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Exploring the Realm of the Possible

On 30 April, the chair of the WTO agriculture negotiations Crawford Falconer released an outspoken assessment of where he saw 'centres of gravity' emerging across a wide range of areas.

While no Member found the document entirely – and some not even remotely – to its taste, there was a palpable feeling of relief that the negotiating process was resuming at the multilateral level after months of waiting for a breakthrough to occur outside the WTO.

Ambassador Falconer stressed that although his 28-page 'challenges paper' did offer an assessment of the 'basic centre of gravity' for a potential Doha Round agriculture deal, it was not a negotiating draft. Rather, it aimed to "promote serious engagement that sharpens the appetite for decision." He cautioned that his sense of the broad parameters for an agreement was "not a matter of what I think is fair or right or even where the majority is. It is a more hard-nosed view of what I think is within the realm of the possible."

Reacting to several Members' comments that the paper lacked balance, the chair suggested that at least it had succeeded in engaging the membership on substance. "Everybody was doing what I would have expected, which is actually negotiating – they are all now trying to tug the blanket firmly to their side of the bed," he said.

Key Points of the Paper

First, Ambassador Falconer stated that it was 'frankly inconceivable' that the US could come out of the negotiations "with an entitlement to spend more on overall trade distorting domestic support than it had when it came in." The centre of gravity in play for the US, he concluded, would be somewhere between US\$10-18 billion instead of the US\$22 billion proposed by the US in October 2005. The EU and Japan want the US to go down to US\$15 billion, while the G-20 coalition is seeking a US\$12 billion spending cap. The EU would need to cut its own overall trade-distorting domestic support by more than 70 percent at a minimum, Mr Falconer said.

If the US is under pressure to lower subsidies, the EU faces strong demands to go further in lowering tariffs. So far, both have refused to move from their initial positions: the EU is not willing to cut its highest tariffs by more than 60 percent and the US insists that the reduction should be at least 83 percent. Mr Falconer said his sense was that the negotiations would have to deliver an overall cut above 50 percent for a deal to be possible. The EU's current formal offer would result in a 39-percent overall reduction.

The number and treatment of 'sensitive' products that will not be subject to standard formula cuts are also major points of contention. Ambassador Falconer said tariffs on sensitive products would probably need to be cut by one- to two-thirds of the reduction that would be achieved through the formula. The likely number of sensitive products would be between one and five percent of all agricultural tariff lines.

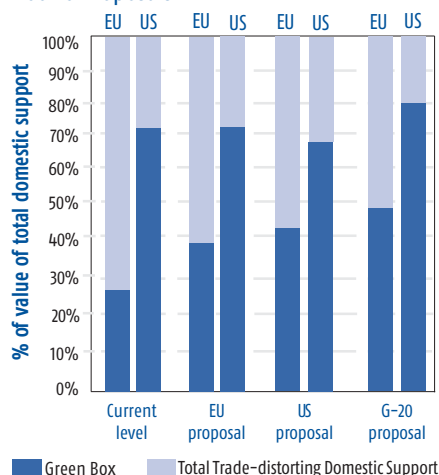
Only developing countries have the option to designate 'special products' based on their food security, livelihood security and rural development needs (see page 3). Mr Falconer acknowledged that existing positions were far apart on this issue, but added that "those positions will not work. And everybody knows it." Controversially, he argued that special products could

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Facts and Figures

Green Box spending now represents a large and increasingly important share of WTO Members' spending on domestic agricultural support. It is likely to become ever more significant in coming years. The sheer volume of Green Box payments may have trade-distorting effects even when support is provided through policies that decouple subsidies from production levels.

Relative importance of Green Box subsidies to the EU and the US under different Doha Round Proposals



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not be entirely exempted from tariff cuts, and predicted that the membership might not accept more than five to eight percent of tariff lines to be designated as 'special'. The G-33 coalition of developing countries had proposed that the ceiling must not be lower than 20 percent.

As a parting shot, Ambassador Falconer offered a 'radical thought' for Members to consider with regard to developing country market access. "Drop the tiered approach, drop the complicated flexibilities, two-third proportionalities, all the 'specials' debate," he said. Instead, he proposed that developing countries could opt for a Uruguay Round-type of tariff reduction formula, cutting through "all the bands and proportions and just go for a straight overall average cut target for developing countries to meet however they choose, provided they simply make a minimum specified cut (which is of course well below the average target) on each line."

See page 6 for further details of the challenges paper.

Initial Reactions

Predictably, virtually every Member that took the floor at the 7 May meeting of the Committee on Agriculture found fault with the document. The G-33 coalition of developing countries raised serious concerns about imbalances in the paper, which they said paid much greater attention to developed countries' political sensitivities than those of developing countries. The group also emphasised that negotiations on 'special products' could not be based on the number of tariff lines alone, but should also take into account the indicators for their selection developed by the G-33 (Bridges Year 11 No.2 page 6). The G-20 cautioned that balance would not be found by averaging negotiating positions, but by "reference to the mandate and to the outcome in other areas of the negotiations."

China noted that exemption from tariff cuts was one way to treat special products, and should be allowed at least for small and vulnerable economies, as well as very low tariffs. India's commerce minister Kamal Nath warned that any outcome that would perpetuate structural flaws and distortions in agricultural trade, or not address the sensitivities of developing and least-developed countries, would run counter to the Doha Round's development mandate and risk another failure of the negotiations.

Japan objected to Mr Falconer's assessment that the cap for 'sensitive' would not exceed five percent at the most. Japan currently imposes high tariffs on 140 products, including rice, wheat, sugar and dairy products. These would be reduced to 66 if the five-percent limit were to be applied. Switzerland said the paper would not provide an acceptable basis for further negotiations. French agriculture minister Dominique Bussereau issued a statement asserting that the centres of gravity identified by Mr Falconer were beyond the EU's margin of manoeuvre.

The US stressed that tariffs, rather than subsidies, were the main obstacle to market access, while the EU reiterated its long-standing position that to achieve an appropriate balance, it would be necessary to make equivalent concessions in the three pillars of the negotiations, i.e. market access (tariffs), domestic support and export competition.

Several developing countries said they were still assessing the implications of Ambassador Falconer's suggestion that they could opt for a Uruguay Round approach to tariff reduction.

Next Steps

Around 14 May, Ambassador Falconer was expected to release a second challenges paper on issues not covered in the 30 April document. These include, inter alia, his thoughts on Green Box disciplines, tropical products and preference erosion. As of 21 May, intensive meetings will take place between the chair and smaller groups, as well as the membership at large. A new negotiating draft – or 'modalities' paper – is likely to be issued by late June.

G-4 trade ministers were to meet in Paris on 17-18 May. They are scheduled to continue negotiations in London on 10 June (the trade ministers of Japan and Australia may be invited to join these gatherings). The G-4 may also reconvene during the week of 14-19 June.

Why Are Special Products and the Special Safeguard Mechanism Essential to China?

Ni Hongxing

Like many other developing countries, China has a huge population of low-income, resource-poor subsistence farmers who cannot compete in open international markets.

These farmers would become even more vulnerable if further trade liberalisation were to result in imports displacing domestic production and depressing domestic prices. Against this backdrop, it is imperative that the Doha Round agricultural negotiations provide adequate and effective flexibilities to the farm products of developing countries that are of vital importance to subsistence farmers.

Special Products (SPs) and the Special Safeguard Mechanism (SSM) are crucial for delivering on the developmental goals of the Doha Round. SPs refer to products that are of great significance to food security, livelihood security, and rural development in developing countries. The Hong Kong Ministerial Declaration explicitly stipulates that developing WTO Members will have the flexibility to self-designate an appropriate number of tariff lines as SPs 'guided by indicators based on the criteria of food security, livelihood security, and rural development'.¹ The Declaration also provides that a Special Safeguard Mechanism, based on both import volume and price triggers, will be established for developing country Members.

The Economic Importance of Agriculture

China is a major agricultural developing country with a population of 1.3 billion, of which 940 million live in rural areas, and 500 million rely on agriculture for employment. The sector not only ensures food security and provides the foundation for the existence and development for the majority of the country's population; it also provides a source of income and livelihoods for 900 million rural residents. Ensuring food security has always been a top priority for the government. Although China's economy has been growing rapidly in recent years, agriculture is still of great importance to the national economy. In 1978, it accounted for 28.1 percent of Gross Domestic Production (GDP) and represented 70.5 percent of national employment. By the year 2005, agriculture still accounted for 12.5 percent of China's GDP and 43 percent of all jobs in the nation. Agriculture will remain the foundation of the national economy for the foreseeable future.

2005 Rural population, farm size and per capita income in selected regions

Region	Population	No. of rural households	Rural population	Cultivated area/ household	Per capita income	Per capita income/day
Unit	10,000	10,000	10,000	mu	Yuan	US\$
National	130628	25223	94907	2.08	3254.93	1.1
Beijing	1536	142	382	0.69	7346.26	2.49
Hebei	6844	1449	5422	1.89	3481.64	1.18
Jinlin	2715	384	1444	6.24	3263.99	1.11
Shanghai	1778	111	338	0.43	8247.77	2.8
Zhejiang	4894	1225	3791	0.70	6659.95	2.26
Anhui	6114	1346	5241	1.68	2640.96	0.9
Henna	9371	2026	8000	1.53	2870.58	0.97
Hunan	6320	1493	5476	1.17	3117.74	1.06
Guangxi	4655	986	4146	1.31	2494.67	0.85
Sichuan	8208	1979	6904	0.96	2802.78	0.95
Guichou	3725	792	3276	1.02	1876.96	0.64
Yunnan	4442	877	2075	1.40	2041.79	0.69
Gansu	2592	463	2075	2.65	2052.63	0.73
Xinjiang	2008	224	990	4.11	2482.15	0.84

Source: China Statistical Yearbook, Statistical Yearbook for China's Rural Areas. (US\$1= RMB 8.19 yuan)

Agriculture in China

Chinese agricultural production is predominantly family-based and small-scale (252 million farming households in 2005). Farmland is very limited and most farmers produce a diversity of subsistence crops on plots averaging only half a hectare. Owing to the huge population base, water resources per capita account for only a quarter of the world average. Out of almost 504 million employed rural inhabitants in 2005, nearly 300 million were engaged in farming, forestry, animal husbandry and fishing.

Due the variability of agricultural resources and climatic conditions, as well as the small scale of production, China's agriculture is diversified and regionalised. Statistics show that wheat, rice and corn are still the most important grain products, and remain essential to domestic food security and to farmers' livelihoods, as well as a mainstay of local development in some areas.

In Hubei, Anhui, Sichuan, Jiangsu and Hunan provinces, most farmers rely heavily on rapeseed production (these regions account for more than 60 percent of the country's rapeseed areas). China is also a major cotton consumer, as well as producer. In more than 100 major cotton-planting counties across the country, over 60 percent of farmers' financial revenues come from cotton production. Sugar has become the lead sector and most important source of income in some Western provinces. For example, in Guangxi autonomous region and Yunnan province, sixty percent of farmers have lifted themselves out of poverty by planting sugarcane. Animal husbandry is also a major source of income and a good way to absorb the rural surplus-labor, which has contributed a great deal to rural development.

Social Considerations

Hidden unemployment is high in rural areas, farmers' incomes remain low, and a large income gap prevails between rural and ur-

Continued on page 4

ban dwellers. There may be as many as 150 million unemployed rural residents, and farmers' average per capita income per day is only US\$1.30. Rural unemployment and poverty will increase if the Doha Round results in a further destabilisation of the farming sector.

The ratio of incomes of rural and urban residents is 1 to 3.2 and, to make the matter worse, the gap keeps widening. In 2001, the disposable per capita income of urban inhabitants was 6860 yuan and that of farmers 2366 yuan. Five years later, the figure for urban dwellers was 10,493 yuan (US\$1,359.6), but only 3,255 yuan (US\$421.7) for farmers.

Rural poverty remains a persistent constraint to China's social and economic development. Since the mid-1980s, the government has launched a number of well-planned and well-organised poverty alleviation actions accompanied by supporting policies. Despite these efforts, there are still 150 to 200 million Chinese farmers living under one dollar a day. Low incomes and the lack of basic social security make farming the country's toughest livelihood issue.

Agricultural Trade and Productivity

Chinese agriculture in general, and bulk commodities in particular, lack competitiveness. Restructuring is difficult and costly, and trade liberalisation has extensive and far-reaching impacts on the sector. Agriculture relies heavily on natural resources, particularly land and water, which are limited in China. In light of the high proportion of the population that lives in rural areas, weak resource endowment and the prevalence of small-scale farming, Chinese farmers are clearly disadvantaged, and the country's long-term agricultural trade balance is expected to remain negative.

Since China's accession to the WTO five years ago, agricultural trade has increased from US\$21.9 billion in 2001 to US\$44.3 billion in 2005. A US\$2 billion surplus changed to a US\$8.3 billion deficit in 2004. Agricultural trade deficits reached US\$4.9 billion in 2005 and US\$2.5 billion in 2006.

China is still facing the challenge of maintaining a balance between supply and demand. The key to preserving a balanced outcome between agricultural trade and domestic agricultural development is to retain a tariff level that prevents sharp domestic price declines as imports increase. Since the inception of the reform and opening-up policy, the overall productivity of agriculture has registered remarkable improvement, with impressive increases in grain, cash crops, animal husbandry and aquaculture outputs.

Although the volume of domestic production has increased significantly for many products, such as milk and edible oil, per capita output of staple agricultural products is still low. This makes ensuring an adequate supply a challenge. In 2006, per capita grain consumption in China was only one-sixth of that of the US, Canada and Denmark. Per capita consumption of meat, eggs, milk and aquaculture products is also low. Grain consumption is projected to reach 405 kg per person in 2010 and 410 kg in 2020. Consumption of meat, eggs, milk, fruit and vegetables will also increase over the long run as the nutrition structure and consumption patterns change.

Tariff rates and quotas for major agricultural products

Product	Out-of-quota tariff rate (%)	In-quota tariff rate (%)	Final TRQ volume ('0000 tonnes)
Wheat	65	1-10	963.60
Rice	65	1-9	532.00
Maize	65	1-10	720.00
Sugar	50	15	194.50
Cotton	40	1	89.40
Wool	38	1	28.7
Wool tops	38	3	8
Vegetable oil	9	-	-
Rape seed	9	-	-
Soybeans	3	-	-
Barley	3	-	-
Pork	12-20	-	-
Mutton	12-25	-	-
Poultry	15-20	-	-
Dairy products	6-20	-	-
Potatoes	13	-	-
Bananas	10	-	-
Citrus	12	-	-
Apples	10	-	-
Citrus juice	7.5-30	-	-
Apple juice	20	-	-
Vegetable	7-25	-	-

Clearly, China has achieved a great deal in trying to increase farm incomes, reduce poverty and promote rural economic development. Since the mid-1990s, the supply and demand pattern has undergone an historic change, shifting from the long-term shortage of the past to a basic balance, with some surplus in good harvest years.

Consequences of WTO Accession

In its WTO accession process, China undertook comprehensive and substantial commitments and opened its agricultural market to a great extent. As a result, its average agricultural tariff level declined by 66 percent, from 54 percent in 1992 to 17.9 percent in 2001. To be specific, 73 percent of China's agricultural tariff lines were cut over 60 percent, while tariff lines of vital importance to the national economy and livelihoods of the people were cut more than 50 percent. After the WTO accession, the average farm tariff in China has been further lowered to 15 percent, or less than one-fourth of the world average.

Through reducing agricultural tariffs by 72 percent in total since the start of its accession process, China has exceeded the overall tariff cut commitments undertaken by other Members under the Uruguay Round plus the cuts to be projected for this round. In addition, China's tariff structure is flat and simple, with no obvious tariff peaks, and the highest tariff is much lower than that of most other Members. Tariffs on almost all agricultural products are bound in *ad valorem* terms, and tariff rate quotas (TRQs) are large for major products such as grain, cotton, edible oil and sugar. In-quota tariffs are very low, ranging from one to five percent, while the highest over-quota tariff is only 65 percent. In this sense, China has become one of the most open agricultural markets in the world.

Since its WTO accession, China's agricultural imports have increased by more than 20 percent per annum (see table below).

The majority of imports are edible oil seeds, cotton, edible oils and livestock products. Edible oil seed imports (soybeans account for 95 percent) have increased substantially from US\$2.6 billion in 2002 to US\$7.9 billion in 2006, accounting for a quarter of total agricultural import value. Cotton imports have risen from US\$2 billion in 2002 to US\$4.9 billion in 2006, surpassing edible oil and livestock as the second largest imported agricultural commodity. Imports of edible oil increased from US\$1.4 billion in 2002 to US\$3.8 billion in 2004. Another category that has witnessed drastic import increases is livestock products in three sub-categories: (i) animal hides/skin and hair as industrial materials, making up 60 percent of livestock imports; (ii) chicken giblets, guts, legs and wings, which are favoured by Chinese consumers only, and; (iii) high value-added items such as dairy products, and high-quality beef and mutton. Since 2000, imports of livestock products have exceeded exports.

The influx of heavily subsidised agricultural products, such as soybeans, cotton, wool and vegetable oil, has already had extensive negative impacts on China's agricultural development and farmers' livelihoods. Among many contributing factors, the low tariffs and large TRQs have resulted in import surges that have depressed domestic prices. Consequently, strong demand has failed to stimulate corresponding growth in domestic outputs, and agricultural prices have not risen in response to growing demand. Even worse, the prices of some products have declined. For example, the domestic soybean price dropped by 8.9 percent in 2005 and 5.1 percent in 2006, which directly reduced farmers' income. China's special tariff structure means that any tariff cuts in the Doha Round would be real as there is no water between bound and applied tariffs. Tariff cuts on Special Products would generate a major negative consequences for China's small-scale farmers.

Value and annual growth rate of agricultural imports/exports 2001–2006

	Total import and export value	Export/import growth rate	Import value	Import growth rate	Export value	Export growth rate
Unit	US\$100 m.	%	US\$100 m.	%	US\$100 m.	%
2001	218.64		99.62		119.02	
2002	236.38	8.11	101.76	2.15	134.62	13.11
2003	323.31	36.78	164.49	61.65	158.82	17.98
2004	411.71	27.34	247.53	50.49	164.18	3.37
2005	442.64	7.51	245.76	-0.71	196.88	19.91
2006	498.26	12.57	277.77	13.02	220.50	12
2002–06 average		18.46		25.32		13.27

Source: Customs Database, China

The special characteristics of Chinese agriculture make it imperative for the country to minimise the negative impacts of trade liberalisation by seeking effective flexibility in the Doha Round agricultural negotiations. Special Products and the Special Safeguard Mechanism are vital to ensure food security, farmers' livelihoods and rural development in China.

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ENDNOTE

¹ According to the July 2004 Framework Agreement, Special Products – based on developing countries' food security, livelihood security and rural development needs – will be eligible for 'more flexible treatment', i.e. smaller tariff cuts will be required for them than for other agricultural products. Additional selection criteria and the precise definition of 'more flexible treatment' are still under negotiation.

China Fact Box*

- Total land area: 9,326,410 square km
- Arable land: 10 percent
- Population: 1.3 billion
- Rural population: 949,070,000
- Urban population: 357,210,000
- Farming households: 252,230,000
- Major agricultural products: grain, cotton, edible oil, hemp, sugar, tea, fruit, meat, milk, wool, eggs and honey
- Agricultural jobs as share of national total: 43 percent
- Average urban disposable income per capita: US\$1,359.6
- Average rural disposable income per capita: US\$421.7
- Average agricultural tariff: 15 percent
- Peak agricultural tariff: 65 percent
- Value of agricultural imports 2006: US\$277,770,000
- Value of agricultural exports 2006: US\$220,500,000
- Gross domestic product (GDP): US\$2.23 trillion
- WTO accession: 2001
- Positions in the Doha Round agriculture negotiations: member of the G-20 coalition of developing countries that seek substantial reductions in developed country farm subsidies and tariffs; member of the G-33 group, which focuses on promoting Special Products and the Special Safeguard Mechanism, and; member of the RAMS group, which advocates additional flexibilities for recently-acceded WTO Members.

* All figures refer to 2005 unless otherwise indicated.

Chair Challenges Agriculture Negotiators to Move

The central message of a 'challenges paper' issued by the chair of the WTO agriculture negotiations on 30 April was that countries and coalitions would have to give up long-held positions to make a Doha Round deal possible.

The paper was the 'first installment' of the chair's assessment of the range of plausible parameters for concluding the agriculture negotiations. A second paper, likely to cover Green Box disciplines, tropical products, preference erosion and the Special Safeguard Mechanism was expected to be released during the week of 14 May.

The main aim of these papers is to generate and focus debate, which in turn should help the chair in drafting the new 'modalities' text he plans to circulate to Members in the latter half of June. This document should be clearer and contain fewer square brackets than the one he issued to Members in June 2006, Ambassador Falconer said.

Many negotiators praised the chair's courage in attempting to provoke a more honest debate and generate momentum, although they also questioned the underpinnings of his many of his conclusions (see page 2).

Domestic Subsidies

Ambassador Falconer said that it was 'frankly inconceivable' that other Members would accept the current US offer to drop its limit on overall trade-distorting support by some 53 percent to US\$22 billion (see page 1). The G-20 proposal would slash the cap by 75 percent. A cut of roughly 68 percent would be necessary to bring this limit near to the US\$15 billion sought by the EU.

The EU would have to envision a cut above 70 percent, with a reduction 'in the vicinity of 75-80 percent' still conceivable, depending on the outcome of other aspects of the negotiations. Japan should be able to match the cuts undertaken by the US 'comfortably', Mr Falconer said.

Depending on their existing commitments, developing countries would either be exempt from cuts or be allowed to make lower reductions to their more modest subsidies over longer time periods.

According to the chair's 'working hypothesis', the US would cut the most heavily

trade-distorting Amber Box subsidies by 60 percent; the EU would do so by 70 percent. He proposed compromises for reconciling the 1995-2000 base period that most Members prefer for setting commodity-specific Amber Box spending caps and the 1999-2001 period the US wants because its spending levels were much higher. For the other two components of overall trade-distorting support in developed countries, Mr Falconer suggested that the cap on 'de minimis' spending and Blue Box payments could be cut by at least 50 percent.

The paper explored various options for limiting Blue Box and de minimis spending on specific commodities, or for preventing payments from being concentrated on a handful of products. However, Members would first have to determine whether or not there actually was a "genuine willingness to take a ceiling limit one way or the other."

WTO Members have already agreed that cotton payments should be reduced 'more ambitiously' than others. Mr Falconer estimated the 'rough zone' for achieving this to lie between the 53 percent cut to overall trade-domestic support proposed by the US and a West African proposal that would cut cotton subsidies by over 80 percent even if the standard cut is relatively modest (Bridges Year 10 No.2, page 6).

Tariff Cuts

A deal on slashing farm tariffs would lie "squarely between the US and the EU positions," Mr Falconer suggested, with a scenario that would deliver an overall cut above 50 percent 'still in play' (see page 1). Developing countries would cut tariffs by two-thirds as much as developed countries.

Ambassador Falconer assumed that the structure of the tariff reduction formula would be based on the G-20 proposal, under which developed countries would classify their tariff lines into four bands, with duties on the most heavily-protected products in the highest band – above 75 percent – to be cut most steeply. Once the figure for the reduction in the top band was settled, the cuts for lower bands would follow, he predicted.

He acknowledged that some Members' would only agree to a relatively high cut for the top band if they knew the extent to which they would be able to shield 'sensitive products' from the full force of tariff cuts. Furthermore, some sort of arrangement would have to be made to account for countries with a particularly high proportion of tariff lines in the top band. One option might be to let them designate more sensitive products.

Special Products (SPs)

Mr Falconer acknowledged that Members' positions were 'a long way apart' on the Special Products that developing countries alone will be allowed to shield from the full force of tariff reduction on the grounds of food security, livelihood security, and rural development needs.

He speculated that the centre of gravity for SPs would be 5-8 percent of all tariff lines, and that tariffs on those products would be cut by 10-20 percent (see page 2). While Members were 'perfectly entitled' to disagree with his assessment, Mr Falconer said, he invited them to explain how they envisaged reaching an agreement based on different broad parameters. He said that 'discernible movement' on numbers was necessary within months, if not weeks. Otherwise, Members might have to admit that they were "not in fact going to ever negotiate a specific number for specials, [...] or we are never going to have an agreement on this at all."

Mr Falconer also presented ideas for compromise in the export competition talks, including subsidy elimination, food aid, exporting state trading enterprises and export credits.

NAMA Talks Probe Non-tariff Barriers

Given the absence of progress in the Doha Round, Members have focused on ways to reduce non-tariff measures that distort trade in the WTO talks on non-agricultural market access (NAMA).

The current situation in the negotiations is unclear, NAMA Chair Don Stephenson told Members on 30 March. As long as cutting agricultural tariffs and subsidies remain deadlocked, Members are unlikely to make any changes in their long-standing negotiating positions on industrial goods.

Members Discuss Specific NTBs

As one trade diplomat explained, Members have already carried out detailed mathematical calculations for the three core NAMA issues: the numbers plugged into the tariff reduction formula that will determine the depth of cuts; flexibilities for developing countries to shield some products from tariff reduction; and the treatment of unbound tariffs. With this 'homework' done, they know how a wide range of different figures and formulae will affect them. However, equivalent work has not been done on non-tariff barriers and sectoral liberalisation.

For instance, countries have notified several NTBs to the WTO, arguing that different standards, labelling systems, and other policies are serving to unjustifiably restrict their exporters' market access. What they have not sufficiently done, the delegate said, is describe the new multilateral rules that they want introduced to reduce these barriers. This, in turn, has left other Members unable to fully assess how they stand to be affected by new disciplines.

Discussion started to become more specific in the last week of March, when Members looked at a variety of text-based country submissions (compiled into a single document by the Secretariat) spelling out what future rules might look like. The chair emphasised that this was not a text-based negotiation on a future agreement – such negotiations are typically the final stage – but merely a discussion.

To take one example of the NTBs under consideration, the US called for an agreement that would limit the kind of information that Members could require on labels for textiles, clothing and footwear. The EU put forward a similar paper. Under such an accord, governments would not be allowed to require clothing labels to provide any information beyond the country of origin, fibre content, washing instructions and consumer safety information. The US would restrict mandatory footwear labels to the country of origin. Many Members expressed scepticism about the proposals' content. Argentina, Cuba and China said it was too soon for a text-based discussion.

Other proposals suggested measures for dealing with, for instance, differing standards on electronic and forestry products. Not all sought new binding agreements.

The most controversial proposals dealt with restrictions that governments place on exports (rather than imports). Japan called for creating a set of WTO rules to ensure that governments do not discriminate when granting export licences, based on the institution's existing rules on import licensing procedures. Although the EU and Korea expressed support for the idea, countries including China, Malaysia and Kenya voiced opposition, questioning whether it fell within the market access-focused mandate for the negotiations.

The EU met with an even more unfavourable response when it repeated its long-standing call for a ban on export taxes except in emergencies. As before, many developing countries strongly rejected the proposal, including Argentina, Brazil, Bangladesh, India and Malaysia. Some developing countries place taxes on the export of certain goods, especially primary commodities, to generate revenue and promote specific kinds of domestic industrial development. Sources report that the EU hinted that Members' responses would affect its position in other areas of the negotiations.

Trade Facilitation

The Doha Round talks on trade facilitation are slowly moving towards the development of a future WTO agreement on reducing red tape and other obstacles to the transit and customs clearance of goods. At a 30 April - 1 May meeting of the Negotiating Group on Trade Facilitation, Chair Eduardo Sperisen-Yurt called on Members to pick up the pace so they could quickly proceed to discussing draft text for a future agreement.

Many delegates called for the preparation of 'fourth-generation' texts that would incorporate comments made in recent sessions of the negotiating group. While the US noted that Members seemed to be in 'legal drafting mode', a developing country trade delegate cautioned that the focus was more on process and strategy rather than on substance.

Technical assistance was an important subject of discussion. Most developing countries want an upfront commitment that they will be provided the technical assistance and capacity-building they need to implement new commitments. The official added that developing countries also want a clearer understanding of the type and extent of actual assistance that would be forthcoming, and how this would be distributed among various Members. In contrast, most if not all developed countries want implementation-related aid to be determined bilaterally between the donors and recipients.

Developing countries have placed a high priority on meaningful technical assistance language as an integral part of any text. The trade facilitation mandate is unique in that Members will not be required to implement commitments unless they receive the technical assistance necessary to do so.

Transitional periods for implementation also need to be resolved: the trick will be to establish timetables that vary according to the realities of each Member without creating a multi-tier regime. The next formal meeting of the negotiating group is scheduled for early June.

CTE Update

At an early-May negotiating session of the WTO Committee on Trade and Environment (CTE), Members considered a streamlined list of environmental goods slated for tariff cuts or elimination, based on proposals previously submitted by Canada, the EU, Japan, Korea, New Zealand, Norway, Taiwan, Switzerland and the US.

The revised list (JOB (7)/54) set out a reduced set of goods in response to concerns raised by trading partners, and sought to offer the potential for convergence among Members. With their proposal, the proponents hoped to encourage more focused engagement on products of interest and trigger momentum in the negotiations.

Coined ‘the potential convergence set’ of products by its co-sponsors, the list contains 153 products (including a number of ex-outs, i.e. specific products identified solely by name rather than by HS code). This is a significantly lower number than the 465 products on the previous consolidated list of goods. The new list groups the various products under broad environmental categories, with details related to the environmental benefits of each product described in an additional column. Some delegates noted, however, that the proposal did not clarify how many of the products on the list were ‘dual-use’ items (meaning they could be used for other purposes than solely environmental ones).

The proposal envisages extended liberalisation periods for developing countries. It also includes a review mechanism to ensure that the list does not remain static over time.

Many countries developing countries, including major players such as Brazil and India, said they wanted discussions on whether to adopt a ‘list’ or ‘project-based’ approach – or a compromise solution – before progressing to discussions on specific products (Bridges Year 10 No.4, page 12). Reportedly, India is set to submit a new proposal fleshing out issues related to the project approach, including more development elements. The next CTE negotiating session is scheduled for 11 June.

US Calls for Ban on Fish Subsidies

WTO Members have given a mixed welcome to a new US proposal to prohibit most government subsidies to commercial fishing.

The proposal (TN/RL/GEN/145) was discussed at a late April meeting of the Negotiating Group on WTO Rules, which has a mandate to “clarify and improve WTO disciplines on fisheries subsidies, taking into account the importance of this sector to developing countries.”

The proposal calls for a broad prohibition on commercial fishing subsidies, targeting any initiatives that encourage wild-capture fishing for commercial purposes, such as payments for ships and fuel, as well as loan guarantees.

Specific negotiated exceptions to the ban would be available to policies that do not encourage increased fishing capacity, such as the removal of boats through buyback schemes, re-education for fishermen and research initiatives focused on marine conservation. However, the proposal underlines that these exemptions would need to be strongly disciplined to ensure that they do not become a loophole for promoting overcapacity.

Access fees, typically paid by developed country governments in return for the right to fish in developing countries’ territorial waters, would be not be counted as prohibited subsidies if: the fleet using the distant water fishing right pays adequate compensation to the government that bought the access; the terms and conditions of access, as well as the compensation paid, are published, and; the arrangement includes science-based assessment and monitoring of the status of the fisheries resources in question. Access fees – an important source of revenue for many small island states – would not be treated as subsidies to the recipient states.

The paper also calls for a periodic review of the new rules’ impact and points to methods for increasing transparency, avoiding circumvention of the regulations, and helping countries make the transition into conformity with the policy.

The US proposal does not outline any provisions on special and differentiated treatment for developing countries. Instead, it states that the US remains “interested in the further development of Argentina’s proposal (TN/RL/GEN/138/Rev.1), noting the need for further clarification of the limits of any proposed special and differential treatment.”

At the April meeting, Australia, Brazil, Canada, Chile, China, Ecuador, Mexico and New Zealand supported the US proposal. Japan, South Korea and Taiwan objected to its ‘blanket ban’ approach and reiterated their preference for a bottom-up process, with WTO Members identifying specific subsidies that would be prohibited rather than exceptions to a general ban. The three countries are working on a new submission based on this approach. The EU and Norway also expressed reservations over the broad scope of the US proposal.

Subsidies and Overfishing

In his introductory remarks, US Ambassador Peter Allgeie told the rules group that high subsidy levels were “part of the reason the global fishing capacity is significantly greater than needed to catch what the oceans can produce sustainably.”

Conservation organisations WWF and Oceana expressed strong support for the US proposal. Oceana’s campaign director Courtney Sakai called it a ‘bold move’ that would help address the ‘havoc in our oceans’ created by large subsidised fishing fleet. An international group of leading ecologists and economists warned in November 2006 that fisheries could collapse worldwide by 2048 if no action were taken to halt current levels of overfishing. A 2006 report by the University of British Columbia estimated global annual fisheries subsidies to amount to US\$34-30 billion. Conservation advocates say at least US\$20 billion of these are harmful and account for three-quarters of the world’s overfishing.

Services: Focus on Sectorals

Enhanced market access in specific services sectors has emerged as the main approach for talks to move forward, but agreement is still far from imminent.

The first formal cluster of services meetings since the Doha Round talks were suspended last July concluded on 27 April after two weeks of intensive plurilateral and bilateral negotiations.

Plurilaterals: More Specific

The plurilateral market access negotiations followed on from the collective liberalisation requests submitted by groups of *demandeurs* in specific services sectors in February 2006 (Bridges Year 10 No.1 page 12). The targeted countries were each specifically asked whether they were going to meet the liberalisation commitments set out in the collective request, and, if not, why they were unable to do so. They were also asked whether they were prepared to formally bind the level of liberalisation already applied in practice in each sector and, again, why not, if they were unable to do so. A delegate noted that the *demandeurs* appeared better-informed about the regulatory and other policies in place in the target countries and were actively using this information as leverage for seeking qualitatively improved market access offers.

Bilaterals: EU, US Identify 'Breakthrough' Sectors

The bilateral negotiations were even more focused as major *demandeurs* targeted markets most critical to their export interests. Among these are Brazil, India, China and the four big markets within the Association of Southeast Asian Nations (ASEAN) – Indonesia, Malaysia, the Philippines and Thailand.

US meetings with the so-called ASEAN 4 focused on energy, telecommunications, financial, distribution, audio-visual, postal and express delivery services, as well as computer-related services. Lack of new concessions in these 'breakthrough' sectors is thought likely to discourage the private sector from trying to prod the US Congress to extend the Bush administration's fast-track authority to sign off on a Doha deal. The authority is set to expire on 30 June.

The EU identified financial, telecommunications, computer-related services, maritime transport, distribution, postal and courier, construction, environment and legal services as its 'breakthrough' sectors.

Ambassador Fernando de Mateo, who chairs the services negotiations, has also adopted a sectoral approach in his ongoing consultations – dubbed 'enchilada' talks – with a group of ambassadors from about two dozen selected WTO Members. The tentative lineup of issues for the enchilada talks scheduled for the second week of May included maritime transport, logistics, computer-related services and Mode 4 (the temporary movement of workers).

Developing Countries Want Progress on Ag, NAMA

Many developing countries remain reluctant to agree to substantive commitments, as well as to set new timelines for submitting revised offers of liberalisation, absent greater clarity on the outcome of the negotiations on agriculture and non-agricultural market access (NAMA).

Brazil referred to certain *demandeurs* as falling into a 'take-and-take' mentality, rather than the 'give-and-take' approach more appropriate to a mutually beneficial conclusion to the Doha Round. It also proposed that in the event that new timelines were set for tabling revised offers, the target date for such submissions should be three months after modalities have been agreed in the agriculture and NAMA negotiations. The African Group called for 'meaningful' services trade opportunities in sectors where LDCs have real supply capacity. Many LDCs have asked trading partners to allocate specific Mode 4 quotas exclusively in favour of LDCs, as well as requested other WTO Members to relax their entry and work permit requirements for workers from LDCs, as a form of special and differential treatment. The next services cluster is scheduled for late May – early June.

US Gambling

A panel found on 30 March that the US had not complied with earlier dispute settlement rulings on the country's restrictions on internet gambling. The dispute was brought by Antigua and Barbuda, which alleged that several US statutes discriminated against foreign providers of gambling services in violation of US commitments under the General Agreement on Trade in Services (GATS).

Although the original panel, as well as the Appellate Body, agreed with the complainant, they also accepted the US defence that most of the disputed measures were justified under GATS Article XIV(a), which allows Members to apply GATS-inconsistent measures that are "necessary to protect public morals or to maintain public order."

The only outstanding issue related to the application of the Interstate Horseracing Act (IHA), whose ambiguous language appeared to allow domestic providers to offer internet betting services. The US told the Dispute Settlement Body that it was already in compliance with the finding, since its legal authorities had determined that existing criminal statutes prohibited domestic internet gambling under the IHA. In its compliance challenge, Antigua argued that the US had not taken any measures to implement the adverse ruling, or prosecuted any offenders. The compliance panel agreed with the complainant.

Antigua's victory may, however, prove short-lived. On 4 May, the US announced that it would implement the dispute settlement rulings through formally clarifying that the government never intended to include gambling in its Uruguay Round commitment to open 'recreational services' to foreign competition under the GATS. While modifications of scheduled commitments in principle entail compensation to affected parties, Deputy US Trade Representative John Veroneau argued that the obligation would not apply to the gambling clarification since no concession had been withdrawn due to the fact that the US had never committed to opening the sector in the first place.

China's IPR Enforcement, Regulations Challenged

The US has initiated two new WTO complaints against China, charging that Beijing is tolerating intellectual property rights violations and maintaining trade barriers against books, music and other copyrighted goods.

The first of the challenges deals with China's allegedly inadequate enforcement of intellectual property rights (WT/DS362/1). The US claims that China is not doing enough to enforce copyright and trademark protection on a wide range of goods such as books, CDs and DVDs. Washington argues that Beijing sets an unacceptably high bar for punishing copyright infringements with criminal prosecution, allowing large-scale commerce to take place in pirated movies and music with the threat of little more than an administrative fine. On 9 April, US Trade Representative Susan Schwab said that under Chinese law, police raiding a business would have to find at least 500 'infringing works' in order to launch a criminal prosecution. "The thresholds create a safe harbour for the pirates, and the pirates are only too willing to take shelter there," she said, explaining that businesses dealing in pirated goods take care to remain just short of the threshold level, and thus avoid serious punishment.

The US is also seeking a ruling on whether China's practice of removing fake logos from seized counterfeit products before auctioning the goods to the highest bidder – instead of destroying the illegal copies – is consistent with WTO rules. In addition, the complaint targets China's practice of withholding copyright approval to works until they go through the country's censorship approval process. This creates incentives for pirates, "leaving only the leftovers for the legitimate property rights owner" once the copyright has been granted. Washington also wants China to clarify whether its laws do not treat the unauthorised reproduction of copyrighted works (such as DVDs) as a criminal offence unless it is accompanied by distribution of them.

Canada, the EU, Japan and Mexico have joined the dispute as third parties.

The second US complaint (WT/DS636/1) focuses on the Chinese government's requirement for books, journals, movies and music to be imported by state-approved or state-run companies. Washington claims that this violates Article XI.1 of the General Agree-

ment on Trade in Services, which prohibits Members from applying "restrictions on international transfers and payments for current transactions relating to its specific commitments." According to the complainant, China agreed in its accession protocol to "fully open the right to trade (*i.e.*, the right to import goods into China and to export goods from China) within three years after accession." The EU has requested third party rights in the dispute.

Beijing Issues Sharp Rebuke

The Chinese Ministry of Commerce said the US decision to file complaints at the WTO was "contrary to the consensus between the leaders of the two nations about strengthening bilateral trade ties and properly solving trade disputes," and was likely to "seriously undermine the co-operative relations the two nations have established [as well as] adversely affect bilateral trade."

China's Vice Premier Wu Yi vowed her country would "fight [the US complaints] to the end," adding that – by taking China's IPR and market entry regimes to the WTO – the US had ignored the great progress China had made in protecting intellectual property rights. According to Ms Wu, nearly a 1000 people were arrested last year for IPR violations.

Shortly before the new cases were filed at the WTO, Chinese antipiracy officials carried out the biggest raid of the year 2007, seizing 1.64 million illegal DVDs and 30 machines used to erase source identification codes. On 15 April, thirty million pirated discs and 11 million illegally published books and magazines were destroyed in a government-led campaign.

China Auto Parts Update

In related news, the first panel hearing in the China auto parts dispute is scheduled for late May. At issue are different tariffs imposed by China on parts of automobiles. Canada, the EU and the US allege that the 25 percent tariff levied on imported parts that make up more than a certain threshold of the finished vehicle is designed to bolster China's own car part industry, giving manufacturers incentives to favour domestic over imported parts and pushing foreign suppliers to relocate production to China. The complainants also say the 25 percent tariff – the same as that for completed cars – exceeds China's scheduled commitments for car part imports, which are taxed at around 10 percent (Bridges Year 10 No.6, page 6).

According to sources familiar with China's defence, the country is likely to argue before the panel that the measures in question were adopted to prevent car manufacturers from importing all the parts from abroad at a 10-percent tariff rate and then assembling the vehicle in China, instead of paying the 25 percent duty for a fully assembled imported automobile. China reportedly intends to invoke the General Interpretive Rule 2(a) of the Harmonised System (HS) of tariff codes used at the WTO, under which it says customs authorities should consider as a complete article any group of parts and components that has the 'essential character' of that article. Thus, parts can be taxed at the rate of a finished product if they account for the 'essential character' of it, even when the imported parts do not make up 100 percent of the fully assembled product.

China also faces a WTO dispute over allegedly granting prohibited subsidies to domestic industries. The case was launched by the US in February 2007 (Bridges Year 11 No.1 page 10). On 2 May, the US modified its complaint to take into account China's termination of advantageous loan guarantees to large exporters and the adoption of a new enterprise income tax regime, which removes some of the disputed export-contingent taxbreaks. Australia, the EU, Japan and Mexico have joined the dispute as third parties. Mexico has also initiated proceedings of its own on the same grounds as the original US complaint.

Appeal Without Remand: A Design Flaw in WTO Dispute Settlement and How to Fix It

Joost Pauwelyn

Under current dispute settlement rules, a favourable panel ruling may become inoperable if the Appellate Body lacks the factual basis to complete its analysis. Such an outcome is particularly detrimental to developing countries.

Imagine you are a poor developing country that mustered the political courage and financial resources to file a WTO complaint. Turns out, the WTO panel finds in your favour. Sadly, however, on appeal, the Appellate Body reverses the panel and, worse still, decides that it cannot come to any conclusion because of holes in the panel's factual record. So, after (on average) one and a half years of litigation, you end up with empty hands. Does this sound like a nightmare for policy-makers from developing countries? Yes, it does. Is it possible under current WTO dispute settlement rules? Yes, perfectly so.

A Design Flaw Hurting Developing Countries

This nightmare scenario can, and has, happened because of a design flaw in WTO dispute settlement: the Appellate Body does not have the mandate to decide on factual questions, which sometimes means it cannot complete a case. Yet, at the same time, it cannot either remand a case back to the original panel, which sometimes forces a complainant to re-file a case from scratch. In a growing number of disputes the Appellate Body has thus left entire cases, or parts of cases, unresolved: in *EC – LAN Equipment*, it left the United States without an answer; the same happened in *US – DRAMS*, this time sending Korea home without any finding on whether or not there was a subsidy. Similarly, in *EC – Sugar*, the Appellate Body could simply not come to any conclusion under the Subsidies Agreement, thereby potentially withholding stronger remedies from the complainants Australia, Brazil and Thailand.

What does this mean for developing countries? The absence of a remand procedure can force developing country complainants to go through two full proceedings before they achieve any result. Given time and resource constraints, such re-filing of a case subsequent to the Appellate Body finding that it 'cannot complete the analysis' may simply be excluded. The money and/or human resources may just not be available for another round of consultations, panel proceedings and Appellate Body hearings.

Moreover, another one to two years of litigation may simply be too long to wait for relief: not to have access to crucial export markets (such as the EU or the US) during another one to two years may force developing country businesses to close shop.

So what should be done?

Three strategies are available: (i) enable the Appellate Body to more frequently 'complete the analysis' in the first round of proceedings; (ii) expedite the re-filing of disputes in a second round of proceedings within the current system, or; (iii) amend the Dispute Settlement Understanding (DSU) and introduce a remand or referral system. These strategies are not mutually exclusive and should, ideally, complement each other.

Early Resolution by the Appellate Body

First, panels and disputing parties should do their best to enable the Appellate Body (AB) to 'complete the analysis'. If the AB can resolve the case, there is no need for a remand in the first place. Panels can contribute by making alternative findings, especially factual findings, thereby laying the groundwork for consequential legal findings by the Appellate Body. Panels should also refrain from exercising too much 'judicial economy' and at a minimum decide all claims that are necessary to give an effective resolution to the dispute (the so-called *Salmon* test on false judicial economy). Disputing parties, in turn, should be careful enough to request a 'completion of the analysis' before the Appellate Body, lest they be surprised by a reversal and

subsequent silence. The AB itself can also facilitate early resolution of disputes. So that more disputes can be resolved before the Appellate Body itself, the latter should only refuse to complete the analysis in case the panel's factual record is incomplete. If the AB carefully questions the parties at the hearing and potentially even thereafter (it could also make preliminary rulings), concerns of 'novelty' of the legal claims or due process should not arise, nor prevent the Appellate Body from deciding the case (*jura novit curiae*).

Finally, with a DSU amendment, the limits of WTO appellate review could be loosened by permitting the Appellate Body itself to make decisions on factual disagreements. Although this would take away the parties' right to appeal, such right of appeal is not absolute and must be weighed against the benefits of a timely resolution of the dispute. No doubt, to have the Appellate Body itself decide the case would be much faster and simpler than having to go through a remand process, let alone a complete re-filing of the case.

Expedite Re-filing

A second strategy to avoid the nightmare scenario of spending one and a half years on WTO litigation without any substantive outcome is to creatively use the current dispute settlement system to obtain an expedited second proceeding. One avenue is to resort to Article 21.5 implementation proceedings to obtain a completion of the analysis. Such proceedings should be completed in 90 days. This is exactly what the United States and New Zealand did in *Canada – Dairy (Article 21.5 – II)*: subsequent to the Appellate Body's finding in the first Article 21.5 proceeding where it could not complete the analysis, the complainants simply asked for a second Article 21.5 panel. One could imagine that a first Article 21.5 proceeding can also be used to

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complete elements of the analysis that could not be completed in the original proceeding. Yet, in those cases where the original proceeding did not lead to any finding of violation (as in *EC – LAN Equipment*), a complainant cannot invoke implementation proceedings under Article 21.5, as there is nothing to implement in the first place.

Another way to expedite a second round of panel proceedings, without an actual remand process, is for the parties to agree to shorten and/or simplify the re-filed proceedings: they could appoint the same panelists, agree to one round of submissions and one hearing only, and even do away with the interim review stage. Where the parties cannot agree to an expedited re-filing, panels themselves, after mere consultation with the parties, can change standard working proceedings (not DSU provisions themselves).

A Remand or Referral System

A third strategy to avoid a complete re-filing in cases where the Appellate Body cannot complete the analysis is, of course, to amend the DSU and to provide for a remand process. The original drafters of the DSU did not include a remand process mainly based on fears that it would extend the time limits (US argument) or make the proceedings too complicated (the view of many developing countries, even in respect of adding an appellate procedure in the first place). Other negotiators may have considered that a remand process was not necessary given that the Appellate Body

The absence of a remand procedure when the Appellate Body cannot complete its analysis can force developing country complainants to go through two full proceedings before they achieve any result. Given their time, financial and human resource constraints, re-filing a case from scratch may effectively be excluded. Moreover, another one to two years of litigation may simply be too long: not to have access to crucial export markets (such as the EU or the US) for such a long period may force developing country businesses to close shop.

itself can ‘modify’ panel findings. Because GATT cases were not usually factually complicated, such modifications could have been expected without requiring new factual findings. With more than ten years of DSU experience, it has become clear, however, that a remand would actually save time as opposed to a complete re-filing (rebutting the US time-related argument against a remand), that the added complexity of a remand is outweighed by the waste of resources and time linked to a complete re-filing (rebutting developing country concerns in respect of a remand) and, finally, that the increasing factual complexity of WTO disputes often makes it impossible for the Appellate Body to ‘modify’ panel findings without making new factual findings.

As a result, most people agree that the DSU needs a remand process. Yet, the devil is in the details: what should such a process look like? No less than four proposals are currently on the table of the DSU review negotiations (by Jordan, the EU, Korea and, jointly, by Argentina, Brazil, Canada, India, New Zealand and Norway). These proposals raise three core questions.

Who triggers the remand, when and what happens next?

First, who can trigger a remand? All four proposals put the right to request a remand in the hands of the disputing parties. The Appellate Body would not be able to remand at its own initiative. Some party control may, indeed, be wise so as to avoid an unnecessary extension of proceedings (if the complainant is happy with, for example, one finding of violation why waste the time needed for a remand in respect of a second claim of violation?). More specifically, since not completing the analysis on either a claim or a defense means that no conclusion either way can be reached on a particular claim, remand can only benefit complainants. Thus, in this author’s view, the right to request a remand ought to be reserved exclusively to complainants (not defendants).

A second thorny question is whether remand should occur before or after adoption of the first Appellate Body report where it was decided that the analysis could not be completed. The EU and the six country group proposals favour early adoption of the first Appellate Body report and would trigger remand only *after* such adoption. Korea, in contrast, would remand during the first Appellate Body proceeding and move to DSB adoption, of all reports involved, only *after* the remand is over. If the remand can be expeditious, Korea’s approach is preferable as it avoids the complications of two parallel implementation proceedings (one for the original Appellate Body report; a second for the findings on remand).

In respect of the third remand question, however, it is Korea’s proposal that is flawed: Korea would remand the case back to the original panel for it to make new factual findings only; after that, the dispute must in all cases be sent back to the Appellate Body for a completion of the analysis. This would unnecessarily extend the proceedings and take away the parties’ right to appeal over legal questions (as only the Appellate Body on remand, not the remand panel, would make legal findings). One of the core reasons for a remand process is, however, to preserve the parties’ right to appeal. Korea’s proposal would not serve that purpose. Instead, in this author’s view, a remand panel should decide on both the facts and the law, after which the panel report on remand must be adopted unless the parties appeal. That is also how the proposals by the EU, the six country group and Jordan envisage a remand process.

A carefully tailored and sufficiently expedited remand process – that respects the panel’s fact-finding role and the parties’ right to appeal, and does not lend itself to delay tactics by defending parties – would clearly be simpler and less time consuming than a full-fledged second proceeding. It is in the interest of both developed and developing countries to amend the DSU accordingly. Failure to do so will inevitably lead to a waste of resources and time and, with sufficient cases left unresolved by the Appellate Body, may eventually undermine the credibility of the entire WTO dispute settlement system.

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Trade-distorting Domestic Support: Alternatives for Product-specific Disciplines

Cinthia Costa, André Nassar and Marcos Jank¹

Setting product-specific spending caps on agricultural subsidies based on how adversely they affect international prices would provide a means to reduce trade distortions caused by domestic support policies.

The WTO cotton and sugar panels introduced two new parameters for product-specific agricultural subsidy disciplines. The first, particularly evident in the case of cotton, is that farm subsidies that result world market distortions are subject to the Agreement on Subsidies and Countervailing Measures, particularly when they cause serious prejudice. Second, the panels found that some domestic support can act as export subsidies and therefore such subsidies must be eliminated.

However, the jurisprudence does not specify how the adverse market effects of domestic support could be eliminated, or propose any criteria that would assist in determining whether the reform of a programme found to be WTO-inconsistent has effectively eliminated the trade-distorting element of the subsidy. The Doha Round negotiations provide a valuable opportunity to craft disciplines that will lead to minimising trade-distorting effects of product-specific domestic subsidies, improving the provisions of ‘substantial reductions in trade-distorting domestic support’ as established in the negotiating mandate.

One way to tackle the problem would be to set product-specific caps on trade-distorting subsidies based on Blue and Amber Box spending notified by WTO Members.²

We selected the US as a case study for this analysis because its price support programmes are highly concentrated on a few products. Moreover, the country is a significant global exporter of the commodities concerned and US spending on agricultural subsidies is considerably higher during years when global prices are low for these commodities, generating considerable negative impacts on the world market. Furthermore, in the Doha Round negotiations the US has shown great reluctance to accept product-specific disciplines that go beyond spending caps based on a 1999-2001 reference period (the base period is still a major bone of contention in the negotiations).

Averaging recent data, the products analysed in the table below represent about 75 percent of all US agricultural price support programmes.

Table 1: Share of key commodities in total US agricultural subsidies and the value of its domestic production (average values for 2000–2005)

	Share of total US agricultural subsidies (subsidy by product/total agricultural subsidies)	Value of Production (VOP) (subsidy by product/VOP by product)
Cotton	18%	63%
Soybeans	10%	11%
Corn	31%	26%
Wheat	10%	28%
Rice	6%	87%
Total	75%	27%

Source: WTO, ICONE estimation.

Defining Caps Based on Price-distortion

The depressive effect of subsidies on global pricing is an appropriate indicator for the establishment of product-specific disciplines for three reasons. First, it is a reliable indicator of serious prejudice as defined in Article 6 of the Agreement of Subsidies and Countervailing Measures (SCM Agreement) and shown by the cotton case; second, it negatively impacts all international suppliers who export at market prices (i.e., no discrimination between export-

ers), and; third, it increases the volatility of a product’s international price, thus affecting world importers as well.

Although the SCM Agreement acknowledges that trade-distorting subsidies do lower world prices, it does not establish what level of trade-distortion would be considered to cause adverse effects to other countries’ exports. Furthermore, none of proposals currently on the table in the Doha Round agriculture negotiations address the maximum acceptable trade-distortion that any specific subsidised product could be allowed to cause to world markets.³

Establishing product-specific caps based on applied levels of the aggregate measurement of support (AMS) – or anti-concentration disciplines for the Blue Box – does not in itself guarantee that these subsidies will be disciplined according to their market impacts. Therefore, we propose that whatever the form of the new subsidy spending ceilings (whether individual, or combined for both categories), the value should be determined on the basis of the price distortion the subsidised product causes on world markets.

Daniel Sumner’s analysis of the impact of US subsidies on global prices for agricultural commodities has demonstrated that they most likely depressed world prices for maize (by ten percent), wheat (by eight percent) and rice (by six percent).⁴ As a contribution to the Doha Round negotiations on product-specific domestic support, we suggest that caps on such subsidies should be set on the basis of a maximum decline of two percent in world prices.

Global Product-specific Caps

Table 2 overleaf shows the amount of trade-distorting US domestic subsidies that would result in a distortion of two and four percent in world prices. To calculate the impact of a country’s domestic subsidy on world

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prices, we based ourselves on a world supply and demand economic model for agricultural products that receive subsidies. We have assumed a low product price scenario based on the fact that US trade-distorting subsidies rise when prices decline. The proposed ceilings for product-specific domestic subsidies are thus intended to control over-subsidisation when world prices are low.

Table 2: Trade-distorting domestic support (in US\$ billion) applied by the US at periods of low world prices

	Trade-distorting domestic support (Amber and Blue Box)	2% price distortion	4% price distortion	10% value of production (1999–2005 average)
Soybeans	3.35 (avg. 1999–2001)	1.01	2.10	1.52
Cotton	2.67 (avg. 2000–2002)	0.60	1.36	0.51
Rice	1.10 (avg. 2000–2002)	0.20	0.48	0.13
Corn	4.40 (avg. 1998–2000)	1.40	2.92	2.08
Wheat	1.98 (avg. 1998–2000)	1.35	3.9	0.64

Source: Authors' calculations

The calculations presented in Tables 1 and 2 are based on the following trade-distorting subsidies: marketing assistance loans and other programmes of lesser value notified as AMS support; marketing loss assistance from 1998 to 2001, and; counter-cyclical payments since 2002. Production flexibility contracts up to 2001 and direct payments as of 2002 were not included in our study. The inclusion of these programmes in the trade-distortion calculation would almost certainly have resulted in lower product-specific caps than we have proposed here.

The caps we propose for product-specific subsidies are based on the value that corresponds to a two-percent world market price distortion. We understand that a higher level of distortion would not be acceptable in setting product-specific subsidy disciplines in the Doha Round negotiations. The four-percent distortion figures in the table were only included to provide a comparison against other values. While this is a high level, such distortions have occurred several times during the implementation period of the Uruguay Round Agreement on Agriculture.

Table 2 shows a fairly strong correlation between the amount of subsidies that may distort world prices by about two percent and the value of ten percent of US production (between 1999 and 2005) for each of the products included. This correlation provides the basis for suggesting an easily

measurable, and applicable, criterion for product-specific disciplines to subsidies applied by developed countries. In other words, using the calculated values for a two-percent market distortion as a reality check against any other possible criterion for capping product-specific AMS and Blue Box support, it appears that ten percent of a product's value of production is an appropriate joint ceiling.

The ten-percent product-specific cap has an additional advantage compared to the two-percent price distortion criterion: complex calculations are necessary to estimate the impact of subsidies on world prices, which would require negotiators to take into account several parameters.

Limiting product-specific subsidies to ten percent of the good's value of production over a determined time period would simplify their task and possibly generate workable new proposals.

Final Comments

Whether joint or individual Amber and Blue Box product-

specific caps will be established, it is clear that spending limits must fall between the values of a two-percent contribution to world price distortion and a ten-percent share of the exporting country's value of production for the product concerned. These criteria are essential for achieving a substantial reduction of the negative impacts that domestic subsidies have on world markets when international prices are low.

Given the complexity of calculating the trade-distortion caused by domestic subsidies, we suggest that the ten-percent of production value parameter should be the main criterion for determining a joint product-specific cap. When compared with the two-percent price distortion calculated in this study, this measurement passes the reality check, particularly when prices are low. It is also coherent with the *de minimis* limit established for developed countries in the Uruguay Round. It should be noted that a joint cap must be applied in conjunction with product-specific *de minimis* support to avoid loopholes when Blue Box and below *de minimis* payments are cumulated.

If a product-specific cap of this order of magnitude were established in the negotiations, the attractiveness of litigation based on serious injury would decrease. This would provide predictability for developed countries and ensure that domestic policies are consistent with WTO rules on agriculture, as well as those on subsidies and countervailing measures.

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ENDNOTES

¹ The authors are very grateful to Adriana Verdier and Maria Rodriguez-Alcala for the assistance provided in this study. A full version of the paper, including details about the methodology used, is available on the ICONE website (www.iconebrasil.org.br/en).

² According to the July 2004 Framework Agreement, "to prevent circumvention of the objective of the Agreement on Agriculture through transfers of unchanged domestic support between different support categories, product-specific AMSs will be capped at their respective average levels according to a methodology to be agreed."

³ For more details on the proposals and analysis, please see Jales, M. and Nassar, A.M. 'How to Read the US and EU Proposals on Domestic Support to Agriculture'. *Bridges* Year 9 No.10, December 2005. ICTSD. Geneva

⁴ Sumner, D.A. *Conflicts between US Farm Policies and WTO Obligations*. Center for Trade Policy Studies No. 32. December 2005. CATO Institute. Washington D.C.

Scaling Up Energy Efficiency: The Problem of Market Access

Paul Waide and Moustapha Kamal Gueye

Energy consumption from end-use electric and electrical appliances account for a significant portion of emissions of carbon dioxide.

The International Energy Agency estimates that were governments to implement the carbon-reducing energy policies they are seriously considering, global CO₂ emissions would be stabilised by 2030 and would be 16 percent lower than under the reference case. Some 78 percent of these savings would come from accelerated energy efficiency improvements.

Given that the vast majority of energy-using equipment and consumer products are traded globally, an important question is how can markets work better for the scaling up of energy efficiency? A global trade-led market transformation effort would require expanding markets for more advanced technologies while eliminating outdated equipment.

Expanding Markets for More Advanced Technologies

At the WTO, discussions on the accelerated liberalisation of environmental goods and services have focused largely on traditional environmental goods such as those directly related to air pollution control, waste water treatment, or cleaning up oil spills. However, since they generate environmental benefits at some point during their production process, usage or disposal, energy-efficient products have made their way in the trade negotiations under the banner of environmentally-preferable products. Indeed, several proposals submitted by WTO Members (including Cuba, the EU, Japan and Switzerland) have included products based on their energy performance characteristics.

These submissions have referred to the potential of reducing emissions from the use of consumer goods by relying on the most energy-efficient products. It is also considered that tariff liberalisation, if selectively applied to efficient products, could provide opportunities for emerging developing countries to rapidly penetrate a large portion of the market with high-efficiency equipment.

There are, however, a number of technical and procedural obstacles that must be overcome for a co-ordinated trade liberalisation effort to succeed. In addition, trade negotiations would have to respond to the concerns and scepticism of many developing countries about the potential benefits of liberalisation.

Technical and Procedural Obstacles

First, for some of the products concerned, there is no appropriate code under the Harmonised System Codes (HS Code), which is used in the WTO. While some of these products can be located through the six-digit HS code, for most it would have to work at eight or ten digits and may require new classes to be devised. In a few cases visual inspection might suffice to identify a relatively efficient good: e.g. compact fluorescent lamps or LCD monitors, etc. But generally an energy-efficient electrical appliance can only be identified through testing and comparison according to test procedures, product categories and efficiency metrics, which often differ by country. For energy-efficient goods to be included in tariff-reduction or -elimination initiatives, there would have to be agreement on a standard set of product descriptions, reference testing standards and efficiency thresholds, etc. This implies a major effort towards harmonisation. An alternative would be to set lower/zero tariffs on goods that meet some percentage of improved performance compared to existing national energy efficiency thresholds.

Developing Country Concerns

Certain developing countries are reluctant to accelerate the liberalisation of consumer goods on the basis of their energy performance due to fears that such liberalisation would primarily benefit advanced industrialised countries. India, for instance, has raised concerns that preferential tariff treatment (including zero tariffs) for dual-use goods, such as energy-efficient refrigerators, would have significant ramifications for industrial sectors, particularly in devel-

oping and least-developed countries where industry is largely dominated by small- and medium-size enterprises.

Replacing Outdated Equipment

Mandatory minimum energy performance standards (MEPS), used in many countries, aim to push up the efficiency level of new products entering the market. But governments can take these a step further by phasing out older technologies and products that use more energy and produce more emissions of greenhouse gases. Examples include replacing incandescent light bulbs with more energy-efficient compact fluorescent lamps, which use only about 20 percent of the power to produce the same amount of light and last longer.

Consumer information that can influence purchasing decisions is an essential component of market transformation. Mandatory energy-information labels are required by all OECD and EU Member countries, and by a growing number (at least 14) of non-OECD countries. In addition, voluntary seal-of-approval labels can be selectively awarded to products that meet relatively strict environmental requirements.

But standards and labels raise a different set of problems. In practical terms, they represent non-tariff measures and, as such, are potential obstacles to market entry. The WTO Agreement on Technical Barriers to Trade is the main instrument that deals with standards, technical regulations and labelling. These should be non-discriminatory, should not cause unnecessary obstacles to trade, and should be applied in a transparent manner and notified to the WTO. In addition, standards and technical regulations should be based on international standards where they exist. In the area of energy efficiency, international initiatives have just started to take off and have a long way to go.

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Lexus vs Toyota: The Southern Africa–EU Trade Agreement

Peter Draper

The European Union and its former colonies in Africa, the Caribbean and the Pacific are nearing the conclusion of new potentially far-reaching trading arrangements. For Africa, reaching the right outcome is vital.

The Economic Partnership Agreements (EPAs) between the EU and six regional blocks of the African, Caribbean and Pacific (ACP) group have been under negotiation for five years. Four of the regions are on the African continent. If the parties fail to sign an EPA by the impending end-2007 deadline, the current preferential access regime, known as the Cotonou Partnership Agreement, will be vulnerable to substantial challenge generating significant consequences for Africa.

The EU's current EPA agenda is a Lexus: it includes everything comprising a modern reciprocal trade negotiation: goods, services, intellectual property rights, customs regimes, government procurement, investment regulations and competition policy. Its breadth is a significant source of tension, particularly given that chunks of it (the 'Singapore issues') were rejected by the Africa group in the WTO. Another major challenge in the negotiations is the future of the EU's development assistance package for the ACP (EDF-10) and the extent to which it will be linked with EPA outcomes.

Africa and EPAs

Unlike most civil society activists, I am in favour of a broad liberalisation agenda, under certain conditions. The economics, rooted in well-known African development challenges, point convincingly to this. These fall roughly into two categories: supply-side constraints and trade constraints.

The former consists of a host of infrastructure needs: physical, institutional, financial and technological. Solving them will take time, direct investment (especially foreign), appropriate regulations and implementation thereof, as well as money. The same logic applies to the litany of constraints traders encounter in doing business on, with, or from the continent. The two agendas are intimately connected and need to be tackled comprehensively. The EU could play a stronger role in addressing this agenda

through greater direct investment, more focused and responsive development assistance, as well as market access guarantees.

Market access is guaranteed for least-developed countries (LDCs) through the EU's 'Everything but Arms' (EBA) preference scheme, albeit with restrictive rules of origin. The concerns of non-LDC ACP states, with the exception of South Africa, appear to have been largely accommodated through the Commission's recent offer to extend EBA-like access to them conditioned on concluding a WTO-compatible economic partnership agreement.¹

African import liberalisation must match this offer. Europe produces a host of productivity-enhancing commodities and consumer goods that Africa requires; to impose duties on these products does not make economic sense. Yet, any tariff liberalisation package must be sensitive to fragile tariff-dependent government revenues and the need to shield African agricultural producers from subsidised EU products. There may also be a case for maintaining tariffs to develop domestic industries,² but these caveats do not undermine the broader liberalising logic.

Beyond historical relationships and the 'feel good' factor, can a business case be made for significantly increasing European foreign direct investment (FDI) into the continent, beyond resource extraction? Such a case hinges on significant regulatory upgrading and economic liberalisation in African states. Unfortunately, there is no guarantee that FDI will flow if these conditions are met; hence they are best thought of as necessary, but not sufficient, preconditions.

So, the broad EPA agenda is appropriately framed. But the details – especially regarding the regulatory issues – are important; the regulatory agenda should not intrude *unduly* into African states' policy space. The key question is: what does 'unduly' mean in different contexts? Clearly, the agenda must be tailored to specific political and economic peculiarities.

Regulatory issues must be adapted to African states' capacity to negotiate EPAs and, more importantly, implement the agreements; this should determine the overall scope of negotiations, commitments and sequencing. African negotiators' overarching goal should be to establish an implementable and modernising regulatory agenda that not only extends and locks in reforms, but is also supported by adequate resources or an 'aid for trade' agenda.

Metaphorically-speaking, African EPAs should be Toyotas rather than Lexuses. And therein lies the rub(ber): the EU seems to insist on a Lexus in the face of widespread African opposition, whilst apparently conditioning aid for trade on Africans 'purchasing' the Lexus. This is a recipe for entrenching drip-feed dependence. And the EU holds almost all the negotiating cards: market power (access to the common market), financial power (development assistance) and negotiating muscle.

For EPAs to be truly development-friendly, EU negotiators should listen to their African counterparts and agree to properly tailor and sequence the broad agenda to African capacities. That means concluding the core goods market access deal first, before the end of 2007. Then the complex regulatory agenda should be tackled piecemeal, possibly via revision clauses, in tandem with a targeted resource package. In principle, the European Commission's recent concession to non-LDC ACP states makes this outcome substantially easier (see page 18).

The Southern Africa EPA

So how do the EPA negotiations between the EU and the Southern African Development Community (SADC) measure up? Unfortunately, not very well, and despite the looming deadline, official negotiations have yet to begin. Why?

Southern and Eastern Africa is divided into two EPA negotiations groups not corresponding to Regional Economic Community (REC) boundaries, complicated by the fact that several countries in the region are members of two or more of the 'available' RECs. The SADC EPA group currently consists of eight countries: those of the Southern African Customs Union (SACU) – Botswana, Lesotho, Namibia, Swaziland and South Africa³ – plus Mozambique, Angola and Tanzania. A number of problems arise from this configuration.

First, South Africa has its own trade arrangement with the EU, called the Trade, Development and Co-operation Agreement (TDCA). This *de jure* excludes its customs union partners, although *de facto* they are subject to it since most of their trade transits South Africa. This peculiar circumstance arose because the EU, in its mandate to negotiate the TDCA with South Africa, excluded South Africa's customs union partners. It apparently did so because Botswana, Lesotho, Namibia and Swaziland are full ACP members whereas South Africa, owing to its apartheid past and comparably higher level of development, is not. Hence, the EU treats South Africa as a powerful regional hub on par with EU member states.⁴

Second, as a customs union SACU shares an external tariff, and must thus negotiate all external goods arrangements as a group, i.e. any tariff reduction offer must be made jointly. Obviously, the TDCA predicament undermines this legal requirement and drives a wedge through the heart of the customs union. It also raises the troubling political issue of why South Africa – a new country on the global stage and one deserving every consideration given its apartheid past, major development challenges and central role in the region – is being singled out for differential treatment.

Furthermore, as the other SACU members were excluded from the Trade Development and Co-operation Agreement negotiations, they understandably want to place their own defensive concerns with respect to goods imports on the table. So far, however, the EU has not been willing to countenance tariff increases in EPAs.

Given the potential for trade diversion, formulating tariff offers and the associated rules of origin is complex. Logically, SACU sought to remedy this problem by requesting the EU to grant South Africa the same market access conditions as those enjoyed by Botswana, Lesotho, Namibia and Swaziland. It argued that this would build SACU as a regional integration arrangement, simultaneously correcting an historic EU blunder and meeting one of the EU's key stated EPA goals. Sadly, that was formally discarded by the EU Council and recently confirmed in the 4 April market access announcement.⁵ Yet, if the EU's logic is strictly applied, European countries should be accorded differential access to the SACU market based on their level of development (less for Spain, more for Lithuania, for instance?). Notwithstanding the absurdity of their position, EU member states are unmoved.

Besides, SACU contains a revenue-sharing component whereby South Africa effectively massively subsidises its partners (Botswana being the least dependent), and the revenue pool is based on tariff collections. This gives the weaker SACU partners an incentive to avoid tariff reductions. Together with South Africa's newfound reluctance to undergo tariff liberalisation, the result is a strong defensive constituency.⁶

Worse, Mozambique, Angola and Tanzania are not SACU members and their tariff regimes differ substantially from each other, never mind SACU. Furthermore, as LDCs they are not obliged to reciprocate unless they wish to conclude an EPA. In addition, Tanzania belongs to a different customs union: the East African Community (EAC).⁷ Here, the situation is reminiscent of Mercosur where members have a plethora of their own trade deals independent of their customs union partners. One can only wonder about EAC's future.

Third, the SADC group is reluctant to negotiate regulatory issues for fear of conceding market access, possible closure of 'policy space' and a stated lack of common policies or regulations amongst them. In South Africa's case, the hesitation is motivated by an in-principle objection to extending regulatory commitments beyond those pertaining in the WTO.

Yet SADC (the original one with 14 members) has a longstanding, if inconclusive, process in place to conclude a services liberalisation package, and through various protocols, there is a substantial degree of regulatory harmonisation on paper. Some SADC EPA members – notably South Africa – would prefer to harmonise regulations within the Southern African Customs Union before doing so with respect to an external partner. But some observers – myself included – worry that according primacy to regional regulatory harmonisation would lock the region into South Africa's high-cost growth model. Others have concluded that South Africa is exploiting the impasse to its advantage. South African negotiators argue that the EU's desire to first conclude a regulatory package with the country will entrench regional divisions. Meanwhile, the EU's suggestion that development assistance be linked to adoption of the regulatory agenda is a further complication.⁸

In short, suspicions abound and the SADC EPA group will struggle to negotiate regulatory issues with the EU unless the latter is prepared to sign separate deals with each member state. Yet the regulatory agenda should be pursued – albeit cautiously in some areas – with a view to deepening and locking in domestic and regional reforms. A commitment to negotiate may also solve the market access puzzle. Furthermore, given the parlous state of the Doha Round and hence the WTO's questionable future as an instrument of rule-making, I am also sceptical of the notion that these issues should only be negotiated in the WTO. First prize would be for regional governments' to unilaterally reform and upgrade their regulations, but given weak capacities and a poor track-record, this is unlikely. Thus EPAs are a good second-best alternative, although the details will require close monitoring.⁹

Continued on page 18

So how will this conclude? Most likely Mozambique, Angola and Tanzania will part company from SACU, and Angola may not sign an EPA at all. And while there has been longstanding speculation that Mozambique will join SACU, that does not seem imminent. Tanzania logically should join its EAC partners in the Eastern and Southern Africa EPA group.

That would leave SACU, and South Africa, to slug it out with a truculent EU.

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ENDNOTES

¹ Conditionality will extend to services and other aspects of the regulatory agenda. Transitional arrangements tariff rate quota will apply to sugar and rice.

² While I am not convinced of this, the notion retains strong political support in Africa.

³ Until recently, S.A. was an observer.

⁴ It appears that in the EU 133 committee, S.A. is regarded as a competitive threat on par with Brazil, Russia, India and China. This does not reflect economic reality.

⁵ According to a senior EC official involved in the March 2007 Gaberone meeting, the EU may be prepared to consider according South Africa EBA access provided it signs up to the regulatory agenda. South African negotiators regard this as an inappropriate exchange of concessions.

⁶ Draper, P. and Sally, R. *Business Day*, 8 February, 2006. 'S.A. Needs to Get the Basics Right'.

⁷ The other founder members are Kenya and Uganda. Rwanda and Burundi acceded in 2006.

⁷ Discussions with officials involved in the March 2007 Gaberone meeting. Director-General of the European Commission's ACP relations division, Stefano Manservigi, draws a distinction between 'conditionality' and a 'factual' linkage between negotiated outcomes and development support, arguing that financial assistance can only be allocated once the trade package is in place.

⁹ Some argue that if the EU's primary concern is African development, it should not link regulatory reforms to market access for its companies. I think market access is a mutually beneficial objective.

Duty-free Access for ACP Countries?

On 4 April, the European Commission unveiled an offer to remove tariffs and quotas on all exports from the African, Caribbean, and Pacific (ACP) group of countries.

Since 1975, ACP nations have benefited from preferential access to EU markets. Maintaining the non-reciprocal preferences has required a succession of waivers from the WTO's most-favoured-nation treatment principle. In 2001, WTO Members agreed to extend the waiver (with certain conditionalities regarding the EU's banana import regime) until 1 January 2008 – the self-imposed deadline for concluding negotiations on WTO-compatible Economic Partnership Agreements (EPAs) between the EU and six regional groupings of ACP countries under the Cotonou Agreement (see page 16).

The Commission's new offer proposes to lift quotas and tariffs for 'substantially all' ACP products – with rice and sugar as the exceptions – immediately upon the signing of an EPA. Duties on sugar would be phased out through 2015, subject to special safeguard clauses. While the detailed terms for rice are not yet determined, the Commission stated that the transition period would be brief, with a duty-free import quota.

The proposal would offer all ACP nations, except South Africa, the same market access as that available to least-developed countries (LDCs) under the EU's Everything but Arms (EBA) initiative. Brussels claims that its proposal would encourage ACP countries to build strong sub-regional markets, increase competitiveness and diversify, thus promoting their integration into the global economy.

Sceptics are concerned that the proposal might only be an attempt to step up the pace of the EPA negotiations, which for most regions are considerably behind schedule. Others fear that increased regional competition and integration among ACP countries might benefit the strongest economies among them, while leaving the rest in a worse economic position.

Critics also worry that the duty-free offer will allow the EU to gain liberalised access to ACP markets in the future, since the EPAs are to replace the EU's increasingly contested unilateral preferences with WTO-compatible reciprocal free trade agreements. A surge of imports from the EU could raise unemployment and hold back industrial development, they say. The EU has refuted these allegations, arguing that EPA partners would only have to implement market-opening commitments over a long transition period, up to 25 years.

Aid is another sticking point in the negotiations. The EU has promised more than • 22 billion to ACP nations from 2008-13, but African countries say that without more support they will be unable to offset lost tariff revenue or develop their products to comply with EU standards.

Concern from Some Member Countries

Officials have reported that only Sweden and the UK are strongly in favour of the proposal. At a 16 April meeting of EU farm ministers, France read out a note asserting that the Commission's offer to fully open EU markets to all products from ACP countries could threaten the balance of Europe's sugar and banana markets, as well as undermine recent policy reforms. France also said that extending permanent duty- and quota-free access for bananas from all ACP countries could "weaken our negotiating positions in the WTO and in the proceedings currently being brought by Ecuador and Colombia" (Bridges Year 11 No.2 page 9).

While Germany, Austria, Spain, Ireland, Italy, Belgium, Portugal, Cyprus and Poland raised similar concerns, EU Agriculture Commissioner Mariann Fischer Boel argued that sufficient safeguards were in place to protect EU markets from import surges. She reminded the ministers that the EPA negotiations were "not a choice that the EU is pursuing to provide enhanced market access to the poorer countries in the ACP region. They are a necessity imposed by WTO rules and time is certainly not on our side as the waiver expires on December 31, 2007."

Brazil Grants Compulsory License

Following in Thailand's footsteps, Brazil has decided to override the patent on an AIDS drug in order to make it available under the country's free treatment programme.

On 4 May, President Luiz Inacio Lula da Silva signed a decree, which allows the government to import generic efavirenz from India rather than buy Stocrin – the brandname for patented efavirenz – from its US-based manufacturer Merck & Co. Brazil took the step after price negotiations broke down between the company and the government. Merck had offered a 30-percent cut in its current Stocrin price of US\$1.59 per tablet, but Brazilian officials held out for a US\$0.65 per tablet price, which is what the company offered to Thailand when the government there issued a compulsory license for generic efavirenz (Bridges Year 11 No.2 page 17).

Brazil has previously used the threat of compulsory licensing to pressure companies to lower prices of patented medicines, but efavirenz marks the first time one has actually been issued. Like Thailand, Brazil plans to first import the generic from India (at US\$0.45 a pill) and, possibly, start domestic manufacturing later.

Brazil's free AIDS prevention and treatment programme has won wide-spread praise from UN agencies and health activists. Adult infection rates have stabilised at about 0.6 percent, a level similar to that in the United States. But Brazilian health authorities say spending on anti-retroviral drugs doubled in four years to nearly US\$495 million in 2005. A year's supply of Stocrin costs US\$580 compared to US\$166 for generic efavirenz. Importing the generic from India will save US\$30 million this year and US\$236.8 million by 2012, the health ministry said.

Mixed Signals from Industry

While health groups, such as Médecins sans Frontières, warmly welcomed the decision, industry representatives responded with great concern. Merck said it was 'profoundly disappointed' and that Brazil's "expropriation of intellectual property sends a chilling signal to research-based companies about the attractiveness of undertaking risky research on diseases that affect the developing world, potentially hurting patients who may require new and innovative life-saving therapies. Research and development-based pharmaceutical companies like Merck simply cannot sustain a situation in which the developed countries alone are expected to bear the cost for essential drugs in both least-developed countries and emerging markets. [...] As the world's 12th largest economy, Brazil has a greater capacity to pay for HIV medicines than countries that are poorer or harder hit by the disease." Merck added that it hoped the government of Brazil would "reconsider its stance in the interests of HIV patients around the world."

The International Federation of Pharmaceutical Manufacturers & Associations (IFPMA) said that while compulsory licensing was permitted under specific conditions by the WTO TRIPS Agreement, it was "a confrontational approach, and may be aimed to benefit local government-owned companies' commercial interests regardless of the local capacity to produce quality, bio-equivalent drugs." IFPMA also warned that compulsory licensing would create disincentives to the introduction of new medicines in countries that break patents.

Abbot Laboratories announced in March that it would not introduce new medicines to the Thai market after the government issued a compulsory license for Kaletra, a second-line AIDS drug needed by patients who no longer respond to first-line anti-retrovirals such as efavirenz.

Nevertheless, the two countries' compulsory licensing strategies have produced some results. Abbot offered in April to cut the price of Kaletra in low-and medium-income countries, including Thailand, to US\$1,000 a patient per year. According to the company, that is cheaper than any generic on the market and 55 percent less than the current price. Merck has proposed to cut Stocrin prices to US\$0.65 for Thailand and US\$1.11 for Brazil, while Swiss-based Novartis offered in April a 75-percent price reduction on its leukemia medicine Glivec after Thai officials said they were looking into a compulsory license for the drug.

News in Brief

The US and South Korea concluded a free trade agreement on 1 April, thus opening the door for congressional ratification before the president's trade promotion authority expires on 30 June. Both countries made a major last-minute concession: the US agreed to leave rice out of the FTA, and Korea accepted to resume imports of US beef once the World Organisation for Animal Health has declared US beef safe. Seoul also agreed to eliminate its 40 percent tariff on beef over the next 15 years.

If ratified by legislatures in both countries – likely to prove harder in the US – the FTA is projected to have the potential to boost bilateral trade by as much as US\$29 billion. It would liberalise trade in most industrial products, including automobiles and textiles, and further open up services markets and public procurement contracts. Many US farm products will get greater access to Korea's traditionally-protected market. The US also obtained a review mechanism for Korea's drug pricing and reimbursement system. The agreement requires both parties to enforce their own labour laws, but the US Trade Representative has informed Korean authorities that the labour chapter may be reopened once the administration and congressional Democrats reach agreement on changes to US trade policy. Korean officials have publicly stated that they are not prepared to renegotiate the labour provisions.

On 23 April, EU members countries approved negotiating mandates for free trade agreements with India, South Korea and the Association of Southeast Asian Nations (ASEAN). They agreed that the new FTAs "should be ambitious and comprehensive and comprise far-reaching liberalisation of trade in goods and services, and investment." Other key goals will be to open up public procurement contracts and reduce non-tariff barriers. The biggest gains for EU companies would come from exporting business services to ASEAN and Korea, and manufactured goods to India. ASEAN is projected to boost exports to the EU by 18.5 percent, India by 18.7 percent, and Korea by 36 percent. Talks are expected to start within months.

Catching up with the Slowest: NGO Accreditation at the WTO

Mark Halle

One thing can be said for globalisation: nothing stays the same for very long – civil society accreditation to the WTO excepted, that is.

Nations rise and fall, form and break apart. Companies start up, grow and go out of business. Atmospheric carbon accumulates, temperatures go up a click, sea level rises, glaciers recede, hurricanes rage and the locusts return to devastate the crops. Children somehow make it to adulthood as one generation replaces another. Change, as one wag had it, is today's only constant.

This wag was clearly unfamiliar with the WTO. Early in its history the first regular Director-General, Renato Ruggiero, decided to fill in the moat that surrounded the GATT, to open a few breaches in the fortress walls and to lock the drawbridge in down position. He decided not to assume that non-governmental organisations were, by virtue of their status alone, necessarily the enemy. NGOs, after all, represent a legitimate set of constituencies; many of them actually understand trade and might even hold the key to eliminating some of the obstacles to trade openness that currently impede progress. Ruggiero began work on a system for accrediting NGOs for whom the rules of trade were a central concern.

That was in 1996, a scant two years after the Rwandan genocide, a year before Tony Blair – soon to celebrate ten years in office – came to power. It predated the first WTO ministerial conference in Singapore, although the sixth of these conferences is receding into distant memory. And yet, the WTO has so far made not one inch of progress in accrediting even the NGOs with whom they interact every day, not to speak of those grumbling from behind the barricades.

Lack of progress in the WTO is not, of course, confined to NGO relations. Little progress is being made with the core business of breaking down trade barriers. The best brains still struggle with formulae, coefficients, scenarios and other arcane calculus of trade liberalisation. No wonder! If the challenge of coming up with an acceptable system to accredit NGOs continues to stymie the institution,

how can the WTO ever hope to work out a system of special and differential treatment, or figure out an equitable approach to special products? How can we feel confident when an issue that the UN figured out years ago still throws the WTO for a loop?

Advanced political science theory holds that some problems are better ducked than confronted, especially if the problem itself generates no real negative fallout. But it might be better to turn that nostrum on its head. What value does the WTO gain by stubbornly refusing to address this relatively simple problem, and how can that value be thought to be more important than the frustration felt by NGOs and by the organisation's own staff?

Geneva-based trade-related NGO communities regularly camp out at the WTO. They wander the dark halls of the Secretariat as if they were fitting them for curtains. They are on a first-name basis with a high proportion of WTO staff. And yet, every time we come to the institution's headquarters, we suffer the indignity of being directed to the service entrance. There we wait patiently while a member of the staff interrupts his or her work and treks down to the entrance to sanction our admission to the Valhalla of trade negotiations. The time wasted on both sides is, cumulatively, staggering. And to what end?

Non-accreditation does not protect security since the WTO sits in a public park, about as impenetrable as the Geneva train station. NGO representatives are admitted if a single WTO staffer agrees and thereafter have unlimited access to every part of the building. Indeed, some NGOs – tired of tramping over to the second class gate – have long since obtained press badges, or simply declare they are headed for the library to look up some obscure reference in the literature.

It is not protecting confidential information, since most WTO staff and virtually every delegate are not only prepared, but eager, to share their insights on negotiations down to the last detail. Indeed, most information of any importance can be found on the WTO website or, if not, will be in Bridges within a few days. Obtaining inside information from the WTO is, frankly, no longer a challenge.

Nor can it be the fear of infecting vulnerable trade diplomats with un-liberal ideas concerning trade since many of the most radical objections to the current negotiating texts stem from the WTO Members themselves.

Instead, NGOs seem to be suffering from the same problem that bedevils the talks more generally – lack of political courage. The Director-General has built up a library of public statements extolling the importance of environment, development, labour, human rights, partnership and other well-established virtues. And yet, the dossier on NGO accreditation long ago disappeared under a thick layer of dust on his desk.

Modern change theory suggests that instead of designing new systems from scratch, it is often more successful to start with simple, incremental changes, demonstrate that change is, after all, possible, and in this way build a 'momentum of success'. Maybe it is time for this – the fifth – DG to throw caution to the winds and issue badges to NGOs that follow trade.

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New Trends in Technology Transfer

John H. Barton

The character of technology transfer has changed profoundly over the last couple of decades. This has broad implications for defining policies that might benefit developing nations and, therefore, for international negotiations.

In the technology transfer debate of the 1970s, the paradigm involved technology licensing from a multinational firm to a host-nation subsidiary, or licensee manufacturing for the local market. The concerns were that the costs of the technology (many of which were hidden through transfer prices or management fees) were too high; that host nation use of the technology was often hindered by restrictive clauses, and; that the licensees often failed to receive the best technology.

The Underlying Changes

Today, the world is quite different. A number of developing nations have become much more technologically sophisticated. The comparison from 1976, say, to 2006 is incredible in terms of the numbers of trained scientists and technologists, the level of science-based industry, and the magnitude of national scientific research and financing programmes. This change is, of course, greater for the middle income and largest nations such as Brazil, China and India, and much weaker for the poorest nations, such as many of those of Africa. The change is demonstrated dramatically by the emergence of multinational research facilities located in developing nations such as China.

Further, the world is now globalised in the sense that free trade has spread and that, in many industries, economies of scale now favour production facilities that serve more than one nation. The result has been increasing specialisation and trade, both in components and in finished products that may have origins in a number of nations. Production chains are now often spread over a number of nations. Computer chips may be designed in one nation, manufactured in a second, diced and tested in a third, assembled into computers in a fourth, with software written in a fifth. Automobile component suppliers are becoming independent of automobile firms and doing a greater share of the overall R&D going into a car. Multinationals, in general, now invest in a developing nation in order to obtain a basis for export to a global market or production process. China is in part an exception because its domestic market is so large, but much of the investment and production in that nation is for export as well.

These developments have changed the incentives and barriers for indigenous developing world firms, i.e. those that are organised with primarily domestic ownership and management (although they may enter into alliances and joint ventures with global firms). Such indigenous firms face global, as well as local, competition and they may have to find a place in an already elaborate international production structure.

As a result of free trade and globalisation, the international regulatory structure is also different. Today, an indigenous firm in the developing world may be less able to begin through a protected market, as did the US industrial firms of the early 19th century. And because of intellectual property (IP) protections in TRIPS, the firm may be less able to begin by imitating existing technologies, as did Japanese firms in the middle of the 20th century.

Moreover, technological flow has become strongly political, not only because of the global move towards IP but also because of technological protectionism. The fact that free trade provides mutual benefit is widely recognised, even if politically difficult to implement. Less recognised, at least among politicians, is the parallel point that exchange of knowledge leads to an equally – if not more – beneficial cross-fertilisation and acceleration of the benefits of free trade.

National Programmes to Support Technological Development

In this new world, nations are seeking to encourage their own high-technology industry. Any such national technology policy must be based on a rational subsidy criterion. In the devel-

oped world, the economic analysis of a research subsidy is based on the fact that many of the benefits of new technology development are unlikely to be recouped by the investor in the new technology. Hence subsidies should be given to those industries in which the social benefits of the technology are significantly greater than the profits that will return to the entrepreneur.

For a developing nation, an additional circumstance is appropriate. This is analogous to the traditional infant-industry subsidy or tariff – if there is a market imperfection making it hard for an industry to get started, and the industry can be expected to be efficient and to survive without protection after a start-up period, the subsidy or protection is justified. It is clear that many developed and developing nations have successfully used various forms of subsidy to jump-start a particular technology – examples abound from semiconductors to aircraft to medical and agricultural technologies. Economically, a developing nation can reasonably subsidise an industry under similar circumstances. All the standard economic objections to government intervention apply to warn that such an approach is often unwise: governments are generally less good than the market at ‘choosing winners’ as political pressures often push in uneconomic directions, and it is politically hard to terminate the subsidy or protection. But the point remains: specific subsidies, as well as general subsidies (i.e. education or broad tax incentives), are *sometimes* economically rational.

Human Resources

The transfer of technology is fundamentally a matter of the flow of human knowledge from one human being to another. This can be through education, scientific literature, or direct human contact. While at the legal level, one thinks about licenses dealing with legal rights to use particular technologies in a particular context – it is the human level that dominates the managerial and economic reality.

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Although some inventions have been made by individuals with little education, but today the majority of inventions are made by those with substantial education in science or technology. The reduction of inventions to commercial application usually also requires skilled entrepreneurs and, depending on the particular field, skilled mechanics, lab technicians, or software writers. Many of the same skills are needed for the thoughtful adaptation and application of a technology developed elsewhere. Hence, a broad range of scientific and technological skills is absolutely crucial for a nation to participate effectively in the international technological economy.

There are a number of international approaches to improve developing world access to human technological resources, and those should be considered as topics for negotiation. These include improved support for technical education, international clinical programmes to assist developing country science and technology graduates to obtain experience in business, and improved access to visas for students and scientists.

Public Sector Technologies

In volume, developing world public sector research far outweighs developing world private sector research. Nevertheless, the developing world public sector probably supplies far less technology to the developing world economy than does the international private sector. Thus the role of public sector support is generally more one of building a capable infrastructure than of creating new developing world industries. There is an obvious exception in areas such as agriculture, where much of the research is carried out in the global and national public sectors. And, as noted above, public sector support may *sometimes* be useful in ‘jump-starting’ a new industry.

There are many other issues in the public sector area that might be usefully discussed in further negotiations. These include improving mechanisms for access to technology held by global agricultural biotechnology firms; as well as increasing developed and developing nations’ government support for medical research of importance to developing countries and for covering the costs of distributing the products of that

research in the developing world. It will also be important to recognise the possible need for major public sector involvement in recipient nations in areas such as energy and environmental technologies; to organise a global sector-based research inventory to assist in defining those areas where increased public-sector research investment might best be focused; to clarify patent law to expand research exemptions and to minimise the negative impact of patents on research, and; to negotiate arrangements to minimise the impact of national security restrictions on the freedom of science and of international technological development.

The Role of the Private Sector

The majority of technology important to the developing world is probably derived from the developed-world private sector, through licensing or foreign direct investment (FDI). Participation in this private sector network is the normal way for an indigenous developing nation firm to gain its first technology. Depending on the sector and the nation, the firm may go on to gain a substantial role in the international production chain, sometimes with its own technology, and may ultimately produce its own product for the domestic market for export.

The most important topics here to be considered for further international negotiations include principles for trade secret law; designing the purchasing policies of global health (and other) procurement entities to ensure that these entities are adequately open to developing nation supply tenders; developing mechanisms to discourage bilateral agreements that modify the balance struck in TRIPS; renegotiating of the technology-related provisions of the WTO antidumping and subsidy codes to ensure that the use of reasonable subsidies is not penalised, and; developing antitrust measures to ensure that the international flow of technology is conducted competitively.

Overall Implications

Clearly, many areas require multilateral attention, and the above analysis provides an agenda. This is a somewhat different agenda than that traditionally posed for technology transfer. Hence, it is wise to test the ideas here by further studies. One group of such studies would be case studies examining specific industries and the relative success or failure of developing nation entrants. The role of subsidies deserves analysis, in light of their historical success and the current orthodoxy rejecting nearly all such efforts. What is the experience on the ground? And there should be studies of the effectiveness of technological education, basic research, and tax benefits as mechanisms of encouraging developing world technology. It is also important to analyse whether the relevant areas of trade and WTO law are actually discriminatory or not. This would include the principles on the treatment of R&D subsidies, as well as the provisions of bilateral investment treaties, which may go further than the WTO’s TRIMS Agreement, just as bilateral agreements often go further than TRIPS.

Most of all, any negotiations must be in a context of movement towards a seamless global scientific and technological community, such that each scientist or engineer, anywhere in the world, has an opportunity to make his or her optimal contribution to the science and technology needed by the planet. It is important that the firms and research institutions in the developing nations are able to participate in this global technological process. A treaty on access to knowledge and technology – governing issues such as subsidies, visas and access to scientific information – would provide benefits to both developed and developing nations. As the world moves further toward a global technology community, it will be essential to remove restrictions on technology licenses and on investment in technology-based firms, as well as to remove the barriers implicit in the current WTO patterns of anti subsidy and antidumping principles. There are certainly appropriate exceptions to protect national security, but these should be against a background of a free flow of scientific and technical ideas and persons. In light of the current status of the Doha Round, it is not clear whether this vision is best sought in the context of a modified or expanded round or in one of detailed revisions and understandings within existing WTO bodies. But it is important to seek it.

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Facilitating Temporary Labour Mobility

Labour mobility has the potential to be a key driver of sustainable economic growth and development for many developing countries. Revenues generated by the remittances of nearly 200 million migrant workers amounted to approximately US\$167 billion in 2005, over twice the value of official development assistance. For labour-receiving countries, there is also substantial evidence that in view of actual and expected labour shortages, labour migration can confer important economic and social benefits. At the same time, ever-expanding international trade in goods and services feeds the need for labour mobility, as production seeks the most efficient factor sources. However, while barriers to trade in goods and services have decreased, significant obstacles remain for the temporary cross-border movement of labour.

As a contribution to fostering better understanding among the various stakeholders from both sending and receiving countries, ICTSD and the World Trade Institute's NCCR-Trade project held a dialogue on Trade and Labour Migration: Developing Good Practices to Facilitate Labour Mobility from 20 to 22 April in Jongny, Switzerland.

Good Practices of Sending Countries to Facilitate Return Migration

Strategies to facilitate circular migration of temporary labour and to provide 'comfort' to receiving countries differ significantly among sending countries. The Philippine government has a coherent set of regulations that facilitate the deployment of temporary labour, protect migrant workers while abroad and encourage their return and reintegration. In contrast, while the government of India provides information to potential temporary labour migrants, it relies on private initiative to facilitate the movement of labour abroad.

Facilitating Temporary Labour Migration in Receiving Countries

In receiving countries, labour market tests ensure that lower-skilled migrant workers do not take away jobs from domestic employees. Wage parity requirements imposed for the protection of workers are seen by some as a disincentive for local employers to hire temporary migrant workers. To ensure the temporary character of labour migration, some countries withhold a proportion of migrant workers' remittances until they return home. Other countries prevent access to permanent status by allowing instead multiple renewals of temporary work permits, without granting the migrant worker any possibility to apply for permanent status.

Learning from Bilateral Agreements

While many bilateral agreements tend to allow labour-receiving countries to simply incorporate provisions that already exist under their unilateral admission programmes, they may nonetheless offer useful lessons on how temporary labour migration could be facilitated in a broader context. Among the measures that may be emulated are those promoting the circulation of migrant workers, training programmes, wage parity, compulsory saving programmes, mechanisms for reduced remittance costs and, in some cases, the provision of social rights.

An additional advantage of bilateral agreements is their ability to adjust to fluctuating labour market needs. For example, Canada's bilateral agreements with Central American and Caribbean countries offer additional flexibility in terms of volume and specific types of labour skills.

Given the present inability of the multilateral trade framework to advance temporary labour migration, some experts say bilateral agreements may provide a more viable strategy for countries keen to reap the benefits from temporary labour migration. Moreover, labour mobility covered under the General Agreement on Trade in Services' so-called mode 4 accounts only for a portion of total labour migration, and yet, is subject to very few liberalisation commitments. In addition, a number of issues critical to facilitating labour mobility may be extremely difficult to address in a multilateral trade negotiations context. These include national visa regimes, broader immigration policy, licensing and qualification requirements and procedures administered at the sub-national level and labour standards, among others.

For more information, visit: <http://www.ictsd.org/dlogue/2007-04-20/2007-04-20-desc.htm>

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.

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May 21	Council for Trade in Goods
May 21	Start of two weeks of consultations on agriculture in different formats
May 22	Dispute Settlement Body
May 22	Committee on Trade and Development
June 4-8	NAMA Week
June 5-6	Council for Trade-related Aspects of Intellectual Property Rights
June 7-8	Negotiating Group on Trade Facilitation
June 11	Committee on Trade and Environment

Other Meetings

May 14-23	WHO World Health Assembly Geneva http://www.who.int
May 14-15	OECD Forum on Innovation, Growth and Paris Equity http://www.oecd.org
May 21-24	FAO Committee on Rold Food Security Rome http://www.fao.org
June 6-8	G-8 Summit Heiligen- damn http://www.g-8.de
June 10	G-4 Ministerial Meeting London

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