

### In this issue

- 3 The Hong Kong Ministerial: What's at Stake for the Poor?
- 5 How to Read the US and EU Proposals on Domestic Support to Agriculture
- 8 WTO News: Agriculture and SDT
- 11 Now's the Time for Political Leadership on Cotton
- 12 WTO News: Services and TRIPS
- 13 Managing Patents on Medicines
- 15 Environmental Goods: Dispelling Myths to Identify Opportunities
- 16 WTO News: Trade and Environment
- 17 Anti-dumping in Developing Countries
- 18 WTO News: Rules
- 19 Non-tariff Barriers and the Hong Kong Negotiations: How Much of a Risk Do Phytosanitary Controls Pose?
- 21 Barriers to Least-developed Country Participation in the Dispute Settlement System of the WTO
- 22 Doha Round Challenges: Defining Tropical Products
- 24 Meeting Calendar and Resources

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### Facts and Figures

- Respondents in a new survey conducted in the US and five European countries were evenly divided on whether phasing out public subsidies, even to large farms, should be a high, medium, or low priority for their governments.
- Eight out of ten respondents on both continents felt that multinational companies would be major beneficiaries from trade liberalisation; only 35 percent thought small firms at home would benefit.
- Despite general agreement that freer trade increases prosperity at home and abroad, clear majorities in France (74%), Italy (65%), Germany (59%), and the United States (57%) believed it cost jobs at home.

Source: Perspectives on Trade and Poverty Reduction. German Marshall Fund of the US. December 2005

## Whose Development Round Is It?

As hopes have dwindled for finalising the negotiating frameworks for agriculture, industrial market access and services, several Member countries have proposed making development issues the focus of the Hong Kong Ministerial.

Top negotiators recognised in November that ministers would not be in a position to agree on 'full modalities' for concluding negotiations on agriculture and non-agricultural market access (NAMA) in Hong Kong. Instead, they are expected to set new deadlines for reaching consensus on the framework for subsidy and tariff cuts, possibly at another ministerial-level meeting during the first semester of 2006. As a consequence of this general lowering of expectations, some Members have shifted their attention to reaping at least some substantive benefits from the Hong Kong meeting through a focus on development concerns that many consider to have been sidelined in discussions so far.

### The Development Package Approach

Common elements of a 'development package' sought by a number of developing countries, the European Union and the Ministerial Conference host, Hong Kong's Secretary for Commerce, Industry and Technology John Tsang, include duty- and quota-free access to industrialised country markets for all least-developed country (LDC) exports; the adoption of five LDC proposals to amend special and differential treatment provisions in WTO agreements; a permanent solution to poor countries' access to affordable medicines under the Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPS); and a strong aid-for-trade package aimed at strengthening developing countries' participation in the WTO, as well as their capacity to trade.

One of these issues has been formally resolved: on 6 December, Members reached agreement on a permanent amendment to the TRIPS Agreement on the conditions for import and export of generic versions of medicines under patent, although many argue that those conditions are too cumbersome for the system to be of much practical use to poor countries (see page 12). Members also agreed in November to exempt LDCs from the obligation to apply rules protecting patents, copyrights and other intellectual property until 2012. Some observers have, however, noted that the extension is limited since it prohibits LDCs from loosening existing intellectual property laws unless they already go beyond TRIPS requirements.

The draft ministerial declaration states that "developed-country Members, and developing-country Members declaring themselves in a position to do so, agree to fully implement duty-free and quota-free market access for products originating from LDCs by the end of the Round in a manner that ensures security and predictability." This wording may, however, prove unacceptable to the US, which has deep reservations about increased textiles imports from LDCs. One of the five LDC proposals aimed at enhancing special and differential treatment provisions – presented to ministers in Annex F of the draft Hong Kong declaration – offers three different versions for quota- and duty-free access, including one that would provide such access to a certain percentage of LDC products by a year to be negotiated, with Members extending full market access at some later date (see page 9).

With regard to aid-for trade, several WTO Members are expected to announce autonomous financial or technical assistance initiatives in Hong Kong.

*Continued on page 2*

# Bridges

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While most developing countries support measures such as these, many consider them to be insufficient to meet the objectives of negotiations that have been loftily dubbed as the Doha 'Development Agenda'.

## Reclaiming the Development Objectives of the Doha Round

On 28 November, nine developing countries issued a strongly-worded statement contending that the debate on development had been "hijacked by some developed countries" purporting to be speaking for developing countries. Argentina, Brazil, India, Indonesia, Namibia, Pakistan, the Philippines, South Africa and Venezuela stressed that the 'strategic objective' of the negotiations was for developed countries to "undergo structural adjustment by reducing a range of protective and support measures in inefficient sectors in their economies." As examples they cited trade distortions arising from tariffs and subsidies in agriculture and high tariffs on certain industrial products, which had the effect of limiting developing countries' opportunities to increase exports and thus their integration into the global economy.

Agriculture, they reminded, was the central issue of the negotiations, and developing countries should not be asked to pay for market opening in the form of "onerous and burdensome obligations on industrial products and services" that were not commensurate with their levels of development.

Some of the group's criticism was clearly directed at the EU, whose latest agricultural tariff offer (see page 8) was conditioned on advanced developing countries lowering their tariffs for industrialised goods by as much as 75 percent, as well as opening their services markets in nearly a hundred sectors or sub-sectors. While several other developed countries, including the US, also seek significantly better access for their industrial goods and services, they have not made such concessions a quid pro quo for their agricultural offers. South African delegation chief Faizel Ismail said that such demands failed to reflect the central Doha Round principles of less-than-full reciprocity and special and differential treatment for developing countries.

India's Ambassador Ujal Singh Bhatia suggested that the cuts demanded by the EU in non-agricultural market access (NAMA) in exchange for lowering its own tariffs on agricultural products would deny developing countries even a limited amount of policy space and tariff protection that they might use to promote industrialisation. In comparison, the group said, the EU's offer of a 39 percent average reduction in farm tariffs, with lower cuts for sensitive products, would not result in any meaningful new market access.

The group also pointed to developed countries' reluctance to open their services markets to temporary workers as an example of the way they consistently sought to avoid liberalisation in sectors of offensive interest to developing countries (see page 12). In effect, the nine developing countries contended, rich nations were seeking a 'round for free'.

EU Trade Commissioner Peter Mandelson's defence of the Union's agricultural tariff offer has essentially focused on two arguments. The first is that radical agricultural tariff reductions would benefit competitive developing country exporters such as Brazil, but erode the trade preferences of poorer countries, with 'devastating effects' on their agricultural trade. Second, Mr Mandelson has long insisted that the Doha Round negotiations must look beyond the 'agricultural silo' if progress is to be made. In a 30 November statement to the European Parliament, he said that the talks had been stuck for far too long "on one issue and one set of interests – that of agriculture exporters."

Referring to such arguments, the nine developing countries called the recent proposals of 'some major developed countries' an attempt "to sow division among developing countries, re-interpret the framework and trajectory of the negotiations and, in a self-serving manner, narrow, limit and – ultimately – undermine the developmental objectives of the Doha Development Agenda." The group appealed to developed countries to make their positions consistent with the developmental core of the Doha mandate, warning that an 'imbalanced outcome' of the negotiations – one that asked more of developing countries than it gave in exchange – would "exacerbate the crisis of legitimacy of the WTO."

# The Hong Kong Ministerial: What's at Stake for the Poor?

Timothy A. Wise and Kevin P. Gallagher

At the WTO's Cancun Ministerial in 2003, Eveline Herfkens, former World Bank executive director and current executive co-ordinator for the UN's Millenium Development Goals, had this to say, "A pro-poor Doha Round could increase global income by as much as US\$520 billion and lift an additional 144 million people out of poverty. This is why so many hundreds of us come together today."

What a difference two years makes. In 2003, World Bank projections promised US\$832 billion in estimated gains from global trade liberalisation, the majority – US\$539 billion – going to the developing world. These seemingly robust numbers were cited far and wide, by negotiators and NGOs alike.

Now, on the eve of the Hong Kong Ministerial, the so-called gains from trade seem to have evaporated. New projections, from the same World Bank sources, estimate potential welfare gains of US\$287 billion – just one-third their level two years ago. Developing country gains have dropped to US\$90 billion, which represents only a 31-percent share of global gains. When compared to the 60-percent share projected in 2003, this is hardly a good advertisement for this so-called 'development round' of global trade talks.

More dismaying, these figures are based on a scenario of full global trade liberalisation, with the admittedly unrealistic assumption that all tariffs and trade-distorting support are completely eliminated. The same report includes projections for a 'likely Doha scenario' of partial liberalisation, reforms that presently appear ambitious in light of the current deadlock in negotiations.

What can we expect from this more realistic scenario? Global gains of just US\$96 billion, with only US\$16 billion going to the entire developing world. That is less than a penny-a-day per capita for those living in developing countries.

Not surprisingly, the poverty impacts have vanished with the income. The Cancun promise of bringing 144 million people out of poverty has been devalued to 66 million in the full-liberalisation scenario. The researchers' 'likely Doha scenario' brings the number to a sobering 6.2 million people, a 0.3 percent reduction in the number of people living on less than US\$2 a day.

A great deal of attention is being placed on the agriculture part of the negotiations. Indeed, most of gains come from agriculture, but a bigger piece of a much smaller pie will not feed the hungry. Developing country gains from 'likely' agricultural reforms, amount to less than 0.1 percent of GDP, just US\$9 billion. Likely gains from Northern subsidy reduction are projected at barely US\$1 billion.

The model projections now show a disproportionate share of the benefits going to high-income countries. In the full-liberalisation scenario, rich countries, with their bigger economies, get more than twice the income gain in dollar terms, and more than ten times the gain per capita. In the 'likely Doha scenario', rich countries capture nearly twice the percentage gain in GDP, five times the dollar gain, and a remarkable 25 times the developing country gain per capita.

The World Bank modelled the impacts of agricultural trade liberalisation and reductions in non-agricultural tariffs, but not services which are widely considered too difficult to project with any reliability. Popular presentations of the World Bank's research leave out the most important findings: the numbers themselves.<sup>1</sup> And the numbers paint their own stark picture of the limited gains from trade (see table below).

In fact, the picture is far worse if one puts these numbers in their proper context:

- Trade liberalisation brings a one-time increase in GDP, not an increase in growth rates.
- The World Bank's model phases in these gains between the base year of 2001 and the end year of 2015. Spread the gains over ten years, and the numbers shrink to complete insignificance – barely one-hundredth of a percent of GDP. For someone making US\$100 per month, that would amount to a sixteen-cent raise in monthly salary after ten years.
- Half of the developing country benefits go to just eight countries: Brazil, Argentina, China, India, Thailand, Vietnam, Mexico, and Turkey.

## Where Did All the Benefits Go?

What happened to the vast gains of just two years ago? One thing the World Bank researchers seem to have done well, or at least better than they had earlier, is to find ways to bring their abstract models a few steps closer to reality. Results should still be taken with a healthy dose of salt, mainly because they rest on a very shaky set of assumptions. For example, most of these computable general equilibrium models assume full or fixed employment, i.e., no gains or losses in overall employment within any country. Workers are assumed to find new jobs in expanding sectors. That keeps most of the models in equilibrium, but makes their findings particularly unstable.

Benefits of a 'likely' Doha Round Scenario			
	Beneficiary Region		
WELFARE GAIN	High-income	Developing	World
Total amounts, in US\$ billions	80	16	96
Per capita, in US\$ per person/per annum	79.04	3.13	15.67
Percentage of gross national product (GDP)	0.24%	0.16%	0.23%

Source: Anderson, K. and Martin, W. "Agricultural Trade Reform and the Doha Development Agenda," *World Economy*, September 2005, Table 10, p. 1319; authors' calculations.

*Continued on page 4*

Still, this year's models, based on the recently updated GTAP Version 6 database, made several notable improvements. They updated the 'base year' from 1997 to 2001, while notably bringing China's liberalisation, and accession to the WTO, into the base as a reform already achieved. Not surprisingly, China's gains accounted for a significant proportion of developing country gains in the earlier modelling, though most results were reported as if all developing countries stood equally to gain from an ambitious WTO agreement. The new versions of the models also incorporated the European Union's expansion, the expiration of the Agreement on Textiles and Clothing, and more detailed data on applied versus bound tariffs, including the effect of trade preferences and regional trade agreements. The result is demonstrably closer to the realities of today's global economy.

Therein lies the problem for those seeking to generate numbers that will motivate developing country negotiators to come to Hong Kong ready to make concessions in order to capture the gains from trade. Those gains, quite simply, have largely vanished. In fact, they were mostly never there to begin with. True, this year's lower projections are partially the result of liberalisation that took place since 1997. In that sense, the world has simply already realised many of the gains from trade embodied in the pre-Cancun projections.

### Calculating the Costs

The World Bank study identifies only the potential benefits. But what are the costs? What do developing country governments have to give up to get their coveted market access? Many of the proposals in agriculture, services, intellectual property, and non-agricultural market access will squeeze the ability of nations to deploy effective development strategies. Such a loss of policy space will not only be *legally* constraining, but will come at significant *economic* cost as well.

Key among those costs will be the administrative costs of complying with new rules, and the welfare losses of such rules. Other World Bank studies have shown that the costs of implementing just the WTO agreements on SPS, Customs and TRIPS are US\$130 million annually for the average developing country. Scaled to the entire developing world that's US\$4.4 billion in losses per year.

TRIPS also generates large welfare losses for developing countries by raising the price of patented goods. World Bank estimates of the amount of South-to-North profit transfers vary immensely, but conservative estimates suggest that the annual transfers are US\$41 billion annually. The actual welfare losses can be as much as six times the transfer costs.

While presentations of modelling results exhibit the 'net' benefits, they rarely highlight the losers from trade liberalisation. For the Doha Round, among the losers are governments. Current proposals would result in large tariff revenue losses for developing countries, where tariff revenues are an important source of funds for development, accounting for twenty percent of government revenue. According to UNCTAD, tariff revenue losses could be as high as US\$60 billion for the developing world.

These costs are rarely considered in the debates over trade liberalisation, but for developing countries they are significant. As we can see, they dwarf the potential gains of just US\$16 billion now projected by the World Bank. Those projections certainly make clear why so many negotiators are resisting the continued call for trade liberalisation: they have little or nothing to gain and possibly much to lose.

*Timothy A. Wise is deputy director of the Global Development and Environment Institute (GDAE), Tufts University. Kevin P. Gallagher is a professor at Boston University and senior researcher at GDAE. For a detailed analysis of the new modelling projections, see Frank Ackerman, 'The Shrinking Gains from Trade: A Critical Assessment of the Doha Round Projections' GDAE Working Paper No. 05-01, October 2005. For a detailed analysis of the 'costs' of the Doha Round see Kevin P. Gallagher (editor). 2005. 'Putting Development First: The Importance of Policy Space at the WTO'. ZED Books.*

### ENDNOTES

<sup>1</sup> World Bank Trade Note 23, June 2005. *Agricultural Market Access: The Key to Doha Success*.

According to new research carried out by the Carnegie Endowment for International Peace, the total global real income gain under a plausible Doha Round liberalisation scenario would be US\$59 billion.

- Developed countries would share a US\$5.5 billion real income gain from agricultural liberalisation while developing countries as a whole would lose US\$63 million. The greatest global gains would come from liberalising trade in industrial products, with US\$23 billion going to developing countries and US\$30.2 billion to developed countries.
- Brazil would gain the most – US\$358 million in real income growth and a 0.6 percent increase of world market share – from a likely agricultural liberalisation scenario, while China stands to lose the most (US\$294 million).
- With the liberalisation of manufactured goods, China's real income is projected to grow by nearly US\$15 billion, India's by US\$3.1 billion and Vietnam's US\$2.4 billion. For most other developing countries, real income gains would vary between US\$2.3 billion (rest of ASEAN) and US\$266 million (Mexico). South Africa would gain US\$340 million, while East Africa's loss would amount to US\$30 million and that of the rest of Sub-Saharan Africa to US\$120 million.
- In terms of all trade, China would increase its share of the world export market by 0.35 percent, India by 0.09 percent, and the rest of ASEAN and Brazil by 0.4 percent.

The full findings of the global general equilibrium model will be available at [www.carnegieendowment.org/trade](http://www.carnegieendowment.org/trade) in late January 2006.



# How to Read the US and EU Proposals on Domestic Support to Agriculture

Mario Jales and Andre Nassar

The latest proposals presented by the United States and the European Union in the context of the Doha Round do very little to effectively cut or discipline trade-distorting agricultural domestic support. If implemented as proposed, either offer would require no reduction effort on overall trade-distorting support, i.e. the sum of Amber Box, *de minimis*, and Blue Box payments.

The EU, the US and Japan account for the vast majority of agricultural subsidies and related distortions in international markets. Lenient disciplines in the Uruguay Round Agreement on Agriculture provided several loopholes to subsidising countries: inflated AMS<sup>1</sup> (Amber Box) base levels; exclusion of trade-distorting Blue Box and *de minimis* payments from reduction commitments; misclassification of trade-distorting support in the Green Box; absence of product-specific controls; and a Peace Clause preventing challenges against domestic support programs, among others. As a result, subsidisation levels for some countries and commodities are higher today than they were twenty years ago.

## Weak Proposals

The proposal presented by Washington is a masterpiece in box-shifting. It accommodates current US domestic support programmes by reducing expenditure limits in some boxes and expanding others. Labels are changed, but subsidies and distortions remain the same. The proposal also ignores the need for additional disciplines to guarantee that the Blue and Green Boxes are respectively less and minimally trade-distorting. Furthermore, the call for litigation protection (i.e. a renewal of the Peace Clause) is a sign that the US is not prepared to commit to true reform in agricultural domestic support.

The proposed expansion of the Blue Box – if not accompanied by strict and detailed rules that guarantee that it is less trade-distorting than the Amber Box – contradicts the WTO's goal of promoting increasingly open, fair and undistorted competition. It is crucial at this stage of the negotiations to develop firm criteria for the implementation of a potential New Blue Box.

When created in the Uruguay Round, the Blue Box served as a loophole to accommodate the MacSharry reform of the EU Common Agricultural Policy (CAP). It excluded significant portions of trade-distorting domestic support from reduction commitments, and allowed countries to undertake AMS cuts that did not require adjustments in the form or level of existing practices. In the Doha Round, we risk seeing the creation of yet another category of trade-distorting support custom-made to accommodate the domestic policies of a major country: the counter-cyclical payments of the US. This is particularly worrisome if we consider that: (i) the New Blue Box is significantly more trade-distorting than the Old Blue Box, given that it does not require supply control, and (ii) Washington has not terminated domestic cotton support programmes condemned by the WTO. As the US plans to use the New Blue Box to accommodate some of these subsidies, the current negotiations may nullify the gains already obtained through the cotton dispute and discredit the role of the WTO Dispute Settlement Body. Four additional disciplines are essential to guarantee that Blue Box payments are less trade-distorting than Amber Box measures: (i) product-specific caps, (ii) non-accumulation of Blue and Amber payments for the same product, (iii) limits to price-gap differentials, and (iv) monitoring and evaluation mechanisms.

The US proposal on domestic support contains other traps that must be unraveled. First, the three years (1999-2001) proposed as the base period for Amber Box product-specific caps registered the highest amounts of agricultural subsidies in the recent US history. A more reasonable base period should include the entire implementation period of the Uruguay Round (1995-2001). Second, the capping of total Blue Box spending at 2.5 percent of total value of production provides enough room for US counter-cyclical payments, as the cap compares total US agricultural production value to the value of the support given to a handful

of protected commodities (cereals, oilseeds, dairy and cotton). Third, the 50 percent cut on *de minimis* will have very little effect on US spending because payments that were previously (mis)classified as non-product specific *de minimis* support will be shifted to the New Blue Box.

Finally, the proposed 53 percent cut in overall trade-distorting domestic support (OTDS) becomes irrelevant for the US because the individual cuts in AMS, *de minimis* and the Blue Box will already produce such a result. In fact, the artificial way in which OTDS was constructed in the July 2004 Framework Agreement makes a US cut under 62 percent meaningless due to the overhang or 'water' between allowed support levels and the subsidies actually applied (see graph on page 4).

The EU proposal to address domestic support is also inappropriate. It is more ambitious than that of the US in terms of reducing *de minimis* and calling for additional criteria for Blue Box spending. Nonetheless, it shields Europeans from cuts in both Amber Box and OTDS applied levels after the implementation of the Fischler reform of the Common Agricultural Policy (CAP).

In spite of recognising the need for additional criteria on Blue Box payments, the EU proposal advocates disciplines that would only affect the US, i.e. freezing the existing price difference between linked support prices and limiting the price gap to a percentage of the base price difference. The EU proposal argues against both product-specific caps and additional reductions in the five percent overall ceiling. The EU's efforts to ensure that at least five percent of the value of production would be eligible for the Blue Box without product-specific caps signals that compensatory payments may be extended to other products in the

*Continued on page 6*

future, including sugar, dairy and olive oil, which were not fully decoupled from production by the Fischler reform.

## Driving Forces

Two driving forces are determining the negotiations on the depth of reductions in trade-distorting domestic support: (i) the limitations of the EU in making concessions that go beyond the already agreed changes in the CAP; and (ii) the precautionary approach adopted by the US to ensure that a new WTO agriculture agreement does not affect the Congress' flexibility in negotiating the 2007 Farm Bill.

Can these driving forces deliver on the goals established in the Doha Mandate and preserve the original level of ambition on domestic support? The response is a clear 'no' if cuts and additional disciplines are set in accordance with the US and EU proposals. The response is a 'maybe' if the parameters are set through bargaining between the two majors and members of the G-20 and the Cairns Group.

For G-20 and Cairns Group members, this round must be capable of: (i) drastically reducing allowed levels of trade-distorting subsidies; (ii) disciplining the use of these subsidies in order to avoid circumvention of established rules; and (iii) eliminating loopholes that increase the level of trade-distorting subsidies as observed in the Uruguay Round implementation period.

At least three important loopholes were legitimised in the Uruguay Round Agreement on Agriculture. The first one is reflected in the increasing levels of Amber Box support in the US, made possible because AMS maximum expenditure commitments were set using the very high level of payments prevailing in the 1986-88 base period. Actual Amber Box payments in the US were substantially below the commitment level in the beginning of the implementation period.

The second loophole is reflected in the ability of the US to notify product-specific trade-distorting domestic support as non-product specific *de minimis* support, thus excluding billions of dollars from the AMS reduction commitment. *De minimis* payments grew considerably after 1998, with

the introduction of the emergency marketing loss assistance payments (replaced by counter-cyclical payments in the 2002 Farm Bill).

The third loophole is exemplified by the case of rice in Japan. The dramatic reduction in AMS applied levels in 1998 was not a result of reduction in trade-distorting support. The Japanese government eliminated the intervention price for rice, but border protection, which keeps the level of domestic prices substantially above international prices, did not undergo any changes.

## The Depth of Cuts

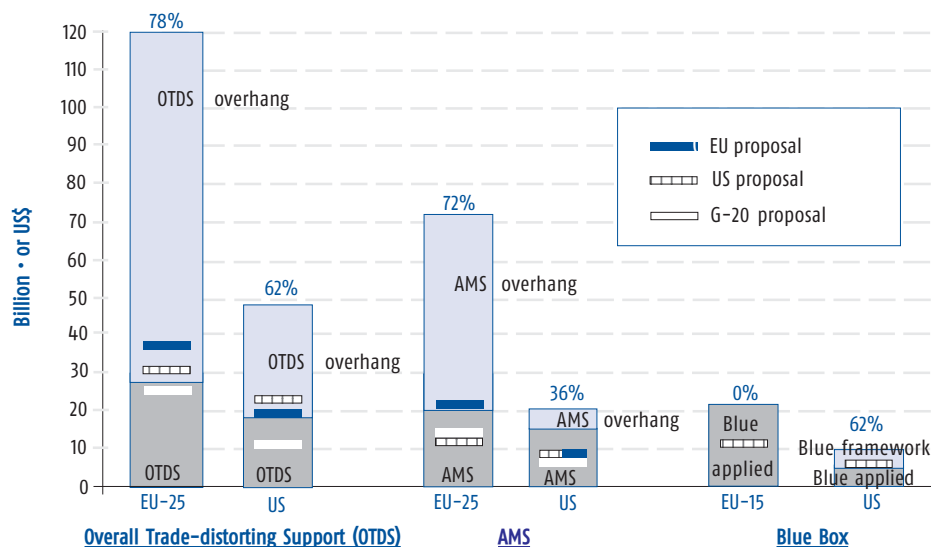
OTDS and AMS cuts are the mechanisms that will lead to effective reductions in the allowed level of trade-distorting support. Therefore, the depth of cuts has become a central issue in the negotiations. In order to define the precise magnitude of cuts, it is necessary to analyse the applied levels of domestic support in the main subsidisers: the EU and the US.

The graph below presents applied levels of overall trade-distorting support, AMS and Blue Box payments in the EU and the US. It also shows the overhang or 'water' between the starting points for cuts (commitment level in the case of AMS) and applied levels. The numbers expressed in percentages represent the size of the cut necessary to bring down the ceiling to the applied level. Finally, the graph presents the cuts required by the EU, US and G-20 proposals on domestic support.

The single most important variable is the applied level. For the EU, the assumption is that the bloc is ready to undertake reductions in line with the CAP reform. Our calculations suggest that the EU could reduce current applied AMS from • 40 billion to • 20 billion (*de minimis* support is not a sensitive issue for the EU). In the Blue Box, the current level of • 24 billion could be brought down to • 6 billion. Despite Brussels' opposition to reducing the Blue Box cap below five percent of the value of production, the EU could well afford to cut OTDS by 78 percent since a significant portion of support currently classified as Blue Box will be transferred to the Green Box through the CAP reform.

Therefore, the major problem for the Europeans is not cuts *per se*, but the implementation period for these cuts, particularly with regard to the Blue Box. We should thus expect the EU to propose an implementation period that lasts at least until 2013, when the current CAP reform is scheduled to conclude.

## Overhang in EU and US Trade-distorting Domestic Support



Sources: European Commission and USDA/Commodity Credit Corporation.

EU: OTDS and AMS applied levels estimations for EU-25 according to the provisions of the Fischler CAP reform. Figures are estimates for 2008. •26 billion were projected in OTDS. Data for the Blue Box refers to the latest EU-15 notification to the WTO. US: 2004 data were collected in the USDA-CCC reports and adapted to the format of WTO notifications. Expenditures on CCP were included in the Blue Box.

Elaboration: ICONE.

The case of the US is substantially different. Given that no Farm Bill reform has been announced as yet, applied subsidy levels must be found in past data. The ideal period for prospective analysis of US domestic support is the period following the 2002 Farm Bill. While the US has not yet notified domestic subsidy figures for any year after 2001, USDA Commodity Credit Corporation data can be adapted for this end. The numbers for 2004 show that the US is ready for a 62 percent cut in OTDS, a 36 percent cut in AMS, and a 62 percent reduction in the Blue Box cap assuming current expenditures of US\$3.6 billion in counter-cyclical payments.

It is important to note that the percentage cuts shown in the graph are those that would accommodate the current situation. Higher cuts are necessary in order to achieve substantial reductions in agricultural domestic subsidies. Besides, the expansion of the Blue Box gives the US additional flexibility in the reduction of Amber Box and overall trade-distorting support. An extra effort in AMS and strict disciplines for Amber and Blue Box payments are indispensable to compensate for this flexibility.

The graph also shows that the G-20 proposal is the only one that leads to effective reductions in the applied levels of OTDS. The reduction coefficients proposed by the US and the EU accommodate their respective situations and do not even reach applied OTDS levels.

The negotiations on the domestic support pillar focus on cuts for trade-distorting domestic support and product-specific disciplines. The cotton case taught a lesson that should be brought to the negotiations: it is imperative to create a link between the Agreement on Agriculture and the Agreement on Subsidies and Countervailing Measures (ASCM). The current negotiations provide the opportunity for reforming the 'serious prejudice' provisions. Canada has proposed to reinstate item (a) of Article 6.1 of the ASCM. The clause, which lapsed in the end of 1999, provided that serious prejudice shall be deemed to exist when total *ad valorem* subsidisation of a product exceeds five percent. That clause establishes a presumption of serious prejudice, which relieves the complainant of the initial burden of having to demonstrate adverse effects. This kind of discipline should not only be reinstated, but should also be adopted for domestic subsidies in agriculture.

## Way Forward

The G-20, US and EU proposals on domestic support reveal the interests and limitations of each party. The G-20 has the most ambitious proposal in terms of cuts and disciplines. The EU proposal is conservative in the reduction of AMS and OTDS. In order to retain the scope it considers appropriate for the Blue Box, Brussels is trying to significantly limit the bite of the OTDS cut so that no additional cut in Blue Box spending is necessary. However, the EU proposal has a very positive point: the 80 percent cut in *de minimis* support for developed countries. The G-20 should welcome this provision.

The US is in the right direction in proposing a 60 percent cut in AMS. On the other hand, the proposed OTDS cut is very conservative; the reduction in the Blue Box only accommodates counter-cyclical payments; and the 50 percent cut in *de minimis* support leaves space for increasing non-product specific expenditures. And finally, resuscitating the Peace Clause is unacceptable for G-20 countries.

The projections for EU subsidies under the CAP reform and current data on US subsidies show that Brussels and Washington could go beyond the limits established in their proposals. The G-20 proposal should serve as basis for further negotiation.

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## ENDNOTE

<sup>1</sup> AMS stands for 'Aggregate Measurement of Support', i.e. the most trade-distorting domestic support covered by the Amber Box, under reduction commitments since the Uruguay Round.

## Farm Subsidies under Scrutiny

Thanks to civil society and media activism, light is finally starting to filter to the opaque realm agricultural subsidies.

In Washington, the non-governmental Environmental Working Group (EWG) released its updated Farm Subsidy Database in November, which showed that ten percent of subsidy recipients received more than 70 percent of the payments made out by various government programmes in 2004. Among these were 312,000 large farming operations, co-operatives, partnerships and corporations. The data collected also shows only 1,172 (out of 1.2 million) recipients received more than US\$250,000, an amount recently rejected by Congress as the upper limit of annual farm payments to a person/entity. EWG data assisted Brazil in its successful challenge of US cotton subsidies. The latest farm subsidy update can be accessed at [www.ewg/farm](http://www.ewg/farm).

In Europe, a network of journalists and activists from EU member states on 1 December launched a website dedicated to providing citizens information on who receives payments under the Common Agricultural Policy. The information available shows a similar picture to that of that of the US: agribusinesses and very large landowners reap the lion's share. In the UK, for instance, the Tate & Lyle sugar company topped the list, followed by Meadow Foods Ltd, with Nestlé UK in the eighth place. A large share of producer subsidies went to the landed gentry. In none of the three countries that provided detailed data – Denmark, the Netherlands and Sweden – did the biggest payments benefit smallholder farming.

Eight other countries provided some of the information requested and others either declined – often referring to national data and privacy protection legislation – or did not answer queries. Court cases and appeals have been initiated in several countries to make more of the information public. For more details see <http://www.farmsubsidy.org>

## Agriculture Draft Reflects Continuing Differences

Although the revised Hong Kong declaration does its best to 'capture' progress in agriculture since the July Package was adopted in 2004, it gives ministers little to go on to push the negotiations forward: all they are requested to do is to set a new deadline for establishing modalities for the final phase of the negotiations, as well as a date for the submission of comprehensive draft Schedules based on those modalities.

In an attempt to lock in whatever progress has emerged in the intense negotiations of the past three months, the body of the draft ministerial declaration released on 1 December highlights some convergence can be discerned. For instance, concerning domestic support, the text refers to a 'working hypothesis' that developed countries' most trade-distorting support (Amber Box subsidies), as well as their overall trade-distorting domestic support (the combined amount of Amber and Blue Box subsidies plus allowed *de minimis* support) would be cut according to three bands with higher linear cuts in higher bands.

The progress report of the agriculture negotiations Chair, Ambassador Crawford Falconer, (attached to the draft ministerial declaration as Annex A) further specifies that, with regard to developed countries' overall support, conditional convergence has emerged on the thresholds for the bands and – more tentatively – on the range of cuts in each band. The reduction percentages proposed by Members for countries with the highest support (more than US\$60 billion a year, in practice the EU) range from 70 to 80 percent. For countries in the second tier (support between US\$10 to US\$60, in practice the US and Japan), proposed reduction percentages vary more widely, from 53 to 75 percent. All other

developed countries would be classified in the lowest tier (support under US\$10 a year), and be required reduce overall trade-distorting support by 31 to 70 percent.

The picture is murkier for the most trade-distorting support (Final Bound Total AMS, roughly what is referred to as the Amber Box). The lowest band would apply to countries with support levels up to US\$12 or 15 billion, the middle tier to those between the US\$12-15 and 25 billion range, and the highest tier to Members whose Final Bound Total AMS exceeds US\$25 billion. Chair Falconer reported a 'working hypothesis agreement' that the EU should be in the top tier and the US in the second. Japan's placement with either the EU or the US remains to be resolved. Proposed percentages for the cuts vary widely, from 37-60 percent in the lowest tier, to 60-70 percent in the middle tier and 70-83 percent in the highest tier. Despite these seemingly high figures, it appears that even the most ambitious cuts envisaged would do no more than set a new spending ceiling that is either just above (EU and US proposals) or slightly below (G-20) present support levels (see related article on page 5).

Despite numerous ministerial-level meetings, no decisive progress has been made on market access, i.e. agricultural tariff cuts, since the EU tabled its revised offer on 28 October. As shown in the table below, key Members' positions remain far apart, ranging from a 45 percent maximum cut and no limits on the highest possible tariffs in the proposal put forward by the G-10 group of net food-importing countries (including Japan, Korea and Switzerland) to a 90 percent maximum cut with a 75 percent cap proposed by the US. The EU's revised tariff offer has been strongly criticised for being conditioned on (i) a carve-out from full formula cuts for 8 percent of all agricultural tariff lines to be treated as 'sensitive products', and (ii) significant market access concessions in industrial goods and services by advanced developing countries

### Export Subsidy Elimination Date May Be Agreed in March

All WTO Members agreed in July 2004 that the Doha Round negotiations would set a 'credible end date' for phasing out 'all forms of export subsidies'. On 2 December 2005, the trade ministers of Australia, Brazil, the EU, India, Japan and the US announced their intention to set the elimination deadline by 1 March 2006. 'All forms' of export subsidies cover notified export subsidies, the 'subsidy element' contained in export credits and export credit guarantees or insurance programmes, as well as certain aspects of exporting state trading enterprises and food aid that causes commercial displacement. See also page 10 regarding developments on cotton.

The Main Tariff Reduction Proposals on the Table

G-20				US				EU (revised offer)				G-10			
Developed Countries		Developing Countries		Developed Countries		Developing Countries		Developed Countries		Developing Countries		Developed Countries		Developing Countries	
Tiers	Cuts	Tiers	Cuts	Tiers	Cuts	Tiers	Cuts	Tiers	Cuts	Tiers	Cuts	Tiers	Cuts <sup>1</sup>	Tiers	Cuts <sup>1</sup>
0 – 20%	45%	0 – 30%	25%	0 – 20%	55 – 65%	Same tiers, slightly smaller cuts, to be decided after parameters are agreed for developed countries.		0 – 30% <sup>2</sup>	35%	0 – 30% <sup>2</sup>	25%	0 – 20%	27%	0 – 30%	NA
20 – 50%	55%	30 – 80%	30%	20 – 40%	65 – 75%			30 – 60%	45%	30 – 80%	30%	20 – 50%	31%	30 – 70%	NA
50 – 75%	65%	80 – 130%	35%	40 – 60%	75 – 85%			60 – 90%	50%	80 – 130%	35%	50 – 70%	37%	70 – 100%	NA
> 75%	75%	> 130%	40%	> 60%	85 – 90%			> 90%	60%	> 130%	40%	> 70%	45%	> 100%	NA
Cap: 100%		Cap: 150%		Cap: 75%		Cap: 100%		Cap: 100%		Cap: 150%		Cap: none		Cap: none	

<sup>1</sup> The G-10 specified that the percentages for cuts were only illustrative. No potential values were offered for developing country reductions.

<sup>2</sup> In the lowest tier, the EU proposes 35% as the developed country average reduction, achieved through a minimum cut of 20% and a maximum of 40%. Developing countries should average 30%, with a minimum cut of 10% and a maximum of 40%. The other three tiers have no such flexibility.



# Special and Differential Treatment: LDCs and Agriculture

References to special and differential treatment for developing countries abound in the Doha Declaration, the July 2004 Framework Agreement, as well as the draft text forwarded ministers in Hong Kong. However, consensus remains far from reach in nearly all areas under negotiation.

The draft declaration reconfirms the special and differential treatment (SDT) provisions that were already agreed in the July 2004 Framework Agreement with regard to the negotiations on agriculture, industrial market access, services and other areas under the Doha Round umbrella. It also includes a section on the review of all SDT provisions contained in existing WTO Agreements, mandated by the 2001 Doha Declaration “with a view to strengthening [such provisions] and making them more precise, effective and operational.” The review was originally slated to conclude by July 2002 with ‘clear recommendations’ for a General Council decision regarding which – and how – SDT clauses should be amended.

While that and many subsequent deadlines have been missed, the Hong Kong draft declaration presents ministers with the possibility of adopting five amendments – out of a total of nearly 90 submitted in the review – put forward by least-developed countries (LDCs).

Reflecting persistent differences between Members, however, the proposals themselves (grouped in Annex F of the draft Hong Kong declaration) contain several options. Many have to do with whether the amendments should mandate certain action – and therefore use the verb ‘shall’ – or merely recommend it, as reflected by the verb ‘should’. LDCs, as well as other developing countries, have long complained that too many SDT provisions are ‘best endeavour’ clauses rather than binding obligations.

The first proposal would have the General Council agree that LDC requests for waivers of the most-favoured-nation (MFN) obligation “ [shall] [should] be given positive consideration and a decision taken within 60 days. Bracketed (i.e. unagreed) language would require such decisions to take into account “the interests of other developing Members so as not to affect them.”

The three different versions of the second proposal reflect Members’ divergent views on when, or even whether, Members should be bound to grant duty- and quota-free market access to all LDC exports (see also page 1). Two of the versions would mandate such action by developed countries by a certain date, while the third would only exhort them (using ‘should’) to do so. Some of the options also cover preferential/simplified rules of origin, and financial or technical assistance to LDCs with regard to health and technical standards, as well as adjustment processes resulting from the erosion of preferential margins.

A bracket-free proposal merely reaffirms that LDCs will only be required to undertake commitments and concessions to the extent consistent with their individual development, financial or trade needs, or their administrative and institutional capacities.

The fourth proposal states that LDCs ‘shall’ be allowed to both maintain existing measures and introduce new measures that deviate from their obligations under the Agreement on Trade-related Investment Measures (TRIMS). Any measures “incompatible with the TRIMs Agreement and adopted under this decision shall be phased out by year [x].”

The fifth proposal would have the General Council agree that LDCs’ implementation WTO obligations ‘will’ require adequate further technical and financial support directly related to the nature and scope of such obligations or commitments, or that it only ‘may’ require such support.

## SDT in Agriculture

**Tariff Cuts:** The July 2004 Framework Agreement (FA) stated unequivocally that special and differential treatment would “be an integral part of all elements of the negotiation, including the tariff reduction formula, the number and treatment of sensitive products, expansion of tariff rate quotas, and implementation period.”

The Chair’s report attached to the draft ministerial declaration notes that while Members agree that developing countries would make smaller tariff cuts, ‘significant disagreement’ remains on whether the reductions should be two-thirds of the effort required from developed countries, as proposed by the G-20 group of developing countries. Divergence is even more marked on the thresholds for the tiers for developing countries (see table on page 8).

**Special Products:** The FA confirmed that developing countries would have the right to designate an ‘appropriate number’ of tariff lines as Special Products – based their food security, livelihood security and rural development needs, and that such products would be eligible for ‘more flexible’ treatment. No consensus has been reached on the criteria for, or number of, SP tariff lines, and a ‘fundamental divergence’ remains on what the ‘more flexible treatment’ for such products would consist of.

**Special Safeguard Mechanism:** The FA mandated the establishment of a Special Safeguard Mechanism (SSM) for use by developing countries. Members largely agree that the SSM should at least be capable of effectively addressing import surges, but strongly diverge on whether it could also be triggered by drops in world market prices.

**Tropical Products:** Despite proposals and discussions, no common approach has been established on how to implement Members’ long-standing commitment to the ‘fullest liberalisation’ of trade in tropical products (see related article on page 22).

**Preference Erosion:** Members also differ on how to address the erosion of long-standing preferences. According to the Chair’s report, “while there is some degree of support for e.g. longer implementation periods for at least certain products in order to facilitate adjustment, there is far from convergence on even this. Some argue it is not sufficient or certainly not in all cases, while others [say] that it is not warranted at all.”

## All Key Issues Still Unresolved in Industrial Market Access

Negotiations non-agricultural market access (NAMA) have suffered from the long shadow cast by agriculture. The draft ministerial declaration would set a new deadline for agreement on full modalities, but otherwise does little more than report on the current state of play.

As in agriculture, the body of the draft ministerial declaration seeks to lock in place progress since July 2004, but the pickings are meagre: an agreed methodology for converting volume-based specific import duties (such as US\$100 per tonne) to *ad valorem* equivalents (AVEs, or tariffs expressed as a percentage of the good's value); a 'level of common understanding' of product coverage; and a 'working hypothesis' to use a Swiss formula to reduce industrial tariffs. Some developing country WTO Members, however, insist that they have not agreed to the use of a Swiss formula, which cuts high tariffs more than lower ones and has a strong harmonising effect.

On the key issues – i.e. finalising the structure and details of the tariff reduction formula, flexibilities for developing countries and the treatment of unbound tariffs – ministers would just instruct the NAMA negotiating group to conclude its work 'as soon as possible'. The only concrete decisions expected from ministers are new deadlines for agreement on 'full modalities' for the final phase of the negotiations, and for scheduling new tariff commitments.

According to the Doha Declaration, the NAMA negotiations "shall take fully into account the special needs and interests of developing and least-developed country participants, including through less than full reciprocity in reduction commitments." The Chair's report, attached to the draft ministerial declaration as Annex B, notes that some developing countries consider 'less than full reciprocity in reduction commitments' to mean lower average percentage cuts than those undertaken by developed countries. Argentina, Brazil and India are particularly strong supporters of this view.

They, as well as many other developing countries, also consider that the additional flexibilities for developing countries enshrined in paragraph 8 of the July 2004 NAMA framework are independent of the tariff formula, i.e. lower developing country formula cuts cannot be offset by reduc-

ing the availability of paragraph 8 flexibilities. In addition to longer implementation periods for tariff reductions, these flexibilities include (i) applying less than formula cuts to a certain percentage of tariff lines; or (ii) keeping some tariff lines unbound, or not applying formula cuts to them.

Many WTO Members objected strongly to the EU's conditioning its latest agricultural tariff offer on advanced developing countries' lowering their industrial tariffs to 15 percent at the most. Brazil, for one, noted that bringing its average bound tariffs of 30 percent down to the level sought by the EU would mean a reduction of 75 percent for some tariff lines. This, it contended, would be contrary to the principle of 'less than full reciprocity in reduction commitments', as well as wholly disproportionate with the EU's offer on agriculture.

### India, Brazil Offer NAMA–Agriculture Tradeoff

Trade ministers of India and Brazil said in early December that they could agree to cut their bound industrial tariffs by 50 percent if the US and the EU improved their offers on agricultural subsidy and tariff reductions, as well as lowered the number of sensitive products (the EU's latest agriculture proposal would carve out eight percent of 'sensitive' tariff lines from full formula cuts, see page 8). So far, there have been no official reactions from other WTO Members.

## Hong Kong Prospects for Cotton

The draft ministerial text offers two options for the treatment of cotton in post-Hong Kong talks. Ministers could either just reaffirm the commitment already made in the July 2004 Framework Agreement to "ensure appropriate prioritisation of the cotton issue independently from other sectoral initiatives" within the agriculture negotiations. Or they could take a great leap forward and agree upon modalities that would ensure an 'early harvest' for cotton, i.e. earlier and faster subsidy reductions specific to the sector.

In November, Benin, Burkina Faso, Chad and Mali called for the elimination of export subsidies for cotton by the end of 2005. They also said trade-distorting domestic support should be phased out by 1 January 2009 – 80 percent by the end of 2006, with the remaining cuts to be evenly divided between 2007 and 2008 – accompanied by rules prohibiting the reclassification of unauthorised subsidies as permitted ones. The four countries urged Members to grant duty- and quota-free access to LDCs' cotton exports, and called for the creation of an emergency fund to help governments cope with deficits resulting from the decline in the price of cotton.

In an informal paper submitted to the Sub-committee on Cotton, the EU indicated on 18 November that it was prepared to eliminate all tariffs and quotas on cotton imports from all WTO Members, as well as all cotton export subsidies, "from day one of the implementation period of the results of the round." With regard to domestic subsidies, the EU proclaimed its willingness to eliminate Amber Box trade-distorting support and apply all new rules on Blue Box support. Furthermore, it announced that it was ready to implement these commitments 'on an autonomous basis' from 2006.

The US agreed that disciplines on cotton should go further than the overall results of the farm trade negotiations, but said that an ambitious agreement on agriculture was necessary for any package on cotton to have a significant effect.

# Now's the Time for Political Leadership on Cotton

Mary Robinson and Scott Jerbi

A single issue – cotton – has become emblematic of the Doha Development Round of negotiations. Today, it is widely seen as a litmus test of whether the WTO can truly serve the interests of less powerful countries and poor people around the world.

Yet, as government leaders gather in Hong Kong for the WTO's Sixth Ministerial Conference, it is difficult to point to concrete changes in rich country policies that comply with their WTO obligations and demonstrate their commitment to the world's developing countries, some of which stand to benefit enormously from fairer global trade in cotton.

Two years have passed since four African cotton producing countries – Benin, Burkina Faso, Chad and Mali – joined together to highlight the increasing harm caused to their countries by cotton subsidies in richer countries. At the 2003 WTO Ministerial in Cancun, these countries, along with many others, demanded special efforts as part of the Doha Round negotiations to address the negative impacts on developing countries of export subsidies and domestic support for cotton industries in the world's richest nations. Their focus on reform in this area led in part to the deadlock at the Cancun Ministerial.

Since then, the cotton issue has only continued to move further up the global trade agenda. This can be seen, for example, in the WTO's dispute system ruling earlier this year, which found largely in favour of Brazil's case over United States cotton policies.

On the negotiations front, the WTO General Council's 'July Package' in 2004 instructed Members to address cotton "ambitiously, expeditiously, and specifically." A sub-committee on cotton was established to address – as part of the Doha Round negotiations – *all* trade-distorting policies affecting the sector. However, no significant progress has been made.

The problems with making a breakthrough on cotton are symptomatic of the broader agriculture negotiations. Developed countries currently spend about US\$1 billion each year supporting rural development in the world's poorest countries. But they spend about US\$1 billion *each day* subsidising agricultural systems that systematically reinforce poverty in developing countries. Bluntly stated, Northern taxpayers and consumers are paying for agricultural policies that destroy livelihoods around the globe.

If that judgment seems harsh, it is grounded in the testimony and experience of people whose voices are seldom heard at the WTO. In West Africa today, two million smallholder farmers are grappling with a deep price slump. What trade negotiators and the wider public do not see are the effects on people in cotton-producing countries – the children being taken out of school, the family health care out of reach financially, the reduced spending on food, and the increased risk of malnutrition.

Of course, there are many factors behind the crisis in cotton-producing countries. The recent announcement by US trade and agriculture officials of a 'West Africa Cotton Improvement Programme', an initiative to provide additional financial and technical aid to African countries seeking to strengthen their cotton production and capacity to trade, is a recognition of supply side constraints faced by African producers.

But such programmes, helpful though they may be, cannot be seen as an alternative to ending subsidies in the United States, the world's largest cotton exporter. This year, the 25,000 producers in the cotton belt will receive over US\$4.5 billion in support – almost as much as the value of the crop. These subsidies enable the US to expand production in the face of falling prices, and these market distortions directly affect African cotton producers.

In the US, the issue of counter-cyclical payments is particularly important, as these payments have a large impact on cotton production and prices. But US progress on reforming cotton

payments has been woefully inadequate. Powerful politicians and lobbyists claim that cotton subsidies are a way of supporting the typical American farmer. But the recent defeat of the Grassley-Dorgan amendment in the US Senate, a good-faith effort to cap payments and limit support to the country's richest farmers, illuminates the hollowness of this claim.

The real threat to the Doha Development Round is the failure of political leaders in the US and Europe to promote the livelihoods of small farmers, rather than those of influential domestic farm lobbies. Clearly, trade reform poses tough policy choices for rich and poor countries alike. But compromising global poverty reduction efforts and undermining the WTO by maintaining an outmoded farm subsidy system is surely the wrong choice.

When WTO negotiators and their governments committed to a Development Round, they were responding to internal and external pressures that called for governments to stop doggedly pursuing narrow domestic sectoral interests. Has this really changed?

The year 2005 will not be remembered as a breakthrough in the fight against poverty, building on the achievements registered at the G-8 meeting in Gleneagles, if it perpetuates a pattern of globalisation that tolerates double-standards, and pits poor African producers against wealthy government-subsidised producers in the US or elsewhere. Nothing exemplifies this better than the issue of cotton.

The clock is ticking on the Doha Round and the legitimacy of the rules-based system represented by the WTO. The time for political leadership is now. Reforming trade in cotton is a good place to begin.

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## Draft Text on Services Drops Market Opening Benchmarks

The draft ministerial declaration attempts to give some direction to post-Hong Kong negotiations on services through endorsing a set of objectives, approaches and timelines for improving the coverage and quality of market opening offers.

Angering many developing countries, the EU linked its 28 October agriculture proposal to the acceptance of quantitative targets for market opening in services by all WTO Members except least-developed countries and ‘other weak and vulnerable developing countries in a similar situation’. Other developing countries would have to take on commitments in 93 services sub-sectors. Although only the EU has linked its agriculture offer to specific commitments in services, several other WTO Members would also like to see a set of minimum market opening requirements.

All developing countries but India have strongly rejected the establishment of multilateral quantitative targets in the services negotiations, arguing that it would be contrary to the very nature of the Agreement on Trade in Services (GATS), as well as the negotiating guidelines adopted in 2001. Their view ultimately prevailed, and any mention of quantitative targets was deleted from the revised Chair’s report, attached to the Hong Kong ministerial text as Annex C. An earlier version of the text had incorporated the possibility of quantitative targets as a ‘complementary approach’, albeit without numbers for the sectors/sub-sectors.

The draft ministerial text calls for intensifying negotiations in line with the ‘objectives, approaches and timelines’ set out in Annex C, with a view expanding the sectoral and ‘modal’ coverage of Members’ services offers, which should give ‘particular attention’ to sectors and modes of supply of interest to developing countries.

Annex C – which does not purport to be a negotiated text – proposes a number of objectives that Members’ new and improved commitments should strive to adhere to. These include developed country priorities such as the removal of existing requirements of commercial presence and commitments on enhanced levels of foreign equity participation, as well as some issues of high importance to developing countries, such as the removal or substantial reduction of the economic needs tests that countries routinely

use to limit the number of foreign service providers. Annex C also suggests that Members should offer more access to ‘independent professionals and others, de-linked from commercial presence’. So far, offers on Mode 4 access have concentrated heavily on intra-corporate transferees and business visitors, with practically no new opportunities offered for unskilled workers.

Annex C confirms that the current request-offer approach will remain the main method of negotiation, complemented by plurilateral negotiations between Members interested in deeper liberalisation in certain sectors. Contrary to current practice under the GATS, all countries that receive requests in a specific sector or mode of supply would be obliged to “enter into plurilateral negotiations to consider such requests.” Any market access achieved through the plurilateral approach would apply to all WTO Members.

With regard to timelines, Annex C suggests that outstanding initial offers should be submitted ‘as soon as possible’. In addition, ministers should set deadlines for the submission of (i) plurilateral requests; (ii) a second round of revised offers; and (iii) final draft schedules of commitments.

### TRIPS and Access to Medicines

On 6 December 2005, WTO Members agreed after intense negotiations to amend the Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPS) so as to ease the difficulties that countries with “insufficient or no manufacturing capacities in the pharmaceutical sector could face in making effective use of compulsory licensing.” The 2001 Doha Declaration on TRIPS and Public Health mandated the TRIPS Council to find an ‘expeditious solution’ to this problem.

The perceived problem lay in TRIPS Article 31(f), under which goods produced under compulsory license must be “predominantly for the supply of the domestic market of the Member authorising such use.” This clause meant that many potential suppliers of generic versions of medicines still under patent could not export such drugs to countries lacking the capacity to produce them locally.

On 30 August 2003, WTO Members adopted a temporary waiver that allowed exports and imports of drugs manufactured under compulsory license subject to a complex set of rules for both importing and exporting countries. Many of the waiver’s provisions sought to prevent imported generics from finding their way back to rich country markets, where they would be competing against the original brandname drugs. However, the system’s eligibility, notification and control requirements were so complicated that not a single country signalled its intention to use it as an importer.

The 6 December decision faithfully translates the waiver’s provisions into a permanent amendment to the TRIPS Agreement. A new Article 31 bis will waive the application of Article 31 (f) “to the extent necessary for the purposes of production of a pharmaceutical product(s) and its export to an eligible importing Member(s).” The rules governing the import-export system, set out in an annex, are identical to those of the waiver. While WTO Director-General Pascal Lamy said the decision showed that Members were “determined to ensure the WTO’s trading system contributes to humanitarian and development goals”, the Nobel-winning civil society organisation Médecins sans Frontières challenged the WTO to “provide evidence by the end of next year demonstrating that the mechanism it is putting in place can bring an end to the negative effects that full TRIPS implementation has on access to medicines.”



# Managing Patents on Medicines

James Love

Developing countries face three related problems. First, they must make and enforce standards for what should be patented. Second, they must deal with the many cases where patents that do not meet those standards were issued by mistake. Third, they need to make the patent status of medicines more transparent. Here are some measures to address these problems.

## Standards for Patentability

Every country must decide how to define a patentable invention. Policies are important. Is it possible to patent a second use for an older drug (such as AZT for AIDS, sildenafil for erectile dysfunction, or ritonavir as a booster of protease inhibitors), combinations of existing drugs, the prescribed dose of a medicine, or common methods of buffering, coating or delivering medicines (e.g. an enteric coating of a pill, or the common use of a solvent in connection with a gel tab presentation). If there are more ways to get a patent, there will be less generic competition and higher prices.

Countries can have clear policies regarding patentable subject matter (the patentability of second uses, doses of drugs, etc.), or resolve disputes on a case-by-cases basis, depending upon an expert assessment of the novelty, obviousness or utility of the innovation. Increasingly, public health experts are asking to play a greater role in pre- or post-grant review of such matters.

One should not assume that patents are always appropriate, but rather ask whether patents would improve social welfare in the area concerned. A 'cost-benefit' approach based upon practical real world realities will exclude patents where granting it would provide an unimportant incentive, and the costs of imposing patents would be high.

National policies are not harmonised on patentability criteria, and there is no obvious value in doing so, given the paucity of state practice that is free from poor patent quality, anti-competitive practices and other abuses, and the relatively low level of current engagement on these issues by public health experts. Experimentation and innovation in state practice is desired, although some level of organic harmonisation among regions or blocks of like-minded or commonly situated countries will be appropriate as countries gain experience and confidence.

The World Intellectual Property Organisation (WIPO) or the World Health Organisation (WHO) could collect information on state practices, and governments should experiment with and share information about guidelines for the patentability of medical inventions, including collaborative efforts involving both health and patent authorities.

Such guidelines could list areas that should not be subject to patents, such as second uses of medicines, doses, or enteric coatings of pills. These guidelines would be useful for patent examiners, as well as potential generic competitors who need to evaluate whether or not to challenge patents that had been registered in a given country.

It is also important to evaluate the implementation of such policies and guidelines. If a country has indicated it will not patent doses, second uses, or other areas, are such patents nonetheless granted and registered?

## Avoiding Unwarranted Encroachments on the Public Domain

Whatever the intended standards for patentability, the actual administration of a patent system depends on the evaluation of highly technical patent applications. Mistakes are made – lots of mistakes, which are described as 'poor quality' patents, and 'unwarranted encroachments on the public domain'.

It is difficult to address problems of poor quality patents. Resources *and incentives* are important, both on the front-end, before a patent is granted, and later to resolve post-grant disputes.

A patent examination requires access to expensive library and database resources to judge prior art, as well as trained personnel. The United States Patent and Trade Office (USPTO) employs more than five thousand patent examiners and spends more than a billion dollars a year, but still faces a crisis of public confidence regarding patent quality. It is increasingly doubtful that any government can be realistically expected to weed out applications that should never see the light of day.

Not every country seeks to examine patent applications on the front end. Many maintain registration systems, where every application is accepted. Unlike the examination approach, in a registration system, the initial grant of the patent does not imply that the patent will be enforced in case of a dispute.

If it is not realistic or cost-effective to enforce policies on patent quality before the patent grant, the burden shifts to post-grant mechanisms for resolving disputes. These include mechanisms, if any, for administrative challenges to patents, or litigation. Litigation is expensive, and takes time. According to a recent article in *Nature*, US costs of litigating disputes over biotechnology or pharmaceutical patents typically range from US\$3 to US\$10 million for each party.<sup>1</sup> While costs are lower in developing countries, they are often too high to justify the expense of litigation, given the smaller domestic markets. The challenge to a controversial ddI patent in Thailand took several years, and during that time, patients could not use generic ddI in pill form.<sup>2</sup>

WIPO has identified patent quality as a priority issue for the Standing Committee on Patents, but proposed only harmonisation of patentability laws, something that is not necessarily related to improved patent quality. More useful would be a work program to look at the practical issues that lead

*Continued on page 14*

to poor patent quality, and the most useful policy interventions to address anti-competitive practices and inappropriate encroachments on the public domain.

WIPO should start with collecting data on the costs of resolving patentability disputes in different countries, and examine the practical barriers to the reversal of an inappropriate patent grant. The Patent Co-operation Treaty (PCT) or a new instrument or agreement could address some of the obvious issues concerning patent quality, such as creating an obligation to inform the PCT of challenges to patent claims, and the reporting of the resolution of such disputes, as well as automatic re-examination of patentability if a patent claim was reversed in a foreign jurisdiction.

Administrative procedures for post-grant patent opposition can be greatly strengthened. Here, WIPO should consider providing low-cost arbitration services to resolve disputes over patentability, such as it now provides for resolving disputes over trademark protection on domain names. This could be particularly useful in cases where foreign patent disputes have already created a record regarding prior art or inventive step. WIPO could also facilitate sharing of information on national pro-

The pharmaceutical industry devotes very little R&D effort to diseases of the poor in developing countries, since such diseases are not high income generators. Between 1975 and 1997, only 13 of 1,223 new chemical entities – or one percent – were for the treatment of tropical diseases.

According to James Orbinski, former President of the International Council for Médecins sans Frontières, while 95 percent of active tuberculosis cases occur in developing countries, no new drugs have been developed since 1967.

It is unlikely that the provision of stronger and better patent rights will shift research investment towards malaria and tuberculosis.

Source: ICTSD. 2003. *Intellectual Property Rights: Implications for Development*

grammes for administrative patent opposition procedures, to see which approaches are effective in controlling anticompetitive practices or poor patent quality.

### Increasing the Transparency of Relevant Patents

Uncertainty regarding the existence of patents on particular medicines sometimes slows down the introduction of generic medicines. Patent searches are costly and time consuming, particularly where patent office records are poorly organised or difficult to search. But governments, as well as regional or global organisations can facilitate much better transparency on patent status.

The United States publishes an ‘Orange Book’ that lists the patents companies claim to be relevant for the medicines they market in the US. The disclosures in the Orange Book are voluntary. The incentive to disclose is related to the patent enforcement mechanism linked to the Orange Book. The US Food and Drug Administration (USFDA) will not register a generic competitor so long as there are patents listed in the Orange Book. While the Orange Book improves transparency of patent filings in some ways, it is routinely misused. Companies often list patents of dubious merit and relevance. As a consequence, the improper listing of patents is frequently the subject of litigation and antitrust enforcement actions. The USFDA is needlessly embroiled in disputes over the listing of Orange Book patents, because of the link to drug registration. Unfortunately, the US government is promoting this flawed system in regional and bilateral free trade agreements. However, as flawed as the US Orange Book system is, it could easily be modified to work better. In particular, a listing of patents could be required or encouraged in any of the following ways.

Drug registration authorities could require or encourage disclosure without linking it to drug registration, by providing that patent owners could not enforce non-disclosed patents against generic competitors. Although this approach would still likely result in the listing of patents of dubious quality or relevance, the drug registration authorities need not and indeed should not use the listing to block generic competitors. The patent owners should have to seek enforcement in national court systems, as is now the case in most countries, and everywhere for non-pharmaceutical inventions.

Regional or multilateral bodies concerned with health care, such as the African Union, the Pan-American Health Organisation, the World Bank, UNAIDS, the Global Fund, regional patent pools or the WHO could also play an important role. For example, donors for AIDS treatment could meet with the handful of companies that market key AIDS drugs and insist that they disclose the relevant patent numbers and countries where the patents are approved, and publish the information on the Internet.

The task of disclosure could also be managed by local, regional or multilateral patent offices, including the Patent Co-operation Treaty administered by WIPO. While patent offices have not played a traditional role in such disclosures, it is increasingly difficult to ignore the enormous problems presented by the lack of transparency of patent status.

A global system would provide useful information about the differences in the patent landscape for the same drug sold in different countries. Countries that face a high number of patents may seek to understand why such patents are not listed for other jurisdictions. The global authority could also do a more efficient job of ‘delisting’ patents that are not relevant.

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### ENDNOTES

<sup>1</sup> Ted Apple, “The Coming US Patent Opposition,” *Nature Biotechnology*, Volume 23, No 2, February 2005.

<sup>2</sup> 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, *Lancet* 2004; 363: 560-63

# Environmental Goods: Dispelling Myths to Identify Opportunities

Robert M. Hamwey

After four years of discussion, WTO negotiators still cannot agree on what an environmental good (EG) is. As a result, the fundamental reference frame needed to begin negotiations on modalities remains absent, leaving negotiators far from concluding an agreement.

Eager to strike a deal providing them with future gains, most developed countries have proposed EG lists in negotiations. Developing countries, however, are yet to do so. Many appear convinced that there can only be one winner in this game, and the fact that there are clear gains for the North means that there must be commensurate losses for the South.

Succumbing to emerging myths that project gloomy liberalisation prospects for the South, many developing countries fail to approach negotiations with due enthusiasm. Yet if the growth in GDP witnessed in developed and developing countries alike over the past decade is any indication, trade liberalisation can provide win-win outcomes. Certainly there must be a silver lining and a rainbow in the cloudy EG realm that developing countries have yet to discover.

## Emerging Myths

Regrettably, much of the accepted wisdom deriving from recent studies,<sup>1</sup> workshops and countries' WTO statements, continues to mislead negotiators. Specifically, the quest to identify EGs of export interest to developing countries is obscured by two widely promulgated myths:

- EGs on the OECD and APEC lists (Class A EGs) are of little export interest to developing countries; and
- Environmentally-preferable goods (Class B EGs) will deliver the greatest export gains to developing countries.

These myths have hampered negotiations. Stalled in a four-year theoretical discussion of EG lists, the more important practical task of crafting modalities, including special and differential treatment (SDT) provisions to ensure commercial gains for developing countries, has not even started. Unfortunately, as in the Uruguay Round, time and political pressures may leave little time for an elaboration of SDT once a list is finally agreed upon.

## Dispelling the Myths<sup>2</sup>

Moving beyond the list discussion requires that realities replace myths so that opportunities can be discerned.

First, environmental goods on the OECD and APEC lists *are* of substantial export interest to developing countries. As studies and Members' WTO statements correctly observe, Class A EGs are mainly added-value industrial manufactured goods, and developing countries have a negative trade balance in these goods. However, these facts should not suggest that only developed countries produce Class A EGs, nor that they are of little export interest to developing countries. Years have passed since the colonial era, and today developing countries are major world producers of manufactures. The proportion of manufactures in their exports has climbed continuously from only 20 percent in 1980 to 75 percent in 2003.<sup>3</sup> Developing countries currently produce and export a wide range of Class A EGs.

Although developing countries have a trade deficit in Class A EGs, these goods rank among their most dynamic exports. Growing at annual rate of 12.5 percent – and rising as a share of total exports from 2.5 to 2.8 percent between 1997 and 2003 – Class A EG export growth by developing countries exceeded the 9.8 percent growth of world exports over this period. While exports are mainly towards the North, South-South trade is significant. In 2003, some 20 percent of the South's Class A EG import demand was met by exports from the South, compared to 13 percent in 1997. Certainly, tariff reductions from current high levels would stimulate increased South-South trade in these goods and contribute to narrowing the South's trade gap.

Studies and negotiators have aptly noted that 10 large developing countries are the source of 90 percent of the South's Class A EG exports. But this should not imply that smaller developing countries have a lesser export interest in these goods. Many of the latter have higher Class A EG export-to-GDP ratios than their larger counterparts. Moreover, because many Class A EGs are intermediate goods used to manufacture environmental technologies, lower tariffs on Class A EGs would enhance prospects for a wide set of developing countries to participate in related production chains.

Studies and negotiators have also recognised that many Class A EGs are multiple-use intermediate goods. The reduction of import tariffs on Class A EGs will thus reduce costs of inputs for developing country producers of many consumer goods, allowing them to increase added value and competitiveness in domestic and international markets. It is thus surprising that many developing countries perceive multiple-use as an administrative problem rather than an economic opportunity.

The above figures and trends indicate that trade liberalisation of Class A EGs can generate dynamic gains for many developing countries. Unfortunately, the focus by recent studies on trade balances alone fails to reveal this important fact.

Second, environmentally-preferable (Class B) goods *will not* deliver the greatest export gains to *most* developing countries.

It is incorrect to assume that developing countries will achieve their greatest export gains in Class B EGs simply because they have positive trade balances for these goods. The level of their exports for a group of Class B EGs examined by UNCTAD<sup>3</sup> was only US\$18 billion in 2003, while imports stood at nearly US\$14 billion. Although

*Continued on page 16*

there is a trade surplus here, it is not remarkably large.

Class B EGs show little dynamism. The annual growth rate of developing country exports for the core group of Class B EGs between 1997 to 2003 was only 8.7 percent, lower than that of world exports, and significantly lower than the 12.5 percent growth rate for Class A EGs. In absolute terms, developing countries' total exports of core Class B EGs rose from US\$13 billion to only US\$18 billion between 1997 and 2003, while their exports of Class A EGs more than doubled from US\$27 billion to US\$56 billion. Clearly, liberalisation of Class A EGs can offer developing countries far greater opportunities for income and employment generation than Class B EGs.

Nevertheless, many least-developed and developing countries with small rural economies appear prominently in a ranking of Class B EG exports relative to GDP. This observation, and the fact that many of these countries' exports are concentrated in natural resource-based commodities, indicates that trade liberalisation of Class B EGs will be essential in providing them with immediate export gains. That is the value they bring to negotiations. However, the large number of developing countries with more diversified economies will accrue substantially greater gains from trade liberalisation of Class A EGs.

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## ENDNOTES

<sup>1</sup> UNCTAD, 2003, *Environmental Goods and Services in Trade and Sustainable Development*, TD/B/COM.1/EM.21/2; Singh, S., 2005, *Environmental Goods Negotiations: Issues and options for ensuring win-win outcomes*, IISD, Winnipeg; and Howse, R. and van Bork, P. B., 2005, *Liberalising Environmental Goods in the Doha Round*, Bridges, August 2005, ICTSD, Geneva.

<sup>2</sup> The EG trade data quoted in this section are from UNCTAD, 2005, *Environmental Goods: Identifying Items of Export Interest to Developing Countries*, CBTF Briefing Note, UNCTAD, Geneva.

<sup>3</sup> UNCTAD, 2004, *Handbook of Statistics*, UNCTAD, Geneva.

# Trade and Environment Pre-Hong Kong

Negotiations on the Doha Round's environment mandate are unlikely to command much ministerial attention in Hong Kong.

Reflecting the uneven progress in the Special Session of the Committee on Trade and Environment (CTE-SS), the draft ministerial declaration only instructs the body to "intensify the negotiations, without prejudging their outcome" with regard to the relationship between WTO rules and trade-related provisions in multilateral environmental agreements (MEAs), and 'recognises' work undertaken on granting observer status to MEA Secretariats. Neither of these areas of the negotiating mandate has seen much progress since the launch of the Doha Round, although a number of proposals have been submitted on the WTO-MEA relationship.

Lately, however, Members have focused intensely on the third part of the mandate, i.e. the definition of environmental goods in view of negotiating the "reduction or, as appropriate, elimination of tariff and non-tariff barriers in this area."<sup>1</sup> The draft ministerial declaration presents ministers with the choice of either instructing Members to just (i) continue their work on "developing a common understanding of the different approaches to the negotiations" or (ii) to complete the task by [x date] in 2006 "by identifying environmental goods for the reduction or, as appropriate, elimination of tariff and non tariff barriers in this area."

So far, Members have proposed nine initial lists of 'environmental goods', most of them based on compilations previously agreed by the Organisation for Economic Co-operation and Development or the Asia Pacific Co-operation forum. These lists focus largely on end-of-pipe pollution prevention technologies. Several Members, including the EU, Switzerland, Brazil, New Zealand and India, have raised the possibility of broadening the definition of environmental goods to include 'environmentally preferable products' (EPPs), i.e. goods with high environmental performance and/or low environmental impact. Such products could include organic agricultural products; sustainably-harvested timber or non-timber forest products; fish products from sustainably-managed fisheries; or products made from natural fibres, such as jute or coir.

In June 2005, India proposed that a potentially wide array of both goods and services could be temporarily liberalised for the duration of a project seeking to fulfil a specific environmental objective, approved by a 'designated national authority'. This approach, India argued, would address a number of problems attributed to the list approach, including the fact that many of the items likely to appear on such lists could have dual or multiple uses; the negative impacts of unrestricted concessional market access for environmental goods on indigenous innovation and the competitiveness of local industries; and the separation between environmental goods and environmental services (EGS). EGS eligible for specific concessions for the duration of the environmental project could include, for instance, air pollution control, renewable energy facilities, or EPPs. The national authority would base its assessment on criteria to be developed by the CTE, which would ensure transparency (Bridges Year 9 No.6-7, page 12).

The CTE-SS Chair's report to the last session of the WTO's Trade Negotiations Committee noted that some elements of convergence could be discerned among the lists proposed so far, but added that "significantly more analytical and technical work" would be required before starting work on a consolidated set of environmental goods that would ultimately provide the basis for negotiations in the Negotiating Group on Non-agricultural Market Access (NAMA).

## ENDNOTES

<sup>1</sup> The CTE is only concerned with the definitions for environmental goods and services; the actual market opening commitments in these areas are the bailiwick of the negotiating groups on industrial market access and services respectively.

<sup>2</sup> Little work has been undertaken so far on the definition of environmental services, which also falls under the CTE's negotiating mandate.



# Anti-dumping in Developing Countries

Gary N. Horlick

While Doha Round negotiations on changes to anti-dumping rules have been overshadowed by the intense focus on market access, they are of vital importance to a number of WTO Members.

Anti-dumping rules raise at least two major issues for developing countries.<sup>1</sup> The first concerns the advantages anti-dumping offers compared to other trade defences available under WTO rules. The second has to do with the serious threats that anti-dumping duties against their own exports pose to development strategies.

## Background

Anti-dumping was hardly used after the Second World War – the first GATT survey, in 1958, shows only 37 measures in place, 21 of them in South Africa. Neither the tariff cuts of the early GATT rounds nor the Kennedy Round appear to have increased the number particularly. The main upsurge seems to have been stimulated by the worldwide recession of 1974-75 and related changes in national laws to change in definition of ‘dumping’ to include sales below cost, as well as price discrimination. Until 1987, more than 95 percent of reported anti-dumping cases were brought in Australia, Canada, the EU (then the EC), and the US.

That tendency began to change dramatically with the introduction and relatively high use of anti-dumping measures by Mexico beginning in 1987. For the period 1995-2004, India was the leading user of anti-dumping, followed by the US, the EU, Argentina and South Africa. In short, developing countries have become leading users of anti-dumping.

## Advantages

There are several advantages for developing countries in using anti-dumping rather than other border protection measures:

- Anti-dumping can be used selectively, against specific countries, while safeguards threaten all sources of exports. Developing countries often wish to avoid angering other trading partners when they can target just a few sources of the exports (of course, this can also be true in developed countries). This selectivity creates an incentive to use anti-dumping as corporate strategy: I have seen several cases where corporation X brings an anti-dumping case against imports from countries A, B and C (where it has no factories), but conspicuously avoids bringing the same case against exports from country D where it does have a factory.
- No compensation is owed for anti-dumping, but is required for safeguards after three years (or immediately, if certain conditions are met).
- A developing country can justify anti-dumping action with both traditional ‘infant industry protection’ arguments, as well as the comforting – if somewhat contradictory – claim that its industry would be fully competitive but for the ‘unfair’ imports.<sup>2</sup>
- Developing countries can be fairly confident that their anti-dumping measures will not be challenged in the WTO. The leading target of anti-dumping cases since 1995, the European Union (including its member states), has only challenged anti-dumping decisions by a few countries (the United States, India and Argentina), while the second leading target, China, has challenged none, and Korea, the third leading target, has only challenged the US and Philippines. The fourth leading target, the United States, has only challenged three cases (all agricultural products subject to Mexican anti-dumping duties).

Anti-dumping systems are more costly to maintain than safeguard systems, because there are more procedural requirements in the Anti-dumping Agreement than the Safeguards Agreement. But that also means that defending an anti-dumping case in a developing country is more expensive for the exporter than defending a safeguard case, all other things being equal. Since many developing country markets are small relative to big markets such as the US and the EU, the added expense of anti-dumping may mean that the foreign exporter does not bother defend the case.

## Threats

If a developing country exporter is a new entrant in the importing country market, it may well be perceived as more of a threat to established market shares since its prices are likely to be lower to reflect lack of name recognition or familiarity (an economist may argue that this means that the prices as such are not immediately comparable). Because of the calculation methodologies, anti-dumping margins may be higher for new entrants in the process of setting up distribution facilities, market reputation and so on. To the extent that developing countries export products are subject to high tariffs in the importing country, such as textiles, their exporters would be found to have higher dumping margins, because high tariffs in the importing country are subtracted from the exporters’ prices in calculating the dumping.

The impact on developing country exports becomes far more dramatic in the context of developing countries’ attempts to diversify away from reliance on one or a few exports. As soon as a market is found for a non-traditional export, it can be hit by an anti-dumping case. This is even more damaging where the developing country has a relatively small home market, so that the loss of the export market may be well far more devastating than the loss of the much smaller home market. Consider the following:

- Chile for many years relied on copper for more than 80 percent of its exports. It has now successfully diversified to also export wine, salmon, wood products, grapes, fruits and mushrooms. All of those products have been hit with anti-dumping cases or credible threats of them. In the case of mushrooms, the industry was nearly destroyed by one case.
- Brazil once relied heavily on coffee for export earnings, but now ships a wide range of products. As a result, for example, there have been 80 cases against Brazilian products ranging from orange juice and ethanol to specialised steels and airplanes.

*Continued on page 18*

- Colombia diversified away from coffee and illegal drugs into fresh flowers – and faced dumping cases in both the US and in Europe.
- Vietnam, one of the poorest countries in the world, tried to develop a large market in the United States for farmed catfish and farmed shrimp – and ran into anti-dumping cases in the US against both.
- Even developing countries shipping more traditional raw material exports are not immune; anti-dumping cases were filed in the United States in 1999 against imports of crude oil (a major source of income) from Saudi Arabia, Mexico, Venezuela and Iraq.

In summary, anti-dumping represents an opportunity for developing countries to protect selected industries at relatively low costs in WTO terms, but at the same time it can be a potential ‘death sentence’ for developing countries’ exports of non-traditional exports, especially if the export market is larger than the home market.

How this tension is resolved by developing countries such as Brazil, Thailand, India and others will probably determine the outcome of the Doha Rules negotiations on anti-dumping.

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#### ENDNOTES

<sup>1</sup> This article discusses aspects of anti-dumping specific to developing countries. Those interested in the broader debate over anti-dumping can compare Greg Mastel, *Antidumping Laws and the U.S. Economy* (1998) (anti-dumping is necessary to permit trade liberalisation) with Brink Lindsey and Dan Ikenson, *Antidumping Exposed* (2004) (anti-dumping is disconnected from any initial rationale of ‘unfairness’).

<sup>2</sup> The WTO nowhere says that dumping is ‘unfair’, as the WTO website is careful to point out. When New Zealand proposed that dumping itself be disciplined, its proposal was blocked at the behest of the United States. See J. Jackson, *World Trade and the Law of GATT* at 412 (1969), and GATT Doc. SR.7/41 (1955).

## The Ministerial Draft on WTO Rules

The ministerial draft text on anti-dumping and subsidy rules is likely to be approved without much discussions in Hong Kong.

The main difficulty encountered in preparing the text in Geneva was whether ministers should establish a timeframe – such as ‘early in 2006’ – for a move to negotiations on amendments to existing WTO rules on anti-dumping and subsidy rules (including specific disciplines for fisheries subsidies) and regional trade agreements. Although many countries feel strongly that many of the rules should be amended, most WTO Members are not in favour of a mandated starting point for text-based negotiations at this stage. Some, such as the US and Egypt, are generally opposed to stricter rules on anti-dumping, while others – including Brazil, the EU and Switzerland – have emphasised that progress in the rules negotiations should be ‘commensurate’ with that in other groups in terms of ambition and substance.

After drawn-out discussions on the issue, Members eventually agreed not to include specific target dates in the progress report submitted by the Chair of the rules negotiations, Ambassador Guillermo Valles Galmes of Uruguay, to the Trade Negotiations Committee (TN/RL/15, 30 November 2005).

Reflecting language in the Chair’s report, Annex D of the draft ministerial declaration simply directs the group “to intensify and accelerate the negotiating process in all areas of its mandate”, as well as mandates the Chair “to prepare, early enough to assure a timely outcome within the context of the 2006 end date for the Doha Development Agenda and taking account of progress in other areas of the negotiations, consolidated texts of the AD and SCM Agreements that shall be the basis for the final stage of the negotiations” (original emphasis).

The draft declaration also includes the circumvention of anti-dumping measures in a list of issues that will be further discussed after Hong Kong. WTO rules do not currently cover circumvention, and a number of Members had requested the Chair to remove this issue – strongly pushed by the US and the EU – from the text.

The draft declaration notes that “there is broad agreement that the Group should strengthen disciplines on subsidies in the fisheries sector, including through the prohibition of certain forms of fisheries subsidies that contribute to overcapacity and over-fishing, and call[s] on participants promptly to undertake further detailed work to, *inter alia*, establish the nature and extent of those disciplines, including transparency and enforceability. Appropriate and effective special and differential treatment for developing and least-developed Members should be an integral part of the fisheries subsidies negotiations, taking into account the importance of this sector to development priorities, poverty reduction, and livelihood and food security concerns.”

### The Post Hong Kong Agenda

In his progress report, Ambassador Valles Galmes said post-Hong Kong work on anti-dumping would mean “first and foremost an intensified schedule of negotiations on the precise textual proposals that already are before the Group or that may yet be submitted.”

With regard to the negotiations on subsidy and countervailing rules, as well as disciplines on fisheries subsidies, the Chair called for Members to submit ‘as soon as possible’ more specific textual amendment proposals, which he said were prerequisites for undertaking a “sufficiently focused discussion [...] to allow for identification of possible areas of convergence.”

The Chair also said he now had a ‘solid base’ for a revised roadmap on systemic issues regarding regional trade agreements. He anticipated that its focus would be the clarification of what constitutes ‘substantially all trade’ and “other questions so far discussed, with a detailed breakdown of the concrete elements underpinning each of the issues. [...] The aim of the roadmap is to achieve sufficient convergence on these questions to allow the group to arrive at appropriate outcomes by end 2006.”

# Non-Tariff Barriers and the Hong Kong Negotiations: How much of a Risk do Phytosanitary Controls Pose?

Andrew Mold

Recent years have seen a resurgence of concern about the application of non-tariff barriers especially regarding industrialised nations' use of 'new generation' import controls, such as antidumping and phytosanitary measures, labour and environmental standards, and rules of origin. There is a parallel concern that developing nations seem increasingly targeted by these non-tariff barriers (NTBs). This is certainly the case with the Newly Industrialising Countries (NICs) and developing countries with enormous export capacity, such as China and India, but poorer developing countries are also increasingly suffering from the impact of new generation NTBs, particularly with regard to phytosanitary controls and quality standards.

Such standards are especially an issue for African countries dependent on one or two primary commodities for the bulk of their export earnings. For them, the potential loss of trade through the imposition of higher standards in the export market can run into millions of dollars. It is thus not surprising that product standards are highlighted by African leaders as one of two important concerns in the 'NEPAD Market Access Initiative' (the other being OECD farm subsidies).<sup>1</sup>

## Food Safety Standards as Trade Barriers

Of course, nobody would deny the importance of guaranteeing minimum food safety standards or quality standards – indeed, it is a customarily a statutory obligation on the part of authorities throughout the world to ensure that food stuffs or other products present no major health risks, and that goods meet certain minimum quality standards. The danger resides in how such regulatory power can be used for purposes other than the protection of consumers. In this context, Milton Friedman is well known for voicing the opinion that, however well-intentioned they are in principle, regulations are prone to be used *against* rather than *for* the benefit of consumers.<sup>2</sup> Businesses have a powerful vested interest in lobbying governments to get regulations set to suit their own interests, but consumers are often unorganised, and do not have the same incentive in making changes to regulations. There is, in other words, an unequal power base between consumers and companies when setting regulations.

A similar dilemma confronts African countries, which have generally been unable to participate equally in the setting of standards and regulations. They have become, in the words of one report 'standard-takers', being "*forced to accept and try to meet international standards, reacting to ever-changing standards that do not accommodate unique constraints pre-existing in the local environments.*"<sup>3</sup> Acknowledging this problem, the WTO's Sanitary and Phytosanitary (SPS) Agreement requires agricultural exports to meet standards laid down by international standard-setting bodies such as the Codex Alimentarius. Unfortunately, these bodies are currently dominated by developed country experts, many from the corporate sector. Moreover, for many agri-food products there is a paucity of international standards. Indeed, the vast majority of SPS measures taken to impede imports notified to the WTO during 1995-99 did not correspond with any international standard at all.<sup>4</sup>

In consonance with these concerns, empirical data shows a very large recent increase in the number of detentions under phytosanitary controls. As Africa's leading export market, more stringent controls by the EU are particularly worrying. The number of EU notification/alerts increased more than six-fold between 1998 (230 cases) and 2002 (1520).<sup>5</sup> As a consequence, in recent years African exporters of horticultural and food crops have suffered a number of serious cases of prohibitions of their products. To cite just two examples, Kenyan exporters of horticultural products are now forced to hire European-based audit and pre-shipment inspection firms to certify 'minimum residual' levels of produce before it is shipped out, thus incurring higher expenses. This threatens an export industry estimated at US\$500 million. Another well-documented case is the Lake Victoria Fish Industry. The losses resulting from the ban on fish imposed by the EU from March to July 1999 was estimated at about US\$36.9 million to

the Ugandan economy alone. It affected some 35,000 people involved in fish-related activities (e.g. fishermen, fish mongers and transporters), as well as indirectly generated income and employment losses.<sup>6</sup>

Lack of predictability in standard-setting is a particular problem. Salvador Namburete, Vice Minister of Industry and Commerce for Mozambique, has called the EU's standards a 'moving target', evoking the story of a shrimp exporter who met all standards and import regulations when the ship left the port, but by the time the ship reached the EU the standards had changed and the cargo was not unloaded.<sup>7</sup> Another serious problem is the cost of compliance, estimated in one study to reach up to ten percent of the overall production cost for some agricultural goods.<sup>8</sup> However, that is just an average. In particular cases, cost increases can be far higher. Finally, a serious problem is the way in which standards and technical barriers marginalise smaller players, especially producers, traders and processors. Given the relevance of small-scale production for poverty reduction, this is a particularly worrying development.<sup>9</sup>

## The Mechanics of Standard Setting

The problems are compounded by the fact that, so far, industrialised countries have resisted developing country attempts to be more active within standard-setting bodies. Before the WTO's Seattle meeting in 1999, India – ultimately unsuccessfully – sought a decision that only standards developed by the relevant international bodies with the involvement of developing countries should be treated as international standards for the purposes of the SPS and Technical Barriers to Trade (TBT) Agreements.

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Industrialised countries typically justify their insistence on being able to unilaterally impose standards by suggesting that they are simply responding to consumer pressure. However, such an argument is difficult to square with evidence of poor enforcement, and in some cases actual relaxation, of existing food and environmental safety standards in developed countries.

To cite some examples, according to one study carried out in France, eight percent of the fruits and vegetables presented pesticides residues above the authorised ceiling.<sup>10</sup> In a similar study carried out in the early 1990s in the US, 5.6 percent of all the fruits and vegetables tested were contaminated at levels higher than legally allowed. As a final example, in 1997 the UK government agreed to raise the permitted levels of a potentially carcinogenic chemical called glyphosate in soybeans by a factor of 200 times.<sup>11</sup> The argument that industrialised countries have increasingly tended to use phytosanitary controls as covert protectionism is reinforced, for example, by that many have a near-zero tolerance for salmonella in imported poultry products while this pathogen is widely present in domestic supply chains.

It is especially ironic that many of the major food safety scares in recent years have had their origin in the industrialised countries themselves. For example, in the late 1980s Italy and the UK experienced the beef hormone scare; in the early 1990s, there was the e-coli outbreak in fast-food hamburger chains in the United States; in the mid-1990s, the brain-wasting disease associated with BSE caused panic in the UK; in 1999 there was the alarm over dioxins in animal feed in Belgium; and in Spain in 2001 there were wide-spread fears over contaminated olive oil.

Against this backdrop, there would seem to be a profound inconsistency in demanding risk-free flowers and fruits from African exporters, while simultaneously consenting to the consumption of enormous quantities of domestically-produced and potentially hazardous processed foods, household products, cosmetics, etc. If human health were the highest priority, it would seem logical to impose more stringent health standards in the domestic market instead of penalising African exporters.

### Common Problems Require Common Solutions

Simply because considerable progress has been made reducing tariffs through multilateral and bilateral trade negotiations over the last forty years does not mean that barriers to trade no longer impede exports. African and other poor developing countries are especially vulnerable to new forms of protectionism, particularly with regard to product and safety standards. Fortunately, there is at least a growing international acknowledgement of the problem. The Standards and Trade Development Facility, established in mid-2002 as a joint initiative of the FAO, the World Organisation for Animal Health, the World Bank, the WHO and the WTO, is an example of the new initiatives being tabled to tackle the poor capacity of developing countries to deal with product standards.

However, in view of the scale of the problem, the low level of initial funding, and the fact that many of the previously mentioned codes are not legally-binding, we would suggest that initiatives like these are not sufficient. For instance, while the EU imposes very strict controls on SPS, it provides only derisory funding for enhancing developing countries' capacity to meet trading standards.<sup>13</sup> Moreover, product standards tend to be 'moving targets' that the poorest developing countries are ill-equipped to deal with. Indicative of this, the WTO's SPS Committee has so far only received five counter-notifications from low-income countries, with the vast majority being brought by a handful of more developed countries such as Argentina, Brazil, Chile and Thailand.<sup>14</sup>

One way of at least initiating a solution is by stressing the extent to which this is a shared problem – a potentially serious impediment to trade for the developed countries too. In 1996, the US Department of Agriculture found that 'questionable' technical barriers (measures judged to have no scientific basis) were inhibiting US exports of agricultural and food products to some 62 countries. More than 300 market restrictions were identified as constraining exports worth some US\$5 billion, or around 7 percent of US agricultural, food and forestry trade in 1996.<sup>15</sup> Industrialised countries should realise that it is also in their own interests to abide by international norms on these issues.<sup>16</sup>

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# Barriers to Least-developed Country Participation in the WTO's Dispute Settlement System

M. A. Taslim

In the ten-year history of the WTO's dispute settlement mechanism, Bangladesh is the only least-developed country to have initiated a complaint against a trading partner. Its experience provides a pointer to the formidable difficulties that the poorest countries can face in making use of the system.

Least-developed countries (LDCs) make up roughly a quarter of the WTO's Membership. It would be most unusual if the trade interests and economy of only one of them had been injured by the policies of other Members. A more plausible reason is that these countries simply did not have the capacity to mount a legal challenge at the WTO.

Bangladesh's ultimately successful case against India's controversial anti-dumping measure on its lead acid battery exports could assist other LDCs in weighing the pros and cons of launching a WTO dispute against any perceived wrong-doing by powerful trading partners.

## Barriers to LDC Participation

The most important prerequisites for seeking legal redress from any unfair trade practice or measure are a *decision* to seek redress and the *capacity* (both intellectual and material) to do it. While the former might at first blush seem trivial, it could prove to be the most critical factor in many circumstances. Most LDCs mainly trade with developed countries, particularly the US and the EU. Their domestic economies are thus greatly influenced by developed countries' economic policies, such as agricultural subsidies and tariffs. It follows that many of LDCs' potential trade-related complaints would be likely to involve developed countries, and on some occasions large developing countries such as China and India.

When this is the case, the decision to confront the adversary at the WTO is no longer simply based on the merit of the case. The political, economic and financial leverage that these larger countries possess are usually sufficient to browbeat the aggrieved LDC into inaction. Thus, cotton-growing African LDCs might quite correctly assess that the subsidies provided by the US to its cotton farmers badly injure their economies, but they might not proceed to seek a remedy for fear of US retaliation in other important areas.<sup>1</sup> Even in the absence of explicit threats, LDC governments might worry about developed nations hardening their positions in various negotiations, or withdrawing various forms of support.

In such circumstances, it is no wonder that during the first nine years of the existence of the WTO, no LDC had summoned the political will to utilise the institution's good offices to settle grievances about the policies of developed countries.

Although India is not comparable to the US or the EU in terms of economic or political clout, it has considerable influence on Bangladesh. A very large country that surrounds Bangladesh on three sides, India is also its largest trading partner and the supplier of many essential commodities. Bangladesh's decision to engage India in the WTO thus did not come about easily. Bangladesh had to overcome much internal resistance as well as a psychological barrier in its ideas about the relationship between trade and diplomacy in order to reach the decision to challenge India's anti-dumping measures in the WTO dispute settlement system.

Another factor that contributes to the unwillingness of LDCs to seek legal recourse is their sheer lack of capacity. WTO laws, regulations etc. have quickly multiplied into tens of thousands of pages, and preparing a case for the Dispute Settlement Body (DSB) requires an enormous amount of effort. No LDC is likely to invest heavily to develop the capacity necessary for such a task — it might not be economically feasible for any LDC to do so unless the country foresaw a steady stream of disputes that it would wish to settle at the WTO. For most LDCs this is unlikely to happen and hence they would not have a strong incentive to build legal capacity in this area.

Of course, a country need not possess a legal capacity of its own to pursue cases as the WTO — so long as it has the means to hire the services of specialised lawyers or firms. However, such services can be procured only at a very high cost. Gregory Shaffer has noted that the lawyers' fees alone for an average WTO case are in the range of three to four hundred thousand dollars and could be much higher in specific cases.<sup>2</sup> This puts the WTO dispute settlement system beyond the financial reach of LDCs if they have to bear the full costs.

Bangladesh was able to go ahead with the Indian anti-dumping case largely because its legal costs were drastically reduced by the concessionary services that the Advisory Centre on WTO Law in Geneva provides to LDCs. The Centre helped prepare the legal brief, and provided two lawyers to assist the Bangladeshi team during the formal consultation with India at the WTO. Without the Centre's assistance Bangladesh would have found it well nigh impossible to contest India's anti-dumping measure at the DSB.

Although it is governments that formally engage in dispute settlement in the WTO, the real aggrieved parties are often private companies (in some cases public enterprises). Hence, the effectiveness of the legal challenge mounted by the government depends on its co-ordination and co-operation with the actual injured party. The government needs full disclosure of information and data on all relevant issues in order to prepare a strong case. Private firms in LDCs often do not keep records of all their transactions, and some of the records may not be in a usable format. They are also sometimes reluctant to divulge information about the financial aspects of their business to the government. The existence of such problems would weaken a country's case and should therefore be sorted out before a dispute is lodged at the WTO.

*Continued on page 22*

The administrative structure of the government could also pose some constraints. If several government departments or agencies become involved in the procedures leading to filing a WTO case, problems might arise. For instance, different departments might be reluctant to co-operate with one another due to over-protectiveness of their respective jurisdictions. They may also differ on the appropriate course of action.<sup>3</sup> All these factors may cause the case to be caught up in a political and bureaucratic tangle, leading to long delays. The problem is likely to be less severe if a single department holds the statutory authority to decide on the case with other departments only assisting in an advisory capacity.

### Conclusion

The WTO's dispute settlement system provides an opportunity for smaller nations to seek an impartial resolution of their trade

disputes, particularly with large and powerful nations. However, due to apprehension of retaliation, LDCs are generally reluctant to approach the WTO to take action against a powerful nation. A lack of adequate human and financial capacity to legally contest any perceived unfair trade measure – whether in the WTO or in the local institutions of the powerful nations – also contributes to their reluctance or inability to take action. The disclosure requirements of a legal contest are sufficiently daunting to sometimes discourage the relatively small-sized private firms of LDCs from co-operating with their authorities in the preparation of a case. While the Advisory Centre on WTO Law in Geneva provides very useful assistance to LDCs with regard to their human and financial capacity constraints, the other difficulties must be addressed through domestic policies and efforts.

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### ENDNOTES

<sup>1</sup> That such apprehension is not baseless is borne out by the fact that the US had already threatened these countries with cutting off financial and food aid if they bring the case to the WTO.

<sup>2</sup> Gregory Shaffer (2003). 'How to Make the WTO Dispute Settlement System Work for Developing Countries: Some Proactive Developing Country Strategies' in *Towards a Development-supportive Dispute Settlement System in the WTO*, ICTSD Resource Paper No. 5.

<sup>3</sup> Even when other departments are not directly involved, they may nonetheless object to a legal challenge out of concern that the dispute might eventually spill over to their domain.

## Doha Round Challenges: Defining Tropical Products

The July 2004 Framework Agreement calls for the implementation of the long-standing commitment to achieve the fullest liberalisation of trade in tropical agricultural products, but an agreed definition is still lacking for such products.

Under the GATT, negotiations on liberalising trade in primary agricultural commodities produced predominantly in the tropical region were held in a separate group constituted for this purpose. During the Kennedy, Tokyo and Uruguay Rounds, special groups on trade in tropical products (TPs) were established to ensure that developed countries paid priority attention to removing tariffs and other barriers affecting developing country exports of TPs.

During the Uruguay Round, negotiations on TPs were classified according to a scheme proposed by the US under (i) tropical beverages (cocoa, coffee and tea); (ii) spices, flowers and plants; (iii) certain oilseeds, vegetable oil and oilcakes (e.g. palm and coconut oil); (iv) tobacco, rice and tropical roots; (v) tropical fruits and nuts; (vi) tropical wood and rubber, and, (vii) jute and hard fibres. The result was the elimination of tariffs on almost all unprocessed TPs by all developed countries.<sup>1</sup> However, some of the latter still levy duties on an MFN basis on imports of processed products. Lower or zero duties are frequently applied to imports under preferential systems.

In the Doha Round, trade in TPs is discussed in the Special Session of the Committee on Agriculture, together with all other aspects of liberalising agricultural trade. The current TP negotiating mandate is anchored in the built-in agenda of the Agreement on Agriculture concluded during the Uruguay Round. Its preamble specifically states that developed countries would "take fully into account the particular needs and conditions of developing country Members by providing for a greater improvement of opportunities and terms of access for agricultural products of particular interest to these Members, including the fullest liberalisation of trade in tropical products". Paragraph 43 of Annex A of the Framework Agreement

### Simulation of some tropical product tariff cuts under the US and EU proposals

Product	Current bound MFN tariff	MFN tariff after application of US formula	MFN tariff after application of EU formula
<b>Rice husk/husked</b>			
US	5.1%	1.8 - 2.3%	3.3%
EU	61.9%	6.2 - 9.3%	30.9%
<b>Rice glazed/polished</b>			
US	5.6%	2 - 2.6%	3.1 - 4.5%
EU	89.7%	9 - 13.4%	44.8%
<b>Pineapple - fresh</b>			
US	1.2%	0.4 - 0.5%	0.7 - 1%
EU	5.8%	2 - 2.6%	3.3 - 4.6%
<b>Pineapple - juice</b>			
US	4.1%	1.4 - 1.8%	2.2 - 3.3%
EU	33%	8.2 - 11.5%	18.1%

Source: FAO/ICTSD

(WT/L/579) adopted in July 2004 notes that the full implementation of the long-standing commitment to achieve the fullest liberalisation of trade in tropical agricultural products is “overdue and will be addressed effectively in the market access negotiations.” In October 2004, several developing countries, including 11 Latin American countries,<sup>2</sup> submitted a proposal reiterating the need to fulfil this commitment, supported by the G-20.

### Towards a Definition of Tropical Products

As TPs play a critical role in the economies and exports of most developing countries, they are of particular importance for the delivery of development outcomes from the Doha Round negotiations. In order to identify and define TPs, an economic and geographical analysis could be based on the classification of agro-ecological zones originally developed by the FAO.<sup>3</sup> An agro-ecological zone is defined in terms of climate, landform and soils, and/or land cover, with a specific range of potentials and constraints for land use. Determining factors include the growing period (i.e. the time of year when moisture and temperature conditions are suitable for crop production), the thermal regime (usually characterised by the mean daily temperature) and soil.

Four agro-ecological zones can be distinguished in the tropical belt: warm arid and semi-arid tropics; warm sub-humid tropics; warm humid tropics; and cool tropics. These zones encompass 95 countries in Sub-Saharan and North Africa, Asia and the Pacific, as well as Latin America and the Caribbean, seventy-six of which are WTO Members. The main crops grown in these zones are sorghum, millet, cowpeas, pigeonpeas, soybeans, groundnuts, sweet potatoes, rice, maize, cotton, cassava, yams, bananas, plantains, pineapples, tree crops (coconut, cocoa, palm oil), beans, tea, coffee, potatoes, wheat and barley. Most of these crops are a primary source of nutrition and food security in many developing countries. Exports of tropical products also make an important contribution to employment and income generation in the areas where they are produced.

The majority of rural producers of tropical commodities rely on export earnings for their livelihoods. However, tariff escalation – i.e. tariffs that increase according to the degree of processing – prevails in a large number of agricultural commodity chains. For instance, while the average tariff on cocoa beans is zero in the US, the EU, Japan and Canada, bound rates for chocolate exceed 20 percent (see table on page 22 for further examples).

Reducing tariff escalation is considered a critical element of the Doha Round’s development dimension since escalation lowers demand for more processed imports from commodity-exporting countries, and hence the expansion of their processing industries – the means of accumulating skills and capital, as well as achieving export diversification. In addition, the concentration of exports in less processed commodities often results in slower export growth and greater exposure to commodity price volatility. Tariff escalation can also contribute to environmental damage in exporting countries since an excessive reliance on primary product exports is likely to cause over-depletion of natural resources.

Given the mandate to fulfil the long-standing commitment to achieve the fullest liberalisation of trade in TPs, it is necessary to find a way of identifying, selecting and eventually defining them. Agro-ecological zones could form a basis for such an exercise. However, in order to assess the relevance of liberalising trade in TPs, specific indicators related to economic and social factors (e.g. the product’s contribution to the economy and employment), as well as market access barriers (e.g. tariff rate quotas, tariffs and tariff escalation), must be explored.

### ENDNOTES

<sup>1</sup> Sugar imports, however, continue to be subject to high MFN tariffs in a number of developed countries, particularly the US and the EU.

<sup>2</sup> Bolivia, Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, Honduras, Nicaragua, Panama, Peru and Venezuela.

<sup>3</sup> FAO. 1996. *Agro-ecological Zoning Guidelines*, FAO Soil Bulletin 73, Soil Resources, Management and Conservation Service, FAO Land and Water Development Division.

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