future FTAA. Technical assistance to the small economies of the region was also discussed and the consultative group on this topic was instructed to develop an action plan. The Committee further requested governments to enhance civil society participation and to improve the FTAA website through public statements after meetings.

The third round of negotiations for the Central American Free Trade Agreement (CAFTA) between the US and Costa Rica, El Salvador, Guatemala, Honduras and Nicaragua with the US was held from 31 March to 4 April. The fourth round will be held from 12-16 May in Guatemala.

Several Central American sources expressed disappointment in the lack of movement over agricultural and textiles market access, on which the US has so far offered no significant improvement. On the other hand, the US has focused heavily on curbing agricultural export subsidies, including a clause already incorporated in the US-Chile Free Trade Agreement, that allows signatories to subsidise their own exports to trading partners that do not take measures to counteract subsidised imports from third parties.

Civil society organisations in CAFTA countries are worried that the fast-paced negotiations – slated to conclude by 1 January 2004 – will result in a carbon copy of the US-Chile Free Trade Agreement, which is largely oriented toward market opening and investment enhancement. Going well beyond the multilateral standards provided by WTO Agreements, the US-Chile FTA includes, *inter alia*, TRIPS-plus intellectual property protection for trademarks and patents while severely restricting the scope for protecting geographical indications (Bridges Year 7 No.2, page 14).

On the US side, trade unions are pressing the government to come up with labour provisions. Their chief concern is to ensure that lower protection of workers’ rights in CAFTA countries does not compromise the competitiveness of US businesses. Until now, they have been able to pressure the government regarding CAFTA countries’ eligibility for the US Generalised System of Preferences (GSP, on which their market access preferences have hitherto depended) due to insufficient labour rights protection. Cases are currently pending over violations in Costa Rica, El Salvador and Guatemala. The rulings are expected in the next few months.

In April 2003, Japan told the Association of South-east Asian Nations (ASEAN) that it would collaborate in the Initiative for ASEAN Integration (IAI), the development of areas along the Mekong River and expansion of Internet accessibility. The initiative is aimed at narrowing the development gap among ASEAN nations by raising the level of development of newer members – Cambodia, Laos, Myanmar and Vietnam – to that of the older and more developed members – Brunei, Indonesia, Malaysia, the Philippines, Singapore and Thailand. Japan and ASEAN countries also discussed ways to secure energy in Asia given growing demand in China and agreed to co-operate in tackling terrorism and other transnational problems and to move forward projects involving the planned Japan-ASEAN comprehensive economic partnership.

EU governments agreed in early April to maintain the controversial concept of ‘graduation’ in the Union’s Generalised System of Preferences (GSP), but extended preferential duties for key imports from Argentina and Uruguay, whose economies have been buffeted by major a crisis in recent months. Colombia and Costa Rica, on the other hand, will face duty increases. These will be applied in two steps: 50 percent in November and the remainder in May next year.

The EU reviews its GSP preferences annually on the basis of economic criteria. Under normal circumstances, Argentina would have lost its preferential tariffs for fish, fresh fruit and vegetables, making them more expensive to export to the EU. Argentina feared this would cost it hundreds of millions of dollars a year.



## Building Bridges between Intellectual Property and Biodiversity: The EC's Point of View

By Jean Charles Van Eeckhaute

All too often the current discussion on the interplay between the Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPs) and biodiversity-related issues has been depicted as pitting the North and the South against each other. This presentation of facts however deserves some fine-tuning. While it is true that certain industrialised countries have systematically downplayed this issue, the European Community (EC) takes the view that it must be thoroughly discussed and that adequate solutions must be found.

A global intellectual property (IP) system must reflect the specific needs of all its participants, including the developing countries. What we need are core rules, such as those provided by TRIPs, while leaving countries the flexibility to tailor the systems to their specific needs. Just as the EC believes that trade liberalisation can bolster development, provided it is complemented by effective rules and appropriate domestic policies, we believe that IP can be a tool for development, provided it is properly calibrated to the needs of the implementing countries. The EC's Communication to the WTO of 17 October 2002 (IP/C/W/383) explores this approach with regard to Article 27.3(b) TRIPs and related issues.

This approach can be summarised under three headings:

- **Make full use of the flexibility available under the TRIPs Agreement**

As has been shown in the access to medicines issue, many of the perceived problems with the TRIPs Agreement do not reside in the Agreement itself, but rather in the restrictive interpretations advocated in certain circles. The EC Communication shows that, as regards the patentability of biotechnological inventions, the degree of flexibility offered by the TRIPs Agreement is in fact considerable. This flexibility resides not only in Article 27.3(b). For instance, the interpretation of the patentability criteria under Article 27.1 may differ from Member to Member, which may lead to certain nuances in approach, for instance when distinguishing between an invention and a discovery. Each Member is free to use these flexibilities, while taking into account its needs in terms of biotech research.

Other issues where TRIPs offers a significant degree of flexibility are plant variety rights and farmers' exemptions. The absence of a definition of the term "effective *sui generis* protection" means that Members have considerable room of manoeuvre to design a protection regime for plant varieties that is appropriate to their specific national situation. The UPOV Convention offers a useful standard, but other systems can be envisaged.

Also, specific exemptions allowing subsistence farmers and small farmers in developing countries to save, use, exchange or sell seeds of protected varieties can be perfectly justified under Articles 27.3(b) and 30 of the TRIPs Agreement. This is a clear illustration that, when properly interpreted, TRIPs can offer effective solutions.

- **Use all available means to ensure a mutually supportive implementation of the TRIPs Agreement and the Convention on Biological Diversity (CBD)**

The Communication acknowledges that, even in the absence of legal incompatibility between TRIPs and CBD, there is a considerable *interaction* between both agreements. Specific measures need to be made to ensure that they are implemented in a mutually supportive way. Therefore, the TRIPs Council should focus on ways and means of doing this.

**Disclosure of origin should serve to ensure that benefit-sharing takes place, not to prevent the grant of patents.**

This means that the CBD (and related instruments, e.g. the Bonn Guidelines) must be fully implemented at national level. Sound regulation of access to genetic resources and benefit-sharing is paramount to creating legal security and to protecting the rights of providers of genetic resources. Contractual approaches alone are not sufficient. At the same time, the TRIPs Agreement must be enforced in a way that supports the objectives of the CBD. The point is that intellectual property systems can and must be used to prevent misappropriation of genetic resources and traditional

knowledge and to ensure appropriate benefit-sharing, as patent protection can serve as an effective trigger for benefit-sharing.

- **Examine new concepts and approaches**

Ensuring an optimal degree of mutual supportiveness between the TRIPs Agreement and the CBD may also require the examination of new mechanisms.

A number of WTO Members have proposed to create a direct interface between the TRIPs Agreement and the CBD by incorporating a requirement into the TRIPs Agreement that patent applicants should disclose the geographical source and origin of the genetic material and the related traditional knowledge (TK) used, and produce an official certificate or evidence that domestic laws on access and benefit-sharing of the source country have been respected (evidence of prior informed consent and of fair and equitable benefit-sharing).

Certain Members have dismissed such proposals, but the EC is prepared to enter into a serious discussion on this issue. As it is related to the list of "outstanding implementation issues", it may even be subject to negotiations in the framework of the Doha Development Agenda in view of inserting a disclosure requirement into the TRIPs Agreement.

As regards the substance of the matter, the Communication takes the view 1) that the information to be provided by patent applicants should be limited to information on the geographic origin of genetic resources or TK used in the invention; and 2) that such a disclosure requirement should not act, *de facto* or *de jure*, as an additional formal or substantial patentability criterion.

There should be no misunderstanding: the disclosure mechanism the EU has in mind is a compulsory one, not a voluntary one.

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Failure to disclose, or the submission of false information should have legal consequences with a deterrent effect. However, these legal consequences should lie outside the ambit of patent law, such as for example in civil law (claim for compensation) or in administrative law (fee for refusal to submit information to the authorities or for submitting wrong information). In our view, disclosure of origin should serve to make sure that benefit-sharing takes place, not to prevent the grant of patents. This would be counterproductive, as the grant of patents can be a useful and effective trigger for benefit-sharing (e.g. the sharing of royalties or transfer of technology).

Such a system would be effective, because it would help to prevent misappropriation of genetic resources and related traditional knowledge, *i.e.* by allowing patent offices to establish novelty more accurately by making more focused searches. Moreover it would enable providers of genetic resources to monitor and keep track of compliance with access and benefit-sharing rules as well as with the contractual arrangements between providers and users of genetic resources.

Another missing piece of the jigsaw is effective protection for traditional knowledge. The Communication confirms the EC's support for the development of an international model for the protection of TK. This issue is currently being considered by the WIPO Intergovernmental Committee, and it is important for this Committee to deliver on this issue. On the basis of the outcome of the WIPO process, the TRIPS Council will have to determine whether this warrants further work in the TRIPS-context.

### Conclusion

The Doha Development Agenda provides an opportunity to give new momentum to the review of Article 27.3(b) of the TRIPS Agreement and related issues. True, these issues have been overshadowed by the intensive work on TRIPS and public health in the last few years. Also, due to the wide divergences of view among key players, the process has not yet evolved into a constructive dialogue. In this respect, the EC hopes that its approach will contribute to the search for pragmatic and effective solutions. Such an approach is in the interest of all. It is in the interest of the biotech industry, because it will benefit from an IP system that is considered legitimate by all its participants. It is also in the interest of the providers of genetic resources and TK holders, as, if there is a proper interplay with the CBD, they can use the IP system to trigger benefit-sharing and to protect their traditional knowledge.

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The relationship between TRIPS Article 27.3(b) and the Convention on Biological Diversity have been discussed for a number years in the WTO Committee on Trade and Environment (CTE), as well as the TRIPS Council. The agenda of the Council's next regular meeting – scheduled for 3-5 June 2003 – is not yet available, but biodiversity-related issues are expected to feature less prominently than protection for geographical indications and access to medicines (see page 2).

The CTE's meetings in late April/early May will be covered in the next issue of Bridges.

### End of the Road for Shrimp-Turtle Litigation

After 11 years of more or less constant litigation between the US government and conservation groups, the domestic-level battle over import requirements for marine shrimp has come to an end. On 7 April 2003, the Supreme Court refused to consider the Sea Turtle Restoration Project's challenge of the revised implementation guidelines for US sea turtle protection legislation.

The law itself – officially known as Section 609 of Public Law 101-162 – requires all marine wild shrimp from regions where sea turtles occur to be caught with vessels using turtle excluder devices (TEDs), which allow the turtles to escape instead of drowning during shrimping operations. This requirement applies to both domestic and imported shrimp.

The first implementing guidelines for Section 609 allowed shrimp imports only from countries that were certified by the US State Department to have (and enforce) national legislation requiring TEDs. That requirement was ruled discriminatory in a landmark WTO case on two main counts. First, it essentially required foreign governments to have the same (instead of comparable) legislation as the US and, second, it discriminated against shrimp caught with TED-equipped vessels in countries that were not certified (Bridges Year 2 No.7, page 9).

To deal with these shortcomings, the US revised the implementing guidelines (but not the law itself) so that fisheries, as well as countries, could be certified. Together with other changes – in particular, a commitment to negotiate an international agreement on sea turtle conservation and to assist other countries in TED-building and use – this 'shipment-by-shipment' exception was an essential element of the US 'compliance package', which was confirmed WTO-compatible in the fourth and final WTO ruling on the case in October 2001 (Bridges Year 5 No.8, page 6). While that ruling ended the multilateral trade dispute, domestic litigation to annul the guidelines revision continued unabated.

### New Legislation, Consumer Boycott Considered

In particular, conservation organisations focused their energies on overturning the 'shipment-by-shipment' exception, which they consider an impossible-to-monitor loophole that betrays Congressional intent in passing Section 609. According to Peter Fugazzotto of the Sea Turtle Restoration Project (STRP) "the US shrimp industry may be on its last legs" due to the "flood" of aquaculture shrimp in US markets, as well as "preferential treatment" of foreign shrimp fleets. "It's not fair," he said, "that American shrimpers get punished for doing their share in protecting global resources." STRP's Todd Steiner acknowledged that legal avenues to fight the exception were now exhausted, but added that environmentalists were "currently developing a legislative fix to this loophole in the Shrimp-Turtle Law that will both protect endangered sea turtles and US shrimpers, and not allow the State Department any latitude in misinterpreting the law. Environmentalists are also considering a consumer boycott of all foreign shrimp – both wild-caught and aquaculture."

The shrimp-turtle court battles resemble those still being fought with regard to labelling 'dolphin-friendly' tuna. Conservation groups have twice stopped the US Commerce Department from introducing new labelling criteria developed to comply with multilateral commitments under the International Dolphin Conservation Programme. That case is still under litigation (Bridges Year 7 No.1, page 11).

## Tobacco Control: Don't Trade Away Public Health

By Rémi Parmentier and Kelly Rigg

Negotiations for the World Health Organisation's Framework Convention on Tobacco Control (FCTC) ended in Geneva in February 2003. The Convention will be forwarded for adoption to the UN World Health Assembly in May. Tobacco companies, with support from several key countries, are expected to continue to try to weaken the Convention before then, and tobacco control campaigners are concerned that the rules of the multilateral trading system could be used to undermine the WHO effort to curb the tobacco epidemic.

While tobacco control may appear to be a 'soft' issue, the negotiations epitomised the same dynamics that have come to characterise most recent international negotiations: developing countries saddled with rising costs to feed the profits of Northern multinationals, US double standards, and other cynical arm-twisting rich-country politics.

In particular, there are interesting parallels between the tobacco experience and environmental negotiations involving scientific uncertainty and implementation of the *precautionary principle*, although with tobacco, there is no scientific controversy as to the reality of tobacco-related diseases.<sup>1</sup> While the industry is still involved in a massive campaign to sow doubts about several key related issues, at the core the World Health Organisation (WHO) is dealing with scientific certainty and one would think that with this issue at least governments would put health before trade.

### Worldwide Tobacco Epidemic

As WHO Director-General Gro Harlem Brundtland has observed, "Four million unnecessary deaths per year, 11,000 every day – it is rare, if not impossible to find examples in history that match tobacco's programmed trail of death and destruction." 'Programmed' was a good choice of words, as this is the most disturbing aspect of tobacco addiction in comparison with other global public health crises such as AIDS or malaria. As the WHO has noted, "Tobacco use is unlike other threats to global health. Infectious diseases do not employ multinational public relations firms. There are no front groups to promote the spread of cholera. Mosquitoes have no lobbyists."<sup>2</sup> And according to WHO figures, if current growth rates continue, by 2020, tobacco use will be responsible for about 10 percent of the global burden of disease.<sup>3</sup> The evidence is overwhelming.

### Dirty Business

The multinational tobacco corporations have selected as their prime targets young people and – increasingly – those from developing countries. Targeting young people is obvious: start young and be addicted for life. Why target developing countries? Because corporations need to compensate for control measures and increased health awareness in Europe and North America. Countries with already distressed economies and faced with increasing levels of poverty are therefore now also projected to face the costs of an unprecedented tobacco-related epidemic in the next decades. Tobacco has now become what is known in UN jargon as a development and poverty eradication issue.<sup>4</sup>

Everyone knows tobacco executives put private profit before human lives. Very few, however, realise that governments are still covering up for them. And, ironically enough, the US is taking the lead. The irony is that the rest of the world sees the US leading with anti-smoking initiatives. Given that the largest multinational tobacco corporation, Philip Morris, is US-based and needs to sell its products somewhere, US negotiators have stood in the way of all key tobacco control measures proposed under the Convention. It probably doesn't hurt that Philip Morris is also the single largest corporate contributor to the Republican Party.

### Looming Tobacco Trade War?

As the negotiations drew to a close, negotiators refrained from clarifying in the treaty whether countries would be able to challenge any tobacco control provision they consider an unfair restriction on trade through the WTO.

Since the creation of the WTO in 1994, campaigners have warned of its *chilling effect* on the further development of laws and regulations aimed at the protection of the environment and human health via trade-restricting measures. One particular *chilling factor*, they say, is the legally binding WTO dispute settlement mechanism.

In principle there is nothing wrong with a legally-binding mechanism. It could even be a good thing were the judgements unbiased. In most cases, however, it rules in favour of trade at the cost of public health and the environment. This is why, for example, European taxpayers pay for the EU having banned growth hormones in beef, a health measure that the US dislikes because it restricts American meat exports to Europe.

But here's another great irony. While the Bush Administration campaigns against multilateralism on nearly all fronts, it nevertheless uses the multilateral trading system to pursue its own unilateral agenda. The application and use of double-standards by the US is perhaps nowhere as clearly exemplified as in its opposition to a strong and effective multilateral framework on tobacco control which is in many respects consistent with policies applied in the US to protect American citizens.

### Awaiting the Emperor with no Clothes in Cancun

So, having ducked the issue of whether tobacco control measures will be subordinate to free-trade regulations, negotiators have – perhaps inadvertently – subjected the newly agreed convention to the politics of the WTO negotiations to be held in Cancun in September.

Cancun is likely to take place in a very politically charged environment. Apart from (and perhaps compounded by) the impact of the Iraq war and related controversies, there is increased irritation with the lack of progress on the so-called Doha 'Development Agenda'. US double talk on export credit and subsidies and – of course – the deadlock in carrying out the mandate of the Doha Declaration on TRIPs and Public Health (i.e. easing poor countries' access to medicines) have created much ill will.

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*Tobacco Control, continued from page 17*

For example, EU Trade Commissioner Pascal Lamy recently wrote, "Neither the US nor the European Union has a 100 percent record to brag about when it comes to the implementation of rulings of the World Trade Organisation. But the problems, particularly on the US side, are starting to mount up. Meetings of the WTO's dispute settlement body have become a litany of complaints against the US and its failure to implement WTO findings".<sup>5</sup> You can read between the lines that Lamy sees his US partners behaving like bulls in a china shop.

It is unclear whether Lamy knew when he wrote this that the US was overtly threatening to use the WTO to undermine the Tobacco Convention. Someone should tell him quickly! In the context of the Doha Round, Lamy is negotiating on behalf of the European Union with the other WTO governments an agreement on the relationship between the WTO multilateral trading system and multilateral environmental agreements (including application of the 'precautionary principle'). The outcome of this will have important long-term consequences for public health. The question is whether trade agreements should supersede health and environment agreements – precisely the issue which was avoided in Geneva.

What can we expect from the US in this context? To start with, the US is and will continue to be a forceful opponent of the precautionary principle. Its negotiators claim that they would accept trade-restricting measures for environment and health only when enacted on the basis of scientific evidence.

This position is at odds with that of the EU, which is constantly threatened by the US with WTO retaliation when putting health first.

Why is this relevant to tobacco control? Because now, in the context of the anti-smoking negotiations, the US government is taking a position which is 180 degrees the opposite. The US position has been, in effect: "We don't support measures to protect human health and the environment unless these impacts are scientifically proven. But actually, we don't support them when they are scientifically proven either, at least when it comes to making sure that other countries aren't deterred from buying our deadly products."

At this point, the credibility of the US negotiators falls apart: who can believe them when they claim they would agree to trade-restrictive measures on issues such as GMOs if only there were more solid scientific evidence of the damage to biodiversity or health? Won't it be hard for US Trade Representative Robert Zoellick in Cancun to tell everyone that GMOs are safe, when his negotiators at the WHO act as if tobacco smoking were safe too? Poor Robert Zoellick is doomed to play the part of the emperor with no clothes in Cancun. Perhaps health activists should bring along spare clothing to Cancun – to donate to him in sympathy for his nudity.

In all seriousness, perhaps no one is as acutely aware of the boomerang effect that a WTO dispute settlement panel over tobacco control could have on the credibility of his organisation as WTO Director General Dr. Supachai Panitchpakdi. The concern that Philip Morris could convince the Bush Administration to fight tobacco control at the WTO is possibly what motivated Dr.

Supachai on 3 March to "congratulate all of those who worked so hard to bring about this important agreement".<sup>6</sup>

**WHA: Towards a Coalition of the Committed**

Despite its economic might and arm twisting tactics, the US lost in Geneva. The Convention has many novel provisions, including the explicit recognition that a ban on all tobacco advertising would save lives.<sup>7</sup> However, in the end, the US expressed reservations to several of the most meaningful provisions, supported to a lesser extent (and for different reasons) by others, including Germany, Japan, China and Cuba. It is feared that they will try to re-open the Convention to negotiation.

Organisations from all over the world will come to the World Health Assembly to support the fight of poorer countries which need the legitimacy and protection of the UN to secure protection for their people from the abuse of tobacco multinationals.<sup>8</sup>

The World Health Assembly also provides an opportunity for those countries to go beyond the lowest common denominator. Countries could announce collectively or individually that they will implement the strongest tobacco control measures envisaged under the FCTC, particularly a total ban on advertisement; banning the use of the

misleading words *mild*, *light* and *low tar*; and compulsory use of 50 percent size warning labels on tobacco packages.

The world places great stock in signals. What better signal could there be to reaffirm the right of States to protect human health than by forming a 'Coalition of the Committed' on tobacco control at the World Health Assembly? In so doing, governments would highlight the imperative need to prevent the US from trading away public health.

*Rémi Parmentier and Kelly Rigg provided this comment on behalf of ASH, Action on Smoking and Health (UK). This article is a summary of the article posted on ICTSD website at <http://www.ictsd.com/pubs/external/tobacco.pdf>*

**ENDNOTES**

<sup>1</sup> Physicians have estimated that since the negotiation of the Framework Convention started on 25 October 1999, 13,461,552 people have died from tobacco-related illnesses.

<sup>2</sup> <http://www.tobaccofreekids.org/campaign/global/pdf/infiltration.pdf>

<sup>3</sup> *Women and Tobacco Epidemic, Challenges for the 21<sup>st</sup> Century*. Foreword by Dr. Gro Harlem Brundtland, WHO, 2001, WHO/NMH/TFI/01.1.

<sup>4</sup> See *The Economics of Tobacco Use and Tobacco Control in the Developing World*. The World Bank, February 2003, available at: [http://europa.eu.int/comm/health/ph/programmes/tobacco/world\\_bank\\_en.pdf](http://europa.eu.int/comm/health/ph/programmes/tobacco/world_bank_en.pdf), and *Tobacco and Health in the Developing World*, WHO, February 2003, available at: [http://europa.eu.int/comm/health/ph/programmes/tobacco/who\\_en.pdf](http://europa.eu.int/comm/health/ph/programmes/tobacco/who_en.pdf)

<sup>5</sup> *The Wall Street Journal* on 3 March, 2003

<sup>6</sup> [http://www.wto.org/english/news\\_e/news03\\_e/sp\\_who\\_tobacco\\_agr\\_3march03\\_e.htm](http://www.wto.org/english/news_e/news03_e/sp_who_tobacco_agr_3march03_e.htm)

<sup>7</sup> For the full text see: [www.ash.org.uk/html/international/html/postINB6text.html](http://www.ash.org.uk/html/international/html/postINB6text.html)

<sup>8</sup> The WHA will be held 17-28 May, 2003 in Geneva. Website [www.who.int](http://www.who.int)

### Southern Agenda on T&E Enters Second Phase

In early 2002, ICTSD, together with the International Institute for Sustainable Development (IISD) and a number of developing country policy research institutions (the Regional and International Networking Group – Ring), launched the second phase of their collaborative project aimed at building capacity for developing countries on trade and environment issues at the WTO.

Entitled 'A Southern Agenda on Trade and Environment', the first phase sought to gather and present Southern perspectives on the trade and environment link. It built on extensive consultations with developing country trade policy representatives in Geneva, and compiled a comprehensive matrix of developing country and least-developed country proposals on trade and environment submitted thus far to the WTO (see [www.ictsd.org/environment/products](http://www.ictsd.org/environment/products)). The results of the Phase I were presented at the WTO Symposium on 'The Doha Development Agenda and Beyond' in May 2002.

Phase II, which builds upon the results of Phase I, endeavours to respond to the opportunity offered by the Doha mandate on trade and environment. The Doha mandate provides an opportunity for all parties to shape the agenda of WTO trade and environment negotiations in more profound ways than might be possible on many other issues. This opportunity is particularly pertinent to developing countries, the majority of which have been generally suspicious of environmental issues seeping into trade deliberations and accepted the Doha mandate on trade and environmental negotiations rather hesitantly, if not grudgingly. Furthermore, developing countries see an opportunity to broaden the trade and environment discussion by placing it in an overall sustainable development framework.

Such an approach requires active engagement. Importantly, the consultations conducted during Phase I of the Southern Agenda project suggest that there is a certain degree of desire on behalf of developing countries to invest themselves in such an exercise. Phase I also concluded that in order to fully engage, developing countries required enhanced capacity to identify regional priorities and to translate these to WTO negotiating positions.

As a result, Southern Agenda II aims to strengthen the capacity of trade negotiators, key national policymakers and regional actors in developing countries to determine priorities for promoting and negotiating proactive positions that reflect their own 'Southern Agenda' on environment and trade in the multilateral trading system.

The project will be carried out over a two-year period, and is based on six dialogues in developing country regions that aim to bring forward regional priorities in trade and environment. The dialogues will both feed into and run parallel to a Geneva-based consultation process involving WTO negotiators, in order to ensure that regional environmental priorities are reflected at the multilateral level.

The first two dialogues are set to take place in Dakar, Senegal, in June, and Santiago, Chile, in October 2003. They will be followed by meetings in South/SE Asia, East-Southern Africa, the Mediterranean, and Central America over the course of 2003-2004. The project is scheduled to last until the end of 2004, following the timeline for the conclusion of the current Doha round of trade negotiations.

In the course of Southern Agenda II, policy papers on key trade and environment issues from a Southern perspective will be commissioned, and regional papers from Africa, Asia and Latin America will form the underpinning of the respective dialogues. A *Resource Book on Trade and Environment* aimed at Southern negotiators at the WTO, as well as regional processes, will be a key output of the initiative.

For more information, contact Hugo Cameron at [hcameron@ictsd.ch](mailto:hcameron@ictsd.ch)

The International Centre for Trade and Sustainable Development (ICTSD) implements its programme of information, dialogues and research through partnerships with institutions around the globe.

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## MEETINGS OF WTO BODIES

May 5-7	Negotiating Group on Rules*
May 8-9	Trade Negotiations Committee
May 12-16	Council for Trade in Services
May 13	General Council on Coherence – World Bank/IMF
May 13	Working Group on Trade and Technology Transfer
May 15-16	General Council
May 19	Dispute Settlement Body
May 19-22	Council for Trade in Services, special session*
May 20-23	Dispute Settlement Body, special session*
May 21	Sub-Committee on Least-developed Countries
May 26-28	Negotiating Group on Market Access*
May 26-27	Working Group on the Interaction between Trade and Competition Policy
June 2-3	Council for Trade in Goods – Trade Facilitation
June 3-5	Council for TRIPs, regular session
June 5-6	Working Group on Trade, Debt and Finance
June 10-12	Working Group on the Relationship between Trade and Investment
June 12-13	Trade Negotiations Committee
June 16-18	Symposium on Challenges on the Road to Cancun
June 18-20	Negotiating Group on Rules*

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

## OTHER MEETINGS

May 15-16 Brussels	Joint ACP-EU Ministerial Trade Committee on the EPA negotiations Contact: ACP Secretariat, tel: (32-2) 743-0600, e-mail: info@apsec.org, web: www.apsec.org
May 16-17 Washington	Managing Global Trade: The WTO, Trade Remedies and Dispute Settlement Contact: <a href="http://dartmouth.edu/~dirwin/DCconf.html">http://dartmouth.edu/~dirwin/DCconf.html</a>
May 19-20 London	Royal Institute for International Affairs Conference on Food Production and the New Trade Agenda E-mail: <a href="mailto:contact@riia.org">contact@riia.org</a> , tel: (40297) 957-5700
May 26 – June 6 Geneva	Third Session of the UN Forum on Forests Contact: UNFF Secretariat, tel: (1-212) 963-3262, fax: (1-212) 963-4260, e-mail: <a href="mailto:unff@un.org">unff@un.org</a>

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## NEW FROM ICTSD

[Trade Negotiations Insights: From Doha to Cotonou](#). The April 2003 issue of this quarterly newsletter contains articles on *Food Safety, the SPS Agreement and EPA Negotiations*; and *The WTO Agriculture Modalities Negotiations: Anticipating the Outcomes of Future EPAs*, as well as an update of the state of play of the EPA negotiations. To subscribe, contact ICTSD by e-mail at [subscribebridges@ictsd.ch](mailto:subscribebridges@ictsd.ch). *Disponible en français également*.

[Doha Round Briefings](#) This series of 13 papers provides a comprehensive mid-term report on the status of the ongoing WTO negotiations, as well as other mandates arising from the Doha Ministerial Conference. The Briefings are available on the ICTSD and IISD websites ([www.ictsd.org](http://www.ictsd.org) and [www.iisd.ca](http://www.iisd.ca)), as well as in hard copy from the two organisations.