

Year 9 No.9 September – October 2005

## In this issue

- 3 Special Products: Options for Negotiating Modalities
- 4 A Matrix Approach for Designating Special Products
- 6 WTO News
- 12 Fisheries Agreements and Sustainable Trade: Implications for the Current WTO Negotiations
- 14 Interests of the Caribbean Community in Trade-related Environmental Issues
- 16 Regional Integration News
- 18 How to Address the Disclosure Requirement at the International Level
- 20 Culture, Trade and Additional Protection for Geographical Indications
- 22 New WIPO Forum for the Development Agenda
- 23 ICTSD and Partner News
- 24 Meeting Calendar and Resources

Published by the International Centre for Trade and Sustainable Development

## Facts and Figures

- In 2004, inflows of foreign direct investment (FDI) to developing countries surged by 40 percent, giving them 36 percent of global inward FDI – the highest level since 1997. Meanwhile, developed countries' FDI inflows dropped by 14 percent.

Source: *World Investment Report 2005*. UNCTAD. 29 September 2005

- By September 2005 China had exported over 300 million pullovers to Europe compared to approximately 40 million in 2004. By the end of last year, China accounted for 20 percent of global textile trade and had become the world's third-largest trading nation overall.

Source: The US-China Business Council

- Global exports of merchandise surged 21.2 percent in 2004 to US\$9.07 trillion. This boost, led by the US and China, marks the fastest annual growth rate in 25 years.

Source: Japan External Trade Organisation

## First Bids Show Big Gaps in Ambition

At long last, WTO Members have started to show their hand in view of the rapidly approaching Ministerial Conference in Hong Kong. However, the proposed numbers for agricultural subsidy and tariff cuts are still far apart, as are positions on the grand bargain that is to constitute the final outcome on the Doha Round.

The EU and the US tabled their opening bids on the cuts they could envisage making and the concessions they expected in return at a meeting attended by more than 20 agriculture and trade ministers in Zurich on 10 October. More intense negotiations followed in Geneva, generating counter-proposals and clarifications, particularly in the area of agricultural market access. Ministers were to return to Geneva for at least part of the agriculture negotiations scheduled for the third week of October.

### Domestic Subsidy Reductions

The US started the ball rolling by proposing the elimination of all trade-distorting agricultural support, as well as tariffs, over a 15-year period starting in 2008. During the first five years, the EU and Japan should reduce their most trade-distorting (Amber Box) domestic subsidies by 83 percent, and other developed countries should commit to a 37 percent reduction. In exchange, the US offered to cut its own Amber Box support by 60 percent, as well as to reduce from US\$7.6 billion to US\$5 billion the annual counter-cyclical payments it uses to shield US farmers from the fluctuation of world market prices. US Trade Representative Robert Portman also said his government was ready to cut allowed *de minimis* support from the current 5 percent to 2.5 percent of the value of total agricultural production. In addition, he called for the elimination of export subsidies by 2010. Controversially, he added that the US would like to see the Peace Clause reinstated in the new agriculture deal.

Two days later, the G-20 group of developing countries proposed domestic subsidy reductions ranging from 70 to 80 percent for developed countries, with developing countries reductions amounting to less than two-thirds of those undertaken by industrialised countries.

European Trade Commissioner Peter Mandelson said in Zurich that the EU's Amber Box spending could be cut by 70 percent, coupled with a 65 percent reduction in *de minimis* support and "possible reductions in maximum agreed levels of partially distorting Blue Box payments." He also confirmed that the EU could offer a "commitment to negotiate on product-specific [spending] caps" – a long-standing developing country demand. Commissioner Mandelson did not, however, suggest specific timelines for the elimination of export subsidies, or achieving domestic support or tariff cuts. To the consternation of many developing countries, Mr Mandelson strongly stressed that the EU's flexibility in agriculture would be "heavily influenced" by how ambitious all WTO Members would be in non-agricultural market access (NAMA) and services, stating outright that there would be "no outcome on agriculture or other parts of the negotiations" without developing countries agreeing to significant industrial tariff cuts. See page 6 for further details.

### No Convergence on Market Access

The entire US proposal was conditioned on other countries offering significantly increased market access for its farm products through steep import tariff reductions, and the establish-

*Continued on page 2*

# Bridges

## Between Trade and Sustainable Development

Published by the International Centre for Trade and Sustainable Development.

Director: Ricardo Meléndez-Ortiz  
Editor: Anja Halle  
Address: 7 chemin de Balexert  
1219 Geneva, Switzerland  
Tel: (41-22) 917-8492  
Fax: (41-22) 917-8093  
E-mail: [ictsd@ictsd.ch](mailto:ictsd@ictsd.ch)  
Web: <http://www.ictsd.org>

### Regular ICTSD contributors include:

Heike Baumüller  
Johanna von Braun  
Dominic Furlong  
Malena Sell  
Mahesh Sugathan  
David Vivas

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

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

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

### Annual subscription:

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

The *BRIDGES* series of publications is possible in 2004–2005 through the generous support of the Swiss Agency for Development and Co-operation (SDC), the UK Department for International Development (DfID) and the Rockefeller Foundation.

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

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

ment of tariff caps for both developed and developing countries, at 75 and 100 percent respectively. The G-20 sought almost as high tariff concessions from industrialised countries, but left much more leeway for developing country WTO Members. While the EU's tariff offer was generally deemed far too weak, the G-10 group of net food-importing countries continued to seek even greater flexibility in tariff reductions, as well as in the treatment of sensitive products. See page 7 for more details.

### Initial Reactions

While agricultural exporting nations cautiously welcomed the US proposal as step in the right direction, India's Trade Minister Kamal Nath noted that the EU and the US were "offering postdated cheques on subsidies but asking for cash up front on [industrial] market access." The development charity Oxfam called the US offer "a case of smoke and mirrors," alleging that it would require only a two percent cut in actual US domestic agricultural support by 2023, while requiring developing countries to make greater tariff cuts than industrialised WTO Members. The EU came in for similar criticism. Brazil's Trade Minister Celso Amorim was among those calling for much deeper tariff cuts in order to really improve market access.

With regard to subsidies, the criticism centres on the fact that – despite the seemingly impressive numbers – both the EU and the US proposals are based on cuts from bound support levels, which are significantly higher than current government spending. World Bank economists Kym Anderson and Will Martin, for instance, have calculated that even a 75 percent domestic subsidy cut would result in a 28 percent *de facto* reduction for the US and 18 percent for the EU (*Bridges* Year 9 No.8, page 3). The US vigorously denied the charge that its proposed 60 percent reduction would make no difference to actual spending levels, but the lack of up-to-date data makes that claim difficult to verify.<sup>1</sup>

G-10 officials were also sceptical, albeit for different reasons. Japan's Agriculture Minister Mineichi Iwanaga said the US approach was unacceptable even as a basis for further negotiations. Rejecting the US view that the Doha Round must result in at least some harmonisation in the support levels of key industrial countries, Minister Iwanaga said the proposed US domestic support cuts were disproportionately low compared to those it required from other major subsidisers. Above all, the G-10 remains wholly opposed to maximum tariffs.

### Services Link Contested

Brazil was particularly incensed by the EU's conditioning the outcome in agriculture to the adoption of a multilateral formula for commitments "based on a mandatory numerical target for the number of services sectors in which each WTO Member would be required to make offers." This approach has been intensely debated in recent negotiating sessions on services, where a number of developing countries have rejected it as contrary to very structure of the General Agreement on Trade in Services and the guidelines adopted in 2001 to conduct the negotiations (see page 8).

### 'Round for Free' Likely to Revive Old Tensions

The EU also confirmed that least-developed countries should have the "round for free" and not be asked to open their markets in the current negotiations. More controversially, Commissioner Mandelson noted that some other developing countries might also need flexibilities in market opening. This approach has previously been condemned by Argentina, Brazil and Malaysia, among others, as an unacceptable attempt to make distinctions between the WTO Members that make up the large, self-designated group of 'developing countries' (*Bridges* Year 8 No.5, page 2). Mr Mandelson defended the EU position by saying that "if we don't make some differentiation, we risk being faced either with an overall outcome that is not ambitious enough, or with an outcome that the poorer developing countries cannot in fairness live with."

### ENDNOTE

<sup>1</sup> The US has not notified its agricultural subsidy levels to the WTO since 2001, a year before the Farm Bill currently in force established the counter-cyclical payments. Other large subsidisers are also behind in their WTO notifications.

# Special Products: Options for Negotiating Modalities

Anwarul Hoda

The concept of Special Products had its origin in developing countries' quest for flexibility in applying trade policy instruments to agriculture. This article examines options for designating such products and different ways they could be granted flexible treatment.

After years of debate dating back to pre-Doha days, the Framework Agreement (WT/L/579), adopted by the WTO General Council on 31 July 2004, finally recognised that one of the ways in which the developing countries would benefit from special and differential treatment in agricultural market access would be to entitle them to designate an 'appropriate number' of products as Special Products based on food security, livelihood security and rural development needs. The Framework stated that the criteria and treatment of Special Products would be specified further during the negotiations.

## The Special Products Rationale

Many countries have traditionally equated food security with self-sufficiency in the production of basic foodstuffs. The concept has, however, been evolving and it is now stressed that food security can be attained effectively by an optimum combination of domestic production, importation and public stockholding. In respect of developing countries it is widely recognised that economic access to food is as important as its physical availability for assuring food security. Countries with large populations point out the limits on reliance on international trade arising from the fact that their annual consumption of some foodstuffs exceeds the quantities that are internationally traded. Availability of foreign exchange is also a constraint on the import capacity of some developing countries.

For some countries livelihood security is equally important. Agriculture accounts for 70 percent of the employment in low-income countries and 30 percent in middle-income countries. While market economies are generally expected to redeploy in another sector productive resources that have become redundant in one area of the economy, in developing countries alternative avenues of employment are lacking. Even if the share of employment in agriculture in a country is not very high, there could be a situation in which it is high in a particular region, for a particular crop.

In many developing countries agriculture constitutes a big slice of the Gross Domestic Product (GDP), even if the share has decreased rapidly in those that are industrialising. Since in rural areas agriculture is the dominant economic activity, rural development can be sustained only by a vibrant and growing agricultural sector.

## Definition and Selection of Special Products

In designating multiple criteria as the basis for selection of Special Products, WTO Members clearly did not intend to work on a narrow definition for these products. The intention appears to have been to do further work for drawing up guidelines for the application of these criteria in order to assist individual Members in the selection of these products.

Several guidelines could be identified for applying the three criteria, including:

- the importance of the product in the traditional diet of the population;
- the level of self-sufficiency;
- import capacity as measured by the food imports as a percentage of total exports of goods and services minus debt service;
- agricultural labour as a percentage of total work force; and
- the percentage of agricultural workers employed to produce particular products; and
- the contribution of agriculture to the country's GDP.

In some cases additional guidelines may be necessary to take into account the situation in certain geographical locations, where the livelihood of the population depends heavily on

certain products even when that is not the case at the national level.

While agreement may be possible on broad criteria for identifying Special Products, it would be difficult to agree on precise benchmarks to make the guidelines operational. What, for instance, should be the level of self-sufficiency: 90, 75, 65 percent or a lower figure? Benchmarks may have to be different for different countries to take into account their respective agricultural situations. Allowing a large measure of discretion to individual developing countries in the application of the guidelines is therefore inevitable. Each developing country would have to be left free to fix its own benchmarks and critical levels and apply them.

The self-selection option can be viable in the context of reciprocal and mutually advantageous negotiations only if developing countries are also willing to consider the imposition of an overall limit by way of the proportion of agricultural tariff lines or percentage of trade or both. The exact level of the overall limit would have to depend on the outcome of the agricultural negotiations as a whole: if the negotiations achieve a high level of ambition, developing countries should be willing to consider accepting a relatively low limit, and they should demand a high limit if the opposite turns out to be the case.

## Treatment of Special Products

Exemption from tariff cuts could be included in the range of possibilities. However, the chances of agreement on exemption would be better for a restricted list of Special Products. Agreement may also be possible for exempting a large list of Special Products, but it would carry a considerable cost by way of a corresponding lowering of the overall level of ambition in the agricultural negotiations.

One of the major achievements of the Uruguay Round was that the general principle

*Continued on page 4*

of GATT 1994 prohibiting quantitative restrictions was extended to agriculture. Asking for the possibility of imposing quantitative restrictions on a permanent basis would be a retrograde step at a time when developing countries are trying to bring further reform in world agriculture.

The flexibility for Special Products would depend upon the flexibility accorded to other products. Developing countries could ask for the same treatment across-the-board or for greater flexibility in each tier. There might be some advantage in seek-

ing a calibration of tariff treatment in different tiers, as it would enable them to make a case for exemptions from tariff reduction for those Special Products that fall in the lowest tariff tier. A stricter option could be to seek exemption of tariff lines in those cases where the product has low tariffs and there is also little or no gap between the bound and applied levels.

The Special Safeguards Mechanism is needed to protect domestic production in times of import surges or steep declines in international prices. During the Uruguay Round, developed countries used the special agricultural safeguard even for the products in which they had undertaken minimum tariff reduction. Seeking recourse to the Special Safeguard Mechanism for Special Products would thus have both precedent and rationale.

*Anwarul Hoda, a former WTO Deputy Director-General, is a member of the Planning Commission, Government of India. He based this article on a longer study entitled Special Products: Options for Negotiating Modalities, commissioned by ICTSD and available at <http://www.ictsd.org/>. The views expressed here are personal and do not necessarily reflect the positions of the Government of India.*

## A Matrix Approach for Designating Special Products

Emalene Marcus-Burnett

While the criteria for and treatment of the Special Products that developing countries can designate for 'more flexible' tariff treatment remain to be further specified during the agriculture negotiations, this article proposes a methodological tool for selecting them.

Thus far, the approaches proposed for the designation of the Special Products (SPs) can be broadly classified under two categories: (i) self-designation, limited by a numeric ceiling, and (ii) the use of criteria that is objectively verifiable, but may not necessarily ensure the realisation of the basic goal for the creation of SPs – the protection of poor and small farmers. The approach outlined here could serve the dual purpose of assuaging the fears of some countries that SPs could be used as an 'opt-out', while providing each developing country the flexibility to designate those products that are 'special' within a local context.

The matrix presents a template for identifying SPs that takes into account the need for 'constrained flexibility'. At the forefront of the approach is the fact that WTO Members in the 'developing countries' category have diverse economic and social structures, are at different stages of development and of varying sizes, and have different products of interest. There is no one set of indicators that would adequately meet the needs of *all* developing countries with regard to food security, livelihood security and rural development. The primary intention of the matrix is to assist developing countries' internal discussions on selecting their *own* SPs, i.e. those that are the most critical to each state's overall development goals.

### The Indicators

Under the food security criterion – understood to comprise individual, household and national elements – indicators could include:

- the product's contribution to caloric intake;
- its import dependency (used as a measure of the relative importance of domestic production in consumption, with the higher the dependency, the lower the score for the product);
- its percentage contribution to domestic consumption; and
- whether or not the product has been identified as a 'food security' product or included in a basket of goods for the benefit of the vulnerable in society.

Under the criterion of rural development and livelihood concerns, indicators could include:

- the percentage of farmers who farm full time;
- the percentage that are small farmers (as per a national definition);
- the contribution of small farmers to total output; and
- the level of employment for the product.

If the SP modality is to be seen as a development tool, certain indicators in favour of the most vulnerable producers and countries should be included. One such indicator could be domestic production as a percentage of world trade, which could be used to gauge the potential for possible trade distortions, as well as to provide a mechanism for ensuring that the specific concerns of small developing countries and net food-importing developing countries are addressed. In addition, the important agro-ecological role of some farming practices and the positive contribution of some crops to the environment, although not itemised in the July Framework, need to be considered (strict adherence to the three criteria in the Framework Agreement – food security, livelihood security and rural development – would necessitate a re-weighting of the areas to omit the 'other issues' category). The format for the matrix, including a number of possible indicators under each criterion is outlined in the table opposite.

The matrix uses a mix of qualitative and quantitative indicators to overcome potential limitations on data, including:

- lack of detailed or current quantitative data in some countries;
- published data may not be sufficiently disaggregated by product, region or vulnerable grouping;



- the limited number of commodities for which comparative country data is available (cereals and grains are the most easily accessible commodity grouping), which makes it difficult to compare some important cross-country indicators.
- recognition that enhancing the food and livelihood security of the most vulnerable in a country cannot always be adequately captured in quantitative terms; and
- the difficulty in collecting information on small farmers who may be nomadic, reluctant to provide the information or who, because of the size of holdings, are not part of the sample population in agricultural surveys.

Once the indicators are selected, weights and scores are applied to the criteria and indicators to assist in identifying the *most* critical products. The weights selected would depend on the relative importance of each of the three criteria for the particular country. For example, where food security is the most critical concern, this criterion may be assigned a larger weight than the others. However, to minimise bias, each indicator uses the same overall score. Each potential SP is then rated according to the indicators and the overall score is aggregated. It is this overall score that then forms the basis for the identification of SPs. Given the importance of selecting the ‘right’ SPs, this exercise is envisioned as a collaborative effort among agricultural stakeholders.

The definition of the most vulnerable farmers and potential SP products is a *country-specific* undertaking. Any *a priori* exclusion or definition of the intended beneficiaries by broad measures, such as the World Bank-defined poverty level of US\$2 per day, could undermine the usefulness of the measure for a number of developing countries that may not achieve the indicator but where there are, nonetheless, vulnerable producers and products that meet the criteria of food security, livelihood security and rural development needs. For some countries, vulnerable segments and regions are defined in national legislation. For others, such groups and the products that they produce are identified through non-governmental organisations,

community groups, social and welfare departments and other such groupings. In any event, the goods produced by vulnerable farmers, as well as their direct substitutes, should be used as the initial list from which potential SPs will be identified.

The matrix approach assumes greater importance where there are small and vulnerable farmers that produce a wide range of products. However, within the context of the current negotiations, it may be extremely difficult to achieve consensus on a lengthy list of SPs. The matrix therefore allows for the identification of the *most critical* of these products and marries the constraints of negotiations with the need to protect the most vulnerable producers.

The matrix approach can also assist in identifying products that a country may wish to designate as ‘sensitive’, another category available to developing countries. Sensitive products will be eligible for some favourable treatment, although such treatment will not be as favourable as that accorded to SPs. Those products that do not meet the level for SPs can comprise the initial grouping from which ‘sensitive’ products are chosen. In a similar manner, the products that could be eligible for protection by the still-to-be-negotiated Special Safeguard Mechanism can be identified through the matrix.

An indefinite carve-out for any product would go against the grain of continued agricultural liberalisation agreed by WTO Members. Yet, a temporary derogation in the case of SPs may be warranted. This, however, means that programmes and policies must be in place to assist those identified as the most vulnerable to improve their status. A holistic development strategy including, among other things, product diversification, increased value-added production, as well as retraining and retooling, is vital. Some countries have already begun to implement such strategies. The process of empowering poor and vulnerable people is a slow one. Above all, it else requires time and flexibility – two things that the SP modality is expected to provide.

*Emalene Marcus-Burnett is an economist at the Barbados Agricultural Planning Unit. This brief article is based on an ICTSD-commissioned study on Special Products and the Special Safeguard Mechanism.*

### Sample Matrix Worksheet for Identifying Special Products

Product	Criteria																			
	Food Security Weighted [x] <sup>1</sup>						Livelihood Security and Rural Development Weighted [y] <sup>1</sup>								Other Issues Weighted [z] <sup>1</sup>		1.0			
	National food security – identified in nat'l food security basket	Household food security	Individual food security	Import dependency – % sourced from imports	Contribution to caloric intake	Contribution to total domestic output	Contribution to total domestic consumption	% of labour force employed in activity	% of producers that are small farmers (<0.025 ha)	% of [agricultural] land under cultivation of product	% of farmers with activity as sole source of income	Income generation	Potential forward/backward linkages	Sectoral linkages/co-ordination/strategic alliances	Vulnerability to import displacement	Contribution of small farmers to total output	Environmental impact	Agroecological sustainability	Domestic production as % of world production	OVERALL SCORE FOR PRODUCT
	Indicator-specific Scores																			
Onions <sup>2</sup>																				
Rice <sup>2</sup>																				
Chicken <sup>2</sup>																				
Milk <sup>2</sup>																				
Beans <sup>2</sup>																				
Beef <sup>2</sup>																				

<sup>1</sup> The weightings for each category would depend on the country's agricultural and economic profile.

<sup>2</sup> Products inserted by the editor for illustrative purposes only.

## Still No Traction in Industrial Tariff Negotiations

Discussions on industrial tariff reductions have hardly moved in months due to Members awaiting signals from the agriculture negotiations.

The 21-22 September session of the Negotiating Group on Non-agricultural Market Access (NAMA) revealed a continued lack of convergence in Members approaches to the structure of the tariff reduction formula and the flexibilities to be accorded to 'sensitive' products.

According to the July 2004 Framework Agreement, Members are to develop a NAMA tariff reduction formula that takes into account the needs of developing and least-developed countries, "including through less than full reciprocity in reduction commitments." Paragraph 8 specifies that developing countries may retain some unbound tariffs and not apply formula cuts to a limited number of tariff lines.

In September, Pakistan formally presented its July proposal (TN/MA/W/60) based on a simple 'Swiss' formula with coefficients of six for developed countries and 30 for developing countries.<sup>1</sup> Several delegations, including Canada, New Zealand and the US, complained that 30 was too high, and would not cut developing country tariffs steeply enough. Canada and Norway did, however, say that the proposal provided a realistic basis for negotiations. At several earlier NAMA meetings, the US has made clear that differentiated coefficients would replace rather than complement paragraph 8 flexibilities, a position rejected by a large number of developing countries.

Mexico elaborated on its February proposal (TN/MA/W/50, with Chile and Colombia), which would allow developing countries to choose a balance among the extent of tariff reduction required by the formula through the use of different coefficients, leaving tariff lines unbound, the ability to exempt some products from the tariff reduction formula, and the implementation period for tariff cuts (Bridges Year 9 No.2-3, page 11). Several developing countries argued that the proposal, by requiring trade-offs between the formula and flexibilities, essentially rendered the paragraph 8 mandate meaningless. Mexico countered that it merely sought to reward countries that opted not to exercise those flexibilities.

So far, Members have not proposed concrete numbers for any of the proposals on the table in the NAMA group. They have, however, broadly agreed to follow the model from the agriculture talks for the conversion of 'specific' tariffs based on quantities imported into price-based 'ad valorem' equivalents (AVEs) – a mathematical exercise necessary in order to apply the reduction formula to such tariffs. Trade sources say that Members are determining their tariffs in percentage terms by using their import volumes and the notified import values they submit to the WTO Integrated Database (IDB). Most WTO Members have fewer than seven percent of non-ad valorem industrial tariff lines and have already started making the calculations.

Although non-tariff barriers received more attention than in the past during the two-day September session, Members are still unclear on the specific issues they want to address in the talks. The EU and Japan spoke out against taxes and quantitative restrictions placed by countries on their own exports, generally of mineral resources. Argentina, Kenya, and the US argued that such measures were not always unjustified.

### Four New Sectoral Liberalisation Proposals Come from the East

Japan, Singapore, and Taiwan together called for the complete removal of tariffs on 20 products in the sports equipment sector, pointing to persisting high tariffs and the recent rapid increase in their worldwide trade. The three were joined by Thailand in another proposal, which called for eliminating tariffs on bicycles and related parts.

Hong Kong, Japan, Singapore, Taiwan, Thailand and the US called for sectoral tariff elimination on gems and jewelry, and the 21 members of Asia-Pacific Economic Co-operation (APEC) put forward a proposal for the elimination of tariffs on three information technology products.

The next issue of Bridges will report on the October NAMA negotiating session.

### EU Outlines Negotiating Position

In related news, the EU has explicitly conditioned the outcome of all areas in the Doha Round negotiations, including agriculture, on a 'satisfactory' outcome in NAMA. At the Zurich 'mini-ministerial' on 10 October, it proposed a 10 percent tariff cap for developed countries after the application of a Swiss formula. Again raising the controversial idea of differentiation between developing countries, the EU added that most – but not all – developing countries should also be "obliged by the formula to cut into their applied duties" and that this group of WTO Members should have a tariff cap of 15 percent. On flexibilities for developing countries, the EU stated unequivocally, that it could not accept a "coefficient that would cut only a few applied duties, and for these cuts then to be excluded through the recourse to 'flexibilities'". The result of this would be paper cuts only for nearly all developing countries, including those that have now become very competitive."

Brazil and others have repeatedly pointed out the discrepancy between most developed countries' level of ambition for NAMA and their lack of it for agriculture. This is neatly illustrated in the case of the EU, which has proposed a 100 percent tariff cap in agriculture compared to 10-15 percent for industrial products, insisted on a strong formula that would bite into applied industrial tariffs while refusing a Swiss formula to cut agricultural tariffs, and adopted a stern stance on NAMA flexibilities while proposing to exclude eight percent of all EU agricultural tariff lines from less demanding formula cuts (see page 7).

### ENDNOTE

<sup>1</sup> A Swiss formula includes a harmonising coefficient that cuts higher tariffs more steeply than lower ones and establishes a maximum final rate, no matter how high the original tariff was. The coefficient correlates strongly with the final outcome, i.e. a coefficient of 30 would result in a tariff close to 30 percent after the application of the formula.

# Agriculture Negotiations Expected to Pick up in October

WTO discussions on agriculture have yielded no tangible results since the summer break, but a flurry of new proposals emerging from meetings between ministers and the presence of high-level officials from capitals are likely to mark the beginning of real bargaining in October.

The most pressing issue facing the negotiators at this juncture is the tariff reduction formula. The July 2004 Framework Agreement lays down the bare bones for this by specifying that reductions will take place through a tiered formula that would ensure deeper cuts in higher tariffs with flexibilities for 'sensitive' products.<sup>1</sup>

Inconclusive discussions in September and early October at the WTO focused mainly on the tariff reduction formula and the closely-linked question of sensitive products. The ministerial-level talks held in Zurich and Geneva from 10-12 October finally provided substance to the negotiations as key WTO Members and groupings came out with numbers for tariff reductions. The proposals, however, remain far apart in their level of ambition.

## Many Proposals, Little Convergence

The proposal put forward by the US in Zurich still sought progressivity within each tariff tier, as shown in the table below. This has also been Australia's preferred approach, but going into the 17 October agriculture week there were indications that both countries might accept a flat reduction rate for each tier. The US proposed that by the end of a five-year implementation period developed country tariffs should be cut by 55 to 90 percent. Developing countries would be subject to "slightly lesser reduction commitments and longer phase-in periods to be determined when base parameters for developed country commitments are established." However, the US warned that developing countries "must make meaningful commitments which reflect their importance as emerging markets." In addition, the US proposed limiting sensitive products to one percent of dutiable tariff lines, and suggested that developed countries cap their tariffs at 75 percent and developing countries at 100 percent.

On 11 October, the EU gave up its long-standing demand for flexibility within the tiers, which would have allowed smaller reductions for some products in a given tier, compensated by steeper cut on other tariff lines. It proposed a 20 percent cut in the lowest of four tiers and 50 percent in the highest (above 90 percent) tier, coupled with designating 8 percent of all EU tariff lines – corresponding to roughly 160 products – as sensitive. This is a far cry from the one percent proposed by the US, but an improvement of the EU's earlier suggestion of 10 percent. In a move sharply criticised by French government officials, the EU also suggested that it could accept a 100 percent tariff cap for developed countries. EU Trade Commissioner Peter Mandelson said he would table a revised market access offer during the agriculture week after more consultations with member states.

The G-20 group of developing countries also tabled a revised tariff proposal, which showed a marked difference in cuts suggested for developed and developing countries (see table below). The G-20 proposed a 100 percent maximum tariff for developed countries, and a 150 percent cap for developing countries. The number of sensitive tariff lines should be "very limited" and any deviance from formula reductions should be compensated through corresponding quota expansion. The G-20 also tabled a domestic subsidy proposal, demanding developed countries to reduce their overall trade-distorting support by 70-80 percent (see page 1).

## G-10 Still Against Tariff Caps

The G-10 group of net food-importing countries<sup>2</sup>, which tend to have notoriously high tariff peaks on a number of products, is looking increasingly isolated in its adamant opposition to tariff caps. The group's latest proposal would give Members the choice between two options for reducing tariffs: (i) a fixed percentage in each tier, with a maximum of 15 percent of tariff lines designated as sensitive, or (ii) flexibility built in the tariff reduction formula itself, with 10 percent of tariff lines eligible for being treated as sensitive. The second option would allow limited deviation from the overall reduction level within a given tier, but require a slightly higher average cut.

*Continued on page 8*

## Tariff Reduction Proposals

G-20				US				EU				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>2</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.	Cap: 100%	Lowest Tier	20%	No specifics available	Cap: 150%	0 – 20%	27%	0 – 30%	NA
20 – 50%	55%	30 – 80%	30%	20 – 40%	65 – 75%			NA	NA			20 – 50%	31%	30 – 70%	NA
50 – 75%	65%	80 – 130%	35%	40 – 60%	75 – 85%			NA	NA			50 – 70%	37%	70 – 100%	NA
> 75%	75%	> 130%	40%	> 60%	85 – 90%			> 90%	50%			> 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 in its proposal were only illustrative. The figures shown here are for simple linear cuts. The illustrative reduction rates were 5 percent higher for the formula with flexibilities, which ranged from 7 percent in the lowest tier to 10 percent in the highest.

<sup>2</sup> The G-10 proposal did not offer potential values for developing country reductions.

The G-10 also proposed that the required increase in market access for sensitive products be provided through a ‘standard combination’ of quota expansion and tariff reduction, such as 15 percent for each. However, Members could choose to reduce the tariff by 30 percent and offer no quota expansion at all, or vice versa, or they could balance the two elements in a ratio of their choice.

### Other Issues

With the intense focus on market access in recent months, a number of issues of particular importance to developing countries have been sidelined, including the selection criteria for the Special Products (SPs) that developing countries may designate, the Special Safeguard Mechanism for the use of developing countries, the erosion of long-standing preferences and liberalisation of trade in tropical products. Ambassador Falconer warned the membership on 7 October that these issues would have to be addressed before the Hong Kong Ministerial. In its market access proposal, the G-20 said that it would soon table new proposals on remedial action that developing countries could take against subsidised imports from developed countries, as well as on tariff escalation and tropical products. The G-33 group of developing countries is set to table an illustrative proposal on indicators for food security, livelihood security and rural development, the three criteria on which SPs would be based (see related articles on pages 3 and 4).

Nevertheless, the 17-21 October agriculture week is likely to focus largely on tariffs and domestic support, the two areas identified by Chair Falconer as the most in need of progress to unblock the talks, and the core subjects of the ministerial discussions of the previous week.

### ENDNOTES

<sup>1</sup> All WTO Members may designate “an appropriate number, to be negotiated, of tariff lines to be treated as sensitive.” However, ‘substantive improvement’ in market access for these products must still be provided through combinations of expanded tariff rate quotas and tariff reductions.

<sup>2</sup> The G-10 comprises Bulgaria, Iceland, Israel, Japan, Korea, Liechtenstein, Mauritius, Norway, Switzerland and Taiwan.

## Benchmarks Divide Services Talks

Recent negotiations on services liberalisation have been dominated by debate on whether Members could be required to make a minimum number of market opening commitments.

At present, most-favoured-nation (MFN) market access is negotiated through specific requests that Members submit to each other and the offers they receive in return. The process is bilateral, and does not oblige any Member to grant the market access requested. Citing concern about the lack of substantial improvements in the offers received so far, Australia, the EU, Japan, Korea, New Zealand and Taiwan tabled ‘non-papers’ in September outlining approaches that would establish minimum ‘benchmark’ levels for Members to open sectors to competition from foreign services providers. Under all proposals, countries would, however, retain the ability to choose which sectors to liberalise in order to reach these levels.

Argentina, Brazil, Egypt, Malaysia and the Philippines strenuously objected to the concept. They argued that the establishment of mandatory minimum market access requirements for services trade would burden developing countries disproportionately, since industrialised countries had already made liberalisation commitments on a far greater proportion of their trade in services. One delegate commented that the informal submissions amounted to an attempt to secure a “round for free for developed countries” at least with regard to services. These and other developing countries contend that – contrary to the claims of the benchmark proponents – the services negotiations do not have an *a priori* high level of ambition, and argue that the notion of a collective level of ambition for liberalisation applicable to all Members runs counter to the very structure of the General Agreement on Trade in Services (GATS), as well as the 2001 negotiating guidelines, which confirm that developing countries will have the flexibility to open fewer sectors and liberalise fewer types of transactions.

### EU Seeks Ministerial Backing in Hong Kong

In September, the EU called for a ‘common baseline of commitments’ that would incorporate quantitative targets, such as requiring Members to open a certain number of sub-sectors to foreign competition, as well as qualitative ones to make sure that the new commitments are ‘meaningful’. Australia took a similar position, suggesting that Members establish in Hong Kong a mandatory ‘clear goal’ for improved offers on market access by the end of the Doha Round.

The EU’s ‘conditional negotiating proposals’ presented in Zurich on 10 October, maintained this controversial demand, stating that the services modalities to be agreed at the Ministerial should include “a multilateral formula for commitments by WTO Members based on a mandatory numerical target for the number of services sectors in which each WTO Member would be required to make offers.”

To make the numerical target acceptable to all Members, the EU proposed: (i) to set different bands for the number of sectors to be addressed by developing and developed countries; (ii) to accept new commitments in previously uncommitted sectors and to improve on existing partial commitments; (iii) to “provide guidance on, rather than set a mandatory link with, the four different modes of supply.” The last point, clearly included to accommodate US concerns, makes the proposal even less palatable to developing countries, as the EU had previously proposed that Members make commitments in all four modes in the sectors they agree to open, including cross-border movement of services providers (Mode 4), which is the area of greatest interest to most developing countries.

The EU also proposed agreement in Hong Kong on a “more ambitious” plurilateral formula to be used for deeper liberalisation in sectors where a ‘critical mass’ of Members indicates interest. In addition, new dates should be set for revised and final offers, and ministers could be requested to provide targets for discussions on services-related rules in government procurement, emergency safeguards, subsidies and domestic regulation.



# EU's Future Banana Regime Under Renewed Scrutiny

A second arbitration of the EU's new banana tariff is currently underway at the WTO. A finding that the proposed tariff is still too high could mean the end of the waiver for banana trade preferences enjoyed by a number of poor countries under the Cotonou Agreement.

After repeated WTO condemnations of its quota- and license-based banana import regime, the EU decided in 2001 to replace it with a system relying solely on tariffs as of 2006. That decision meant undertaking negotiations with all WTO members exporting bananas to the EU under quota. These included the African, Pacific and Caribbean (ACP) Group of States, which had a 750,000 tonne duty-free quota, and a number of Latin American countries that shared a 2,653,000 tonne quota with 75 euro/tonne tariff. The latter amount is the current *de facto* most-favoured-nation (MFN) tariff, as out-of-quota exports would be taxed the official MFN rate of 680 euros/tonne.

Negotiations on a new MFN tariff have so far borne no fruit. The main beneficiaries of the current regime, i.e. European banana producers in the Canary Islands and the French territories of Martinique and Guadelupe, as well as ACP countries would like to maintain the *status quo*. Faced with the EU's determination to establish a tariff-only system, they have pressed for as high an MFN tariff as possible (275 euros/tonne) to ensure continued market share for their exports despite quota-free competition from much cheaper bananas produced in Central and Latin America. The latter, on the other hand, seek to expand their exports, or at the very least maintain existing market access. They warned at the outset of the negotiations that the current 75 euro/tonne tariff was the highest MFN tariff they were prepared to accept.

At 230 euros/tonne, the EU's first tariff proposal was much closer to the demands of domestic and ACP producers, and was flatly turned down by Brazil, Colombia, Costa Rica, Ecuador, Guatemala, Honduras, Nicaragua, Panama and Venezuela. WTO arbitration confirmed on 1 August that a 230 euro tariff would not guarantee these countries' existing market access to the EU, as required by the Cotonou waiver (Bridges Year 9 No.8, page 9).

## The Latest Developments

On 12 September, the EU announced a revised MFN tariff of 187 euros/tonne. However, contrary to its original agreement to establish a tariff-only regime, the EU accompanied this offer by reinstating a 775,000 tonne quota for ACP countries.

While the Latin and Central American countries made clear that the proposal was unacceptable, they experienced difficulties in obtaining information on the methodology used in calculating the new tariff, even if the Cotonou waiver clearly specifies that the EU must provide such information in the course of the consultations. The late submission of this information hampered these countries' ability to negotiate effectively, and they were still formulating their request for a second arbitration when the EU beat them to the post: on 26 September, it requested the WTO to determine whether its second proposal was adequate. The arbitrator must adjudicate the matter within 30 days. Should it find against the EU, the Cotonou waiver will cease to apply to bananas as of 1 January 2006 (see box).

## The ACP Quota

On the face of it, the proposed quota would be a victory for ACP countries. Some observers have noted, however, that it would also serve to cap the share of these countries in the EU market, thus giving more breathing space for domestic producers, which could be hands-down losers to competition from Cameroon and Côte d'Ivoire – the two main African ACP exporters to the EU. The point has also been raised that these two countries could shut Caribbean producers out of the European market under a single quota for all ACP countries.

Some of the Latin American countries involved in the dispute have indicated that they could live with a quota for bananas from the Caribbean, at least for a time. However, many consider Cameroon and Côte d'Ivoire well able to compete with Latin American bananas on price and

quality, and thus would not necessarily look favourably on quota protection for their exports. Brazil and Guatemala are seen as the keenest supporters for a tariff-only regime.

*Continued on page 10*

## The Cotonou Agreement and Banana Trade

The Cotonou waiver allows the EU to extend non-reciprocal trade preferences to countries belonging to the African, Pacific and Caribbean (ACP) Group of States until 31 December 2007, when the two sides are slated to start transitioning into WTO-consistent Economic Partnership Agreements based on mutual concessions. The waiver, which covers preferential treatment for a number of products, was an unexpected deal-maker in Doha, where ACP countries refused to sign off on the Ministerial Declaration that launched the current round of multi-lateral trade negotiations unless other WTO Members agreed to the continuation of the Cotonou preferences until the end of 2007. The root cause for the near-impasse was bananas.

The last-minute consensus was based on the assumption that the EU would adopt a tariff-only regime starting 1 January 2006 at the latest. Prior to that date, Latin and Central American banana supplying countries and the EU were to negotiate a new MFN tariff, which was to result in "at least maintaining total market access for MFN banana suppliers." In case of no agreement, the WTO was to arbitrate whether the tariff proposed by the EU fulfilled this condition. If the arbitrator found against the EU, more consultations would be held, and – if agreement still was impossible – a definitive second arbitration would take place. If that arbitration went against the EU, the waiver would "cease to apply to bananas upon entry into force of the new EC tariff regime."

## The Business Angle

The case is further complicated by the business interests underlying the dispute. The present regime has generated a lucrative parallel market for import licenses. The great majority of these are owned by trading companies that are either European-based, such as Fyffe, or have established important operations in the EU, such as Jamaica Producers or Chiquita. Some industry analysts say that these companies do nearly as brisk a trade in licenses as in actual bananas, and would thus benefit from the extension of the *status quo*. In contrast, Dole and Del Monte, which now buy the licenses from Chiquita and others, have invested heavily in Africa, banking on the advantages of imminent license- and duty-free trade and geographical proximity to European markets.

There are also growing concerns about companies seeking to produce the cheapest bananas relocating to countries with the laxest labour and environmental standards and the lowest wages. This has translated into increased investment in Ecuador, certain parts of Brazil and Guatemala, as well as Cameroon, putting companies in other producer countries under increased pressure to cut corners to stay competitive.

## Possible Next Steps

What are the EU's options if the arbitration goes against it and the ACP banana preferences elapse? One approach would be to seek an extension of the transitional regime while more negotiations are carried out with the interested parties. Another would be to cease providing preferences to the ACP, which would be politically difficult. Or the EU could unilaterally decide to prolong the present situation, risking opprobrium for weakening the multilateral trading system.

As for the complainants, the US and Ecuador, which won the latest battle in the banana wars, could seek to resume trade sanctions due to the EU's failure to implement WTO rulings in the manner agreed, i.e. the establishment of a tariff-only regime. The Latin American countries that fruitlessly negotiated with the EU could potentially also seek retaliatory action on the grounds that the latter had failed to establish a mutually satisfactory new tariff that would "at least maintain total market access for MFN banana suppliers."

## Cross-Retaliation in Cotton and FSC Compliance

- On 6 October, Brazil filed a second request seeking WTO authorisation to apply countermeasures against the US in the cotton dispute. This request bears on the US failing to remove or modify – by 21 September – a number of its cotton subsidies found by WTO rulings to cause serious prejudice to Brazil because they suppress world prices. To compensate for economic losses caused by the continuation of these 'actionable' subsidies, Brazil sought the "right to apply countermeasures on an annual basis in the amount of US\$1.037 billion. This corresponds to the annual average value of US surplus production resulting from subsidisation between 1999 and 2002 – estimated in an econometric study submitted by Brazil during the litigation – multiplied by international prices for that period."

In its first retaliation request in July, Brazil had targeted US inaction on 'prohibited' – rather than just 'actionable' – subsidies, which were to be withdrawn by 1 July. That request remains valid, although at the time of this writing WTO arbitration was still suspended over the amount sought by Brazil (US\$3 billion). Both retaliation requests have stated Brazil's intention to suspend concessions in the areas of intellectual property rights and services, as well as raising tariffs on some goods.

The essential action sought by Brazil is the termination of the Step 2 subsidy programme, which pays cotton exporters the difference between the US and world market prices, and provides compensation to textiles producers who use US cotton. Last August, the two sides requested the arbitrator to suspend its work after the US announced that it had sent to Congress a proposal to repeal Step 2 'as soon as possible'. So far, the only Congressional action has been a 5 October proposal by the Senate Agriculture Committee to repeal the programme on 1 August 2006 as part of a budget reconciliation package, which also included a 2.5 percent overall reduction in subsidies spread over a wide range of products. The vote on the proposal was, however, postponed at the last minute due to disagreement over dairy subsidy cuts.

The US does not deny that it has not fully implemented the cotton rulings, but keeps pointing to the WTO agriculture negotiations as the right venue to deal with the issue. Deputy Secretary of State and former US Trade Representative Robert Zoellick underlined this approach at a 6 October press conference, where he dropped heavy hints that retaliation might cause Brazil to lose its preferential access to the US market under the Generalised System of Preferences. Brazil, on the other hand, has linked the Hong Kong Ministerial's chances of success to US implementation of the rulings, and in particular the eliminations of Step 2.

- On 30 September, the WTO circulated the panel report requested by the EU on US compliance with WTO rulings on taxbreaks granted to exporting companies, first under the Foreign Sales Corporation Act, then its successor regime the Extraterritorial Income Act (ETI) and still partially included in the latest version of the legislation, the American Jobs Creation Act. The compliance panel agreed with the EU's claim that the 'transition' and the 'grandfathering' provisions included in the 2004 Jobs Acts were WTO-inconsistent, as they perpetuated subsidies found illegal in earlier rulings. Under the transition provision, companies eligible for ETI benefits may keep 80 percent of them in 2005 and 60 percent in 2006. The 'grandfathering provision' exempts tax benefits attached to pre-September 17, 2003 sales contracts indefinitely from the repeal of the ETI scheme. The EU estimates that 'grandfathered' benefits for Boeing alone will amount to 750 million euros over the next decade. Initiating the eighth WTO proceedings in this much-litigated dispute, the US announced on 3 October that it would appeal the compliance ruling, thus putting off an imminent resumption of trade sanctions. The WTO has already ruled that the damage caused to EU economies by the illegal subsidies amounts to US\$4 billion per annum.

# Disputes: The Burden of Proof in Compliance Challenges

For the first time in its ten-year history, the WTO allowed the public to follow a dispute settlement hearing in September. At issue was the EU's compliance with WTO rulings in the long-standing beef hormones dispute brought by the US and Canada.

At the opening session of the hearing, the EU, the US, and Canada each acknowledged the importance of the day, emphasising the benefits that increased transparency would bring to Members that have never participated in a WTO dispute, as well as to the general public's understanding of the WTO and the dispute settlement system. The three have long supported the principle of making dispute settlement meetings public provided that doing so is acceptable to all parties involved. The 14 September meeting among the disputing parties and the third parties in the case – Australia, Brazil, China, Taiwan, India, Mexico, New Zealand, Norway – was closed, as not all of the latter were willing to open it to the public.

## EU Wants Retaliatory Sanctions Lifted

The issue before the panel was a complaint brought by the EU against continued trade sanctions applied by the US and Canada on certain EU exports, worth US\$116.8 million and US\$11.6 million respectively. The Dispute Settlement Body authorised the sanctions in 1999 after the Appellate Body had found that an EU ban on hormone-treated meat exports from the US and Canada violated the WTO Agreement on Sanitary and Phytosanitary Measures (SPS Agreement).<sup>1</sup>

At the hearing, the EU argued that it had adopted measures in 2003 to come into compliance with the 1998 Appellate Body ruling, and that the continued sanctions therefore violated WTO law (Bridges Year 8 No. 10, page. 6). The US and Canada countered that the authorisation to retaliate still applied as the EU had not proven that it was in compliance with the ruling. To this charge, the EU responded that the US and Canada should have requested a compliance panel to review the matter, rather than merely continue to apply the sanctions.

## Systemic Implications

In the parties' arguments lies an important systemic issue. No WTO panel has ever had to rule on the procedures for removing previously authorised sanctions. This panel will have to determine where the burden of proof lies, i.e. whether Members are under obligation to file a compliance or a non-compliance case in order to determine if and when authorised sanctions should be lifted. This is an important clarification of Members' rights and obligations under the Dispute Settlement Understanding (DSU).

The US and Canada have thus far not been willing to file a non-compliance case against the EU under DSU Article 21.5. Instead, they contend that the EU should prove its own compliance. Moreover, the EU's compliance should be confirmed multilaterally, such as through the adoption of a WTO panel report recommending the suspension or revocation of their right to retaliate. At the hearing, the US and Canada argued that the EU had submitted no arguments or evidence proving its compliance, but had merely stated that it was in compliance.

The EU, on the other hand, claimed that the US and Canada, by refusing to file a case to determine whether the EU is indeed in compliance, had made a unilateral *de facto* determination that it was not. Since WTO rules require such determinations to be made multilaterally by the DSB, the EU argued that the US and Canada were in violation of WTO law. Continuing to send the ball back and forth, the latter two claimed that the EU's case had no legs, since it had neither removed its WTO-inconsistent ban on hormone-treated meat nor established that the measures it implemented in 2003 had brought it into compliance with the 1998 ruling. Moreover, the US and Canada charged that the EU's notification to the DSB that it was in compliance with the ruling was in itself a unilateral action.

In view of these systemic considerations, the hearing focused more on procedural and systemic issues than on the substantive SPS and science issues at the heart of the case. During the first

session, the parties laid out their claims and arguments. The next day, they and the panel were given the opportunity to ask questions and seek clarifications about previously-made statements and submissions. On the final day, the panel directed a large number of specific technical questions to all parties, who often said they would respond in writing. There were no concluding remarks.

## Who Should Prove Compliance?

The panel appeared to explore the parties' possibilities to resolve the dispute within the DSU. It asked the EU if its present case was tantamount to a case filed against the US and Canada under DSU Article 21.5 – since, in seeking the removal of US and Canadian sanctions, it was essentially implying that it was in compliance with previous WTO rulings. The EU rejected this, maintaining that its complaint was against the US and Canada's unilateral determination of its guilt. The panel also asked the US and Canada why they had not filed a case against the EU charging non-compliance, in the interest of quickly solving the matter. Instead of answering the question directly, the US and Canada merely argued that they were not obliged to do so under the DSU, with the US specifying that it was for the Members to determine the most efficient way of solving such cases. The likely reason for both sides' approach, however, was that the challenger of a measure bears the burden of proof for its claims.

## Sparse Attendance

A disappointingly low number of civil society representatives took advantage of this first opportunity to follow panel proceedings: only 100 people (delegates, media and the public) attended the first day and by the end the second day, a mere 20 remained.

The next hearing is scheduled for November. Exact days were not known at the time of this writing, nor was it clear whether the meeting would be open to the public.

## ENDNOTE

<sup>1</sup> WT/DS26/AB/R and WT/DS48/AB/R

# Fisheries Agreements and Sustainable Trade: Implications for the Current WTO Negotiations

Stephen Mbithi Mwikya

As global demand for fish grows, an increasing proportion of supply is being met through fishing access agreements. These arrangements have serious trade and sustainable development implications that are relevant to the WTO's fisheries subsidy negotiations.

The vast majority of access agreements are now between developed and developing countries, and are becoming an essential part of North-South relationships. Typically, developing countries are the ones granting access, given that they often lack the capacity to fish in their exclusive economic zones (EEZs). The developed countries 'buying' the access are referred to as 'distant water fishing nations' or DWFNs.

## Access Agreements and Resource Depletion

With the increase in DWFN activities in the open seas, there are indications that stocks of several of the targeted species, including tuna, hake and coastal fishery products such as molluscs and shrimp, are in serious decline. This has been caused in part by the fact that the catch levels specified in most fisheries agreements are not based on proven scientific assessments of sustainable takes. In addition, if the access payments are based on the amounts harvested, as is often the case, countries granting access have an incentive to negotiate high catch levels. The DWFNs for their part seek to maximise returns by concentrating on high-value species and discarding by-catch. The situation is exacerbated by illegal, unregulated and unreported fishing, which is difficult to eradicate since most coastal and island countries lack effective monitoring, control and surveillance measures in their EEZs.

These unsustainable fishing activities exist despite the existence of several international conventions aimed at them, such as the UN Convention on the Law of the Sea (UNCLOS), the FAO Code of Conduct for Responsible Fishing and the UN Agreement on Straddling Stocks and Highly Migratory Species. It is disappointing to note that these conventions are rarely enforced even if many fishing access agreements explicitly refer to them. Given the experiences of stocks collapse in several over-fished waters, especially in Northern Europe, and the tell-tale signs of stocks decrease in most of

the waters with heavy DWFN presence, there is a need for urgent action to sustain marine fishery resources in developing countries. This is made more urgent by the consideration that significant numbers of developing island and coastal states are heavily dependent on EEZ fisheries for their economic development, and therefore a stock collapse would be devastating.

## Imbalanced Negotiations

Developing countries granting access to DWFNs are increasingly expressing genuine concerns that access payments are unjustifiably low. Fish is a natural resource just like minerals or forestry, and access payments should be based on resource rent principles. The current fees – about 3 to 6 percent of the catch's market value – cannot be considered a fair level of resource capture by the host countries. Given the low levels of investment required for fishing when compared with investments in other sectors such as mining, resource rent capture by countries granting access needs to be increased several-fold if this trade is to be made fair. The difficulty of applying resource rent principles is that it is nearly impossible to oblige foreign operators to accurately declare their revenue and costs. Also, unless applied in a regional context, distant water fishing in migratory species such as tuna responds to 'any hard bargains' by shifting attention to neighbouring EEZs and 'wait for the fish there'. It could be helpful to EEZ fishery-dependent countries in particular, if future WTO rules on fisheries subsidies required access payments to be based on resource rent principles as a precondition for being considered as legitimate trade, whether between governments or government-private sector arrangements.

Negotiations are made more difficult by the fact that developing countries lack stock assessment data for their EEZs, whereas the DWFNs seeking access may have been operating in the waters since before UNCLOS, and therefore have accumulated historical catch data, which is rarely public. This, coupled with the lack of effective monitoring, control and surveillance measures, makes it very difficult for the host country to negotiate a fair access agreement, and manage its stocks sustainably. Given that fisheries agreements are mainly negotiated between developed and developing countries, the DWFN may also use development aid to the host nation as leverage to conclude an advantageous fisheries agreement.

## Access Fees and WTO Disciplines

Under current EU and US fisheries access agreements, the vast majority of access payments are paid by governments (70-80 percent). If a subsidy is understood to mean 'any form of assistance given (financial or otherwise) which has a potential to improve the ability of a beneficiary trading entity's capacity to compete', then access fees are not subsidies for the country granting the access; rather they are payments for a natural resource. Strictly speaking, access fees represent a trade between two governments, with the distant water fishing nation buying access to a fisheries resource. The DWFN is not extending any assistance to the country granting access, so at this level, buying access is a legitimate trade relationship as long as the WTO does not ban trade between governments.

Thus, the issue is not whether government-to-government transfers of access fees are subsidies, but rather the way that government-paid access fees are recovered from the DWFN's own industry and the consequent implications for the competitiveness of this industry. If fishers do not pay to fish in their country waters, and do not enjoy any specific support in their operations when doing so in distant waters, then the access acquired is not a subsidy. Similarly, if fishers do not enjoy a competitive advantage over those of other countries fishing under similar agreements, the government's contribution should not be seen as a subsidy. Only in cases where such an advantage is provided, could possible subsidisation problems arise.



Given the difficulties and expense involved in implementing effective monitoring, control and surveillance measures, it is doubtful that developing countries would be able to receive payments from private foreign operators at levels and timeliness similar to what is currently paid through government to government agreements. Efforts to discipline fishing access payments at WTO might therefore seriously hurt the economies of small island states. Some Pacific island states, for example, meet 25–40 percent of their budgets through these payments.

### Subsidies to Distant Water Fleets

Most fishing by DWFNs under access agreements takes place with heavily subsidised fleets. Subsidies are provided for, among others, shipbuilding, financial credit and setting up joint ventures. It has been estimated that about 25 percent of the value of fish caught through fishing access agreements is subsidised. The dilemma for a business person in a developing coastal country is whether it makes sense to invest in a ship – which can cost anywhere between three and ten million US dollars for a purse seiner – and operate in a fishing ground alongside a DWF fleet subsidised sometimes up to 40 percent at purchase and operations, and expect to make profit given that all vessels still have to market their catch in the same destinations (usually a DWFN). It is apparent that, unless fishing vessel subsidies are eliminated, only DWFNs will continue to fish the world's oceans.

However, even if these subsidies were stopped today, most DWFNs already have all the vessels they need. In fact, they have overcapacity and the EU is actually considering decommissioning vessels older than 30 years. If we consider 30 years as the average economically viable life span of a fishing vessel (which is underscored by the fact that most second-hand ships being offered for sale were manufactured in the seventies), then most developing countries that have no capacity to subsidise their fleet will have to wait for 30 years to compete in their waters with unsubsidised ships. In other words, the damage is already done, and eliminating subsidies now will not greatly help level the trading field for quite some time.

Nevertheless, it is possible that elimination of subsidies associated with fishing under access agreements will in some way address some of the current distortions in fishing, and may eventually assist efforts of developing coastal and island states to 'fish their own fish', even if only in the longer term. Thus, well-crafted WTO disciplines on fisheries subsidies might greatly help to sustain fishery stocks by discouraging fishing overcapacity in several waters, as well as increase the participation of developing countries in the global fishery trade.

### Financial Aid to Host Nations as a Subsidy?

What about the financial aid that accompanies access payments to developing countries? One could plausibly argue for their disciplining if the fishing trade in the EEZs were not so seriously distorted. Given that it may take up to 30 years of no fisheries subsidies to achieve a level playing ground for fishing in these waters, developing countries have a real chance of arguing for the ring-fencing of this type of financial assistance, at least for a defined period of time in order to develop domestic fisheries.

### Other Considerations

The WTO debate on fisheries subsidies is complicated further by the request to exempt government support to artisanal fisheries from a blanket disciplining of all fisheries subsidies. This is based on the noble idea of allowing public funding support for developing artisanal fisheries in order to enable them to compete effectively with commercial fisheries. The first obstacle to this request has been in defining 'artisanal' fishing, or rather distinguishing it from small-scale fishing, given that countries such as Japan would consider their small fishing boat owners as artisanal fishers. The requests also assume that developing countries subsidise their artisanal fishers. In fact, the vast majority of these countries lack the resources required for subsidising although some of them grant limited subsidies for small-scale fishers.

*Stephen Mbithi Mwikya is Executive Director of the Kenya Fish Processors and Exporters Association. The author based this article on a longer study entitled Fishery Access Agreements with Distant Water Fishing Nations: Critical Negotiating Issues, commissioned by ICTSD and available at <http://www.ictsd.com/>*

## Fisheries Update

A joint proposal on fisheries subsidy disciplines from 12 small island states (TN/RL/GEN/57/Rev.2) generated lively discussions at the late September meeting of the WTO's Negotiating Group on Rules. The paper's sponsors argued that classifying subsidies as prohibited, actionable and unchallengeable might be inadequate for addressing the conservation of fish stocks, suggesting that multilateral environmental agreements and the UN Food and Agriculture Organisation might be better suited to the task. They also expressed the fear that a 'traffic light' approach might let Members initiate disputes against subsidies that "directly promote overcapacity and overfishing" without having to directly link them to trade effects. The proposal called for special and differential (S&D) treatment exempting the following from any disciplines: development assistance; assistance to artisanal or small-scale fisheries; access fees in fisheries access agreements; and fiscal incentives to facilitate the development of fisheries capacity in vulnerable coastal states (see also page 14).

New Zealand voiced concern about exempting entire categories of subsidies from disciplines, instead suggesting that a *de minimis* exemption could be established to address development issues. The proposal to exempt fiscal incentives in particular raised questions and requests for clarification. Chile, Peru, Brazil and China, objected to its implicit differentiation between small vulnerable coastal states and other developing countries. The 'Friends of Fish' – a loosely-defined group of ten developed and developing countries – stressed the importance of taking into account overfishing and overcapacity, as opposed to only the trade effects of fisheries subsidies. Japan reiterated its standard position that fisheries subsidies should be prohibited on a case-by-case rather than a blanket basis.

At the group's next session, scheduled to start on 24 October, Members will hold a general discussion on their expectations from the Hong Kong Ministerial Conference in December.

# Interests of the Caribbean Community in Trade-related Environmental Issues

Taimoon Stewart

This article examines issues of critical importance to the Caribbean Community in the area of trade and environment and argues that these economies need special treatment due to the constraints imposed by their small size.

No single criterion can capture the essence of 'smallness', since several characteristics interact with each other to create the special conditions for it. These include limited human, financial and natural resources, as well as small of markets that limit the number and size of business actors, the scale of production and development options. The vast majority of firms in the member countries of the Caribbean Community (CARICOM) are family owned, technologically backward, inefficient and inflexible. These constraints are compounded by economic vulnerability as a result of their insertion into the global economy at a low level of the global product value chain and a reliance on only a few commodity products whose prices are internationally fixed. Vulnerability to natural disasters is another major constraint to development since infrastructure and crops regularly destroyed by volcanoes and hurricanes.

## Environmental Standards as Barriers to Trade

As in other new areas of trade negotiations, it is the standards and regulations already developed in the North – without input from, or reference to, foreign firms that export to their economies – that are put on the environmental negotiating table. This puts the burden of compliance on developing country firms and governments, which have limited capacity to meet these requirements because of, among other factors, under-developed infrastructure, poor information flows and an inability to influence the international standard-making process. Moreover, the shifting goalpost of standards makes it difficult to keep up with the demands of the North.

For example, in recent years, shipments of papaya and t-shirts have been returned to Jamaica, Barbados and Belize due to unacceptable pesticide residues in the papaya and the dyes used in the t-shirts. Take-back obligations for packaging of fruit and vegetables

mean that exporters from the Windward Islands have to pay for the return of boxes used to transport bananas and other fruit to Europe. The increased cost is significant for small farmers.

Of particular concern at present is the trend of large supermarket chains in the EU to impose environment-related requirements on suppliers, particularly in the food sector. This requires rigorous record-keeping by producers/suppliers, including traceability of the product back to the producing farm; self-inspection; inputs to production; waste/pollution management; worker health, safety and welfare; and process and production methods. As of January 2002, the EU requires exporters of fish and fishery products to label consignments identifying the species name, the production method and the catchment area.

Small family farms and artisanal fishermen in CARICOM are hard-pressed to comply with these increasingly stringent technical and phytosanitary requirements. There have been several instances of bans on CARICOM fish exports to Europe, based on the new monitoring system. It is also interesting that the private sector in the North insists on the traceability of products (and non-compliance means effective barrier to entry) but simultaneously resists complying with the traceability of genetic materials used in inventions for which patents are sought.

## S&D for Artisanal Fisheries Is Necessary

The issue of fisheries subsidies is of vital importance to CARICOM countries. As all them are small islands or low lying coastal states, artisanal fishing is an important economic activity, which sustains the livelihoods of many families, contributes to foreign exchange earnings, provides an important source of food for the tourism industry and the local population and thus contributes in some measure to food security. Given that CARICOM fish workers are generally in the low-income group, government support contributes in no small measure to sustaining their livelihoods. It is therefore important to distinguish between subsidies granted to large operators, who use fishing methods that indiscriminately over-fish and kill non-edible species, and the fish workers in small economies using artisanal fishing methods. CARICOM countries should request special and differential treatment for their artisanal fisheries while agreeing on a global ban on fisheries subsidies.

Further, the smaller economies within CARICOM allow foreign vessels to fish in their territorial waters for a fee. This is an important source of income, given their limited development options and reduced revenues due to the erosion of preferential markets. What is necessary is proper management of this activity to prevent indiscriminate over-fishing. At this point, there is no such management.

This is extremely disturbing not only for the implications for fish stocks and the livelihoods of artisanal fishers, but also in the larger context of sustainable development, including the preservation of the tourist product, that is, the coastal waters, reefs and diving environment that are vital to the industry. This is an area where technical assistance for capacity-building is vital, given that the awareness and the will are there, but not the human capacity or the equipment.

## Foreign Service Provides Cause Environmental Damage

The interface between services trade and the environment is of importance to CARICOM because the major economic activity in all of these countries with the exception of Trinidad (but including Tobago) is the export of tourism services. The influx of tourists (more than three times the size of the local population) puts unsustainable pressure on the environment.

Disposal of sewerage and solid waste is a major problem because the islands are so small and do not have the capacity to handle such large transient populations. Fragile marine ecosystems are threatened. However, the sector is controlled by transnational corporations (TNCs), which operate with impunity to extract profits and remit out of the economy, without internalising the cost of environmental services or re-investing to the repair and forestall environmental damage.

The environmental impact of the cruise ship industry is equally harmful, but with fewer returns to the host economy. Despite the existence international rules governing the disposal of waste in territorial waters or the high seas, incidents of dumping occur repeatedly in Caribbean waters. Solid waste discarded from cruise ships litters the beaches of the region.

CARICOM countries should have the leeway to demand rigorous record-keeping from cruise ship operators with regard to the time and place of sewage and solid waste disposal, as well as have regular audits of their records for verification. Unless the power of international tour operators and cruise liners is curbed, CARICOM governments will have little room to require firms to internalise the environmental costs of tourism. Assistance from industrialised country governments in breaking the cartel-like operations of these entities would go a long way to help. Conveniently for the transnational corporations, however, competition authorities in industrialised countries will not act unless there is an effect on the domestic market.

### The WTO's Trade and Environment Negotiations

The Doha Ministerial Declaration mandates negotiations, *inter alia*, on the relationship between existing WTO rules and specific trade obligations in multilateral environmental agreements and the liberalisation of environmental goods and services.

With regard to trade measures in multilateral environmental agreements (MEAs), CARICOM countries' main consideration is that they may not have adequate resources to meet the obligations of the MEAs they are party to. This could be a disincentive to join an MEA, particularly if non-compliance with the agreement in question could involve the application of trade measures in unjustified circumstances. Technical and financial assistance and capacity-building aimed at facilitating compliance with MEAs are thus of critical importance and have already encouraged a number of developing countries to sign onto MEAs.

As for environmental goods or services, CARICOM countries are unlikely to be able to take advantage of increased export opportunities, and they already have very liberal import regimes for these products. Domestic firms in the region have little capacity to provide environmental services beyond end-of-pipe technology. For sophisticated preventive environmental technologies these countries depend on imports; indeed, loans from international financial institutions, such as the Inter-American Development Bank, are generally tied to use of environmental services from IADB member countries. In addition, aid is often tied to employing consultants from the donor country. However, there is much that can be done using basic approaches that do not need to be imported and efforts should also be made in this direction.

A glaring omission in the WTO negotiations on trade and environment is the issue of export of domestically prohibited goods (DPGs) from the North to the South. CARICOM countries have not only been the recipients of such products, but have had the backlash of having shipments of agricultural products returned from the US because of residues of banned chemicals imported from the US itself. It is imperative that the North be made to discontinue the export of DPGs and to stop the practice of dumping hazardous wastes in developing countries. It is unethical, yet condoned by the rules of the world trading system.

### Other Trade and Environment Issues

CARICOM countries attach great importance to the issue of traceability of genetic resources and traditional knowledge (TK) used in patented inventions because it represents a way of ensuring that the local custodians of such resources or knowledge get a share of the benefits derived by TNCs from their use. Countries like Guyana, Suriname and Belize are rich in genetic resources

and TK. The island states of CARICOM are rich in marine genetic resources.

So far, the US, Canada, Japan and some other industrialised countries have refused developing country proposals to amend the WTO's TRIPS agreement so that it would require patent applications to disclose any genetic material and/or TK used in the invention (see also page 18).

Another issue of relevance to CARICOM countries is the uncertainty and risk associated with the introduction of genetically modified organisms into the natural environment and the consumption of genetically modified foods by humans and animals. The vast majority of seeds for fruit and vegetable, as well as embryos for poultry and other livestock, are imported from the United States without screening for GMOs, which are now being freely introduced into the Caribbean environment. Interestingly, the issue of GMO labelling also reveals the expediency with which the United States guards its commercial interests. It insists on the right of US consumers to demand eco-labelling of products, ignoring the complaints of developing countries about increased costs and difficulties in complying. And yet, the US refuses to accept responsibility for labelling of GMOs, arguing that it would be too time-consuming, difficult and costly.

### Conclusion

CARICOM governments should press for environmental requirements in export markets to be WTO-consistent, inclusive and transparent, and to take into account the capabilities of developing countries. Further, they should insist that rules on corporate responsibility in trade and investment by transnational corporations be included under international trade law, which has clout in enforcement. The South now has the opportunity to re-introduce the issue of corporate governance in the WTO, broadening that agenda beyond the limited approach of competition policy to include all aspects of unethical corporate behaviour.

*Taimoon Stewart is Senior Research Fellow at the University of the West Indies. She adapted this article from a longer study commissioned by the ICTSD/IISD Southern Agenda project, available at <http://www.trade-environment.org/>*



## Regional News in Brief

- The late September round of US-Thai-land free trade agreement (FTA) talks saw some progress on technical barriers to trade, but revealed continuing gaps on intellectual property rights. Initiatives suggested for the simplification of technical barriers to trade included a workshop for Thai exporters to learn about US trade restrictions and the establishment of a unit to promote compatibility and mutual recognition of standards for industrial goods.

Thailand also submitted intellectual property proposals to the US including one seeking geographical indication (GI) protection for products such as Jasmine rice and Thai silk. Another called for both countries to enact measures for benefit-sharing related to the research and commercialisation of products that utilise genetic resources and/or traditional knowledge. The US has turned down similar demands in other FTA negotiations, and remains fundamentally opposed to extending GI protection to products other than wines and spirits at the WTO. While the leaders of both countries have expressed an interest in concluding negotiations by next year, Thai civil society groups have urged their negotiating team to evaluate the potential agreement slowly and carefully (Bridges Year 9 No.8, page 16).

- Efforts to conclude a free trade agreement between the US and the Southern African Customs Union resumed in the last week of September after a year-long standoff. Negotiators focused on industrial tariffs, but also evoked some contentious issues, such as intellectual property protection and government procurement. SACU would prefer an FTA solely focused on market access, but the US maintains that it can only conclude 'comprehensive' bilateral or regional agreements. The next session, scheduled for mid-November, will tackle agriculture and textiles. After that, negotiators plan to meet once every eight weeks or so with the aim of concluding the deal towards the end of next year. This is two years later than originally planned.

## EU's Sugar Export Increase Slammed

The European Union's decision to release two million extra tonnes of subsidised sugar on the world market has enraged more competitive sugar producers in other WTO Member countries.

The Commission cited overproduction under quotas meant for supplying the domestic market as the reason for 'declassifying' some two million tonnes of sugar into the C quota, which must be exported. Although no direct export subsidies will be paid for this extra quantity, the EU's internal subsidies are so high that the sugar can be sold in third countries at a price vastly below the cost of production.<sup>1</sup> WTO rulings adopted on 19 May 2005 confirmed that the EU's internal price- and production support in fact cross-subsidised exports, pushing the Union way beyond its scheduled commitments for sugar exports.

At the 27 September Dispute Settlement Body meeting, Australia, Brazil and Thailand, which brought the successful sugar challenge to the WTO, strongly cautioned the Commission against going ahead with the expansion of exports. The three countries stated that following the WTO ruling, the EU should be looking at decreasing its exports to 1.3 tonnes instead of expanding them to 7 million tonnes. To comply with the WTO ruling, the EU should also cut its export support from two billion euros to less than 500 million euros.

The release of two million extra tonnes on the world market under these circumstances "would be undertaken in the clear knowledge that exports of sugar in excess of the scheduled commitment levels constitute prohibited export subsidies under the WTO Agreement on Agriculture" and would undermine both the EU's WTO obligations and the effective functioning of the Dispute Settlement Body, the complainants argued. Brazil also noted that the declassification decision sent a negative signal to WTO negotiators less than three months before the Hong Kong Ministerial: "Hardly could any of us find a more deleterious way to express the gap between words and deeds."

The EU seemed to shrug off such warnings. A Commission spokesperson only noted that until the end of the implementation period for the rulings – expected to be determined by a WTO arbitrator by 28 October – the EU had no legal constraints to increasing its exports. In line with other Commission officials earlier, he stressed that getting rid of the surplus was necessary to push through the controversial sugar sector reform, which essentially constitutes the EU's implementation strategy for the WTO ruling. The reform would cut the guaranteed internal price by 39 percent and thus probably wipe out sugar production in countries such as Finland, Greece and Ireland. The Commission hopes to get member states' approval for the reform before the Hong Kong Ministerial, but most observers predict that this will not happen unless it is significantly watered down.

### ACP Countries Seek a Better Deal

Meanwhile, the 18 sugar producing countries of the African, Caribbean and Pacific (ACP) Group of States have vowed to fight the reform, which could mean a 40 percent decrease in the price the EU pays for their exports under a 1.3 million-tonne annual duty-free quota. These countries have evoked the possibility of reviving the G-90 group of developing and least-developed WTO Members, which significantly contributed to the demise of the Singapore issues in Cancun, to put pressure on EU officials in Hong Kong. So far, the EU has promised 40 million euros in adjustment aid for 2006, with further payments extending over the next eight years. The European Parliament is pressing member countries to compensate affected ACP producers more generously.

### ENDNOTE

<sup>1</sup> Despite domestic prices more than four times as high as the global market rate, the EU is the second largest sugar exporter in the world behind Brazil, but ahead of Thailand and Australia. The international charity Oxfam estimates that the EU spends 3.30 euros in subsidies to export one euro's worth of sugar.



# US–Andean Trade Agreement Nears Conclusion

US, Colombian, Ecuadorian and Peruvian negotiators may conclude the Andean Free Trade Agreement (AFTA) in November, provided that key intellectual property and agricultural market access issues can be solved.

Ecuador's opposition to US demands on the protection of test data for clinical drug trials has emerged as one of the difficulties in the talks. The US continues to insist on a five-year protection period for the test data that pharmaceutical companies submit to government sanitary authorities when seeking the right to place a new drug on the market. Colombia and Peru have reportedly given in on this demand, but Ecuador is holding out for a protection period of three years at the most.

The five-year test data exclusivity period has been a contentious point in earlier negotiations, but so far the US has always prevailed. For developing countries, the importance of the issue lies in its potential to delay the release of generic copies of brandname medicines, as generic manufacturers usually rely on the efficacy, toxicity and safety documentation submitted by the company seeking marketing rights for the original version of the drug.

Data exclusivity is only one of several standard US intellectual property protection requirements that exceed the level demanded by the WTO's Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPS). Another is granting 'second use' patents for chemical entities that the manufacturers have found to be effective in treating a different condition than the one described in the original patent application. Under current Andean legislation, patents can only be issued for new chemical entities.

## Agriculture and SPS Concerns

In agriculture, the treatment of sensitive products remains unresolved. The key issue for the Andean side is whether certain products, such as rice corn and chicken legs could be permanently excluded from full liberalisation. Difficulties also persist over dairy and sugar, both of which are heavily protected and subsidised in the US. The agriculture negotiations are taking place bilaterally between the US and each of the Andean countries, which have already had to back off on their demand to establish a sanitary and phytosanitary (SPS) working group with its own dispute settlement to deal with problems arising from non-trade barriers, such as safety or environmental standards for food/agricultural products. The two sides are still looking into how an SPS working group without dispute settlement powers could still speed up the resolution of market access conflicts.

## Other Areas

According to US trade sources, final text has already been agreed on financial services, transparency in government procurement and technical barriers to trade. Industrial market access has nearly been wrapped up, with textiles being the notable exception. As in the CAFTA negotiations, rules of origin are particularly difficult to agree, since the US is reluctant to allow duty-free access for textiles made with third party inputs. Footwear is another sensitive area, where the US insists on transition periods reaching up to 15 years.

Although all 'new generation' US FTAs require its trading partners to at least enforce their own labour and environmental laws, trade unions and green activists in the US contend that the provisions are too weak to prevent social or environmental dumping. The Andean countries have reportedly indicated that they could accept strengthening the treaty's labour provisions in order to attract support for the agreement. The US Trade Representative is consulting the Congress on the issue.

## Andean Countries Seek Rapid Conclusion

The difficulties notwithstanding, the three Andean countries – with the possible exception of Ecuador, see below – are keen to conclude the agreement as soon as possible, particularly since the US has made clear that the Andean Trade Promotion and Drug Eradication Act, which provides market access preferences to the region, will not be renewed when it expires

at the end of next year. Both sides have agreed that negotiating groups on specific topics will continue to meet outside formal 'rounds' in an effort to speed up the talks. Chief negotiators were to convene from 19–21 October to take stock of progress.

## US Lawmakers Lukewarm

In related news, a bipartisan group of US House Representatives released a report in September, calling for the Andean countries to improve their negotiating offers. For instance, they said that Colombia should not be allowed to shield a large number of agricultural products from liberalisation on the grounds that they offer an alternative to the cultivation of illegal narcotics, although some flexibility should be offered when 'credible proof' is available that liberalisation would hurt efforts to curb coca production. The report also called on the Bush administration to demand the elimination of the Andean countries' price band mechanism, which allows governments to ensure that the price of certain commodities does not fall below a minimum level.

On intellectual property rights, the group backed the government's tough stance on clinical test data, as well as warned against accepting a requirement for US companies to disclose the origin of genetic resources/traditional knowledge (TK) in patent applications. The protection of access to genetic resources/TK, or clauses mandating benefit-sharing from their commercial use, "do not fit within the US intellectual property regime," the report said.

The report picked up several specific points of contention with Ecuador, ranging from ongoing investment disputes to the enforcement of child labour laws and the country's outdated labour code in general. In addition, the group said Ecuador was the most reluctant of the three countries to make concessions and suggested that it could be left out of the AFTA, at least initially. On the other hand, while Peru has signalled its readiness to sign the agreement without the other two, the report was unenthusiastic about concluding an FTA without Colombia.

# How to Address the Disclosure Requirement at the International Level

Felix Addor and Martin Girsberger

On the eve of the WTO Ministerial Conference in Hong Kong, developing countries are pushing for a mandate to negotiate a broad international disclosure requirement for genetic resources and traditional knowledge under patent law. The relevant discussions, however, are stalled. Are there any alternatives to an 'all-or-nothing' scenario at Hong Kong?

The discussions on genetic resources and traditional knowledge (TK) have shown a need for measures that increase transparency in access and benefit-sharing. One such measure is the requirement to disclose certain information regarding genetic resources and traditional knowledge in patent applications. The majority of least-developed and developing WTO Members want to amend the WTO's TRIPS Agreement to include an obligation for Members to introduce a broad disclosure requirement in their national laws. In contrast, developed WTO Members either consider the World Intellectual Property Organisation (WIPO) to be the competent forum, or oppose international disclosure obligations altogether. Consequently, there is a continuing impasse at the WTO.<sup>1</sup>

## An Alternative Way Forward

In order to support the process, and because it has an interest in balanced patent protection for biotechnological inventions, Switzerland – not a *demandeur* on these issues – has presented specific proposals for amendments to international patent legislation.<sup>2</sup> The proposed amendments to WIPO's Patent Co-operation Treaty (PCT) would explicitly enable the national legislator to require patent applicants to declare the source of genetic resources and the associated TK in patent applications, if the invention is directly based on the resources or knowledge in question. The proposals would also grant applicants the possibility of satisfying this requirement at the time of filing an international patent application, or later during the international phase. This declaration of source would be included in the publication of the international patent application in order to render it accessible to the public at the earliest stage possible.

Additionally, Switzerland has proposed to establish a list of government agencies competent to receive information on patent ap-

plications containing a declaration of source. Patent offices receiving such applications would be obliged to inform, in a standardised letter, the competent government agency that the respective country has been declared as the source, thus further enhancing the transparency function of the disclosure requirement.

The proposals have four policy objectives: They would (1) increase *transparency* in access and benefit-sharing, (2) allow providers of genetic resources and traditional knowledge to *trace* their resources or knowledge in patentable inventions, (3) assist in the establishment of *technical prior art* with regard to inventions relating to genetic resources or traditional knowledge, and (4) increase mutual *trust* among the various stakeholders involved.

## Replies to Comments on the Proposals

These proposals have been discussed in a number of international fora, and different opinions have been expressed. Some commentators were concerned that the proposals would:

- make it optional for the national legislator to introduce the disclosure requirement;
- not be reflected in the TRIPS Agreement; and
- not require evidence of prior informed consent (PIC) and benefit-sharing.

When drafting the proposals, these and other points were carefully considered, the aim being a balanced, timely, effective and practical solution.

## Optional Introduction at National Level

The *demandeurs* propose to make it *mandatory* for the national legislator to introduce this requirement in national law, one of their main objectives being to target the major players in the field of patents. In contrast, the proposals by Switzerland would *explicitly enable* the national legislator to introduce the disclosure requirement at the national level. When comparing these approaches, the optional approach offers at least three main advantages:

- Much faster international consensus is likely to be achieved on an optional approach, thus making it possible to reach a timely resolution; in contrast, the mandatory approach entails the risk of blocking progress at the international level.
- The optional approach would explicitly enable interested countries to introduce a disclosure requirement in their national legislation, and would allow them and the international community to gain experience without prejudice to further international efforts. This would be particularly useful for those countries that have a positive attitude towards disclosure requirements.
- The optional approach would not oblige developing countries, especially the least-developed among them, to introduce the requirement in their national laws. This takes into account the difficulties these countries might face with such an obligation, since their patent authorities are likely to lack the necessary legal and technical capacity to apply the requirement in practice. It appears, however, that many developing countries are not fully aware of the new obligations that a mandatory approach would place upon them.

In this regard, proposals have been made to oblige only industrialised countries to introduce a disclosure requirement in their national laws. Any such solution, however, would unduly open the door for abusing this measure and would thus weaken its effectiveness. Furthermore, this solution would hardly be acceptable to industrialised countries.

It is also important to note that many European countries have already introduced a disclosure requirement in their national legislation or plan to do so. For example, the draft revised Swiss patent law to be submitted to Parliament in 2005 contains provisions in this regard.<sup>3</sup> In addition, the proposed establishment of a list of competent government agencies and the inclusion of the declaration of the source in the publication of international patent applications would bring results very similar to a mandatory approach.

Once the proposed disclosure requirement is introduced at the national level, it would be *mandatory* for patent applicants to disclose the source, and failure to disclose or wrongful disclosure would carry the sanctions currently allowed for under the PCT and the Patent Law Treaty (PLT), including the refusal of the patent application. Sanctions outside of the patent system could also be imposed, including criminal sanctions. The draft revised Swiss patent law, for example, would impose fines of up to CHF 100,000 and allow judges to publish their rulings.

### The Role of the TRIPS Agreement

Switzerland proposes to apply the disclosure requirement to international patent applications as well. Its proposals would also afford applicants the possibility of satisfying this requirement at the time of filing an international patent application or later during the international phase, and would include this declaration in the publication of international patent applications. Accordingly, Switzerland proposes to amend the PCT. Through reference, the proposals would also apply to the PLT and thus to national and regional patent applications.

In contrast, any amendment of the TRIPS Agreement would *not* apply to international patent applications, and would thus not bring the same results as an amendment of the PCT. Furthermore, since the relevant provisions of the TRIPS Agreement (Articles 27.1, 29.1 and 62.1) should provide for adequate flexibility with regard to a requirement to disclose the source, there is no need to amend the TRIPS Agreement. Moreover, the PCT approach has a considerable advantage of time: amending the PCT Regulations could likely be carried out quickly, whereas amending the TRIPS Agreement would probably require considerable time. This notwithstanding, it may be conceivable to reflect the Swiss proposals in the TRIPS Agreement at a later stage.

### Evidence of PIC and Benefit-sharing

In our view, the proposals by Switzerland on the declaration of the source and the establishment of a list of competent government agencies would allow the providers of genetic resources and traditional knowledge to verify whether the applicable national legislation on access and benefit-sharing has been complied with. It is thus not necessary to also require evidence of PIC and of fair and equitable benefit-sharing in patent applications. In addition, such requirements would raise a number of legal and technical concerns, including the following:

- Patent authorities would need easy access to the – likely differing – national legislations on access and benefit-sharing in a language familiar to them. Up to now, however, only few countries have actually implemented such legislation and designated the competent national authorities. The patent authorities would also have the complex task of analysing and applying this legislation. Moreover, they lack the necessary legal and technical competence to determine the veracity of the evidence provided.
- In contrast to the Convention on Biological Diversity (CBD), the FAO International Treaty for Plant Genetic Resources for Food and Agriculture does not require PIC; accordingly, burdensome distinctions would be necessary between patent applications where the PIC-requirement applies and where it does not apply.
- Patent authorities are not in a position to determine whether the sharing of benefits is 'fair and equitable'. Moreover, at the time of filing patent applications, no monetary benefits will have arisen yet, and the commercial success of the invention is generally unknown. The applicant is thus unable to provide the required evidence when filing a patent application.

### Conclusions

The proposals submitted by Switzerland to WIPO present a practical and result-oriented way forward. They could be introduced in a timely manner. Disclosing the source can be seen as

the 'entry point' of the access and benefit-sharing system in the patent regime and would strengthen mutual supportiveness between the two regimes.

The proposed disclosure of the source would allow parties to contract on access and benefit-sharing to verify whether the other contracting party is complying with its obligations. This would not only assist in and simplify the enforcement of these obligations, but would also permit verifying whether prior informed consent has been obtained and whether provisions have been made for fair and equitable benefit-sharing.

The proposed way forward would enable countries to fulfil their international obligations, in particular those arising out of the TRIPS Agreement, the PCT, the PLT, the CBD and the FAO International Treaty, and would provide one means to implement these international agreements in a mutually supportive way. Since no modifications to the TRIPS Agreement would be necessary, they provide further evidence of the flexibility of this agreement. And finally, the possibility to require the declaration of the source would also support the determination of prior art with regard to traditional knowledge, as it would simplify searching the TK databases that are increasingly being established at the local and national levels.

*Felix Addor is Chief Legal Counsel and Deputy Director-General of the Swiss Federal Institute of Intellectual Property (IPI). Martin Girsberger is the Co-head of Legal Services, Patents and Design at the same institute. The authors thank Marie Kraus-Wollheim, Legal Adviser, IPI, for her valuable help and input. The views expressed are the authors' and do not necessarily reflect the views of Switzerland.*

### ENDNOTES

<sup>1</sup> See generally, e.g., [www.ip-watch.org/weblog/index.php?p=86&res=1024&print=0](http://www.ip-watch.org/weblog/index.php?p=86&res=1024&print=0).

<sup>2</sup> The Swiss submissions to WIPO and WTO can be found at [www.ige.ch/E/jurinfo/j105.shtm#6](http://www.ige.ch/E/jurinfo/j105.shtm#6) and [www.ige.ch/E/jurinfo/j1101.shtm#5](http://www.ige.ch/E/jurinfo/j1101.shtm#5). For a more detailed summary of the Swiss proposals see [http://www.iprsonline.org/ictsdocs/DOO6\\_Addor.pdf](http://www.iprsonline.org/ictsdocs/DOO6_Addor.pdf).

<sup>3</sup> The draft for a revised Swiss Patent Law can be found at [www.ige.ch/E/jurinfo/documents/j10017e.pdf](http://www.ige.ch/E/jurinfo/documents/j10017e.pdf).

## Culture, Trade and Additional Protection for Geographical Indications

Tomer Broude

Cultural diversity is sometimes evoked to justify the legal protection of geographical indications, but these arguments may be misguided. Nevertheless, 'additional protection' under the TRIPS Agreement should be extended to all such indications in order to remove discrimination between products from developed and developing countries.

According to Article 22.1 of the Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPS), geographical indications (GIs) identify a good as "originating in the territory of a Member, or a region or locality in that territory, where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin." The GIs that qualify for international legal protection under WTO law are place-related names most often associated with food and beverage products, such as Parma ham, Darjeeling tea or Budvar beer.

There is a distinct cultural backdrop to GIs: the assumption that – beyond their private-interest and public-welfare effects – they are required for the preservation of local traditions and cultural diversity. This approach is necessary to justify the inclusion of GIs in intellectual property disciplines, which are usually aimed at encouraging innovation and individual creativity through the grant of a temporary monopoly. GIs are different: based on commonly used place-names, they establish communal rights and are maintained to protect 'traditional' knowledge.

Under TRIPS Article 22, GI protection may not apply if it can be shown that circumstances or proactive measures prevent confusion regarding the product's true geographical source. Article 23 – which relates only to wines and spirits – goes a step further, conferring to the GI a nearly absolute degree of exclusivity that prevents others from using it even when measures have been taken to prevent confusion (for instance, a wine cannot be called a 'Beaujolais' or described as 'Beaujolais-style' unless it actually comes from the Beaujolais region in France even if the label clearly indicates that the product originates in another location). In this enhanced category, consumer protection – the original rationale for integrating GIs in the WTO's intellectual property rules – no longer serves as the basis for the

GI and so must be replaced by another one, such as cultural protection. In the Doha Round, a number of WTO Members seek to extend this degree of absolute protection to all GIs.

The main proponent of the cultural argument is the EU, which is interested in extending TRIPS Article 23 'additional protection' to its Member States' non-wine and spirit products. The EU has gained support from certain developing countries keen on enhancing the protection of their own current and future non-wine GIs, which are now inherently disadvantaged because most wines and spirits are produced in developed countries. The EU argues that GIs are "key to EU and developing countries' cultural heritage, traditional methods of production and natural resources".<sup>1</sup> This widely-held idea<sup>2</sup> is usually taken for granted, based on general perceptions of the trade/culture relationship.

### How Are GIs Expected to Protect Culture?

A popular image of the effects of trade on culture is the apocalypse of a 'McWorld', where the global proliferation of standardised products of mass culture through international free trade threatens to stifle national and local cultures and traditions embodied in cultural goods and services ('widgets').

A 'widget' may become cultural in three ways, all of which may apply also to food and wine products, currently the main beneficiaries of GI status:

- *The culture of production:* The process and/or method of the widget's creation and production endow it with cultural merit worth protecting, irrespective of the widget's commercial value or end-use (e.g., hand-crafted boots). This corresponds to elements of Article 4 of the preliminary draft of UNESCO's Convention on Cultural Diversity<sup>3</sup>, which requires 'cultural activities, goods or services' to embody or convey cultural expressions that result from the creativity of individuals, groups and societies. Food and wine products are cultural in this sense, especially if produced through traditional viticultural, oenological or agricultural practices. Most relevant for the geographical indications debate is the so-called 'old world' concept of *terroir*, which sees such products as non-industrial expressions of their specific natural and human environment, so that the place of production itself becomes a cultural value.
- *The culture of consumption:* The widget may also become 'cultural' by virtue of the context in which it is consumed. For example, the demand for music once spawned a tradition of musical performances, expressed through the culture of concert- and opera-going, but also that of the dance-hall or the folk musician. When the same performances became available, with enhanced audio quality, through mass-produced long-playing records, the social context of consumption changed from the communal to the private. In this respect, food and wine products covered by GI rules are closely linked with local cultures of consumption, as evidenced by a rich sociological literature on relevant ceremonies, social norms, lifestyles and local tastes. This aspect appears to have been neglected in the UNESCO Draft Convention, although it may be included in the broad concept of 'cultural activities'.
- *The culture of identity:* Acknowledged in the UNESCO Draft Convention as 'symbolic meaning', this is the least tangible manner in which local culture may attach to a widget. Culture is embedded in the widget by its very existence – and through its content – in a



way that somehow makes it representative of a cultural value that is associated with the relevant individual or group identity, such as a flag or ceremonial dress. This dimension appears in food and wine products that are national ‘champions’ closely associated with national or regional perceptions of identity (e.g., Champagne in France).

Intuitively, trade restrictions protecting cultural ‘widgets’ may be able to prevent cultural degradation. Culture may be highly valued collectively, but if aggregate individual consumer demand cannot independently sustain the cultural widget in the face of ‘non-cultural’ but otherwise functionally substitutable products, the widget’s economic survival requires regulatory protection for its preservation. Conflicts between international trade liberalisation and domestic policies shielding cultural goods and services may arise in any conceivable trade measure, from tariffs to tax preferences.

GIs are somewhat different. They do not have the obvious trade restrictive effects of other measures. The primary goal of GIs is not cultural diversity but consumer protection – preventing the ‘passing off’ of a good as the ‘genuine article’ even when it has been sourced from another locale, thus diluting a geographical production area’s reputation. In this sense, GIs do not appear to have an inherent value beyond their role in the perfection of market information. A cultural widget is simply shielded from ‘non-cultural’ competition unfairly using its GI, permitting consumers to exercise their preferences. A similar effect could be achieved by a prohibition on misleading labelling, instead of the institution of a quasi-intellectual property right. In itself, this seems a weak contribution to cultural protection, as market failure is still imminent.

Moreover, it is acknowledged that GIs actually may add value to goods. It is the monopolisation of the GI ‘brand’ that achieves this, and under TRIPS Article 23 the GI concept has been detached from consumer protection, significantly increasing the strength of GIs for wine and spirits. Thus, culture is protected in theory not only by distinguishing cultural widgets from the non-cultural, but by valorising the cultural expression embodied in the widget and converting it into a commercial premium.

### The European Experience: Cultural Change Despite GIs

Europe, where GIs and similar rights have been legally regulated and enforced since at least the early decades of the last century, provides an observatory for assessing the effectiveness of GIs as protectors of local traditions. Despite the theoretical considerations above, evidence shows that GIs cannot in themselves provide cultural protection, and in fact may serve as agents of change.

*Markets change production practices despite GIs, even when regulated:* Wine styles and winemaking practices have changed significantly over the last thirty years in many European wine appellations, shifting from ‘traditional’ to ‘international’, accommodating evolving tastes in domestic and foreign markets – displaying clear influences of Australian and Californian styles. This may have improved the overall quality and marketability of many wines. Sometimes little cultural loss has ensued (i.e., in bulk wine industries), but in other cases local traditions of production and most of all regional product characteristics have deteriorated despite GI protection.

In the Chianti Classico region of Tuscany, for example, starting in the 1970s many quality-conscious and innovative winemakers simply abandoned the prestigious appellation, using the formally inferior *Vino da Tavola* label so that they would be able to stray from the traditional production requirements regulated by law, introducing non-indigenous grape varieties, new trellising, oak aging and other methods, which significantly changed local practices and the character of products. Following this ‘Super-Tuscan’ revolution, the Chianti Classico law itself underwent far-reaching changes, to the point that the current GI-eligible varietal composition prohibits the use of the indigenous white varieties Malvasia and Trebbiano, where in the traditional Chianti ‘recipe’ consolidated by Barone Ricasoli in the 1850s, the use of white varieties in the red wine was mandatory.

Other wine regions have experienced similar changes, in which the cultural content of GI requirements has shifted significantly. This is perhaps testament to the dynamics of cultural evolution, as well as the strength of market forces, but in any case shows that GI protection does not prevent cultural change.

*Markets change cultures of consumption despite GIs:* For example, Britain has long had established traditions of taste in wines and spirits, closely linked to France and with high degrees of discernment between different appellations. Yet despite France’s advantage in GIs and its general philosophy of *terroir*, in 2000 Australian wine exports to Britain surpassed those of France. A 2002 French government-commissioned report acknowledged that one reason for loss of market share was the proliferation of geographical appellations, which has led to customer confusion – reflecting the fact that the culture of consumption had moved away from geographical sensitivity to simpler varietal preferences and homogenous tastes, despite (or even because) of GIs.

*The GI market invents traditions, dilutes culture and distorts identity:* Led by the assumption that GIs add value to products, a market has evolved for GIs, in which regional groups of producers lobby government regulators for GI status. In order to satisfy reputational, legal and political requirements for GI recognition, communities have had to crystallise where none really existed before, and traditions have had to be ‘invented’, sometimes drawing upon defunct reputations from the distant past. More importantly, like tourism, GIs may cause distortions in the representation and evolution of local culture if, in order to benefit from the indication, communities emphasise the more commercially marketable aspects of their culture.

### Implications for the WTO GI Debate and Cultural Policy

GIs, as legal mechanisms and quasi-intellectual property rights, evidently do not have the independent capacity to protect local cultures of production, consumption or identity, or to prevent the erosion of cultural diversity.

*Continued on page 22*

In the WTO, this finding might appear to weaken the position of those advocating 'additional protection' for all GIs – not just wines and spirits – under TRIPS Article 23, as it could be argued that if GIs are not culturally justified, they should remain as much as possible within the narrower TRIPS Article 22 consumer protection equation. However, insofar as the abolition of 'additional protection' for wines and spirits is not on the negotiation table, the only way to prevent the current discrimination against developing countries whose GIs cannot now enjoy 'additional protection' is to extend the latter to all GIs.

Moreover, with or without extension, developing countries that are considering adopting GIs as a suitable vehicle for the protection of rights regarding traditional knowledge – or that would like to see stronger specialised rules for cultural protection in the WTO and elsewhere – should be aware that although such modalities may increase the commercial value of existing cultural goods and services, their effect on cultural preservation and diversity is indeterminate at best, as GI-protected traditions might nevertheless in the future succumb to economic pressures and international consumer preferences. GIs and other trade-related measures must be complemented by more comprehensive flanking policies if cultural diversity is to be preserved.

*Tomer Broude teaches international law and development at the Hebrew University of Jerusalem. This article is based in part on his forthcoming article, "Taking 'Trade and Culture' Seriously: Geographical Indications and Cultural Protection in WTO Law", 26:4 Pennsylvania Journal of International Economic Law (2005).*

#### ENDNOTES

<sup>1</sup> See EU Background Note No. 01/04 *Why Do Geographical Indications Matter to Us?* (2004), available at [http://jpn.cec.eu.int/home/news\\_en\\_newsobj553.php](http://jpn.cec.eu.int/home/news_en_newsobj553.php).

<sup>2</sup> See public opinion surveys presented by the EU, WTO Doc. IP/C/M/38 at 32-33.

<sup>3</sup> UNESCO, 33 C/23, *Preliminary Draft of a Convention on the Protection and Promotion of the Diversity of Cultural Expressions* (the 'UNESCO Draft Convention'), Paris, August, 2005, available at: [http://portal.unesco.org/culture/en/ev.php-URL\\_ID=28182&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/culture/en/ev.php-URL_ID=28182&URL_DO=DO_TOPIC&URL_SECTION=201.html).

## WIPO Development Agenda Status Unclear

The General Assembly of the World Intellectual Property Organisation agreed in early October to establish a 'provisional committee' to continue discussions on proposals to mainstream a 'development agenda' into all of WIPO's work.

A year ago, Argentina, Bolivia, Brazil, Cuba, the Dominican Republic, Ecuador, Egypt, Iran, Kenya, Peru, Sierra Leone, South Africa, Tanzania and Venezuela (known as the 'Friends of Development') convinced WIPO members to hold a series of intersessional intergovernmental meetings to discuss their proposals for wide-ranging changes to the mandate and functioning of the organisation (Bridges Year 8 No.9, page 21). This year's General Assembly (GA) had to decide if, where, and how to continue talks on the development agenda.

In closed informal meetings, delegations disagreed on whether to continue the discussions in the high-level intergovernmental meetings that reported directly to the GA, or to confine them to the Permanent Committee on Co-operation for Development Related to Intellectual Property (PCIPD), a body of minor importance. For the first time, the 'Friends', led by Brazil, expressly linked the development agenda to the Substantive Patent Law Treaty under elaboration at WIPO, refusing to discuss the latter in the absence of progress on the former.

Negotiators eventually compromised by creating the 'provisional committee', which is to hold two one-week sessions on the development agenda. In the interim, the PCIPD will cease to exist. Delegates differ in their interpretations of the significance of the new committee, particularly as to whether it will enjoy the high status of the intergovernmental meeting process.

### Substantive Patent Law Treaty

The General Assembly focused particular attention on how developing country concerns would be reflected in the discussions on the Substantive Patent Law Treaty (SPLT), especially with regard to public interest flexibilities, genetic resources, traditional knowledge and competition. In an effort to address these concerns, the GA agreed to hold, in early 2006, a three-day informal open forum in Geneva, followed by an informal session of the WIPO Standing Committee on the Law of Patents charged with agreeing on an agenda for a five-day formal meeting later in the year, which will in turn report to the 2006 GA.

### Genetic Resources and Traditional Knowledge

The GA extended the mandate for the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC). A number of industrial countries, which continue to oppose raising these issues of particular importance to developing countries in the WTO's Council for TRIPS, contend that WIPO, and the IGC in particular, is the appropriate forum to address them. However, in its five-year existence, the body has not come up with any significant recommendations. The General Assembly admitted several new civil society observers to the IGC, including the International Centre for Trade and Sustainable Development, the Third World Network and Consumers International.

### Protecting Broadcasters' Rights

Existing treaties, such as the WTO's TRIPS Agreement and the Berne Convention, allow states to limit the protection of broadcasts to the authors of copyrighted subject matter. This has motivated broadcasters to lobby for an additional layer of protection to be granted specifically to them, independent of existing copyrights. The issue before the GA was whether and when a diplomatic conference for the adoption of a broadcasting treaty should be scheduled. Countries finally agreed to hold two additional meetings of the Standing Committee on Copyright and Related Rights with the aim of finalising a "basic proposal for a treaty [...] in order to enable the 2006 WIPO General Assembly to recommend the convening of a Diplomatic Conference in December 2006 or at an appropriate date in 2007."

The next issue of Bridges will carry more detailed analysis on the General Assembly outcome.

# Making Global Trade Rules Address Local Needs in Agriculture

The 2004 July Package offers developing countries an unprecedented opportunity to address their food-security, rural development and livelihood needs in the context of multilateral trade negotiations. It is important to seize this chance to integrate sustainable development concerns in the international trading system by making judicious use of the Special Products (SPs) that developing countries may designate to ensure that the most vulnerable producers and consumers retain access to local staple foods and employment, and are protected against destructive import surges through the Special Safeguard Mechanism (SSM) to be negotiated.

Enhancing developing countries' capacity to integrate the concepts of SPs and the SSM into multilateral trade rules is an important element of ICTSD's work on agriculture. ICTSD supports the efforts of stakeholders in developing countries to clearly articulate the various options in order to secure negotiating outcomes that respond to their specific sustainable development priorities. Strengthening stakeholders' capacity to identify SPs is an integral part of this process.

## Methodology for the Identification of SPs

A methodology for the identification of Special Products and products eligible for the SSM has been developed and subsequently tested. This is a useful tool that allows countries to engage in the process of 'objective' self-selection of SPs. The methodology has been updated through a process of participatory research and dialogue that involved, among others, a multi-stakeholder team of trade negotiators, government officials, civil society and farmers' groups.

## Indicators

The methodology for the identification of SPs requires a context-specific approach extending beyond nation-wide indicators to consider the relevance of particular products in areas where the poor (primarily the rural poor, including women and small farmers) are concentrated. Three categories of potential indicators have been developed to target vulnerable groups whose livelihoods may be put at risk by the effects of further trade liberalisation.

## Dialogues, Country Studies and Cross-cutting Research

The research and dialogues conducted under the project aim at introducing new thinking and a participatory approach to designating SPs and developing a safeguard mechanism that truly serve the interests of the intended beneficiaries. Built into the process is the objective of strengthening research capacities in developing countries through working with local institutions. Country studies have been completed in Sri Lanka, Pakistan, Kenya, Peru, Honduras and Barbados, and 13 more are planned, including in the Pacific and South East Asia.

Research is also needed on cross-cutting issues that are directly pertinent to the ongoing WTO negotiations on SPs and the SSM, including among others:

- the tariff structures of G-33 countries, the main *demandeurs* of negotiations on these topics;
- developing country experiences in using the existing Special Safeguards under the WTO Agreement on Agriculture and lessons that can be drawn for the negotiations on the SSM;
- lessons drawn from negotiations involving agricultural safeguards and food security concerns in bilateral and regional trade agreements; and
- options for negotiating modalities in Special Products.

## The Blueprint

ICTSD is currently preparing a practical tool for negotiators and policy-makers in the form of a 'blueprint', which will provide a number of options for the selection, treatment and modalities for Special Products and the Special Safeguard Mechanism. The Blueprint will draw upon the research and dialogues outlined above, translating their findings into policy implications. It is designed to assist policy-makers and other stakeholders in weighing up different negotiating options, particularly in the lead-up to the WTO Hong Kong Ministerial.

The International Centre for Trade and Sustainable Development (ICTSD) is an independent non-profit organisation that upholds sustainable development as the goal of international trade and promotes participatory decision-making in the design of trade policy. ICTSD implements its information, dialogue and research programmes through partnerships with institutions around the globe.

### BRIDGES Regional Editions

#### PUNENTES

##### entre el Comercio y el Desarrollo Sostenible

Co-publisher: Centro Internacional de Política Económica para el Desarrollo Sostenible (CINPE), San José, Costa Rica

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

#### PONTES

##### entre o Comércio e o Desenvolvimento Sustentável

Co-publisher: Fundação Getúlio Vargas, São Paulo

Web: <http://www.edesp.edu.br>

#### PASSERELLES

##### entre le commerce et le développement durable

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

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

### Other ICTSD Periodicals

#### BRIDGES Weekly Trade News Digest

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

Editor: Trineesh Biswas

#### BRIDGES BioRes

Co-publisher: IUCN – The World Conservation Union

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

Editor: Heike Baumüller

#### TRADE NEGOTIATION INSIGHTS

Co-publisher: ECDPM

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

Editors: Yvonne Apea/Teisha Mattison, Christophe Bellman and Sanoussi Bilal

#### ECLAIRAGE SUR LES NEGOCIATIONS

Co-publisher: ECDPM

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

Rédaction: Yvonne Apea/Teisha Mattison, Christophe Bellman et Sanoussi Bilal

#### PASSERELLES SYNTHESE MENSUELLE

Co-publisher: ENDA – Tiers Monde

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

Rédacteur: El Hadji Diouf

#### PUNENTES QUINCENAL

Co-publisher: CINPE

Servicio de información electrónico quincenal enfocado a la difusión de noticias relacionadas con el comercio y el desarrollo sostenible

Redactor: Eduardo Escobedo Reachi

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

### Meetings of WTO Bodies\*

- Oct. 24-25 Dispute Settlement Body Special Session\*
- Oct. 24-25 Negotiating Group on Trade Facilitation
- Oct. 24-28 Rules Week\*
- Oct. 25-28 Council for Trade-related Aspects of Intellectual Property Rights, regular meeting followed by a two-day Special Session\*
- Oct. 31 Council for Trade in Services Special Session\*
- Nov. 7-11 NAMA Week\*
- Nov. 8-10 Negotiating Group on Trade Facilitation
- Nov. 10 Council for Trade in Goods
- Nov. 14 Dispute Settlement Body Special Session\*
- Nov. 30 Dispute Settlement Body
- Dec. 1-2 General Council
- Dec. 5 Dispute Settlement Body Special Session\*

\*Negotiations mandated in the Doha Ministerial Declaration.

**Sixth WTO Ministerial Conference**  
December 13-18, 2005  
Hong Kong, China

### Other Meetings

- Nov. 4-5 Fourth Summit of the Americas  
Mar del Plata, Arg.  
<http://www.summit-americas.org/>
- Nov. 7-12 39<sup>th</sup> Session of the International Tropical  
Yokohama Timber Council  
<http://www.itto.or.jp/>
- Nov. 16-18 World Summit on the Information Society  
Tunis <http://www.itu.int/wsis/>
- Nov. 19-26 FAO Special Conference on Small Island  
Rome Developing States  
<http://www.fao.org/>
- Nov. 28- Dec. 9 First Meeting of the Parties to the Kyoto  
Montreal Protocol & 11<sup>th</sup> Conference of the Parties  
to the UN Climate Convention  
<http://www.unfccc.int/meetings/>

### Selected Documents Circulated at the WTO

- Dispute Settlement. 7 October 2005. Mexico – Tax Measures on Soft Drinks and Other Beverages. Report of the Panel. (WT/DS308/R)
- Dispute Settlement. 30 September 2005. United States – Tax Treatment for Foreign Sales Corporations. Report of the Review Panel. (WT/DS108/RW2)
- WTO. 6 October 2005. Key Issues in WTO Dispute Settlement. WTO/Cambridge University Press

### Other Selected Resources

- Chapagain, A.K.; Hoekstra, A.Y. and Savenije, H.H.G. September 2005. Saving Water Through Global Trade. UNESCO Institute for Water Education. Delft
- Gallagher, Kevin (ed.). September 2005. Putting Development First: The importance of policy space in the WTO. Zed Books. London
- International Association for Impact Assessment and the Netherlands Commission for Impact Assessment. September 2005. Guidelines on Biodiversity-inclusive Environmental Impact Assessment and Inclusive Strategic Environmental Assessment. Available at <http://www.biodiv.org/programmes/cross-cutting/impact/guidelines.shtml>
- Hamilton, Kirk. 13 September 2005. Where Is the Wealth of Nations? World Bank. Washington D.C.
- Organisation for Economic Co-operation and Development. Forthcoming November 2005. The Development Effectiveness of Food Aid: Does tying matter? OECD. Paris
- Rangaswami Viji. September 2005. A Stitch in Time: Helping vulnerable countries meet the challenges of apparel quota elimination. Carnegie Endowment for International Peace. Washington D.C.
- Sajhau, Jean-Paul. September 2005. Promoting Fair Globalisation in Textiles and Clothing in a Post-MFA Environment. The International Labour Organisation. Geneva
- United Nations Conference on Trade and Development. 29 September 2005. World Investment Report 2005. UNCTAD. Geneva
- United Nations Development Programme. 7 September 2005. Human Development Report 2005 – International co-operation at a crossroads: aid, trade and security in and unequal world. Oxford University Press
- World Bank. 2005. Intellectual Property and Development: Lessons from recent economic research. Oxford University Press
- Cororaton, Caesar, Cockburn, John and Corong, Erwin. October 2005. Doha Scenarios, Trade Reforms and Poverty in the Philippines: A computable general equilibrium analysis. World Bank Policy Research Working Paper. World Bank. Washington D.C.

