

Year 12 No.1 February 2008

## In this issue

- 3 New Ag Text Provides More Details but No Consensus
- 5 Revised NAMA Draft: Nemo Tenetur ad Impossibile
- 6 Services Chair's Text Reflects Large Gaps in Positions
- 7 WTO News
- 9 WTO Disputes
- 13 Brazil Tyres: Policy Space Confirmed under GATT Article XX
- 16 Regional News
- 18 Ensuring a Development-Friendly WTO
- 19 Friend or Foe: Regional Trade Agreements and the WTO
- 21 Five Suggestions for Clarifying the Draft Text on Fisheries Subsidies
- 23 ICTSD and Partner News
- 24 Meeting Calendar and Resources

Published by the International Centre for Trade and Sustainable Development

## Facts and Figures

- Americans bought US\$1.96 trillion worth of imported goods last year. About 60 percent of all US tariff revenue came from a narrow range of household goods, which totalled less than 7 percent of all imports.
- Countries that make cheap and simple clothes, shoes and luggage face a far more restrictive American trade regime than the rest of the world.
- In 2007, tariffs on clothes imported from Cambodia amounted to US\$419 million, while the value of these goods was US\$2.5 billion. In percentage terms this is the highest rate for any US trading partner.
- Together, Cambodia, Bangladesh and Pakistan supplied about 0.4 percent of US imports, but accounted for a nickel in each dollar of America's tariff revenue.

Country	Per capita income	Goods imports from the US	Tariffs paid to the US	Average tariff rate
Cambodia	US\$ 430	US\$ 2.46 billion	US\$ 419 million	17.0%
Great Britain	US\$ 37,760	US\$ 57 billion	US\$ 412 million	0.70%
Saudi Arabia	US\$ 12,510	US\$ 35 billion	US\$ 45 million	0.10%

Source: *Trade Fact of the Week*. 20 February 2008. Progressive Policy Institute. Washington

## Breakthrough Still Elusive in Doha Round

The February release of revised negotiating drafts on agriculture and industrial market access has so far failed to break the deadlock in seven-year-old multilateral trade liberalisation talks.

Neither of the two 'modalities' texts contained any major surprises. Most importantly, they left virtually untouched the figures proposed in drafts circulated in July on the extent of domestic farm subsidy and tariff cuts, as well as the formula for reducing import duties on non-agricultural products. Members widely accept that these 'headline numbers' can only be decided at the political level.

Since the release of the two papers, governments have largely focused on putting on record the elements that they disagree with. At one end of the spectrum, Argentina has warned that it cannot accept the revised industrial market access text as a basis for further negotiations due to its unbalanced nature, while French Agriculture Minister Michel Barnier has declared the new agriculture draft 'unacceptable and even more unbalanced than previous versions'. According to Minister Barnier, nineteen other European countries support this view.

### Flexibility Options under Fire in Agriculture Text

Three issues have dominated Members' comments on the revised agricultural modalities draft: the number and treatment of 'sensitive' and 'special' products, the provisions proposed for a special safeguard mechanism (SSM) for developing countries and a new requirement for a minimum average tariff cut.

The G-33 group of import-sensitive developing countries said the disciplines proposed for the special safeguard mechanism, which is supposed to protect farmers against import surges, were 'extremely inadequate' and would render the mechanism 'ineffective and non-operational'. G-33 members, which include China, India and Indonesia, have also insisted that developing countries must be allowed to exempt 8 percent of their total agricultural tariff lines from any cuts. This demand is included in the February draft in brackets.

However, the text also contains optional language proposed by the US that would subject all agricultural products to tariff reductions, including the 'special' products that developing countries may shield from standard cuts due to food security, livelihood security and rural development concerns. While the G-33 said this proposal should not be included in the modalities even as an option, US Trade Representative Susan Schwab expressed 'alarm' at both the 8-percent exemption and potential tariff increases under the SSM.

The EU and other countries with highly protected farm sectors have rejected out of hand an additional requirement that developed countries' agricultural tariffs be cut by at least 54 percent on average. They have also argued that the draft's provisions would require too drastic expansion of quotas for 'sensitive' products. See page 3 for details of the agriculture draft.

### Questions of Balance Continue to Dog NAMA Negotiations

As happened in July, the revised text non-agricultural market access (NAMA) sparked stronger and more critical reactions than the agriculture draft. The main change in the new draft was the removal of long-established indicative numbers for derogations from standard tariff cuts accorded to developing countries. Despite their contrasting views on how extensive such

*Continued on page 2*

# Bridges

## Between Trade and Sustainable Development

Published by the International Centre  
for Trade and Sustainable Development.

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

### Regular ICTSD contributors include:

Trineesh Biswas  
M. Kamal Gueye  
Victoria Hanson  
Jonathan Hepburn  
Malena Sell  
Mahesh Sugathan  
David Vivas

The opinions expressed in signed contributions to *BRIDGES* are the authors' and do not necessarily reflect the views of ICTSD.

Manuscripts offered for publication are expected to respect good journalistic practice and be compatible with ICTSD's mission. Guidelines for contributors are available on request, as well as on ICTSD's website.

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

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

### Annual subscription:

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

The *BRIDGES* series of publications is possible in 2007–2008 through the generous support of the UK Department for International Development (DfID).

It also benefits from contributions from ICTSD's core funders: the development co-operation agencies of Denmark, the Netherlands and Sweden; the Ministry of Foreign Affairs of Finland, Christian Aid (UK), NOVIB (NL) and Oxfam (UK).

See inside back cover for information on other ICTSD periodicals.

flexibilities should be, both developed and developing countries have complained that taking out the numbers increases uncertainty. USTR Susan Schwab said the removal created "the prospect that we must duke it out over whether there should be more flexibility than in the original." The EU called the text 'a step backwards'.

The NAMA-11 coalition of developing countries also called on the chair to reinstate the figures. In addition, it criticised the paper for still lacking balance with the agriculture text, since it retained the controversial ranges for formula tariff cuts included in the July draft.

Prior to the release of the new draft, Argentina warned that it would not be in a position to accept revised NAMA modalities, if they did not include a 25-point gap in developed and developing countries' tariff reduction coefficients, as well as "wider flexibilities, in line with those considered in the negotiations on agriculture." See page 5 for further details.

### Revised Texts Expected, Timing of Mini-ministerial Uncertain

Several countries have called for a further revision of both the agriculture and NAMA drafts before starting 'horizontal' discussions on potential tradeoffs between concessions on agricultural subsidies and tariffs on the one hand, and market access for manufactured goods on the other. The chairs of both negotiating groups have said they are willing to revise their texts but only when, and if, Members bring something new to the table.

Ambassador Crawford Falconer, who chairs the crucial agriculture negotiations, admitted to a degree of frustration after the first week of consultations on his 8 February draft. He told reporters that unless negotiators changed tack during consultations held in late February, he would not be able to revise the text by early March as many had hoped.

NAMA chair Donald Stephenson has also indicated he does not yet have enough to go on to issue a second revision of the industrial market access draft.

It is increasingly obvious that NAMA and agriculture are so inextricably linked that seeking more convergence in either area in isolation is yielding diminishing returns. At the time of writing, an informal understanding appeared to be forming that the horizontal negotiating phase among Geneva- and capital-based senior officials would not commence in earnest until the latter half of March.

The EU and the US reportedly favour convening a ministerial-level meeting sometime in (probably late) April to conclude the negotiations on the agriculture and NAMA modalities.

Many other Members, including India, have emphasised that substance rather than predetermined deadlines should drive the process, and a ministerial meeting should not be called until further groundwork provides a clear indication of a successful outcome. This could delay the ministerial until June or even July, some trade sources have speculated.

The agriculture and NAMA chairs share the view that the pace should be driven by substance. So does WTO Director-General Pascal Lamy, although he has repeatedly reminded Members that in order to conclude the Doha Round negotiations by the end of this year they will need six to eight months after the agriculture and NAMA modalities deal has been struck.

Regardless of the timing, some 35–40 ministers are expected to attend the modalities meeting. Participation is likely to reflect that of the small group agriculture and NAMA negotiations among trade envoys representing all groups and alliances.

The key challenge facing the negotiators can be summed up in just one word: balance. Balance concerning developed and developing country obligations and interests within future disciplines in agriculture and NAMA. Balance with regard to the level of ambition between those two areas and, finally, enough comfort for Members seeking to ensure that other issues, such as services, anti-dumping and fisheries subsidy rules, will not be sidelined once agreement has been reached regarding agriculture and industrial market access.

## New Ag Text Provides More Details but No Consensus

Although the revised draft modalities released by chair Crawford Falconer on 8 February did not contain any major surprises, some of the proposed new disciplines on flexibilities for developing countries have raised stiff opposition from a number of WTO Members.

The new text proposes few changes to the controversial ‘headline numbers’ for overall percentage cuts to tariff and subsidy levels from the previous draft issued in July 2007 (see Bridges Year 11 No.5 page 6 for details). Members generally recognise that these can only be determined at the political level by ministers, who will also take into account the level of ambition in industrial market access (see page 5).

### Subsidy and Tariff Cut Changes from the July Draft

The new text removes brackets around cuts to most trade-distorting Amber Box’ subsidies – which would be 70 percent for the EU, 60 percent for the US and Japan, and 45 percent for all other countries – suggesting that consensus might have emerged on this issue.

Another change from July is the increased front-loading of subsidy reduction commitments by the EU and the US, with both required to cut overall trade-distorting support by one-third on the first day of implementation, and Amber Box support by an undetermined amount (a 25-percent figure is mentioned in brackets). In addition, if Members exceed their limits for either product-specific or overall Blue Box support, the entirety of this support must be counted in the Amber Box.

The February draft reflects a continued stalemate over Green Box payments – the WTO category for subsidies that ostensibly cause not more than minimal trade distortion. The text provides two options for updating the base periods used to calculate ‘decoupled’ support, i.e. payments not tied to the amount of production. Both options aim to ensure that such updates do not affect producer expectations or decisions. The chair also proposes more flexibility for developing countries to account for some food stockholding payments under the Green Box.

While the deadline for eliminating developed country export subsidies has long been established as 2013, the new draft proposes that developing countries eliminate such support by the end of 2016.

In line with what had been proposed by the G-20 group of developing countries, the revised text asks developed countries to make a minimum average tariff cut of 54 percent, even if the distribution of their tariffs in the tiered reduction formula would have otherwise resulted in a lower average reduction. The comparable figure for developing countries is 36 percent. After the text’s release, the EU and the G-10 group of mainly developed countries with heavily protected agricultural markets promptly rejected the notion of an average tariff cut.

Unlike the July modalities, the latest document is drafted entirely in the form of legal text. While some of text is ‘clean’, other parts contain brackets denoting lack of consensus.

### Special Products: Number of Options Reveals Extent of Disagreement

The continuing divisions among major exporters and importers of agricultural products are reflected by numerous brackets in the section that deals with the number and treatment of the Special Products (SPs) that developing countries may designate for gentler tariff cuts on the basis of food security, livelihood security and rural development criteria.

The February draft suggests that consensus exists on allowing developing countries to designate a minimum of 8 percent of agricultural tariff lines as ‘special’, without any reference to food and livelihood security ‘indicators’ (a list developed by the G-33 group of developing countries is attached as an annex). The text further proposes a maximum of 12-20 tariff lines, with the additional commodities guided by indicators that would demonstrate that a product satisfies food and livelihood security and rural development criteria. Some exporters, however, argue that all SP designations should be guided by such indicators.

Bracketed figures in the text provide several different options for the tariff treatment of these products. Duties on 6 percent of all tariff lines could have to be reduced by either 8 or 15 percent. A further 6 percent could face cuts of either 12 or 25 percent. A possible third band of 8 percent of tariff lines – which could either replace part of the first two bands, or round out a total of 20 percent – could be exempt from cuts. Yet another option, however, would explicitly prohibit the complete exemption of any SPs from tariff reduction.

Countries that recently acceded to the WTO would be allowed slightly greater flexibility, such as a larger number of SPs and lesser cuts, most likely to accommodate the particular needs of China.

In a statement released on 15 February, the G-33 welcomed the inclusion of its proposed SP indicators in the text, but strongly opposed even a bracketed option that no special products could be completely exempt of tariff cuts. “The percentage of zero-cut for SPs shall be 8 percent of total agriculture tariff lines,” the group stated, and the maximum tariff cut for any SP should be 12 percent. In addition, developing countries must be allowed to designate at least 12 percent of tariff lines as ‘special’.

### Special Safeguard Mechanism

In the new text, chair Falconer made his first attempt to set out a potential legal structure for the special safeguard mechanism (SSM) that is to be negotiated with a view to providing developing country farmers a measure of defence against import surges and price depressions.

Reflecting the views of the G-33, the February draft states that a safeguard measure can be triggered by either a price-based or a volume-based import surge (a number of countries with strong export interests had argued that both triggers should be necessary to invoke the SSM). However, separate SSM duties cannot be simultaneously applied to a product under both criteria.

*Continued on page 4*

The text envisages different responses to low, medium and high volume surges. Under one set of figures, a 5 to 10 percent increase in average import volumes over a three-year period would be enough to trigger additional duties equalling up to 40 percentage points or half the current bound rate, whichever is higher. Another set, closer to exporters' demands, would not allow SSM duties until imports reached 30-35 percent above the base level, and even then the additional tariffs could not exceed one-fifth of the bound rate.

Other bracketed provisions would limit even the highest safeguard duties within the maximum 'bound' ceiling tariff levels established prior to the Doha Round. The possibility to temporarily exceed those rates has been one of the key demands of the G-33.

The price-based safeguard, provisionally triggered by a 30 percent price drop, would be similarly restrained – additional duties would not be enough to make up the difference between the new import price and the average.

Least-developed countries, which are not required to cut tariffs in the current round, could impose safeguard duties exceeding pre-Doha bound rates by some 20 percentage points, according to a bracketed provision. So would small and vulnerable economies, albeit in limited circumstances.

Perhaps most controversially, the February draft contains an option to base safeguard duties on (generally much lower) applied rates rather than bound tariffs. It also suggests a possibility of terminating the SMM when the implementation for Doha Round commitments expires.

The G-33 called the draft text on the SSM 'extremely inadequate'. The group said the proposed disciplines "would eventually and only provide a stringent, restrictive, burdensome, ineffective and non-operational mechanism for developing countries and LDCs."

It also objected to the differentiation in treatment among developing countries as 'simply unacceptable'. The SSM "shall not be designed with layers and multiple of limitations for developing countries and LDCs," the coalition stated, adding that the mechanism must be permanent "as long as there is abnormality and imbalances in the world trading system."

### Sensitive Products: Major Differences Unresolved

Both developed and developing countries will be able to designate certain products as 'sensitive' (no particular criteria required). The 8 February text leaves unchanged the numbers suggested for such tariff lines in July (4-6 percent for developed countries, and 6-8 percent if the country has more than 30 percent of its tariff lines in the top tier that is slated for the steepest cuts under the general tariff reduction formula).

Sensitive products are eligible for smaller tariff cuts in exchange for expanded import quotas. The more the cut deviates from that required by the general formula (the options range from one-third to one-half or two-thirds), the more the existing quota must be enlarged.

Developing countries' sensitive product allocation will be one third higher than that of developed countries, and their quota expansion obligation one-third lower.

The text does not resolve the question of how specific the sensitive product designation can be. The Cairns Group of agricultural exporters favours selection at the 6-digit tariff level (i.e. broad categories such as bovine meat or cheese, say), while importers such as the EU want the designation to take place at the more detailed 8-digit level in order to pinpoint products of particular import sensitivity across a wide variety sectors (for example, only some cuts of beef or certain cheeses). The draft includes both camps' approaches as alternative options.

### Tropical Products and Preference Erosion

Negotiating mandates to liberalise trade in tropical products while addressing the effects of preference erosion have pitted Latin American liberalisation proponents against countries in the African, Caribbean and Pacific (ACP) group of countries that have long benefited from preferential access to major markets, especially on products such as bananas and sugar. The chair's text presents different options for both issues, and includes lists of products for each mandate tabled by the respective bloc.

One option is for tariffs on tropical products below 25 percent to be eliminated, while the rest are subject to an 85 percent reduction, with no commodities in the tropical product list eligible to be designated as 'sensitive'. Another would subject most tropical products facing tariffs of over 10 percent to the highest percentage cut required by the standard reduction formula (even if they would not otherwise fall in the highest tier).

For preference erosion, one of the options would postpone tariff reduction on affected products for ten years – the ACP position. The other provides for a longer implementation period for tariff cuts on those products that account for a significant share of preference-receiving countries' agricultural exports to preference granters.

Nevertheless, the text takes only small steps to resolve the stand-off between the two camps: a bracketed provision states that when the products listed for each issue overlap, tropical product liberalisation shall prevail, except for a limited number of specific products on which negotiators have yet to agree. Not surprisingly, bananas and raw cane sugar are on the list for tropical products as well as that for preference erosion.

The February draft also provides disciplines for curbing tariff escalation, i.e. tariffs that rise according to the degree of processing (from raw cocoa beans to chocolate, say).

### Cotton Subsidies

Like the July text, the February draft retains the formula proposed by a group of least-developed African countries (dubbed the Cotton-4), which would result in a faster and steeper reduction of cotton subsidies even in the event that the Doha Round provides only shallow cuts to domestic support ceilings for the Amber and Blue Boxes.

The US in particular continues to oppose the Cotton-4 proposal, but declined to provide an alternative for this draft. Its position remains that any special treatment for cotton can only be addressed once the overall subsidy limits are decided.



# Revised NAMA Draft: Nemo Tenetur ad Impossibile

The most significant change in the February draft modalities on industrial market access compared to its July predecessor is that it reflects much more accurately the profound lack of consensus among WTO Members on nearly all key issues.

The July draft on non-agricultural market access (NAMA) was denounced as unacceptably imbalanced by a coalition of developing countries known as the NAMA-11 as soon as it was issued. The group argued that it was far more ambitious than the agriculture text released at the same time, as well as placed disproportionate liberalisation demands on developing countries. In October, around 60 developing WTO Members issued a counterproposal seeking substantial changes to the text (Bridges Year 11 No.6, page 1).

No perceptible progress has occurred since then. The NAMA-11, supported by many other developing countries, has stood firm in its rejection of the July text as a basis for negotiations. In contrast, most developed countries view that document as a barely adequate starting point for discussions on more robust market access commitments from major developing economies.

Faced with this impasse, NAMA chair Don Stephenson issued a revision that is “more of a record of where we actually stand in the negotiations” than a draft legal text. Most elements of the proposed modalities are accompanied by comments that make plain the continued divergence among Members, often along with suggestions for possible ways toward consensus.

There are two main points of contention. The first pertains to the coefficients in the formula that will determine new maximum tariffs. According to the 2001 Doha ministerial declaration, ‘less than full reciprocity in reduction commitments’ will be required from developing countries. The second hotly disputed element concerns additional flexibilities available to developing countries under ‘special and differential treatment’ (see page 1 for reactions).

## Tariff Formula Coefficients

The February text retains the coefficients proposed in July: 8 or 9 for developed countries (resulting in a new maximum tariff of less than ten percent) and 19-23 for developing countries (capping their tariffs somewhere in that range). About 30 developing countries will be required to make formula cuts, although limited exceptions remain to be negotiated.

The chair acknowledged that there was no consensus on the coefficients. Without mentioning any Members by name, Mr Stephenson noted that some countries (i.e. the EU and the US) seek coefficients of 10 for rich countries and 15 for developing nations, while others (i.e. the NAMA-11) want a difference of at least 25 points between developed and developing country coefficients. Chair Stephenson also referred to the so-called ‘middle ground’ proposal from ten developing countries, which have suggested figures similar to those in the July draft.

## Flexibilities Most Likely to Determine Acceptable Coefficients

Where the new draft breaks with the July 2007 text is on the ‘flexibilities’ that will determine how many products, and what proportion of manufacturing imports, developing countries will be able to shield from the full force of tariff cuts.

The July text would have allowed developing countries to subject 10 percent of tariff lines to reductions half as steep as those ordinarily required. Alternatively, they could have excluded 5 percent of tariff lines from reduction altogether. The figures, still in square brackets denoting lack of agreement, were based on those suggested in the July 2004 framework agreement, which serves as a starting point for the current negotiations.

The only real surprise in the text was the removal of numbers altogether from the flexibility options. Chair Stephenson has come under considerable criticism for this move, with both developed and developing countries complaining that leaving the brackets empty is a step backward. Mr Stephenson explained that his decision arose from the realisation that Members would need to resolve the flexibilities “before they are going to be able to resolve the coefficients.”

## Explore ‘Sliding Scale’

Chair Stephenson noted that his consultations had revealed that many countries were willing to consider a tradeoff between the flexibilities and the coefficient. This, he concluded, “strongly suggests a ‘sliding scale’ approach to achieve consensus, especially as it might provide a basis upon which to agree different outcomes for different developing countries.”

“I make the [sliding scale] proposal because some Members tell me they could accept a higher coefficient for countries that agree not to use their flexibilities; some Members tell me that they could accept a lower coefficient if the flexibilities were increased; some Members tell me that they could consider increased flexibilities if the coefficient was low enough,” Mr Stephenson said.

The chair urged negotiators to make the tradeoffs between the coefficient and the flexibilities more explicit. This would clarify the options before senior officials and ultimately ministers, increasing their chances of striking a compromise, he said.

## Additional Flexibilities

The February text suggests that recently acceded WTO Members (RAMs) could have an implementation period two to five years longer than the eight pencilled in for all developing countries. Products for which accession-related tariff cuts are still being implemented would benefit from a two to three year grace period before Doha tariff cuts start phasing in. These provisions apply to the four RAMs – China, Taiwan, Croatia and Oman – that will have to subject their tariffs to the reduction formula.

The new text also proposes less stringent liberalisation requirements for small and vulnerable economies and countries with binding caps on fewer than 35 percent of all tariff lines than those suggested in the July 2007 draft.

The chair noted that there was no consensus on any of Members’ proposals seeking extra flexibility on tariff cuts for customs unions.

## Services Chair's Report Reflects Large Gaps in Positions

A new report on the state of play of the services negotiations shows that Members agree on little else than the need for new deadlines for the submission of revised market opening offers and updated schedules of concessions.

A number of (mostly developed) countries had pushed for an ambitious text on services that could be formally adopted more or less in parallel with the results of the modalities negotiations on agriculture and industrial market access.

Instead, Ambassador Fernando de Mateo issued on 12 February a factual progress report on his consultations on the elements that should be addressed in order to conclude the services negotiations. Most of those elements – listed in paragraph 4 of his report – have been already agreed in other documents, such as the services annexes of the July 2004 Framework Agreement and the 2005 Hong Kong Ministerial Declaration. Bolivia, Cuba and Venezuela have argued throughout that this fact makes the issuance of a services text unnecessary.

Since there is no substantive disagreement on any of the provisions, paragraph 4 – with possible slight changes in wording – could conceivably be adopted by Members as a 'services text'. It does not, however, add anything to previous commitments.

### Non-controversial Elements

Members agree that new deadlines should be set for the submission of revised offers and final draft market access schedules in services. No dates are proposed.

Other (near) consensual elements reiterate previous calls for the conclusion of mandated negotiations on domestic regulation disciplines, as well as emergency safeguard measures, government procurement in services and services-related subsidies. All of these rules-related negotiations were originally meant to conclude before the submission of final market access offers.

Paragraph 4 also suggests that Members shall strive to develop 'appropriate mechanisms for according special priority' to sectors and modes of services supply of interest to least-developed countries, as well as complete the consideration on special and differential treatment provisions for developing countries in the Committee on Trade

and Development. It further confirms that the concerns of small economies and recently acceded WTO Members shall be taken into account in the negotiations.

With regard to the bilateral and plurilateral request-offer market opening negotiations, the chair noted that some Members considered progress achieved so far satisfactory compared to other areas of the Doha Round, while "others took the view that so far progress fell well short of responding adequately to their requests." Nevertheless, he stressed the membership's 'shared view' that major strides were needed to reach a successful conclusion of the negotiations.

### Elements of Significant Divergence

Prudently, the chair refrained from suggesting compromise language on any of the additional proposals put forward by Members. He noted that 'significant divergences' existed on some these, and listed the suggestions as presented by delegations without commenting on their potential to eventually command consensus.

Among those least likely to do so, is the suggestion that the "same level of ambition and political will as reflected in the Ag and NAMA modalities is required for services."<sup>1</sup> The proponents also said that new offers should (i) reflect current levels market access and national treatment, and (ii) provide new market access where market impediments remain.

Many developing countries have repeatedly stressed that there is no mandate for an equivalent level of ambition in agriculture, NAMA and services in any of the texts that form the basis for the services negotiations. Brazil warned in November that the services negotiations could face 'complete collapse' should the approach suggested by the developed country group prevail.

The chair's report also contains a 'middle-ground' proposal from Chile, Hong Kong, Peru, Singapore and Turkey, which asks Members to include in their next offers: (i) a broader range of sectors and modes of supply, and (ii) deeper commitments for these sectors, taking into account special and differential treatment provisions for developing countries.

A third non-agreed proposal refers the provision of market access "to sectors and modes of supply or export interest to developing Members, such as Modes 1 and 4 (cross-border supply and temporary access for services suppliers to foreign markets)."<sup>2</sup>

### Initial Reactions

European and US officials expressed disappointment that the chair's report did not go beyond suggesting what was already agreed in Hong Kong. In particular, they called for a 'signalling conference' – preferably before the ministerial meeting on agriculture and NAMA modalities tentatively planned for March-April – where WTO Members would indicate their willingness to improve the market access commitments in services that they had offered so far.

Australia's trade minister Simon Crean cautioned that his country "could not support a Doha package that doesn't include an ambitious outcome on services. Our starting point must be locking in most of the market openness that is currently available to Australian services exporters, but we also need to build new market access in international markets and sectors. This is the core political message that is needed to move the services negotiations forward. The final services text needs to provide strong and clear guidance on the level of ambition we can expect in revised services offers."

### ENDNOTES

<sup>1</sup> Australia, Canada, the EU, Japan, Korea, New Zealand, Norway, Taiwan, Switzerland and the US

<sup>2</sup> Text proposed by Argentina, Brazil, China, India, Pakistan and South Africa

# Rules Negotiations Heading for Choppy Waters

The first meeting on proposed changes to WTO rules on anti-dumping and subsidies showed no narrowing of differences between Members, casting doubt on how these issues could be reflected in upcoming negotiations across the different areas under the Doha Round mandate.

On 30 November 2007, the chair of the rules negotiations, Uruguay's Ambassador Guillermo Valles Galmés, released a draft text on possible amendments to existing disciplines on trade remedies and subsidies. Unusually, the 93-page document contained no blanks or brackets denoting lack of consensus (Bridges Year 11 No.7 page 2). Criticism predictably promptly followed along well-established faultlines between those wishing to curb the use of anti-dumping and countervailing measures, and those (mainly the US) intent on making the circumvention of such measures more difficult.

Reactions on new restrictions on fisheries subsidies were also divided. The 'Friends of Fish' group came out largely in favour of the chair's approach, while countries that heavily subsidise their fishing industries, as well as some developing countries seeking more concessions to support their artisanal fishing sectors, objected to the proposed reforms.

## Zeroing under Fire

Twenty countries submitted new legal text explicitly prohibiting 'zeroing' – a method of calculating dumping margins that can result in an inflated anti-dumping duty determination – in revised WTO trade remedy disciplines.<sup>1</sup> The proposal reflects the near-unanimous condemnation of the inclusion of certain forms of zeroing in the 30 November draft text (Bridges Year 11 No.7 page 10).

Although virtually all specific aspects of zeroing challenged by complainants in anti-dumping disputes have been condemned by the WTO, dispute settlement panels (or the Appellate Body) have shied away from declaring the entire practice inconsistent with multilateral trade rules.

While the US – the country targeted by the anti-zeroing camp – has modified some of its procedures as the result of these rulings, it continues to use the method in others, and has repeatedly blamed panels and the Appellate Body for over-reaching their authority in interpreting WTO rules.

Testifying to the ongoing debate regarding the practice, Mexico on 4 February appealed a December 2007 panel ruling that had upheld US use zeroing in administrative reviews (one of the instances allowed in the draft rules text) despite a previous condemnation by the Appellate Body. WTO arbitration is also currently underway on Japan's request to impose trade sanctions worth US\$248 million due to alleged US non-compliance with an Appellate Body zeroing ruling dating from January 2007.

## Other Trade Remedy Concerns

Other issues raised during the first round of consultations on the rules draft included the proposal to automatically terminate anti-dumping measures after ten years (some Members wanted this reduced to eight or even five years), the inclusion of stronger anti-circumvention disciplines (one of the main US priorities with strong opposition from China and Hong Kong in particular), and a 'public interest' clause, which would oblige anti-dumping authorities to take into account the views of domestic interested parties that would be affected by the imposition of an anti-dumping duty (favoured by many countries frequently targeted by anti-dumping investigations but opposed by the US).

Kenya expressed disappointment over the draft text's omission of many elements of its proposal to strengthen special and differential treatment. Among these were technical assistance to enhance developing countries' capacity to implement WTO disciplines on anti-dumping and subsidies, as well as allowing developing country governments to assist affected industries or the agricultural sector in bringing complaints to investigating authorities.

Kenya's intervention was supported by the African, Caribbean and Pacific (ACP) Group of States, as well as the African Group.

## Fisheries Subsidies

Overall, speakers commenting on the disciplines suggested for fisheries subsidies fell into two long-established camps. Those in favour of strong new WTO rules – including Argentina, Brazil, Ecuador, Iceland, New Zealand, Pakistan and the US – praised the text, while the countries such as Canada, the EU, Japan and Norway said the list of banned subsidies was too drastic. Among the latter's concerns were prohibitions of government support to bait, fuel, insurance and port infrastructure. The EU, for instance, highlighted the need for latitude to assist small-scale fishermen affected by high oil prices.

## Debate on Small-scale Fisheries

India argued that the conditions attached in the draft to developing countries' right to support small-scale fishing would in effect render the special and differential treatment exception inoperable.

The exception is embodied in Article III. 2(b)(3) of the proposed annex on fisheries subsidies, which allows developing countries to subsidise the acquisition, construction, repair and modernisation of fishing vessels exceeding 10 metres in length, "including subsidies to boat building or ship-building facilities for these purposes" if the vessels are used in their exclusive economic zones. In addition, the boats' fishing activities must be targeted at 'particular, identified stocks' that have been "subject to prior scientific status assessment conducted in accordance with relevant international standards, aimed at ensuring that the resulting capacity does not exceed a sustainable level; and [the] assessment has been subject to peer review in the relevant body of the United Nations Food and Agriculture Organisation."

A number of developing countries raised concerns over the 10-metre length cap for

*Continued on page 8*

boats eligible for acquisition, construction or modernisation subsidies.

The Solomon Islands, Barbados and South Africa argued that the text's disciplines on port infrastructure spending would limit developing countries' policy space for nurturing domestic fisheries industries.

Canada, the EU, Japan, Norway and South Korea objected to the fact that the proposed small-scale fisheries exemptions from general subsidy disciplines applied only to developing countries. Proponents of a strong anti-subsidisation regime were largely unconvinced by the arguments these countries presented to substantiate the claim that their artisanal fishing sector contributed only marginally to overfishing. New Zealand, for instance, cited an FAO report, according to which small-scale fishermen made up 80 percent of the European and 90 percent of the Japanese fishing fleet. See also analysis of the fisheries annex on page 21.

### What Next?

Led by Japan and South Korea, countries opposed to the proposed zeroing language are pressing for a more 'balanced' rules draft to be issued before the Doha Round negotiations move to a horizontal phase where Members will consider trade-offs across different sectors. For the US, the existing zeroing provisions are a 'must have' if rules are brought into mix before the modalities on agriculture and industrial market access are decided. India is equally keen to ensure its concerns over the fisheries text are taken on board in the process.

In view of such conflicting desires, rules are an unlikely candidate for initial horizontal talks, which are expected to focus on agriculture and industrial market access. Meanwhile, the negotiating group on rules was scheduled to continue discussions on anti-dumping and fisheries subsidy disciplines in the latter half of February. Members are expected to take up issues proposed, but not included, in the draft text in March.

### ENDNOTE

<sup>1</sup> Brazil, Chile, China, Colombia, Costa Rica, Hong Kong, India, Indonesia, Israel, Japan, Mexico, Norway, Pakistan, Singapore, South Africa, South Korea, Switzerland, Taiwan, Thailand and Vietnam

## EPAs: A Threat to South-South Trade?

Brazil has raised serious concerns over potential new constraints to South-South trade created by the EU's economic partnership agreements (EPAs) with African, Caribbean and Pacific countries.

In a statement presented to the WTO's General Council on 5 February, Brazil singled out the negative effects of the so-called 'most-favoured-nation' (MFN) clause included in EPAs.

Such provisions are present – with slight variations – in all the EPA blueprints. So far, only the 15 Cariforum member countries have signed a fully fledged regional agreement with the EU. A number of other African, Caribbean and Pacific (ACP) countries have initialled interim deals on goods trade, but negotiations continue on other aspects of their new trading relationship with Europe. These include services, investment, competition policy, government procurement and intellectual property rights (Bridges Year 11 No.7 page 17).

### MFN Clause in the Caribbean EPA

The Caribbean EPA – the only one to be concluded so far – requires Cariforum countries to accord to the EU any more favourable treatment that the region or any of its individual member states grants to 'any major trading economy' under a free trade agreement concluded after the signature of the EPA.

A 'major trading economy' in turn is defined as any developed country, or "any country or territory accounting for a share of world merchandise exports above 1 percent in the year before the entry into force of the free trade agreement." In case of an FTA concluded with a group of countries, the obligation applies if the group's collective share of world goods exceeds 1.5 percent. Parties to the EPA have the possibility of waiving the MFN obligation by mutual consent.

### Disincentive for Expanding Trade among Developing Countries

Brazil told the General Council that an MFN obligation would leave the ACPs without any "incentive to negotiate agreements with other developing countries containing market access conditions that are more favourable than those the EU might enjoy. [...] In effect, the conditions the EU enjoys in the market of the ACP countries would be the 'ceiling' for access in those markets, as those countries would have to take into account the competitiveness of the EU's industry when negotiating with other developing countries."

MFN clauses would seriously impact South-South trade, Brazil argued. They would, for instance, "discourage or even prevent third countries from negotiating FTAs with EPA parties." Brazil also noted that such provisions had the potential to undermine initiatives aimed at integrating developing countries into the world trading system, including ongoing negotiations on the Global System of Trade Preferences, and the efforts some developing countries are making to extend of duty- and quota-free market access to least-developed countries.

Brazil said it was raising the issue partly out of systemic and legal concerns that would affect all WTO Members (and developing countries in particular), but also due to 'very concrete objections' arising from the MFN clauses' implications for its own trade with other developing countries, which now represents 55 percent of Brazilian total trade.

About a dozen developing countries – including China, India and South Africa – expressed support for Brazil's intervention.

Concerns related to bilateral trade arrangements are usually discussed at the WTO Committee on Regional Trade Agreements. A Brazilian source noted, however, that the 'legal limbo' surrounding the EPAs, none of which have been notified to the WTO, would make it difficult to conduct a timely examination of the MFN provisions.



# Pressure Mounts on EU Biotech Approval Regime

After missing an 11 January deadline for lifting restrictions on the approval and marketing of biotech products, the European Union faces the possibility of trade sanctions in the high-profile trade and environment dispute.

At issue is the EU's compliance with 2006 panel rulings that faulted its application of marketing approval procedures for genetically modified organisms (GMOs). The deadline was originally set for 21 November 2007, but the three complainants in the case – Argentina, Canada and the United States – agreed to extend it until 11 January 2008.

Since then, Argentina has prolonged the deadline until 11 June, while Canada has agreed to an extension until 30 June. On its part, the US has said it will allow the EU an unspecified grace period to sort out remaining problems before following through with retaliation proceedings already in the pipeline.

While the EU can reasonably argue that its general approval process now conforms to WTO requirements, the national-level safeguard measures imposed by a number of member states challenged by the complainants remain a serious problem (Bridges Year 10 No.7 page 13). Austria, Hungary and Poland continue to refuse the marketing or cultivation GMO varieties cleared by the central European Food Safety Authority (EFSA). To make matters worse from the exporters' point of view, France decided on 11 January 2008 to disallow the cultivation of the only genetically modified crop – Monsanto's corn strain 810 – approved by EFSA for such a purpose.

President Sarkozy said the decision was based on doubts raised by a committee composed of scientists and representatives of consumers, environmental groups, farmers and industry on the environmental impacts of cultivating the strain. "[The decision] means simply that when the precautionary principle is at stake, I will make the political choice to put my country on the frontline of the environmental debate," he said in defence of the ban. On 9 February, France formally notified the European Commission that it was seeking to invoke a safeguard clause in EU law in order to keep the prohibition in place despite an EU-wide cultivation approval dating from 1998.

French critics, however, have accused the government of wilfully misrepresenting the committee's findings. Monsanto contends that the committee did not turn up any new scientific evidence of environmental damage. Before the safeguard clause can be activated, France needs to present such evidence to EFSA for evaluation, after which the EU will decide whether the move is justified.

## US Patience Wearing Thin

The Office of the US Trade Representative (USTR) warned on 14 January that the patience of the country's stakeholders was 'close to exhaustion'. Nevertheless, the agency said after the expiry of the January deadline that it would 'suspend for a limited period' the retaliation proceedings it had already initiated "in order to provide the EU an opportunity to demonstrate meaningful progress on approval of biotech products."

USTR also stressed that it was 'hard to overstate' the United States' disappointment regarding the new French cultivation ban on MON810, particularly as a WTO dispute settlement panel had already found a similar Austrian ban insufficiently supported by science.

## Retaliation Prepared

The temporary cessation of hostilities notwithstanding, the US has taken preliminary procedural steps toward eventual trade sanctions.

On 17 January, it requested the WTO's Dispute Settlement Body to authorise retaliatory action since the EU had failed to comply with previous rulings in the GMO dispute within

the specified time period. Although the US has promised to seek a formal confirmation of non-compliance before pressing ahead with sanctions, the retaliation request gives a hint of the consequences the EU could face in case the US decides to take matter further.

According to the request, US action will target tariffs on industrial and agricultural goods, as well as the suspension of other concessions and obligations under the Agreement on Sanitary and Phytosanitary Measures, and the Agreement on Agriculture. While the request does not provide any details on specific products, USTR has published a formal notice in the Federal Register seeking public comments on a possible draft retaliation list.

As for the amount sought for the sanctions, the request only notes that the level would be equivalent to the annual lost value of US shipments to the EU. For biotech crops intended for cultivation, the lost value of royalties and licensing fees for each category of biotech crop would also be taken into account in the calculation.

## Sanctions Complicated to Assess

Should the US follow through with the retaliation proceedings, it would most likely fall upon the WTO to ultimately establish the financial value of its trade losses. This would involve a determination by an arbitration panel of what the level of US export revenues from GMO trade would be if the WTO-inconsistent measures did not exist.

The panel would not have an easy task, however, given that there is no reliable point of comparison since the EU has never really had a market for most of the products concerned. The evaluation of hypothetical US export losses would also have to take into account the fact that European farmers' and retail outlets' cultivation and marketing decisions are shaped by deep-seated public distrust of genetically engineered food or feed products at least as much as by government regulations.

## Disputes in Brief

- A WTO panel has ruled against China's tariffs on auto parts in a dispute brought by Canada, the EU and the US. The complainants alleged that China had violated its market access commitments through the imposition of 25-percent import duty on certain car parts instead of its scheduled most-favoured-nation tariff of 10 percent. The higher duties are on par with the MFN tariff for entire cars, and apply to imported components that make up more than 60 percent of a vehicle manufactured in China.

The complainants had charged that China's motivation was to favour its domestic auto part industry and to push foreign manufacturers to relocate their production to China. In its defence, China had argued that the measure was intended to discourage manufacturers from importing entire vehicles as spare parts in order to circumvent the 25-percent tariff levied on fully assembled autos (Bridges Year 10 No.6 page 6).

The confidential interim ruling was handed to the parties on 13 February. Although the latter may seek changes to the report, panels have virtually never amended their interim findings following such comments. The final ruling is likely to be publicly circulated in March.

- The EU and the US are also reportedly on the verge of launching a dispute on China's restrictions on the supply of financial information services. At issue is a September 2006 administrative measure, which obliges foreign providers of financial information (Bloomberg, Dow Jones, Reuters, etc.) to go through an agent designated by the Chinese news agency Xinhua to distribute their products rather than offering their services directly to customers. China has argued at the WTO Committee on Financial Services that the suppliers cited by the complainants are news agencies rather than financial information providers. While China has agreed to open up its financial information sector, it has not undertaken any market access commitments on news agency services.

## EU Banana Regime Condemned Again

The European Union has suffered comprehensive losses in separate disputes brought by Ecuador and the United States against its import regime for bananas.

The complainants had requested compliance panels to determine whether the EU had reformed its banana import regulations as required by earlier WTO rulings in the dispute.

### The Case

By January 2006, the EU was to eliminate all import quotas and negotiate a new most-favoured-nation (MFN) tariff with its banana suppliers, making sure that new the regime would 'at least maintain total market access' for countries that did not benefit from preferences.

However, the EU import regime that entered into force on 1 January 2006, maintains a 775,000 tonne annual duty-free quota for suppliers from African, Caribbean and Pacific (ACP) countries, while applying a • 176/tonne MFN tariff to banana to all other exporters. The tariff was set unilaterally by the EU rather than negotiated with trading partners.

The complainants argued that these measures were contrary to the EU's stated intentions on the implementation of previous rulings, and did not allow MFN suppliers to maintain pre-2006 level of exports to the European banana market. The compliance panels found both the ACP quota and the level of the new MFN tariff inconsistent with the EU's WTO obligations. Compliance rulings are expected shortly on similar complaints from Colombia and Panama.

### EU Reaction

Commenting on the 10 December ruling on Ecuador's complaint, EU officials said the compliance panel had taken a 'purely formalistic approach', overlooking EU data that demonstrated that European imports of Latin American bananas were increasing.

In both disputes, the European Commission maintains that any findings regarding the ACP quota have been rendered 'irrelevant' by the full duty- and quota-free access for bananas granted to ACP countries as of 1 January 2008 under Economic Partnership Agreements (EPAs). Some analysts contacted by Bridges warned, however, that the current legal status of the EPAs remains unclear since only one of them has been formally concluded and none have been notified to the WTO (see related article on page 8).

The commission also blasted the US for bringing the dispute in the first place, since the country does not export any bananas to the EU. "The fact that US multinationals are engaged in exports of Latin American bananas to the [European] market should not be sufficient to establish a prejudice" to US trade interests, it argued. The multinational in question are Chiquita, Dole and Del Monte, all of which own large plantations in Latin America.

With regard to the claim that the • 176/tonne tariff is too high, commission spokesperson Michael Mann said it would be through 'negotiations, not litigation' that a solution satisfactory for all suppliers would emerge.

### More Negotiations Possible, Appeal Probable

It is not entirely clear when such negotiations would take place. Confidential discussions between the EU and MFN suppliers were held last year. However, sources contacted by Bridges were uncertain about the current status of those talks. In particular, they noted that the options for a lower MFN tariff proposed by the EU in July 2007 were conditioned on an end to WTO litigation on its banana import regime (Bridges Year 11 No.5 page 8).

In addition, the European Union is expected to appeal the rulings. Critics suggest the move is motivated by a desire to prolong dispute until a Doha deal on agricultural tariffs is clearer rather than a genuine belief that the Appellate Body would overturn the compliance verdicts.

# WTO to Determine Worth of Gambling Concession

Antigua and Barbuda, as well as Costa Rica, have requested the WTO to arbitrate how much the US should compensate them for withdrawing a bound market access concession in gambling services.

The gambling dispute between Antigua and Barbuda and the United States is often cited as a perfect illustration of how difficult it is for a small economy to make a much larger trading partner comply with WTO rulings. The case has already marked the first time in WTO history that a Member has opted to modify a scheduled market access commitment to implement an adverse dispute settlement ruling rather than changing the trade measure found inconsistent with multilateral trade rules. It will also break fresh ground in making the WTO responsible for determining the value of a withdrawn trade concession.

## Background in a Nutshell

In April 2005, the Appellate Body ruled that the exclusion of foreign service suppliers from certain sectors of the US gambling market was inconsistent with the US Uruguay Round commitment to fully open its recreational services to competition. This was particularly so with regard to gambling on horseracing, on which remote betting was – and still is – possible across state borders within the United States. The AB accepted, however, the US defence that its cross-border restrictions on other forms gambling were justified under Article XIV(a) of the General Agreement on Trade in Services (GATS) as measures “necessary to protect public morals or to maintain public order.” Those restrictions also apply to domestic service providers.

The US took no action to change its gambling regime following the AB ruling. Instead, it argued that its laws and regulations were already consistent with its GATS obligations, as well as underlined that the entire predicament it found itself in was due to a simple ‘oversight’, i.e. an inadvertent omission of an explicit carve-out for the betting and gambling sector when scheduling its market opening commitments in services trade.

In March 2007, a compliance panel rejected the first argument, and confirmed that the intentions of US negotiators when scheduling GATS commitments did not alter the fact that some US gambling regulations discriminated against foreign suppliers such as Antigua.

After the adverse ruling, the US took the unusual step of announcing a modification of its GATS schedule to correct the ‘oversight’ rather than changing its legal framework so it they would apply equally to domestic and foreign suppliers. Even some US lawmakers warned that the move could set a doubtful precedent for the implementation of adverse rulings, and possibly affect the entire WTO dispute settlement system (Bridges Year 11 No.7 page 12).

## Antigua Awarded Trade Sanctions

When the WTO has confirmed that a Member has not implemented a dispute settlement ruling, the complainant in the case can request authorisation to ‘suspend concessions or obligations’ under WTO agreements ‘equivalent to the level of nullification or impairment’ suffered as a consequence of the non-compliance. Simply put, this means the right to impose retaliatory measures, such as higher tariffs or the withdrawal of other contractual obligations.

On 21 December 2007, the WTO authorised Antigua and Barbuda to impose trade sanctions worth US\$21 million in retaliation for the United States’ failure to remove restrictions that discriminated against foreign suppliers. Antigua had sought US\$3.4 billion, while the US had suggested that just US\$500,000 would be sufficient to compensate losses suffered by the Antiguan gambling industry.

The arbitrators argued that the methods used by either party to determine the losses incurred by Antiguan service suppliers due to the US restrictions were flawed and that they therefore had “no choice but to adopt [their] own approach.” The panel said that the measurement of lost exports should reflect the ‘most likely scenario of compliance’ by the US, and deemed that

this scenario was likely to have been the removal of restrictions on horseracing bets alone. It then arrived at the US\$21 million figure, factoring in calculations suggesting that Antigua’s market share in the US would have diminished even in the absence of restrictions, due to increased competition from elsewhere.

Antigua’s legal counsel Mark Mendel objected to the calculation methodology adopted by the panel, but arbitration decisions cannot be challenged.

## Cross-retaliation on IPRs

As a rule, WTO Members should target any countermeasures to the sector where the defendant is found in breach of WTO rules, in this case concessions granted under the Agreement on Trade in Services.

However, the arbitrating panel noted that the “extremely unbalanced nature of the trading relations between the parties makes it [...] difficult for Antigua to find a way of ensuring the effectiveness of a suspension of concessions or other obligations against the United States” under the GATS alone. It therefore granted Antigua the right to suspend obligations under the Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPS) up to a level US\$21 million annually.

Antigua has identified copyrights, trademarks, industrial designs, patents and the protection of undisclosed information as the likely targets of its retaliatory action, but has not so far provided details on how it intends to put this into practice.

Prior to the gambling dispute, the WTO had authorised ‘cross-retaliation’ only once. This occurred in 2002, when Ecuador obtained the right to suspend intellectual property obligations following the EU’s failure to implement WTO rulings in the banana dispute, which involved both goods and services trade. The permission was never put into practice.

*Continued on page 12*

Some intellectual property experts have predicted that Antigua is likely to encounter problems in determining the precise value of actions such as non-enforcement of patents and copyrights, or the refusal to register trademarks. Nevertheless, as the arbitrators acknowledged, Antigua has no other effective means to make the US take any notice of sanctions due to its heavy dependence on US goods and services on the one hand, and the marginal interest of the country to US exporters on the other.

### Compensation Negotiations

The arbitration award marked the end of litigation between Antigua and the US. However, a new – and potentially more promising – avenue has opened for Antigua with the shift of focus to compensation for the scheduling modification. For the change to become effective, the US must reach agreement with all trading partners that deem themselves negatively affected by the change.

Compensation negotiations on the gambling case have involved eight WTO Members. All developed country parties – Australia, Canada, the EU and Japan – concluded bilateral agreements with the US last year. To Antigua's disappointment, the EU, which could have been a powerful ally in seeking substantial compensation, accepted a settlement that essentially consisted of the US making permanent existing – but not yet bound – market access in certain services sectors (Bridges Year 11 No.7 page 12). The details of Australia, Canada and Japan's compensation deals have not been made public.

The remaining four complainants – Antigua and Barbuda, Costa Rica, India and Macao – did not reach settlements with the US. Antigua and Costa Rica subsequently asked the WTO to arbitrate the level of compensation due to them following the scheduling change, with the former requesting just over US\$2 billion. Although unhappy with what the US had offered in earlier negotiations, India did not file formal arbitration claim. Officials from Macao declined to say whether their government had done so.

This is the first time that formal arbitration has been sought on a proposed scheduling change. The arbitrating panel will have three months to deliver its verdict from the day its members have been appointed.

## Brazil Scores Another Cotton Goal

**The US has not fully implemented WTO rulings in Brazil's cotton subsidy challenge, a compliance panel found in December.**

According to the compliance ruling made public on 18 December, US subsidies continue to cause 'significant price suppression' in the world market for cotton. The elimination of the Step 2 programme, which compensated processors and exporters for using US cotton, did not "affect the price suppressing effects of [continued US] marketing loan payments and counter-cyclical payments in the world market for upland cotton," the panel found. It further argued that without such payments the level of US cotton acreage and production would be considerably lower, and world prices therefore higher.

The panel also upheld Brazil's claim that US export credit guarantees constituted export subsidies since they were provided at 'well below' OECD minimum premium rates and were not designed to cover the long-term operating costs and losses of the programme. It therefore concluded that the payments amounted a circumvention of US export subsidy reduction commitments under the Agreement on Agriculture, as well as violated provisions of the Agreement on Subsidies and Countervailing Measures.

### US Appeals, Avoiding Imminent Cross-retaliation Threat

As was widely expected, the US appealed the compliance panel verdict on 13 February. The appeals process can take up to three months.

If the Appellate Body confirms the compliance panel ruling, Brazil can reactivate its 7 October 2007 request for authorisation to take countermeasures. In that request, Brazil argued that the asymmetries between the two economies were so great that simply imposing additional import duties on US products "would have a much greater negative impact on Brazil than on the United States."

It therefore sought the right to 'cross-retaliate' to 'the extent necessary' through the suspension of intellectual property protection obligations (in copyrights, trademarks, patents, industrial property rights and the protection of undisclosed information), as well as the suspension of concessions in several services sectors. Brazil requested the Dispute Settlement Body to grant it authorisation to take such countermeasures in the annual amount of US\$1,037 billion. The US has contested both the amount and the need for cross-retaliation, and asked the WTO to arbitrate matter.

Even if Brazil ultimately wins the compliance challenge, it will probably not be able to apply the sanctions until next fall at the earliest given the timeframes necessary for first the appeal and then the arbitration of the proposed countermeasures. Brazil's initial request for consultations in the cotton subsidy dispute dates from October 2002.

### New Panel Established on US Agricultural Subsidies

In related news, a single dispute settlement panel was established on 17 December to look into Brazil and Canada's allegations that, with the exception of 2003, the US exceeded its spending limit on the most trade-distorting subsidies every year between 1999 and 2005. Both countries argue that some US support has been improperly calculated as non-trade-distorting. Brazil also specifically named US export credit guarantees as part of its complaint.

Canada has openly admitted that part of its motivation in launching the dispute is to influence the direction of the US farm bill, which is currently nearing full congressional debate. The US told the Dispute Settlement Body that its farm programmes were designed to be WTO-compliant, and that some of the challenged measures had ceased to exist five years ago.

All parties have agreed that panel meetings in the dispute will be open to the public.



# Brazil Tyres: Policy Space Confirmed under GATT Article XX

Hannes Schloemann

Health and environmental policies, even import bans, enjoy not only the protection of GATT Article XX but also the sympathy of the Appellate Body – unless, that is, they discriminate without a suitable reason. *Brazil-Tyres* may make it easier to defend the ‘necessity’ of measures, but harder to fit them into regional trade agreements and other preferential arrangements.

Exactly three months after the European Union’s notice of appeal, the Appellate Body on 3 December 2007 issued its report on *Brazil – Measures Affecting Imports of Retreaded Tyres*. Like the panel (Bridges Year 11 No.4 page 7), the Appellate Body found Brazil’s import ban on retreaded tyres to be in principle justified under Members’ right to protect human, animal or plant life or health, embodied in GATT Article XX (b), but discriminatory in its application, and hence not covered by the provision’s *chapeau*.

Notwithstanding Brazil’s loss on points, the decision is no less than a slam dunk victory for Members’ environmental and health policies *vis-à-vis* trade disciplines. The Appellate Body’s message to WTO Members, not for the first time, is (almost) straightforward: if your objectives are legitimate and your measures reasonable, don’t worry too much about technicalities; the system is with you. But do worry about discrimination – we won’t tolerate that, unless it is a logical part of your protective policy.

A special additional message goes to developing country governments with limited resources at their disposal: there is no obligation to come up with costly and difficult in-depth analyses, in particular quantitative economic projections and the like (even though they remain welcome), when establishing ‘necessity’. Qualitative, inductive and logical reasoning based on available science and other information will normally be quite sufficient to provide cover.

## Mixed Reactions Likely

Environmental NGOs had strongly criticised the EU for its decision to go after the Brazilian ban in the first place, and even more for its decision to appeal. Perhaps they should send flowers to Brussels now – for the EU provoked a decision that widens and cements the policy space for environmental and health measures. The much-feared ‘trade bias’ of the WTO dispute settlement system, in this decision at least, seems to have been turned on its head. The Appellate Body’s and the panel’s rather explicit sympathy for a preventive environmental policy, namely the avoidance of tyre waste rather than its management and disposal (alternatives the EU had proposed), appears to have easily eclipsed their concern about this policy’s tough trade effect.

Lawyers’ views will be divided. Purists may be frustrated, pragmatists more or less satisfied, litigators delighted. The ‘necessity’ analysis remains a rather flexible catch-all (or catch-nothing) piece of wax in the hands of the Appellate Body. The ‘weighing and balancing’ test in particular is a thinly veiled proportionality test, miraculously operating rather well without an agreed value system (constitution) to rely on – probably because it comes along with utmost judicial restraint, if not deference to national policy choices. Perhaps ‘disproportionality’ test would therefore be a better word for it. The *chapeau*, never mind its embellishing adjectives (‘arbitrary’, ‘unjustifiable’ and ‘disguised’), operates as a general check against abuse – but a very sharp one when it comes to discriminations: only those that are justified by the same protective rationale as the measure itself will pass.

Trade policy observers will equally have mixed perspectives. While trade can and will be unequivocally trumped by good faith non-trade policy measures, at least those catering to key societal interests such as health and the environment (trade seems a distant second), this must happen without discrimination and must not otherwise be abused as a trade policy measure (trade catches up). Since this balance is probably the only workable one for an institution without either central authority or a comprehensive constitution, however, true friends of the WTO system are likely to sympathise with (most of) this Appellate Body decision.

## The Case

The EU had challenged Brazil’s ban on imports of retreaded tyres. These are used tyres that are refitted by replacing the old tread (the rubber) with a new one. Unfortunately, this cannot be done infinitely with the same tyre, in most cases only once, before it turns into waste.

Waste tyres carry two significant risks: they provide ideal breeding grounds for mosquitoes carrying dangerous diseases (malaria, dengue). And tyre fires generate nasty toxins and are very difficult to put out.

In order to reduce these risks, Brazil – in conjunction with other measures – banned imports of retreaded tyres, because they have a shorter overall lifetime left than new ones, thus turn into waste after fewer kilometres performed in Brazil. Logically, Brazil also prohibited the importation of used (i.e. not yet retreaded) tyres.

Two caveats apply, however. First, following a Mercosur tribunal ruling in 2002, Brazil now allows imports of certain retreaded tyres from Mercosur countries. Second, despite the ban on imports of used tyres, Brazilian retreaders, citing violations of their fundamental rights, have managed to obtain numerous temporary court injunctions to allow imports.

The EU claimed (among other things) that the ban itself was not “necessary to protect human, animal or plant life or health,” in particular because less restrictive alternative measures, namely better waste management and disposal, were available. The EU further claimed that the ban was applied in a discriminatory manner in violation of Article XX’s *chapeau*, because Brazil allowed retreaded tyres from Mercosur (under the law) and used tyres from everywhere (under the court injunctions) to be imported.

Continued on page 14

## The Panel and Appellate Body Decisions

The Appellate Body and the panel rejected the EU's attack on the 'necessity' of the import ban. The Appellate Body accepted the panel's 'weighing and balancing' of factors and, like the panel, did not find any of the alternatives proposed by the EU to be both suitable and readily available to Brazil. Both therefore found the ban provisionally justified under Article XX (b).

The two bodies, however, disagreed with respect to the *chapeau* of Article XX. The panel found that both the Mercosur exception and the court injunctions did indeed lead to discrimination. It found, however, that neither one of them was 'arbitrary,' because both constituted implementations of court decisions by administrations and legislators, their action thus being neither 'capricious' nor 'unpredictable' nor 'random' (elements of a dictionary definition of 'arbitrary'). The result was different for 'unjustifiable discrimination'.

The panel looked at the quantitative impacts, and found the Mercosur exemption not to generate sufficiently significant actual imports of retreaded tyres to counteract the purpose of the ban. The same, it determined, was not true for the imports of used tyres under the court injunctions, which for this reason (to the extent that they crossed that threshold) acted as an 'unjustifiable discrimination'. For the same reason the panel found the court injunctions, but not the Mercosur exemption, to operate as 'disguised restrictions'.

The Appellate Body rejected this quantitative caveat and found both to be 'arbitrary or unjustifiable' discriminations, because neither had a basis in the rationale of the ban itself – defining this as the only criterion that mattered.

A lot could – and should – be said about the details of this case, including the new 'contribution' standard (too lenient?), the test for 'alternatives' a Member would have to accept (not many), and the potential pitfalls of the strict discrimination check under the *chapeau* (probably no special and differential treatment, and regional policies difficult to justify). Since that would require much more space than we have here, here's a checklist for post-*Brazil-Tyres* users of Article XX (b) instead.

## Checklist – Where is the Policy Space?

☑ **Is my objective one of those listed in the paragraphs of Article XX?** This is a more or less objective test (with some margins of appreciation), which can and will be reviewed by panels and the Appellate Body. However, the coverage is very broad, so the actual policy space is vast. The "protect[ion] of human, animal and plant life or health," for instance, covers comfortably virtually anything related to health, and many things considered 'environmental' (the rest falls under paragraph (g)). Absent labelling fraud, Members will be left undisturbed by the WTO system at this stage (but mind the 'disguised restriction on trade' test under the *chapeau*).

☑ **What is my desired 'level of protection'?** Here Members are entirely free to set their goals, says the Appellate Body, and so far no-one publicly disagrees. But it gets even more dynamic: Brazil in this case, supported by the panel and the Appellate Body, defined its level of protection as "*the reduction of the risk of waste tyre accumulation to the extent possible*." This means that anything short of a complete eradication of those risks (dengue, malaria transmitted by mosquitoes that may have bred in tyres; poisoning from tyre fires) will not satisfy as long as there is anything that can be done against it. A dynamic 'as much as possible' goal has two effects.

First, it is likely to spill over into the 'contribution' analysis. Second, it puts all potential alternatives strongly on the defensive, especially since there is no grand net calculation of costs and benefits, because alternatives may work differently than the original measure. If the target is not defined in a static way (X number of malaria cases avoided), more complex alternatives proposed by claimants stand little chance. This is what happened here. The panel and the Appellate Body rather quickly bought Brazil's (probably correct) argument that tyre waste avoidance is in fact by definition superior to waste management. While technically a separate analysis, the intuitive conclusion is hard to reject if 'as much as possible' is the target, absent quantifications of actual results. The problem from a trade perspective is that this approach may result in a rather powerful anti-trade bias, because saying no (e.g. in the form of an import ban) tends to be much easier than saying "yes, but...". Be that as it may: the policy space here is vast, as only the sky (the ideal situation, e.g. perfect public health) is the true limit.

☑ **Is the measure 'necessary' to achieve this level of protection?** This is where it gets complicated. The sub-checklist after *Brazil-Tyres* looks as follows:

- *Does the measure 'contribute' to the achievement of the protection and, if so, to what extent?*

Here two things matter, namely the degree and the actual occurrence of the contribution required. The second aspect is where the Appellate Body, despite denials, arguably softened its scrutiny vis-à-vis its demand in *Korea-Beef* that the 'extent' of the contribution be examined as a component for the 'weighing and balancing'. Brazil had not provided any quantitative analysis, but the panel had been satisfied with the conclusion that the ban was capable of making that contribution. The Appellate Body, agreeing in principle (and graciously overlooking the gradual divergences with the panel's conclusions), phrased its test as follows: is the measure *apt* to advance the goal and is it *likely* to make a *material contribution* to the goal? Importantly, 'aptitude' and likelihood do *not* require hard quantitative projections based on sound (expensive, difficult) economic analysis. A more abstract, lawyerly, inductive perspective looking at the assumed logic of cause and effect is acceptable (quantitative analyses remain welcome for support). This 'qualitative' analysis significantly lightens the burden on user Members to substantiate their 'necessity' claim – leaving significant policy space.

- *How important is the protected value?* The basis for this value judgement by WTO bodies is not clear, because there is no comprehensive value system to rely on – common sense, bolstered with evidence of what the WTO and wider international community currently thinks, seems to be the best guide for predicting the Appellate Body's reaction. Since in reality it performs a negative test (can we tell the Member that this value is not as important as it thinks?), the policy space resulting from *de facto* deference may be significant.

- *How trade-restrictive is the measure?* This is a technical task, fully reviewable by panels and the Appellate Body – after all this is their core area of expertise. No policy space here.

### Are Equally Effective but Less Trade-restrictive Alternatives Readily Available?

‘Equally effective’ is a technical test. Importantly, there is no offsetting of costs. ‘Readily available’ implies a value judgement – what can Members be asked to take on by way of costs, risks, difficulties, hassle? In *Brazil-Tyres* the Appellate Body and the panel took a very restrained view of the multiple alternatives proposed by the EU. Potential risks and ‘high’ costs (‘prohibitive’ is not the measure) easily eliminated proposed alternatives from the game, leaving a significant policy space to Brazil. ‘Less trade restrictive’, again, is a technical test, fully subject to revision. It may be tricky if various trade interests pull in different directions, but so far that has not been a major issue.

### Weigh and Balance All That

It is in fact not entirely clear when and where exactly this is supposed to happen – among the three factors, together with the alternatives, or both. Be it as it may: the Appellate Body stresses that this is a flexible, ‘holistic’ exercise, to be performed on a case by case basis. What does this mean for user Members? Some legal insecurity (ticking boxes won’t do), but in the end a significant margin of both appreciation (risks, projections) and discretion (choice of tools). The approach is really a general proportionality test with important value judgements to be performed, a questionable exercise in the absence of a comprehensive constitution. Thanks to the restraint commonly exercised by panels and the Appellate Body, however, it acts more as a ‘disproportionality test’ – and arguably works quite well.

### Is the Result ‘Arbitrary or Unjustifiable Discrimination’?

Is there discrimination? What is discrimination will in most cases be relatively clear. Note that ‘likeness’ is not part of the analysis – the scope is wider. No policy space here – the test is technical, subject to full review.

Is the discrimination ‘arbitrary or unjustifiable’? ‘Arbitrary and unjustifiable’ are – and this is a key result of *Brazil-Tyres* – not too important as terms of law; what they mean is one thing: is the discrimination based on the very same rationale that the protection measure itself relies on? All other justifications are irrelevant. This includes regional trade agreement constraints (such as the Mercosur ruling Brazil had invoked in this case) and other considerations, including, it would seem, benevolent ones like special and differential treatment. This is a very strict and very legal test. The discrimination hurdle is thus a very high one, with little room for manoeuvre. This is not entirely new – the US experience in *US-Gasoline* and *US-Shrimp* was not dissimilar to Brazil’s here.

### Does the Application Operate as a ‘Disguised Restriction on Trade’?

Again, this test is technical – except that the purity of the non-trade motivation behind the measure (the ‘disguised’ criterion) may be looked at. Panels and the Appellate Body, however, are not keen on rejecting a Member’s claimed motivation and accuse it of hidden trade interests, absent a smoking gun. Trade protection benefits that happen to arise out of health and/or environment measures are not a problem per se – in *Brazil-Tyres* they were even part and parcel of the mechanism.

All in all, there is very significant policy space within Article XX. Importantly, the ‘necessity’ test at issue here is supposed to be the strictest of all tests under that provision. *Brazil-Tyres*, however, was also about obviously rather nasty risks to human health that everyone can sympathise with. This may have helped to shape the legal conclusions. No sympathy (and no flexibility) can be expected for discrimination – an important point to remember for policymakers who are tempted to settle other accounts, help their friends or do other things when the spirit moves them.

*Hannes Schloemann is a Director of WTI Advisors Ltd., a trade policy consultancy, and a partner with MSBH Rechtsanwälte, a law firm. He is based in Geneva.*

## MEA Update

The elaboration of an international agreement on access to genetic resources and the sharing of benefits arising from their commercial use may have moved a notch closer in January, when parties to the UN Convention on Biological Diversity (CBD) agreed on a new structure to advance more detailed negotiations on the subject.

Access and benefit-sharing (ABS) is one of the most complex issues under the CBD. Concerned about biopiracy, many developing countries have pushed for years for a change in WTO patent rules to prevent the misappropriation of biological resources or indigenous/traditional knowledge by foreign entities without compensatory payment. To this end, they have called for an amendment of the Agreement on the Trade-related Aspects of Intellectual Property Rights (TRIPS) to require the disclosure of the origin of genetic resources/associated traditional knowledge in patent applications.

An international agreement on access and benefit-sharing under the CBD would give the proponents a TRIPS disclosure requirement a firmer basis to press their claim, which currently faces stiff opposition from several influential WTO Members (Bridges Year 11 No.7 page 9).

The most important outcome of the January meeting was agreement on a four-part framework for further negotiations on an international ABS regime. Although nearly all options on the objectives, scope, components and nature (i.e. will it be legally binding or not) are still bracketed and thus open for negotiation, many supporters of a comprehensive and legally binding agreement noted with cautious optimism that even countries traditionally opposed to international regulation of ABS arrangements seemed to have moved beyond questioning the need for some sort of international regime.

The issue will be on the agenda of the ninth CBD Conference of the Parties (COP-9) next May. The ABS working group should complete its work at the earliest possible time before COP-10 in 2010.

## EU Spells Out New Climate and Energy Regime

The European Union is preparing to take the next step in tackling climate change after its executive arm presented a draft legislative package on 23 January. The draft legislation proposes an EU-wide greenhouse gas emission trading scheme and energy-related measures.

Less than a year ago, Europe agreed to make a 20-percent cut in greenhouse gas emissions by 2020 as compared to 1990 levels – a percentage it said it would increase to 30 if other countries followed suit. Under the Commission's January draft proposal, the wealthier EU member states would take on more stringent targets than those less developed to reach the overall 20-percent reduction.

The European emissions trading scheme will be a key tool in achieving the goal. It will be expanded to cover greenhouse gases beyond carbon dioxide, as well as additional sectors, such as oil refineries and airlines, chemical and aluminium production. In order to allay competitiveness concerns, energy-intensive industries such as the steel, cement and aluminium sectors are likely to be awarded special consideration when the new, tighter regime comes into place. However, power utilities, which are to a great extent shielded from international competition due to their physical proximity to consumers, will have to pay for all their permits starting in 2013.

EU member states will be obliged to derive 20 percent of their energy from renewable sources. This target has also been divided among individual member states, with some countries set to take on significantly higher proportions of renewables in the energy mix. States will also be able to purchase renewable certificates from other countries.

The package also contains provisions to support carbon capture and storage technologies, and new rules for state aid towards climate projects.

### Checks on Biofuel Production

The draft directive on renewable energy spells requires ten percent of transport fuel to be derived from biofuels. This target has proved controversial, as the sustainability of such fuels has been seriously questioned over the last year on both environmental and food security grounds.

Under the Commission's proposal, biofuels would have to achieve a real saving in carbon dioxide emissions of 35 percent compared to oil. Feedstock crops could not be grown on land with high biodiversity values, nor on land containing high carbon stocks. In addition, growing biofuels feedstock would have to fulfil best agricultural practices criteria. The restrictions would apply both to home-grown and imported biofuels.

A Malaysian commentator from the palm oil industry called the restrictions non-tariff barriers. Biodiesel derived from palm oil has been particularly controversial, as tropical forests have been cleared to make way for palm oil plantations.

The package will still go through a lengthy process before entering into force. The European Parliament and member states will have to approve it, and may amend it before doing so.

### Border Measures Still Possible

European Commission President José Manuel Barroso warned that the EU might take trade measures to safeguard its energy-intensive industry if international negotiations on a global post-Kyoto Protocol climate agreement did not succeed. "There is no point in Europe being tough if it just means production shifting to countries allowing a free-for-all on emissions [...] if our expectations about an international agreement are not met, we will look at other options such as requiring importers to obtain allowances alongside European competitors, as long as such a system is compatible with WTO requirements," he told the European Parliament.

The draft European climate/energy package does not now include provisions requiring exporters of energy-intensive goods, such as steel or cement, to buy EU emissions permits. However, it does leave the door open for a decision on the issue in 2010, when there is more clarity regarding the global climate change regime.

While President Barroso stressed that EU would protect European companies, he also denied that Europe was seeking to introduce protectionist measures. Other players, however, cautioned against setting up a system of carbon barriers. Following a 21 January meeting with US Trade Representative Susan Schwab, EU Trade Commissioner Peter Mandelson reiterated his belief that trade restrictions were not the way forward for combating climate change. A Chinese trade official voiced a common developing country concern when commenting that "I doubt whether the measures taken in the name of the environment will always be applied to protect the environment and not to protect domestic industries."

Draft climate change bills under consideration in the US also include provisions that would require trading partners that do not undertake strict climate change policies to buy 'emissions offsets' at the border. However, climate legislation is still at an early stage of the legislative process and years are likely to pass before new climate change laws come into force (see page 17).

### Civil Society Response

European environmental groups' reactions to the proposed energy and climate change package were lukewarm. Many felt that the 20-percent target for greenhouse gas reduction lacked ambition. At the UN conference on climate change in Bali last year, the EU had called for a cut in emissions of 25 to 40 percent under 1990 levels.

Friends of the Earth Europe also regretted that the package did not give more emphasis to improving energy efficiency in line with the 20-percent enhancement target (to be achieved by 2020) adopted by the EU last year. Increasing energy efficiency is widely considered as the most effective and lowest-cost means of reducing greenhouse gas emissions.



# US Ponders Options For Climate Bill

US legislators should keep potential WTO challenges firmly in mind when drafting a new federal climate change bill, a congressional committee has advised.

On 31 January, the staff of the House Committee on Energy and Commerce issued a 'white paper' on potential climate change legislation, with a particular focus on competitiveness concerns and ways to engage developing countries. The paper is part of a series aimed at providing guidance to lawmakers in crafting a mandatory, economy-wide climate change programme for the United States.

As a starting point, the paper notes that Congress is unlikely to adopt legislation committing the US to reduce its greenhouse gas emissions without 'action by developing countries as well'. The task facing lawmakers is thus to craft legislation that not only limits US carbon emissions, but also induces developing countries to curb the growth of their emissions

- on a timetable that meets both environmental and trade competitiveness concerns;
- in a manner that is reasonably certain to withstand a WTO challenge; and
- on terms that pose acceptable risk to US interests in the event of a negative WTO determination.

The paper examines three broad approaches for achieving this goal:

- border adjustments – trade-related policies that use tariffs, taxes or other mechanisms, such as requiring foreign goods to the US to be accompanied by emissions allowances;
- performance standards – a 'non-market-based' type of regulation, such as emissions standards or carbon intensity-based regulations; and
- carbon market design – imposing conditions for other countries' access to and participation in the US carbon market established in a climate change bill.

The committee concluded that there was a "general expectation that a WTO challenge is likely regardless of what approach Congress takes." It recommended further discussion on the advantages and disadvantages of each alternative, including which of them would be the most likely to result in a prompt resolution of any WTO challenge. Legislators should also keep in mind the need to align the domestic climate change bill with any international obligations the US might take on under a post-Kyoto Protocol agreement, as well as the bill's potential impact on the negotiations and conclusion of a new global climate treaty.

## Current Legislative Proposals

Two main climate- and energy-related bills are under preparation in the Senate. Both are based on the 'cap and trade' principle, under which energy-intensive enterprises would be allocated CO<sub>2</sub> emission rights. A certain portion of the allowance would be cost-free and another would be auctioned. The Low-carbon Economy Act sponsored by Senators Bingaman and Specter calls for limiting CO<sub>2</sub> emissions to 2006 levels by 2020, while the bill being developed by Senators Lieberman and Warner would require a 10-percent reduction from that level by the same deadline. Both proposals would also allow regulated industries to buy credits through climate-friendly projects in foreign countries, as well as foresee the possibility of requiring US importers of energy-intensive goods to submit allowances in an amount that would compensate for the economic advantage resulting from the products not being subject to emissions-related regulation in their countries of origin (Bridges Year 10 No.6 page 16).

Representatives Dingell and Boucher are working on a House bill along similar lines. Mr Dingell has suggested that a both cap-and trade regime and a carbon tax would be necessary for the US to meet realistic emission reduction goals.

While WTO compatibility is an obvious concern for legislators everywhere, the issue could also be addressed – at least in part – through a clarification of global trade rules to ensure that the institution contributes, or at least does not hinder, efforts to tackle climate change.

## News in Brief

- **Andean Preferences:** At the time of writing it looked virtually certain that the US Andean Trade Preference and Drug Eradication Act (ATPDEA) would be extended by ten months after its scheduled expiry on 29 February. The legislation grants unilateral market access preferences to Bolivia, Colombia, Ecuador and Peru.

Many Republicans hope that the prospect of Colombia losing ATPDEA preferences within a few months will prod Congress into passing the US-Colombia free trade agreement, which the Bush administration strongly supports, but most Democrats oppose due to violence against trade unionists in Colombia (Bridges Year 11 No.7 page 21). Peru is expected to use the extension period for adapting its legislative framework so that the country's FTA with the US can enter into force before the end of the year.

A renewal of ATPDEA preferences for Bolivia and Ecuador beyond the ten-month extension is uncertain due to opposition by a number of Republicans.

- **US Farm Bill:** The US Congress is in the midst of negotiations on funding options for a new farm bill that would not reduce spending levels from those authorised under current legislation, due to expire on 15 March.

The House of Representatives and the Senate have already approved slightly divergent versions of the bill. Once the funding is agreed, the two chambers will move on to reconciling the few substantive differences in their respective bills, including an income cap for farmers eligible for subsidy payments. President Bush has threatened to veto whatever bill emerges from the process if it relies on tax hikes to cover costs or does not include greater reforms to the current subsidy regime. In January 2007, the administration proposed new legislation that went well beyond both the House and the Senate versions in that regard (Bridges Year 11 No.1 page 3).

## Ensuring a Development-friendly WTO

Joel P. Trachtman

The Doha Round negotiations, formally named the Doha Development Agenda, continue to founder. While agriculture negotiations have dominated public discussion, the critical obstacle to conclusion of the round is the failure of negotiations so far to deliver on developing country needs.

Developing countries are determined to ensure that this round contributes to their economic development, or at least does not detract from it. After the rise of Brazil, India and China, the greatest barrier to achieving this goal is not the lack of bargaining power of the developing countries, but uncertainty as to the best policy.

There is substantial uncertainty in general as to what types of obligations will contribute to development, although there is growing consensus that no single prescription is best for all countries. However, the WTO can easily ensure that the obligations accepted by developing countries will consistently be development-friendly. If it does, it will go a long way toward achieving the objectives of the Doha Development Agenda, toward silencing critics and, most importantly, toward reducing poverty. All that is required is commitment of the Member States to ensure a development-friendly agreement, articulated in a fairly simple institutional mechanism.

In the background of tense agriculture negotiations, developing countries continue to complain that they were not helped, and were sometimes hurt, by 1994 Uruguay Round commitments, and that their interests are not adequately reflected in the current negotiations.

WTO Members should include in the Doha Round agreements a simple exception stating that developing countries shall not be required to fulfil any commitment that is detrimental to their development or poverty alleviation.

To ensure that developing country commitments continue to be meaningful, the exception should be made conditional on a report by a team of professional development economists, appointed by the WTO.

Agriculture is just one area where developing countries feel their interests have not been adequately reflected in the WTO. They are broadly unhappy with the results of their intellectual property protection obligations under TRIPS, and with the level of non-agricultural market access they have achieved in developed countries. Developing countries demand special treatment recognising their poverty and seeking to alleviate it. But the sad truth is that neither the developing countries themselves, nor the WTO, nor the World Bank or the IMF, necessarily knows at this moment what specific measures will promote poverty alleviation in particular countries. How can a Doha Development Agenda proceed without this knowledge?

In order to develop the knowledge to negotiate *ex ante* a development-friendly agreement, it would be necessary to engage in a careful and individualised evaluation of the markets, products and comparative advantage of each developing country, and a projection of the actual effects of proposed commitments, both by the developing country itself and by its trading partners. This type of evaluation cannot be achieved by amateurs. Rather, it would take a great deal of work by a team of highly skilled professional economists to prepare such an assessment for each country. Many poor countries lack the capacity to do this themselves, and many countries would lack the political will to follow the most economically beneficial prescriptions. Without this type of information, developing countries have no truth to speak to the power of developed countries, and critics will continue to ask how this can be termed a Doha Development Agenda unless commitments are carefully crafted to ensure that they are favourable to development in poor countries. With this type of information, developing countries, critics and others can be told with confidence that the WTO is truly development-friendly.

If WTO Members had begun this daunting task at the start of the Doha Round in 2001, we would today have the information we need to structure commitments that would be expected to be development-friendly. But even if this work had been done, it would necessarily be incomplete, and there would be circumstances in which changes in markets would show that a commitment thought to be development-friendly when made turned unfriendly. Is there an alternative means to achieve a similar development-friendly outcome at this point in the round – one that would continue to ensure that commitments remain development-friendly?

Literally at the stroke of a pen, it would be possible to ensure that developing countries are not obliged to fulfil commitments that do not promote their development. To do so, states should include in the Doha Round agreements a simple blanket exception stating that developing countries shall not be required to fulfil any commitment that is detrimental to their development or poverty alleviation. The key to ensuring that developing country commitments continue to be meaningful and valuable to developed countries – and to ensuring that developing country governments do not fall prey to their own protectionist special interests – is to make this exception conditional on a report by a team of professional development economists, appointed by the WTO. This arrangement would have the dual effects of providing incentives for each country to examine carefully the effect of its commitments on its development, and of providing confidence to developing countries and other that they will incur no obligations that stand in the way of development.

This broad ‘development policy exception’ would also enhance the legitimacy and effectiveness of the WTO at a time when the institution is needed more than ever to provide the tools that allow states to co-operate to improve the welfare of their citizens.

Joel P. Trachtman is Professor of International Law, The Fletcher School of Law and Diplomacy in Medford, Mass.

# Friend or Foe? Regional Trade Agreements and the WTO

Matthew Wilson

Reams of paper and hours of discussion have focused on whether regional trade agreements are building blocks or stumbling blocks to the multilateral system. This approach, however, is too simplistic in view of the diverse economic and political dimensions of individual agreements.

There are certain realities that must be accepted at this stage in international trade:

- Regional trade agreements (RTAs) are here to stay and it is likely that the next decade will continue to see an exponential widening and deepening of this architecture.
- In the past ten years we have seen a mutation of traditional RTAs into extra-regional agreements covering a large number of areas beyond simple tariff reduction.
- The multilateral system of trade negotiations is still generally viewed as the most effective approach to negotiating tariff reductions, market opening, trade rules and settling disputes.

This does not dilute the argument that the WTO should seek, as far as possible, to ensure coherence and compliance between the rules negotiated at the multilateral level and those at the inter-regional, sub-regional and extra-regional levels, but rather that the work of the WTO in the area of RTAs should be tempered by the recognition that they are an important species in the global trading ecosystem.

## Demise of Multilateralism?

Many have argued that the failure of the Doha Round negotiations to reach an acceptable resolution is to blame for the increased movement of countries towards establishing RTAs. This is yet another flawed argument.

For a start, a comparison of the Uruguay and the Doha Rounds shows that the former was completed in a longer timeframe than the timelines originally envisaged for Doha and that the current round contains more areas for negotiation and has, thankfully, been characterised by enhanced awareness and participation by developing countries. It is only rational to assume that the Doha Round could take longer to conclude.

Second, the move towards RTAs has been a steady one over the last 10 years and evidence does not indicate any obvious link between a perceived lack of progress at the multilateral level and a move towards bilateral or regional arrangements. In many respects the new RTAs are governed by strategic interests beyond just dollars, and often entail 'WTO-plus' provisions. The move towards RTAs is a natural progression that can be equated to the more traditional establishment of diplomatic, or bilateral politico-economic relations; they are a natural and essential component of multilateral trade relations.

## RTA Schizophrenia

This does not mean that RTAs are without problems. In fact, the characteristics that make RTAs attractive – manageable negotiations, WTO-plus features and political dimensions – are the very ones that potentially threaten the multilateral trading system and could possibly have a negative impact on some developing countries.

Nevertheless, regionalism is a necessary and important policy option for some countries, especially the small and vulnerable amongst us. The Caribbean is a perfect example of this as can be seen by the creation of CARICOM and other representative regional processes and institutions of a geographically distinct union with both political and economic pillars. An increasing number of trade agreements seek to deepen economic relations, either because of political strategic interests or economic potential, or a combination of both. A customs union may seek an arrangement with other similar entities, or with individual countries. Some RTAs aim primarily to lower tariffs, some seek to maintain historical and traditional political and trade linkages, while others aim to incorporate non-WTO issues, and yet others are created as a conduit to garner greater market access into a non-party or to place pressure on a non-party. The different possibilities and computations are endless.

## Wider Coverage and Scope

Some RTAs are created with the aim of going beyond the discussions in the WTO. Hence issues such as investment, trade facilitation, government procurement, environmental and labour standards, intellectual property rights and competition policy often feature in modern arrangements with provisions which can be termed WTO-plus. This may occur either because the multilateral system has not agreed to negotiate (or to conclude) one or more of these issues, or as a result of partner A requiring such benefits from partner B rather than from the entire membership of the multilateral system.

The WTO/RTA relationship thus becomes a two-way street where the multilateral system often provides the 'floor' denominator for the RTA's trade dimension while the regional agreement acts as a laboratory for the testing and application of new measures that may or may not be adopted at a later stage at the multilateral level. The inherent dilemma of this scenario is (i) whether it creates a form of 'forum shopping' that could undermine the viability of the multilateral system and promote a raft of plurilateral agreements that do not require universal accession, but do have universal implications or (ii) whether it establishes a propitious environment for countries to enhance measures – such as technical and environmental standards, transparent border processes and simplified rules of origin – that make them better prepared for integration into the multilateral trading system.

## Trade Creation vs Trade Diversion

The principal riddle to be solved is whether an RTA creates or diverts trade. The simple answer is that it depends on the genesis, composition and impact of the agreement in question. The risk of actual or potential trade diversion and trade distortion as a result of an RTA is a valid concern, especially if a country outside of the arrangement has a production structure similar to one or more parties involved in the RTA, or if the coun-

*Continued on page 20*

try's demand constitution corresponds to the product or service base of the RTA members. Conversely, particularly with regard to geographically concentrated countries, an enhanced regional economic structure can allow for principles of comparative advantage to kick in. This may create more realistic market structures and production patterns that may help the participants to enhance their integration into the global production and trade system.

### The Political Dimension

Some RTAs are not created with the primary objective of advancing the WTO's concept of trade liberalisation. Indeed, they may have opt-out or asymmetrical treatment clauses, which could be perceived as contrary to the tariff-reduction/market-access orientation of the multilateral trading system. This, however, does not make them 'bad' agreements, especially if the developmental externalities are positive. We need enhanced and more sophisticated criteria for determining an RTA's compliance with WTO rules beyond just dollars and cents.

### Contribution to the Multilateral Negotiating Process

Although the WTO-plus component of some RTAs may have an impact on the future areas for negotiation at the multilateral level, it can also be an important contribution as it allows some Members, especially developing countries, to gain experience from negotiating and participating in regional or extra-regional processes, which could in turn improve their level of understanding and engagement at the WTO.

One major negative repercussion, however, is whether parties to an RTA, especially developing countries involved in North-South agreements, may not be 'locking in' certain levels of contribution and inadvertently minimising their domestic policy space or undermining their negotiating leverage at the multilateral stage. And then there is the question of negotiating legitimacy. If, for example, a developing country has taken a strong stance in the WTO negotiations against a Member (or against an issue championed by it) and then undertakes an RTA with that same Member, it can severely undermine the integrity and legitimacy of the developing country on that particular issue at the multilateral level.

### What Can the WTO Do?

Although it is not simple to define what constitutes an 'acceptable' RTA under the WTO, one thing is clear: the WTO should not seek to micro-manage the specifics of every existing or potential agreement. The key for the institution is to ensure that an architecture is put in place to measure coherence with multilateral rules, and that there are mechanisms to seek appropriate redress if an RTA is blatantly out of conformity with the expectations under the WTO agreements. The first task to be undertaken is a clarification of WTO rules governing RTAs to ensure that there is certainty as to the exact meaning and intention of the key terms used in the agreements – such as 'substantially all the trade' and 'other regulations of commerce', etc. – and, most importantly for developing countries, that the elaboration of rules and concepts does incorporate the developmental dimension of regional agreements. A revision that seeks to tighten only the econometric and quantitative requirements without incorporating appropriate 'special and differential treatment' and other flexibilities would be counterproductive and against the spirit of both the Doha Round mandate and the developmental aspects of RTAs.

WTO Members have achieved some success with regard to enhancing the level of transparency of what is expected of RTAs by the multilateral system and revitalising the procedures for 'examining' notified RTAs. The provisional RTA transparency mechanism, adopted by the General Council in 2006, has already been 'tested out' and discussions continue on a similar mechanism for Generalised Systems of Preferences (GSP) schemes.

The other track of WTO discussions on RTAs concerns the so-called 'systemic issues'. Under this heading, Members have addressed many of the legal terms and requirements of RTAs notified under GATT Article 24.

The African, Pacific and Caribbean (APC) Group, for instance, has requested that the development dimension and flexibilities be incorporated into the rules, but positions have not really coalesced on this issue. In contrast, Australia and others have sought to tighten the disciplines. It is generally recognised within the ACP that Australia's position on 'substantially all the trade' (SAT, i.e. the proportion of two-way trade that must be covered by free trade agreements concluded outside the WTO) may be too ambitious and does not take into account the significant political and developmental dimensions of certain RTAs.

Some other important trade actors do not necessarily appear to want any major changes to the current GATT Article 24, and the danger of the ACP trying to push for such changes is that it may induce the more liberalisation-oriented WTO Members to push in the opposite direction. The core concern of some of these countries is that granting 'development concessions' to ACP countries would also mean extending them to larger developing countries – a scenario that many developed WTO Members are not comfortable with.

The EU had floated some interesting ideas on how to define 'substantially all the trade' based on both trade volume and tariff lines, cumulative measurement of SAT rather than individual country measurement and development benchmarks. However, any assessment of this proposal must take into account the EU's demands in its ongoing negotiations on Economic Partnership Agreements with ACP countries. Some delegations have already begun to modulate the expected level of ambition regarding the systemic aspect of the RTA negotiations and are questioning whether the existing 'uncertainty' in the current Article 24 would not be better than the stricter rules that could be imposed by some Members if the negotiations continue.

Nevertheless, special and differential treatment for developing countries should be a major component of any revised rules, and should indeed be a critical component of any RTA where the playing field is uneven. While no RTA can be a substitute for the engagement of all WTO Members in multilateral trade regulations, completing the Doha Round in a manner that fully takes into account the interplay between liberalisation and development is essential.

*Matthew Wilson is First Secretary at the Permanent Mission of Barbados in Geneva. The author adapted this article from his presentation at the 'Roundtable for the Orientation and Preparation Discussion for the 2008 Regional Trade Policy Course for Caribbean Countries', held on 29 November, 2007.*



# Five Suggestions for Clarifying the Draft Text on Fisheries Subsidies

Marc Benitah

Although the draft text on fisheries subsidies released in November is on the whole a remarkable synthesis, certain points would benefit from further clarification, in particular to avoid unnecessary litigation in the future.

Of course, international negotiators often opt for a degree of ‘creative ambiguity’ on certain points of a treaty in order not to jeopardise consensus on the entire agreement. The five suggestions outlined below do not appear to relate to points of this nature, however, and therefore ambiguity is not really necessary here for facilitating the adoption of the draft text.

## Insert a Conflict Clause

While some observers of the negotiations had speculated that the new disciplines on fisheries subsidies could be embodied in a stand-alone agreement (like that on agriculture, say), the draft text eventually emerged as Annex VIII to the existing Agreement on Subsidies and Countervailing Measures (SCM Agreement). However, since SCM Article 32.8 specifies that this annex, like all the others, constitutes an integral part of the agreement itself, it seemed at first glance that everything was for the best in the best of all possible worlds.

Unfortunately, substantial WTO jurisprudence on the relationship between Annex 1 (i.e. the ‘illustrative list’ of prohibited export subsidies) and the rest of the SCM Agreement casts a shadow over this impression. Many countries are known to have attempted to induce dispute settlement panels to determine that subsidies not literally in conformity with the Illustrative List could not be prohibited export subsidies in the sense of SCM Article 3. Moreover, the fact that the Illustrative List is an integral part of the SCM Agreement does not appear to have been particularly helpful in avoiding this kind of manipulation. This should alert negotiators to the following points:

Whereas past panels have used footnote 5 of the SCM Agreement (relating to the Illustrative List) to deal with this manipulation, there is no equivalent footnote in the draft text – or the revised SCM Agreement itself – concerning the relationship between Annex VIII and the rest of the Agreement on Subsidies and Countervailing Measures.

The word ‘annex’ used in the formal title of the draft text on fisheries subsidies is somewhat misleading. In fact, Annex VIII is a mini-treaty with eight voluminous articles, each comprising several paragraphs. The relationship between Annex VIII and the SCM Agreement looks much more like one between two treaties rather than a relationship between an agreement and one of its annexes.

Taking into account the conflict clause already established between GATT 1994 and the SCM Agreement with regard to isolated potential conflict issues, negotiators should include such a provision in Annex VIII, or in a footnote to the revised SCM Agreement itself. This clause should give precedence to Annex VIII in such instances, particularly since this conclusion appears to be in harmony with the present intention of negotiators. This would avoid many interpretative problems for future panel and Appellate Body members. In the absence of such a clause, these members would have to resort to tortuous reasoning based on the not very well established *lex specialis* doctrine in order to give precedence to Annex VIII. In sum, the conflict clause should establish that in the case of a conflict on an isolated issue, the most recent version of rights and obligations relating to disciplines on fisheries subsidies is to be found in Annex VIII.

A simple example will show that this discussion is far from academic. Let us suppose, for example, that a complaining WTO Member invokes the *Softwood* jurisprudence (WT/DS247/) in the fisheries subsidies context. To this end, it could argue that a government

allowing its domestic fishers to access its territorial waters without adequate compensation is similar to a government that provides timber harvesting rights without adequate compensation in *Softwood*. We know that the Appellate Body has confirmed that this latter practice is prohibited. In contrast, Annex VIII does not seem to adopt this position for access granted by a government to domestic fishers in its territorial or exclusive economic zone waters. In fact, it is likely that the intention of the negotiators of the draft text on fisheries subsidies is that the *Softwood* jurisprudence does *not* apply in a national context. A conflict clause would therefore have the substantial merit of establishing clearly that, in case of an isolated issue, the most recent version of disciplines relating to fisheries subsidies is to be found in Annex VIII.

Finally, it should be clear that the conflict clause would by no means render the SCM Agreement inapplicable to fisheries subsidies; it would only be valid to the extent of a conflict on a particular issue. Of course, when there is no conflict, the SCM disciplines remain applicable to fisheries subsidies.

## Determine Specificity

Article I.1 of the draft text enumerates a certain number of fisheries subsidies that are prohibited ‘to the extent that they are specific’. This expression implies that, in contrast to export and import substitution subsidies forbidden by SCM Article 3, prohibited fisheries subsidies are not deemed to be specific. One can thus expect that the issue of ‘specificity’ will arise regularly in the context of prohibited fisheries subsidies.

According to Article 2 of the SCM Agreement, a subsidy is ‘specific’ if it is granted to a certain enterprise or industry, or group of enterprises or industries (referred to in the SCM Agreement as ‘certain enterprises’).

*Continued on page 22*

However, beyond setting out this rather general principle, Article 2 does not speak with precision about where ‘specificity’ may be found. In other words, it does not offer any technical definition about how broadly or narrowly we are to define an ‘industry’.

This means in practice that uncertainty prevails over, for example, whether the agricultural sector of a country is too broad and diverse to constitute a single ‘enterprise or industry or group of enterprises or industries’. In other words, we do not know for sure if a subsidy available for all firms in the agricultural sector of a country ceases to be ‘specific’ because it is sufficiently broadly available in the sense that it does not benefit a particular limited group of producers of certain products.

It would be useful to remove this ambiguity in the fisheries sector. Negotiators could indicate one way or another in the draft text whether they consider that the fisheries sector is a sufficiently distinct segment of the economy in order to be considered as ‘specific’. Or, on the contrary, whether it is ‘too broad’ for this purpose.

### Clarify Legal Status of ‘Not Prohibited Subsidies’

It is interesting to note that – in contrast to the SCM Agreement’s distinction between ‘prohibited’ subsidies on the one hand, and

‘non-actionable’ and ‘actionable’ subsidies on the other – the draft text on fisheries subsidies uses only the concepts of ‘prohibited’ and ‘not prohibited’ subsidies.

What then is the exact legal status of ‘not prohibited’ subsidies in the draft text? Are such subsidies ‘non-actionable’ in the classic sense of the SCM Agreement?

On the basis of the structure of draft Annex VIII, it appears that ‘not prohibited’ fisheries subsidies remain potentially subject to various disciplines, and are therefore still ‘actionable’ – i.e. subject to potential dispute settlement challenges – if they produce certain adverse effects to the interests of other Members.

First, Article IV of the draft text entitled General Discipline on the Use of Subsidies stipulates that “[n]o Member shall cause, through the use of *any* subsidy [...] depletion of or harm to, or creation of overcapacity” in respect of certain fish stocks. As indicated by the term ‘any’, every fisheries subsidy, including a ‘not prohibited’ subsidy, falls within this general discipline.

Moreover, since the draft text is an integral part of the SCM Agreement, it appears that SCM Article 5 relating to ‘actionable’ subsidies applies to the category of ‘not prohibited’ fisheries subsidies. That article states clearly that “[n]o Member should cause, through the use of *any* subsidy [...] adverse effects to the interests of other Members.” Once again, the term ‘any’ implies that ‘not prohibited’ fisheries subsidies fall within the disciplines of Article 5 if they cause one of the adverse effects mentioned under this provision (see box).

In sum, even if there is no real ambiguity about ‘not prohibited’ fisheries subsidies being nevertheless actionable, it would be perhaps make sense to use in the draft text an expression other than ‘not prohibited subsidies’. This would allow for more coherence with the rest of the SCM Agreement. Alternatively, a footnote could indicate that ‘not prohibited’ fisheries subsidies are still ‘actionable’ in the sense of Article 5 and, of course, under Article IV of the draft fisheries annex.

### Provide Examples of Access Rights Subsidies

Article I.1(g) is one of the annex’s most intriguing provisions because it deals with the thorny issues of ‘access rights’. Admittedly, the aspect that worried many developing countries is now clarified since the draft text specifies that “government-to-government payments for access to marine fisheries shall not be deemed to be subsidies.” However, Article I.1(g) adds that subsidies “arising from the *further transfer*, by a payer Member government, of access rights that it has acquired from another Member” are prohibited subsidies.

One could legitimately ask ‘transfer to whom’? It is likely that negotiators deliberately chose this vague language in order to encompass various potential scenarios. However, taking into account that this provision would certainly be invoked in the future fisheries subsidy disputes, it would be desirable for the draft text to give at least some examples that would help avoid endless debate on this issue.

### Clarify Determination of ‘Overfished’ Stocks

Article I.2 of the draft text prohibits subsidies “affecting fish stocks that are in an unequivocally overfished condition.” This is another provision likely to be invoked in future disputes. However, in contrast with Article IV (which mentions ‘relevant international organisations’ as one of the sources for determining whether certain fish stocks are ‘depleted’ or ‘harmed’), Article I.2 is silent on how to decide that a stock is in an ‘unequivocally overfished condition’.

It would be useful and more straightforward to correct the asymmetry between Article I.2 and Article IV. This would ensure that the two ecologically adverse effects are determined through a similar procedure.

*Marc Benitah is Professor of International Law at the University of Quebec. The author is currently working on a new comprehensive Treaty on the Law of Subsidies under the WTO, to be published in 2009 by Kluwer Law International.*

#### Article 5 of the SCM Agreement

No Member should cause, through the use of any subsidy referred to in the SCM Agreement’s Article 1 paragraphs 1 [definition of the existence of a subsidy] and 2 [determination of whether the subsidy is specific to an enterprise or industry or group of enterprises or industries] adverse effects to the interests of other Members, i.e.:

- (a) injury to the domestic industry of another Member;
- (b) nullification or impairment of benefits accruing directly or indirectly to other Members under GATT 1994 in particular the benefits of concessions bound under Article II of GATT 1994;
- (c) serious prejudice to the interests of another Member.

## Tropical Products in the DDA and Beyond

The Agreement on Agriculture concluded during the Uruguay Round stressed that future negotiations should address ‘the fullest liberalisation of trade in tropical products’. The July 2004 Doha Round framework agreement further noted that the full implementation of this commitment was “overdue and will be addressed effectively in the market access negotiations.”

In December 2007, ICTSD and the Institute for International Trade Negotiations (ICONE) co-organised a stakeholder dialogue on tropical products, trade, natural resources management and poverty, which attempted to develop a better sense of how the WTO agricultural negotiations on tropical products could increase benefits for developing country exporters and identify elements of a pro-poor, pro-sustainable development agenda for tropical commodities.

The dialogue addressed not only challenges related to the Doha Round tropical products mandate (i.e. tariffs, tariff escalation, preference erosion and possible trade adjustments), but also other imperatives and research priorities with regard to a global strategy for sustainable development in agricultural trade (i.e. non-tariff barriers, domestic support, international supply and value chains, biofuels and the environment).

Among the elements included in the *Forward-Looking Agenda on Tropical Products*, which underpinned the discussions, were the following:

- It is widely recognised that standards, whether publicly set by governments or imposed by private entities, are becoming increasingly significant market access barriers. Where privately set, such standards are particularly difficult to cope with, not least because they mostly fall outside the remit of the WTO. At the same time, in certain situations private standards may allow exporters to apply measures that make them more competitive, especially with regard to achieving economies of scale. There seems to be much more scope for undertaking research and information exchange on standards, a topic that has only relatively recently become a major focus of WTO discussions, notably at the Committee on Technical Barriers to Trade.
- Participants also suggested that more research was needed on the impact of private standards (positive and negative) on tropical products, as well as on options to resolve difficulties faced by exporters (mindful of the positive consequences which compliance with standards may bring). Further research into the effects of standard-related subsidies in export markets would also be valuable. The EU, for instance, allegedly provides subsidies to its own business sector to help it comply with private standards. How do these subsidies affect the ability of the private sector in countries that produce tropical products to comply with private standards? Do they indirectly encourage more stringent levels of such standards?
- As non-tariff barriers develop into ever more important obstacles to market access, and the effects of subsidies become more apparent, it would be useful to establish a composite index of protection, taking into account tariffs, domestic support and non-tariff barriers imposed on tropical products.

Market access cannot be ensured if discussions focus exclusively on tariffs, as is currently the case in the Doha Round negotiations on agriculture. The reduction, or even elimination, of farm tariffs would not secure entry for developing countries’ exports to developed country markets due to the proliferation of sanitary/phytosanitary and technical measures, including in particular private standards and the continued subsidisation of tropical products. In order to assess the true extent of trade liberalisation or, conversely, the effective protection prevailing in tropical products, a composite index of protection is necessary. Such an index would be of great use in better appreciating and visualising the real magnitude of trade liberalisation achieved during the Doha Round. Furthermore, it could be a powerful tool in pursuing further liberalisation and effective reform.

For further information on the dialogue and, more particularly, on the *Forward-Looking Agenda on Tropical Products*, see <http://www.ictsd.org/dlogue/2007-12-03/>

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.

### BRIDGES Regional Editions

#### MOSTI

##### Bridges regional edition in Russian

Co-publisher: Eco-Accord, Moscow, Russia

Web: <http://accord.cis.lead.org>

#### PASSERELLES

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

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

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

#### PONTES

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

Co-publisher: Fundação Getúlio Vargas, São Paulo

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

#### PUENTES

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

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

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

### Other ICTSD Periodicals

#### BRIDGES Weekly Trade News Digest

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

Editor: Trineesh Biswas

#### BRIDGES Trade BioRes

Co-publisher: IUCN – The World Conservation Union  
A bi-weekly electronic news service on trade, sustainable development and biological resources.

Editor: Malena Sell

#### TRADE NEGOTIATION INSIGHTS/ ECLAIRAGE SUR LES NEGOCIATIONS

Co-publisher: ECDPM

Bi-monthly publication on trade negotiations of particular importance to Africa and ACP countries. Publication bi-mensuelle sur les enjeux des négociations commerciales pour les pays d’Afrique et ACP.

Editors/Rédaction: Victoria Hansen and Sanoussi Bilal

#### PASSERELLES SYNTHESE MENSUELLE

Co-publisher: ENDA – Tiers Monde

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

#### PUENTES QUINCENAL

Co-publisher: CINPE

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

#### PONTES QUINZENAL

Co-publisher: Fundação Getúlio Vargas

Serviço de informação eletrônico quinzenal focado na difusão de notícias relacionadas ao comércio e ao desenvolvimento sustentável.

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

### WTO Meetings

- Mar. 10 Working Group on Trade and Transfer of Technology
- Mar. 11 Council for Trade in Goods
- Mar. 13-14 Council for Trade-related Aspects of Intellectual Property Rights
- Mar. 17 Round of Consultations on the Development Assistance Aspects of Cotton
- Mar. 18-19 Committee on Agriculture (regular session)
- Mar. 18-20 Committee on Technical Barriers to Trade
- Apr. 14-16 Committee on Regional Trade Agreements

### Other Meetings

- Mar 14-16 Gleneagles Dialogue on Climate Change, Clean Energy and Sustainable Development  
[www.do-summit.jp/](http://www.do-summit.jp/)

### Selected Documents Circulated at the WTO

- Committee on Agriculture – Special Session. 8 February 2008. Revised Draft Modalities for Agriculture. (TN/W/AG/W/4/Rev.1)
- Negotiating Group on Non-agricultural Market Access. 8 February 2008. Draft Modalities for Non-agricultural Market Access (NAMA). (TN/W/MA/W/103)
- Council for Trade in Services – Special Session. 12 February 2008. Elements Required for the Completion of the Services Negotiations. (JOB(8)/5)
- Dispute Settlement. 17 January 2008. European Communities – Measures Affecting the Approval and Marketing on Biotech Products. Recourse to Article 22.2 by the United States (WT/DS291/39)
- Dispute Settlement. 21 December 2007. United States – Measures Affecting the Cross-border Supply of Gambling and Betting Services. Decision by the Arbitrator. (WT/DS285/ARB)
- Dispute Settlement. 18 December 2007. United States – Subsidies on Upland Cotton. Report of the Compliance Panel. (WT/DS267/RW)

### Other Selected Resources

- Cameron, Hugo and Njinkeu, Dominique (eds). December 2007. Aid for Trade and Development. Cambridge University Press. New York
- Haley, Usha. January 2008. Shedding Light on Energy Subsidies in China: An Analysis of China's Steel Industry from 2007. Alliance for American Manufacturing. Washington D.C.
- International Labour Organisation. January 2008. Global Employment Trends – January 2008. ILO. Geneva
- Polaski, Sandra. January 2008. India's Trade Policy Choices. Carnegie Endowment for International Peace. Washington D.C.
- The Royal Society. January 2008. Sustainable Biofuels: Prospects and Challenges. The Royal Society. London
- Razzoque, Mohammad and Laurent, Edwin (eds.) January 2008. Global Rice and Agricultural Trade Liberalisation: Poverty and Welfare Implications for South Asia. Commonwealth Secretariat and the Academic Foundation. London and New Delhi
- Tansey, Geoff and Rajotte, Tasmin. January 2008. The Future Control of Food. Earthscan. London
- United Nations Environment Programme. 2007. Trade-related Measures and Multilateral Environmental Agreements. UNEP. Geneva
- Woodrow Wilson Center. January 2008. Tools for the Trade: Models for Trade Policy Analysis. WWC. Washington D.C.

### New Publications from ICTSD

[www.ictsd.org](http://www.ictsd.org)

Ahmad, Munir. 2007. Impact of Origin Rules for Textiles and Clothing on Developing Countries. ICTSD Programme on Competitiveness and Sustainable Development. Issue Paper No. 3

#### Recent Releases in the Trade in Services and Sustainable Development Series

- Daima Associates Ltd. 2007. Opportunities and Risks of Liberalising Trade in Services in Tanzania. Issue Paper No. 4
- Bila, Alberto; Chambal, Hélder and Tamele, Viriato. 2007. Opportunities and Risks of Liberalising Trade in Services, Country Study on Mozambique. Issue Paper No. 5
- Geloso Grosso, Massimo. 2007. Regulatory Principles for Environmental Services and the GATS. Issue Paper No. 6
- Burky, Abid. 2007. Opportunities and Risks of Liberalising Trade in Services in Pakistan. Issue Paper No. 7
- Ghoneim, Ahmed and Omneia, Helmy. 2007. Maritime Transport and Related Logistics Services in Egypt. Issue Paper No. 8

