

In this issue

- 3 Taking Politics Out of Preferences: The Need for a New Deal for Africa
- 7 An Insider's Guide to the WTO's Problems
- 8 WTO News
- 13 EU's Sugar, Banana Reforms under Fire
- 14 Intellectual Property Protection Dogs Regional Trade Deals
- 15 Access to Medicines After 2005: Opening Pandora's Box?
- 17 Opportunities and Risks in Liberalising Services in South Africa
- 19 Millennium Project Calls for Balancing the Trading System
- 19 Multilateral Environmental Agreements
- 21 Producing International Public Goods in a Proprietary Science World: The CGIAR Contribution
- 23 ICTSD and Partner News
- 24 Meeting Calendar and Resources

Published by the International Centre for Trade and Sustainable Development

Facts and Figures

- Seafood is one of the most traded commodities in the world.
- Developing countries account 50 percent of the global fish product trade by value.
- This trade now constitutes 20 percent of their agricultural and food processing exports, more than tropical beverages (coffee, cocoa, and tea), nuts, and spices, cotton, and sugar and confectionary combined.
- Aquaculture has expanded to 30 percent of world seafood production.
- The most valuable component of the seafood trade is shrimp, with a total world trade of more than US\$10 billion in 2000.
- Sixty percent of the world's fisheries are either overused or fully used.

Source: *Global Agricultural Trade and Developing Countries*. The World Bank, 2004. Edited by M. Ataman Aksoy and John Behin.

A Trade Response to the Tsunami?

With a death toll creeping up to 300,000, countless wounded, loss of livelihoods and enormous destruction of vital infrastructure, the 26 December Southeast Asian tsunami counts among the greatest natural disasters of modern times. With enough political will, the international trading system could help restore damaged economies.

According to one recent tally, governments have pledged about eight billion dollars in different types of aid, including debt relief and loans, to the countries hit by the killer wave. Private donations have topped the two billion mark. A large number of international agencies have set up programmes to respond to the catastrophe. WTO chief Supachai Panitchpakdi has urged Members to "individually reflect deeply and expeditiously on whether there is anything they can do at this moment in time in terms of their trade policy." Pointing to individual measures, such as expanding market access and "some restraint in use of trade remedies," Dr Supachai also evoked the possibility of "some form of enabling action at the multilateral level" if Members felt it would be useful. What could such action consist of?

An Early Harvest of the Doha Round?

A precedent exists for starting tariff elimination/reduction in certain sectors before the conclusion of overall negotiations: in 1988, during the middle of the Uruguay Round, GATT Members agreed to liberalise trade in several tropical products. To help the tsunami-hit countries, WTO Members could consider an 'early harvest' market access deal of the Doha Round in sectors of export interest to the countries affected by the tsunami. For instance, Sri Lanka paid EUR57 million in textiles import duties to the European Union in 2003; Indonesia EUR136 million. Sri Lanka's textile exports to the US face average duties between 13 and 17 percent, resulting in an annual disbursement of US\$250 million.

A major problem in generalised early harvest liberalisation in sectors such as textiles is that it could expose countries weakened by the tsunami to competition from other efficient exporters such as China. On the other hand, WTO Members have an entrenched reluctance to create new categories of countries entitled to more favourable treatment, as the inconclusive talks on small and vulnerable economies amply demonstrate.

Temporary measures could be easier to agree. For instance, WTO Members could decide to voluntarily refrain from imposing anti-dumping and countervailing duties on exports from the tsunami-affected countries for a certain period of time, as well as to a moratorium on challenging subsidies given to small-scale fisheries and industries in affected regions, even if they might not seem to be in complete accordance with WTO obligations.

The mandate for the newly-agreed negotiations on trade facilitation offers another potential avenue, as it exempts developing and least-developed country Members from implementing commitments if they do not receive the necessary support for infrastructure development.

It has also been suggested that a multipronged framework could be developed for disaster-prone developing countries. This could involve assistance from the entire international community, including the multilateral trading system, to help potentially affected countries mainstream risk management in development and trade policy (for instance, though reduction to exposure, infrastructure standards and improvement of trade defense capabilities).

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: 7 chemin de Balexert
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 (MEAs)
Johanna von Braun (TRIPs)
Malena Sell (WTO rules, agriculture)
Mahesh Sugathan (investment)
David Vivas (TRIPs and services)

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 Development Co-operation Agencies of Denmark, the Netherlands and Sweden; Christian Aid (UK), NOVIB (NL), Oxfam (UK) and the Swiss Coalition of Development Organisations (Switzerland).

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

The trade response could include special and differential (S&D) treatment provisions, such as easy recourse to safeguards and/or waivers of commitments, as well as granting special market access conditions and flexibilities regarding commitments that may contribute to increasing capacities to resist and recover from trade shocks.

Individual Measures under Consideration

UNCTAD has identified a number of immediate trade measures: a temporary elimination of import duties for products of the affected countries; the immediate rescinding of anti-dumping and safeguard measures; trade capacity-building to help tsunami-affected countries reach importing countries' sanitary and phytosanitary standards; opening markets to service providers from the countries; and measures aimed at rebuilding the tourism industry. UNCTAD has estimated that the region's tourism and fisheries exports, worth US\$30 billion, are now at risk.

The US government has agreed to consider reviewing its anti-dumping duties ranging from 5.6 to 13.4 percent on shrimp from India and Thailand. Thailand has also requested the termination of anti-dumping duties on canned pineapple (currently 0.96 to 51.16 percent) and certain steel products, as well as an expedited sanitary and phytosanitary assessment of its chicken and fresh fruit exports, and the elimination of tariffs on the main exports from the affected provinces, including canned crabmeat and pouched tuna. Sri Lanka has requested tariff reductions on textiles and apparel to help economic recovery. Oxfam America has proposed textiles tariff cuts for Indonesia and the Maldives. While the government is still considering its response, the US shrimp and textiles industries are strongly opposed to any easing of market access in these sectors.

EU member states agreed on 20 January to expedite the entry into force of the Union's new Generalised System of Preferences from July to April 2005 (GSP; see Bridges Year 8 No.9, page 17). The new scheme would offer Sri Lankan textiles and other GSP-eligible products duty-free access, while India, Indonesia and Thailand would benefit from reduced duties on a wider range of products, including seafood and other fisheries products. However, Sri Lanka's WTO Ambassador Gomi Tharaka Senadhira said that his country would not be able to take advantage of the tariff concessions unless the EU also substantially modified its rules of origin. Currently, the fact that Sri Lanka imports much of the raw materials needed by its textiles and apparel industry makes a large part of its exports ineligible for GSP benefits. The European Commission is assessing changes to the system's rules of origin with a view to allowing more regional cumulation in the components of GSP-eligible products.

The EU has also promised to consider reviewing and suspending trade defense measures such as anti-dumping duties and said it could re-orient its trade-related technical assistance to help the affected countries boost exports through, for instance, assisting businesses in complying with health standards. Another initiative being explored involves sending to the stricken region fishing vessels slated for the scrap yard as a result of the restrictions on fleet size the EU has taken to relieve pressure on dwindling fish stocks.

The EU has warned that it cannot make tariff concessions for individual countries without contravening WTO rules, but said it would be ready to "support WTO-wide initiatives to agree on tariff concessions for the affected countries". Canada has also emphasised that any tsunami-related trade measures would have to be complementary to the Doha Round negotiations, perhaps involving the speedier introduction of proposals already under consideration.

The Tsunami-Trade Linkage in Perspective

Modifying trade rules to help countries that are victims of natural disasters – in the case of the tsunami, none of them are among the world's poorest – should not detract from other global problems that cry out for equal assistance. For countries like many in sub-Saharan Africa that are plagued by grinding poverty, low or negative economic growth, disease, environmental degradation and an utter lack of infrastructure, the role that trade along with well-targeted aid and debt relief can play is even more fundamental. It is reasonable to suggest that any privileges the multilateral trading system grants to the tsunami-affected countries, could well be extended to the WTO's most vulnerable Members.

Taking Politics Out of Preferences: The Need for a New Deal for Africa

Andrew Mold

In recent years, preferences have become enormously popular policy instruments among developed countries for helping the developing world, and towards Africa in particular.

From the early 1970s until the 1990s, the basic building blocks of preferential market access for developing countries consisted of the Generalised Systems of Preferences (GSPs) of the European Union and the United States, as well as the Lomé Conventions, which significantly widened EU preferences under offer through the GSP for 77 African, Caribbean and Pacific (ACP) countries. However, after the Ministerial Conference of the WTO in Singapore in 1996, many countries expanded or introduced market access preferences for marginalised developing countries, especially for the UN's list of 50 least-developed countries (LDCs). In 2001 *the WTO registered no less than 28 market access initiatives in favour of LDCs* (UNCTAD, 2004: 245). Since 33 of the LDCs are African, these initiatives have a particular relevance for African development. Since the year 2000, the EU's EBA extends duty-free access to LDCs for all products except armaments and three 'sensitive' products (bananas, rice and sugar), to be phased in at a later date. With the exception of South Africa, sub-Saharan non-LDC countries benefit from the EU's Cotonou Agreement (the successor of the Lomé Conventions). Many African countries are now also beneficiaries of the United States African and Growth and Opportunity Act (AGOA), passed by Congress in 2000 and extended recently until 2015.

Why the Proliferation?

It is easy to see why non-reciprocal trade preferences are popular from the point of view of the donor countries. First, against a backdrop of 'aid fatigue', it is now widely believed that developing countries can benefit more from opportunities to increase their exports than through aid 'hand-outs.' Aid fatigue is particularly evident in Africa where, up until a few years ago, aid had suffered a significant and secular decline since the end of the Cold War. Even though empirical evidence in support of this contention is thin on the ground, it is commonly inferred that market access agreements like the EBA scheme have a potentially greater impact on poverty reduction than traditional aid programmes. Second, from the perspective of the preference-granting countries, in budgetary terms no explicit item has to be included *ex ante*. Rather, the cost is assumed *ex post*, in terms of the loss of tariff income on imports (Freres and Mold, 2004). In a period of budgetary restraint, this advantage is an important one. Third, the industrialised countries offering these market access agreements are well aware that the poorest developing countries are not really in a position to take full advantage of them because their supply-side capacity is extremely limited. As a consequence, as long as these agreements have strict rules of origin (which is invariably the case), there is little danger of a surge of imports from the beneficiary countries. Finally, and perhaps most importantly, as unilateral policy instruments they are not binding, which leaves developed countries free to recant on these schemes should political expediency demand this. Modifications to the schemes can also be made without consultation.

Controversies over Effectiveness

African countries tend to decry any attempt to cut back on preferential access. Many are also extremely worried about the erosion of preferences due to the generalised lowering of tariffs through multilateral and unilateral liberalisation. But why are preferential agreements apparently so popular with recipient countries in Africa? It is a commonplace observation that Africa's aggregate export performance has been poor over the last two or three decades, with relatively slow export growth in its major commodities, and an even slower rate of progress on export diversification out of primary commodities. Since the establishment of the Lomé Convention in 1975, for instance, the ACP countries' share of EU imports has fallen from 7.7 percent to 2.7 percent in 2000. Is there cause and effect between these circumstances? Have preferential access schemes inadvertently provided a series of erroneous signals to African

countries, and encouraged them to continue their specialisation in commodities, despite collapsing terms of trade? This is certainly the argument frequently expressed by orthodox economists. The World Bank (1987, cited in Ozden and Reinhardt, 2002:2), for instance, has called preferential agreements a 'Faustian bargain'. The basic criticism is that preferential market access distorts trading choices and that, on balance, the system actually delays a poor country's efforts to liberalise. It is also argued that preferences may artificially shift economic activity towards sectors where trade preferences exist, but out of line with the country's long-term comparative advantage. Once benefits under preferential access are lifted, or eroded by tariff reduction with competing countries, the costs of adjustment are inevitably high. Fears are also often expressed that the erosion of preferences could cause the formation of a block of preference-receiving countries who will lobby against the continuation of multilateral liberalisation.

Critics of these schemes are certainly right that preferences have not been as useful as their proponents have suggested. The bulk of African exports are still commodities, and as such are zero-MFN rated anyway (clearly, in the interests of maintaining competitiveness, it is logical for the industrialised countries to allow primary inputs into their countries duty-free). Critics are also right to stress that the subsequent loss of preferences can be extraordinarily damaging, especially on products benefiting from special import-quotas (sugar, bananas and textiles). The IMF (2004) has recently identified a group of countries where the estimated losses through preference erosion will exceed two percent of export unit values. Among sub-Saharan African countries, the most notable cases are Mauritius (-11.5 percent), Malawi (-6.6 percent) and Mauritania (-4.8 percent). Other countries negatively affected include the Seychelles, Swaziland,

Continued on page 4

Cape Verde, Sao Tomé and Príncipe, Tanzania, Côte d'Ivoire and Comoros.

Critics frequently point to another negative characteristic of these schemes: their low rates of utilisation, i.e. a large share of imports which should technically qualify for duty-free or preferential access do not actually do so (UNCTAD, 2004). However, new evidence is coming to light that the use of preferences has actually been rather higher than previously thought – calculations in the past have tended not to bear in mind the fact that exports can qualify for different schemes simultaneously (OECD, 2004). This is particularly the case in sub-Saharan Africa, where exports can qualify for preferential access to the EU under three competing schemes: the EBA, the GSP and the Cotonou Agreement. Most African countries find that the vast majority of their exports to the EU either come under MFN zero-rated tariffs, or the Cotonou Agreement. Overall, in value terms around three quarters of African exports are MFN zero-rated, and another 23 percent receive Cotonou preferences. In other words, *around 98 percent of sub-Saharan exports are either zero-rated or come in under the Cotonou Agreement* (Mold, 2005). The European Commission tends to cite figures like these to support the argument that preferences are well-used. Figures such as these also explain why the EBA is having a very limited impact on the exports of least-developed African countries to the EU: the majority of their exports already had duty-free access.

If this is the case, why has there been so much controversy over preferences? Why have they apparently not been having the beneficial impact on African growth prospects and poverty reduction that their proponents expected of them? A number of points are probably relevant here. First, there is a growing body of evidence that trade has been overplayed as a factor in stimulating economic growth and poverty reduction – trade is not intrinsically beneficial, and some kinds of trade growth have little or no impact on poverty reduction (see UNCTAD, 2004; Mold and Roza, 2005). Second, the cases where preferences have had a particularly strong impact have tended to be in markets where the preference has come in the form of a quota. Mau-

ritius, for example, has benefited enormously from the concession of quotas, allowing its sugar exporters to tap into the EU's internal price, which can be as much as three times the world price. The resulting rents to Mauritius have amounted to a hefty 5.4 percent of GDP on average each year, and up to 13 percent in some years. Most of these rents accrued to producers, who subsequently invested heavily in export-processing zones, especially in the textile sector (Surbramanian and Roy, 2003:223).

However, the diversification story of Mauritius has been the exception rather than the rule. Why has this been so? Research shows a number of reasons why African countries have failed to progress much in the diversification of their export structure. A popular alleged reason is the complexity and strictness of rules of origin (Brenton and Manchin, 2003). Clearly, for poor developing countries with relatively undiversified economies, the inability to source inputs from the cheapest possible source severely constrains their capacity to move into more sophisticated lines of production. Preferential access is fine, then, for any products not made from processed or manufactured goods, but as soon as the good is further elaborated, serious problems occur. The EBA rules are in fact even more complicated than those under Cotonou which – unlike the EBA – allows for full cumulation within the ACP countries.

Playing Politics with Preferences

A relatively overlooked reason for the relative ineffectiveness of preferences has been the way in which, in spite of the ostensibly developmental objectives of preferences, donor countries have been prepared to play politics with preference systems. For instance, when in 1991 the US Trade Representative determined unilaterally that India's intellectual property protection was 'unreasonable', President George Bush senior suspended duty-free privileges under the GSP for US\$60 million in trade from India in April 1992. Similarly, in 2002, in the aftermath of the Afghan war, the US pressured the EU to extend its special GSP scheme for Latin American countries affected negatively by the narcotics trade to the US's ally, Pakistan. India objected to the concession of preferences to its neighbour, and subsequently won a WTO panel on the matter. Such blatant *realpolitik* on the part of preference-giving countries does little to dispel critics' perceptions of preferential market agreements as a (heavy-handed) tool of foreign policy rather than development.

An associated problem is the frequency with which the preference-granting countries revise the rules for preferential agreements – for the EU's GSP, this is every three years. This means that the whole system is effectively put on a 'short leash', increasing uncertainty about the permanence of the benefits on offer. Entrepreneurs and policy-makers in developing countries are understandably reticent to channel resources towards sectors where the competitive advan-

Table 1: Utilisation of the Cotonou Agreement by African Countries 2002

Country	1,000	In EUR1,000		Use in %		
	Total Imports	MFN = Zero	MFN + Cotonou Zero	Preferences/ MFN=0	MFN=0	Cotonou Preferences
Nigeria	4,989,988	4,689,188	4,988,985	100.0%	94.0%	6.0%
Ivory Coast	2,600,303	1,652,511	2,470,654	95.0%	63.6%	36.4%
Ghana	1,106,461	665,270	1,103,340	99.7%	60.1%	39.9%
Kenya	845,305	281,319	834,662	98.7%	33.3%	66.7%
Mozambique	582,737	25,265	573,894	98.5%	4.3%	95.7%
Madagascar	525,793	120,162	523,513	99.6%	22.9%	77.1%
Tanzania	409,639	197,943	398,197	97.2%	48.3%	51.7%
Senegal	404,990	81,540	399,211	98.6%	20.1%	79.9%
Uganda	259,375	127,682	259,310	100.0%	49.2%	50.8%
Ethiopia	183,860	139,661	175,019	95.2%	76.0%	24.0%
African ACP Countries TOTAL	23,326,717	17,279,488	22,698,061	98.0%	74.10%	23.20%

Source: Author's elaboration from data supplied by the European Commission.

tage relies on factors that could prove ephemeral. This has been the case, for example, with the EU's introduction of the system of 'graduation', whereby countries are excluded from the benefits of the preference agreement when their exports in a particular sector reach a pre-determined level, or when the beneficiary country reaches a specified level of development. Similarly, the US GSP has elapsed on five occasions without being immediately renewed (OECD, 2004:78).

It is hardly surprising, under such circumstances, that the supply-side response to preference schemes of most African countries has been disappointing. Neither foreign nor national investors are willing to risk the sunk costs of large scale investments on the basis of ephemeral preferential market access. Regrettably, EU trade policy towards developing countries seems to be heading in the direction of greater, not less, discretionality. The European Commission has recently announced new rules, to be applied from January 2006, which will open EU markets as a reward to developing countries that adopt 'progressive' environmental and labour policies. Developing nations that wish to qualify must implement a list of 27 "key international conventions on sustainable development and good governance" by 2008.¹ Measures such as these can only increase the uncertainty and discretionality that continues to undermine the long-term impact of preferential market access agreements.

Towards an Agenda for Reform?

There is a certain parallel between the criticisms regarding existing preferential agreements and those frequently leveled at aid systems – the lack of predictability and clear commitment from donor countries undermines aid in the same way as it does for preferential market access. And without the necessary support for capacity-building, both aid and trade instruments are likely to disappoint. How could preferential access be improved? The following points should perhaps be considered:

- **Preference schemes are presently too complex.** Certain characteristics of preferential schemes, such as rules of origin, product exemptions and safety-guards against import surges all undermine their potential impact. Agreements need to be simplified if their developmental potential is to be realised, particularly with regard to rules of origin. One proposal would be to allow for automatic cumulation between African countries. This would have the added advantage of supplying a much-needed boost to regional integration within Africa.
- **OECD Countries should make their respective preference systems legally-binding.** One of the inherent problems of current preference systems is their concessionary nature. Because the economic stakes are high for exporters, preference systems need to be contestable in the courts – as unilateral measures, currently no country can take any action against a sudden withdrawal of the preferences, whether this is justified or not (as Costa Rica found to its cost in 2003 when a whole sector was 'graduated' by the European Commission, allegedly without even following the EU's own rules correctly).² Firm commitments, over long time horizons, by the Quad countries (the EU, the US, Canada and Japan) would minimise the uncertainty that has so far undermined the potential impact of these agreements. More generally, Quad countries should endeavour to 'take politics out of preferences', perhaps by placing preferential access agreements for poor developing countries under the remit of the WTO. A critic of such a move might affirm that this proposal misunderstands the unilateral nature of preferential agreements – that they are by nature concessionary and in no way legally-binding. But it is not by any means self-evident that the situation has to stay that way. Their current status, in a grey area of legality within WTO legislation, surely needs to be rectified, and the idea of preferential access dovetails perfectly with WTO legislation regarding the granting of special and differential (S&D) treatment for developing countries.
- **Free market access for all products?** Another interesting proposal, which is currently being voiced in other fora,³ is that the EU's EBA should be generalised to all sub-Saharan Africa, and should be granted by all the Quad countries (the EBA is taken as a model, because it is currently the most 'generous' deal on the table – in comparison, AGOA is a much more restrictive agreement). Such a policy initiative could constitute a major pillar of the 'New

Deal' for African development, which is currently unfolding in the shape of the forthcoming recommendations of the (UK) Commission for Africa, the Millennium Development Project (see page 19) and the ECA/OECD 'Mutual Review'.

• Compensation for preference erosion.

Finally, preference-giving countries need to respond urgently to the concerns raised regarding adequate compensation due to preference erosion. Unless they wish to create a constituency of African countries intent on blocking any further progress on multilateral liberalisation, the issue of compensation needs to be dealt with. Although a welcome initiative, the only mechanism on the negotiating table at present – the IMF's *Trade Integration Mechanism* – does not fulfill the aspirations of the affected countries because the funds provided are within the IMF's existing facilities (i.e. would be interest-bearing loans). Moreover, the scale of the financial support would not be directly tied either to a country's total loss from preference erosion or its net loss from a WTO settlement (Page, 2004).

Beyond these recommendations, it should be borne in mind that preferential market access has the added advantage for most African countries of not further threatening their fragile situation regarding the balance of payments. A recent comparison carried out on the LDCs shows that liberalisation measures have been accompanied by a deterioration in the trade balance – import growth has generally been much stronger than export growth (UNCTAD, 2004: Santos-Paulino and Thirlwall, 2004). To some extent, this was a fairly predictable outcome of trade liberalisation for countries with weak supply-side capacities. There is simultaneously a general feeling in the continent that the efforts that African countries have made to liberalise over the last decade-and-a-half have not been sufficiently acknowledged. In such a context, it could be argued that further trade liberalisation in Africa is untenable unless African countries receive adequate recompense in the form of enhanced market access. A bold initiative on preferential market access on the part of the Quad countries would seem to be called for if African countries are to re-

Continued on page 6

main convinced of the benefits of the multilateral system of trade liberalisation.

Andrew Mold is Economic Affairs Officer at the Trade and Regional Integration Division of the Economic Commission for Africa in Addis Ababa. The views expressed here should not in anyway be attributed to the ECA.

ENDNOTES

¹ “Brussels to reward ‘good’ poor countries” by Tobias Buck, *The Financial Times*, 21 October 2004, page 1.

² This case is explained in some detail in Freres and Mold (2004).

³ See the (UK) Commission for Africa’s Consultative Document, for instance (<http://213.225.140.43/index.html>).

REFERENCES

1. Brenton, Paul and Manchin, Mariam (2003), ‘*Making EU Trade Agreements Work: The Role of Rules of Origin*’, *The World Economy*, Volume 26 Issue 5, pp.755-769.
2. Freres, Christian and Mold, Andrew (2004), ‘*European Union Trade Policy and the Poor. Towards Improving the Poverty Impact of the GSP in Latin America*’, Instituto Complutense de Estudios Internacionales Working Paper WP02/04.
3. IMF (2004), ‘*Fund Support for Trade-Related Balance of Payments Adjustments*’, IMF, Washington, February 27.
4. Mold, Andrew (2005), ‘*Trade Preferences and Africa – The State of Play and the Issues at Stake*’, African Trade Policy Centre Working Paper No. 12.
5. Mold, Andrew and Rozo, Carlos (2005-forthcoming), ‘Mexico’, in Kishor Sharma and Oliver Morrissey (eds), *Trade, Growth and Poverty in Developing Countries*, Routledge, London.
6. OECD (2004), ‘*Assessment of Utilization and Motive for Under-Utilization of Preferences in Selected Least Developed Countries*’.
7. Ozden, C. and M. Olarreaga (2004), ‘AGO and Apparel: Who Captures the Tariff Rent in the Presence of Preferential Market Access?’, mimeo, World Bank
8. Page, Sheila (2004), ‘*The Doha Development Agenda Impacts on Trade and Poverty – Preference Erosion: Helping Countries to Adjust*’, Overseas Development Institute, London.
9. Santos-Paulino A. and Thirlwall, A.P (2004), ‘*The Impact of trade liberalisation on exports, imports and the balance of payments of developing countries*’, *The Economic Journal*, 114 (493), pp. 50-73.
10. Subramanian, Arvind and Devesh Roy (2003), ‘*Who Can Explain the Mauritian Miracle? Meade, Romer, Sachs, or Rodrik?*’, in Dani Rodrik (editor), *In Search of Prosperity – Analytic Narratives on Economic Growth*, Princeton University Press, Princeton.
11. UNCTAD (2004), ‘*The Least Developed Countries Report 2004*’, UNCTAD, Geneva.

UNCTAD Study on Industrial Tariffs

A new study by the United Nations Conference on Trade and Development (UNCTAD) concludes that while developing countries stand to gain from WTO-negotiated reductions in industrial tariffs, the distribution of benefits will be uneven.

The study, *Coping with Trade Reforms: Implications for the WTO Industrial Tariff Negotiations for Developing Countries*” (January, 2005) analysed ten different scenarios in terms of the degree and scope of tariff reductions on industrial products which could arise out of the WTO’s non-agricultural market access (NAMA) negotiations. The scenarios were based on three different formulae:

- the ‘Swiss-harmonising’ formula, which is effective in reducing tariff peaks and escalation;
- the ‘WTO-harmonising’ formula with a co-efficient that can be varied to reflect different initial tariff levels; and
- the ‘capping formula’, i.e. an across-the-board uniform reduction in average bound tariff levels with a capping mechanism of three times the average national applied rate.

Each formula, in turn, was then considered in terms of ambitious, moderate and flexible variations. The tenth scenario envisages fully liberalised trade, with all tariffs on industrial products eliminated.

The study predicts increases in export revenues for almost all regions under all scenarios, with the most ambitious scenario – that of free trade – producing the greatest gain of 8.1 percent in export revenues. Of the ambitious, moderate and flexible variations under each of the Swiss, WTO and capped formulae, the ambitious scenarios across all three generate the largest export revenue gains. The second best outcome of a 4.3 percent increase in global export revenues would be provided by the ambitious variation of the Swiss formula for tariff reduction (the higher the tariff, the greater the reduction), which would eliminate all tariffs under two percent and tariffs in specific sectors such as textiles and clothing, and electronic goods.

Despite forecasting roughly equal gains in export revenues from industrial tariff cuts for both developed and developing countries, the study finds that the gains may not be spread evenly, especially among developing countries. Under the ambitious Swiss-formula scenario, estimated global export revenue gains are US\$314 billion, and of this US\$175 billion accrues to developing countries and the remaining US\$139 billion to developed countries. Among developing countries, however, the main beneficiaries are China (US\$67 billion), South East Asia (US\$22 billion) and India (US\$16 billion). Together they would account for 60 percent of the projected increase in export revenues for developing countries. In contrast, some smaller developing countries such as Bangladesh and Zambia would only generate minimal export revenue gains across all scenarios, mainly due to losing markets in the textiles and clothing sector.

The study warns that average tariff rates imposed by developing countries on imports could fall from the current 12.5 percent to 3.4 percent. Although these reforms might help improve competitiveness in the long-run, many developing countries could face short-term structural adjustment costs in the form of loss of tariff revenue, employment losses and reductions in real wages.

In terms of the negotiation process, the study emphasises that current talks face several challenges and that the large number of variables to be negotiated make it difficult to identify what countries will be required to do, and consequently, what benefits they will receive. Ongoing negotiations will therefore have to be to find ways to take into account the special and differential needs of developing countries so as to offset the short-term costs arising from reform of industrial tariffs.

A draft version of the report is available online at:

<http://192.91.247.38/tab/namameeting/NAMastudy.pdf>

An Insider's Guide to the WTO's Problems

Andrew Guzman and Joost Pauwelyn

Like many international organisations, the World Trade Organisation is reflecting on its mission. On 17 January, it released a report ambitiously entitled 'The Future of the WTO: Addressing institutional challenges in the new millennium'.¹ That its eight authors are all eminent figures with impressive trade credentials is beyond doubt. Indeed, that may be the major weakness of the report: it fails to rock the boat.

The authors, led by former GATT Director-General Peter Sutherland, were charged with reflecting on the institution's role and the key challenges it faces. Disappointingly, their report nibbles around the edges of the WTO's problems, addressing significant but hardly foundational problems within the organisation – just the sort of problems that insiders are likely to focus on.

The report follows the by now familiar template of the defenders of globalisation: liberalised trade is a good thing and lifts all boats. Regional trade deals are bad since they are discriminatory and detract from the multilateral effort. Although the report recommends some co-ordination with non-trade organisations (both intergovernmental organisations and NGOs dealing with issues such as the environment, labour, trade adjustment assistance and poverty), the WTO must focus on the ball of economic liberalisation. WTO rules should be shielded from "undue external interference".

The reality, however, is that the WTO is as much about protectionism as it is about free trade. For historical reasons, the system is skewed in favour of the rich and powerful. When developing countries have a chance of winning the free trade game, the relevant sector is either carved out (textiles, agriculture) or so-called fair trade remedies (anti-dumping, safeguards) are ushered in. Moreover, the very premise of the institution is to bring producer-exporters together internationally so as to avoid domestic protectionist tendencies. The system is producer-driven, not consumer-focused. That must be changed. To achieve this, the WTO needs more, not less politics; more flexibility to respond to genuine citizen concerns rather than an ever more legalised treaty system; more leeway for opt-outs and regional deals rather than a one-size-fits-all WTO straightjacket. This problem will not be resolved by observership for NGOs or a WTO-wide parliamentary assembly (thoughtful proposals referred to in the report). It requires a paradigm shift both in the mechanics and substance of the institution.

With respect to non-trade concerns, the problem is that they simply cannot be separated from trade concerns. Having already restricted the ability of states to use non-trade interests as a justification for trade measures, the WTO can hardly wash its hands of the problem and walk away. Existing WTO rules impact these non-trade issues, and the WTO must participate in the messy political debate on their relationship. One way to do so is to relinquish the idea, omnipresent in the report, that the WTO somehow stands above, and separated from, all other international organisations and treaties. To confront poverty, for example, the WTO must work actively with the UN, the World Bank and the IMF, not just exchange observers and diplomatic niceties. It is not good enough to accept that "the advantages the WTO can endow on chronically poor countries are limited". The UN Millennium Project Report that sets out recommendations on how to halve poverty by 2015 can serve as a useful guide (see related article on page 19).² That report was issued the very same day the WTO report came out. So much for co-ordination!

The need to shift focus from producer to consumer welfare, as well as the non-trade issues problem, is aggravated by the fundamental imbalance between the way in which WTO rules are negotiated and the way dispute settlement works. Negotiated agreements at the WTO require a consensus. This has the predictable effect (in an organisation of close to 150 members) of making any changes exceedingly difficult, and controversial changes all but impossible. As a result, non-trade issues have been pushed to the dispute resolution side of the system, where any Member can have a complaint adjudicated. This forces WTO judges to opine on critical questions about which the agreements themselves provide precious little guidance.

It is admittedly difficult to imagine large-scale deviations from the consensus rule. Yet, to permit like-minded countries to move forward and to give political feedback to the judicial branch, regional deals or a multiple-speed WTO must at times be welcomed.

On the judicial side, rather than blindly defending an ever more legalised WTO judiciary (at most, the report calls for a 'special expert group' to examine the correctness of specific WTO dispute rulings), WTO judges must be warned against judicial activism and some political checks must be added. Dispute resolution, like the organisation as a whole, needs more politics, not less.

To be clear, we are both fans of the WTO. We believe it is an enormously important and valuable institution. We also believe that it has the potential to deal with the important problems that it faces. To do so, however, requires a more frank assessment of the institution's weaknesses and a willingness to consider broader and bolder reforms. The Consultative Board's report is a good and useful guide for and about the problems of insiders, but it fails to address the WTO's key institutional challenges in the new millennium. In that sense, it is a missed opportunity.

Andrew Guzman is Professor of Law at the University of California at Berkeley (US) and Joost Pauwelyn is Associate Professor of Law at Duke University (US).

ENDNOTES

¹ Report by the Consultative Board to the Director-General Supachai Panitchpakdi, 17 January 2005, available at http://www.wto.org/english/thewto_e/10anniv_e/10anniv_e.htm#future.

² Investing in Development: A Practical Plan to Achieving the Millennium Development Goals, 17 January 2005, available at <http://www.unmillenniumproject.org>.

DG Hopefuls and Civil Society

For the first time in GATT/WTO history, three of the candidates for the organisation's top job (Carlos Pérez del Castillo was unable to attend) answered questions sent in from around the world regarding their vision for international trade at a public hearing organised by three NGOs in Geneva on 26 January. The questions focused on the candidates' personal qualifications and commitment to increasing the WTO's transparency and accountability; coherence between the WTO and 'non-trade concerns', such as human rights, the environment and labour standards; the role of the DG in trade negotiations; corporate control of the WTO agenda; and the WTO agricultural liberalisation mandate.

On institutional issues, the candidates' answers largely mirrored the views they expressed at the General Council meeting (see opposite). Mr Lamy said that transparency with regard to civil society would be a priority for him, while Minister Cuttaree called for more transparency in both national policymaking and the functioning of the WTO. Ambassador Seixas Corrêa said that 'good chairmanship' and transparent communications within the WTO would increase the legitimacy of the decisions taken by the organisation in the eyes of Members.

The candidates struggled to respond to the request to put forward concrete proposals for improving coherence between trade rules and non-trade concerns. Ambassador Seixas Corrêa 'fully conceded' that trade liberalisation could have harmful effects on these areas, but noted that protectionism could as well. He pointed to the positive links between trade liberalisation and reduced pressure on natural resources. Minister Cuttaree said that such issues, though central to developmental policy, should be the responsibility of national governments and that bringing issues like labour standards into the WTO would be wrong. Mr Lamy raised the possibility of granting observer status to other international institutions as a way to enhance coherence between trade and non-trade issues.

For a webcast of the hearing, see <http://www.iatp.org/>

Race for Next Director-General Launched

The four candidates vying for the post of WTO Director-General focused on development concerns as the central message of their presentations to the General Council on 26 January.

Uruguay's former WTO Ambassador Carlos Pérez del Castillo; Foreign Affairs and Trade Minister Jaya Krishna Cuttaree of Mauritius; Brazil's WTO Ambassador Luiz Felipe de Seixas Corrêa; and former European Trade Commissioner Pascal Lamy of France each made fifteen-minute presentations to the General Council, followed by an hour of questions and answers with Member delegations. All four declared that their highest priority as DG would be the swift, successful conclusion of the ongoing Doha Round of trade negotiations, and agreed that coherence should be enhanced between the WTO and other international institutions with a development mission, such as the World Bank and the International Monetary Fund (IMF). All candidates said, however, that the WTO should remain a Member-driven and consensus-based organisation rather than adopt the decision-making structures of the Bretton Woods institutions.

Mr Pérez del Castillo, who chaired the WTO's General Council in the run-up to the Cancun Ministerial Conference and now serves as Special Advisor on International Trade Negotiations to the President of Uruguay, described himself as a 'consensus candidate'. He emphasised the need to ensure that the multilateral trading system offered all Members "concrete opportunities for trade and development" and called giving a "concrete meaning to the development dimension beyond special and differential treatment" one of the WTO's most important responsibilities. The WTO should also confront the "growing fragmentation" resulting from regional and bilateral trade agreements that undermine the institution's fundamental principle of non-discrimination.

Minister Cuttaree – whose candidacy has already been endorsed by the group of African, Caribbean and Pacific countries that comprise 79 of the WTO's 148 Members – portrayed himself as a bridge-builder between rich and poor countries. He noted that the benefits of trade liberalisation had not been evenly distributed, and that developmental concerns must be "duly entrenched in the system as a whole". He also emphasised that WTO decision-making had to be made more transparent and inclusive, and defended "effective regional integration" as a stepping-stone to the multilateral system.

Ambassador Seixas Corrêa said that the successful conclusion of the Doha Round would require Members to "mainstream the development dimension into the WTO to the benefit of all developing countries," with specific provisions to help least-developed countries (LDCs) and vulnerable economies "enhance their national structures for development". He also called for the WTO to provide "an overarching normative structure, capable of effectively harmonising the growing number of trade agreements" if it were to retain its pre-eminence.

Mr Lamy reminded the General Council of his role as "one of the authors" of the 'Doha Development Agenda' and stressed the need to "re-balance the international trade system in favour of developing countries". He noted that while trade liberalisation was not enough to promote development, it was a 'necessary condition' for it. Despite his well-known characterisation of WTO decision-making as 'medieval', Mr Lamy denied that he would be seeking sweeping institutional reforms. Nevertheless, he stressed that the DG had a duty to "reform if necessary, notably in the direction of transparency".

While most WTO Members say they have not yet made a choice among the candidates, press reports have given an edge to Carlos Pérez del Castillo and Pascal Lamy. The next phase of the selection process will involve successive rounds of consultation by the Chair of the General Council, with the candidate least likely to muster consensus expected to bow out at each stage. Should no consensus emerge, an unprecedented vote could be held, or someone new – some speak of Alec Erwin, currently South Africa's Minister of Public Enterprises, while others have mentioned former Mexican President Ernesto Zedillo – could be requested to apply. In late May, Members are to appoint the new DG, whose four-year term will start on 1 September.

Agriculture: Chair Seeks 'Pre-modalities' by August 2005

At the December 2004 agriculture week, WTO negotiators reviewed draft text on export credits and inconclusively discussed a formula for tariff reductions while Chair Tim Groser called for agreement on 'pre-modalities' – or a preliminary outline for the conduct of the last leg of the negotiations – by mid-2005 in order for Members to strike a deal at the Hong Kong Ministerial Conference in December 2005.

Ambassador Groser made no bones of his disappointment with the inconclusive nature of the 'technical' agriculture talks since negotiations resumed in September 2004, and warned Members that the time of 'power-brokered deals' was long past: the next text, he said, would have to be the full modalities – not another framework – and it must be drafted in Geneva. While this might not be possible by the Hong Kong Ministerial, he stressed the importance of working towards that goal. In order to focus the negotiations, Chair Groser said he would produce a 'first approximation' of the modalities by July – despite the risk of serious omissions and outright errors of judgement – so Members could debate them before the WTO's summer break. Trade sources predicted, however, that the draft or 'sketch' would be unlikely to include any figures and would probably offer only bracketed options for handling controversial topics.

Link to NAMA Modalities Unavoidable

Some developing countries, such as Argentina, made clear that they would not agree to detailed agricultural modalities unless the currently blocked talks on industrial tariffs (see page 11) produced a satisfactory result from their point of view. This linkage presents a major challenge as many industrial countries seek to offset agricultural subsidy or tariff cuts by aggressive across-the-board reductions in tariffs for industrial products. In contrast, many – if not most – developing countries tend to view industrial tariff reductions as something that will mainly benefit OECD countries while exposing their domestic industries to unfair competition and depriving poorer governments of much needed tariff revenue.

Export Support

At the December meeting, Ambassador Groser's presented a 'draft non-exhaustive outline' text on export credits, which was largely based on the February 2003 document proposed by former Chair Stuart Harbinson on new disciplines on government-backed export financing (TN/AG/W/1). The new text incorporates the August 2004 framework decision to limit repayment periods for export credits to a maximum of 180 days, revises the language on minimum interest rates for export financing, and introduces a new risk-sharing requirement. The text was based on technical discussions on export support in November 2004 (Bridges Year 8 No. 10, page 9) and did not address the key political issue of deciding a 'credible end date' for the elimination of export support. It also left the details of special and differential treatment for developing countries up to further negotiations.

Domestic Support: G-20 Proposes Blue Box Criteria

The G-20 group of developing countries called for the establishment of product-specific spending caps for Blue Box payments (partially decoupled farm support under production-limiting programmes) similar to those Members agreed to negotiate for the Amber Box (trade-distorting subsidies) under the framework agreement. The G-20, which had advocated the elimination of the Blue Box, insisted that this support category was only designed to help major subsidisers reform their agricultural programmes, and that such programmes should therefore be considered temporary in nature. The EU, which faces the steepest potential Blue Box cuts, said the G-20 proposal to cap payments per product would reopen a carefully constructed compromise in the framework and would prevent agreement by the Hong Kong Ministerial.

The G-20 pointed out that the framework called for the negotiation of criteria to ensure that Blue Box payments are less trade-distorting than those under the Amber Box. Australia, Canada and New Zealand concurred. Australia and the G-10 group of (mostly industrialised) net food importers agreed that the new Blue Box provision for

payments when production is not required – added to accommodate US countercyclical price support – meant that new criteria would be needed. The US also said the negotiations provided an opportunity to ensure that the Blue Box would genuinely serve to move away from trade-distorting support.

Amber Box Caps: Members continued discussions on an appropriate base period for determining the level of product-specific spending caps for Amber Box support, with some advocating an 'Olympic average' (average for some years but excluding the highest and lowest years). Some Members pointed out that the framework not only called for the establishment of caps, but also envisaged reductions in support given to specific products. Canada proposed applying different ways of calculating the average depending on how high the support was. Others such as the EU said this method would be unacceptable.

Reference Periods For Domestic Support Commitments: According to the framework agreement, developed country Members must 'substantially reduce' their combined Amber Box, *de minimis* and Blue Box support. Several countries said the final bound rate could serve as a basis for Amber Box reductions. Australia suggested that the simplest solution would be to use the same base year for all three categories, but acknowledged that up-to-date information was lacking. Some members called for technical assistance through seminars and papers.

Market Access: No progress on tariff reduction formula

The December session also saw the first discussion since the adoption of the framework agreement on the tariff reduction formula. Little was achieved, however, as delegates stuck to their old positions. Thus, the US and G-20 members supported the 'Swiss' harmonising formula (which would see higher cuts in higher tariffs) while the

Continued on page 10

EU and the G-10 favoured the Uruguay Round formula, which sets an average tariff cut with a minimum reduction per tariff line. The framework agreement requires steeper cuts in higher tariff brackets or 'tiers' (these remain to be negotiated), but offers flexibilities, such as 'sensitive products' for all Members plus 'special products' for developing countries. Costa Rica and New Zealand suggested that the type of formula applied within each tier should depend on the number of tiers. The stricter Swiss formula would be applied if there were few tiers, each covering a broad range of starting tariffs, while the more flexible Uruguay Round approach could apply if there were more, narrower tiers. The EU and the G-10 (minus Bulgaria) strongly opposed this approach. The EU argued that it could lead to anomalies since a Swiss formula applied to a tariff at the lower end of a tier could result in gentler cuts than one applied to a tariff at the top of the tier below.

Sensitive products: G-20 members Chile and Argentina rejected the G-10's suggestion of applying a 'similar but separate' formula to sensitive products (the criteria for determining these remains to be negotiated).

Ad valorem duties: The framework agreement requires Members to convert specific duties (i.e. a fixed monetary amount per volume of imports – these duties typically account for high tariff peaks) to *ad valorem* duties (determined as a percentage of value). Based on discussions so far, Chair Groser issued a draft text on 11 January, recommending a 'unit value' method for the conversion. This would involve calculating the value of the specific duty (usually based on weight) for a single piece of each affected product and then converting that amount into a percentage. As a base period, he suggested the average of the most recent five years for which data was available.

Special Safeguard Mechanism

The agreement to negotiate – under the market access pillar – a 'special safeguard mechanism' (SSM) to protect developing countries against sudden import surges was a major victory for the G-33 group of developing countries. At the December session, the group submitted a paper explaining that the SSM was necessary to improve on existing safeguard provisions, which had

proved inadequate "to address the concerns of developing country Members related to stabilising domestic markets and avoiding sudden increases of imports that threaten to disrupt domestic production and employment." The paper noted that developing country Members often lacked the capacity to follow the rigorous provisions of existing procedures, particularly as small subsistence farmers found it difficult to establish the necessary causal link between imports and injury. To remedy the situation, the paper proposed "building on the flexibilities embedded in the existing safeguard provisions [in the Agreement on Agriculture] rather than extracting from them." Specifically, it proposed that the safeguard measure should: be automatically triggered, as well as simple, effective and easy to implement; it should be available to all agricultural products and apply both in case of import surges and price falls; and additional duties, as well as quantitative restrictions, should be considered as response measures. China, Brazil, El Salvador, Indonesia, Kenya, Mauritius, Morocco, the Philippines, Sri Lanka and Turkey supported the paper, with Kenya adding that no limitations should be placed on the SSM so as to allow countries to effectively address import surges and price fluctuations.

Reactions to the SSM paper were not split just along North-South lines. For instance, Argentina, Brazil, Chile, Costa Rica, Egypt, Malaysia, Thailand and Uruguay joined Australia, Canada, the EU, New Zealand and the US in voicing concern that too much flexibility would defeat the purpose of liberalisation and hamper South-South trade. Some of these countries suggested that the ability to use the safeguard should be related to the depth of tariff reductions (i.e. it should primarily apply to products that already have low tariffs in order to facilitate the overall liberalisation process) and should be temporary. Several also said the mechanism would be simpler if it was triggered only by import surges and not by price falls.

The EU and the US noted that rather than extending SSM coverage to all agricultural products, criteria should be negotiated, perhaps limiting the mechanism's application to only staple food products or products necessary for food security. Members also discussed how broadly or how narrowly the products should be defined (the Harmonised System digit-level), the relationship with the current special safeguard, the basis for calculating whether there has been an import surge, how to deal with products that are subject to quotas, and the mechanism's transparency.

Geographical Indications Discussed for First Time

Despite earlier objections from a number of Cairns Group members, as well as the G-20, to discussing topics 'of interest but not agreed', such as geographical indications (GIs) this early in the process, WTO Deputy Director-General Francisco Thompson-Flôres on 16 December held an initial technical consultation on how to proceed with GIs in the agriculture negotiations. Predictably, the EU and Bulgaria insisted that GIs should be part of the market access discussions, while some Cairns Group maintained that the framework said this was "not agreed".

Although Mr Thompson-Flôres wanted to focus on proposed topics for the meetings, delegates spent most of the two hours covering familiar ground on why they sought or opposed extending to other products the higher level of protection currently given to wines and spirits. Switzerland, the EU and Bulgaria wanted the discussion to focus only on the extension. They said the consultations should not cover geographical indications in general, the negotiations on a register for wines and spirits, or 'clawback' (the EU's proposal to reclaim terms used in other countries, submitted as a market access issue in the agriculture negotiations). Australia was among those insisting that clawback and the register were part of the picture.

The Chair commented that Members needed to get down to business to sort out the technical questions because later next year countries with an interest in this subject were likely to raise it as a political question in the context of the broader Doha Agenda rather than within this technical group. Based on some suggestions for topics to be considered, Mr Thompson-Flôres said he would compile a list, circulate it in the new year, and call the next informal meetings in early February and in March.

The next agriculture week is scheduled to begin on 7 February 2005.

Divisions Continue on Industrial Tariffs

WTO Members are no closer to agreement on the approach to be pursued to reduce industrial tariffs, or on whether to focus first on an overall tariff cut formula or sector-specific elimination.

The conceptual difference between developed and developing countries seemed as wide as ever at the December meeting of the Negotiating Group on Non-agricultural Market Access (NAMA) with regard to choosing a formula for cutting tariffs for industrial products, which as of 1 January 2005 include textiles and clothing. OECD countries continue to insist on a 'Swiss-type' harmonising formula that would flatten the allowable tariff range, while a number of key developing countries maintain that the principle of 'less than full reciprocity' is incompatible with the steep cuts in high tariffs that would result from across-the-board application of a Swiss formula. It should be noted, however, that some technologically-advanced developing countries, such as Malaysia, favour the application of a harmonising formula. On the other hand, there is a marked contrast with the EU's strong insistence on such a formula for all WTO Members' industrial tariffs and its adamant opposition to applying that approach to agricultural tariff reductions (see page 9 for the NAMA-agriculture linkage).

Less than Full Reciprocity and S&D

Kenya made a point of differentiating between the 'less than full reciprocity' principle – which should address development concerns – and 'special and differential treatment' (S&D) designed to assist developing countries in complying with WTO rules through longer implementation periods and other adjustment measures. Seconding this point of view, India said that developing countries should be allowed to make less far-reaching market access commitments than developed WTO Members, and that those commitments should be determined according to the country's level of development. As an alternative to the Swiss formula for addressing tariff peaks, India suggested the negotiation of tariff ceilings.

Sectoral vs Overall Approach

Proponents of the sectoral approach – including the US and Canada – claimed that such a strategy had been successful in the past, pointing to agreements on toys and raw materials such as paper products and steel. Developing countries remained generally unconvinced of the merits of this approach, arguing that Members should devote their energies to developing a tariff-reduction formula. China was sceptical about the value of sectoral agreements; along with India, it argued that such an approach might not even be necessary if an agreed formula cut tariffs substantially enough. Brazil demanded that participation in any sectoral initiative be voluntary. Several developing country Members fear that sectoral deals would leave them facing high tariffs in areas of importance to them, and a number of them requested more studies on the impacts of different liberalisation scenarios (see related article on page 6).

In contrast, supporters of sectoral liberalisation argued that a 'critical mass'-based approach – which would see tariffs on a product eliminated when a sufficiently high percentage of countries trading in it agree to participate in the initiative – would address Brazil's desire to keep participation voluntary. Some countries asked the WTO Secretariat to prepare studies on the sectoral approach, looking at whether such initiatives had ever been successful in the past.

Non-tariff Barriers

Discussions on non-tariff barriers (NTBs, mandated for negotiation both in the Doha Declaration and the 1 August framework text) came to no conclusion on the way forward. While Kenya and the EU advocated addressing NTBs as a whole in the NAMA group, some others thought they should be dealt with within the relevant bodies such as the Committee on Sanitary and Phytosanitary Measures or the Committee on Technical Barriers for Trade. The US suggested that the Chair could hold consultations on NTBs with smaller groups of Members. New Zealand stressed that Members were obliged to ensure the legitimacy of their NTBs under WTO law. Given the absence of consensus on how to change the process for dealing with NTBs, the Chair decided that work would simply continue as it has been proceeding.

The NAMA Negotiating Group is scheduled to meet next in early February 2005.

Textiles Update

With the elimination of decades-old quotas on 1 January 2005, textiles and clothing products have been fully integrated into WTO disciplines on industrial goods. In October, Tanzania requested the Secretariat to look into problems that least-developed countries (LDCs) are likely to face, as well as to propose ways for a 'smooth transition' to a post-quota environment, including the preservation of pre-quota market access. The WTO's LDC Sub-committee approved a watered-down version of this request on 20 January. Instead of analysing adjustment costs or ways to safeguard pre-2005 market access, the Secretariat was instructed to "look into options for LDCs to improve their competitiveness in textiles and clothing business, namely coherence programmes of the International Monetary Fund and the World Bank, more flexible rules of origin, technical assistance and capacity-building, bilateral co-operation programmes and other means to tackle constraints affecting LDCs' exports."

China had advocated a similar response – which essentially bypasses the need for specific WTO action – to earlier requests by other developing countries for a study on adjustment costs and the establishment of a work programme to seek solutions to the problems identified in the study, as well as Turkey's call for a WTO mechanism to monitor post-quota distortions in the textiles trade, and a 'self-triggering' safeguard mechanism to defend against unfair trade practices (Bridges Year 8 No.9, page 1).

In related news, the Committee on Trade and Development agreed late last year on the 2005 Technical Assistance and Training Plan. Adoption of the plan had been held hostage to Brazil's, China's and some others' opposition to WTO technical assistance in the field of textiles and clothing (Bridges Year 8 No.10, page 8). Members ultimately decided that the four regional seminars planned on the topic must be cancelled, although the Secretariat could respond to requests for national-level seminars from developing countries and LDCs.

Services Update

At the December meeting of the Negotiating Group on Services, sixteen developed and developing WTO Members presented a statement calling for countries to communicate their market access priorities before the end of the first services week that starts on 7 February 2005. Only around 50 WTO Members (counting the 25 EU members as individual countries) have tabled their initial market opening offers so far, and most of those have been modest. Revised offers are due by May 2005.

In an attempt to break the deadlock, the EU has tabled revised market access requests to 103 WTO Members. The European Commission said in a press release that the requests were tailored to the recipient's level of development, and generally covered professional services, other business services, telecommunications, postal and courier services, distribution, construction and related engineering services, financial services, environmental services, tourism, news agency services and energy services.

According to the Commission, least-developed countries were requested to make offers in only two sectors out of five that "provide essential infrastructure for economic development, such as telecommunication, financial services, transport, construction and environmental services". No requests were made to any country in the health or audio-visual services sectors, and only the US received a demand related to privately-funded education services. The EU expects to discuss the requests at the services group's February meeting.

- **Corrigendum:** An article on the gambling dispute in Bridges Year 8, No.10, page 7 erroneously stated that the panel had found US restrictions on internet gambling to violate the national treatment (NT) principle. In fact, having already found a violation of a specific market access commitment, the panel declined to rule on the NT claim on the grounds of 'judicial economy'.

Developments in Rules Negotiations

In the December 2004 rules discussions, Korea complained that talks on fisheries subsidies were advancing too quickly, while the US suggested that Members should pay interest when refunding anti-dumping duties found to be excessive.

At the meeting, the US put forward a submission (TN/RL/W/169) expressing support for a November 2004 proposal (TN/RL/W/166) by Argentina, Chile, Ecuador, New Zealand, the Philippines and Peru which would have Members first broadly prohibit fisheries subsidies and subsequently negotiate appropriate exceptions to the ban. According to the US, the "primary focus of the negotiations should be to strengthen disciplines on fisheries subsidies that contribute directly to overcapacity and overfishing," and the November proposal's 'top-down' approach "offers a simple, administrable, enforceable and realistic structure" for doing so. In addition to the six sponsors of that proposal, Australia, Brazil, Pakistan, and Venezuela expressed support for the US submission.

Japan opposed the proposal for a general prohibition on fisheries subsidies, and once again argued for a 'bottom up' approach (TN/RL/W/164) that would require Members to evaluate each type of subsidy and slate it for preservation or elimination depending on its effect. The US countered that the Japanese approach would "contemplate a very small number of prohibited subsidies and a large number of permitted subsidies," and that it "could potentially lead to a set of disciplines weaker than the current rules". Korea, which supports the Japanese approach, said that the fisheries subsidies talks were proceeding far too quickly and urged other Members to make concessions on the issue, arguing that it had already given enough ground itself.

The EU said that the simple fact that Members' generally agreed that harmful subsidies must stop already represented significant progress. It also urged participants not to take hardline positions in favour of the top-down approach on the grounds that the alternative approach might also yield results. India, Sri Lanka, Malaysia, and China emphasised developing countries' need for special and differential treatment.

Anti-dumping Discussions

At the same meeting, the US submitted a paper (TN/RL/W/168) that proposed modifying the Anti-Dumping Agreement to ensure that importing Member governments are required to pay interest when refunding excess anti-dumping duties to importers. It argued that failing to compel Members to pay interest on such duties would in effect force importers to make interest-free loans to their governments.

Members also discussed a proposal by Canada on 'like products' as well as others by the 'Friends of Anti-Dumping Negotiations' group on the definition of 'domestic industry' and on the determination of injury. The Friends of Anti-Dumping Negotiations include Brazil, Canada, Chile, Colombia, Costa Rica, Hong Kong, India, Israel, Japan, Korea, Norway, Singapore, Switzerland, Taiwan and Thailand. Senior officials of the coalition held a meeting in January to discuss a strategy for moving the talks forward. The group, which so far has made 22 proposals aimed at curbing abuse of trade remedies, agreed to reach out to other WTO Members and discussed the possibility of issuing a comprehensive legal text incorporating all of its suggestions. No decision was taken. Meanwhile, some trade analysts speculate that with so many Members worried about China's dominance in textiles and other industrial products trade, the emphasis of the anti-dumping discussions may shift to improving defensive instruments. This is already the position of the US and Egypt, which share the view that the problem is anti-dumping itself rather than measures taken to counter it.

During informal discussions on the Chair's draft text on transparency in the WTO review of regional trade agreements, Members broadly supported the creation of a mechanism similar to the trade policy review to look at such agreements.

The Negotiating Group on Rules will meet next on 21-23 February.

EU's Sugar, Banana Reforms under Crossfire

Members of the African, Asian and Pacific Group of States have strongly condemned the European Commission's plan to reduce its guaranteed sugar price by a third, while Central and Latin American banana producing countries have launched a joint fight against the high tariff proposed by the Commission for bananas.

On 26 January, presidents and high officials from Ecuador, Colombia, Costa Rica, Guatemala, Honduras, Panama and Nicaragua signed a declaration rejecting the EUR230/tonne tariff the EU is proposing to adopt as of next year when it is to eliminate banana quotas and move to a tariff-only regime. According to the Latin American leaders, the tariff does not respect the spirit of the WTO banana settlement or the 1 August 2004 framework agreement, which calls on Members to achieve the 'fullest liberalisation' of trade in tropical products. The seven countries agreed to give themselves three months to negotiate with the EU before deciding on more drastic measures, such as a possible WTO challenge.

The EU has already rejected Ecuador's request to keep the quota system in place for another two years during which a compromise could be negotiated. Instead, once the tariff has been approved by EU Member states, it is likely to be submitted to WTO arbitration as the two sides agreed in 2001 on an accelerated decision by WTO arbitrators on whether the proposed single tariff would 'at least' maintain producers' market share. That process is set to take three months once arbitrators are appointed, probably in June. However, the arbitrators' decision is unlikely to hold for long, as the August framework agreement on agriculture requires Members to convert specific duties to percentage-based ad valorem tariffs, which fluctuate with the price of the product (see page 10).

Background

The EU committed to complete the transition to a tariff-only regime by 1 January 2006 after the WTO found its quota system discriminatory in 1997. Under the current import regime, ACP countries have a 750,000 tonne duty-free quota, while Latin American 'dollar banana' producers share a 2.7 million tonne quota with a EUR75/tonne tariff. ACP countries have claimed that without quota protection they would need a tariff advantage between EUR275-300/tonne, while the most the Latin Americans are willing to accept is the current EUR75/tonne. Although the tariff-only regime is expected to contribute to a further decline of Caribbean islands' banana exports to the EU, former World Bank economist Brent Borrell has predicted that a EUR230/tonne tariff would shift production and sales to Africa from countries like Ecuador, Panama and Honduras, which could only maintain existing market access if the tariff did not exceed EUR40/tonne. Mr Borrell noted that banana exports from Africa to the EU reached 500,000 tonnes in 2003, up 100 percent from 1992.

Sugar Reform Draws ACP Wrath

A number of ministers from ACP countries firmly condemned the European Commission's proposal to cut the minimum price for processed sugar from EUR623/tonne to EUR421/tonne and to slash sugar beet prices from EUR43.6/tonne to EUR27.4/tonne. The price cut would also affect ACP countries' guaranteed prices, which have been pegged to the heavily-subsidised internal prices of the EU. Speaking for least-developed country ACP members, Sudan's Industry Minister Galal Yousif Eldegeir said the reform "could be effected within the EU's minimum commitments in the WTO process, treating sugar as a sensitive product and taking into account the relevant provisions of the July WTO package as regards the need to maintain the value of preferential arrangements". Should the Commission go ahead as planned, investment in sugar would cease in the most vulnerable countries "with disastrous consequences for our development," he said.

Jamaica's Minister of Agriculture Roger Clarke said that the projected cut in the guaranteed price of imported raw sugar by at least 37 percent over three years, beginning in July 2006 "would be a mortal blow for small, vulnerable ACP economies and whole societies". Guyana's Trade Minister Clement J. Rohee faulted the EU for equating ACP sugar cane prices with the

EU's internal sugar beet prices, when the Sugar Protocol between the two parties required the EU to "take into account all economic factors relevant to the ACP while negotiating the ACP guaranteed price within the price range obtaining in the EU". Neither the level of the price cut, nor its entry into force or the speed of its implementation could be justified, he maintained.

EU Agriculture Commissioner Marianne Fischer Boel said the Commission was well aware of ACP countries' concerns, but added that she remained committed to seeing the reform through, both for internal reasons and the WTO's adverse ruling on the EU's sugar subsidies. She added that the Commission was working on action plans that would "ease the impact and at the same time enhance the diversification of [ACP] economies." Commissioner Fischer Boel's commitment notwithstanding, the proposed reforms are likely to be significantly watered down as a number of EU member states bitterly oppose them (Bridges Year 8 No.7, page 16).

Sugar Report Appealed

In related news, the EU and complainants Australia, Brazil and Thailand have filed cross-appeals on the October 2004 panel report that faulted the EU for overstepping its spending and quantitative limits for sugar exports under the Agreement on Agriculture (AoA). It also found that the EU's domestic support measures for sugar acted as an illegal export subsidy under the AoA (Bridges Year 8, No.9, page 13). While the EU appealed those findings on 13 January, the complainants requested on 25 January that the Appellate Body rule on their claim that the cross-subsidisation also violated the Agreement on Subsidies and Countervailing Measures (SCM). Australia, Brazil and Thailand argued that the panel erred when it declined to examine the SCM claim on judicial economy grounds. Unlike the AoA, the SCM Agreement requires inconsistent export subsidies to be withdrawn 'without delay', and the complainants requested the Appellate Body to specify a time-period for the EU to do so.

Intellectual Property Protection Dogs Regional Trade Deals

Patent protection for medicines is the most controversial area of a number of free trade agreements in the making. It has also given rise to serious serious domestic discord in India, which is seeking to reform its laws to comply with WTO rules.

One of the main hurdles in free trade negotiations between developed and developing countries is the latter's resistance to the demand for a period of confidentiality (usually five years) on clinical test data that companies seeking marketing approval make available to national regulatory authorities such as health ministries.

This question is at the heart of the breakdown of negotiations between the US and the South African Customs Union (SACU, see Bridges Year 8 No.10, page 17), which now faces by a similar request from the four EFTA countries (Iceland, Liechtenstein, Norway and pharmaceutical heavy-weight Switzerland). According to 57 civil society organisations from SACU and EFTA countries, EFTA governments are "pressuring SACU states to introduce a five- to ten-year exclusivity on data for registration of brand-name medicines. Such protection would apply even when a medicine is not patented or is subject to a compulsory license. During the period for protection, regulatory authorities will not be able to automatically rely on data of clinical tests of original producers when approving the marketing of generic medicines. The authorisation of the original producers will always be necessary, even in emergency situations."

The protest's signatories also denounced EFTA's drive to obtain five-year patent extensions to compensate for 'unreasonable' delays in marketing approvals. Such provisions exceed the requirements of the WTO's Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPS), and are contrary to the letter and spirit of the Doha Declaration on TRIPS and Public Health, the critics alleged, particularly as SACU countries are among those with the highest incidence of HIV/AIDS in the world.

The five-year test data protection requirement is also largely responsible for negotiations stalling between the US and three Andean countries. In addition, during the last round of talks in 2004, Colombia, Ecuador and Peru rejected US demands for an additional five years of 'new use' protec-

tion (i.e. when a drug coming off patent has been found efficient in treating a condition other than the one it was originally patented for); a ban on 'parallel exports' (specifically allowed under the Doha TRIPS and Public Health Declaration); and 'therapeutic' patents that would oblige non-rights holders to pay royalties for the use of a specific medical procedure.

The major systemic implication of these demands is that under Article 4 of the TRIPS Agreement, WTO Members must extend to all other Members any advantage granted to another country. Thus, if a WTO Member agrees to TRIPS-plus provisions in regional or bilateral negotiations, those concessions will automatically apply to the entire membership of the multilateral trading system. With the boom in regional agreements, this 'multilateralisation clause' paves the way to a world where TRIPS-plus concessions are a rule than an exception.

Guatemala Bows to Pressure

Despite the outcry against TRIPS-plus requirements, it is difficult for a developing country vying for access to the richest markets to resist pressure. When the US indicated that Congressional approval of the Central American Free Trade Agreement (CAFTA) would be delayed if Guatemala persisted in denying the five-year protection period for test data, President Oscar Berger agreed to rescind a law approved by an overwhelming majority of by the Guatemalan Parliament only in December 2004. Many trade analysts expect the Andean countries to eventually agree to US demands as well (the Dominican Republic's recent repeal of the hugely popular tax on high fructose corn syrup is another indication of how far countries keen to access an attractive export market are willing to bend; see Bridges Year 8 No.10, page 20).

India Struggles with Patent Legislation

The Indian government's new patent legislation faces wide-spread opposition from both health activists and manufacturers of generic medicines. On 26 December, the government issued an ordinance to comply with the TRIPS requirement to start granting patents for pharmaceutical products as of 1 January 2005. Critics of the new law claim that it goes beyond the demands of the TRIPS Agreement and fails to take full advantage of existing WTO provisions for the protection of public health (see related story on page 13). The ordinance will lapse if lawmakers do not approve it within six months. The Parliament will consider the bill during its budget session beginning in February 2005.

Most importantly, the ordinance requires patents to be granted to products, while India's previous patent regime only required patents to be granted to the chemical processes that resulted in the production of a particular drug. This distinction allowed for the development of a huge generic drug industry built on reverse-engineering of brand-name drugs through slightly modified processes. Although the ordinance does not substantially change the procedures required to obtain a compulsory license from the Indian government to produce copies of products under patent, it does require countries interested in importing generic medicines produced exclusively for export under a compulsory license to issue a separate compulsory license for import. The decree states that "mere new use" of existing drugs is unpatentable, but does not spell out what kind of 'new use' would allow patent protection to be prolonged.

In defense of the new law, India's Commerce and Industry Minister Kamal Nath argued that the rules struck an appropriate balance between the protection of intellectual property rights, public health and national security, and would enhance India's stature as a credible participant in the WTO. He also suggested that India's pharmaceutical and biotechnology industries might benefit from strengthened patent protection, particularly as the country's involvement in the WTO over the past decade had encouraged its pharmaceutical industry to greatly increase investment in research and development – to the point that some players were now actively seeking patent protection.

Access to Medicines After 2005: Opening Pandora's Box?

Karin Timmermans

India is currently in the process of changing its intellectual property laws to conform to the WTO's patent rules for pharmaceuticals. The challenge has large implications given the country's leading position as an exporter of generic medicines and their components.

Developing countries like India that did not grant patent protection for pharmaceutical products prior to the TRIPS Agreement's entry into force, were given until 1 January 2005 to introduce such protection. The introduction of 20-year product patents for medicines in India is significant not only because of its huge population, but also because Indian companies are major suppliers of generic medicines to other developing and developed countries. Thus, India's application of the TRIPS standards is expected to have ramifications far beyond the country's borders.

Under TRIPS' transitional provisions, India had to have a 'mailbox' system in place where applications for pharmaceutical product patents could be filed. Reportedly, more than 5,000 applications are pending in that mailbox [1]. This month, the mailbox will be opened and the assessment of applications will have to commence; if found to be patentable vis-à-vis their filing or priority date, a patent will have to be granted for the remainder of the patent term.

Unfortunately it is not known which applications are pending in the mailbox, nor how Indian authorities will deal with them. Especially, it is unclear what will happen if a 'mailbox-patent' is granted while generic versions are already on the market. Will generic production stop, or will Indian companies challenge such patents? Will they request compulsory licenses? And if so, will those requests be granted?

Because of uncertainty regarding the attitudes and behaviour of the different parties and departments that will shape the answers to these interlinked questions, it is difficult to predict what will happen. So how can access to essential and needed medicines in developing countries be safeguarded? What measures should countries take?

New Drugs: The Problem

The most immediate question that developing countries will have to face is: how can the continuity of supply of generic versions of new medicines be assured?

Compounding factors include the fact that each drug may be protected by multiple patents, resulting in a complex, and country-specific, 'patent thicket'. Furthermore, while in principle patented inventions are disclosed, in practice patents can be difficult to trace. And finally, once obtained, the interpretation of patent claims requires specific expertise, which may be scarce in developing countries.

Short-term Actions

A possible first step would be to identify and make use of 'gaps' in the patent thicket, if any – as Thailand did when initiating the local production of the antiretroviral drug didanosine in powder form, which fell outside the scope of a patent on didanosine tablets [2]. But while a strategy of carefully manoeuvring through the mazes of the patent thicket may in some cases allow for continued supply of generics – and hence facilitate continued access to some drugs in some places – this will not provide a structural solution. Moreover, even though drugs will keep coming off patent over time, ultimately this is a short-term strategy, due to the progressive implementation of TRIPS as well as the gradual replacement of existing drugs by better, future drugs. But where, when and while applicable, this strategy may provide some relief.

Other steps that countries can take include:

- Apply strict criteria for patentability; 'new use' patents, formulation patents and patents for other trivial inventions should not be allowed. Strict criteria will furthermore prevent the patent thicket from expanding unnecessarily.

- Allow for opposition both pre- and post grant, in order to provide ample opportunity for local and generic companies, as well as other interested parties, to challenge and prevent the issuing of trivial patents.¹
- Make patent information easily accessible, including via an on-line, searchable database. In order to not unduly increase the workload of the patent office, applicants could be asked to provide their application in electronic format.
- Generic industry associations could monitor the publication and issuing of pharmaceutical patents and pass relevant information on to their members. Maybe they could also oppose unjustified patents before they are granted, and thereby help screen out 'bad' patents.
- Set up an alert system that informs about patent revocations in developed countries. This system, which ideally should be publicly accessible, would help stakeholders to decide whether to challenge a patent.
- Ensure that domestic laws provide for TRIPS-safeguards, notably compulsory licensing and government use. These safeguard provisions should be workable and should not create undue delays.
- Gain experience in using existing safeguard provisions under national law. The first time is bound to be relatively slow and cumbersome, so countries should not wait for an emergency situation to use these mechanisms. Testing the provisions will also help to find out whether they are workable.
- Avoid TRIPS-plus measures (such as data exclusivity, linkages between patent and registration status, as well as making patent infringement a criminal offense), and avoid bilateral or regional trade agreements that impose such measures.

While these strategies could (and probably should) be applied by all developing countries, their implementation in India and China is especially crucial, since, as major generic producers, the policies of these two countries will

Continued on page 16

have ramifications for the availability of generics throughout the developing world.

Other strategies that countries may consider include price negotiations and voluntary licenses on reasonable terms – although if recent experiences with antiretroviral drugs in Brazil and South Africa are any indication, these strategies are bound to be most successful when they are backed up by a realistic ‘threat’ to use TRIPS safeguards or competition laws.

Future Drugs: The Issues

Whereas the thinking about existing drugs can solely focus on access, the discussion on future drugs – i.e. those that have yet to be invented – will have to touch on R&D as well.² It should include thoughts on how to provide incentives for research focused on ‘neglected’ diseases. For instance, several public-private partnerships, dedicated to finding new cures for specific diseases, have been launched in recent years; examples include the Medicines for Malaria Venture and the Drugs for Neglected Diseases Initiative. While it is too early for any of these initiatives to have delivered new drugs yet, it will be important to evaluate their performance in the future – including with regard to the actual availability and affordability of the products thus developed in developing countries. In fact, any model found to be successful on both accounts may well provide important clues as to how to proceed.

Domestic Production?

Meanwhile, domestic production of medicines appears an attractive option for facilitating access to medicines because of the real or perceived independence it entails. Moreover, one of the crucial TRIPS-safeguards (compulsory licensing) is easiest to implement via local manufacturing. Yet local production will only enhance access in case needed medicines of good quality are produced, and are sold at an affordable price. The latter will depend largely on economies of scale; hence domestic production should not be seen as a panacea.

Furthermore, local production is often limited to formulation, using active pharmaceutical ingredients (APIs) that are imported (mainly from China and India). With product patents in place in both these countries,

sourcing of patented APIs may become a bottleneck. While APIs were included in the ‘30 August Decision’, it is likely that they will only be offered at interesting prices once their production reaches economies of scale – that is, once the relevant medicines come off patent and generic sales take off in the large markets of the developed and/or major developing nations.

Medium-term Actions

Additional strategies to protect people’s access to medicines, which build on and expand the before-mentioned actions, include:

- Insisting on sufficient disclosure of the invention in patent documents. Disclosure of inventions is a basic part of ‘the patent bargain’, though it is not always respected [3]. Adequate disclosure can help domestic researchers and industry; there is no conceivable benefit in foregoing it. Generic or domestic industries or their associations could again play a role here, as ‘watchdogs’.
- Ensuring that both a research exemption and ‘bolar provision’ are incorporated in the national patent law, and that they apply to bio-pharmaceuticals as well as conventional pharmaceuticals.
- National (human) resources could be pooled by setting up a regional patent office that has the capacity to really examine patents critically and to apply strict criteria; this could be a ‘virtual’ regional office, i.e. a network of national offices, each specializing in certain areas of technology.

Building Blocks

While the list of recommended and potential actions pertaining to the intellectual property system seems long, a few principles underlie them all. These are:

- a critical attitude towards standards and criteria for patentability, and toward efforts to further expand the realm of exclusive rights;
- openness and transparency, to facilitate the dissemination of information about patents and the full disclosure of inventions;
- an assertive stance with regard to trivial patents and the use of safeguard mechanisms such as compulsory licensing;
- inclusiveness, and collaboration with all concerned government departments and other stakeholders; and
- co-ordination of policies and actions, within and possibly even between countries.

Conclusion

In order to safeguard access to medicines, developing countries should prepare and enact appropriate intellectual property laws. Yet a change in attitude towards and administration of intellectual property rights is at least as important.

Karin Timmermans is Pharmaceutical Advisor at WHO, Indonesia. Any views expressed in this text are the author’s personal views and may not be attributed to the World Health Organisation.

ENDNOTES

¹ Pre-grant opposition is important, since it could prevent the issuing of trivial patents without litigation, which is often time consuming and expensive, and may be beyond the means of local companies and organisations.

² There is no absolute distinction between existing and future drugs, since, once a future drug has been developed, the challenges described for existing new drugs will apply.

REFERENCES

- 1 Cheri Grace. The effect of changing intellectual property on pharmaceutical industry prospects in India and China: considerations for access to medicines. Department for International Development, UK, June 2004.
- 2 Nathan Ford, David Wilson, Onanong Bunjumnong, Tido von Schoen Angerer. The role of civil society in protecting public health over commercial interests: lessons from Thailand. *The Lancet*, 2004, 363: 560-563.
- 3 Masaharu Kubo, Yukinori Itoh. Problem pharmaceutical patents. *World Patent Information*, 1996; 18(4): 227-233.

Opportunities and Risks in Liberalising Trade in Services in South Africa

Rashad Cassim and Ian Steuart

While exposing South Africa's services sector to the 'fresh winds of international competition' has the potential to unleash significant economy-wide gains, deep and justified concern about unemployment, poverty alleviation and universal access to basic services has resulted in the government adopting a cautious approach to the liberalisation of key services under the GATS.

In terms of its contribution to growth and its export potential, the South African services sector is an increasingly important dimension of the country's economic development. The risks and opportunities of liberalising trade in this area is delicately poised in an environment where regulatory and competition authorities have only relatively recently been established and in which the restructuring of state assets is still far from complete.

The South African government adopted a high-level policy mandate to stimulate the services sector in January 2004, as a central tool to halve unemployment (in excess of 30 percent) and poverty by 2014. The sector is already a large contributor to economic development, accounting for 74 percent of GDP and 72 percent of formal employment in 2003. The government itself plays a central role in the services sector: 40 percent of output may be directly attributed to government activities, while the role of state-owned enterprises in the electricity, transport, and communication sectors is substantial.

Projected growth trends in output and employment indicate that, with respect to growth in value-added, five services sectors exceed the economy-wide average: construction and engineering; medical, dental & other health/veterinary services; business services; government services; and catering and accommodation. Many of the same sectors exceed the projection of economy-wide growth rates in employment and include business services, medical, dental, & other health/veterinary services, government services, finance & insurance, and wholesale and retail services.

Parts of the South African services sector are highly tradable and the country is increasingly becoming a significant exporter of services, particularly to the rest of Africa. Indeed, South Africa became a net exporter of services in 1998, when the value of exports exceeded imports for the first time since 1985. During the 1980s South Africa's exports were a fraction (10 percent) of that of other developing countries. During the 1990s, however, services exports grew at an average annual rate of 6.3 percent, compared to an average of 9 percent for developing economies.

Liberalisation and Privatisation in South Africa

The government's strategy towards the liberalisation of the services sector is inextricably linked to its privatisation strategy. In 1993, the democratic government inherited more than 300 state-owned enterprises (SOEs), with four of the firms accounting for 86 percent of aggregate turnover, 94 percent of total income, 77 percent of all employment, and 91 percent of the total assets of these enterprises. The major state-owned enterprises (or parastatals) today are Eskom (energy), Transnet (transport), Telkom (telecoms) and Denel (defence). Key producer services are still owned by the state although some of these sectors are partially privatised or are in the process of partial privatisation.

As far as these state-owned utilities are concerned, privatisation itself may have little impact on service quality or price. The importance of introducing competition is a more formidable challenge in sectors such as communications and energy than simply selling assets to the private sector without a pro-competitive change in market structure. As far as the provision of private services is concerned (such as finance, tourism and education), major regulatory changes have already taken place. In addition, the government has established a number of regulatory agencies committed to transparent and non-discriminatory rule-making procedures. The

National Electricity Regulator (NER), for example, was established in 1995 to regulate the generation, distribution and transmission of electricity. Similarly, an independent communications authority was set up to oversee the area of communications including broadcasting and telecoms.

One of the major challenges is the independence and credibility of these institutions in ensuring fairer competition in the sectors under their jurisdiction. In this regard the role of competition policy assumes critical importance. South Africa has made considerable progress in the area of competition policy since its democratic transition. The legal framework is set out by the Competition Act (Act 89 of 1998), which came into effect on 1 September 1999. Three institutional bodies were established by the Act: the Competition Commission, the Competition Tribunal, and the Competition Appeal Court. There are still some important jurisdictional issues that need to be resolved between the Commission and the various sector-based regulators, specifically in areas such as finance, communications and energy. It is envisaged that once the process of liberalisation in these sectors is complete all issues relating to competition will fall under the jurisdiction of the Competition Commission.

Liberalisation & the GATS: The Road So Far

The GATS negotiations have important implications for South Africa's domestic reform initiatives. It is important to stress that market access issues are different from domestic competition and regulatory issues. Clearly, there are strong interconnections and the major challenge facing the government is to ensure coherence and consistency in policy. On the domestic efficiency side, market access may be less effective than competition policy. On the export side,

Continued on page 18

South Africa stands to derive major gains from the global liberalisation of services since it has clear comparative advantages in several sectors – particularly with respect to the rest of Africa.

While South Africa has received requests from a number of Members – combined covering every major sector currently listed in the W/120 sectoral classification list – it has not yet submitted requests or an initial offer to the WTO. It has, however, developed initial requests in business services, communication services (particularly mobile cellular services), construction and related engineering services, environmental and energy-related services, and financial services.

The bulk of these requests are to SADC Members¹ and other African countries. Indeed, the most comprehensive requests (i.e., those that cover the most sectors and sub-sectors) are to Members in Sub-Saharan Africa, reflecting the increasing activity of South African service providers in the region. Of requests to non-African Members, the majority are to Members in Asia and South America – the latter largely due to the activity of South African mining companies.

Post-Cancun, the key elements of what is likely to comprise South Africa's initial offer is more difficult to predict. Given South Africa's extensive bilateral agenda, it is likely that South Africa's initial offer will be determined by what is negotiated bilaterally in services with various negotiating partners, particularly the free trade agreement with the United States. Consequently, when it is released, South Africa's initial offer to the WTO is likely to be reasonably comprehensive and will include a range of services already negotiated under various bilateral agreements.

What is certain is that publicly provided services (education and health) will not form part of South Africa's initial offer to the WTO. While South Africa received requests in education and health services during the recent request-offer process and trade in both services is growing robustly, they are perceived as highly sensitive domestically.² Given South Africa's intensive bilateral negotiating process, and the conditions set forth in Article V of the GATS it is unclear how these services will be kept off the GATS negotiating table indefinitely.

South Africa's Trade Negotiating Machinery

There is a general consensus among observers that South Africa's formal mechanisms supporting trade negotiations are not operating optimally from the viewpoint of promoting effective participation in trade negotiations. Compounding this, there is significant variation in the awareness of, and interest in, trade negotiations by other government departments, regulators, and organised business. At the heart of the problem lies a persistent inability to form enduring and co-ordinated institutions of deliberation both to support the trade negotiating agenda and to effectively alter the outcomes of the negotiations themselves.

The ministry responsible for trade negotiations, the Department of Trade and Industry (the DTI), continues to suffer from severe capacity constraints, compounded by a taxing and an ever-intensifying bilateral agenda³. Interaction between the DTI and other departments is patchy while organised business presently remains – on the whole – under-prepared to deal effectively with, and participate meaningfully in, South Africa's trade negotiating agenda. Unfortunately, a recent initiative by the dti to establish a permanent trade forum, facilitating intergovernmental cooperation on trade issues, was not ratified by Cabinet. The constraints inherent in South Africa's trade negotiating machinery are therefore likely to persist.

Conclusions

The liberalisation of services in South Africa is at a delicate stage. A key issue relating to the process of domestic regulatory reform must be to distinguish regulations necessary to meet legitimate economic objectives and conceptions of distributive justice in a post-Apartheid South Africa from those that are merely protectionist, which serve to prolong economic inefficiency, constrain economic growth and hinder labour absorption. In a context in which all the backbone infrastructure sectors (telecommunications, transport, and energy) are state-owned or partially state-owned monopolies, the efficacy of regulation is critical in determining the adequacy and efficiency of these sectors and their contribution to growth and development.

With respect to the GATS, however, South Africa should not only endeavour to lock-in unilateral reforms made since 1994 but also commit to the timing of future liberalisation measures in its schedule of commitments. This will improve South Africa's negotiating leverage, provide an external mechanism by which to protect the government against politically influential lobby groups opposed to further reform, and hold government departments accountable to further reform.

Rashad Cassim and Ian Steuart teach at the School of Economics and Business Sciences, University of the Witwatersrand, Johannesburg. This article is based on a longer study for the Programme on Trade in Services and Sustainable Development co-ordinated by ICTSD with the support of GTZ (Germany) and the Ministry of Foreign Affairs of Sweden.

ENDNOTES

¹ The Southern African Development Community: Angola; Botswana; the Democratic Republic of the Congo (DRC); Lesotho; Malawi; Mauritius; Mozambique; Namibia; Seychelles; South Africa; Swaziland; Tanzania; Zambia; and Zimbabwe.

² Ironically, South Africa's existing commitments in professional services include medical professionals.

³ South Africa is currently negotiating FTAs with EFTA, Mercosur, and the US, and plans to begin negotiations with China, India, and Nigeria in 2005.

REFERENCES

- Draper, P. (2004), "South African Business and Trade Negotiations: Findings from a Survey of South African Foundation Members", mimeo, *Development Through Trade* project, South African Institute of International Affairs.
- Sally, R. (2002), "Developing Countries and the Liberalisation of Services: Strategies for Market Access and Growth", a report for the Commonwealth Business Council (CBC).
- Van Seventer, D., & Hanival, S. (2004), "South Africa Sectoral Outlook: 2004-2009", Trade and Industry Policies & Strategies (TIPS), November 2004, Pretoria.

Millennium Project Calls for Balancing the Trading System

A UN-sponsored report released on 17 January reproached the global trading system for being “unbalanced against the interests of developing countries”. Efforts to correct this should focus on improving both market access and supply-side competitiveness for low-income countries, the authors concluded, repeatedly emphasising the need for assisting poor countries in adjusting to the impacts of trade liberalisation.

The report, entitled *A Practical Plan to Achieve the Millennium Development Goals* was commissioned by UN Secretary-General Kofi Annan to propose the best strategies for meeting the Millennium Development Goals (MDGs, see background below). Above all, it calls for a significant increase in development aid to 0.54 percent of industrialised countries’ income by 2015, and argues that the often unfocused and inefficient international development system is in need of a major overhaul. The report sets out 10 key recommendations for ‘quick wins’ and broader aims, including a call for greater market access, building supply-side capacities, regional co-operation on trade and environmental management, and strengthening UN agencies.

Trade: Improving Market Access and Supply-side Capacity

In the chapter dealing specifically with trade, the authors singled out agriculture as the “biggest and costliest aberration of the trading system,” urging rich countries to deliver substantial liberalisation under all three pillars of the agriculture negotiations (domestic support, export subsidies and market access). Developed countries should aim to remove all export subsidies and decouple all support to farmers by 2010, and to cap all domestic support measures at five percent by 2015, while addressing tariff peaks and tariff escalation. Additional complications for poor countries resulting from agricultural liberalisation, such as increased food import costs, should be dealt with by a significant increase in international aid, the authors recommended.

The need for “economically and socially sustainable adjustment costs” was also emphasised with regard to tariff reductions for non-agricultural goods and in particular the elimination of textiles and clothing quotas. In this context, the report called for developed countries to bind all tariffs for non-agricultural goods at zero by 2015. While acknowledging the need for less than full reciprocity, the report also noted that binding tariffs in developing countries at uniform and moderate rates would be “in their own development interests”.

Regarding trade in services, the authors pointed to liberalisation in mode 4 (temporary movement of people to supply services) as a “major source of gains for developing countries, capable of bringing more benefits to them than perhaps any other part of the Doha Agenda”. Here again, the authors highlighted the need for managing adjustment, which would require appropriate care to the nature, pace and sequencing of reform. While the report suggested bilateral and plurilateral agreements as an interim step, it cautioned that WTO commitments remained “the best and most effective way to deliver gains to developing countries.”

Moreover, the report stressed the importance of making special & differential treatment more effective and operational, including an incremental and temporary “aid for trade fund” or significantly increased contributions through existing channels “to support countries in addressing adjustment costs associated with the implementation of a Doha reform agenda.”

Other issues taken up in the report included the need to reduce anti-dumping measures; assist poor countries in meeting OECD standards; replace preferences with equivalent development assistance; provide support for coping with the erosion of trade preferences; and assess the impact of intellectual property rules on developing countries.

In addition to recommendations related to the Doha Round negotiations, the report stressed the equal – and often neglected – importance of promoting the export supply side in low-income countries, in particular primary commodity exporting countries which have tended to stagnate compared to exporters of manufactured goods. Related policies and investments should be a central element within countries’ MDG-based poverty reduction strategies.

Need for Political Will

Many observers, while welcoming the report, stressed the need for countries to muster the necessary political will to put the recommendations into practice. This year “must see substantial new investment to fund a war on poverty,” said Jonathan Hepburn, policy co-ordinator of Oxfam’s MDGs campaign, pointing in particular to the US, Japan and Germany. Steve Tibbett of ActionAid UK faulted the report for “still trumpeting the development model of 25 years ago even though it has not worked.” Saradha Iyer of the Malaysia-based Third World Network said that the bulk of the sectoral reports was “too academic to be useful for something as practical as the MDGs”. Most those reports were about 300 pages long. Others have criticised the report’s emphasis on aid, pointing to ‘bad governance’ – a euphemism for corruption – as one of the key underlying causes of poverty.

Background

The MDGs are the world’s targets for dramatically reducing extreme poverty in its many dimensions by 2015 – income poverty, hunger, disease, exclusion, lack of infrastructure and shelter – while promoting gender equality, education, health, and environmental sustainability. The three-year UN Millennium Project, which is directed by Professor Jeffrey D. Sachs, Special Advisor to the UN Secretary-General on the Millennium Development Goals, is an independent advisory body charged with proposing cost-effective measures for achieving the MDGs. The bulk of its analytical work was carried out by ten thematic task forces comprising more than 250 experts from around the world. The task force on trade was co-ordinated by Ernesto Zedillo, Director, Yale Center for the Study of Globalisation, and Patrick Messerlin, Professor of Economics, Institut d’Etudes Politiques de Paris and Director of the Groupe d’Economie Mondiale.

The report is available at <http://unmp.forumone.com/>.

Kyoto Protocol

On 18 December climate change negotiators wrapped up two weeks of discussions by agreeing to engage in further talks on what might come after the Kyoto Protocol. The tenth Conference of the Parties (COP) to the UN Framework Convention on Climate Change convened on a high note in Buenos Aires, Argentina, following the recent Russian ratification of the Kyoto Protocol and its imminent entry into force. Despite all the positive momentum, the conference quickly became bogged down in disagreement, with negotiators haggling over the turn of phrase on just how to move beyond the expiry of the Kyoto Protocol in 2012, and on how to treat oil exporting countries that might be adversely affected by climate change mitigation measures taking off around the world. The US and oil exporters such as Saudi Arabia provided fierce resistance to attempts to move the process ahead, and large developing countries with soaring emissions, such as India and China, were explicit about not yet wanting to take on any emissions reduction commitments.

In the end, negotiators agreed to hold a seminar in June 2005 to exchange information on possible future climate change measures, rather than start an actual negotiating process. The COP also adopted the “Buenos Aires Programme of Work on Adaptation and Response Measures,” under which a number of workshops and papers will be prepared on these issues and support will be provided for mainstreaming adaptation into sustainable development planning in developing countries.

Certain issues were left unresolved, and will be addressed at technical meetings to be held in Bonn in June 2005. These issues included ‘good practices’ in policies and measures that countries take to address climate change, as well as issues related to the adverse effects of policies and measures under the Kyoto Protocol. These adverse impacts would mainly be felt by oil exporting countries, which blocked progress in this area.

Small Islands, Sustainability and Trade

Trade featured high on the agenda at a recent meeting on small island developing states (SIDS), held from 10–14 January at Port Louis, Mauritius. As the meeting took place soon after the devastating tsunami in Southeast Asia, participants linked it to the needs of SIDS in areas such as early warning systems, with Kofi Annan calling for a global system in this regard.

The International Meeting to Review the Implementation of the Programme of Action for the Sustainable Development of SIDS, which counted UN Secretary-General Kofi Annan and presidents from 18 countries among the 2000 participants, concluded by adopting a Mauritius Declaration and the Mauritius Strategy for further implementing the Programme of Action.

Tough Negotiations on Trade Text

The Strategy for the Further Implementation of the Programme of Action for the Sustainable Development of SIDS – adopted at the end of the conference as the Mauritius Strategy – had been under negotiation through a series of regional meetings and sessions of the UN Commission on Sustainable Development. The strategy covers a number of areas, including: climate change; natural and environmental disasters; management of wastes; resources, including coastal and marine; and trade – globalisation and trade liberalisation. At the beginning of the meeting, the section on trade remained one of only two not yet agreed.

During negotiations, participants debated issues related to the erosion of trade preferences and its effects on SIDS. They also addressed the question of whether a special category for small and vulnerable economies, such as the SIDS, should be created within the WTO system. A number of SIDS pushed for this, with Anthony Severin, St. Lucia’s Ambassador to the Caribbean Community arguing that preferential trade rules for small island nations could offset vulnerability resulting from their heavy dependence on exports, tiny local markets and high transportation costs. However, developed countries including the EU opposed such a designation, preferring to make commitments to help improve SIDS’ trade capacities. Among statements by intergovernmental agencies, the UN Environment Programme stressed that environmental issues should not be used as a reason to raise trade barriers.

The Mauritius Declaration

The political outcome of the SIDS conference, the Mauritius Declaration, which sets the context for the “Mauritius Strategy,” recognises that trade is important for building resilience and sustainable development in SIDS, and calls for attention to the specific needs and priorities of SIDS in the trade realm. The declaration calls for SIDS to be supported in fully integrating into the multilateral trading system in accordance with the WTO’s Doha mandate on small economies.

The Mauritius Strategy

The Mauritius Strategy goes into more detail on follow-up and implementation. It acknowledges the special difficulties SIDS face in integrating into the global economy due to their small size and structural disadvantages. According to the Strategy, trade liberalisation and globalisation present SIDS with both opportunities and challenges, including in terms of preference erosion. The Strategy reaffirms countries’ commitment to the rules-based multilateral trading system. It welcomes the WTO July Package and Members’ new resolve to fulfil the development dimension of the Doha Round, and stresses the importance of facilitating effective participation by small economies such as SIDS, which often lack representation in Geneva or are involved in the challenging accession process. The trade section of the Mauritius Strategy concludes by listing areas of key concern to SIDS: WTO accession; graduation from LDC status; capacity constraints; technical assistance; structural vulnerabilities; erosion of preferences; structural adjustment; the relationship between trade, environment and development; trade and food security; and lack of Geneva representation.

The two outcome documents are available at <http://www.un.org/smallislands2005/>

Producing International Public Goods in a Proprietary Science World – the CGIAR Contribution

Carl-Gustaf Thornström

Following the entry into force of a number of international conventions, trade agreements and other regulations over the last 15 years, biological matter and related information are increasingly proprietary: they have left the biological commons.

Around 20 kinds of biological matter and related information now come under different proprietary regimes, such as the Convention Biological Diversity, the International Treaty on Plant Genetic Resources for Food and Agriculture, TRIPS, the Cartagena Biosafety Protocol, UPOV, the International Plant Protection Convention, etc. These treaties cover a vast array of matter and information essential to plant breeding (see box below).

CGIAR's Role in International Agricultural Research

Formed in 1971, the Consultative Group on International Agricultural Research (CGIAR) currently comprises 15 international agricultural research centres focusing on natural resources management, agriculture, agro-forestry, fisheries and livestock. With an annual budget of more than US\$400 million in 2004, the CGIAR is the world's largest publically co-ordinated effort to address fundamental issues related to global food security and environmentally sustainable development. The institution was key to the Green Revolution during 1965-1985, introducing high yielding new seed varieties of maize, wheat and rice, which fed another 500 million people who would have otherwise starved. By increasing yields on existing farm land, the Green Revolution also saved rainforests and other biotopes including marginal lands that would otherwise have been brought under cultivation. This success was based on two basic features: free access to necessary genetic resources all over the world for selection and breeding; and free access to knowledge and technologies necessary to carry out the tasks. Furthermore, most of the necessary research and development in plant breeding was carried out in the public sector by universities and government agencies. But all those conditions have dramatically changed during the last 15 years.

Proprietary Science

The concept of 'proprietary science' was introduced to a wider international audience in the mid-1990s. However, the public sector and the scientific community still seem largely oblivious to the implications of the changes ushered in by this new approach. A 1998 CGIAR evaluation predicted that the private sector could account for around 75 percent of future investments in agro-biotechnology, not least in the field of plant breeding. Combined with national sovereignty over genetic material under the Convention on Biological Diversity (CBD), this fact creates tremendous new challenges to international public agricultural research.

Recent studies of the future niche for the CGIAR focus on its role to promote a 'Doubly Green Revolution': increase yields, maintain and increase agro-biodiversity and promote more environment-friendly agricultural practises. In order to perform this task the CGIAR finds itself at the crossroads of accessing genetic material under national sovereignty, as well as proprietary technology/gene contracts from the private sector regulated by a host of different international agreements. Working with proprietary biological matter and related information creates considerable complexities and needs for revised policies as regards the CGIAR's freedom to innovate and operate with a view to continuing to provide international public goods. Beyond the CGIAR, any public research dealing with biological matter (whether national or international) will face the same challenge.

Meeting the Challenge

In February 2004, the CGIAR's Genetic Resources Policy Committee considered the need to be proactive. The result was a decision to conduct a study on CGIAR's use of other institutions' proprietary biological matter and related information. In late November 2004, a questionnaire was sent out to the 15 CGIAR centres, as well as three CG 'challenge programmes'. Among the 90 questions are issues related to present and future access to genetic material

regulated under the FAO's International Treaty or the CBD, and proprietary technologies regulated under UPOV, TRIPS and/or intellectual property law. The study is slated to conclude by mid-2005.

We expect that the study will indicate present and possible future use of proprietary biological matter and related information and how this may affect the conditions for the CGIAR centres to produce international public goods (IPG). We also hope that the study will give guidance about possible

Continued on page 22

Biological Matter and Related Information under Proprietary Regimes

- plant seeds or other propagative plant parts collected after 1994;
- plant and animal cell lines;
- plasmids;
- other recombinant vectors;
- gene promoters;
- gene markers;
- transformed bacteria;
- isolated plant DNA;
- plant cDNAs;
- isolated animal DNA;
- bacteria (other than the transformed bacteria);
- isolated/purified proteins (other than those obtained by purchase of laboratory reagents);
- equipment for specialised laboratory purposes;
- information regarding laboratory methods;
- genomic sequence database(s);
- other nucleotides sequence database(s) such as PCR primer databases, cDNA sequences, etc.;
- ethnobiological information (traditional knowledge, indigenous knowledge); and
- farming systems information.

avenues to accommodate proprietary interests while maintaining IPG. We anticipate examples of use of CGIAR output in segmented markets or use of proprietary matter and related information free for research and development but with proprietary conditions for final commercial products.

The so-called Golden Rice (pro-vitamin A rice) is one example of successful collaboration between the public and private sectors where proprietary material is made available to a CGIAR centre (IRRI) for further use and development and where the end product will be made available for free to small farmers in South and Southeast Asia. We expect to find more such good examples.

In order to avoid infringements in the future use of other regimes' proprietary material and related information we expect that the study will provide baseline information for the development of CGIAR system-wide guidelines focusing on the institution's mission to provide international public goods and its subsequent freedom to innovate, as well as operate.

The Need for Clear Proprietary Policies for Public Sector Biological Research

The challenges facing the CGIAR apply to any (public) biological research on a global scale; national universities and research institutions cannot stand aside of these new realities. Thus any international transfer of biological matter and related information across national borders with a potential commercial use will be affected.

A proactive approach by the public sector (such as the upcoming CGIAR-study) will be necessary if public research entities want to remain active players in the proprietary science world. The CGIAR's role in a Doubly Green Revolution is in the end about intellectual property and the poor. The concept of 'humanitarian use' will be important if we are to find successful new partnerships between the public and the private sectors in fulfilling the objective to let science serve all members of society.

Carl-Gustaf Thornström is Associate Professor at the Swedish University of Agricultural Sciences and a Member of CGIAR Genetic Resources Policy Committee.

No IPRs for Andean Potato Genes

On 18 January, six indigenous communities in Peru signed a groundbreaking agreement with an international genebank to repatriate genetic material related to native potatoes with the objective of ensuring that "genetic resources and knowledge remain under the custody of the communities and do not become subject to intellectual property rights in any form".

The Andes region around Peru has more than 2,000 varieties of potato, about 700 of which are cultivated in the Potato Park in Cusco. The park, managed by an association of indigenous communities, is one of the contracting parties of the new *Agreement on the Repatriation, Restoration and Monitoring of Agrobiodiversity of Native Potatoes and Associated Community Knowledge Systems*. The other is the International Potato Centre (CIP), one of 15 agricultural research centres under the CGIAR umbrella (see page 21).

Under the repatriation agreement, the CIP will make available "elements related to agrobiodiversity of native potato and associated knowledge available for custody by indigenous communities in the park", as well as provide technical assistance for the maintenance, monitoring and multiplication of seed and management of the repatriated genetic materials. The park's responsibilities include the maintenance of both access to the genetic material and "viable genetic material for distribution and sowing" by the park's members.

In addition to the objective of keeping the repatriated material free of intellectual property rights, the agreement aims to promote, through collaborative research, the role of *in situ* and *ex situ* strategies in the conservation of agricultural biodiversity. It also seeks to strengthen the role of the potato park "as a means of promoting continuity between the two strategies for the mutual benefit of the two parties and of conservation and agricultural development in general".

The parties agreed to implement the treaty "in such a way as to reflect the principles of open sharing for mutual benefit and for the benefit of humanity" in accordance with the provisions of the FAO International Treaty on Plant Genetic Resources and the principles of the Convention on Biological Diversity (CBD). The CIP shall not demand legal ownership of designated germplasm or associated information, and "shall ensure that any other person or institution which receives the germplasm shall be subject to the same provisions". The association of the potato park communities agreed to maintain confidentiality of the details of current CIP research and development on the repatriated biological diversity if the CIP "so requests and where this confidentiality is for specific reasons". Possible benefits from the use of the repatriated materials are to go to improving the park's functions and services, "such as those which benefit the communities in general, the region, and the country".

The Association for Nature and Sustainable Development (ANDES), which represents the park's members, said the agreement challenged the trend of "privatising genetic resources and indigenous knowledge, which has seen seed genebanks swallowed up by unaccountable research bodies and corporations, threatening local livelihoods and cultural ways of life".

Michel Pimbert of the London-based International Institute for Environment and Development said that groundbreaking agreements like the one concluded in Peru required negotiation with all parties on "an equal footing, which means boosting the capacity of local indigenous communities to argue their case for access to the genetic resources they helped develop in the first place."

Some predict that civil society campaigners will push for similar initiatives at the 14 February meeting of the CBD's Working Group on Access and Benefit-sharing, as well as the June 2005 session of the WIPO Intergovernmental Committee on Intellectual Property, Genetic Resources, Traditional Knowledge and Folklore. The Committee agreed in November to enhance the involvement of indigenous communities in its work (Bridges Year 8 No.10, page 14).

ICTSD Project Aims at Enhancing the Participation of Developing Countries in the WTO's Dispute Settlement System

Ten years after the introduction of a more predictable and enforceable WTO dispute settlement system, the cross-cutting implications of recent disputes such as India's challenge against the EU's Generalised System of Preferences, the ongoing biotech dispute between the EU and the US, and Brazil's challenges against EU sugar export subsidies and US cotton subsidies have drawn further attention to the system's credibility in safeguarding Members' trade rights and securing development objectives.

Dispute settlement has become more complex and resource-demanding for a country interested in accessing it, raising concern about the capacity and the ability of poorer developing countries to make effective use of the system when their trade interests are at stake. Participation rates of countries to date justify this concern: while developing countries such as Brazil and India are among the most frequent users, countries in sub-Saharan Africa have never initiated disputes although some of them have participated as third parties. Aside from resource and capacity constraints, the lack of participation of these countries has been attributed to economic and political considerations in bringing challenges against major aid and trade partners. Systemic problems linked to the current structure of the dispute settlement rules, such as the inadequacy of remedies, also create barriers to access the system. This latter point is best illustrated in the recent US and Antigua and Barbuda gambling dispute in which the panel found in favour of Antigua. US trade officials have, however, hinted that even if the US loses its recent appeal, it does not intend to change its rules to comply with the decision. It remains to be seen how a small island with a population of 76,485 can compel compliance from an economic power such as the US under the current dispute settlement rules in the event that the US loses the appeal.

ICTSD recognises the importance of developing country participation in the dispute settlement system both at the level of initiating and defending disputes, and in the ongoing review of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU review) – an avenue that developing countries could use to influence changes in the current rules to facilitate their involvement. In response, ICTSD and partners from the University of Wisconsin, the Graduate Institute of International Studies in Geneva, the University of Geneva and the Advisory Centre on WTO Law have initiated a two-year research and dialogue project aimed at enhancing the participation of developing countries in the DSU system through strengthening their understanding of the options and potential strategies available to them in defending their trade rights. This objective will be achieved through two primary mechanisms: first, the project team will sponsor and co-ordinate original research by forming a multi-disciplinary network of academics from developed and developing countries. Second, starting in 2005, three multi-stakeholder regional dialogues will be organised in Asia, Africa, and South America that will bring together developing country stakeholders to discuss developing country experiences and challenges in an attempt to identify options and solutions. The regional dialogues will present an added opportunity for developing country stakeholders to establish networks for the pooling of legal resources.

This project, sponsored by the Geneva International Academics Network (GIAN), builds on ICTSD's ongoing work on dispute settlement over the years, not least through its regular publications such as the Monthly Review and the Weekly Trade Digest, which have consistently followed developments in the WTO dispute settlement system. On 7 February 2003, ICTSD organised a conference entitled 'Making the WTO Dispute Settlement System Work for Developing and Least-Developed Countries' with the overall objective of facilitating innovative solutions and ideas on how the WTO DSU system could be made more accessible and attractive to developing countries (conference documents are accessible at <http://www.ictsd.org/dlogue/2003-02-07/03-02-07-desc.htm>).

Further information on the project is available at: <http://www.ruig-gian.org/proj/projects2004detail.htm#WTO>, as well as at the ICTSD's website: <http://www.ictsd.org>

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-publisher: Centro Internacional de Política Económica para el Desarrollo Sostenible, San José, Costa Rica
Web: <http://cinpe.una.ac.cr>

PONTES

entro o Comércio e o Desenvolvimento Sustentável
Co-publishers: Fundação Getulio Vargas, São Paulo
Web: <http://www.edesp.edu.br>
CERBI, Rio de Janeiro, Brazil
Web: <http://www.cerbi.org.br>

PASSERELLES

entre le commerce et le développement durable
Co-publisher: ENDA – Tiers Monde, Dakar, Senegal
Web: <http://www.enda.sn>

Other ICTSD periodicals:

BRIDGES Weekly Trade News Digest

A weekly electronic news service on trade, sustainable development and the WTO.
Editor: Malena Sell, msell@ictsd.ch

BRIDGES BioRes

Co-publisher: IUCN – The World Conservation Union
A bi-weekly electronic news service on trade, sustainable development and biological resources.
Editor: Heike Baumüller, hbaumuller@ictsd.ch

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: Yvonne Apea, Christophe Bellman and Sanoussi Bilal; yapea@ictsd.ch

ECLAIRAGE SUR LES NEGOCIATIONS

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: Yvonne Apea, Christophe Bellman et Sanoussi Bilal; yapea@ictsd.ch

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, ediouf@ictsd.ch

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

Meetings of WTO Bodies*

Feb. 7-9	Services Meeting
Feb. 7-9	Negotiating Group on Trade Facilitation
Feb. 7-10	Committee on Agriculture, Special Session*
Feb. 15-16	General Council
Feb. 16	Sub-Committee on Cotton
Feb. 17	Dispute Settlement Body
Feb. 21	Council for Trade in Services, Special Session*
Feb. 21-23	Negotiating Group on Rules
Feb. 21-22	Committee on Trade and Development
Feb. 22 & 24	Committee on Trade and Environment, regular meeting followed by Special Session*
Feb. 28	Dispute Settlement Body, Special Session*
Mar. 3	Sub-Committee on Least-developed Countries
Mar. 7	Negotiating Group on Rules – Regional Trade Agreements
Mar. 7-8	Working Group on Trade, Debt and Finance
Mar. 8-10	Council for Trade-related Aspects of Intellectual Property Rights
Mar. 11	Council for Trade in Goods

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

Other Meetings

Feb. 14 Bangkok	Third Meeting of the Ad Hoc Open-ended Working Group on Access and Benefit-sharing www.biodiv.org/doc/meeting.aspx?mtg=ABSWG-03
Feb. 14-18 Geneva	Second Session of the UN Conference for the Negotiations of a Successor Agreement to the International Tropical Timber Agreement, 1994 http://r0.unctad.org/commodities/
March 2-4 Masai Mara	WTO Mini-Ministerial Hosted by the Government of Kenya
March 18 New Delhi	G-20 Ministerial Meeting Hosted by the Government of India

Selected Documents Circulated at the WTO

Dispute Settlement. 4 January 2005. [Working Procedures for Appellate Review](#) (WT/AB/WP/5)

Negotiating Group on Rules. 13 December 2004. [Additional Views on the Structure of the Fisheries Subsidies Negotiations](#). Communication from the United States (TN/RL/W/169)

Sutherland, Peter et al. 17 January 2005. [The Future of the WTO – Addressing Institutional Challenges in the New Millennium](#). Report of the Consultative Board to the Director-General Supachai Panitchpakdi. WTO. Geneva

Other Selected Resources

Busse, Matthias. July 2004. [Trade, Environmental Regulations and the World Trade Organisation: New Empirical Evidence](#). World Bank. Washington D.C.

Consumer Unity & Trust Society. 2004. [The WTO Agreement on Rules of Origin: Implications for South East Asia](#). CUTS Centre for International Trade, Economics & Environment. Jaipur

Falkner, Robert and Gupta, Aarti. November 2004. [Implementing the Biosafety Protocol: Key Challenges](#). The Royal Institute for International Affairs. London

Fernandez de Cordoba, Santiago and Vanzetti, David. January 2005. [Coping with Trade Reforms: Implications of the WTO Industrial Tariff Negotiations for Developing Countries](#). UNCTAD. Geneva

Jenkins, Rhys and Edwards, Chris. December 2004. [How does China's Growth Affect Poverty Reduction in Asia, Africa and Latin America?](#) Overseas Development Group, University of East Anglia

Lecocq, Franck and Shalizi, Francis. November 2004. [Will the Kyoto Protocol Affect Growth in Russia?](#) World Bank, Washington D.C.

Millennium Project. 17 January 2005. [Investing in Development: A Practical Plan to Achieve the Millennium Development Goals](#). Includes Final Millennium Project Task Force Reports to the UN Secretary-General. The Millennium Project, New York/Earthscan, London

Mitchell, Andrew D (Ed.). 2004. [Challenges and Prospects for the WTO](#). Cameron May. London

Overseas Development Institute. July 2004. [Developed Country Cotton Subsidies and Developing Countries: Unravelling the Impacts on Africa](#). ODI. London

Organisation for Economic Co-operation and Development. December 2004. [A New World Map in Textiles and Clothing – Adjusting to Change](#). OECD. Paris

Oxfam International. January 2005. [The Asian Tsunami: The Challenge after the Jakarta Summit](#). Oxfam. Oxford

