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Facts and Figures

- The overall downward trend in commodity prices that began in 1996–1997 continued throughout 2001–2002.
- For a number of agricultural commodities, notably cotton and sugar, market-support measures in developed countries, such as the 2002 US Farm Bill, contributed to weakness in their world prices. Cotton prices declined a further 3.3 percent, while sugar prices were down by 20.3 percent.
- For a second consecutive year, terms of trade deteriorated for Africa as a whole, with import growth exceeding export growth in value terms by a wide margin. There is now a growing consensus that, as a result, it will be impossible to meet the Millennium Development goals.
- If industrialised countries liberalised trade in labour-intensive manufactures, additional developing country exports of such goods could reach US\$700, or over 12 percent of world merchandise trade.

Source: UN Conference on Trade and Development (UNCTAD). *Trade and Development Report 2003, October 2003*.

The Doha Round Still on Life Support, WTO Members Cast for a Way Forward

As finger-pointing slowly subsides, the consequences of the Cancun Ministerial Conference's failure to reach consensus are becoming clearer. These include a loss of confidence in the multilateral trading system and the 'single undertaking' model of negotiations, a disengagement of major trading powers and an intense focus regional and bilateral arrangements. Despite many ringing public statements on the urgency to get the Doha Round back on track, consultations underway in Geneva have yielded few signs of forward movement. Most Members now agree that the 1 January 2005 deadline for concluding the negotiations will be missed.

The Cancun Outcome

Ministers took only one decision in Cancun: the General Council shall convene at a senior officials level before 15 December "to take the action necessary at that stage to enable us to move towards a successful and timely conclusion of the negotiations". A terse Ministerial Statement issued on 14 September instructed officials to "continue working on outstanding issues with a renewed sense of urgency and purpose and taking fully into account all the views we have expressed in this Conference. [...] We will bring with us into this new phase all the valuable work that has been done at this Conference. In those areas where we have reached a high level of convergence on texts, we undertake to maintain this convergence while working for an acceptable overall outcome."

On 13 September, the Conference Chair, Mexico's Foreign Minister Luis Ernesto Derbez issued a revised version of the draft Ministerial Text sent to Cancun by General Council Chair Ambassador Pérez del Castillo on his own responsibility (Bridges Year 7 No.6, page 1). Many Members, and developing countries in particular, pronounced the text unacceptable and it was never adopted. In other words, there was no agreement on any of the substantive issues put to ministers or on procedural questions, such as new deadlines for completing work in the many sectors lagging months behind the schedule set in Doha two years ago.

How did it happen?

Technically, the negotiations came to a halt when Minister Derbez decided that Members had reached an impasse over the Singapore issues (investment, competition policy, transparency in government procurement and trade facilitation). Korea – supported by a less vocal Japan – insisted on the immediate launch of negotiations on all four topics. The European Union, which was the chief *demandeur* for negotiating disciplines on these issues, finally offered to drop investment and competition policy, which were by far the most controversial of the lot. The offer was rejected by a coalition formed in Cancun between three groups of the poorest, largely African, WTO Members. In the post-Cancun setting, the EU may withdraw the proposal, which it has described as having "outlived its shelf-life".

Minister Derbez's decision to call it quits has been much criticised, both because he chose to place the controversial the Singapore issues first on the 'final crunch' agenda and because he pulled the plug before Members could seriously address the possibilities for compromise in other vital areas, agriculture in particular. However, he defended the decision as a 'judgement call' based on his appreciation of what was possible in the light of previous consultations with a membership bitterly divided over all key areas under negotiation.

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Bridges

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Agriculture: Timid Signs of Flexibility but Peace Clause Fate Uncertain

Advanced by developed countries as a fundamental – if not the only – cause for the Cancun impasse, the confrontation on agriculture between the EU and the US, and the G-20 group of developing countries may not have been as intractable as portrayed both by the protagonists and the press (see page 4). While the EU and the US have not been forthcoming in explaining why they thought that a deal was just around the corner in the final hours of negotiations, both have indicated that they could work on the basis on the revised draft Ministerial Text (commonly called the Derbez text) if others approach it with a spirit of compromise rather than “rhetoric”.

The G-20 have shown more political will to find a way out of the impasse, but have given few indications of what new flexibility they might be able to offer (see page 4). Brazil is planning a ministerial-level meeting between the G-20 and the major trading powers in order to seek mutual understanding ahead of the 15 December WTO General Council meeting that is to decide on the way forward. Dates for ministerial have not yet been announced.

The fate of the Peace Clause, which exempts most of developed country subsidies from WTO disciplines and protects them against dispute settlement proceedings, is a critical factor in any post-Cancun agricultural negotiations. Unless Members make a breakthrough before the end of the year, the Peace Clause will expire in 2004, opening the way to a flurry of potentially successful WTO challenges (see box on page 4). A controversy has already arisen as to when exactly this will happen. Brazil has vigorously contested recent claims by the US and the EU that the Peace Clause could apply until mid-2004 for certain commodities because Article 1(i) of the Agreement on Agriculture defines the term “year” as the calendar, financial or marketing year specified in Members' schedules of commitments. Most Members consider that the Peace Clause expires on 1 January 2004, i.e. nine-years after the WTO's establishment in 1995.

WTO wheels still turning slowly

It is undeniable that the WTO as an institution has taken a beating. Regional and bilateral negotiations have experienced a spectacular revival while talks are lagging in Geneva where all the ‘single undertaking’ negotiating processes launched in Doha have been put on hold.

Members showed little engagement at a 14 October Heads of Delegation Meeting, where General Council Chair Pérez del Castillo and WTO Director-General Supachai Panitchpakdi outlined the way they intended to conduct consultations in search for a basis for moving forward. Agriculture was first on the list followed by industrial market access, the Singapore issues and the cotton initiative, which Dr Supachai will continue to steer (see page 3). At the General Council meeting of 21 October Members only decided to accept of Hong Kong's offer to host the next WTO Ministerial – dates or substance were not discussed (see page 15).

In fairness, some of the apparent disengagement can be put down to Members' unwillingness to show their cards while many governments are still assessing their post-Cancun options. Through informal consultations with capitals and in Geneva, Chair Pérez del Castillo is trying gauge the level of their ambition and political will. One of the challenges facing him is to determine what text – or combination of texts – Members would accept as a basis for negotiations.

The Casualty List

Overshadowed by the Singapore issues and agriculture, a host of other questions fell on the wayside. Had the end-negotiations turned differently, concessions might perhaps been made in some of the following areas.

Special and Differential Treatment: Developing countries might have had more leverage to advance specific issues, such as special and differential treatment (S&D) and implementation concerns. As it turned out, virtually no progress was made on S&D or implementation despite the establishment of a working group to address these issues (this was a first for a WTO ministerial conference). Although the Derbez draft would have increased the number of amendments to S&D provisions put forward by developing countries from 24 to 27, the original proposals were so watered down that their economic value was questionable at best (Bridges Year 7 No.6, page 14). With regard to implementation, debate on the extension of geographi-

cal indications ‘hijacked’ the agenda to such an extent that hardly any of developing countries’ more pressing issues were seriously considered (see page 20).

Commodity prices: The Cancun offer was meagre. The Derbez draft (unchanged from the one sent to the Ministerial by Ambassador Pérez del Castillo) instructed the WTO Committee on Trade and Development (CTD) to continue the consideration of falling/wildly fluctuating commodity prices. An African delegate commented in Cancun that the general disregard for this issue was one of the “most offensive” omissions in the draft.

At the CTD’s October session, regulation of commodity prices gave rise to some of the liveliest post-Cancun exchanges at the WTO, but the response from major trading powers was cool at best. Canada and the US – supported by Australia – expressed “strong reservations”, with the US arguing that primary commodity prices were dependent on market forces, and that previous attempts to interfere with these had proved unworkable. The EU acknowledged that the issue merited further discussion, but nevertheless said the question was less about market management instruments than competitiveness, diversification and encouraging investment.

The Cotton Initiative: The elimination of cotton subsidies came to symbolise Cancun’s development promise, but this promise did not materialise despite the WTO Director-General’s personal involvement in seeking a solution. The initiative’s proponents felt the Derbez draft’s cotton language as a slap in the face. It instructed various Doha Round negotiating groups to “address the impact of distortions that exist in the trade of cotton, man-made fibres, textiles and clothing to ensure comprehensive consideration of the entirety of the sector.” Worse for the outraged coalition of African and least-developed countries, it suggested that international finance organisations should use “existing programmes and resources toward the diversification of economies where cotton accounts for the major share of their GDP” (see page 11).

It is doubtful whether further negotiations would have brought a significant change since the US was the main country targeted by the initiative, and the vote of the cotton states is considered crucial in the 2004 presidential elections. Consultations continue in Geneva between Dr Supachai and the Members involved, but the cotton initiative has lost some of the momentum generated in Cancun and may become just another of the many standing items on the General Council’s agenda (see page 15).

Non-violation complaints: Under Article 64 of the TRIPs Agreement, Members may bring a dispute on the grounds that a measure or ‘any other situation’ has nullified or impaired a benefit even when no provision has actually been violated. Developing countries have tried for years to strike Article 64 from the Agreement, but – largely due to US opposition – talks have reached a dead end in the TRIPs Council (Bridges Year 7 No.2, page 3). The 13 September Ministerial draft instructed the Council to make recommendations to the “first Ministerial Conference to be held after 1 August 2004” (with a dispute settlement moratorium in place until that time). The status of the moratorium is now unclear.

Non-agricultural market access: There never was a chance of results without a significant move on agriculture. The Derbez text generally frustrated developed countries due to its “lack of ambition”. On the other hand, India tried (unsuccessfully) to obtain only linear tariff cuts for developing countries instead of the steeper reductions that would result from the formula-based approach proposed by the Derbez text (see also Bridges Year 7, No.6, page 10).

The environment: In the highly polarised atmosphere of the Cancun Ministerial, even further negotiations would have been unlikely to obtain a more meaningful result. Despite a push from the EU, the 13 September draft Ministerial Text did not even call for the acceleration of the negotiations conducted in the Committee on Trade and Environment on relationship between the WTO and multilateral environmental agreements. On environment-related intellectual property issues, the Derbez text merely instructed the TRIPs Council to continue its work on the review of Article 27.3(b) on patentability of life forms, biodiversity and traditional knowledge, and requested the General Council to report to the next WTO Ministerial meeting.

A Shift to Bilateral Negotiations

The non-result of the Cancun Ministerial has shaken many Members’ faith in the virtues of multilateralism. While that approach formed the cornerstone of the EU’s trade policy up to Cancun, the European Commission is now stressing the Union’s need to critically evaluate the advantages and disadvantages of “alternative approaches, plurilateral or bilateral, if the pursuit of [its] objectives in the WTO were now blocked by other participants.” US Trade Representative Robert Zoellick has vowed to move ahead with ‘can-do’ countries rather than wait while WTO Members “ponder on the future”. The consequences are already felt in the multitude of regional and bilateral initiatives that have flourished since Cancun (see page 16).

If the powerful abandon the WTO in favour of bilateral deals, the weaker economies will be even more vulnerable to economic and political pressure from countries whose markets offer the best outlets for their exports.

The future of the WTO

The debacle has again raised the question of the WTO’s decision-making procedures, which EU Trade Commissioner Pascal Lamy has called medieval and unsuited for reaching consensus between 146 Members. The EU is expected to present some amendment ideas to the General Council before the year’s end. These could include more plurilateral agreements between willing participants (a ‘WTO-II’ – potentially signalling a ‘two tier’ WTO and an erosion of the ‘single enterprise’ model of negotiations); reinforcing the role of the WTO Director-General; creating a smaller “representative group” to allow for meaningful negotiation in the General Council; and focusing the Ministerial Conferences on basic political choices as “the technicality, the breadth and the substance of the numerous issues where fundamentally contradictory positions were presented at Cancun clearly overwhelmed the capacity of the system to deal with even a fraction of them”.

Some of these ideas are also under consideration by a board of eminent advisors to Director-General Supachai (see box on page 9). Justifiably suspicious of ‘small group’ negotiations where neither their diversity nor their majority in the WTO is adequately reflected, developing countries are unlikely to endorse any moves in that direction.

How Real Is the Impasse on Agriculture?

The large group of developing countries whose ‘intransigence’ on agricultural issues was liberally blamed for the Cancun Conference’s collapse has put forward several signs of flexibility in recent weeks while the major subsidising countries have showed themselves less sanguine to make concessions.

Pre-Cancun, twenty developing countries – including Brazil, China and India – rallied around a counter-proposal to the agricultural modalities text (essentially based on a joint proposal from the EU and the US) sent to ministers by WTO General Council Chair Carlos Pérez del Castillo under his own responsibility. Dubbed the G-20, the group sought far-reaching concessions from developed countries on domestic and export subsidies, as well as broader market access commitments regarding export products of interest to developing countries. It also advocated smaller tariff cuts for developing countries (Bridges Year 7 No.6, page 11).

In Cancun, the alliance was called the G-21 after Egypt joined in and later the G-20

plus as Indonesia and Nigeria became members. Since then, Colombia, Costa Rica, El Salvador, Guatemala and Peru have withdrawn from the group, which now consists of 18 members still accounting for more than half of the world’s population and nearly two-thirds of its farmers.¹

‘Shadow Proposal’ Pointed to Flexibility in Cancun

The US in particular has made much of the G-21’s unwillingness to compromise in Cancun. Nevertheless, both the EU and the US insisted that in the final hours the negotiations a deal on agriculture was “nearly there”. As the talks collapsed over the Singapore issues before agriculture was even addressed, it is difficult to know what was on offer. While the official proposals on the table (i.e. the original G-20 text and the revised Ministerial Annex A) certainly showed gaping distances between the positions of the main protagonists, an internal G-21 document – apparently never formally tabled – pointed to grounds for potential compromise.

Most importantly, the ‘shadow proposal’ dropped the erstwhile G-20 demand for the elimination of the Blue Box, which exempts certain categories of agricultural support from reduction obligations. Instead, it accepted the Blue Box criteria elaborated between the US and the EU, but specified that such support should be limited to 2.5 percent (instead of 5 percent) of all agricultural production, and should be subject to substantial annual reduction “with a view to phasing out”.

The text continued to seek the elimination of export subsidies and tighter disciplines on trade-distorting (Amber Box) domestic support than the revised draft Ministerial Text issued on 13 September. On the other hand, while it called for more stringent criteria for the Green Box (minimally trade-distorting support), it no longer required setting a spending cap (see also box on page 7). The majority of EU and US subsidies are notified under the Blue and Green Boxes.

While the unofficial document would have required developing countries to make smaller tariff cuts than those included in the revised Ministerial Text draft, it went further than the original G-20 proposal in accepting market access obligations for developing countries.

Post-Cancun Developments

Meeting in Buenos Aires on 10 October, twelve members of the group² issued a joint declaration confirming their “firm determination of continuing the process of reform and achieving the total integration of agriculture in the disciplines of the WTO”, but also stressing that “the multilateral system of commerce [was] essential in order to continue the process of commercial liberalisation on a just and stable basis” and calling on countries to “adopt a constructive spirit” ahead of the WTO’s 15 December General Council meeting (see page 1).

After the Buenos Aires meeting, Brazil’s WTO Ambassador Luiz Felipe de Seixas Corrêa told the Reuters news agency that he did not see the Cancun Ministerial as “a failure or a collapse.” Instead, it was “a meeting that did not finish. We never put farm negotiations to the test, we never put negotiations on industrial goods to the test,” he said. Ambassador de Seixas Corrêa also said that the G-20 (as it now is again termed) was prepared to pick up where things left off in Cancun, without getting into arguments about which documents should be taken as a basis for negotiation. “We do not like the Derbez [i.e. the revised draft Ministerial] text, but we are prepared to use it,” he noted. However, India’s Minister for Commerce and Industry Arun Jaitley has called the text unacceptable as a starting point for “any discussion”.

The Peace Clause Effect

The expiration of the Peace Clause in 2004 is a major incentive for subsidy-granting industrialised countries to return to the negotiating table.

Embodied in Article 13 of the WTO Agreement on Agriculture (AoA), the Peace Clause shields Members’ notified domestic agricultural subsidies and export support from dispute settlement proceedings. Once it no longer applies, not only can disputes be initiated against subsidy programmes, but trade remedy measures such as countervailing or anti-dumping duties can also be brought to bear.

The Cancun Ministerial Text would have extended the Peace Clause by a number of months to be negotiated in Geneva. That opportunity missed, the US and the EU have recently put forward a controversial interpretation that the Peace Clause actually expires nine years from the date they notified their subsidies to the WTO under the Agreement on Agriculture, i.e. next July rather than on 1 January 2004 (see also page 2).

In the next issue of Bridges, Richard Steinberg and Timothy Josling will analyse the vulnerability of the EU and US to WTO legal challenge.

¹ The group now consists of Argentina, Bolivia, Brazil, Chile, China, Cuba, Ecuador, Egypt, India, Indonesia, Mexico, Nigeria, Pakistan, Paraguay, the Philippines, South Africa, Thailand and Venezuela.

² Argentina, Bolivia, Brazil, Chile, China, Cuba, Egypt, India, Mexico, Paraguay, South Africa and Venezuela.

Trade Liberalisation and the Environment: Are There Legitimate Worries?

Simon Upton

One of the features of the debates leading up to the WTO's Cancun Ministerial meeting was the prominence given by some parties to linkages between trade liberalisation and the environment, particularly as they apply to agriculture. These concerns were made formally a part of the negotiating agenda in Doha. The linkages were given particular prominence as a result of the European Union's decision to embark on a major reform of its Common Agricultural Policy (CAP) and in doing so seek to make its agricultural support policies more trade friendly.

As a result, Europe has invited a more thorough-going debate on the sorts of environmental concerns that might give rise to policy interventions, and the extent to which they might support trade-restrictive measures. This is not the case with other parties to the negotiations. The United States, for instance, has tended to accept without serious challenge that its subsidies are little more than the outcome of blatant pork-barrel politics. No-one pretends that any future reductions might be crafted to garner significant environmental gains. Farm subsidies in the United States will disappear the day politicians feel emboldened to ignore the lobby groups circling around the Capitol.¹ We may be in for some wait.

But Europeans have mounted a more sophisticated defence. They have acknowledged the trade-distorting effects of their billowing subsidies but have equally drawn attention to the environmental consequences of liberalisation and subsidy removal, not all of them positive. And in noting this they invite an altogether more complex response than the United States. It is this argument I should like to expand on.

Classical trade theory suggests that any level of liberalisation – no matter how partial – is advantageous. This flows from the uncontentious claim that comparative advantage will bring benefits to all participants even if not in equal measure. It is not a zero-sum game.² Where the environmental consequences of changed patterns of trade and production are concerned, however, there is no such guarantee. Environmental outcomes are dependent on a huge array of bio-physical and regulatory environments. They may or may not be exacerbated depending on the regulatory environment in countries to which production shifts in response to changing comparative advantage. But even (implausibly) assuming a seamless regulatory climate between economies, physical and social factors can mean quite different outcomes in the face of changing patterns of trade.

The questions that demand sharp focus revolve around what environmental concerns are legitimately the business of trade negotiators and, assuming these concerns are held in good faith, how might they be addressed?

In the first place those who advance these concerns need to be very precise about what is worrying them. That's because for some, the greening of subsidies and the maintenance of protective barriers is merely a useful means of making publicly acceptable what amounts, in fact, to a capitulation to vested interests. Listening to the way some European politicians seek to assure their farming constituents of their loyalties doesn't give one huge confidence that this is all driven by an unimpeachable desire to save the planet.

Even at the level of the European Commission, where Commissioners struggle manfully to hold the line against some stiff, vested, national producer interests, the case has not been adequately made. Pascal Lamy, for instance, has recently explained the European position on agriculture in *Le Monde* in these terms:

“The European Union has made a political choice to support agriculture because it cannot just be regarded as an economic activity like any other. It fills many other roles than simply that of production. It contributes to the protection of the environment, food safety, animal welfare, etc.”³

It is the “etc.” that worries me as much as anything. Because the failure to specify the problem leaves us in a warm – and potentially limitless – zone of comfort that defies tough-minded analysis. Is agriculture so different? The chemical industry impinges equally on environmental protection, food safety and animal welfare not to mention a vast array of human welfare-related issues. In a world in which people wish to speak increasingly of sustainable development, it is surely hard to draw such tidy distinctions between the impacts of different types of economic activity?

I can identify three sorts of legitimate environmental concerns. Properly described we can then decide whether and how those concerns might be addressed.

Environmental Impacts in the Liberalising Country

This concern often focuses on cultural and heritage values imprinted on the rural landscape. These are real worries in many cases. They are also exclusively the domestic concern of the country in which they are found. At least conceptually, they should pose no problems for negotiators; to the extent that they involve the provision of public goods that would not otherwise be provided, they can be transparently purchased from taxes. Needless to say, the boundary between landscape values and the desirability of having real, live, close-to-nature artisans not just tilling those Brueghelian fields but living in those exquisite villages is not easy to draw. But social subsidies can be equally transparent. To some extent the mooted CAP reforms – scheduled only to bite some years from now – mark a step in this direction.⁴ The key reform to the CAP will be the expanded ‘decoupling’ of support to EU farmers from production and moving this support to non-production related activities.

Continued on page 6

Of one thing we can be certain: this concern cannot credibly be extended to fields as far as the eye can see broken only by silos, large tractors, irrigators and factory farms. Neither, at least on economic grounds, can the argument that similar agricultural products from countries abroad should be kept out because they would compete unfairly. If the objective is to maintain landscapes and the people who inhabit them, that can be achieved while still delivering, through liberalisation, lower prices to consumers in the same country – consumers who are, after all, paying the taxes that purchase the public goods. The annual welfare gains to Western Europe from full liberalisation are estimated to exceed €15 billion.⁵

Impacts in Countries Benefiting from Liberalisation

The concern here, again a real one, is that the opening of markets will lead to significant new production beyond the liberalising country's borders with negative environmental impacts. The fear is that whatever environmental damage may be mitigated at home as a result of reduced production in response to lowered subsidies and/or tariffs, will simply be transferred to another country, and particularly to developing countries that may not be able to support such rigorous environmental standards. The net result may not be a simple transfer of harm but an overall increase in environmental damage at the global level.

While the concern is a real one, it does not follow that subsidies should be maintained on the basis that this represents some lesser of two evils. The local responses by producers in a developing country represent trade-offs which they have jealously guarded the

right to make – see Principle 2 of the *Rio Declaration*.⁶ No developing country is going to limit its freedom to develop as developed countries have before them. Developed world living standards are built on the conversion (for which read, destruction) of natural resources into intellectual and human resources. This 'substitution of natural capital with human capital' (as economists characterise it) is a trade-off that every country regards as its own sovereign choice.

But that does not leave developed countries without the means to respond. A co-ordinated refocussing of technical and development assistance aimed at alleviating such problems could go a long way to helping both development and the environment. Here's a real world example involving cotton subsidies.

OECD member subsidies to cotton farmers lower world prices by some 25 percent. A reduction in cotton subsidies would certainly mean improved market access for a number of developing countries. But what would it mean for the environment?

One country with significant cotton interests is Uzbekistan. Improved world prices for Uzbek cotton as a consequence of reductions in cotton subsidies would certainly have positive implications for poverty reduction and economic growth in this central Asian economy. However, the increased output is likely to have negative implications for water use and the Aral Sea in Uzbekistan. The water supply of Uzbek cotton farmers is already a dwindling resource. Currently, more than 40 percent of the water taken from the severely stressed Aral Sea to irrigate the cotton fields evaporates before it even reaches those fields because Uzbek farmers use open channels, not closed pipes, for irrigation. Further pressure on the Aral Sea water resource would have significant negative spill-overs to other parts of the Uzbek economy. What can be done about this?

If countries concerned about the environmental impact of liberalisation beyond their shores are really worried about these sorts of consequences, they can look to technical and development assistance to plug the gaps. So if improved market access for Uzbek cotton as a consequence of subsidy reductions threatened local environmental harm, developed country policy-makers should be able to fund flanking measures to mitigate them (such as enhanced technical assistance for improved irrigation techniques).⁷

Global Environmental Impacts from Liberalisation and Subsidy Removal

Finally, there may be concerns that the economic welfare gains from subsidy removal will accentuate a variety of non-local environmental externalities as a result of higher consumption.⁸ Greenhouse gas emissions come to mind. Again, this is a valid concern (although I must confess I haven't heard it argued by a government). But the solution for such problems lies, by definition, with the negotiation of multi-lateral environmental agreements. Whatever our difficulties in elaborating them, it would be hard to argue that maintaining subsidies was a legitimate alternative.

I have elaborated these three possible concerns because it seems to me that, in varying degrees, they are legitimate and should be raised. Of course, before proposing expensive solutions or negotiating new multilateral environmental agreements (MEAs), one would first want to take into account the very significant environmental benefits that are likely to flow from the elimination of agricultural subsidies. I say this with some feeling coming from a country, New Zealand, which allowed production-based subsidies to become an engine for the destruction of primeval temperate rain forests on a large scale. The consequences for soil, water and biodiversity were alarming. The complete removal of those subsidies has seen huge areas of land undergo changes to less destructive uses than grazing, and in some cases begin the process of reversion to native forest. The on-going degradation of water quality has been arrested.

That is not to say that there are no remaining environmental problems. Those sectors that have prospered and expanded from a newly self-sustaining economic base, are imposing new pressures. They are in turn the subject of new regulatory interventions and, in some cases, some very limited payment of public moneys to secure particular public goods. It is true that such pay-

There are environmental consequences of subsidy removal. Those countries which have raised them – bravely in my view – must be challenged to make their arguments defensible. This will be the real test for those charged with seeing through the transformation of the CAP. But nothing can justify keeping everyone poorer by preserving the status quo. Doing so in the name of the environment would be the final straw.

ments press close to the boundary of subsidies. But it should be possible to distinguish on the one hand between payments that do confer a private benefit while securing a significant public benefit (i.e. something that is characterised by non-rival consumption and non-excludability) and, on the other hand, payments which largely confer only private benefits. This will be a matter of degree, but surely not one that defies differentiation.

The removal of subsidies in New Zealand was not an easy business. In fact it was incredibly painful. That was in part because New Zealand (well down the OECD league table) wasn't rich enough to pay for a soft landing. But then again, it was only because it wasn't very rich that it acted in the first place. Which of course is not the case with either the United States or Europe. These two economic colossi are stupendously wealthy. And agricultural support payments are minor when set alongside their other budgetary concerns. So one should not hope for subsidy reform as a result of economic necessity. In reality, electoral necessities point the other way.

Making the Demands Defensible

What then can those concerned about the environmental consequences of subsidies demand in the context of the present negotiations? For my part I would advocate a large injection of candour into the debate. This cuts both ways. As Konrad von Moltke has noted, those who support the abolition of subsidies as a strategy for environmental improvement have to acknowledge that, within the current negotiating structure, they are in effect seeking to add "yet another layer of uncertainty to what is already a frighteningly complex system of environmental management."⁹

On the other hand, those who defend subsidies, or worry about the unintended environmental consequences of their removal, should be placed on notice that these arguments will be rigorously searched for unworthy motives. Here I find myself in something of a dilemma. On the one hand, there is something almost attractive about the disarmingly frank way in which the United States manages to pour money into rural vote retention schemes. There's no secret about why they do it. We can merely rail at the consequences.

But it would be too simple to leave it there. There are environmental consequences of subsidy removal. Those countries which have raised them – bravely in my view – must be challenged to make their arguments defensible. This will be the real test for those charged with seeing through the transformation of the CAP.

In the final analysis, let's be blunt, agricultural subsidies as we have come to know them are largely the result of a failure or an unwillingness to confront tricky social and economic dislocations. The resulting distortions have made the potential dislocations even bigger – like huge potential capital losses in land values if the rules of the game change. These dislocations are quantifiable. People can be bought out or compensated. If doing it in a way that purchases some clearly recognisable public good makes that easier, so be it. But nothing can justify keeping everyone poorer – off-shore producers and domestic consumers – by preserving the status quo. Doing so in the name of the environment would be the final straw.

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ENDNOTES

¹ That said, conservation-related arguments were a minor feature of President Bush's justification for the Farm Bill.

² See in particular: V Vitalis (2003) The Development Impact of Developed-World Policies on Developing Countries: The Case of Trade, chapter in *The Effect of Rich Countries' Policies on Poor Countries*, forthcoming

³ Le Monde (2003) 5 September

⁴ For an outline of the EU's reform package see: http://europa.eu.int/comm/agriculture/mtr/index_en.htm

⁵ J. Beghin, D. Roland-Holst, and D. van der Mensbrugge (2002), *Global Agricultural Trade and the Doha Round, What are the Implications for North and South?* Paper presented to the OECD/World Bank Global Forum on Agriculture, May 23-24, Paris.

⁶ According to Principle 2 of the Rio Declaration, "States have [...] the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction."

⁷ See also Vitalis (ibid) for further details.

⁸ For more detail on this and other aspects of the environment and the agriculture sector see OECD (2001) *Improving the Environmental Performance of Agriculture: Policy Options and Market Approaches*, OECD, Paris

⁹ K. von Moltke (2003) *Negotiating Subsidy Reduction in the World Trade Organisation*, IISD September.

Environmental Subsidies at Cancun

In the Cancun agriculture negotiations, the nature of acceptable environmental support measures was only implicitly present in the different proposals on the table regarding allowable (Green Box) agricultural domestic support, under which most environment-related payments would fall. Presently, there is no limit to a country's Green Box spending and no reduction commitments apply.

The second revision of the Draft Cancun Ministerial Text proposed that "Green Box criteria shall be reviewed with a view to ensuring that Green Box measures have no, or at the most minimal, trade-distorting effects on production" (editor's italics). The G-21 counter-proposal went further in targeting future EU CAP support: "Green Box disciplines on direct payments shall be strengthened with a view to [...]" (editor's italics). It was, however less strict than the original proposal put forward by most members of this developing country group, which called for capping developed countries' direct payments under the Green Box, as well as the development of "additional disciplines".

Post-Cancun WTO: Focus on the Objectives, Not the Means

Laurence Tubiana

The Cancun Ministerial Conference's lack of concrete results would have mattered less if the event had sent different signals for the future. Such signals would make a difference at a time when deepening trade liberalisation and the WTO's legitimacy as a multilateral institution are under fire even if the organisation seems to have been spared from the worst of the crisis affecting international governance in general.

Ever since the 1996 Singapore Ministerial Conference, developing countries have felt that the liberalisation programme does not take their concerns into account. They demand more justice and international equity. Broadening the negotiations to new areas implicating fundamental choices regarding public policy (in particular services and investment), adherence to a harmonised intellectual property regime and the single undertaking principle (i.e. committing to a series of agreements) represent constraints that are not compensated by developed country efforts to open their markets or reconsider their agricultural subsidies.

WTO agreements supersede national legislation, are legally-binding and non-reversible except when motivated by national security reasons or the public interest ('bound' according to WTO speak). Trade rules thus form a powerful system, which influences national economic and societal choices in depth. Those defending 'societal' values are concerned about the strong impacts economic opening can have – by modifying price ratios and calling into question social compacts – on income distribution and the provision of national public goods such as health, the environment or education. Putting liberalisation first on the list of priorities, the international community has introduced a *de facto* hierarchy that hinders the provision of public goods. It is this implicit hierarchy that protest movements reject in the name of global justice.

The emergence of the notion of justice in the trade debate shows that current discussions concern the negotiations' goals rather than their modalities; the WTO can no longer avoid the issue of *why* liberalisation should be pursued. In fact, the preamble of the Marrakesh Agreement establishing the WTO provides an answer by listing the *goals* pursued: ensuring economic growth, improving incomes and living standards, achieving full employment and optimising

the use of the world's resources with the objective of sustainable development. In the mandate of the WTO, the reduction of trade barriers and the expansion of international trade are the *means* to achieve these goals.

While the primacy of development is well present in the founding text of the WTO, this has not resulted in a fundamental questioning of the relationship between trade liberalisation and economic development. The debate has been obscured by an ideological battle regarding globalisation and the Washington Consensus (a model of political economy founded on opening up goods and capital flows, firmly recommended by the Bretton Woods institutions). In this framework, pursuing liberalisation is assimilated with economic development; one does not exist without the other. The assimilation of the two objectives is called into question by developing countries and other critics.

Development in the Driver's Seat

In Doha, WTO Members sought to respond to this array of criticism by placing development on the negotiating agenda. Characterising the process launched there as a 'development round' means that the WTO can no longer find its legitimacy in deepening the liberalisation started in 1948 or in the extension of its areas of competence. Development must not only figure as the primary objective – and trade liberalisation as the means to achieve it – in WTO texts; this new hierarchy must also be applied in the conduct of negotiations.

The extent of this turning point has no doubt yet to be fully grasped. Putting development in the driver's seat means evaluating each agreement and every progress from the point of view of its impact on sustainable development. This change brings us to question the way the WTO functions. Currently, it is in principle no more than a framework within which Members negotiate rules. Assessing trade liberalisation measures according to their contribution to development obliges the WTO to open the debate on economic development perspectives and the best policies to reach development goals. Issues carefully kept apart from the negotiations in the name of efficiency have thus caught up with the institution: the concept of economic development so far confined to financial institutions (the World Bank and the IMF), as well as the political, social and environmental dimensions of development. The fora that meet around the Ministerial Conferences show that, willy-nilly, the WTO is seen as a universal institution that must integrate the world-wide debate on globalisation.

There are strong contradictions between trade negotiations as presently conducted, i.e. centred on bargaining in terms of national interests, and the debates on managing globalisation. If these contradictions are not clearly analysed and overcome, they risk giving rise to false alternatives and creating inefficient coalitions as witnessed by the confusion of the debate between the anti- and pro-globalisation movements.

Justice and Equity

Forging an international trading system favourable to development would imply relying on each country's own institutions, asking at each stage if common and harmonised rules are preferable to national ones and, finally, integrating new thinking about liberalisation in national and international strategies aimed growth and poverty reduction.

A country joining the WTO must not just lower customs duties and international investment barriers. It also has to cut out industrial subsidies, build an intellectual property regime, set up

a mechanism for standardising sanitary measures, organise a customs administration and, at the same time, elaborate policies to offset the negative effects of market opening. Such policies might include adapting the labour market, instituting support measures for those driven out of business and engaging in fiscal reform. As many economists have found (Rodrik 2002; Finger and Shuler 1999), the adjustment costs of WTO agreements are high, and the few financial and institutional resources necessary to build interfaces with the international trading system would be diverted from addressing other pressing priorities. Even if the measures to be taken can favour economic development, making regulatory or legal frameworks compatible with WTO rules can – at least in the short term – represent a sacrifice from the point of view of national objectives. This applies to adopting intellectual property regimes for medicines, which have negative impacts on health, or the elimination of subsidies, which compromise the development of not yet competitive industrial sectors.

For all these reasons, the negotiating agenda should reflect the interests of different parties and do justice to developing country priorities.

Admittedly, the approach proposed by the European Union – access to developed country markets in exchange for competition, investment and government procurement rules – is one way of constructing this balance. Nevertheless, it leaves out too many issues of major interest to developing countries, such as liberalising the movement of the labour force, and particularly that of temporary workers.

Labour is a resource that developing countries have in abundance, but immigration rules are mostly unilaterally determined by the host countries and remain very restrictive. Several models show that even very partial liberalisation of labour flows would bring least-developed countries benefits far surpassing the combined result of all trade concessions or market access currently on the table.

Instead of aiming at total liberalisation as in the goods trade, instruments could be envisioned to regulate temporary migration flows, for instance through permit systems that would include the obligation to return. The absence of mobilisation around this important development issue is linked to the political economy of the negotiations. If so much energy is expended to deepen liberalisation in services, investment or obtaining a single world-wide intellectual property protection system, it is because powerful and organised economic groups support these issues. Meanwhile, movement of labour responds to market demands in developed countries, and these demands will grow as populations age.

Relying on National Institutions

A perspective founded on equity and justice implies efficient international policies, i.e. policies that reduce inequalities and poverty. The definition and application of trade rules, and market opening must serve development objectives. No country has managed to develop by turning its back to international markets, whether in goods and services, technology, capital or by staying closed to investment flows in the long term. Nevertheless, the models of integration into the global economy have varied greatly. The successful experiences of Vietnam, Brazil, China or South Korea have resulted from models combining openness and the development of domestic markets, liberalisation and state intervention. Even open market economies rely on institutions necessary to the functioning of society, and the quality and resilience of those institutions are an essential factor of economic development, although social arrangements, the nature and type of contracts that structure societies vary according to country even within entities such as the European Union.

A development-oriented international trade regime must take note of these differences instead of systematically attempting to eliminate them. Because the WTO is founded on the adoption of rules and not on fulfilling objectives, its negotiation logic pushes towards institutional harmonisation rather than maintaining diversity. The intellectual property protection debate provides a telling illustration: notions such as geographical indications or *sui generis* systems specific to each country are barely tolerated and often combated.

Consultative Board Debates Ideas for WTO reform

Early next year, the Consultative Board of eminent persons set up by WTO Director-General Supachai Panitchpakdi last June is expected to deliver its report on “how to institutionally strengthen and equip the WTO to respond effectively to future systemic challenges brought about by an increasingly integrated global economy.”

Among the proposals under discussion – but no agreed – in the eight-member body chaired by former WTO chief Peter Sutherland is returning the WTO’s focus to its roots of lowering tariffs on industrial and agricultural goods. This would respond to charges that an overloaded agenda tends to lead to gridlock, as happened in Cancun where lack of consensus on the Singapore issues proved decisive for ending the talks.

Another idea being discussed is an opt-out clause to the ‘single undertaking’ negotiation model. This would allow, for instance, a deal to be struck on lowering agricultural tariffs but leaving it up to Members to join the agreement. Those not in a position to sign on could ‘opt out’ but would also not benefit from tariff cuts made by others.

The eight sages have also looked into the economically weaker WTO Members’ growing reliance on advice from non-governmental advocacy organisations. This, some advocate, could be remedied by expanding the WTO’s staff – perhaps doubling it to over 1,000 – on the premise that a larger staff could help smaller, poor nations that lack the resources of larger Members.

These are controversial ideas, and Board members caution that their report would only be a starting point for debate on possible changes, which would in any case be likely to take years to implement. Nevertheless, Dr Supachai may make proposals to WTO Members based on the report’s recommendations. Some Members are also expected to offer reform proposals of their own (see page 3).

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And yet, there is no universal institution or institutional arrangement that would allow all societies to develop, although global economic actors demand identical rules wherever they intervene – the harmonisation of accounting norms is a good example. If harmonisation provides efficiency gains to companies, its benefits for host nations are far from assured.

The procedural logic of the negotiations does not facilitate dealing with diversity. At each stage, we should assess the need for harmonisation and evaluate the social costs and benefits that it would generate. To arbitrate between the construction of common rules and the pursuit of specific development objectives, an evaluation of the negotiated measures will be necessary. This would bring a major innovation in the way negotiations are conducted. The idea arouses mistrust and hope in equal measure, but it must be part any future process.

A More Balanced Institutional Architecture

The institutional change brought by the WTO's creation and its ever-broadening reach into public policy areas has generated an important debate on the balance of international governance. This discussion has opposed those who – defending the prerogatives of national governments – propose to exclude certain areas from the WTO's competence, to those who see the solution in a more balanced institutional architecture that would reinforce the weak poles of global governance by giving more means to collective objectives (Jacquet, Messerlin, Tubiana, 2000; Jacquet, Pisani-Ferry, Tubiana, 2002).

For the latter, strengthening the WHO and UNESCO, as well as creating a World Environment Organisation, should allow better balancing of trade liberalisation and other objectives, such as public goods that cannot be provided by a global and liberalised market place. It has to be recognised, however, that the present political and institutional context is not favourable to such changes.

The United Nations system is undergoing a political crisis. In addition, no international consensus is emerging, particularly between the major international players, on the nature of reforms or the mandate of the or-

ganisations that should be created or strengthened. Disagreements between the European Union and the United States have destabilised several organisations and threaten international treaties, in particular those related to the environment. Furthermore, the US has multiplied bilateral agreements that far surpass trade *per se*.

This puts the WTO in a paradoxical situation: criticised because its norms go beyond trade alone and yet seen as the only forum with real decision-making power – hence the mobilisation of civil society movements, which see the WTO as an institution to either influence or to abolish. The efficiency of the sanctions system obviously plays a major role in this polarisation, but this efficiency holds first and foremost because big public and economic actors support the institution. The response to the over-influence of the WTO consisting of strengthening other poles of the system and redefining mandates thus seems far off today. The creation of an Economic and Social Security Council, which would act as an international arbitrator, is not a short-term solution either (although, ironically, the idea has resurfaced with the crisis of the UN Security Council).

Toward a Goal-oriented WTO

We must take into account current developments and think about their implications for future negotiations. If it proves impossible to confine the WTO's reach to border measures, we must imagine negotiating modes that explicitly associate the different dimensions of a problem. Instead of focusing on negotiating rules, the WTO could identify subjects in need of a solution, i.e. give priority to objectives while seeking a coherent set of means to reach them (market opening; investment; international transfers; environmental, sanitary and social rules, etc.). One controversial example may be cited in the services sector. Rather than concentrate on a list of services to liberalise or not, the negotiations could start with the objective of access to water for half of the world's population (a Johannesburg goal) and address all available means together; trade liberalisation would thus become a tool used in a coherent manner with development aid, private investment, etc. According to Dani Rodrik, to seriously address the objective of development and the reduction of poverty and inequalities in trade negotiations, the goals of international solidarity and liberalisation must no longer be separate.

This would certainly mark an important development in tackling the problem of co-ordination and collective international action, and correspond better to the current political context than the procedural approach prevailing since a certain number of years. If – in the name of efficiency – President Bush's "mission defines coalition" has become the dominant power's catchword in the area of military security, we should be inspired by this motto to deal with vital issues that touch on the equity and justice of the multilateral trading system. It could be a way to surmount the impending stumbling blocs.

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"Once the trade regime – and the governance challenges it poses – is seen from a development perspective, it becomes clear that developing country governments and many of the northern NGOs share the same goals: policy autonomy to pursue independent values and priorities, poverty reduction, and human development in an environmentally sustainable manner. The tensions over issues such as labour standards become manageable if the debate is couched in terms of development processes – broadly defined – instead of the requirements of market access. On all counts, then, the shift in perspective provides a better foundation for the multilateral trading regime."

Dani Rodrik: *The Global Governance of Trade As If Development Really Mattered*. United Nations Development Programme, October 2001.

The Cotton Thread: Was Cancun a Failure of Regulation or a Success for Deregulation?

Eric Hazard

The late 1980s and the Washington Consensus marked the beginning of forced-pace globalisation for many developing countries. “Supported” or supervised by the Bretton Woods institutions, these countries made far-reaching concessions at a high social and economic cost. At the same time, ‘development’ programmes gradually gave way to a ‘fight against poverty’.

The shift in emphasis reflects above all the fact that political efforts rarely resulted in the promised and expected return of investment. The consequences for the hundreds of millions of poor people who live in deplorable sanitary conditions on less than a dollar a day have raised important concerns about the human cost of increasingly disputed policy choices.

In this context, the Cancun Ministerial Conference, depicted as half-way stock-taking exercise, was important. Despite the delays in the negotiations and the many points of tension, the expectations of Southern countries were clear: they wanted to refine the Doha issues. After the failure of Seattle and the unkept promises of Doha, Cancun presented a double opportunity. It was to demonstrate to Southern countries why it was in their interest to participate in international processes the benefits of which are yet to materialise. It also offered the WTO an opportunity to prove its credibility vis-à-vis Southern actors and in particular African civil societies who increasingly question the organisation’s regulatory or deregulatory function.

The cotton case was seen as an answer to such questioning. Four countries squeezed between the anvil of second-generation structural adjustments and the hammer of dumping by certain cotton producing countries decided to use this ministerial meeting to highlight the incoherence between the trade and development policies of several ‘friendly’ countries.

The Cotton Initiative

On 30 April 2003, four West and Central African countries tabled a submission at the WTO on negotiating modalities for agriculture, calling for the progressive elimination of all cotton subsidies and the establishment of a compensation mechanism to support the cotton sector in least-developed countries affected by the collapse of world prices.

The proposal was reflected in paragraph 25 of the first draft Cancun Ministerial Text: “We take note of the proposal by Burkina Faso, Benin, Chad and Mali entitled *Poverty Reduction: Sectoral Initiative in Favour of Cotton* and agree that [...]”. It was thus left to WTO Members to complete the sentence in Cancun taking into account the economic and social urgency of the situation that had pushed the four countries to propose the sectoral initiative (see box opposite for background).

Cancun: Long on Sympathy, Short on Action

Presented at a plenary session during the first day of the debates in Cancun, the cotton proposal called for a strict application of WTO principles. For many, the ‘credibility’ of the organisation depended on whether its Members would be able to find solutions. In parallel, the case aroused enough declarations of support and sympathy from numerous delegations – with the notable exception of the United States – to gradually become one of the symbols of the conference. These dynamics encouraged the WTO Director-General to relinquish his customary neutrality: he called for special attention to the cotton case and personally led consultations between all parties interested in the issue.

Meetings were held on 11 and 12 September between the EU, the US, Japan, Australia, Brazil, Pakistan and India, and the four concerned African countries. A consensus proposal was expected to follow these exchanges. The revised text was released to delegations only in the afternoon of 13 September. The four countries most directly involved perceived the language on cotton – now contained in paragraph 27 of the Ministerial Text – as truly injurious to their joint request. It was felt as an insult by all those who had worked for the initiative’s success.

The revised text amounted to no more than a pale copy of the proposal made by the US to the four African countries. Substantively, in paragraph 27:

- cotton is represented as a mere link in the textiles chain;
- market access is highlighted as an explanation for the African countries’ problems; and
- the countries victimised by dumping are invited to diversify their economies under the aegis of the Bretton Woods institutions, which already impose stringent enough constraints over West and Central African countries.

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As a result of sustained efforts (adjustment, streamlining, privatisation of national companies, partial liberalisation) and quasi-inexistent production support, ten to fifteen million small cotton producers in West and Central Africa (WCA) have managed to produce high quality cotton with some of the lowest production costs worldwide – certainly far below those of the approximately 250,000 producers in the US, which is the largest exporter and second producer of cotton in the world. And yet, WCA producers risk being excluded from international markets in favour of much less competitive but highly-subsidised countries.

While subsidies are contrary to the principles of the WTO, nearly 50 percent of the US\$4.8 billion of global cotton support was distributed to American producers alone in 2001-2002. By artificially inflating a production disconnected from international prices, these subsidies led to the fall of the world market price.¹

¹ In November 2001, the cotton world market price reached the record low of 35 cents per pound. In constant dollars, this price is comparable to that of 1897, the year the cotton gin was invented.

The following points were made in response:

- At present, Africa has no competitive export-oriented textiles industries;
- The attempt to deal with an agricultural issue in the textiles context seems suspect to say the least; and
- As an NGO representative – aptly if ironically – put it, the response to the four countries consisted of saying: “You have the most competitive cotton sector in the world ... so start cultivating strawberries!”

In addition to not reflecting a consensus – or even pointing towards an eventual consensus – this text completely ignored the two problems at the heart of the initiative: the distortive role of subsidies and the urgency of the request.

The alliance consisting of the African Union, the African, Caribbean and Pacific (ACP) Group of States and the Group of Least-developed Countries (LDCs) presented a counter-proposal during the night of 13 September, but this had no chance of survival due to the failure of the Cancun Conference before agriculture-related issues were addressed (see page 15).

No Negotiating Will, No Consensus: Whose fault was it?

Like access to medicines in Doha, the cotton issue in Cancun tested the political will of the parties to free Southern countries from the poverty trap. Contrary to their own commitments – and despite the efforts of several developed country development co-operation ministers – less than 48 hours before the end of the conference it was clear that no consensus would be found.

The African request may well have seemed extreme (elimination of all subsidies) or awkward in the negotiating context. Strategic problems certainly did surface.¹ Alliances were not used optimally, and better communication and more efficient outreach would certainly have benefited the case.

Cancun's response to the cotton initiative effectively amounted to saying: “You have the most competitive cotton sector in the world ... so start cultivating strawberries!”

But could the countries targeted by this submission have made constructive counter-proposals? Would they even have wanted to?

The approaching US primaries certainly played a determining role. But beyond that, it is vital to understand that American and European arrogance weighed more heavily than could be imagined on the entire conference. For cotton, a simple gesture from the EU – in accord with its declarations of principles – would have pushed the US in an untenable position. But the EU did nothing, choosing instead to insist on the Singapore issues. Its stubbornness hastened the end of the conference and (hopefully) led to a realisation that Southern countries are no longer willing to play a game whose rules they cannot even partially determine.

Recently, World Bank President Jim Wolfenson summarised the situation well through highlighting the root causes of the failure: “What happened in Cancun must be an alarm signal because the LDCs – more than three billion human beings – found unacceptable a concept of negotiations where they are only expected to respond to rich country proposals.”

Time to Redefine Regulatory Mechanisms?

If Africa can claim a political victory in Cancun, it is far less certain that the conference's collapse amounted to a major success. It is true that African nations' refusal of the Singapore issues staved off a 'consensus' that had nothing to do with *explicit* and could be highly detrimental to them. On the other hand, delegations returned to their capitals with a problem no closer to solution.

Before resuming the negotiations, it seems necessary to question this 'development' Round where development is increasingly absent. Indeed, the present impasse makes it necessary for all parties to reflect upon the organisation's ideological, political and institutional limits with regard to difficult international regulation. After Seattle and Doha, Cancun showed the WTO as a bulimic international organisation incapable of applying the rules and principles that it has established. Nevertheless, we should be careful not to throw out the baby with the bathwater, for that would deprive Southern countries of minimum regulation tools such as the possibility to block consensus.

Questioning the WTO's framework, prerogatives and capacities should help slim it down. This reflection could benefit other structures, such as UNCTAD, the FAO or the WHO, which have real expertise in certain areas where trade is definitely not the only means of regulation. In the same vein, it is time to question the dogmatic approach that characterises the organisation, which – like the Washington Consensus² in Davos last year – has shown its limits.

After the empowerment they experienced in Mexico, the alliances born in Cancun must now learn to manage new political projects. The real post-Cancun challenge lies in recreating a political dialogue with all the actors around rules that are fair for all. This seems the only acceptable way to maintain minimum international regulation and to avoid the trap of bilateralism which has never been the best outcome for the weaker Members.

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ENDNOTES

¹ For instance, a group of 33 developing countries was defending the concept of 'special products' that should be exempt of tariff cuts by reason of food security and poverty alleviation. On the other hand, certain developed and developing countries noted that a successful outcome on cotton would serve as a precedent for seeking other sectoral solutions involving commodities of major export interest to developing countries.

² Coined in 1990 by economist John Williamson “to refer to the lowest common denominator of policy advice being addressed by the Washington-based institutions (i.e. the World Bank and the IMF, *ed.*) to Latin American countries as of 1989,” the term *Washington Consensus* is now commonly used to describe the belief that neoliberal policies – or ‘globalisation’ – are the necessary underpinnings of successful development strategies.

New WTO Disputes Focus on Sanitary and Subsidy Rules

Most recent WTO disputes of particular interest to the environment and development communities revolve around alleged violations of export subsidy provisions and rules on the use of health/technical standards. If the case against the EU's approval procedures for genetically modified organisms (GMOs) holds the dubious promise of becoming the most controversial WTO ruling ever, several other disputes also involve the use of sanitary standards for allegedly protectionist purposes.

WTO to Arbitrate the EU's GMO Approval Regime

A panel was established on 29 August on the EU's approval and marketing procedures for biotechnology products at the request of the US, Argentina and Canada. This case has the potential of dwarfing previous controversial environment- or health-related disputes at the WTO. The stakes are high for large numbers of EU consumers sceptical about – or outright opposed to – GMOs in food and agriculture. They are equally high for biotechnology exporters, who stand to make billions of dollars by penetrating not just EU markets but also those in countries hesitant to adopt GM crops out of fear of losing access to the EU.

The three countries had filed separate complaints but agreed that a single panel would hear all cases. According to the US panel request (WT/DS291/23), the measures affecting biotech products are: (a) the suspension by the EU of consideration of applications for, or granting of, approval of biotech products; (b) the EU's failure to consider for approval applications for specific biotech products; and (c) national marketing and import bans maintained on specific products by EU member states (Bridges Year 7 No.5, page 9).

These measures, the US alleges, are inconsistent with several provisions of the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement) and the Agreement on Technical Barriers to Trade (TBT Agreement), including being more trade-restrictive than necessary and lacking scientific justification based on risk assessments.

The complainants also claim that the approval procedures are inconsistent with GATT Article III.4, which requires governments to treat 'like' foreign and domestic products in the same way. This argument joins the basic tenet of biotech exporters that genetic modification does not make products fundamentally different; therefore such products should be treated 'like' their non-GMO counterparts – i.e. no approval processes or controls other than those applicable to conventional crops should apply to GMOs (see related article on page 20).

Australia, China, Chile, Colombia, El Salvador, Honduras, New Zealand, Norway, Peru, Thailand, Uruguay and Chinese Taipei have reserved their third-party rights.

US Dismisses EU Call to End Hormone Beef Sanctions

Following the 14 October entry into force of a new Directive (2003/74/EC) on the use of hormones in animal husbandry, the EU has called on the US and Canada to lift the trade sanctions – worth approximately US\$124.5 million – they have applied since 1999 in retaliation for the EU's import ban on beef fed with six specific growth hormones. In 1998, the WTO ruled that the EU embargo was not justified by a proper risk assessment. The EU then launched a number of scientific studies, the first of which confirmed in May 2000 that one of the incriminated hormones (oestradiol 17 β) was a complete carcinogen. Regarding the five other hormones (testosterone, progesterone, trenbolone acetate, zeranol and melengestrol acetate), the EU's Scientific Committee on Veterinary Measures concluded the current state of scientific knowledge was insufficient to estimate the risk to consumers.

The new EC Directive is based on those findings. It confirms the prohibition of substances having a hormonal action for growth promotion in farm animals, as well as severely limits other uses of oestradiol 17 β for their medical treatment. For the other five hormones, the Directive maintains the provisional prohibition, "which will apply while the Community seeks more complete scientific information to clarify the present state of knowledge of these substances." The Commission will regularly review any new scientific information that becomes available.

These steps, the European Commission contends, bring it into compliance with the WTO ruling: justified by a risk assessment, a permanent prohibition has been legislated for oestradiol 17 β , and – based on incomplete scientific knowledge – the provisional import ban has been prolonged for the five other hormones as allowed under Article 5.7 of the SPS Agreement.

Initial comments from the US were negative. Allen Johnson, the chief USTR negotiator on agriculture, said he did not see the Directive as changing anything and found it "a little bit baffling [...] why they think they are now in compliance."

In related news, the European Court of Justice on 30 September dismissed a potentially precedent-setting appeal of Biret International, a now bankrupt meat import company, contending that the "the Community had acted unlawfully in failing to comply with the WTO's 1998 condemnation of the import ban as lacking scientific evidence."

Panel Established on EU Sugar Subsidies

At the request of Australia, Brazil and Thailand, the Dispute Settlement Body (DSB) agreed to establish a panel on the EU's export subsidies for sugar on 29 August. Although the three countries had filed separate complaints, all are to be examined by a single panel.

The EU has a complex sugar regime, involving a quota system that supports local producers through an intervention price for refined sugar and a minimum price for sugar beet; high import tariffs (but preferential access to sugar from the African, Caribbean and Pacific (ACP) Group of States, as well as India); and export refunds – making up the difference between EU and world prices – for all sugar refined in Europe whether sourced domestically or overseas. According

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to Australia, producers of out-of-quota 'C sugar', which cannot be sold on the EU internal market, are able to "sell it on the world market at below the total average cost of production through cross-subsidisation of C sugar from quota sugar profits. By financing payments on the export of C sugar, the EC exceeds its export subsidy reduction commitments under the WTO Agreement on Agriculture."

In addition, the complainants allege that the EU grants direct subsidies contingent on export performance to its sugar producers in violation of its sugar export subsidy commitments under the Agriculture Agreement, as well as Articles 3.1(a) and 3.2 of the Agreement on Subsidies and Countervailing Measures (SCM Agreement).

Concerned about the potential unravelling of their preferential access to the heavily-protected EU sugar market, several ACP sugar producers in Africa and the Caribbean have joined the dispute as third parties (Bridges Year 6 No.8, page 16). Responding to these concerns, Australia has proposed that the EU keep ACP sugar imports at their present levels, but reduces domestic production.

In a related development, the European Commission on 23 September tabled a discussion document outlining three possible options for reforming the Union's sugar sector. The first option would be to leave the current regime intact until 2006 (when it is due to elapse) and the second would consist of phasing out production quotas and adjusting the EU internal price to the price of non-preferential imports. The third option would entail a complete liberalisation of imports (i.e the removal of all tariffs and quantitative restrictions) and the integration of EU sugar producers into the single farm payment system, which is decoupled from production levels.

Introducing the communication, the Commission wrote: "Notwithstanding the different implications of the various options that could be envisaged, it is evident that any reform of the sector would have to follow the fundamental principles of the CAP reform initiated in other sectors, i.e. bridging the gap between domestic and world market prices and shifting support from product to producer. In addition such a re-

form would need to closely examine its effect in the international context, especially with respect to the impact it may have on developing countries in general and ACP countries benefiting from the Sugar Protocol in particular."

Australia, US Obtain a Panel on GI Protection

The 2 October DSB session was expected to establish a panel requested by the US (WT/DS174/20) and Australia (WT/DS290/18) regarding the EU's protection of trademarks and geographical indications (GIs) for agricultural products and foodstuffs. The complainants allege that EC Regulation 2081/92 is inconsistent with several provisions of the Agreement on Trade-related Aspects of Intellectual Property Rights (the TRIPs Agreement). In particular, the two countries complain that the EU provides TRIPs-plus protection only to the GIs of those WTO Members who provide a similar level protection to EU geographical indications. This, according to the US and Australia, not only violates the most-favoured nation principle, but also "undermines the legal protection for trademarks" compared to GIs. This dispute reflects ongoing differences in the TRIPs Council on the extension of the strong GI protection currently available for wine and spirit to other products, as well as the EU's determination to make wider GI protection part of the WTO agriculture negotiations (Bridges Year 7 No.3, page 9).

EU and Korea Challenge Each Other's Shipbuilding Support

A panel requested by the EU was constituted on 21 July on Korea's export financing for shipbuilding. The EU alleges that the preferential rate financing provided by Korea's export-import bank KEXIM to shipyard customers amounts to specific export-contingent subsidy in violation of Articles 3.1(a) and 3.1.2 of the SCM Agreement (WTO/DS273/2). In addition, the EU claims that the government's debt forgiveness and interest relief to three shipyards are inconsistent with SCM Article 5, which prohibits subsidies that cause injury or serious prejudice to the domestic industry of other Members. Korea argues that the latter measures resulted from legitimate, IMF-endorsed banking sector reform in the wake of the Asian financial crisis in 1997. According to the EU, orders for EU-built ships in 2003 were down by more than 50 percent compared to last year, and more than 70 percent compared to 2001. China, Japan, Mexico, Norway, Taiwan and the United States have joined the dispute as third parties.

In a countermove, Korea on 3 September requested consultations over the 'temporary defence mechanism' (TDM) established by the EU until the panel ruling on its claims against Korea is issued. Korea claims that TDM provisions provide aid "particularly but not exclusively" in the form of grants, export credits, guarantees or tax breaks. These subsidies are available for: restructuring; regional or other investment; research and development; environmental protection; and insolvency and closure aid. According to Korea, such aid – provided by the governments of Denmark, Finland, Germany, Italy, the Netherlands, Portugal, Spain, and the UK – violates several SCM Agreement provisions. In addition, Korea argues that some of the subsidies are "effectively designed and implemented as unilateral measures seeking redress of a perceived violation of Korea's obligations under the SCM Agreement which should occur through dispute settlement and not through unilateral action."

Other Disputes in Brief

- **SPS cases:** The EU – so often taken to task over its trade barriers allegedly maintained without enough scientific evidence – requested a panel on 2 October on *Australia's quarantine regime for agricultural imports* (WT/DS287/7). The EU claims that the regime violates several articles of the SPS Agreement, and unfairly protects Australian producers by imposing quarantine rules "which bloc imports for many years without scientific justification" (Bridges Year 7 No.3, page 9). On 29 August, the DSB established a panel on a similar complaint against Australia by the Philippines, targeting pineapples and other fruit in particular.
- Meanwhile, Japan has appealed a 15 July 2003 panel report, which condemned its *import restrictions on apples* as lacking sufficient scientific evidence, not based on a proper risk assessment and not justifiable as a provisional measure while full scientific certainty was being sought. In 1999, Japan lost (on appeal) a similar case involving separate testing requirements to confirm the efficacy of quarantine treatment for different varieties of same fruit.

- **Export subsidies:** The US Congress is currently engaged in a final push to pass replacement legislation for the *Extraterritorial Income Act* (ETI), which was condemned by the Appellate Body in 2002 as providing a WTO-illegal export-contingent subsidy. US companies have saved billions of dollars through tax breaks on exports under the ETI and its predecessor, the Foreign Sales Corporation Act. Legislation now under consideration would replace ETI and FSC provisions with a three percent domestic manufacturing tax cut, as well as scale back several previously discussed forms of tax relief for foreign-earned income, which had been criticised by the EU as perpetuating the export-contingent subsidy.

The EU already has the WTO's blessing to impose trade sanctions worth nearly US\$4 billion, but agreed to postpone action while replacement legislation was being drafted. It has now threatened to start phasing the sanctions in as of next January if Congress does not act before the end of the year. The ETI-FSC represents the by far the greatest damages authorised by the WTO to date. The banana case came closest, with almost US\$200 million.

- The US has appealed a 29 August panel report on Canada's complaint against final US countervailing duties on *softwood lumber* (WT/DS257/R). Although the panel sided with the US claim that Canadian stumpage programmes could be considered as a government subsidy, it faulted the methodology used by the US Department of Commerce to determine that Canadian stumpage fees were unfairly low. This was the fourth WTO ruling on different aspects of the long-running lumber dispute (Bridges Year 5 No.6, page 5 and Year 6 No.1, page 8). While a fifth panel report is expected next December, yet another panel was constituted on 19 June 2003.
- **Anti-dumping:** Out of patience with US failure to repeal the *1916 Antidumping Act* (condemned by the WTO in 2000) or to terminate pending cases against three European companies under it, the EU has revived WTO arbitration procedures suspended in 2001. It is requesting the right to impose import duties equivalent to three times the amount of the damage suffered by EU companies on products found to be dumped on EU markets by US companies. The European Commission has also proposed that the EU Council of Ministers adopt a regulation that would provide relief to EU companies facing claims based on the 1916 Anti-Dumping Act. The proposed regulation would (a) prohibit EU recognition and enforcement of court or administrative decisions based on the Anti-Dumping Act of 1916 and (b) allow EU companies or individuals to counter-sue the US plaintiff in order to recover any outlays, costs, damages and expenses caused by the application of the Anti-Dumping Act of 1916. In January 2002, the EU and Japan had requested – as a retaliatory measure – the right to adopt 'mirror legislation' that would apply only to US companies found to be dumping in their markets (Bridges Year 6 No.1, page 8).
- **Preferences:** On 22 September, the panel adjudicating India's complaint against the *EU's Generalised System of Preferences* (WT/DS246) announced that 'due to the complexity of the case' its report would not be issued before the end of October.

India alleges that the tariff preferences under the special arrangements for combating drug production and trafficking are available only to specified countries selected by the EC; and that the tariff preferences accorded under the special incentive arrangements for the protection of labour rights and the environment are accorded only to countries that the EC unilaterally determines to be in compliance with certain standards. According to India, these tariff preferences do not, *inter alia*, meet the requirements of paragraphs 3(a) and 3(c) of the Enabling Clause, which require non-MFN market access preferences not to create 'undue difficulties' for the trade of other members, and to "be designed and, if necessary, modified, to respond positively to the development, financial and trade needs of developing countries." India initiated the dispute after the EU made Pakistan a beneficiary country under its GSP drug fighting programme (Bridges Year 7 No.1, page 7).

A similar case is at the consultation stage between the EU and Thailand (Bridges Year 6 No.1, page 8). Previous WTO challenges of the EU's GSP schemes have been settled bilaterally.

General Council Summary

The General Council met for the first time after the Cancun Ministerial on 21 October. Over in an hour, the meeting yielded few indications on Members' intentions regarding the Doha Round negotiations (see page 1).

Benin introduced an updated proposal on the cotton initiative. Rejecting the text proposed in para. 27 of the revised Cancun Ministerial Text (see page 11), Benin, Burkina Faso, Chad and Mali now propose that cotton subsidy phase-out start on 1 January 2005 (instead of 2004) and take place over four (rather than three) years for domestic support and three years for export subsidies (WT/GC/W/516). In the light of the ongoing consultations conducted by WTO Director-General, the issue was not discussed further. Instead, it will be on the agenda of the 15 December General Council session.

Members decided to put off until the first 2004 General Council session the question of appointing new Chairs to the eight negotiating processes ('special sessions') set up by the Trade Negotiations Committee in February 2002. The term of the current Chairs was to expire – or be prolonged – at the WTO's fifth Ministerial Conference, which did not address the issue.

No progress was made on the long-standing agenda items of Iran's accession to the WTO and the US Jones Act waiver. The Jones Act prohibits the use, sale or lease of foreign-built or foreign-reconstructed vessels in commercial applications between points in national waters or waters of an exclusive economic zone. It was originally granted an exemption from WTO disciplines under para. 3(a) of the GATT 1994 because the measures were mandated under specific legislation enacted before the US became a contracting party to the GATT 1947. The waiver must be reviewed every two years to determine whether the conditions which created the need for the exemption still prevail. Iran's accession and the Jones Act waiver are again slated for discussion at the 15 December General Council meeting.

Regional Integration Spurred and Complicated by Cancun

Judging by the near feverish pace of post-Cancun activity, interest in regional and bilateral negotiations is indeed on the rise, particularly in traditionally reticent Asia, where China, India and Japan are pursuing significant new trade deals. While in the Western hemisphere all eyes are on the November ministerial meeting that is to shape the final negotiations for the Free Trade Area of the Americas, many less sweeping regional processes are in motion in parallel. In Africa, trade integration is also set to quicken following the launch of negotiations between regional groupings and the European Union in view of setting up Economic Partnership Agreements by 2008.

Most of the deals in the making focus essentially on tariff reductions/elimination on industrial and agricultural goods. The notable exceptions are the Economic Partnership Agreements and the Free Trade Area of the Americas. The ASEAN-Indian Regional Trade and Investment Area, as well as the still tentative Japanese ASEAN initiative also aim to go further than tariff reductions.

Cancun Failure Complicates FTAA Progress

The mid-November Miami Ministerial Conference for the Free Trade Area of the Americas (FTAA) will provide an important test of whether a regional process can succeed where a multilateral one failed in moving a comprehensive agenda forward. Like the WTO's Doha Round, the FTAA negotiations are to conclude by 2005. That date will be seriously compromised if Brazil and the United States cannot settle their differences regarding the issue areas that the future agreement should cover (currently, negotiations are underway on market access, agriculture, government procurement, investment, competition policy, intellectual property rights, services and dispute settlement, as well as subsidies, anti-dumping and countervailing duties). When – and if – completed, the FTAA would create a free trade zone encompassing all Western hemisphere countries except Cuba.

Prior to Cancun, the deliberately parallel timing of the multilateral and regional trade liberalisation processes provided FTAA negotiators a back door with regard to the most sensitive areas. Thus, the US insisted that agricultural subsidy reductions must be negotiated in the WTO, because it could not compromise its subsidy levels without obtaining corresponding concessions from the EU and other countries. In reaction, Brazil proposed shifting to the WTO several US regional priorities, including services, invest-

ment and government procurement rules, as well as intellectual property rights protection, on which the FTAA was heading toward one of the broadest agreements ever adopted (Bridges Year 6 No.8, page 18). Several other FTAA countries have previously made plain that an FTAA outcome without substantive US subsidy reductions – whether through the WTO or the FTAA – would be unacceptable (Bridges Year 6 No.8, page 19).

The matter is further complicated by the fact that seven Latin American countries are members of the G-21 group of developing countries (see page 4), whose “won’t do” attitude on agriculture the US has cited as a decisive factor in the collapse of the Cancun Ministerial Conference. Writing in the *Financial Times* on 22 September, US Trade Representative Robert Zoellick served notice that the US would “move towards free trade with can-do countries” rather than wait while WTO Members (and – presumably – FTAA candidates by extension) “ponder the future”.

Hope for imminent hemisphere-wide consensus receded further when the final pre-Miami vice-ministerial meeting failed in early October to adopt a blueprint for the final stage of the FTAA negotiations. Tension was particularly high between the US and G-21 leader Brazil, which the US publicly depicted as increasingly isolated from other Latin American countries, including fellow Mercosur members Paraguay and Uruguay. Twelve Latin American countries¹ and Canada released a joint communication calling on negotiators to aim at “the highest level of ambition possible”, and stated that “[o]nly by adopting obligations in each and every one of the areas under negotiation in the FTAA will it be possible to establish the balance needed for each of the participating countries to benefit from this negotiation process.” In June 2003, key ministers from the region had evoked the possibility of lowering the level of ambition on such issues as investment, government procurement and services, but stopped short of proposing the total removal of any of the nine negotiating areas from the agreement (Bridges Year 7 No.5, page 21).

With regard to tariffs, Mercosur countries last February denounced the ‘regional segmentation’ of initial US offers, which divided Latin America into four groupings that would be granted different levels of market access immediately after the FTAA’s entry into force. With duty free access for 50 percent of agricultural products (excluding sensitive sectors, such as sugar) and 58 percent of industrial goods, Mercosur would gain the least. The corresponding figures for Caricom countries were 85 and 91 percent. Central American and Andean nations were offered immediate duty-free access for 61-68 percent of both agricultural and industrial goods (Bridges Year 7 No.2, page 14).

CAFTA Negotiations on Course – For Now

In late September, the US and five Central American countries (Costa Rica, El Salvador, Honduras, Guatemala and Nicaragua) agreed to pursue agricultural tariff elimination in four different bands or ‘buckets’, each with a different timeline. The decision was made within the Central America Free Trade Area (CAFTA) negotiations, slated to conclude by the end of 2003, just a year after they were launched. Tariffs would be eliminated immediately on Bucket A products, in five years on Bucket B, ten years on Bucket C and possibly as long as 15 years for the most sensitive sectors, such as sugar. The contents of each ‘bucket’ are to be finalised during the three remaining negotiating sessions.

Among other open questions are textiles and apparel tariffs, as well as rules of origin. CAFTA members are proposing that textile products made in CAFTA but containing elements supplied by other countries with which the US has free trade agreements should have the same preferential market access as products originating wholly in CAFTA. The Office of the US Trade Representative has sought legal analysis on whether this “cumulation rule” is compatible with WTO provisions on regional trade agreements and the most-favoured nation principle. The legal advice is expected shortly.

CAFTA countries have also put forward a 47-item ‘short supply’ list, meaning yarns or fabrics that cannot be supplied by either domestic or US industry in commercial quantities in a timely in manner (Bridges Year 7 No.5, page 21). Exports containing such components should also enter the US duty-free under CAFTA, they maintain. US textiles manufacturers complain that the list includes many products readily available in the US and that giving them short supply status would amount to abuse. Other problems have arisen in opening the services and telecommunication sectors in Costa Rica, as well as the US push to achieve TRIPs-plus intellectual property protection, particularly for pharmaceuticals.

A number of Democrats in the US Congress – supported by labour and environmental organisations – have conditioned their support for CAFTA on stronger environment- and labour-related rules. These have so far taken the backseat in the negotiations, which have essentially focused on agricultural and textiles market access.

CAFTA members Costa Rica, El Salvador and Guatemala have dropped out the G-21, which at the time of press consisted of 17 countries.

Latin American News in Brief

Colombia and Peru, both members of the Andean Community (CAN), have also disassociated themselves from the G-21 (the other CAN members Bolivia, Ecuador and Venezuela still belong to the group). Colombia hopes to begin trade negotiations with the US before the end of the year, while Peru has started lobbying individual members of the European Union to support a free trade agreement between Peru and the EU. During the October APEC Summit, Peru and Thailand agreed to establish a free trade area by 2015.

¹ The Latin American nations urging an ‘ambitious’ FTAA included CAFTA countries Costa Rica, El Salvador, Guatemala, Honduras and Nicaragua; Andean Community members Bolivia, Colombia and Peru; as well as Chile, the Dominican Republic, Mexico and Panama.

An FTA Boom in Asia Reflects China's Growing Influence

In East Asia, a host of integration processes could ultimately merge into a vast free trade zone comprising China, India, Japan, South Korea and the ten members of the Association of South East Asian Nations (ASEAN). This “medium- to long-term goal” was evoked by both China and Japan during the ASEAN summit held on 7-8 October in Bali, where a number of new regional initiatives were launched. So far, few of these projects have generated the kind of opposition – fuelled by social or environmental concerns – that has accompanied multilateral trade liberalisation efforts.

India: In Bali, India and ASEAN members signed an agreement to start negotiations with a view to establishing a comprehensive regional trade and investment area by 2016. The agreement is to cover trade in goods and services, as well as investment. It also involves important special and differential treatment provisions in line with India's commitment last year to improve ASEAN countries' market access to India based on their levels of development.

As of January 2004, a trade negotiating committee (TNC) will start work on rules of origin and the modalities for tariff reductions. Negotiations regarding trade in goods are to conclude by June 2005. Tariff reductions will be phased in asymmetrically, including through an ‘early harvest programme’, which specifies the areas for collaboration and a common list of items for exchange of tariff concessions.

Key dates include:

- 1 November 2004: start of the early harvest programme. India will extend unilateral tariff concessions to new ASEAN member states Cambodia, Laos, Myanmar and Vietnam on 111 items. India, Brunei, Indonesia, Malaysia, Philippines, Singapore and Thailand (ASEAN-6) will start reciprocal reductions on 105 tariff lines.
- 1 January 2007: completion of the early harvest programme for India and ASEAN-6.
- 1 January 2010: Cambodia, Laos, Myanmar and Vietnam will complete reductions on the 111 early harvest items.
- 2011: India will eliminate tariffs for all ASEAN countries except the Philippines. Brunei, Indonesia, Malaysia, Singapore and Thailand will eliminate import duties for India.
- 2016: Cambodia, Laos, Myanmar and Vietnam will complete tariff elimination. Also by 2016, the Philippines and India will eliminate all tariffs on a reciprocal basis (see also China-ASEAN below).

Services and investment talks are scheduled to start after the conclusion of the goods negotiations and to end in 2007. Implementation of the services agreement will begin immediately after on a sectoral basis.

China: China and ASEAN countries have adopted a protocol designed to bring ‘early harvest’ benefits to the countries involved in free trade area negotiations launched in November 2002 (Bridges Year 6 No.8, page 20). As of 1 January 2004, the early harvest programme will offer tariff reductions on a large number of agricultural and manufactured goods. These will involve mutual cuts on agricultural products under the harmonised tariff system and concessions on industrial goods to be negotiated between China and individual ASEAN members. China's concessions are expected to be more significant than those of the other trading partners.

China has reaped much praise for its flexibility with regard to ASEAN members' national priorities. Thus, while Malaysia has reportedly already agreed to a package covering 590 products under the programme, the Philippines – more reluctant to cut its import tariffs – is likely to take good while take longer. In the words of Philippine Trade

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and Industry Secretary Manuel Roxas, “the beauty of the ASEAN process is that there is a structure allowing for differences while we move forward.”

Under the future China-ASEAN FTA, tariffs will be cut/eliminated in two stages:

- by 2010 between China, Brunei, Indonesia, Malaysia, the Philippines, Singapore and Thailand, and
- by 2015 between China and the newer ASEAN members (Cambodia, Laos, Myanmar and Vietnam).

Once completed, the China-ASEAN free trade area will be the largest in the world, covering a population of 1.7 billion people and a volume of trade estimated at US\$1.2 trillion per annum. Already in the first half of this year, trade flows between China and ASEAN members were up 45.3 percent from the same period last year.

Japan: Formal talks are to start next year between Japan and ASEAN nations with a view to concluding a ‘comprehensive economic partnership’ within ten years. The partnership will cover trade and investment liberalisation, as well as trade promotion and facilitation. However, the joint declaration signed on 7 October makes no mention of farm goods.

Southeast Asian nations are also negotiating on a free trade area their own, but there are few signs of concrete progress so far.

Asian News in Brief

China and India have agreed to set up a joint study group prior to starting negotiations on a possible free trade area. The two countries are among the world’s fastest growing economies and both aim to double their bilateral trade to US\$10 billion by 2004. India’s exports to China are roughly doubling annually.

China’s proposal that Japan and South Korea study the idea of a regional free trade agreement among the three has elicited a lukewarm response from Japan, which is more interested in an eventual trade zone covering India and the ASEAN countries as well.

China is also eyeing a free trade area between the members of the Shanghai Cooperation Organisation (SCO), which groups China, Kazakhstan, Kyrgyzstan, Rus-

sia, Tajikistan and Uzbekistan. An economic co-operation framework agreement was signed on 23 September to ‘deepen’ mutual economic connections with the long-term objective of establishing an FTA and transforming the SCO into an international organisation by 2004.

Bilateral talks between China and Mercosur are at an initial stage, and New Zealand has expressed interest in concluding a free trade agreement with regional trade giant.

Japan’s free trade talks with Mexico have stalled over Mexico’s demand for a tariff-free pork import quota. The free trade agreement was to be signed during President Fox’s visit to Tokyo on 16 October. Both sides say negotiations will continue but no new dates have been set. In January 2003, Japan signed its first free trade agreement with Singapore, but this deal excluded sensitive agricultural and fisheries products.

Thailand President Bush is expected to notify Congress in the coming weeks of his intention to negotiate a free trade area with Thailand following an agreement reached on the sidelines of the October APEC summit. The deal is to cut agricultural and industrial tariffs and non-tariff barriers, as well as open markets on a wide range of services. Some US Congressmen such as Senator Charles Grassley have objected to concluding trade agreements with G-21 members (see page 4). In a letter dated 15 October, Thailand’s Minister of Commerce Adisai Bodharamik assured US Trade Representative Robert Zoellick that Thailand neither saw the G-21 as a ‘permanent force’ nor “believed or supported a North-South or confrontational approach to negotiations. [...] Thailand intends to continue our co-operation with the US in all international fora, and we would like to assure the US of our full commitment to the WTO negotiations and the multilateral trading system.” Meanwhile, Thai civil society groups have requested parliamentary consultations before the government enters into an FTA with the US. They urged caution, citing concerns about loss of legislative/regulatory sovereignty, farmers’ rights, patenting obligations for living organisms and national treatment obligations regarding foreign investors.

Thailand already has free trade agreements with China and India. Another with Australia is to enter into force next year, with immediate tariff elimination on a large number of products, and the rest to follow by 2010. Talks were launched with New Zealand and Peru in October 2003.

Singapore and Taiwan: Singapore has already concluded agreements with the US and Japan, and is negotiating others with Mexico, Canada and India. Fearing marginalisation due to the many overlapping regional integration schemes from which it is excluded, Taiwan is trying to interest the US in an FTA. The US, however, seems hesitant, pointing in particular to Taiwan’s lax enforcement of intellectual property rights.

EU, ACP Countries Move Ahead with Integration

The second phase of negotiations on the Economic Partnership Agreements (EPAs) between the EU and the African, Caribbean and Pacific (ACP) Group of States was launched in early October after a year of inconclusive preparatory talks. By 2008, the 76 eligible ACP countries are expected to conclude new, WTO-compatible trading arrangements with the EU, mostly through region-based free trade and co-operation agreements.

While the joint ACP-EU Ministerial Declaration launching the regional-level negotiations called the results of the preceding all-ACP level talks “satisfactory with regard to the high degree of convergence reached”, many ACP countries were disappointed that the first phase did not result in a binding outcome on a number of issues of common interest. Such issues included, *inter alia*, WTO compatibility, dispute settlement, rules of origin, and treatment of least-developed countries (see background below).

Ministers also adopted a *Joint Report on the all-ACP – EC phase of EPA negotiations*, which is to “serve as a point of reference, and provide guidance, for the negotiations to be conducted at regional level.” According to the report, there is an agreement that EPAs will maintain and improve the current level of preferential market access into the EU for ACP exports. The EU could not, however, “automatically guarantee” the preservation of the Lomé Convention *acquis*

or the Commodity Protocols as requested by the ACP. Nevertheless, both sides agreed to review the protocols in the context of the new trading arrangements, “in particular as regards their compatibility with WTO rules, with a view to safeguarding the benefits derived therefrom, bearing in mind the special legal status of the Sugar Protocol.”

The EU confirmed that least-developed countries’ (LDCs) access to the Community market under the Everything But Arms initiative would be maintained. With regard to non-LDC ACP countries, which would not be in a position to enter into EPAs, both sides concurred that the EU would “assess their situation and examine all alternative possibilities, in order to provide these countries with a new framework for trade, which is equivalent to their existing situation and in conformity with WTO rules.”

WTO Compatibility and Way Forward Post-Cancun

“There has been convergence of views that EPAs must be compatible with WTO rules then prevailing and will need to take account of the evolutionary nature of relevant WTO rules, in particular in the context of the Doha Development Agenda. Both sides agreed to co-operate closely in the context of the WTO with a view to defending the arrangements reached, in particular with regard to the degree of flexibility then available.”

A major question regarding WTO compatibility is the GATT Article XXIV.8(b) requirement that under free trade areas “duties and other restrictive regulations of commerce” must be “eliminated on *substantially all the trade* between the constituent territories” (editor’s italics). While the Cotonou Agreement (see background) foresees “less than full reciprocity” regarding trade concessions, the EU said it “could not subscribe to the ACP Guidelines where it is indicated that the ACP cannot accept *a priori* to apply reciprocity, for in the Cotonou Agreement, the parties have actually already committed themselves to progressively remove impediments to trade between them.”

Both sides expressed regret that the WTO Cancun Ministerial conference ended without consensus. “They deplored, in particular, that crucial and directly development-related topics such as agriculture and cotton could not be properly discussed during the meeting. As in Cancun, the EC reiterates its readiness to address the trade aspects of the African cotton initiative. Both sides agree that it would be possible, within a comprehensive package including implementation issues and satisfactory solutions for agriculture and in particular cotton, to define modalities for the pursuit of the Doha negotiations in a balanced manner covering all issues. They agreed to consult on how to move the process forward.”

Central and Western Africa First to Start

Regional negotiations were launched immediately after the ACP-EU Ministerial between the EU and the Central African Economic and Monetary Community (CEMAC), a customs and monetary union between Cameroon, Central African Republic, Chad, Republic of Congo, Gabon, and Equatorial Guinea. Sao Tomé and Príncipe will also take part in this EPA, by way of a free trade arrangement with CEMAC. ECOWAS, the Economic Community of West African States, has also started EPA talks. The countries involved are Cape Verde, Gambia, Ghana, Guinea, Liberia, Nigeria and Sierra Leone, as well as Benin, Burkina Faso, Côte d’Ivoire, Guinea-Bissau, Mali, Niger, Senegal and Togo (who make up the West African Economic and Monetary Union (WAEMU)).

Background

The EPAs are being negotiated under the ACP-EU Partnership Agreement, known more commonly as the Cotonou Agreement. Its central objective is to reduce and eventually eradicate poverty while contributing to sustainable development and to the gradual integration of ACP countries into the world economy. The agreement is centred on five ‘pillars’: a comprehensive political dimension, participatory approaches, a strengthened focus on poverty reduction, a new framework for economic and trade cooperation, and a reform of financial cooperation. The negotiations are to conclude by 2008, after which the EPA arrangements will gradually replace the EU’s long-running unilateral preferences under the Lomé Conventions.

ACP countries (47 in Africa, 15 in the Caribbean and 14 in the Pacific) can enter into new ‘WTO-compatible’ trading arrangements individually, or as part of a group – the latter building upon regional integration schemes. In theory, least-developed countries have considerable flexibility in deciding their trading relationship with the EU, as they are assured to conserve their duty-free access to the EU even without joining an EPA. However, many African LDCs fear that they will be engulfed by cheap EU imports due to the market opening commitments required from the EPA-ACP countries that belong to regional economic/trade groupings that also have LDC members. Of the 76 ACP countries eligible for EPAs – South Africa is the only exception – thirty-eight are LDCs (33 in Africa, one in the Caribbean and four in the Pacific).

Southern Africa Seeks to Widen Scope of FTA Talks with the US

Following the collapse of the Cancun Ministerial, the South African Customs Union (Botswana, Lesotho, Namibia, South Africa and Swaziland) has requested the United States to broaden the free trade area agreement under negotiation to cover agricultural subsidies anti-dumping rules in addition to tariffs, intellectual property protection, investment, government procurement, dispute settlement, e-commerce, labour and the environment.

According to South Africa’s chief trade negotiator Xavier Carim, “[s]ome difficulties have emerged from the fallout from Cancun in the sense that the US had always proposed to deal with anti-dumping and subsidy issues at the WTO level rather than bilaterally. With the WTO negotiations having no clear direction at the moment, and the possibility that the [Doha] Round will be extended, we are in limbo at the multi-lateral level.” A US response is expected at the next negotiating session in December.

Mr Carim denied that South Africa’s leading role within the G-21 had had a negative impact on the free area talks. Instead, both sides “indicated their commitment to see the negotiations through” and tabled detailed texts for discussion during their October session, Mr Carim said. The FTA is slated to conclude around the same time as the WTO’s Doha Round.

EU Struggles with Biotechnology, Chemicals Regimes

The European Union, which has been the main advocate for advancing environmental issues in the WTO, is currently engaged in two major internal legislative initiatives that touch on both regimes. The first is an overhaul of Community chemical legislation and the second is securing member states' ratification of the traceability and labelling laws for biotechnology products adopted last July.

The European Commission has completed a new impact assessment of the costs of its proposed chemicals regime REACH (for Registration, Evaluation, Authorisation and Restrictions of Chemicals). The Commission now estimates that direct costs for EU chemical industry over 11 years will be €2.8 billion instead of the nearly €13 billion it had previously predicted. On the other hand, long-term health and environmental benefits have been re-estimated upwards to €50 billion over the next 50 years. The European Chemical Industry Council is sceptical of the Commission's new numbers, and has called for an extended and independent impact assessment of the new legislation.

On 29 October, the Commission was to present a revised version of the REACH legislation in response to comments received during a public consultation period. The revision is fast becoming one of the most fought-over policy developments in EU history, pitching industry and civil society against each other in an effort to strike a balance between safety and competitiveness concerns. Environmental organisations said the impact assessment exposed industry 'scare-mongering' and called on the Commission to revive its original REACH proposal rather than "give in to industry and US pressure." Unlike its predecessor, the revised proposal would no longer apply to polymers, thereby removing an estimated 3,000 substances from the system, as well as the Commission's attempt to address concerns of the EU's main trading partners through clarifying and softening provisions for chemicals in imported articles (Bridges Year 7 No.4, page 19).

GMO Approvals

EU members remain split on resuming approvals for crops containing genetically modified organisms (GMOs). While former diehards France and Germany have indicated some readiness to restart approvals, Austria and Luxembourg insist that EU-wide legislation must first be in place on measures to avoid contamination between fields of GMO and traditional crops.

According to a new report published by the UK government on 16 October, conventional varieties of oilseed rape, maize and sugar beet are contaminated with GM strains much more extensively than previously expected. The report, based on three years of field research by the Royal Society, shows that bees can pollinate conventional oilseed rape with pollen from GM oilseed rape over a distance of 26 km. It also found far fewer insects and weed species in conventional fields adjacent to those growing GM beet or rape crops. For maize, however, the situation was the opposite: more wild seeds, bees and butterflies were found both in and around GM maize fields. The findings could possibly lead to approval refusals for GM sugar beet and oilseed rape on environmental grounds.

Australia, Argentina and the US have already secured a WTO dispute settlement panel on the *de facto* moratorium on approvals they allege is maintained by the EU and its member states (see page 12). The US is reportedly mulling over launching a parallel dispute on the EU's new GMO traceability and labelling rules expected to enter into force next year as member governments ratify them (Bridges Year 7 No.5, page 22). The Grocery Manufacturers of America has called the rules an "arbitrary barrier to trade with no basis in science" and stated that the labelling requirements amount to a "warning label on all foods derived from biotechnology with the exception of some European products – notably wines – that have used biotechnology to improve their products for many years."

Geographical Indications

Just days before the Cancun Ministerial Conference, the European Commission published a list of 41 geographical indications (GIs) for which it is seeking WTO-wide protection through the Doha Round agriculture negotiations. The list includes several wine and spirit names considered generic in many parts of the world (port, sherry), as well as appellations for cheeses, hams and sausages. The inclusion of GI protection in the agriculture talks is subject to major controversy. In the revised draft Ministerial Text, it was listed as one of the ten 'issues of interest but not agreed'. Separate but related discussions on extending to other GIs the level of protection currently applying to wines and spirits under the Agreement on Trade-related Aspects of Intellectual Property Rights are deadlocked the TRIPs Council between 'old world' countries, who are pushing for it and 'new world' nations, who are vehemently opposed.

Energy Pricing Blocks Russia's WTO Bid

Russia was vowed to resist pressures to reform its dual energy pricing, on which the EU has conditioned its approval of Russia's entry to the WTO. The EU claims that Russia uses export taxes on oil and gas to subsidise cheap energy to domestic industries.

Talks between European Trade Commissioner Pascal Lamy and Russian Prime Minister Mikhail Kasyanov ended in deadlock on 16 October. "We have differences with Russia over the interpretation of WTO principles in the area of gas," Commissioner Lamy said after Minister Kasyanov made it clear that the state-controlled gas giant Gazprom's monopoly was "not up for discussion". Energy pricing has been a particular irritant in the accession talks, with the EU and others demanding that Russia's accession package must include a reduction of the gap between (on average five times lower) domestic and export prices for natural gas and oil (Bridges Year 7 No.2, page 19). The huge price gap is seen as an indirect subsidy from export customers to Russian industry. President Putin and other Russian officials have strongly criticised the EU for demanding unduly tough concessions and warned that an arbitrary increase in domestic gas prices

would undermine macroeconomic stability. President Putin's economic adviser Andrei Illarionov said Russia would not give in to EU demands even if it meant "taking a pause" in the WTO negotiations. On 23 October, Russia completed its first accession protocol with Kyrgyzstan.

"Nyet" to the Kyoto Protocol

Trade-related issues seem to be spilling over to the environmental arena. Against all expectations, President Putin refused to confirm that Russia would ratify the Kyoto Protocol at a climate conference held in Moscow in late September. The ratification is vital, since the Protocol requires the participation of countries representing at least 55 percent of 1990 global greenhouse gas emissions to enter into force, and the US – the world's largest emitter – rejected the Protocol in 2001.

In an opinion piece in the Russian daily *Pravda*, Vyacheslav Nikonov, Director of the Politika Foundation, noted that disappointing EU concessions in Russia's WTO accession negotiations, as well as negative reactions regarding anti-dumping investigations and Russia's request for visa-free entry were among likely reasons to avoid ratification. He warned that with the uncertainties surrounding the Kyoto Protocol's effects, Russia could not "sell [its] future economic growth for an unspecified price".

Russian officials have stressed that in order to ratify, Russia needs guarantees on investment and the sale of emission rights. But Russian gains from emissions trading are likely to be much smaller than earlier projected. The US is out of the game, and the EU has created an internal emissions trading scheme, which relies heavily on trading pollution credits within the enlarged European Union. Others have suggested that Russia is worried about potential negative impacts on its export markets for oil and gas.

The Protocol's proponents still hope that Russia will announce its ratification at the next Conference of the Parties to the Climate Change Convention, to be held from 1-12 December in Milan, Italy.

Canada to Change Drug Patent Law

Canada may become the first industrialised country to change its patent law on pharmaceuticals to allow Canadian generics producers to export medicines still under patent to countries facing a public health crisis but unable to manufacture the drugs themselves.

The announcement was made by Industry Minister Allan Rock and International Trade Minister Pierre Pettigrew on 25 September, following a ringing plea from Stephen Lewis, the UN Special Envoy for HIV/AIDS in Africa. Mr Lewis, who is Canadian, called on his country to take the lead in easing patent laws in order to increase the supply of cheap generic medicines to treat AIDS and other pandemics in the poorest developing countries.

As it stands, Canada's Patent Act does not grant legal authorisation for the manufacture for export of generic versions of medicines patented in Canada, even if the drugs would go to a poor country representing no major commercial interest to the brand-name pharmaceutical manufacturers who have insisted on limits to generics exports. WTO Members are also limited by Article 31(f) of the Agreement on Trade-related Aspects of Intellectual property Rights (TRIPs) in their ability to export medicines made under compulsory license. Only a handful of countries – and India in particular – are exempt from TRIPs obligations on patenting medicines until 2005, and can thus supply 'WTO-legal' generic versions anywhere in the world.

The 30 August decision of the TRIPs Council allows countries without domestic manufacturing capacity to issue a compulsory license for a patented drug in any foreign country capable of producing a generic copy and then import the production to deal with national public health emergencies. The decision, reached in extremis before the Cancun Ministerial Conference, was hailed by developed country WTO Members as proof that the organisation could deliver development benefits but criticised by health activists such as Oxfam for being tied in so much 'red tape' as to render it useless in practice (see related article on page 22).

It was against this background – and in response to Mr Stephen's call to act to counter the devastation brought by AIDS – that the ministers proposed to craft a precise 'surgical strike' in Canadian patent law that would allow exports of generic versions of medicines under patent in Canada. At first, the ministers said they would try to fast-track the decision – possibly within a week – but it rapidly transpired that brand-name drug manufacturers were not convinced by the initiative.

Harvey Bale, spokesperson for the International Federation of Pharmaceutical Manufacturers' Associations, said a patent law revision "would not change a thing" for Africa's access to affordable medicines but would seriously affect investor confidence in patent protection. He also reiterated the industry's long-standing position that weak health infrastructure rather than lack of cheap drugs is the problem in Africa and elsewhere. Canada should support the UN Global Fund to Fight AIDS, Tuberculosis and Malaria instead of engaging on the "slippery slope" of eroding patent protection, he said.

Canada's flourishing generics industry, could offer some competition to cheap drugs from India, Brazil and China, although few believe that the relatively high-cost Canadian producers can beat advanced developing countries on price. The Canadian Generic Pharmaceutical Association said any production under the modified patent law would not be profit-motivated or 'commercially significant', but merely a way to respond to a humanitarian crisis.

The patent law change is not expected to reach Parliament before early 2004.

The Rule of Law and the Problem of Asymmetric Risks in TRIPS

Frederick M. Abbott

The WTO has just finished two and one half years of negotiations on the TRIPS Agreement and Public Health, with an additional tranche of negotiations scheduled to commence soon. Over this period developing countries have made significant strides in integrating and co-ordinating their trade negotiating positions. Despite divisive efforts by powerful developed Members, developing countries stuck together during recent negotiations better than the average family, and in the end resisted the harshest demands placed on them.

Without discounting the continuing large-scale problem posed by asymmetric political and economic power in the trade negotiation process, it is time now to focus on the next phase in WTO trade diplomacy, that is, the process of implementation.

This is where even greater threats and risks await, and where the WTO as an institution must ultimately be held to account. WTO Director-General Supachai (echoed by US Ambassador Linnet Deily and EC Commissioner for Trade, Pascal Lamy) has publicly hailed the Decision on Implementation of Paragraph 6 of the TRIPS Agreement and Public Health¹ as proof positive that “the WTO system is working and can produce important results on critical issues of particular interest to developing countries”.² This time around, such statements must be more than the mere rhetorical flourishes that accompanied the close of the Uruguay Round and the adoption of TRIPS, but must instead be understood as commitments on behalf of the WTO as an institution to defend the interests of its weaker Members. It is here that a detour into the past will bring us to the road ahead.

What brought us here?

Why did the Doha Declaration on the TRIPS Agreement and Public Health come about? South Africa accepted to implement the TRIPS Agreement as a developed Member of the WTO. It brought its national intellectual property legislation into compliance. It also adopted a National Drug Policy (1996) and legislation to implement it, the Medicines and Related Substances Control Amendment Act of 1997. The Act authorised the Health Minister to prescribe rules for the parallel importation of patented medicines, it introduced rules to promote competition and price reductions through generic substitution, and it allowed for the development of a single exit price mecha-

nism for private sector drugs to discourage discrimination against the poor. This legislation was subject to vehement attack from the United States, and later the European Union, for being inconsistent with South Africa's TRIPS obligations, as well as large-scale litigation by 39 pharmaceutical companies seeking to prevent the government from implementing a progressive health care plan to benefit the poor.

But there was nothing inconsistent with TRIPS in this legislation, a fact readily apparent to anyone familiar with the subject, including the United States and EU trade authorities. The South African government came under attack for its implementation of the flexibilities in the TRIPS Agreement, which it was clearly permitted to do. There was a powerful message inherent in that attack: We can agree to TRIPS but reserve the right to breach our commitment.

As we now face the implementation of the Decision on Paragraph 6 in national law, it should be matter of grave concern that the lessons have not been learned, that the new rules will stand as window dressing, and that the strong will not be barred from preying upon the weak.

Concerns on implementation

A number of developing country WTO Members have expressed concern over the Decision because it includes procedural requirements involving provision of information to the TRIPS Council, and the issuance of licenses. These may not be the easiest set of rules to follow, but neither are they the hardest. They call for fairly routine administrative processes. From a legal standpoint, the obligation to provide information is a formality that should add virtually nothing to the transaction cost of using the mechanism.

So why are these countries worried? Is this some form of governmental paranoia? No. It is a deadly serious concern that the powerful actors will use the information as a reason for a visit to the national capital to explain that the rules are not actually intended to be used, and that their use may regrettably lead to the loss of market access or denial of IMF loans. If the concern is that developing country Members will be threatened on the basis of agreed-upon rules, no set of rules will be adequate.³ And because commercial actors and governments are very wary of acting in the absence of agreed-upon rules, the solution is not the absence of rules. The absence of rules would neither act as a deterrent⁴ nor create an environment conducive to addressing public health needs.

Possible responses

There are a number of ways that the problem of threats might be addressed, some already ongoing. *First* is leadership by the economically and politically stronger of the developing Members, coupled with collective political support from other developing and developed Members. Brazil has taken on this task of leadership several times already, and it is currently exercising this important role. Very shortly after adoption of the Decision on Implementation of Paragraph 6 Brazil took measures to import under compulsory licence and is bargaining with patent holders for price reductions on medicines. Although its action is not specifically under Paragraph 6 because it appears to be planning to import medicines that while on-patent in Brazil are off-patent in the supplying country, it is nonetheless apparent that Brazil's action will have the effect of demonstrating that compulsory licensing, including under Paragraph 6, can be used effectively.

It will be important for Brazil to receive political support from fellow WTO Members, both developing and developed, so that any counter-measures by Members representing patent holders might be undertaken only at serious political, and even economic, risk to those Members.

Collective response during previous leadership by Brazil included pursuit of supporting resolutions at the UN Human Rights bodies. In this instance, since the incoming Director General of the WHO has announced that his preference to address HIV-AIDS is to pursue the Brazilian model, institutional support for Brazil from the WHO would be very important and welcome. The effective response by the WHO to the SARS outbreak has created a large measure of international public trust and support for WHO, and its voice will be taken very seriously in the international media and public. NGOs will also play an important role with their demonstrated ability to mobilise world public opinion.

A *second* potential mechanism for countering intimidation tactics is the prospect for the organisation of collective support by multilateral institutions, developing and developed Members, and public interest groups concerned with access for smaller less powerful states in taking advantage of TRIPS flexibilities. Here one might envisage UNCTAD, the World Bank, WHO, UN High Commissioner on Human Rights and other institutions providing expertise and financial support for a series of undertakings intended to demonstrate to smaller economies the viability of using the measures that are lawfully permitted under the TRIPS Agreement. I would hope that DG Supachai and other people in the WTO leadership would on these occasions drop the reluctance to stand behind the measures that were specifically adopted to protect developing Members, and stand behind the words that they have used in the media to provide legitimacy to the WTO as an institution.⁵ The failure of the WTO to support its smaller and less powerful Members would send a strong adverse message about the political basis of the organisation.

When smaller economies begin to act, and if they are subject to counter-measures from the more powerful patent holder Members, it is even more important that collective support be forthcoming. Perhaps the most desirable form of collective action will be for several smaller economy states in different parts of the world to act together, with collective support coming from a set of regional actors.

The problem of threats from more economically powerful Members is fundamentally a political problem requiring leadership and collective action. It is important to recall here that the WTO works on consensus principles, and the TRIPS Council cannot take steps without support of developing Members. This does not mean, however, that lawyers and legal rules cannot and should not play an increasing role in countering abuse of patents by WTO Members and their constituents so as to establish a true rule of law-based WTO system.

A legal response

How can lawyers approach this? How can we prevent repeats of South Africa? How can we force Members of the WTO to play by the rules they have agreed upon?

Some authorities have suggested that making public the behaviour of governments might be enough to create a disincentive to abuse. I am not inclined to agree because I think the powerful actors are generally content to ignore bad publicity.

The broad answer would appear to be the establishment of real and effective disincentives for non-compliance with those rules. By this I mean sanctions or penalties for bad faith behaviour or abuse of the rules. Although I am only at the early stages of developing these ideas, I would raise here the question of how the WTO legal system can create a concrete and effective threat of penalty (or retaliation) against a Member that, on behalf of an industrial client, threatens another Member.

A private patent holder does not have a recognised power or authority to threaten a government with the withdrawal of trade privileges or withholding of funds from multilateral institutions. The prevailing pattern is for the patent holder (or patent holder industry group) to

request its home government to make such threats. The abuse of patents is indirect. Targeted governments are in an extremely difficult position. They cannot take steps to protect themselves against the patent holder without also jeopardizing their full range of economic interests in confronting the patent holder's home government.

Patent holders are subject to sanction under generally accepted principles of competition law for abuse of dominant position. The TRIPS Agreement recognises the right of Members to take measures "to prevent the abuse of intellectual property rights by rightholders".⁶ Conceptually, threats against governments lawfully preparing to take action under the TRIPS Agreement might be treated as a form of abuse of dominant position, and remedial measures taken under national law against the patent holders that instigate the threats. Thus, for example, a threat instigated under Section 301 in the United States might act to initiate a government action in the targeted country for abuse of dominant position by the patent holder (or its industry association). The presence of a credible competition law-based response creating real economic risk for patent holders might to some extent begin to reduce the frequency and intensity of threats. Yet this potential solution presents a problem similar to that which it seeks to cure. If a Member will not act to lawfully grant a compulsory license because it is threatened with governmental retaliation, will it be any more willing to initiate a proceeding for abuse of dominant position?

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The next phase of the Paragraph 6 negotiation, in which an amendment is addressed, might include the subject of potential abuses by the patent holder, and creating real and effective mechanisms to penalise those who attempt to threaten or intimidate WTO Members.

If the institution does not put in safeguards to protect the rights and interests of its less economically and politically powerful Members, it will face an accelerating crisis of legitimacy.

Some form of collective response might insulate the threatened Member acting in its own defence. Such collective response might be possible under the umbrella of a regional organisation. It might also take the form of a joint inter-governmental investigation into abuse of dominant position. Neither the TRIPS Agreement nor WTO law prevents such collective action.

Another possibility is the idea of mutual responsibility. The TRIPS Agreement is the only WTO agreement that purports to establish private rights. Yet in establishing private rights, it leaves the question of liability under WTO rules to Members. There is a fundamental asymmetry. Might a remedy for abuse of the TRIPS Agreement apply not only to a Member, but also to the private party that is the real party in interest in the abuse? There is nothing so unique about private industrial actors playing significant roles in the WTO legal system. Some of the most notable dispute settlement cases are referred to by private actors or their interests: “Kodak-Fuji” as the name for a dispute between the United States and Japan; “Havana Club” for a trademark dispute between the European Union and United States.

Given the unique characteristic of the TRIPS Agreement in which private rights in patents and other IPRs are given express legal protection by the WTO system, might it not then create a preferred symmetry if a private IPRs holder could be joined with a Member abusing the rules as a complained against party, and with the potential for suffering direct economic loss for its conduct? So, for example, the Appellate Body and DSB might recommend a monetary remedy against the patent holder, or that a compulsory license be issued on a patent, or (in egregious cases) the forfeiture or revocation of a patent, as a remedy for privately instigated abuse. A persistent violator would face the most serious repercussions. Though the recommendation would not, as with other WTO remedies, be directly effective, implementation of a remedy such as compulsory licensing of the patent could be framed to authorise a wide territorial scope of use.

While it may be premature to offer concrete suggestions, WTO Members should begin thinking about real and concrete mecha-

nisms to create disincentives to extra-legal threats. At present, the risks are entirely asymmetric. A pharmaceutical patent holder may encourage its government to threaten a foreign country with economic harm, and face little or no risk from engaging in this behaviour. The patent holder is riding the shirt-tails of its government. But if patent holders are accorded rights under WTO law, they should also accept obligations, and failure to comply with those obligations must entail real and effective risk.

The next phase of the Paragraph 6 negotiation, in which an amendment is addressed, might include the subject of potential abuses by the patent holder, and creating real and effective mechanisms to penalise those who attempt to threaten or intimidate WTO Members.

A challenge to the WTO

The WTO claims to be an institution based on the rule of law. It has in the past failed to support the rule of law on behalf of its economically weaker Members. It is imperative that the institution assure that the Paragraph 6 agreement can be used in good faith by those who desire to use it, and not allow it to become a baseline for intimidation. If the WTO is going to succeed in its mission as a rule of law-based framework for the conduct of international trade, it must put in safeguards to protect the rights and interests of its less economically and politically powerful Members. If it does not, the institution will face an accelerating crisis of legitimacy.

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ENDNOTES

¹ Decision of 30 August 2003 on the Implementation of Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health (WT/L/540)

² Address by Dr. Supachai Panitchpakdi, Director General, WTO Ministerial Conference (Cancun), Fifth Session, 10 Sept. 2003, WT/MIN(03)/10.

³ Though, logically, a rule that would effectively penalise threats and end the practice would be adequate.

⁴ This fact is well supported by the historical record. As example, the initiation and conclusion of negotiations on the TRIPS Agreement took place against the backdrop of a series of actions by the United States under Section 301 and Special 301 of the Trade Act of 1974 (as amended) to compel its trading partners to adopt and enforce higher standards of intellectual property protection. When the U.S. Congress approved the Uruguay Round Agreements, it amended Section 301 and Special 301 to permit actions against countries “notwithstanding the fact that the foreign country may be in compliance with the specific obligations of the Agreement on Trade-Related aspects of Intellectual Property Rights” (19 USC § 2411(d)(3)(B)(II) & 19 USC § 2242(d)(4)).

⁵ There is no simple way to define the circumstances in which the WTO leadership should publicly speak out on behalf of less powerful Members that are subject to unwarranted threats, as distinguished from intervening in more ordinary good faith disputes concerning the interpretation of rules. An analogy might be trying to define the circumstances in which the Secretary General of the United Nations should appeal to UN Members to abide by the rule of law enshrined in the UN Charter.

⁶ And also expressly allows measures to address “the resort to practices which unreasonably restrain trade or adversely affect the international transfer of technology” (Article 8.2, TRIPS Agreement). See Frederick M. Abbott, *Report: Are the Competition Rules in the WTO Agreement on Trade-Related Intellectual Property Rights Adequate?* in Challenges to the Legitimacy and Efficiency of the World Trading System: Democratic Governance and Competition Culture in the WTO (E-U Petersmann ed. 2003 forthcoming).

The Global Biodiversity Forum: Building Bridges between the WTO and the Environmental Community

Mark Halle

The Global Biodiversity Forum held in Cancun just prior to the WTO Ministerial Conference was a significant event in many respects. Participants did not only debate several key themes regarding the relationship between trade and sustainable development, but – for the first time – their ideas and recommendations were presented to trade and environment ministers.

The Forum engaged a diverse range of stakeholders, who represented a wide variety of perspectives and experiences.¹ It tapped into deep emotions, and uncovered major concerns and passionately held beliefs. The debates were tinged with the excitement of exploring what is for both the trade and environment communities a relatively fresh topic – the relationship between trade and biodiversity.

It is odd to note, given the current tension between proponents of liberalised trade and proponents of sustainable development that the two in fact co-existed for decades without any particular controversy. Indeed, from the perspective of environmental concern, trade policy was not even interesting – it dealt almost exclusively with tariffs, quotas, customs duties; with what happened to manufactured goods when they arrived at an international frontier. The trade regime did little that either favoured or prevented progress on environmental issues. During the GATT years, instead, the environmental movement focused on the construction of a robust international regime of its own – and with considerable success.

The Uruguay Round Wake-up Call

This tranquil, bucolic picture changed with the conclusion of the Uruguay Round, which established the WTO and vastly increased the scope and impact of trade policy. No longer was trade policy confined to the dry and tedious business of border measures. Indeed, in contrast to the GATT, the focus of WTO is essentially on domestic policy and the WTO agreements, because they seek to limit the scope for domestic regulation to be used as non-tariff barriers, end up having a major constraining impact on domestic policy-making.

For the environment movement, it was as if we had woken up one morning to find the WTO camped in our back yard – picking our vegetables, hanging up laundry and chopping down our trees for firewood. The initial shock grew worse when it became clear that the WTO was there to stay. What was there to do?

First reactions included fear and confusion, which soon gave way to a more reasoned inventory of what in the new situation could be considered positive, and what negative. On the worrying side, it was clear that WTO represents very strong political and economic interests, backed up by the “police force” of a strong dispute settlement system, and the capacity to enforce compliance through the threat of sanctions. The environment community felt badly outgunned.

But the inventory revealed plenty that was positive: the basic principles on which the trade regime is based – non-discrimination, transparency in the rules that apply, and peaceful settlement of disputes – should not pose any threat to the environment. There is no reason why the environment should pursue its goals through unfair trade practices. If the goal is sustainable development, we should not be using environmental policy in a way that limits growth opportunities for poorer countries and people.

We also discovered, though, that the interactions between trade and environment are complex. We are, after all, dealing with two very different cultures, motivated by very different objectives. The trade culture is animated by business, is influenced by commercial interests and answers to a mercantilist logic. The environment culture is animated by a longer-term perspective that tends to be steeped in the notion of public good and to rely on public sector regulatory

frameworks. And yet it is possible to find common ground, and positive solutions to apparent problems where the political will is present. This needs a careful, organised and professional approach.

We need to identify:

- where WTO rules present unjustified obstacles to sustainable development objectives, and how to overcome these obstacles;
- where new WTO rules are needed, and promote them;
- where existing WTO rules might be advantageous, and use them; and
- how to expand the space available for expanding trade in goods and services that advance sustainable development.

A New Era of Interaction

The 18th Global Biodiversity Forum marked an important step for the environmental community in coming together to interact with the trade policy community. In particular, it was something of a first in bringing the biodiversity community together to focus on key concerns of its interaction with trade.

Now we have to carry our message forward. We need to stress that the message of the GBF is that of a highly diverse set of players. These include the thirty sponsors of the GBF, among them IUCN, with its diverse constituency of over nine hundred governments and non-governmental organisations. This broad and extremely representative group of players is now bringing its particular set of skills and its extensive experience to the trade community, where it can do a great deal of good. The GBF must not, therefore, simply be a one-off event – it must lead to the creation of a robust knowledge community around the theme of biodiversity and trade.

Nobody should doubt that such a knowledge community can have an impact. The

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campaign on TRIPs and Public Health offers an excellent demonstration of how a focused group of players with a coherent message can influence outcomes.

WTO negotiators need advice on issues that go beyond the narrow confines of traditional trade policy. They need access to accurate information on the impact of the decisions they take or consider taking. They need alternatives to their sometimes overly conservative approaches, alternatives that will stimulate trade and economic growth, but that will also lead to sustainable development over the longer-term.

The GBF looked at three issues in particular:

- intellectual property rights, traditional knowledge and biodiversity;
- risk, precaution and biosafety; and
- trade and sustainable livelihoods.

These issues are key, but they are not the only ones. Biodiversity is everywhere in the Doha agenda. It could turn out that what happens in the negotiations on agriculture has a greater impact on biodiversity than does the formal environmental negotiating agenda set out in paragraph 31. So it is essential that we go on, that we organise sessions of the GBF in association with major trade events, that we weave together the knowledge community the threads of which were formed in Cancun.

Our recommendations and ideas represent a road map, still rough, but nevertheless a guide to help us begin moving in the right direction. The 18th GBF was the first step on a very long road. We need to ensure that we don't engage on the journey as a weak partner. We need remind the WTO of what the Members themselves have engaged to do – to promote a global trading system that supports sustainable development.

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ENDNOTE

¹ The GBF was convened by IUCN - The World Conservation Union, the International Centre for Trade and Sustainable Development, the Mexican Ministry of Environment and Natural Resources, the Mexican Centre for Environmental Law and some 30 other institutions representing different sectors of society.

Key Messages of the Cancun Global Biodiversity Forum¹

GBF18 in Cancun was timed to convey to the 5th Ministerial of the WTO a message of our growing concern about the urgent need to mitigate the negative impacts of the current trading system on the closely entwined fates of local communities, to which we all belong, and the ecosystems upon which our livelihoods depend. We strongly believe that the goal of trade liberalisation must be a development that is sustainable and preserves the livelihood opportunities of the poorest. The WTO must not work in isolation from other key components of the sustainable development agenda, in particular social equity, good governance, gender issues, health, education, cultural heritage, and the right to a healthy environment.

There are few more damaging practices than the widespread use of agricultural dumping – or flooding the market with subsidised goods sold at below the cost of production. Sustainable livelihoods cannot be built or maintained in markets that are skewed and distorted by large quantities of food and grains subsidised by Northern taxpayers.

We see the liberalisation of goods and services as having potential to expand markets for sustainably-produced goods and services, but it must pass the test of supporting sustainable livelihoods, and not become an instrument for the wholesale privatisation of public goods.

There is an enormous agenda to be addressed in the field of labelling and certification. Small producers in poor countries face a bewildering array of requirements to enter new markets to the extent that, far from favouring trade in sustainable products, they sometimes represent insurmountable barriers to market entry. We strongly urge the international community to promote action on labelling and certification schemes that inform consumers and allow market access to be given to sustainable trade without providing scope for green protectionism.

Various provisions of the TRIPs Agreement profoundly impact biodiversity conservation and the protection of traditional knowledge. These impacts include the creation of incentives to misappropriate genetic resources and traditional knowledge, establish monocultures, displace traditional or native crops, restrict the ability of farmers to save, use and sell seeds, and privatise life forms. As such, they can adversely impact on the obligation in the Convention on Biological Diversity to share equitably the benefits arising from access and use of genetic resources. All participants of the workshop were of the view that reform of the TRIPs Agreement was necessary so as to achieve sustainable development, including the CBD's objectives.

The establishment of national *sui generis* systems for the protection of traditional knowledge could contribute to addressing some of the concerns of indigenous peoples. The TRIPs Agreement should provide the policy spaces to develop such systems. In the development of *sui generis* systems, prior informed consent and full involvement of all affected stakeholders, as well as equitable benefit sharing, will be essential to the legitimacy and effectiveness of the results.

Regarding the delicate balance between risk, precaution and biosecurity, GBF participants agreed on the following messages: Participants are concerned that the WTO Agreement on Sanitary and Phytosanitary Measures is not up-to-date in its ability to respond to advances in life sciences such as hybridisation and evolution. Application of the precautionary approach is often the low-cost option when compared to the huge and growing costs of dealing with the impact of invasive and alien species, especially for developing countries.

Participants insist on the parity between WTO rules and the relevant MEAs, so that WTO cannot "trump" the international agreements in the environment and agriculture spheres that deal with these issues. Instead, there is a need for an active dialogue between the two regimes. The sovereignty of states in this respect is fundamental. The trade regime must safeguard the ability of states to set their own rules in respect of biotechnology, including the right not to admit products that they do not wish to have in their markets.

¹ Excerpted from the presentation by Gustavo Alanis, President of CEMDA, to the High-level Round Table on Trade and Environment held in Cozumel, Mexico, on 9 September 2003.

Priorities for Development-oriented IPR Systems

In September 2003, the UNCTAD and ICTSD joint Project on Intellectual Property Rights (IPRs) and Sustainable Development convened the Second Bellagio (Italy) Dialogue. Entitled *Toward Development-oriented Intellectual Property Policy: Advancing the Reform Agenda*, the event brought together 25 policy-makers, negotiators, capital-based officials, and representatives from the private sector, academia and civil society organisations. Participants stressed that intellectual property policy was only one of a range of possible instruments to promote innovation, creativity and technological capacity in developing countries. They expressed concern over the continuing pressure on developing countries to adopt high standards of protection inappropriate to their different development needs and priorities.

Developments in TRIPS-plus Standards; Negotiations in Different Fora

Participants cautioned developing countries against any TRIPS-plus commitments – either at multilateral, regional or bilateral levels – unless the benefits could be unambiguously shown to outweigh the costs. A pro-competitive international IP regime that fosters domestic innovation and maintains a robust public domain would involve, *inter alia*:

- determining internationally agreed principles to guide discussion of IP standards at all levels;
- devising means for individual countries to effectively address unilateral actions and pressures;
- challenging the institutional framework in which IP policy is developed, including opposition to moves to harmonise the patent regime, including through WIPO's Patent Agenda;
- promoting development-friendly implementation of the 30 August Decision on paragraph 6, in the spirit of the Doha Ministerial Declaration on TRIPS and Public Health;
- supporting initiatives requiring disclosure of origin of genetic resources/traditional knowledge (TK) and exploring further the best means to address the specific challenges of protecting TK; and
- promoting innovation and affordable access to technologies in developing countries, including open source and other collaborative approaches, liability regimes and utility models.

Transfer of Technology, IPRs and Technological Capacity Building

Policies are needed to remove market impediments to the transfer of commercially viable technology and to lower the costs and risks of technology acquisition. The Group highlighted the following needs for action:

- monitoring actions taken by countries to implement the technology transfer commitments in the TRIPs Agreement (Articles 7 and 66.2);
- facilitating technology transfer through matching grants facilities, public-private partnerships, fiscal incentives, building scientific and technological capacity in developing countries, and best practice licensing models;
- adopting proactive national policies, including effective use of competition policy and better use of existing public tools including compulsory licences and government use provisions; and
- conducting sector- and industry specific research, and studies on the impact of co-operative patent regimes on technology transfer and local innovation, and international migration of technology transfer personnel.

Technical Assistance in IPR Policy and Development

Participants stressed the need to involve a broad range of stakeholders in developing countries in the design and implementation of technical assistance in order to ensure that it responds to the development needs of receiving countries. The following needs for action were highlighted:

- evaluation of current technical assistance on intellectual property;
- ensuring that technical assistance programs adopt a development perspective and that they expose recipients to a range of policy options and implications, including the use of flexibilities in intellectual property regimes and in particular in the TRIPS Agreement;
- developing a methodology for needs assessments and guidelines of good practice for development-oriented technical assistance in IP;
- promoting professional, pedagogically sound assistance by providers in consultations with users, and targeting technical assistance on the development of local capabilities and expertise in intellectual property and development; and
- considering ways (e.g. pro bono legal assistance schemes) to improve developing country access to developed country intellectual property systems.

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Meetings of WTO Bodies*

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|------------|---|
| Nov. 7 | Dispute Settlement Body |
| Nov. 7 | Committee on Technical Barriers to Trade |
| Nov. 16 | Symposium on Intellectual Property and Transfer of Technology |
| Nov. 18-20 | Council for Trade-related Aspects of Intellectual Property Rights (TRIPs) |
| Nov. 20 | Committee on Agriculture |
| No. 21 | Committee on Rules of Origin |
| Nov. 24 | Council for Trade in Goods |
| Nov. 27 | Committee on Trade and Development |
| Dec. 1 | Dispute Settlement Body |
| Dec. 15-16 | General Council |

**Negotiating sessions have been postponed until further notice on agriculture, services, market access, special and differential treatment, WTO rules (subsidies/countervailing, anti-dumping and regional trade agreements), the environment, and the multilateral registry of geographical indications for wines and spirits. Negotiations continue on eventual changes to the Dispute Settlement Understanding, which have a separate May 2004 deadline.*

Other Meetings

| | |
|--------------------------|--|
| Nov. 16-19 Miami | America's Trade and Sustainable Development Forum www.miami.edu/nsc/pages/FTAA.html |
| Nov. 16-21 Miami | Free Trade Area of the Americas Ministerial Conference www.ustr.gov/regions/whemisphere/ftaa.shtml |
| Nov 17-20 Wilton Park | Climate Change: What needs to be done in North and South www.wiltonpark.org.uk/web/conferences/ |
| Nov. 17-21 Geneva | Tenth Session of the Intergovernmental Negotiating Committee (INC-10) for the Rotterdam Convention on Trade in Hazardous Chemicals |
| Nov. 17-21 Paris | Codex Committee on General Principles www.codexalimentarius.net/ccgp19/gp19_01e.htm |
| Dec. 1-2 Milan | Ninth Conference of the Parties to the UN Framework Convention on Climate Change http://unfccc.int/cop9/index.html |

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