

Year 8 No.4 April 2004

In this issue

- 3 GATT Magic After Cancun: Finding Ways to Move Along
- 5 Appellate Body Ruling Saves the GSP, at Least for Now
- 7 European Cotton Subsidies: Meeting the Doha Challenge
- 9 Dispute Settlement News
- 12 WTO News
- 15 Regional Integration News
- 18 Trade and Environment Negotiations: A Southern View
- 21 Toward Effective Disclosure of Origin – The Role of the International ABS Regime
- 23 ICTSD and Partner News
- 24 Meeting Calendar and Resources

Published by the International Centre for Trade and Sustainable Development

Facts and Figures

- At the global level, the world is likely to meet the first Millennium Development Goal (MDG) of halving income poverty between 1990 and 2015. While East Asia has already met it, in Sub-Saharan Africa just eight countries are likely to achieve it. The target of halving the proportion of people who suffer from hunger is also likely to be met at the aggregate level, but Sub-Saharan Africa and a number of countries in other regions will fall short.
- The goals of reducing child and maternal mortality will not be attained in most regions as only 15 to 20 percent of countries appear to be on track. The goal of halting and reversing the spread of HIV/AIDS, malaria and tuberculosis will be missed; their incidence continues to rise. The risks of failure are especially high in Sub-Saharan Africa, but are substantial in many countries in other regions as well.
- Most regions will not manage to halve the proportion of population without access to safe water and sanitation by 2015. The gaps are largest in Sub-Saharan Africa for water and in South Asia for sanitation.

Source: *Global Monitoring Report 2004: Policies and Actions for Achieving the MDGs and Related Outcomes*. World Bank/IMF, 25 April 2004.

Mixed Signals for Doha Round

Amidst generally pessimistic predictions for the WTO's troubled Doha Round, a number of developments point to forward movement. First, the deadlock on agriculture, on which all other progress hangs, seems to be less absolute after signs from the EU that it might agree to setting a date to phase out export subsidies. Second, the EU has dropped its long-standing position that the Round must include negotiations on at least one of the controversial Singapore issues. And third, two ministerial-level meetings will be held in the near future to spur political momentum.

Key aspects of the negotiations, notably on services and development concerns (see page 13), remain in a state of suspended animation while Members grope their way forward to an agreement on agriculture. The current aim is to reach a general framework for advancing on all three by July, although many think the deadline will be missed.

No Convergence on Agricultural Market Access

During the third week of April, WTO Members held dozens of consultations between different groupings in an effort to narrow wide gaps on the market access pillar (i.e. tariff reductions) of the agriculture negotiations. In his summary of the March 'agriculture week' (Bridges Year 8 No.3, page 1), the negotiation Chair Timothy Groser had characterised market access as an area where "not even the outline of a possible basis for a political decision [was] evident" while at least "some shape" had emerged on key issues on domestic support and export competition.

No convergence of positions emerged from the April agriculture week. However, according to a developing country source "some real dialogue" did take place as countries/groups of countries talked to each other instead of to the Chair. The source said that both the EU and the US had listened seriously to the concerns of developing countries with regard to the 'blended formula' for tariff reductions they had developed prior to the Cancun Ministerial Conference. That approach would have subjected an unspecified percentage of tariff lines to linear reductions as during the Uruguay Round and another unspecified percentage to the so-called Swiss formula, which cuts higher tariffs more steeply than lower ones. Members would also have been required to eliminate import duties on a third unspecified percentage of tariff lines (Bridges Year 7 No.6, page 11). Although neither of the two major trading powers showed signs of changing this approach, both appeared to recognise that there were problems in the blend. Nevertheless, the US indicated that the formula could be amended – rather than abandoned – to take into account the problems raised.

The G-20 group of developing countries and the Cairns Group of agricultural exporters are still working on consolidating a position on market access (the groups have already agreed on a common position on domestic subsidies and export support). They are likely to take elements of the 'banded' approach suggested by former negotiation Chair Stuart Harbinson, who divided tariffs into four tiers according to their importance, and required developed countries to reduce each band more steeply and rapidly than developing countries (Bridges Year 7 No.3, page 7). According to a source close to the G-20, the common G-20/Cairns position under development would propose a "more appropriate solution" than the EU/US formula, reflecting the Doha mandate of 'substantial reductions' but retaining sufficient flexibility to ensure that development levels and the role that agriculture plays in developing country economies are taken into account.

Continued on page 2

Bridges

Between Trade and Sustainable Development

Published by the International Centre for Trade and Sustainable Development.

Director: Ricardo Meléndez-Ortiz
Editor: Anja Halle
Address: 13 chemin des Anémones
1219 Geneva, Switzerland
Tel: (41-22) 917-8492
Fax: (41-22) 917-8093
E-mail: ictsd@ictsd.ch
Web: <http://www.ictsd.org>

Regular ICTSD contributors include:

Heike Baumüller (TRIPs, MEAs)
Hugo Cameron (trade and environment)
David Primack (trade and development)
Malena Sell (WTO rules)
Mahesh Sugathan (investment)
David Vivas (TRIPs and services)
Alexander Werth (agriculture)

The opinions expressed in signed contributions to *BRIDGES* are the authors' and do not necessarily reflect the views of ICTSD. Manuscripts offered for publication are expected to respect good journalistic practice and be compatible with ICTSD's mission. Guidelines for contributors are available on request, as well as on ICTSD's website.

Material from *BRIDGES* can be used in other publications with full academic citation.

© ICTSD and contributors of signed articles.
ISSN 1562-9996

Annual subscription:

US\$225 for OECD country addresses
US\$75 for other countries
Courtesy subscriptions are possible thanks to the support of ICTSD's funders.

The *BRIDGES* series of publications is possible in 2003–2004 through the generous support of the Swiss Agency for Development and Co-operation (SDC), the UK Department for International Development (DfID), the Ministry of Foreign Affairs of Norway; the John D. and Catherine T. MacArthur Foundation and the Rockefeller Foundation.

It also benefits from contributions from ICTSD's core funders: the Governments of Denmark, the Netherlands and Sweden; Christian Aid (UK), MISEREOR, NOVIB (NL), Oxfam (UK) and the Swiss Coalition of Development Organisations (Switzerland).

Please see inside back cover for information on other ICTSD publications.

Export Subsidy Elimination

While the April meetings focused mostly on market access, the EU gave its clearest signal yet that it might be willing to negotiate an end date for the elimination of export subsidies, widely considered a *sine qua non* for the Doha Round to move forward. The EU's chief agriculture negotiator Mary Minch acknowledged that the Union's offer to negotiate a phase-out date for export subsidies on products of interest to developing countries had "not taken off" and that the Commission had not received any responses to its invitation of lists of such products from developing countries.

Although Ms Minch did not explicitly confirm that the EU would agree to set a date for export subsidy elimination, she said the Union realised it was "one of the key issues for a number of countries" and was "prepared to tackle this very seriously." However, she again emphasised the EU's need for "a clear understanding of what other countries are prepared to put on the table", including what "parallelism means for other WTO Members who use other export competition instruments" such as export credits, food aid and state trading enterprises (see page 11). Representatives of some EU member states said the Commission would need their approval before making any concessions on ending export subsidies.

EU Ready to Drop Singapore Issues

While no official announcement had been made at the WTO at press time, the European Commission has indicated that it is ready to abandon all four Singapore issues – investment, competition policy, trade facilitation and government procurement – in the context of the Doha Round. According to the Reuters news agency, the Commission has sent a memo to EU members stating that the Union "is no longer *demandeur* that negotiations on all or some of the Singapore issues be conducted. [...] If Members decide to exclude one or more....the EU will not oppose this." The Commission's Washington spokesperson Anthony Gooch also told journalists on 16 April that the EU was ready to bow to the will of the WTO membership as a whole if it reached a consensus that none of the four issues should be part of the single undertaking. He added, however, that negotiations could be started on some of the issues on a "plurilateral" basis outside the Doha Round.

Faced with stiff opposition from an overwhelming majority of developing countries, the EU offered in Cancun to take investment and competition policy off the table. Later, talks in the WTO focused on trade facilitation, the only one of the four issues on which consensus to launch negotiations seemed at all possible. There have been no WTO consultations on the other topics since Cancun.

It remains to be seen how WTO Members will react to the EU's change of heart, which according to Mr Gooch means that the Singapore issues will no longer be a 'stumbling block' to progress in other areas. However, those most adamant against new issues negotiations are likely to object to any attempts to revive them in a plurilateral setting even if the talks are decoupled from the Doha Round. On the other hand, Japan and Korea have so far insisted that all four topics must be included in the single undertaking. Many of the topics also have considerable support from other – mostly developed country – Members such as Switzerland.

Ministers to Meet in London and Paris

US Trade Representative Robert Zoellick will host a dinner for trade ministers from the EU, Brazil, Mexico, Kenya and South Africa in London on 30 April. India will be represented by a high official as Trade Minister Arun Jaitley is retained by national elections. In addition, Mexico has invited 28 trade ministers to an informal meeting on 13–14 May in the margins of the OECD's annual ministerial council meeting in Paris. Both events are aimed at increasing the feeling of political ownership of the WTO talks.

Some commentators openly question the motives behind these initiatives, but others are willing to give them the benefit of the doubt. A key developing country negotiator said that while he believed the meetings were an expression of real political will, their outcome remained highly questionable in view of the wide differences remaining between Members.

GATT Magic after Cancun: Finding Ways to Move Along

J. Michael Finger

Few would question that opportunities offered by the international trading system have been an important vehicle for development, or that GATT/WTO negotiations have played a critical role in creating that system. Euphoric perhaps from past successes with trade restrictions, at the Uruguay Round the negotiating community reached too far by extending coverage of GATT/WTO regulations to 'behind-the-border' issues.

Services, standards and intellectual property were the main focus of these efforts. These policy areas do affect trade and their 'trade-related aspects' were the rationalisation for the WTO taking them in. More fundamentally however, the regulations and institutions in these areas establish the structure of the domestic economy. They are traditionally forged in the interplay of the *domestic* interests that will be affected. Uruguay Round implementation has demonstrated that WTO negotiations in these areas provide a troubled approach to development.¹

The Old GATT Magic, How It Works

In order to get the *economics* correct, trade politics must take into account buyer/user interests as well as producer interests. But in domestic politics buyer interests are overwhelmed by import-competing producer interests. Country by country, the domestic *politics* of trade produces more import restrictions than the domestic *economics* of trade would say is optimum.

The secret behind the old GATT magic is that in trade negotiations the interests of buyers/users happen to correspond with those of foreign exporters: both want buyers/users to have the opportunity to pay less. This 'institutional accident' is the basis for the old GATT magic.

International negotiations pit domestic protection seekers against exporters, as exporters advance their own interests they simultaneously advance those of import users. The result, by happy coincidence of buyer/user interests with exporter interests, is trade policy that makes domestic economic sense.

The magic does not carry over to the behind-the-border areas. There, buyer/user and foreign exporter interests do not coincide. An obvious example is intellectual property; in these negotiations exporters want buyers/users to pay *more*, not less. The old GATT magic does not work. On behind-the-border regulations and institutions, the Uruguay Round negotiations did little to identify, much less to advance, the development dimensions of the issues.

Challenges and Approaches

The first challenge for the international community is to learn this lesson – to recognise where the old GATT magic of trade negotiations works and where it does not. The second challenge is to keep that magic working where it does work. The third is to remember that there is a lot of magic in the world – trade negotiations are not the only tool the international community has crafted to advance development.

Where the old GATT magic works

Reduction of restrictions on agriculture and on manufactures trade offers a positive outcome for all WTO Members. Here the old GATT magic works. In economics the concessions are twice blessed. On the export side, a concession extends the comparative advantage of the country who 'receives' the concession. On the import side, the economics are likewise positive. Lifting the burden of import restrictions from buyers/users advances their interests more than it takes from the interests of domestic producers. (The classical economics of the gains from trade never said that *every* domestic interest would benefit. It does, however, assure that the domestic benefits will exceed the domestic costs.)

Where other magic works better

There *is* such a thing as comparative advantage among institutions. It is ironic that the people most resistant to accepting that idea are members of the international community who repre-

sent their governments at trade institutions such as the WTO. They recommend a redoubling of WTO efforts in the behind-the-border areas, they insist that with a sufficient budget we can create *absolute* advantage for the WTO. Their plea awakens echoes from David Ricardo's explanation of *comparative* advantage, his example being wine from Portugal, cloth from England: With sufficient application of labour, e.g., to build greenhouses and heating systems, wine can be produced in England, and good wine, too, Ricardo accepts. Oranges, maybe pineapples, along the banks of Lake Lemman, this logic would continue; with trade-related technical assistance to provide the greenhouses and the heating. Ricardo's argument, of course, is not that it cannot be done, but that it does not make sense to do it.

To understand which institutions have comparative advantage in trade reform versus in construction of behind-the-border institutions, a key distinction should be kept in mind. Where trade negotiations have demonstrated their comparative advantage there is no difference between legal obligation and project design. Legal obligation from tariff negotiations is the schedule of reduced tariff rates, the project design is to put these rates into the national tariff code. Hence the GATT Secretariat did not evolve project design capacities.

The development banks, in their work to build up behind-the-border structures of economies, have evolved such capacities. Their documents at the same level of generality as WTO agreements contain no legal obligations, they are intelligent conversation – e.g., the World Bank's *World Development Reports*, the Asian Development Bank's monograph series, *The Doha Round and Development*. Project design people in development banks bring these intelligent generalisations to bear on the specifics of country situations. The resulting projects, agreed

Continued on page 4

with the host country, are specific to that country's needs and capacities.

In the development banks, legal obligation comes in specific project lending documents. The World Bank's portfolio with Senegal may include an education component for which the relevant lending documents provide specific, *legally-obligated*, performance requirements. The Bank's portfolio with a neighboring country, say Mali, may not include an education component; or if it does, the education component may address the need for teacher training, while in Senegal the Bank may be helping the government to provide textbooks. To build behind-the-border institutions, such country-specific and project-specific legalities are better suited to the one-off problems and the trial-error rhythm of what is needed than is WTO's generic approach to legal obligation. Proposals have been put forward for the WTO to find ways to make its statements of legal obligation specific to particular levels of development, to sub-categories of countries otherwise drawn. If we apply to these proposals what we have learned from development bank experience, we would have to go to the detail of specific projects in specific countries for the legal obligation to be useful.

My response to these well-meaning suggestions is not to insist that such cannot be done, it is simply to ask: "Why bother? Portugal already produces good wine. Yes, wine can be grown in England, and good wine, too. But Portugal is better suited to the task."

Special and differential treatment in the WTO?

The answer in a sentence, special, yes; differential, no. To be helpful, agriculture and non-agriculture market access negotiations must be an effort to achieve *multilateral* lib-

eralisation on products of particular interest to developing Members. Developing country trade restrictions impose an unnecessary burden on their own buyers/users; they display a bias against developing country exports even worse than do industrial country restrictions. In short, the restrictions of special relevance to the prospects of developing countries include those imposed by developing countries themselves. And unless they lead here, addressing their restrictions as all others on the multilateral table, there is nothing to spark the GATT magic to life.

As to differential treatment, the areas where it makes sense for development are not those appropriately managed through trade negotiations (see related article on page 13).

Prospects

A WTO agenda from which all Members would benefit would centre on agriculture and non-agriculture trade reform, but it is difficult to see who will provide leadership. The US is not serious about agricultural liberalisation. Farmers in the US will not readily give up their subsidies as demonstrated by the recently-concluded free trade agreement with Australia. The US cannot however openly oppose agricultural liberalisation because several Latin American countries *are* seriously interested. Regional and bilateral deals on non-agriculture market access provide an opportunity to placate these countries demands on agriculture – at Asia's economic expense.

Moving the trade agenda

Asian leadership is the only way. Asian developing countries are strong exporters, they need a strategy to diminish the spread of anti-Asian regional agreements in the West. They will have to face up to Latin America and Africa's attractions to anti-Asia regional deals with the US and the EU. They will have to work a deal with Latin America and Africa over how agriculture is treated, the US and the EU will not do so. Without leadership from Asian developing country Members, with Latin America and Africa as their major leadership partners, the WTO will achieve little in the near future.

Moving the behind-the-border agenda

On the development dimensions of behind-the-border issues, trade negotiations have already demonstrated their lack of comparative advantage. It is hardly a surprise that growing pineapples on the shores of Lake Lemman has proven difficult.

There is however no need to worry. The world is full of magic, moving these issues forward through the development banks is already under way. The thrust of the work is to identify people in poor countries whose livelihood is affected by standards, intellectual property, environmental degradation, etc. It is to find ways to build the capacity of these people to manage such dimensions of property ownership as copyrights, standards and environmental regulations to their own benefit. It is to find ways to empower these people so that the institutions and regulations in their own countries are sensitive to their own interests.

To members of WTO delegations who want to help developing countries with standards, intellectual property, or other institutions that provide the behind-the-border structure of the economy: you might consider getting yourself reassigned to your government's World Bank or regional development bank delegation. There, you may find more satisfaction in your work. Remember, to abandon growing wine in England is not to abandon growing wine.

J. Michael Finger is Vernon F. Taylor Distinguished Professor of Economics, Trinity University, San Antonio, Texas, and Resident Scholar, American Enterprise Institute for Public Policy Research, Washington, D.C. The author adapted this article for Bridges from his presentation at the UNCTAD high level panel on Development Gains, Opportunities and Challenges in the International Trading System and Trade Negotiations; Geneva, 9 February 2004.

ENDNOTES

¹ I provide a review of the research on which this section is based in J. Michael Finger, *The Doha Agenda and Development: A View from the Uruguay Round*, Asian Development Bank, 2002; available at http://www.adb.org/Economics/pdf/doha/Finger_paper.pdf

Trade negotiations have already demonstrated their lack of comparative advantage on the development dimensions of behind-the-border issues. It is hardly a surprise that growing pineapples on the shores of Lake Lemman has proven difficult. Luckily, however, moving these issues forward through the development banks is already under way.

Appellate Body Ruling Saves the GSP, at Least for Now

Robert Howse

On 7 April, the WTO's Appellate Body issued a report, which considerably modified a panel ruling that could have spelled the end of the Generalised System Preferences (GSP) under which Members are allowed to extend more favourable treatment to developing countries.

Last December, a WTO dispute panel ruled, by a 2-1 majority, that developed countries must provide identical GSP preferences to all developing countries, with very limited exceptions. This finding was based upon the panel majority's reading of both the most-favoured-nation (MFN) obligation in the GATT (Article I) and the Enabling Clause, which provides that a GSP scheme may operate 'notwithstanding' MFN. The case concerned India's challenge of an EU programme, which provided an additional margin of preference (beyond that accorded all developing countries) to recipients with drug enforcement issues. India originally had also attacked preferences aimed at enhancing environmental and core labor rights performance in developing countries. Since the GSP programmes of the EU and the US contain numerous conditions and limitations on GSP treatment, for a wide variety of purposes and motivations, the panel's ruling threatened to spell the end of GSP as we know it (Bridges Year 8, No.1, page 7).

Not surprisingly, then, the Appellate Body (AB) modified the panel's ruling considerably, even if in the end it found that the particular design of the EU's preference programme for countries fighting the cultivation and trafficking of illegal drugs violated the Enabling Clause.

Much of the AB ruling works through many of the arcane procedural and structural issues that seem to have been a focus of the trial at first instance. These paragraphs of the AB ruling will eventually be thoroughly parsed by dispute settlement specialists such as myself, but in this short commentary I will focus on the key holdings of the AB from the perspective of the future of GSP and the legitimacy of the dispute settlement organs.

Chief among these are (1) the finding that the notion of GSP as 'non-discriminatory', brought into the Enabling Clause through reference to earlier instruments, creates a hard legal condition binding on donor countries; (2) the reversal of the panel's holding that 'non-discriminatory' means 'identical' and the creation of a complex test for 'non-discrimination', which may or may not – depending on how it is applied in future cases – give donors significant scope to differentiate among different developing countries.

My own view of state practice is that donor states never accepted that their ability to modify or withdraw GSP preferences would be subject to such a 'hard' legal constraint. At most, they considered 'non-discriminatory' as an aspirational, soft-law norm. This threshold issue was never forthrightly raised by the EU in its written pleadings, and only obliquely raised by two third parties, i.e. the US and the Andean Group (admittedly less obliquely than by the US).

Determining the Legal Meaning of Non-discriminatory

The Appellate Body at least recognised the issue. The AB disposed of it by comparing the English with the French and Spanish texts of the Enabling Clause and observing that "the stronger, more obligatory language in both the French and Spanish texts . . . lends support to our view that only preferential tariff treatment that is 'generalised, non-reciprocal and non-discriminatory' is covered under paragraph 2(a) of the Enabling Clause." However, Article 33 of the Vienna Convention specifies that the treaty interpreter must attempt to reconcile the difference between apparently different but authentic linguistic versions of a treaty by recourse to all the interpretative sources in Articles 31 and 32 of the Vienna Convention; at the end of the day, what is to be decisive in the presence of ambiguity is the purpose and object of the treaty. I think the AB erred in viewing its comparison of the English with the Spanish and French texts of the Enabling Clause as the *end* rather than the beginning of an inquiry into the nature of the obligation of non-discrimination, which would, *inter alia*, have had to consider state practice and the object and purpose of the Enabling Clause.

If the AB's approach was legally incorrect, it was politically correct, however. Whatever the *lex lata*, to deny obligatory force to the notion of non-discrimination in the Enabling Clause in an explicit judicial ruling would be a provocation to developing countries at a very difficult time in the history of their relationship to the multilateral trading system. This is especially so since the structure of the drug preferences – where the Commission invents out of whole cloth a list of beneficiaries of the programme without any objective criteria – highlights the possibility of arbitrary conduct of donors towards beneficiaries, and therewith the need for *some kind* of legal discipline. This said, the AB might have better reconciled law and politics through at least attempting to support its view of the non-discrimination norm with the kind of interpretation explicitly endorsed in cases of linguistic divergence by the Vienna Convention.

Having discerned that non-discrimination is a hard law requirement of the Enabling Clause, the AB resorted to what it considered to be a general concept of non-discrimination, namely that those similarly situated should not be treated differently. The AB went on to apply this general concept of non-discrimination to the situation where different levels of preference are accorded to different developing countries. Since in this situation, different developing countries are being treated differently on the face of the scheme, the AB not illogically suggested that a non-discrimination requirement entails the donor being able to show that this differential treatment flows from the fact that the countries accorded more preferences are not in the relevant sense 'similarly situated' to those accorded lesser preferences.

Criteria for WTO Compatibility

There are four things that a donor country must now show in order to defend a Generalised System of Preference programme that provides different levels of preferences to dif-

Continued on page 6

ferent developing countries:

- that the *different countries are not similarly situated*, in the sense that the countries receiving the greater preferences have special development needs;
- that tariff preferences are an *effective means* of addressing those special needs;
- that all developing countries who have those special needs are offered the greater preferences; and
- that any *conditions or performance requirements* imposed on the eligible countries *be objective, transparent and non-discriminatory*.

Non-discrimination qualified by development needs: The AB imported to 2(a) of the Enabling Clause, from which it carved the non-discrimination condition, a comparator for non-discrimination from 3(c) of the Clause, which requires that GSP respond positively to the development, trade and finance needs of the developing countries. The AB found that India had not properly pleaded a violation of 3(c) taken on its own, and therefore stressed that its interpretation of 3(c) was for purposes of giving context to the non-discrimination requirement in 2(a).

'Similarly situated': In determining what are the needs referred to in 3(c) for purposes of establishing what developing countries are similarly situated, the AB suggested that the adjudicator should look for a benchmark of development needs in WTO treaties, as well as in other multilateral instruments related to development. This implies a further role for non-WTO law (hard and soft) in articulating standards or benchmarks relevant to the application of WTO agreements.

Effectiveness in addressing needs: My assumption is that the AB has in mind a rational connection and, as it emphasised in the *Shrimp-Turtle* ruling, there would be no requirement of empirical proof of effectiveness.

If the legitimacy of GSP schemes hangs on whether individual aspects of individual donor programmes respond positively to the development needs of developing countries, then conditions that are about improving donor country market access, such as intellectual property requirements, are likely to fare poorly in WTO litigation.

Objective criteria: It is encouraging that the AB cited the conditions in the EU's environmental and labour preferences as examples of objective and transparent criteria. This could also be a message that it would be unwise for India to follow up its drugs claim with a challenge to those other preferences (that it had, at the very beginning included in its claim along with drugs, but then withdrawn).

What Are Acceptable Conditionalities?

A very important question is the relevance of the AB ruling for a different kind of GSP conditionality. The US Generalised System of Preferences and, to a lesser extent, that of the EU foresee that GSP may be withdrawn altogether if certain conditions are not met. In other words, a developing country must meet certain conditions (not country-specific but in principle attainable by any developing country) in order to receive the level of preferences offered to all developing countries alike.

The issue of discrimination arises for the AB when different *countries* are being treated differently; it is unclear that any issue of discrimination arises when the same level of tariff preferences is accorded to all developing countries, but they have to fulfill certain minimum conditions – objective, origin-neutral, transparent – in order to receive that general level of preferences. Thus, the AB stressed: “We do not rule on whether the Enabling Clause permits *ab initio* exclusions from GSP schemes of countries claiming developing country status, or the partial or total withdrawal of GSP benefits from certain developing countries under certain conditions.”

Even if such conditions, because imposed on all developing countries alike, do not violate the non-discrimination requirement of Article 2(a) of the Enabling Clause, after what the AB said about 3(c), the question will doubtless arise whether, for example, an intellectual property conditionality would conform to the requirement of 3(c) that GSP respond positively to the individual development needs of developing countries.

If 3(c) as the AB hinted, albeit in dicta, is about judging whether individual aspects of individual donor GSP schemes respond positively to the development needs of developing countries, then conditions that are about improving donor country market access (such as IP conditionality) are likely to fare poorly in WTO litigation. At the same time, conditions that can be linked to generally recognised conceptions of development – such as human rights, including core labor rights and environment, where related to biodiversity and sustainable development – will more likely be found consistent with 3(c). These are controversial matters, however, and one can imagine the sensitivities if the Appellate Body were, for instance, to delve into whether a conditionality based on anti-terrorism measures was or was not in a particular instance consistent with 3(c).

At the same time, it should be recalled that India did not appeal the panel's ruling on Article XX (general exceptions) in the EU GSP case – we do not know how the AB would approach a conditionality that was found to run afoul of the Enabling Clause because it was not a positive response to the development needs of particular developing countries, but that the developed country defendant sought to justify as serving its legitimate policy objectives under Article XX or, for that matter, under Article XXI on national security.

In the short-run, at least, the AB ruling appears as a brilliant compromise, sensitive to what was at stake in the GSP controversy, navigating carefully between different constituencies. The AB has left itself considerable room to evaluate any future challenge to a particular aspect of a GSP scheme on the basis of the facts, and the values and interests that are at stake in that future case. My prediction is that this will hold together, provided that developing countries exercise a certain self-restraint in subjecting GSP to challenge in dispute settlement. Whether such self-restraint occurs may well depend on the fate of the overall relationship between developed and developing countries at the WTO, which very much hangs in the balance in the current round of negotiations.

Robert Howse is Alene and Allan F. Smith Professor of Law at the University of Michigan, Ann Arbor, and a Reporter on WTO Law for the American Law Institute.

European Cotton Subsidies: Meeting the Doha Challenge?

Matt Griffith

Trade-distorting cotton subsidies are often seen as a US problem, but striking new research by the Overseas Development Institute (ODI) commissioned by the British government suggests that Europe is failing to take its share of responsibility.

Cotton subsidies have contributed to a slump in the price of cotton and the erosion of export markets.¹ The prime culprit for these distortions is the United States (US\$3–4 billion in subsidies spent annually), whose exports increased by 23 percent between 1991 and 2001, making the country the world's largest cotton exporter. Nevertheless, with an annual subsidy expenditure of EUR 0.8 billion, the European Union's cotton regime is also substantial and, according to the ODI study, has a disproportionate and significant impact on West African cotton producers.²

Europe's Cotton Regime

Europe's cotton regime has become a damaging system that encourages overproduction. European cotton farmers receive by far the highest level of support per kilo in the world. Prices paid to cotton farmers in the EU were 154 percent above world prices in 2001/2002, significantly higher than prices paid in the US.³

Cotton subsidies within Europe are much higher than competing crops that could be grown as an alternative, which has encouraged a shift into cotton production. A recent report on cotton by the European Court of Auditors showed that current subsidy levels permit a profit margin over twice that of competing crops in the main cotton growing regions whilst “the aid for cotton is three to four times that paid for crops grown as an alternative.”

These incentives have meant that EU production (concentrated in just three countries: Greece, Spain and Portugal) increased significantly throughout the 1980s and 1990s, with annual production of cotton in the EU tripling. Exports from Greece increased by 209 percent between 1991 and 2001 despite the continued decline in world prices.

European Global Impacts

The argument put forward by the EU is that with only 2.5 percent of world cotton production, European subsidies should not be seen as a problem in the current WTO debate. But the ODI findings contest this. The study re-visits the assumption that the global cotton market is unitary and homogenous, and examines segmented market models. With this new approach, relationships between existing trading partners dominate subsidy impact and supply responses.

Under these segmented assumptions, Europe's trade patterns concentrate its impact on West Africa. As the ODI note, US support “by virtue of its absolute magnitude” is “responsible for most of the reduction in cotton-earning potential in West and Central Africa” but “EU subsidies may be more damaging to developing countries, and to West and Central Africa in particular, especially in the short term, than their share in total ... subsidies would suggest”.

About a third of the EU's cotton imports come from West Africa, between 20 percent and 80 percent of cotton exports from Mali, Burkina Faso, Benin and Chad are being sold on the EU market. In terms of volume, EU production represents approximately 47 percent of the EU's internal cotton needs and about 70 percent of West and Central African exports.⁴

According to the ODI findings, a Europe in which cotton production was not supported by subsidies is estimated to contribute to 38 percent of the projected increase in West and Central African production stemming from the global removal of support for cotton production.

Removal of cotton subsidies in Greece and Spain would lead to substantial gains for West Africa, with one ODI projection showing an annual increase in income of US\$5 million for Mali, US\$8 million for Burkina Faso, US\$9 million for Benin and US\$12 million for Chad.⁵

Meaningful European cotton reform is therefore likely to create disproportional development benefits for West and Central African countries.

This window of opportunity for reform exists. The European Commission has put forward proposals for change that will be debated at an extraordinary session of the European Agricultural Council on 21–22 April.⁶ Unfortunately, meaningful reform proposals are not on the table.

Current Reform Proposals Will Not Lead to Significant Change

The Commission proposes a 60 percent decoupled income payment accompanied by 40 percent production aid per hectare of cotton. But there are serious shortcomings in this partial decoupling approach.

Firstly, it doesn't break the link between subsidies and cotton production.

In order to continue receiving the available subsidy package, farmers will be required to continue producing cotton. As the Commission states, “the level of the new area payment has been fixed in order to allow cotton production to continue” albeit “on a more reduced area than at present”. However, this reduction amounts to *only 4 percent less* than the area under production in 2002/03.⁷

And secondly, partial decoupling does not provide the necessary incentives for a move away from cotton production to other less developmentally damaging crops, like maize or durum wheat.

Financially, the coupled area payment is significantly higher than the support per hectare for other possible crops. European cotton farmers are small, highly specialised, and have a tendency towards monoculture in cotton production. They are also often tied into close business or organisational relationships with cotton processors. Only complete decoupling can provide strong enough in-

Continued on page 8

centives to break current patterns of cotton production.

Rather than supporting West African demands for a “total elimination” of cotton subsidies, the Commission proposal will continue to support production at levels very similar to present day production. It will have little effect on current EU production and trade patterns and will not create significant additional export opportunities for the West African cotton producers.

This is a finding also reached by the European Commission’s Directorate General for Development and several EU member states that examined the current proposals.

Pascal Lamy has made much play in aligning himself with the cause of the West African countries. He has attacked US cotton export subsidies, pledged ‘support’ for West African concerns at the WTO and launched an EU-Africa partnership for the West African cotton sector.

All this is welcome. But within Europe these fine words are not being translated into an effective reform of the EU cotton regime because of stubborn resistance from a small group of producer countries.

It is important that Europe demonstrates that the proclaimed ‘partnership’ with West Africa is real. To do that Europe has to fulfil its responsibilities with regard to subsidies. The EU’s current donor approach through partnership outside of the WTO, with minimal action inside it, risks substituting aid for tackling the critical problems of trade.

How EU cotton reform looks to African, and other developing country delegates in Geneva and what it means for the cotton sector and those dependent on it in the poorest countries on earth should be overriding considerations in the internal European negotiations. To this end a group of reform minded European states is now pushing for a 100 percent decoupling of subsidies in the cotton sector.

A move to 100 percent decoupling would meet West African demands on subsidies⁸, create development benefits and put further pressure on the United States for change. This comes at a low political cost

with high political gains not just for Europe but also for a pro-development conclusion of the Doha Round.

Matt Griffith is Trade Policy Analyst with the Catholic Agency for Overseas Development (CAFOD) in the UK. A briefing note on EU cotton reform can be found at CAFOD’s website: <http://www.cafod.org.uk/policy>

ENDNOTES

¹ Bridges Year 7 No.4, page 1

² *Understanding the Impact of OECD Agricultural and Trade Policies on Developing Countries and Poor People in Those Countries – piloting an approach with cotton*. Working Draft, ODI Feb. 2004

³ *Proposal for an EU-Africa Partnership in Support of Cotton Sector Development*. Eur. Commission, 2004 http://trade-info.cec.eu.int/doclib/docs/2004/february/tradoc_115806.pdf

⁴ Ibid

⁵ ODI, February 2004 http://www.odi.org.uk/iedg/cotton_report.html

⁶ On 22 April, the Agriculture Council agreed to decouple 65 percent of support as of 2006; 35 percent of the overall envelope will be spent on coupled area payments for 475,360 hectares.

⁷ The Commission had suggested a coupled area payment of EUR 280 million for 425,360 hectares, i.e. 4 percent less than the 445,134 hectares currently planted with cotton.

⁸ West African countries have indicated that support decoupled from production subject to precise criteria would be acceptable.

Passing the Buck on Cotton Trade?

The WTO convened an African Regional Workshop on Cotton in Cotonou, Benin, on 23-24 March. The purpose of the event – attended by international development agencies, African cotton exporters, as well as individual donor countries – was to address development assistance aspects of the Cotton Initiative placed on the agenda of the Cancun Ministerial Conference by Benin, Chad, Mali and Burkina Faso (Bridges Year 7, No. 7, page 11).

The Initiative’s trade aspects – i.e. a phase-out of all subsidies to developed country cotton producers and a compensation mechanism to offset income losses experienced by least-developed country exporters until the completion of the phase-out – were deliberately excluded from the Cotonou meeting. Even with regard to a ‘development response’, no firm commitments were made on delivery or timelines. Instead, representatives of the US, EU, Japanese and Canadian governments, and the World Bank and IMF identified existing and new programmes for financial and technical assistance and provided “positive indications of additional financial and technical assistance”.

In his opening remarks WTO Director-General Supachai Panitchpakdi, who is in charge of co-ordinating a WTO response to the Cotton Initiative, said that he and “many African countries” shared the view of the “majority of our membership [...] that progress on the trade policy aspects can best be made within the framework of the broader agriculture negotiations”. However, some African trade delegates interviewed after the event insisted that they stood by their original position, i.e. that the issue must be addressed on a separate track (Bridges Year 8, No.1, page 19). Their fear is that cotton will lose its specificity if it is subsumed in drawn-out negotiations with an uncertain outcome. Indeed, nothing points to WTO Members’ willingness to ‘fast-track’ subsidy reductions for any particular agricultural sector and even less to consider compensation during long phase-out periods.

While it was laudable of the WTO to seek a coherent international response to the plight of poor cotton producers, the Cotonou event’s emphasis on financial and technical assistance highlighted the extent to which the WTO has been – and remains – unable to come to grips with an issue that essentially requires a multilateral *trade* response. Benin, Chad, Mali and Burkina Faso did not ask for more development aid; they sought a solution to an export problem caused by declining market prices brought on by heavy subsidisation.

Subsidy Challenges: Cotton and Sugar Disputes Update

Panel reports on two landmark cases on domestic and export support for agricultural products are expected within the next few months. The first will determine whether certain US cotton payments are actionable under the Agreement on Subsidies and Countervailing Measures, and the second will rule on the EU's alleged breach of sugar export subsidy commitments under the Agreement on Agriculture.

The dispute settlement panel adjudicating Brazil's challenge of US cotton subsidies announced on 6 April that it would issue a preliminary report to the parties in the dispute on 26 April. Final panel reports, which rarely differ from the confidential interim drafts, are usually made public within a month or two from the date of the preliminary report.

Brazil said on 10 March that the US had finally provided enough farm-specific information to determine whether there was a causal link between its cotton subsidies and steep declines in world market prices. According to Brazil, counter-cyclical US payments per acre of cotton are three times the amount paid to producers of other crops. This, Brazil argues, suggests that the payments are not truly decoupled and provide US farmers an incentive to produce cotton.

The US continues to maintain that counter-cyclical payments under the 2002 Farm Bill are not 'commodity-specific' Amber Box measures and should thus be excluded from the calculation of US trade-distorting support. Without the counter-cyclical payments, the US contends, its cotton subsidies remain under the 1992-level cap.

In an important precedent, the panel is also to rule on whether the disputed payments fall under the Peace Clause and are therefore non-actionable. Brazil maintains that US subsidies during the years cited surpassed the 1992-level cap established at the end of the Uruguay Round and that the exceeding portion is not covered by the Peace Clause (Bridges Year 8 No.3, page 8). The US, on the other hand, has said that should the panel agree that all 'trade-distorting' support was covered by the Peace Clause, it should not even address the question of whether Brazilian producers had been hurt by prices artificially depressed due to non-Amber Box US subsidies and the resulting increase in US market share.

The case is of particular importance to the four African countries that launched the Cotton Initiative in the WTO to address the effect of low prices on their exports (pages 7 and 8).

Heated Arguments before the Sugar Panel

Substantive proceedings have started on the EU's sugar regime. In an oral statement at the panel's 30 March hearing, the EU denied that its support for domestic producers was contingent on export performance, as claimed by Australia, Brazil and Thailand. The EU contended that the complainants had initiated the dispute in bad faith, as their claims "would turn Article 9.1(c) into a *per se* prohibition of exports below cost of production, totally disconnected from the existence of subsidisation, an outcome which, as complainants know only too well, did not even cross the minds of the drafters of the Agreement on Agriculture." The EU also maintained that Thailand's own sugar regime resembled that of the EU and its complaint could thus "only be described as hypocritical, short-sighted and ill-advised." Australia said the EU's allegations of bad faith were unfounded and that the EU was attempting to persuade the panel that it deserved "permanent immunity in respect of any measures inconsistent with its export subsidy obligations" (for more details on the parties' arguments, see Bridges Year 8 No.3, page 7).

Speaking on behalf of the African, Caribbean and Pacific (ACP) Group of States, the Deputy Prime Minister of Mauritius Pravind Jugnauth said a successful challenge of the EU's sugar regime would be catastrophic for ACP countries. The complainants again stressed that they were not challenging ACP preferences.

The second hearing will take place on 11-12 May 2004. The panel expects to issue an interim report to the parties in July prior to releasing its final report next September.

OXFAM Blasts EU Sugar Regime

In related news, Oxfam International has published report¹ alleging, *inter alia*, that:

- The EU is the world's most prolific subsidy-user and biggest dumper, currently spending 3.30 in subsidies to export sugar worth 1. In addition to the 1.3bn in export subsidies recorded annually in its budgets, the EU provides hidden support amounting to around 833m on nominally unsubsidised sugar exports. These hidden subsidies reflect the gap between EU production costs and export prices.
- Domestic prices are maintained at levels three times those prevailing on world markets. Shorn of diplomatic niceties, the sugar regime has the appearance of a price-fixing cartel operated by governments on behalf of big farmers and sugar-processing companies.
- World-market distortions associated with EU sugar policies cost Brazil \$494m, Thailand \$151m, and South Africa and India around \$60m each in 2002. Trade preferences mitigate the losses caused by the sugar regime – but only marginally. Countries in the African, Caribbean, and Pacific (ACP) group enjoy preferential access to the European sugar market at prices linked to EU guaranteed prices. Least-developed countries (LDCs) also have preferential access for a limited quota. This is a transitional arrangement under the Everything But Arms (EBA) initiative, through which the EU is committed to providing duty-free access from 2009.
- EBA arrangements allow LDCs to export a volume of sugar equivalent to 1 percent of EU consumption. Mozambique and Ethiopia, two of the world's poorest countries, have a right to export a combined total of 25,000 tonnes in 2004. Just fifteen of the biggest sugar farms in Norfolk produce more than this.

¹ *Dumping on the World: How EU Sugar Policies Hurt Poor Developing Countries. March 2004*

Anti-dumping Rules Divide Members and Panel

Recent panel rulings on 'zeroing' and material injury determination highlight how ambiguous current anti-dumping rules are and how much potential there is for clashes between – and even within – national and multilateral trade regulations.

While zeroing (see box below) has featured in several dispute settlement cases, a large group of WTO Members in the Doha Round negotiations on trade remedy rules are advocating an explicit prohibition the practice in the Anti-dumping Agreement (Bridges 7 No.5, page 15). The US, on the other hand, intends to use the negotiations to strengthen the rules in favour of countries' domestic laws and to close any loopholes that allow WTO Members to circumvent anti-dumping measures.

Panel Split on Zeroing

On 13 April 2004, a panel in the long-running US-Canada softwood lumber dispute confirmed a March 2001 Appellate Body ruling that the practice of 'zeroing' in determining dumping duties violated of Article 2.4.2 of the WTO Agreement on Anti-dumping (AD Agreement).¹

However, in a rare instance, one of the three panelists put on record a dissenting opinion, arguing that the AD Agreement contained no obligations on how Members should conduct home and export price comparisons. The anonymous panelist criticised the 2001 Appellate Body ruling for two reasons in particular: first, the AB should not have engaged in rule-making, which remains the prerogative of the Members; and second, the AB did not "set out any of its reasoning" for its statement that zeroing was not a 'fair comparison' between export and domestic prices. The panelist wrote:

'Zeroing' refers to a practice that inflates the level of anti-dumping duties by only taking into account positive findings of goods being exported below local sales prices in the country under investigation in final injury determinations. A 'zero' – instead of negative – value is assigned in those cases where the allegedly dumped good is sold at a lower price domestically than abroad.

"Dispute settlement involves the interpretation of rules agreed by Members. It cannot and must not be used as a substitute for rule-making through negotiations."

The panel unanimously rejected all other main points raised by Canada regarding the way the US Commerce Department initiated/conducted the investigation that eventually led to the imposition of definitive anti-dumping duty of 8.43 percent on Canadian softwood lumber. Either side has until 12 June to appeal the ruling (WT/DS264/R).

The dissenting opinion in the softwood lumber case may influence the panel established on 19 March 2004 on the EU's claim that US 'zeroing' when determining dumping margins in 31 cases involving EU exports violates WTO rules (Bridges Year 8 No.2, page 8). Argentina, Brazil, China, India, Japan, Korea, Mexico, Norway and Chinese Taipei have reserved their third-party rights.

At the domestic level, the US Commerce Department has claimed that it is required by law to apply zeroing, although the US Court of Appeals for the Federal Circuit and Court of International trade have only ruled that zeroing is a "reasonable interpretation" of US anti-dumping law rather than a requirement.

Another dispute on AD calculations may soon be initiated following the US Commerce Department's recent announcement that it will in the future exclude safeguard duties from the basis on which it calculates dumping margins. This policy change makes a positive dumping determination far more likely. Section 201 of the US Trade Act 1947 allows the imposition of safeguard duties – i.e. additional temporary import tariffs – if domestic industry is found to be injured (or threatened by injury) from import surges even when the imports in question are not unfairly priced. Commerce justified its decision by arguing that safeguard tariffs could not be considered normal import duties because they were imposed "only under special circumstances for the express purpose of providing relief from serious injury due to increased imports."

Threat of Material Injury Likely to Become Tougher to Prove

A 22 March panel ruling on another aspect of the softwood lumber dispute is likely to make it harder for investigating authorities to prove "threat of injury" to domestic industry, which is an essential element for the imposing of trade remedy duties under the AD Agreement and the Agreement on Subsidies and Countervailing Measures. The panel confirmed that the threat of material injury determination made by the US International Trade Commission (USITC) was not one that could have been reached by "an objective and unbiased investigating authority" (Bridges Year 8 No.3, page 11). According to the panel, it must be clear from the determination that the investigating authority "has evaluated how the future will be different from the immediate past, *such that the situation of no present material injury will change in the imminent future to a situation of material injury*, in the absence of [anti-dumping or countervailing] measures" (editor's italics). The panel found "no rational explanation" for the USITC's determination that there would be "a substantial increase in imports imminently" (WT/DS277/R).

The ITC's threat of injury determination is also under consideration by a NAFTA dispute settlement panel, which is expected to render its verdict on 30 April. An earlier NAFTA panel found that the ITC had not proven that US producers were threatened by injury from Canadian softwood lumber imports.

ENDNOTE

¹ European Communities – Anti-dumping Duties on Imports of Cotton-type Bed Linen from India (ST/DS141/AB/R) 1 March 2001.

STE Verdict May Weaken US Hand

A 6 April panel ruling essentially confirming that the Canadian Wheat Board (CWB) operates according to WTO rules could make it harder for the US to obtain stricter disciplines for state trading enterprises, which is one of its key objectives in the Doha Round negotiations on agriculture.

In its challenge of CWB, the US sought an affirmation that to be compatible with GATT Article XVII, state trading enterprises (STEs) must behave like ‘commercial actors’. Article XVII requires that STEs make sales or purchases “solely in accordance with *commercial considerations* [...] and shall afford the enterprises of other contracting parties adequate opportunity, in accordance with customary business practice, to compete for participation in such purchases or sales.” STEs must also act “in a manner consistent with the general principles of non-discriminatory treatment” of the GATT with regard to governmental measures affecting imports or exports by private traders.

The panel said that it did not see “anything in the text of Article XVII, which would indicate that the CWB must conduct itself in the marketplace exactly like privately-held profit-maximising share-capital corporations would.” It ruled that the provision requiring STEs to afford enterprises of other contracting parties adequate opportunity for participation in their purchases or sales did not mean that export STEs were required to “afford their competitors...an adequate opportunity to compete in the marketplace.” If that had been the intent of the drafters of Article XVII, then “different wording would have been used.” The panel nevertheless found that some statutory provisions on the treatment of imported grain breached Canada’s national treatment obligations under GATT Article III (WT/DS276/R).

Ruling Used as Fodder for Ag Negotiations

US Trade Representative Robert Zoellick called the ruling “a win for American farmers” as the panel had agreed that Canada’s grain handling system and rail transportation revenue cap discriminated against foreign trade. He conceded, however, that the panel had found against the US in ruling that WTO rules did not “prevent enterprises like the Canadian Wheat Board from using their unfair monopolistic privileges to the disadvantage of commercial actors.” Mr Zoellick said that the ruling demonstrated “the need to strengthen rules on state trading enterprises in the WTO” and vowed “to aggressively pursue reform of the WTO rules in an effort to create an effective regime to address the unfair monopolistic practices of state trading enterprises like the Canadian Wheat Board.” Among US objectives for the agriculture negotiations are the elimination of export monopolies “so that any producer, distributor, or processor can export agriculture products”, as well as ending special financial privileges granted to STEs.

The Chair of the CWB board of directors Ken Ritter wrote in a letter to WTO Members after the ruling: “Even in the complete absence of any evidence of trade-distorting practices or non-commercial behavior, one or two WTO Member countries will no doubt continue to press for disciplines on state trading enterprises like the CWB in the Doha Round of agriculture negotiations, notwithstanding that this subject is not even consistent with the Doha mandate. Although these countries refer to ‘disciplines’, the reality is that they want to dismantle the CWB so that it can no longer operate effectively.” Mr Ritter stressed that putting STEs on par with other trade-distorting policies amounted to “proposing solutions for problems that [did] not exist”. He further claimed that “to say that new disciplines are necessary based on the unsubstantiated allegations of the super-powers makes a mockery of the rule of law.”

On 15 March, US chief agricultural negotiator Allen Johnson claimed that Canada had been ‘isolated’ in the matter after Australia agreed to include STE reform in WTO agriculture negotiations as part of the recently-concluded US-Australia free trade agreement (Bridges Year 8, No.2, page 12). Australia – whose own Wheat Board (now AWB Limited) has long been a target of US criticism – accepted to negotiate export competition disciplines designed to “eliminate restrictions on the right of entities to export”. Mr Allen said this left Canada as the “largest and most significant country ... thwarting reform.”

GMO Dispute Update

On 8 April, the dispute settlement panel hearing the US/Canada/Argentina challenge of the EU’s approval processes for genetically modified organisms (GMOs) rejected the EU’s allegation that the complainants’ panel requests had not been specific enough for the EU to start preparing its defence “in any meaningful way”. The EU also lost a similar procedural request in the dispute on geographical indications it is defending against Australia and the US. There will be no preliminary ruling on either claim, and substantive proceedings are expected to follow on schedule.

The three complainants in the GMO dispute allege that the EU’s non-approval of any new GMO imports for more than five years amounts to a *de facto* moratorium that is not justified by science and is more trade-restrictive than necessary to achieve health or environmental protection objectives. The parties are to make their initial submissions in May and the first panel hearing is slated for early June. The final ruling is expected in September.

In related news, EU legislation on traceability and labelling of GMOs for cultivation or contained in food and feed entered into force on 18 April. The following day, the European Food Safety Authority (EFSA) delivered a favourable risk assessment for a variety of Monsanto GM corn to be used in food processing. The move does not mean automatic marketing approval, however. Several products approved by EU scientists years ago have not been approved for import by EU member states (Bridges Year 8 No.1, page 17).

US Senator Chuck Grassley said in a statement that the new regulations were “yet another example of the official stigmatisation of agricultural biotech products by the European Union” and vowed to “look into their possible inconsistencies” with WTO obligations. In November, 22 organisations representing much of the American food and farm industry requested the US to begin formal WTO proceedings against the new rules, and Argentina has threatened to do so as well (Bridges Year 8 No.1, page 10).

Industrial Market Access Update

Delegates agreed in late March to aim at drafting a negotiating framework for non-agricultural market access (NAMA) by the end of July 2004. However, progress and the level of ambition remain contingent on parallel movement in the agriculture negotiations. Argentina, Brazil, China, Colombia, India, Indonesia, Malaysia, the Philippines and Venezuela, or the ‘mini G-20’, stressed the link particularly strongly.

The March negotiations focused on the overall objectives of the NAMA negotiations; possible formulas for tariff reduction on industrial goods; the sectoral elimination of tariffs on products of export interest to developing countries; and the specific concerns of developing countries.

The US, the EU, Japan, Canada, Australia, New Zealand, Chile, Costa Rica, Singapore, Hong Kong, Norway and Switzerland continued to press for an ambitious outcome on NAMA for both developed and developing countries. Some negotiators noted with concern that the US seemed to revert to an earlier position that would require all Members to reduce tariffs according to a formula that subjects the highest tariffs to the steepest cuts. A number of developing countries, whose tariffs on industrial goods are generally much higher than those of developed countries, sharply reminded Members that the Doha Declaration required the NAMA negotiations to take into account the special interests of developing countries “including through less than full reciprocity in reduction commitments”. These countries have insisted that developing countries should be allowed to undertake only fixed-percentage cuts and to exempt some sensitive tariff lines from reductions altogether. They also said discussions on sector-specific tariff elimination were premature until the group had agreed on an overall tariff reduction formula.

The next meetings of the NAMA group are scheduled for 10-12 May and 9-11 June. Agriculture permitting, the group is expected to agree in July on a framework including concepts and formulas for tariff reductions in preparation for future talks on detailed numbers and percentages.

WTO Environment Negotiations Resume

At its April negotiating session, the Committee on Trade and Environment considered an EU submission on the relationship between WTO rules and multilateral environmental agreements and continued discussions on environmental goods.

In paragraph 31 of the Doha Ministerial Declaration, Members agreed to negotiations on: (i) the relationship between WTO rules and specific trade obligations set out in multilateral environmental agreements (MEAs); (ii) procedures for regular information exchange between MEA secretariats and relevant WTO committees, and the criteria for granting of observer status; and (iii) liberalisation of trade in environmental goods and services.

Mixed Reactions to Global Governance Paper

The EU’s submission on the relationship between WTO rules and MEAs outlined basic principles for considering the issue in the context of the global governance system for sustainable development (TN/TE/W/39). Among the points raised were: recognition of the importance and necessity of MEAs; the fact that multilateral environmental policy should be made within MEAs; the need for close co-operation and information exchange to enhance the mutual supportiveness between international trade and environment policies; and the recognition that MEAs and the WTO are equal bodies of international law.

Developing countries in particular felt that the question was beyond the scope of the Doha mandate. They also noted that the paper was unclear, and wondered where the EU wanted to go with it. Norway and Switzerland said the document provided a good basis for the examination of ways to improve information exchange between the WTO and MEAs and the issue of MEA observer status at the CTE. They also felt the paper offered some useful insights on the co-ordination between trade and environment officials nationally. Venezuela asked whether a reference in the paper to common but differentiated responsibilities between developed and developing countries meant that this principle was acceptable as the basis for negotiations.

Goods Discussion Continues

In a submission on modalities for moving forward with negotiations on environmental goods (TN/TE/W/38), the US proposed that two lists be established: a core list of goods that everyone agrees are environmental (e.g. sewage treatment equipment); and a complementary list of other proposed environmental goods. By 2010, tariffs would be eliminated on the core list, and countries would be required to liberalise a certain percentage of products from the second list. Developing countries asked for more information on possible special and differential treatment, which had not been included in the core list, and only insufficiently in the complementary list. The US promised to provide answers at the next session. Brazil, Mexico, Malaysia and China said they preferred a “more balanced” list containing products of export interest to them, as they felt that the US list focused on industrial goods exported by developed countries. China said it was considering creating a list of its own, and some Members preferred relying on existing lists produced by the Asia-Pacific Economic Co-operation or the OECD.

Moving on the Sustainable Development Mandate

Members also discussed how to address para. 51 of the Doha Ministerial Declaration, which instructs the CTE to “identify and debate [...] environmental aspects of the negotiations, in order to help achieve the objective of having sustainable development appropriately reflected.” While the Secretariat has provided briefings on the environmental aspects of negotiations in other groups, such as agriculture and industrial market access, the EU expressed surprise that Members themselves had not made submissions on the topic. Some Members called for technical assistance and co-ordination among developing countries, and said developing countries needed to provide input on this as a ‘development’ issue. Chair Naéla Gabr (Egypt) will consult with the Chair of the Committee on Trade and Development, in order to better co-ordinate work.

The next meeting of the CTE will be held on 21 June, and the next special session on 22 June.

Reviving the Doha Agenda on Development Concerns

WTO Members agreed on 1 April to seek a new approach to negotiations on special and differential treatment (S&D) provisions for developing countries. Three deadlines have been missed on this core mandate of the Doha Ministerial Declaration, which more than any other has divided the membership along North–South lines.

At the first post-Cancun negotiating session of the Committee on Trade and Development (CTD), the body's new Chair, Faizel Ismail (South Africa), focused discussions on how to structure future work in a way that would allow Members to move the debate, currently polarised on both substance and process, to a more productive level. Mr Ismail will conduct informal consultations aimed at identifying areas of convergence and, once a sufficient basis to move forward has emerged, is expected to reconvene a formal session before the summer break.

Twenty months after the first deadline was missed (in July 2002) to present 'clear recommendations' to the General Council on how to strengthen S&D provisions in WTO agreements, Members remain deeply divided on what the review should deliver. Most developed countries have held that the broader principles and objectives of S&D, called 'cross-cutting issues', must be resolved before any meaningful strengthening of specific provisions. In particular, they seek a mechanism to differentiate among developing countries, i.e. Members as different as Brazil and Honduras should not always receive the same flexibilities.

While diverging somewhat on the issue of differentiating among themselves, developing countries have argued that the mandate specifically instructs Members to review all S&D provisions and that this must be done before moving to any broader discussions. They have put forward 88 proposals on strengthening specific provisions with a view to making them "more precise, effective and operational". While these cover virtually every area of WTO rules, recommendations on anti-dumping and subsidy disciplines stand out, followed by those aiming to make technical and sanitary standards, as well as dispute settlement rules, more development-friendly.

In the run-up to the Cancun Ministerial Conference, then Chair of the General Council, Ambassador Carlos Pérez del Castillo, divided the proposals into three categories: (i) 'early harvest' i.e. those ready, or almost ready, for agreement (38); (ii) those sent to subsidiary WTO bodies (38); and (iii) those over which Members held greatest divergences (12). Consequently, Members focused on the 'early harvest' category. Twenty-four such proposals – considered of dubious economic value by most developing countries – were forwarded for ministers to consider in Cancun, where three additional recommendations were tacked onto the package. However, the unsuccessful end of the Ministerial put all 27 recommendations on hold.

A Tentative Welcome, But No Immediate Breakthrough

At the CTD's April meeting, Members from developed and developing countries seemed to largely welcome the Chair's initiative. The US and Canada reiterated their hope of harvesting the 27 recommendations, and proceeding with broader and deeper discussions. Another major developed country source said his delegation was willing to work towards an outcome possibly involving adjustments in the rules. Most developed country Members also indicated that they saw S&D as part of a broader package, along with agriculture and non-agricultural market access, to be delivered by the end of the summer.

African and other least-developed country (LDC) Members stressed that before moving on to the cross-cutting issues, the 88 agreement-specific proposals should be addressed as a matter of priority. Some also felt the categorisation developed by Ambassador Pérez del Castillo should no longer be applied. One African delegate said there would not be much point in adopting any of the 27 'early harvest' recommendations as they did little to deliver on the Doha mandate.

Noting the impasse resulting from Members' attempting to converge on the 88 proposals, one trade source suggested that looking at alternative ways to meaningfully address the substantive problems underlying them might be an effective way to proceed.

Implementation Concerns

Developing country Members have expressed deep concern about the apparent disregard for the sequence of the 'Doha bargain', which singled out the mandates on special and differential treatment and other outstanding 'implementation issues' as two of the first major deliverables in the work programme. 'Implementation concerns' refer to a broader group of issues stemming from perceived imbalances in the Uruguay Round Agreements.

On 5 April, a group of developing and least-developed countries circulated a submission calling for "a clear road map with specific benchmarks to fulfil the mandate on the outstanding implementation issues and S&D issues in a time bound manner [...]" (TN/C/W/16). The submission's sponsors – Bangladesh (on behalf of the LDC Group), India, Indonesia, Mauritius (on behalf of the African Group) and Trinidad and Tobago (on behalf of the African, Caribbean and Pacific Group of States) – noted that "hardly any progress" had been made on these issues post-Doha and called on Members to address them "on a priority basis".

According to the Doha Ministerial Declaration, implementation-related issues were to be addressed in two ways: (i) under the mandate given for those issues where a "specific negotiating mandate" was provided for in the Declaration itself; and (ii) "as a matter of priority by the relevant WTO bodies". By mid-2003, few of the issues had seen any forward movement and WTO Director-General Supachai Panitchpakdi, who chairs the Doha Round Trade Negotiations Committee (TNC), was requested to explore ways out of the impasse. Dr Supachai announced on 17 July 2003 that certain implementation issues would continue to be discussed under the auspices of the TNC while others would return to subsidiary bodies for further technical work.

The next formal meeting of the CTD special session is scheduled for 19 July 2004.

TRIPs Council in Brief

Negotiations on a multilateral register for geographical indications (GIs) for wines and spirits made virtually no headway at the 7 April session of the Council for Trade-related Aspects on Intellectual Property Rights (TRIPS). Discussions focused on the key outstanding issues in the negotiating mandate provided in the TRIPs Agreement, i.e. 'participation' and 'legal effect', but one observer noted that in contrast to other negotiating areas, such as agriculture, the TRIPs discussions had not even entered a 'listening' phase.

Negotiations on the establishment of "a multilateral system of notification and registration of geographical indications for wines eligible for protection in those Members participating in the system" (TRIPs Article 23.4) were to conclude by the Cancun Ministerial meeting, but Members failed to reach agreement and are now discussing how to proceed.

Argentina, Australia, Canada, Chile, El Salvador, New Zealand and the US, supported by Ecuador, submitted a 'joint proposal' (TN/IP/W/9) advocating that the register function as a searchable database for geographical indications, which would provide national intellectual property offices information on GI rights claimed by producers in the territory of another WTO Member. The register would be voluntary, i.e. Members would be able to choose whether to register their GIs. Enforcement of GI protection would remain grounded in national law.

The EU, Hungary, Switzerland, Bulgaria and Turkey, supported by Bolivia, noted that such a database would be unreliable – and consequently not 'facilitate' protection – if Members could not challenge a term internationally. They believe that allowing Members to opt out of the system would make it 'plurilateral' rather than 'multilateral', as required by the mandate.

Further negotiations on the multilateral register are currently scheduled for mid-May (date to be determined) and June (back-to-back with the 15-17 June TRIPs Council's regular session).

Defining Appropriate Health Standards

Meeting in March, the WTO Committee on Sanitary and Phytosanitary Measures (SPS) made only limited progress on special and differential treatment for developing countries or specific problems arising from Members SPS standards. It did, however, adopt the last of three clarifications to an October 2001 Decision on Equivalence, paving the way for the Decision's implementation.

The SPS Committee is one of many bodies mandated to consider provisions on special and differential treatment (S&D) for developing countries in WTO agreements (see related article on page 11). At the March meeting, Members continued discussions on the implementation details of a Canadian proposal on enhancing the transparency of S&D within the SPS Agreement. The proposal – adopted in principle at the Committee's April 2003 meeting – suggests that Members should be required to engage in bilateral consultations if an exporting country identifies significant difficulties in complying with proposed regulations. Following the consultations, the notifying Member should inform the WTO of the S&D requested and provided (or reasons why it was not granted). The Committee discussed the technical details of the procedures put forward by the Secretariat (G/SPS/W/132/Rev.1), as well as changes proposed by the US (G/SPS/W/141). Some Members voiced concern over language in the US proposal that would treat technical assistance as separate from S&D, and thereby possibly as an alternative to giving developing countries more time to adjust to importing countries' new measures.

Concerns Raised over Coffee, GMOs

During a debate on specific trade concerns, Colombia, Papua New Guinea, Nicaragua, Brazil, Cuba, India, Guatemala, Mexico, Ecuador, Bolivia, the Dominican Republic, El Salvador, Costa Rica and Peru raised concerns over proposed new German health standards for ocratoxin A (a microtoxin contaminant) in soluble and roasted coffee. The countries claimed that the regulations were too strict, not based on science and inconsistent given that similar standards for wine and beer were lower. For instance, enforcing the standard could result in a rejection of up to six percent of Colombian coffee in Germany, which accounts for 17 percent of the country's total coffee exports. In response, the EU noted that pending the adoption of a community-wide maximum ocratoxin A levels for coffee, wines and fruit juices by the end of 2004, Germany could adopt its own levels. The issue is also under discussion at the Codex Committee on Food Additives and Contaminants (see also box on page 20 for concerns raised over the EU's proposed chemical regulations in the WTO Committee on Technical Barriers to Trade).

The US, Canada, Argentina and Australia again brought up reservations about the EU's recently adopted labelling and traceability regulations for genetically modified organisms (GMOs), which they regard as disproportionate, trade restrictive and not scientifically justified. The US requested further guidance from the EU for its farm industry, including how tests are to be conducted. Domestic farm groups are increasing pressure on the US government to bring a WTO dispute against the EU's regulations in addition to the ongoing dispute over the Union's approval processes for new GMOs (see page 11).

Equivalence Decision Finalised

Equivalence refers to the mutual acceptance of another Member's risk-minimising measures that may differ in process but have an equivalent effect. The Decision on Equivalence was adopted to address one of the 'implementation' concerns raised by developing countries by outlining steps designed to make it easier for all WTO Members to make use of the 'equivalence' provisions of the SPS Agreement. The aim of the Decision is to help developing countries prove that their products are as safe as those in developed countries. The third and final clarification adopted by the SPS Committee aims to speed up the recognition of equivalence of SPS measures for products previously traded, for which information already exists (G/SPS/19).

The next meeting of the SPS Committee is currently scheduled for 23-24 June, preceded by informal consultations on 21-22 June.

Shaping a New South America–EU Trade Relationship

The European Union and Mercosur may present a blueprint for their regional free trade agreement as early as 28 May at the EU–Latin America Summit in Mexico. Meanwhile, negotiations have started on the creation of an economic partnership agreement between the Caribbean and the EU.

While reticent about the details, EU and Mercosur officials appeared satisfied after a preliminary meeting on improved market access offers held in Buenos Aires on 17–18 April. Brazil's chief negotiator Regis Arslanian said: "We improved our offer substantially, and they are complying by responding to our top priorities, primarily in agriculture."

According to news sources, the EU refused to discuss farm subsidies within the FTA negotiations, but proposed to increase Mercosur's import quotas for certain agricultural goods, including beef, dairy products, sugar and instant coffee. Quotas for other sensitive agricultural products would be divided up in the Doha Round agriculture negotiations. The EU reportedly also offered to phase out tariffs on 91 percent of imports from Mercosur.

Mercosur tabled improved market access offers with regard to telecom and banking services, and promised to accelerate the phase-out of tariffs on EU goods. Mercosur also responded to requests for new investment opportunities and greater legal protection for EU investors.

Confident that the deal would be sewn up next October as scheduled, the two sides were to meet in Brussels from 3–7 May for formal negotiations on the market access offers.

Ulterior Motives Alleged for EU Move

Many commentators have seen in the EU's offer of an agricultural 'down payment' a ploy to divide and conquer the G-20 Group of developing countries, which has insisted on substantial subsidy cuts in the WTO's agriculture negotiations. Three of the four Mercosur countries – Argentina, Brazil and Paraguay – belong to the alliance, as do associate members Bolivia and Chile. G-20 member Mexico has recently started Mercosur accession procedures. Brazil's EU Ambassador José Alfredo Graça Lima acknowledged that a good bilateral deal would be "an incentive for Mercosur not to push the EU hard in the WTO." Nonetheless, Brazilian diplomats have insisted that their country will do nothing to damage the G-20, and will continue to fight for subsidy reduction at the WTO (see page 1).

The European Commission's agriculture spokesman Gregor Kreuzhuber denied that the EU offer was intended to splinter the G-20 but conceded that there was "a link between the Doha and the Mercosur talks in that if the Doha Round fails then the agriculture trade preferences for Mercosur will be significant. If Doha is a success and we offer all developing countries agriculture trade preferences, Mercosur countries will not get much on top of the WTO concessions."

The Caribbean Stresses Development Dimension of EU EPA

The EU and 15 countries of the Caribbean region¹ opened negotiations for an economic partnership agreement (EPA) on 16 April. As of 2008, such arrangements will gradually replace the unilateral trade preferences the EU has extended for several decades to more than 70 African, Caribbean and Pacific (ACP) developing countries (Bridges Year 7 No.7, page 18).

Barbados Minister of Foreign Affairs and Foreign Trade Dame Billie Miller emphasised that the EPA architecture "must promote the reduction of vulnerability while facilitating sustainable development. It must provide enhanced structural transformation of our economies; and international competitiveness and export diversification." EU Trade Commissioner Pascal Lamy highlighted the role of EPAs in regional integration and said that the EU accepted "asymmetrical liberalisation, specifically differences in product coverage and phasing."

According to veteran trade analyst David Jessop, the "greatest challenge facing the Caribbean will be in ensuring that a regional EPA will be more than a trade arrangement [...] any trade concessions that the Caribbean will make will have to be conditional on the level of financial

support that the EU will grant to the Caribbean under the Cotonou Convention between 2007 and 2013." In this context, the parties will set up a joint Regional Preparatory Task Force (RPTF) consisting of representatives of regional and national authorities and institutions, academia and other non-state actors "in order to cement the strategic link between EPA negotiations and development co-operation." EU members will include officials from DG Trade, DG Development, AIDCO and an EU delegation based in the Caribbean.

The negotiations will be conducted at ministerial, principal negotiator and technical/subject-specific levels according to the following schedule:

- April 2004 to September 2004 – establishing an understanding of the fundamental concerns and interests for both sides;
- September 2004 to September 2005 – establishing a common understanding on the priorities for support of Caribbean regional integration, and the targets to be attained by the time implementation starts in January 2008 and beyond;
- September 2005 to December 2006 – channelling the points of common understanding into elements of a draft EPA; and,
- January 2007 to December 2007 – consolidating the results and completing the negotiations.

The Caribbean is the fourth ACP region to open EPA negotiations with the EU. In October 2003, negotiations were launched in both West and Central Africa, while Eastern and Southern Africa followed in February 2004 (Bridges Year 8 No.2, page 16).

¹ Antigua & Barbuda, the Bahamas, Barbados, Belize, Dominica, the Dominican Republic, Grenada, Guyana, Haiti, Jamaica, St. Kitts & Nevis, St. Lucia, St. Vincent & the Grenadines, Suriname and Trinidad & Tobago. Cuba is only Caribbean country not eligible for the EPA.

Trade Implications of US Electoral Politics

As electoral politics intensify in the run-up to next November's presidential elections, safeguarding US jobs, expanding exports and access to cheap energy have emerged as some of the key campaign issues. Several initiatives already taken or proposed have direct implications for US implementation of existing WTO disciplines, as well as its trade policy objectives in the context of Doha Round negotiations.

In a stinging letter sent to President Bush on 31 March, thirteen House Democrats accused the Administration of having been "asleep at the wheel" in defending US jobs and exports. The signatories noted that the Clinton Administration had initiated on average ten WTO cases a year while only three per year had been launched under President Bush. They demanded that the Office of the US Trade Representative (USTR) launch seven new WTO disputes against countries identified in *National Trade Estimates* reports as maintaining trade barriers against US goods, services, investment and intellectual property exports.

They singled out China's 'non-compliance' with its obligations to eliminate restrictions to trading and distribution rights, as well as "forcing tech transfer through China-only product standards"; the EU for subsidising the aircraft manufacturer Airbus; India for (i) maintaining non-tariff barriers on textiles and other products and (ii) not enforcing copyright and trademark protection; Japan for maintaining barriers to US cars and auto parts; and South Korea for imposing "discriminatory taxes and non-tariff barriers" in the automotive sector.

Mr Zoellick responded on 19 April that "the suggestion that we should bring WTO cases even if affected US interests prefer first pursuing non-litigation options suggests a litigation-for-litigation's-sake approach that would not seem to serve America's broader interests." Nevertheless, some Democrats on the campaign trail will continue to press the issue of attacking foreign trade barriers.

Prosecuting OPEC at the WTO

Agitating the spectre of gasoline prices at US\$2 a gallon, thirty House Democrats (plus one Republican and one Independent Representative) have also written to President Bush, urging him to "file a case against the Organisation of Petroleum Producing Countries (OPEC) at the WTO and enforce 'rules-based' trade." The letter reasons that "colluding to set production lev-

els" violates GATT Article XI on the General Elimination of Quantitative Restrictions, which forbids WTO Members from maintaining other prohibitions or restrictions than "duties, taxes or other charges." The signatories argue that since "pacts among countries to limit production of a product for export" are not "duties, taxes or other charges", OPEC's oil production quotas "clearly qualify as a 'quantitative restriction' and we would request that you file a case at the WTO arguing this point." The letter also notes that the GATT Article XX(g) exception, which allows restrictions for the conservation of exhaustible natural resources, "would not protect OPEC's market manipulation because OPEC is not restricting oil production due to conservation concerns or to preserve an exhaustible supply. Rather, OPEC is restricting supply solely in order to influence world oil prices which clearly qualifies as a 'disguised restriction on international trade'."

In related news, a bipartisan group of eight Senators have proposed an amendment to the Sherman Antitrust Act called 'No Oil Producing and Exporting Cartels Act of 2004' – NOPEC for short. In a letter accompanying the draft legislation, its sponsors expressed 'outrage' at the OPEC decision to cut production by four percent as of 1 April and called the organisation "probably the most notorious example of an illegal cartel in the world today."

The legislation's backers also noted that the enforcement of US antitrust laws with regard to OPEC had for years been 'constrained' by two domestic court opinions upholding that "OPEC's price-setting decisions were 'governmental' acts and accordingly that they were given sovereignty status and protected by the Foreign Sovereign Immunities Act." NOPEC, however, would "effectively reverse these decisions by making it clear that OPEC's activities are not protected by sovereign immunity and that the federal courts should not decline to hear such a case [...]. As a result, under NOPEC, the Department of Justice and the federal Trade Commission could bring a legal antitrust enforcement action against foreign states engaging in the restraint of trade regarding oil and other petroleum products."

Free Trade Area of the Americas in Trouble

The 34-nation Western hemispheric integration project suffered another setback in late March when a group of key ministers decided for a second time to postpone a meeting of the FTAA Trade Negotiations Committee (TNC) amidst continued disagreement on the relationship between a binding 'common set of obligations' embracing nine negotiating areas and voluntary plurilateral agreements between participants willing to take on/benefit from more far-reaching disciplines (Bridges Year 7, No.8, page 1).

The informal 31 March – 1 April negotiations focused on primarily on market access, agriculture, services and intellectual property rights. Deep divisions remain on these (and other) subjects, including how to treat export and domestic agricultural subsidies and the establishment of an agricultural safeguard mechanism, as well ties between the plurilateral agreements and levels of market access. Trade remedy laws are another source of tension.

The TNC, which oversees the FTAA negotiations, was tasked by the November 2003 Miami Ministerial Conference to "develop an common set and balanced set of rights and obligations applicable to all countries", but ran into an impasse in February (Bridges Year 8, No.2, page 15). The contact group was to meet again on 30 April before reconvening the TNC, perhaps in late May 2004.

Labour Union Requests Trade Sanctions

On 16 March, the largest federation of US labour unions filed a petition requesting President Bush and the US Trade Representative to put pressure on the Chinese government “for engaging in unreasonable trade practices by its violation of workers’ rights,” through, *inter alia*, prohibiting the US from entering into any “new WTO-related trade agreements until the WTO requires each of its Members to comply with the core labour rights of the International Labour Organisation.”

AFL-CIO official Richard L. Trumka said that one of the culprits for the estimated 2.8 million loss in US manufacturing jobs since President Bush took office was “a global trading system that fails to protect workers’ rights, which translates into a powerful inducement for capital flight, overseas production by US industries and a loss of market share by domestic producers.”

The federation also alleged that workers in China were “being forced to work for wages 47 to 86 percent below what they should be, often as bonded laborers, with few workplace health and safety protections and no right to join or form free trade unions.” According to the petition, such repression had led to a ‘staggering’ cost-advantage as manufacturing costs in China would rise between 12 and 77 percent (44 percent on average) if the government enforced workers’ rights and its own minimum wage and workplace standards.

Specifically, the AFL-CIO demanded that:

- the USTR investigate its complaint and *impose trade remedies commensurate with the cost advantage caused by the Chinese government’s denial of worker rights* (editor’s italics);
- the USTR negotiate an agreement with the Chinese government that these remedies will be reduced only if China meets specific and verifiable benchmarks of enforcement of workers’ rights; and
- the President direct the USTR to enter into no new WTO-related trade agreements until the WTO requires each of its members to comply with the core labour rights of the International Labour Organisation (ILO).

According to sources familiar with the petition, AFL-CIO lawyers argue that the US can pursue unfair trade investigations and impose sanctions with regard to workers’ right violations without bringing the case to the WTO or asking for its approval on trade sanctions.

Under Section 301 of the US 1974 Trade Act, the USTR must decide within 45 days from the filing of a petition by an interested party whether to pursue an investigation, i.e. in late April in the AFL-CIO case. In the unlikely event that the USTR agrees to investigate the petition and ultimately decides that its allegations are valid, it will have the discretionary authority to undertake retaliation against the Chinese government (see box opposite).

Workers’ Rights and the WTO

Developing countries’ opposition to any linkages between labour rights and the WTO far exceeds their reluctance to address the environment in the multilateral trading system (see related article on page 18). Should the USTR give satisfaction to the AFL-CIO, the red-hot labour issue would inevitably re-emerge in the WTO, either as a dispute filed by China or as a bitterly fought systemic issue in the Doha Round negotiations.

In an interesting parallel, EU Trade Commissioner Pascal Lamy predicted in a speech on 25 March that “the question of compliance with ILO conventions on fundamental social rights – banished from the arena of trade issues at Doha despite my efforts on behalf of the EU – will be back on the agenda, this time probably at the request of the very developing countries who successfully resisted it at Doha. This seems a likely prospect, given that most of the smaller textile and garment exporting developing countries will try to block the Chinese steamroller.”

Bridges will follow the trade/labour linkage closely and – should future developments warrant it – offer analysis on its potential implications to the multilateral trading system.

Retaliation under Section 301

Mandatory retaliatory action: If the USTR determines that a foreign government is violating or denying US rights or benefits under a trade agreement, or its acts, policies or practices are unjustifiable and burden or restrict US commerce, it must undertake retaliation (unless one of six specific exceptions applies).

Unjustifiable acts, policies and practices are those that violate, or are inconsistent with, the international legal rights of the United States, including denial of national treatment or most-favored-nation (MFN) treatment to US exports, the right of establishment to US enterprises or protection of intellectual property rights.

Discretionary retaliatory action: Where USTR determines that a particular act, policy or practice of a foreign country is unreasonable or discriminatory and burdens or restricts US commerce, it has discretion as to whether to take retaliatory action.

An act, policy or practice is considered to be unreasonable if it is unfair and inequitable, even if it does not violate the international legal rights of the United States. *Denial of worker rights* is among the practices against which the USTR may decide to take retaliatory action.

However, “practices of a foreign country will not be treated as unreasonable if USTR determines that such practices are not inconsistent with the level of the country’s economic development.”

Scope of authorised retaliatory action:

Where USTR determines that an act, policy or practice is actionable under Section 301, it may suspend or withdraw trade concessions, impose duties or other import restrictions, withdraw, limit or suspend benefits under the General System of Preferences or the Caribbean Basin Recovery Act and negotiate agreements to eliminate or phase out the act, policy or practice or provide compensation for trade distortion. The retaliatory action must be devised to affect goods and services of the foreign country in an amount equivalent in value to the burden or restriction imposed on US commerce by the foreign country.

Trade and Environment Negotiations: A Southern View

Pedro da Motta Veiga*

Developing countries' reluctance to address 'the environment' within the WTO is based on the concern that admitting a link between the two would allow developed countries to introduce new and sophisticated trade-restrictive measures. While this defensive approach played an important role in preventing the trade and environment issue from entering WTO negotiations too early, the just-say-no strategy must now be updated.

Since the mid-1990s, 'non-trade' concerns such as the environment, and labour and human rights have increasingly shaped the trade policy of developed countries at the multilateral, as well as regional and bilateral levels. The link between trade and environment has also been incorporated into unilateral mechanisms granting preferences to individual developing countries (GSPs). As such links gain legitimacy in the North, Southern countries' sensitivity grows regarding initiatives perceived as possible obstacles to their development.

Nevertheless, some developing countries now appear more receptive to addressing 'the environment' in the context of international trade. This change is partly due to an 'offensive' assessment that linking trade and environment can offer new export opportunities and attract investment, and partly to a 'defensive' perception that it could be in their interest to retain the possibility of resorting to the environmental argument to protect themselves against surging imports from China and other Asian tigers. However, North-South polarisation largely continues to dominate the debate, and most developing countries remain essentially on the defensive.

Existing WTO Regulations

Many WTO agreements contain references to the trade/environment relationship. Most importantly, Article XX of the General Agreement on Tariffs and Trade (GATT), allows Members to adopt higher standards than those recommended in international norms to protect natural resources, as well as human, animal and plant health, even if such domestic standards lead to trade restrictions. Only the fundamental principles of multilateralism, i.e. national treatment and most-favoured nation treatment, must be respected.

The Agreements on Technical Barriers to Trade (TBT) and on Sanitary and

Phytosanitary Measures (SPS) seek to minimise the negative trade effects of standards and regulations while allowing Members to maintain a nationally-determined 'appropriate' level of protection for human, animal and plant life. Both agreements contain modest harmonisation provisions that encourage the use of international norms and impose certain conditions for the use of higher standards and regulations.

The need to protect the environment is explicitly mentioned in the Preamble of the Agreement on Agriculture (AoA). Moreover, subsidies for environment-related research and direct payments to producers in the context of environmental programmes are included in the Green Box, and are thus completely excluded from reduction commitments.

The review of Article 27.3(b) of the Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPs) has polarised developed and developing countries in the TRIPs Council for many years, particularly with regard to protection of traditional knowledge and genetic resources used in inventions.

Elements for a New Southern Trade and Environment Strategy

Negotiations on certain aspects of the trade and environment interface were launched at the WTO's Doha Ministerial Conference in November 2001 despite tenacious opposition from developing countries, many of which continue to focus on keeping the agenda as narrow as possible.

Nevertheless, a purely defensive negotiating strategy ignores not only the risks deriving from current non-negotiated norms and rules, but also the dangers arising from the lack of rules. In addition, environmental concerns are embedded in other negotiating areas, as well as some key 'non-negotiating' Doha mandates, that offer elements for a more proactive developing country strategy.

Trade and Environment Negotiations

There is no doubt that negotiations on the relationship between multilateral environmental agreements (MEAs) and the WTO do add new risks to an already complex scenario: the mandate in para. 31 of the Doha Declaration is unclear and developing countries rightly fear that the trade and environment agenda might spiral out of control under developed country pressure.

For instance, under para. 31(i), certain developed countries advocate an *ex ante* agreement that specific trade measures in MEAs are WTO compatible and therefore non-actionable, even if they refer to process and production methods (PPMs) rather than the characteristics of the finished good (or service). In addition, some of these countries seek to ensure that trade measures taken under the so-called *obligation de résultat* would be considered as automatically compatible with WTO rules. Such measures can be taken to further the overall objective of the MEA in question and may thus go beyond the 'specific trade obligations' identified in para. 31 as the focus of negotiations.

The rejection of the *a priori* presumption that all specific trade obligations in MEAs conform to WTO rules is appropriate to the interests of the South, as is the position of concentrating the negotiations on a limited number of MEAs. The advisability of excluding the *obligation de résultat* from the concept of specific trade obligations is less clear. Since this category of obliga-

tion offers some leeway for Parties to impose trade restrictions that they deem necessary to meet the objectives of the MEA in question, leaving them out of the WTO negotiations could generate new risks and uncertainties for developing countries.

Para. 31(iii) on the elimination of tariff and non-tariff barriers to environmental and goods and services should be assessed with the utmost attention.

Environmental Goods: Some developed countries are seeking to define an ‘environmental good’ in a way that implicitly refers to PPMs, and consider both environmental goods and services as prime candidates for zero-for-zero sectoral negotiations in the groups negotiating on industrial market access and services. Developing countries should insist on a precise definition that would spell out that ‘environmental goods’ are end-products and exclude PPM-related criteria. It should also be made clear that these products will be liberalised as part of a market access ‘package’, and not as a result of sectoral negotiations.

Environmental Services: In principle, new liberalisation commitments in the area of environmental services on the part of developing countries may produce positive results for the populations of these countries, especially if these commitments are made in mode 3 (commercial presence). This, then, is an area in which Southern countries can and should make important concessions, especially as the flexible structure of liberalisation commitments under the General Agreement on Trade in Services (GATS) allows them sufficient leeway to adopt domestic regulations aimed at preserving the public interest, and to apply these to private sector environmental services providers.

Where liberalisation of a sector (such as tourism, transportation or energy, say) may bring about negative environmental impacts, developing countries should moderate their additional offers or alternatively – the better option – negotiate the possibility of an ‘environmental safeguard’ that enables them to make broader and more consistent offers in those sectors, again especially in mode 3.

Related Areas under Negotiation

Agriculture: Developed countries will try to preserve their domestic subsidies schemes under the shelter of ‘environmental programmes’ and even widen Green Box coverage to include such criteria as compensation to farmers who comply with high animal welfare standards. Developing countries should attempt not only to set a ‘ceiling’ for the direct payments defined in paragraphs 5 to 13 of Annex 2 of the AoA, but also to define criteria and mechanisms designed to reduce Green Box subsidies. Developing countries’ own conservation programmes should be considered non-actionable subsidies, albeit observing certain rules and limits.

Main Elements of a Southern Agenda for Trade and Environment

Themes	Positions
GATT Article XX	Rejection of waiver for unilateral measures.
Non-agr. market access	Environmental products: definition to exclude PPMs; rejection of zero-for-zero sectoral negotiations.
Agriculture	Cap and reduce Green Box payments; conservation programmes in the South to be non-actionable.
TBT and SPS Agreements	Strengthen disciplines that limit references to PPMs.
Services	Offer to liberalise environmental services, but caution in offering commitments in environmentally sensitive sectors or negotiating an ‘environmental safeguard’ for developing countries.
Subsidies	Re-introduction of the concept of ‘non-actionable subsidy’ with more favourable treatment for developing countries including programmes related to biodiversity exploration. Discipline the use of fisheries subsidies but restrict the expansion of the GATT concept of ‘subsidy’.
TRIPS	Protection of IPRs for traditional knowledge and access to the benefits associated with the use of developing countries’ genetic resources.
Relationship between MEAs and WTO rules	Focus negotiations on only a few MEAs and reject a WTO waiver for specific trade obligations in MEAs. Need to discipline the use of ‘obligations de résultat’.
Paras. 32(i) and (iii) of the Doha Declaration	Act as <i>demandeurs</i> for rules on measures that can limit market access of developing country exports.

WTO Rules – Subsidies: Reintroducing the concept of non-actionable subsidies (Article 8 of the SCM Agreement) may be in the interest of developing countries, as long as they can obtain less restrictive conditions than those imposed on developed countries for programmes of an environmental nature, and especially for activities aimed at exploring their biodiversity.

Developing countries have a direct interest in negotiating disciplines for fisheries subsidies. Most of them are engaged in fishing activities on an artisan basis, but many could become industrial producers in a market less distorted by subsidies. Therefore, efforts to discipline the fishing subsidies now extensively used by developed countries should be encouraged. At the same time, one should guard against ‘opening the door’ for a broader concept of subsidy as such a trend could limit Southern countries’ future ability to use subsidies for development purposes.

Non Negotiating Mandates

Article 32 of the Doha Declaration: The importance of market access issues arising from the imposition of national environmental requirements was explicitly included in paragraphs 32(i) and (iii) of the Doha Ministerial Declaration, although these are not yet formally part of the multilateral negotiations. Para. 32 thus offers developing countries a logical starting point for the elaboration of an offensive approach as *demandeurs* of rules. This would ensure that when para. 32 eventually becomes integrated in the WTO negotiating agenda, it will be under pressure of the interests and concerns of the South.

In discussing these issues, developing countries should focus on elaborating rules that diminish the risks and uncertainties springing from rule- and standard-setting processes currently biased in favour of unilateralism and industrialised country interests. So far, discussions in the WTO Committee on Trade and Environment (CTE) have stressed the need to examine *how* importing countries could design environmental measures in a manner that (i) is consistent with WTO rules; (ii) is inclusive; (iii) takes into account capabilities of developing countries; and, (iv) meets the legitimate objectives of the importing country.

Continued on page 20

TRIPs – Traditional Knowledge: The Doha Ministerial Declaration's paragraph 32(ii), instructed the CTE to give 'particular attention' to TRIPs provisions relevant to the Convention on Biological Diversity (CBD). Developing countries have pushed, so far without success, for an amendment to the TRIPs Agreement in order to accommodate the essential elements of the CBD. Such an amendment could require an applicant for a patent related to genetic resources or to traditional knowledge to (i) disclose the source and country of origin of the resource and/or knowledge used in the invention; (ii) give evidence of prior informed consent through approval of authorities; and, (iii) give evidence of fair and equitable benefit-sharing.

These demands are in line with the CBD, whose Parties have urged further work on TRIPs and CBD provisions on issues relating to "conservation and sustainable use of biological diversity and equitable sharing of benefits arising from the use of genetic resources, including the protection of knowledge, innovation and practices of indigenous and local communities." The potential benefits from any revision of the TRIPs Agreement in this area will largely depend on Southern countries' institutional capacity and the adoption of adequate domestic regulations.

Risks Associated with the Status Quo

As seen above, many existing WTO provisions can be used to legitimise trade restrictions and norms exceeding international standards, or to render domestic support mechanisms (subsidies) non-actionable. For instance, the GATT Article XX 'exception', as well as the TBP and SPS Agreements have been invoked in several WTO disputes arising from the implementation of national environmental legislation. In other words, it has been left to dispute settlement panels and the Appellate Body – operating within an incomplete and sometimes contradictory framework of rules – to provide *ad hoc* rules, thereby adding a new element of uncertainty regarding the WTO-compatibility of domestic measures.

Certain developed countries have actually sought to establish an 'environmental exception', which could take the form of a waiver from WTO disciplines and thus confirm that national environmental measures are to be considered *a priori* 'non-ac-

tionable'. Developing countries refuse – and should refuse – a blanket exception that could justify unilateral environmental measures that nullify market access negotiated at the GATT.

At present, Southern exports may suddenly be confronted with environmental requirements unilaterally defined by the importer and involving additional 'internalisation' costs. Environmental norms can thus potentially turn into non-tariff-barriers (NTBs), whose importance – particularly in sectors such as agriculture – could eventually exceed that of border duties, which tend to be reduced through successive trade rounds.

Disciplining the proliferation of rules that can have an impact on developing country exports, and regulating the use of the environmental rationale to justify trade restrictions, would thus be the objectives of this new component of the Southern Agenda on Trade and Environment. For instance, certain clarifications of the TBT and SPS Agreements seem necessary to prevent developed countries from abusing provisions that permit reference to PPMs or give them too much freedom in defining more stringent standards than those practiced at the international level.

Conclusion

Two movements are necessary to update the South's trade and environment strategy. On the one hand, it is a matter of formulating negotiating positions that give priority to the development dimension in all the themes where the environmental reference is present in the text of the different agreements of the Uruguay Round. On the other hand, it is necessary to build up a position of *demandeur* of rules that discipline the use of unilateral measures motivated by environmental reasons and that can produce negative impacts on developing country exports.

Pedro da Motta Veiga is Partner at EcoStrat Consultants in Rio de Janeiro.

** This article is the first in a series of 'think piece' summaries from experts around the world commissioned by the ICTSD/IISD/RING Southern Agenda on Trade and Environment. 'Trade and Environment Negotiations: A Southern View' was presented at the Regional Consultation on Trade and Environment in South America, convened in Santa Cruz, Chile, on 10-11 October 2003. The entire paper is available at <http://www.trade-environment.org/output/southernagendals-america/ThinkPiece-SouthAmerica.pdf>*

Pending EU legislation on chemicals is a prime example of technical standards that worry developing countries. Currently under consideration by member governments and the European Parliament, regulations for the Registration, Evaluation and Authorisation of Chemicals (REACH) would require some 30,000 chemicals to be registered and documented in detail in Europe over the next 11 years (Bridges Year 7 No.7, page 20).

The Asia-Pacific Economic Co-operation (APEC) Secretariat has warned that the implementation of REACH would have negative effects on small- and medium-sized enterprises in developing countries, which lack the capacity to comply with the strict deadlines and data requirements. APEC countries are also concerned that REACH might create an unfair advantage for EU industry if companies there turned away from non-EU suppliers. At the 23 March meeting of the WTO Committee on Technical Barriers to Trade, Canada, Chile, China, Japan, Thailand, Taipei and the US criticised REACH for being more trade restrictive than necessary. Responding to these concerns the EU extended the period for comments until 21 June 2004 (see page 14 for a report on health/environment standards).

In related news, the European Commission has slammed the US for giving "inordinate weight to [...] only one side of a highly complex argument" in its comments on the legislation. The reaction was sparked by the publication of a "special interests case study" requested by US Representative Mark Waxman on the influence of the US chemical industry lobby on the Bush Administration's position. According to the Commission's spokesperson, "on the European side we certainly are not prepared to give special attention to the demands of the US chemical industry at the expense of sustainable development, the quality of the environment, our duty to protect public health or indeed other industry sectors such as downstream chemical users whose concerns are sometimes very different."

Towards Effective Disclosure of Origin – The Role of the International ABS Regime

Heike Baumüller and David Vivas-Eugui

The disclosure of origin of genetic resources and traditional knowledge, combined with evidence of prior informed consent and benefit-sharing, is one of the most controversial intellectual property-related defensive measures against misappropriation. As existing intellectual property rules are likely to be insufficient to ensure disclosure, international norms in this area could provide a way to address current gaps, provided they are integrated into a broader access and benefit-sharing framework at the domestic, regional and international levels.

A number of provisions within current intellectual property (IP) rules already provide for the disclosure of origin, albeit in a limited manner.¹ A recent survey of patents using biological source material² found that the country/countries of origin of the plant and its traditional uses are usually disclosed in the description where this information is necessary to carry out the invention. However, while this was the case for patents based on ‘rare’ and ‘exotic’ resources, the information was not generally made available for well-known and widespread plants. Moreover, it is ultimately the choice of the applicant whether to disclose the origin of the material.

With regard to traditional knowledge (TK), various countries currently require applicants to disclose prior art to allow for the assessment of the invention’s novelty. Failure to disclose this information could lead to a revocation of the patent. In addition, TK holders have the possibility of claiming joint ownership if their knowledge has contributed to the invention. In both cases, however, the onus is largely on the TK holders to submit a complaint against alleged cases of misappropriation and to show the link between their knowledge and the invention. Such a claim can prove difficult given the limited manner in which prior art is considered in certain countries³ and the fact that much of the knowledge remains unrecorded.

In addition, while a number of national and regional regulatory frameworks already provide for some form of disclosure requirements, the stringency of the requirements vary greatly, ranging from mandatory requirements for disclosure of origin and legal access (i.e. with prior informed consent and on mutually agreed terms as in the Andean community) to disclosure requirements without legal consequence in cases of non-compliance (as in Sweden) to mere encouragement (as in the EU). The different levels of obligation are particularly relevant in cases of transboundary movement of resources when the country providing the resource or TK has to rely on measures in user countries to ensure that its laws are respected, and has no means of recourse to legal action in case of illegal access or breach of an access contract.

Disclosure Requirements – Some Considerations

To what extent international norms for disclosure requirements could play a role in filling some of these gaps in current IP rules will depend on the nature and implementation of such norms. A number of factors need to be considered in this context to ensure that the workability and effectiveness of the system:⁴

Determination of geographical origin: Genetic resources (GR) are sometimes found in more than one country/region or in the case of plant varieties might be result of genetic resources from different sources. The same is true for TK where the attribution of ownership is often not straightforward. Also, the source country that provided the resource might not actually be the same as the country where the resource acquired its distinctive properties. Thus, disclosure requirements will need to account for this multiplicity of sources and, to the extent possible, procedures for tracking the resource and/or TK, in particular if additional requirements for prior informed consent and benefit-sharing are included.

Extent of obligation: The practicality of the requirements will to a large degree depend on the obligation placed on the patent applicant. The most thorough, but at the same time potentially burdensome option would be the origin disclosure of *all* genetic resources and TK used in the invention. Other possibilities include requiring the applicant to make a ‘reasonable effort’ to

determine the source of relevant material or merely disclose what is already known.

Relationship between the GR/TK and the invention: It will be necessary to establish a trigger for the application of disclosure requirements, based on the relationship between the invention and the GR/TK. Such a trigger could be found at various stages in the innovation process, for instance where necessary for the conception, use or replication. It might also be necessary to clarify to what extent and which type of TK is in the public domain, or even revise the concept of ‘public domain’ in the context of TK.

Legal nature and consequences: As mentioned above, disclosure requirements under existing legal frameworks differ widely. Some are voluntary and others mandatory, and there are different consequences for non-compliance. Within patent law, disclosure of origin could be required either as a formality in the patent procedure or as substantive patentability criterion. While the consequences for non-compliance might be similar in both cases, i.e. a refusal of the patent, granted patents are usually hard to overturn on formality grounds unless the failure to comply can be shown to have been fraudulent. Alternatively, a stand-alone disclosure requirement could be introduced linked to the fulfilment of public law, including access legislation. In case of non-compliance, one of the effects could be the suspension of the administrative procedures for the granting of the patent until the requirements of the access legislation have been fulfilled.

The Role of the International ABS Regime

While international norms for disclosure requirements could help set certain minimum standards with regard to the issues outlined above, such requirements are unlikely to be

Continued on page 22

effective if they are not integrated into a comprehensive access and benefit-sharing (ABS) system consisting of ABS regulations and access contracts, and the international IP regime. Such a system would be necessary both to set the conditions for access and to provide for legal enforcement within and outside a country's jurisdiction.

The international ABS regime – mandated by the World Summit on Sustainable Development and currently being negotiated under the Convention on Biological Diversity (Bridges Year 8 No.3, page 12) – can play a constructive role in providing yet another piece in the existing regulatory environment. For instance, the international regime could set up a Clearing House to provide information on access contracts and national and regional laws, which can help patent examiners assess the legality of the claim and whether the conditions attached to the acquisition and use of the GR/TK have been met. Patent examination could also be facilitated through the use of a certification scheme to attest the lawful acquisition of GR and TK, which could be developed and implemented through the international access and benefit-sharing regime.

Moreover, the regime could be used to set minimum standards or guidelines for domestic and regional ABS and IP legislation, while allowing for sufficient flexibility to adapt them to the national context. Such guidelines could be used for the definition of key terms and concepts, including those outlined above. The focus should be on measures and rules in both provider and user countries and could include standard access contracts or material transfer agreements setting out certain conditions for ABS and the filing of relevant intellectual property rights (as being developed in the context of the International Treaty on Plant Genetic Resources for Food and Agriculture).

Finally, the international regime could help monitor and enforce bilateral agreements and national access laws in cases of transboundary movement of genetic resources or use of traditional knowledge outside the jurisdiction. This could be achieved, for instance, by establishing an international obligation to implement national enforcement mechanisms (judicial and criminal) against the illegal access and use of GR/TK.

The regime could also set up a mechanism at the international level to monitor and resolve disputes among governments regarding the implementation of the obligations contained in the international regime.

Heike Baumüller is Programme Manager, Natural Resources, and David Vivas-Eugui is Programme Manager, Intellectual Property, Technology and Services at ICTSD.

ENDNOTES

¹ WIPO. 2003. *Technical Study on Disclosure Requirements Related to Genetic Resources and Traditional Knowledge*, UNEP/CBD/COP/7/INF/17.

² WIPO/GRTKF/IC/2/15

³ In the US, the law excludes oral communications outside national territory when evaluating prior art for the purpose of determining novelty.

⁴ See, for instance, WIPO 2003; endnote 1.

WIPO Split on Disclosure Requirements

The Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC) decided in March 2004 to accelerate work on protecting traditional knowledge and folklore, but could not agree on how to proceed on assessing the interrelation of access to genetic resources and disclosure requirements in intellectual property applications.

Delegates agreed to initiate work on identifying policy objectives and core principles for the protection of traditional knowledge (TK) and folklore, which will provide the conceptual framework for future discussions. The Committee will also compile specific policy options and legal elements, as well as a brief analysis of their practical implications. The first draft will be prepared for the Committee's next meeting in November. The initiative will draw, *inter alia*, on a 15 March submission by Egypt on behalf of the African Group, which was widely welcomed as a suitable framework for the Committee's work. The submission outlines objectives, principles and elements of an international instrument (or instruments) on intellectual property in relation to genetic resources and the protection of TK and folklore. One observer noted that although countries continue to differ on the means for providing positive protection at the international level, there appears to be growing acceptance of the usefulness of such protection, marking a shift from the more cautious positions in the early days of the Committee's work.

No Consensus on Assessing Disclosure Requirements

Many developing countries, including Brazil and the African Group, questioned whether the IGC was the appropriate WIPO body to respond to the invitation by the Convention on Biological Diversity (CBD) to assess the interrelation of access to genetic resources and disclosure requirements in intellectual property applications. They expressed concern that hosting the discussions in the IGC would not necessarily ensure that the Committee's work flowed into other discussions at WIPO. Other relevant bodies include the Patent Cooperation Treaty, where Switzerland has submitted a related proposal, or the Substantive Patent Law Treaty, where several developing countries have raised biodiversity-related issues. The IGC discussions mirrored similar debates at the CBD's Conference of the Parties in February, where several developing countries opposed specific references to the IGC (Bridges Year 8 No.3, page 12).

Several delegations also felt that the WTO Council for Trade-related Aspects of Intellectual Property Rights (TRIPs) would be a more appropriate forum for the discussions. They were concerned that a debate in the IGC would distract from or pre-empt a decision by the TRIPs Council on a proposal by a group of developing countries, calling for disclosure requirements and evidence of prior informed consent and benefit sharing related to genetic resources and TK in patent applications (Bridges Year 8 No.3, page 12). Given the lack of consensus on how to proceed with the CBD's request, the Committee decided to forward the issue to the General Assembly for consideration (for a more detailed report, see BRIDGES Trade BioRes, 2 April 2004).

'Multilateralism at a Crossroads'

On 25–27 May the WTO will host its annual public symposium for civil society, parliamentarians, the business sector, academia and media to address and debate some of the challenges facing multi-lateral trade negotiations. ICTSD and partner organisations will convene three dialogues during the event on key issues at the intersection of trade and sustainable development.

Sustainable development encompasses diverse components related to economic, social and environmental indicators. The concept is also enshrined in the preamble of the WTO. We now need to break the broad systemic linkages between trade liberalisation and sustainable development into concrete issue-based ones that can provide a road map of specific deliverables.

Environmental Goods and Services

One area of potential contribution could be para. 31(iii) of the Doha Declaration that mandates the lowering of tariff and non-tariff barriers to environmental goods and services (ESG). In this context it is important to assess whether it is trade liberalisation *per se*, or the type of modalities that accompany it, which could more positively contribute to sustainable development, especially from a developing country perspective. Towards this end ICTSD and the South Centre, will organise a session on 25 May entitled “Environmental Goods and Services: Towards a meaningful outcome for sustainable development.” The event will present developing country perspectives on the ESG negotiations, tools and methodologies that could ensure a meaningful sustainable development outcome, as well as discuss such substantive issues as technology transfer and the implications of para. 51 of the Doha Ministerial Declaration.

What is Africa's Role in the Multilateral Trading System?

Also on 25 May, ICTSD's Africa Trade Programme will convene a session to examine the functionality of the multilateral trading system for African countries. This will be done by assessing the success of integration efforts and consequently exploring suitable options and strategies, which could enhance their participation in the global economy. The meeting will offer a forum for interaction among different actors in the international trading scene, including representatives from Geneva-based missions, officials from relevant international organisations and NGOs. The session will also examine the relationship between multilateralism, bilateralism and regionalism in order to determine areas of conflict and compatibility, and to analyse the implications for Africa's participation in these processes. Participants will also look at trade preferences to assess whether they are helpful in advancing the economic development of Africa and determine if current technical assistance and capacity-building programmes directed towards the integration of Africa into the trading system are fulfilling this goal.

Biodiversity

On 26 May, ICTSD, CEESP-GETI and IUCN will host a session on “Trade and Biodiversity – the need to find common ground”. Although the interlinkages between the trade regime and multilateral environmental agreements (MEAs) have been discussed intensively at the WTO over recent years, only limited progress has been made on clarifying the relationship. Nevertheless, a number of key areas have emerged from these debates. In addition, a new generation of MEAs containing specific trade measures, such as the Cartagena Protocol on Biosafety, have been concluded. As a result, trade issues have become a major – and often controversial – focus of discussions within certain MEAs, including the Convention on Biological Diversity (Bridges Year 8 No.3, page 12). Further dialogue and exchange of ideas among the various stakeholders is urgently needed to enhance mutual supportiveness between the multilateral trading system and the environmental regime and analyse its implications. The workshop aims to offer a forum for debating three of the most discussed issues: agriculture and biodiversity, invasive alien species and precaution, as well as issues related to access and benefit-sharing. Achim Steiner (Director General of IUCN) will introduce participants to the event and the topics and Simon Upton (Head of the OECD Roundtable on Sustainable Development) will facilitate the discussion. A broad range of speakers both from developing and developed countries, civil society representatives as well as trade negotiators, will address the issues at stake.

The International Centre for Trade and Sustainable Development (ICTSD) is an independent non-profit organisation that aims to contribute to a better understanding of development and environmental concerns in the context of international trade.

ICTSD upholds sustainable development as the goal of international trade and promotes participatory decision-making in the design of trade policy. ICTSD implements its information, dialogue and research programmes through partnerships with institutions around the globe.

BRIDGES regional editions:

PUNENTES

entre el Comercio y el Desarrollo Sostenible

Co-publishers: Centro Internacional de Política

Económica para el Desarrollo Sostenible, San

José, Costa Rica

Web: <http://cinpe.una.ac.cr>

Fundación Futuro Latinoamericano, Quito, Ecuador

Web: <http://www.ffla.net>

PASSERELLES

entre le commerce et le développement durable

Co-publisher: ENDA – Tiers Monde, Dakar, Senegal

Web: <http://www.enda.sn>

BRÜCKEN

Zwischen Handel und Zukunftsfähiger

Entwicklung

Co-publisher: Germanwatch, Bonn, Germany

Web: <http://www.germanwatch.org>

Other ICTSD periodicals:

BRIDGES Weekly Trade News Digest

A weekly electronic news service on trade, sustainable development and the WTO.

Editor: Malena Sell

BRIDGES BioRes

Co-publisher: IUCN – The World Conservation Union

A bi-weekly electronic news service on trade, sustainable development and biological resources.

Editor: Marianne Jacobsen

TRADE NEGOTIATION INSIGHTS

Co-publisher: ECDPM

Bi-monthly publication with a particular focus on Africa and ACP countries, the multilateral WTO negotiations and the Cotonou process.

Editors: Christophe Bellmann, Sanoussi Bilal and David Primack

ECLAIRAGE SUR LES NEGOTIATIONS COMMERCIALES

Co-publisher: ECDPM

Publication bi-mensuelle sur les enjeux des négociations multilatérales à l'OMC et le processus de Cotonou pour les pays d'Afrique et ACP.

Rédaction: Christophe Bellmann, Sanoussi Bilal et David Primack

PASSERELLES SYNTHESE MENSUELLE

Co-publisher: ENDA – Tiers Monde

Publication électronique mensuelle sur les questions de commerce et développement durable d'importance particulière à l'Afrique.

Rédacteur: El Hadji Diouf

For subscription details, visit <http://www.ictsd.org> or send an e-mail to achardonnens@ictsd.ch

Meetings of WTO Bodies*

May 5	Negotiating Group on Rules – Regional Trade Agreements
May 10-11	Negotiating Group for Market Access
May 11	Committee on Trade and Development
May 11	Dispute Settlement Body, Special Session*
May 17-18	General Council
May 19	Dispute Settlement Body
May 24	Dispute Settlement Body, Special Session*
May 25-27	WTO Public Symposium: Multilateralism at Crossroads (see page 23 for ICTSD events)
May 28	Dispute Settlement Body, Special Session*
June 2-4	Committee on Agriculture, Special Session*
June 7	Sub-Comm. on Least-Developed Countries
June 15-17	Council for Trade-related Aspects of Intellectual Property Rights (TRIPs)
June 21-22	Committee on Trade and Environment, regular session followed by Special Session*

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

Other Meetings

April 19-30 New York	UN Commission on Sustainable Development http://www.un.org/esa/sustdev/csd12/
May 2-6 Vancouver	World Fisheries Congress http://www.worldfisheries2004.org/
May 3-14 Geneva	Fourth UN Forum on Forests http://www.un.org/esa/forests/
May 10-12 Brussels	World Bank Annual Bank Conferences on Development Economics http://wbln0018.worldbank.org/EURVP/
May 13-14 Paris	Informal Ministerial Meeting on the Way Forward in the Doha Round Hosted by the Government of Mexico
June 13-18 São Paulo	Eleventh UN Conference on Trade and Development (UNCTAD XI) http://www.unctad.org

Documents Circulated at the WTO

Committee on Trade and Environment. 24 March 2004. European Communities – The Relationship between WTO Rules and MEAs in the Context of the Global Governance System. (TN/TE/W/39)

Dispute Settlement. 6 April 2004. Canada – Measures Relating to Exports of Wheat and Treatment of Imported Grain. Report of the Panel (WT/DS276/R)

Dispute Settlement. 7 April 2004. European Communities – Conditions for the Grant of Tariff Preferences to Developing Countries. Report of the Appellate Body (WT/DS246/AB/R)

Dispute Settlement. 2 April 2004. Mexico – Measures Affecting Telecommunication Services. Report of the Panel (WT/DS204/R)

Dispute Settlement. 13 April 2004. United States – Final Dumping Determination on Softwood Lumber from Canada. Report of the Panel (WT/DS264/R)

General Council/Trade Negotiations Committee. 5 April 2004. Doha Work Programme on Special and Differential Treatment and Outstanding Implementation Issues. Communication from Bangladesh (on behalf of the LDC Group), India, Indonesia, Mauritius (on behalf of the African Group) and Trinidad and Tobago (on behalf of the ACP Group). (WT/GC/W/528)

Other Selected Resources

Dunkley, Graham. February 2004. Free Trade – Myth, Reality and Alternatives. Zed Books. London

Melchior, Arne. 16 April 2004. A Global Race for Free Trade Agreements: From the Most to the Least Favoured Nation Treatment? Norwegian Institute of International Affairs. Oslo

Office of the US Trade Representative. United States Free Trade Agreements. Draft texts and market access schedules are available for the Morocco FTA at: <http://www.ustr.gov/new/fta/Morocco/text/index.htm> and for the Dominican Republic FTA at: <http://www.ustr.gov/new/fta/Dr/texts.htm>

Oxfam International. March 2004. Dumping on the World: How EU Sugar Policies Hurt Poor Developing Countries. Oxfam. Oxford

TEPAC. 6 April 2004. The US – Morocco Free Trade Agreement: Report of the Trade and Environment Policy Advisory Council. Washington D.C. <http://www.ustr.gov/new/fta/Morocco/advisor/tepac.pdf>

Wallach, Lori and Woodall, Patrick. March 2004. Whose Trade Organisation? A Comprehensive Guide to the WTO. The New Press. New York

Waxman, Henry. March 2004. The Chemical Industry, the Bush Administration and European Efforts to Regulate Chemicals. Committee on Government Reform – Minority Office. Washington D.C.

