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As climate commitments give way to the nuts and bolts of implementing policy, trade, it appears, is taking a position at centre stage. Capitals are looking to boost the role of renewable energy in their bid to reduce carbon emissions, but some countries are calling foul and asking the WTO to act as referee. In one of the more notable cases, Japan is accusing Canada - in fact, the province of Ontario - of unfairly subsidising local manufacturers through its feed-in-tariff (FIT) system. In this issue, Marie Wilke explores the case, which is being followed closely by both the public and private sectors in the 50-plus countries that have, or are planning to, enact their own FIT systems.

In a related article, IDDRI's Emmanuel Guérin and Joseph Schiavo look at renewable energy support policies and call on the WTO to help ensure there is a level playing field between countries and industries (see page 5). Their paper touches on arguably the hottest environment-related dispute currently at the WTO: the US vs. China case over China's wind power subsidies. In a separate article, Marie Wilke takes a look at the US request for consultations and makes sense of the legal particularities of the case (see page 7).

We then return to a WTO issue that has been absent from our pages for years: the *Tuna-Dolphin* case. As the US and Mexico await a ruling on what's being billed as *Tuna-Dolphin II*, we explore the case and look at what's behind the increasing number of disputes over technical and sanitary standards and labelling requirements (see page 8).

In fact, the issue of standards is increasingly becoming a headache for institutions like the WTO. Private sector standards, often with requirements that exceed those in the public sector, are proliferating, posing challenges both to exporters and trade policy-makers. Makane Moïse Mbengue looks at these standards and explores how they interact with WTO law (see page 10).

China surprised many manufacturers - including those in the area of green technology - last year when it announced it would impose export quotas on rare earth metals. Beijing has said the cuts are needed because the mining process for many minerals is hazardous to the environment. Bo Ye outlines the justification in terms of WTO law and assesses whether the Middle Kingdom qualifies for an environmental exception (see page 12).

Finally, Ricardo Meléndez-Ortiz, ICTSD's Chief Executive, launches the first in a series of BioRes Review special articles that will pave the road to next year's Earth Summit (Rio+20). In his article, Meléndez-Ortiz reflects on the means, as well as the limits, of the international trade system to provide solutions for sustainability (see page 13).

We hope you enjoy the issue!

Getting FIT for the WTO: Canadian green energy support under scrutiny

By Marie Wilke

A climate protection policy already used widely all around the globe recently entered the stage of WTO dispute settlement. With Japan's challenge of a Canadian feed-in-tariff (FIT), the WTO might soon have to rule for the first time on a support policy for renewable power generation. With around 50 countries having enacted FITs, including 18 developing countries, this precedence ruling could have great repercussions for global green energy support policies.

Last September, Japan brought Canada to the WTO over the province of Ontario's FIT programme, which enables the province to subsidise renewable energy generation by guaranteeing electricity purchase prices, grid access, and long-term contracts to green energy producers making their cost intensive investments worthwhile. In other words, the FIT is a sophisticated purchasing guarantee for renewable energy.

It is not the FIT as such though, but a controversial "local content" provision of Ontario's FIT that landed Canada at the WTO. The "made-in-Ontario" provision mandates that a certain portion of all green energy project inputs be manufactured (goods) or provided (services) in the province, as it strives to create local jobs. Japan argues that conditioning FIT support on the basis of local input requirements discriminates against equipment for renewable energy generation facilities produced outside of Ontario and amounts to a prohibited subsidy under the WTO subsidy agreement.

Japan also argues that because the local content requirement affords less favourable treatment to Japanese companies exporting solar panels and other equipment to the province, it violates WTO national treatment obligations included in the General Agreement on Tariffs and Trade (GATT) and the Agreement on Trade-Related Investment Measures (TRIMS), under which foreign and domestic producers ought to be treated on an equal footing. The EU and US followed suit by requesting to join Japan in the dispute less than two weeks later.

Buy-Ontario

The local content requirement says renewable energy suppliers must meet a "minimum required domestic content level" in order to be eligible for the benefits of the FIT. Those levels range from 25 percent for wind projects over 10 kilowatts in 2009-2011 to 60 percent for solar projects over 10 kilowatts starting in 2011. For instance, if a company producing solar power wants to receive the price guarantees and grid access granted by the FIT, it needs to ensure that 60 percent of the equipment used to produce that energy, including solar panels, and respective services comes from Ontario.

Ontario on its part introduced the local content requirement with the aim of attracting foreign investment and creating jobs by spurring domestic demand for green energy products. In fact, many countries face domestic opposition when aiming to implement green energy support programmes as the policies are feared to raise the costs of electricity. Selling "green" as a stimulus measure is often seen as a means of reconciling the goal of creating jobs while increasing the share of renewable energy. It was this move that effectively eased much of the public opposition and allowed Ontario's government to implement the programme.

Ontario's FIT has succeeded in increasing the share of renewable energy and drawing manufacturers to Ontario. The largest deal under the province's green power plan is a US\$6.7 billion green investment by South Korea's Samsung Group to build four wind and solar power clusters in Ontario. Some observers have speculated that Japan is targeting Ontario in the wake of the South Korean deal and the fact that Japan and its companies - such as Sharp, Mitsubishi, and Kyocera - were on the losing end of a US\$20 billion nuclear power deal in the United Arab Emirates. The Ontario deal could be perceived by Japan as a sign of losing ground in the green energy arena, some experts have said.

According to its request for consultations, the US joined the dispute because of its substantial trade interests in renewable energy as a major innovator in the field and as a primary source of Canadian imports. It joins Japan in its condemnation of what it perceives as the trade distorting effects of the local content requirement.

In past disputes, local content requirements have been found to violate numerous WTO agreements, including GATT and the Subsidies and Countervailing Measures Agreement (SCMA). The preference of locally produced goods over foreign manufactured goods on the basis of nationality has been found to breach the non-discrimination principle under GATT, and can qualify as a 'prohibited subsidy' under the SCMA, which rules out subsidies contingent on the use of domestic input.

The latter consideration introduces the highly important and controversial question of whether FITs constitute a "subsidy" under WTO law. Whether a case is resolved under GATT or the SCMA matters for several reasons. First, subsidies can be found illegal if a country is able to prove an adverse effect on any sector or part of its economy provided that the same sector in the other country benefitted from the subsidy. This is wider than the scope of GATT. Secondly, the remedies as well as available exemptions and justifications differ, making the SCMA (potentially) a desirable legal ground.

Government procurement vs subsidy

For a policy to qualify as a subsidy under the WTO's subsidy accord, it has to be a "*financial contribution by a government or any public body whereby a benefit is conferred.*" The SCMA lists four different alternatives of a financial contribution, including the purchase of goods or services by the government. Under WTO law, electricity is qualified as a good, thus the payment of feed-in-tariffs could amount to a purchase of goods by a government.

In that case, however, it might as well qualify as government procurement rather subsidisation, experts suggested. The global government procurement market, amounting to around US\$4,733 billion annual spending in OECD countries alone, remains largely outside the realm of WTO law. Until today, only OECD countries signed onto the WTO's specialised agreement on Government Procurement (GPA), and in many cases their sub-federal and local institutions also remain uncovered. This is true for Ontario's Power Authority (OPA) administering Ontario's FIT programme.

Moreover, GATT's national treatment principle recognised an exemption for "*governmental agencies purchasing for government purpose and not with a view to commercial resale.*" The question is then whether the distribution of purchased electricity is a commercial resale. This, by nature, requires a commercial interest, usually profit. Following that thought a FIT could be government procurement as long the resale of electricity does not create profit. Prices, usually the best indicator to calculate profit, however, remain highly distorted in the electricity sectors. Likewise, the impact of FIT programmes is unlikely to show before the measure is used on a large scale over a reasonably long period of time.

In either case, the government procurement exemption does not apply to the SCMA. To the contrary, the SCMA recognises that a purchase of goods and services by a government can qualify as a financial contribution if the price paid is above market standard. The question whether a FIT can amount to a subsidy then becomes even more important. If FITs were found to be government procurement but not a subsidy they could easily fall off the WTO's table. Classifying a FIT as a subsidy, however, would trump the government procurement exemption.

Lost in implementation: Who acts and who pays?

There are three main scenarios as to how governments can implement a FIT. First, a public body could use public funds to execute the FIT programme through, for instance, state-owned enterprises (SOEs). Second, a government could direct a private body to execute the programme but provide the necessary funds itself. And third, a government could direct a private body to execute and pay for the programme by generating resources

through a relocation of costs or other means. While the first two scenarios represent clear instances of government contribution, the third appears "private" in nature.

To prevent the circumvention of subsidy rules by directing private bodies, the SCMA says that if the government directs or entrusts a private body to implement and fund a programme that involves "a practice *normally followed* by the government," it will be considered a subsidy nonetheless.

This distinction is of critical importance as each country implements its FIT in a different way. In many nations the electricity sector remains state owned or state regulated with state-owned enterprises, public price setting bodies and other regulatory institutions playing a great role. In other countries, however, a government might decide to oblige electricity network operators to purchase green energy at a minimum price while reallocating the costs among electricity undertaking, network operators and consumers. Ontario's story is very telling in this regard.

Ontario's energy system continues to be state regulated, with the Ontario Power Authority (OPA) "ensuring an adequate, long-term supply of electricity in Ontario" as directed by the Ministry of Energy. It has also been entrusted with designing and implementing the feed-in tariff programme, which includes price setting and administering contracts. As the OPA functions under the direction of the Ministry and the Ontario Energy Board (OEB), it finds itself in a control-and-command relationship, an important indicator that the OPA is a public body. However, according to the Ministry of Energy the OPA is not a public body, which has created considerable confusion among energy experts and Ontario's greater public.

As for the SCMA, the Appellate Body ruled only a few days ago (US-AD/CVD DS 379) that a "'public body' connotes an entity vested with certain governmental responsibilities, or exercising certain governmental authority." It is a quite "straightforward [case] when a statute or other legal instrument expressly vests authority in the entity concerned." "What matters is whether an entity is vested with authority [...] rather than how that is achieved." This new ruling could suggest that the transfer of responsibility and authority make an entity a "public body" even if its legal status suggests otherwise, as in the case of the OPA. The analysis, however, is far from easy.

In addition to the OPA, local distribution companies and transmission asset (the electricity towers etc.) owners and system operators play an important role in the implementation of the FIT programme. There are two different contract partners - the OPA signing onto the general terms and conditions (the 'FIT contract') and the distribution and transmission companies having to agree on the specific conditions for connection and implementation to manage the actual 'feed-in' process. Hydro One is Ontario's largest transmission company and it holds approximately 96 percent of all transmission assets within the province while its distribution network covers about 75 percent of the region's area. It distinguishes itself from the other 83 local distribution companies available in Ontario as it remains a Crown Corporation whose assets are owned one-hundred percent by the government of Ontario - making it a state-owned enterprise (SOEs). Until recently, trade lawyers understood these to be "public bodies" by nature. Since the last ruling, however, this notion is turned upside down as the Appellate Body found certain SOEs to be "private bodies" as they did not "exercise governmental authority."

In addition to these numerous public and private entities, Ontario's Global Adjustment Mechanism (GAM), a funding mechanism established for adjusting the price of electricity supply within the region, plays a critical role. "The cost of electricity is recovered through a combination of global adjustment and the hourly Ontario energy price (HOEP, the 'market price'), which are inversely related. For example,

if HOEP increases, the global adjustment decreases and vice versa,” the OPA explains. Costs are thus offset through consumer payments and the global adjustment. Depending on whether the revenue generated through the sale of electricity offsets the costs spent for the FIT programme (and other programmes) consumers receive adjustment payments from the mechanism or are required to pay additional contributions. For the FIT programme, the hourly market price hardly ever rises even to the level of the lowest FIT rates.

While highly fragmented with diffuse responsibilities resting with different bodies, the Ontario FIT is largely governmental in nature. This is in stark contrast to the German FIT system - the only FIT system that ever found itself in court, namely the European Court of Justice (ECJ). Germany has issued a purchase obligation for electricity network operators to purchase electricity from renewable energy sources at a minimum price. The costs for the programme are divided between electricity supply undertakings purchasing renewable energy and upstream private electricity network operators. Interestingly, the ECJ found that the German FIT could not be considered ‘state aid’ (subsidy) under European law as a consequence of the absence of any direct or indirect transfer of state resources.

The Appellate Body has rejected a similar view under WTO subsidy law, finding that no public coffers need to be charged in order for a measure to qualify as a subsidy. This is an important conclusion for green energy subsidy programmes, since FIT programmes can be implemented without any cost to the government, as the German example shows.

FITs aren’t “normal”

While more “liberal” on the source of finances, WTO law excludes a large amount of potential subsidies by requiring directed actions to “practices normally followed by the government”. Accordingly, FITs implemented and financed by private entities only qualify as a subsidy if they are ‘normal’ for governments. But what is “normal”?

Previous WTO panels and experts have narrowly interpreted this wording to cover only the particular government functions of taxation and expenditure of revenue. In cases where the government is engaged in *regulation* instead, the measure may not be considered a subsidy under WTO rules. The aim behind this is to strike a balance between the objectives of a) avoiding circumvention of the subsidy rules by directing private entities; and b) ensuring that governments retain the possibility of engaging in “command-and-control regulation” (regulation performed by private actors as directed by the government).

If no such distinction was made between regulation and governmental function, any direction by a government that could potentially distort trade would qualify as a subsidy.

Privately exercised FITs arguably do not represent a delegation of a “function” but a delegation of a “regulation.” It is a purchasing obligation that is imposed on the private bodies and not the design or oversight of such a programme. Against this background, it would be extremely difficult to argue that the purchase of electricity as mandated by law would qualify as a “practice normally vested within the government that does not fundamentally differ from practices normally followed by the government.” Otherwise, any obligation to put public policies into practice could qualify under the SCMA.

Yet again, the recent Appellate Body ruling has introduced a new level to that discussion: that of the “legal order of a country” as the benchmark for “normal,” which could potentially change the assessment.

In any case, for FIT systems implemented by public bodies, this distinction is irrelevant. If the government acts, whether it is a

“normal function” or a “regulation” - and all other requirements are met - a publicly run FIT could qualify as a subsidy.

Outlook

Should a WTO panel find that the Buy-Ontario clause violates WTO law, it would not be news to the ears of trade law experts despite its case specific impact. A ruling on the subsidy question, however, could clarify a number of outstanding issues and in that regard introduce greater legal certainty for countries that have implemented FITs or are planning to do so.

Likewise, a ruling could potentially clarify the basis upon which a FIT can be challenged. In the current case Japan argues that the FIT, thanks to its infamous buy-local clause, discriminates foreign manufacturers. Such a subsidy (contingent on either export performance or the use of local products) is prohibited under the SCMA. For all other subsidies (non-prohibited or ‘actionable’), however, the complaining party would need to show an adverse effect on its economy. While this can be more burdensome than certain requirements under GATT, it also means that an adverse effect could be shown in any affected sector if the like-sector benefitted from the subsidy. It has been suggested that, in theory, this could also include a competing energy sector, such as coal-fired plants. However, in the light of the high standard of proof required under the SCMA and considering the distorted nature of the global energy market, it could be difficult for competing energy suppliers to show an adverse effect attributable to the implementation of a single FIT. For the moment, this seems to be a theoretical mind game, at most.

The most important outcome of the ruling could well be its impact on expert discussion. With the request of consultations the issue has entered the stage of the WTO inducing country delegates and external experts to discuss whether they find that the existing rules are supportive of sustainable development and the fight against global warming. As the above discussion has shown, the WTO agreements allow for various arguments and interpretations which reflects the WTO’s nature as a negotiating body. It will be up to WTO members to decide whether they find these options supportive or whether a renegotiation would be beneficial. Those governments currently implementing or re-designing their FITs will be following the case closely, but it may be of relevance to a much broader group of countries wishing to further support the generation of electricity through renewable energies.

Geneva proceedings

The DSB has not yet been asked to establish a panel on the dispute as the countries continue their consultations searching for a negotiated solution to the case. Should the parties fail to agree and the case continues to the panel stage, it could take up to two years for the case to be resolved at panel and potentially appellate stage. The compulsory period for consultations of sixty days already expired last year - a panel request could thus be introduced at any moment.

One issue that has further complicated Canada’s position in the dispute is its highly federal nature and Ontario’s role as the implementing province. While Ontario is in full control of the FITs administration, including the decision to uphold the local content requirement, it is the federal government that negotiates in Geneva and that will have to ensure compliance with a WTO ruling.

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Pushing and pulling: The bumpy road to effective renewable energy policy

By Emmanuel Guérin and Joseph Schiavo

The spectre of global climate change, the depletable nature of fossil fuels, and energy security have made the development of renewable energy technologies a critical priority for many nations. However, the mainstream commercialisation and deployment of these technologies is impeded by economic and competitive barriers; renewable energy costs remain considerably higher than those of fossil energy, and renewable technologies are in need of vast investment to be brought to scale and deployed. These barriers necessitate government intervention, as the regulation of carbon emissions and large public investments are effectively the domain of the state.

With a highly complex and globalised supply chain of green energy products, it was only a matter of time until the issue would enter the sphere of the World Trade Organization (WTO) and its court system. As one of the first green energy subsidy cases, the US Trade Representative (USTR) filed a complaint against China at the WTO in December 2010, following a petition by the United Steelworkers Union (USW). It alleges that China's wind power manufacturing support program violates the WTO's subsidy agreement (Subsidies and Countervailing Measures Agreement SCMA).

It will likely be months, if not years, before the case is resolved by the WTO's Dispute Settlement Body (DSB). Legal analysis on the case itself and the issue's broader stake will inevitably accompany the process. At this stage, however, one should also look at the political economy surrounding the case, as this is the scene upon which all countries supporting renewable energy act.

Hand in hand: Demand-pull and technology-push policies

Support policies can be classified broadly in two categories: *demand-pull instruments*, supporting the production of electricity through renewable energy sources, such as cap-and-trade systems, renewable portfolio standards, and feed-in-tariffs; and *technology-push instruments*, supporting the production of corresponding technologies, which include R&D, direct investment, and special financing incentives.

The balance between pull and push policies, both within and across countries, is of paramount importance to create the necessary conditions for renewable energy support to really contribute to the global effort to reduce GHG emissions.

The rationale for combining pull and push policies for renewable energies is as follows. Renewable energy technologies are not yet mature, meaning that the price of electricity produced by using these technologies is often still significantly higher than the price of electricity produced by using conventional technologies. In order to bring the costs of renewable energy technologies down, the renewable energy industry must achieve price competitiveness. Given the diffuse nature of these technologies, progress cannot be made only by investing directly in the industry; technologies must be tested on the ground through small and large demonstration projects. Lessons learned *via* these demonstration projects contribute to the progress of the industry and to the development of economies of scale. Pull policies, such as feed-in-tariffs, therefore aim to cultivate and grow these niche markets.

Public and private renewable energy support initiatives need not be opposed to each other; they need to work hand in hand. The private benefit conferred to industries by push policies is necessary to solve the collective action problem of tackling climate change. In the absence of this private benefit, no one country has an incentive to develop renewable energies; on the contrary, the absence would create an incentive to wait for others to develop renewable energies and then adopt them.

Similarly, no country has an incentive to implement only pull policies only. Consider an example: imagine that country A sets the objective of having X percent of the energy it consumes produced by renewable energy sources, and it relies mainly on feed-in-tariffs (a pull policy) to achieve this objective. Country A faces a high risk that renewable technologies will be imported. This risk is even higher if country B supports its renewable energy technology industry (through push policies).

This example more or less corresponds to the situation between the EU (country A) and China (country B), even if this is a very simplistic way of depicting a much more complex reality. It is more complex for two main reasons:

- Some countries within the EU are actively supporting renewable energy technologies through push policies (Germany on wind mills, Spain on photovoltaic panels). But to reach the 20 percent renewable energy target set by the EU, the vast majority of member states are mainly relying on feed-in-tariffs.
- The balance between pull and push policies is different in China for wind and photovoltaic. On wind, China actively supports wind mill technology, but also supports the electricity produced through wind (*via* a feed-in-tariff, in particular). On solar photovoltaic, China aggressively supports the production of photovoltaic panels, but they are mainly exported.

The political debate within the EU on the goal to have a 20 to 30 percent emissions reduction by 2020 shows that the lack of balance between pull and push policies between the EU and China makes it more difficult for the EU to increase the level of ambition of its climate policies. Indeed, the fact that European renewable feed-in-tariffs encourage the import of Chinese photovoltaic panels (and therefore subsidises the Chinese industry) is used by some to oppose such a move. The IEA notes that Chinese production capacity for solar photovoltaic cells has expanded from 100MW to 2GW between 2005 and 2008, with 95 percent of this capacity exported in the absence of domestic demand. The monetary value of solar photovoltaic

Demand Pull	Technology Push
Tax incentives for end-users	Special financing, loan guarantees
Tradable green certificates, quotas	Producer tax incentives
CO ₂ tax	Direct investment
Cap-and-trade systems	Research and development funding
Feed-in-tariffs, feed-in-premiums	

cell exports from China to Europe doubled between 2007 and 2008. The negative economic impacts of this trend are likely to be small and concentrated in a small number of utilities and industries. But this situation is politically important and needs to be addressed. Otherwise, a move that would benefit the EU as a whole would be held hostage by political discourse.

The French photovoltaic case is a good example of what not to do. France put in place high guaranteed purchase prices for photovoltaic electricity but did not implement strong enough policies to create and support the domestic photovoltaic industry. The result of this imbalance between pull and push policies is straightforward. It created a major trade deficit of €800 million in 2009, which amounts to 2 percent of the overall French trade deficit. In the face of this difficult situation, Paris commissioned the “Charpin report.”

The main recommendations of the report are to massively and rapidly decrease the guaranteed purchase prices and to design and implement a new R&D strategy and industrial policy to create and support the French photovoltaic industry. The report also emphasises the need for support schemes that focus on new technologies rather than existing technologies, as Chinese products are priced much lower.

The French government is likely to follow the recommendations from the report. The decrease of the photovoltaic guaranteed purchase price is unfortunate, because unpredictability in policies can reduce credibility and undermine the confidence that investors, utilities, and industries require to engage in the transition towards a low carbon economy. Nevertheless, it is inevitable, and it was, in fact, foreseeable.

One should be cautious in drawing conclusions from these examples. They suggest that if pull policies are not combined with push policies within a given country or a group of countries (such as the EU), the policy mix will not be sustainable. Indeed, there will be political pressure to end them or at least not to increase them. Therefore, there should be international coordination on how to balance pull and push policies, lest the global effort to reduce GHG emissions will be weaker than it could be.

The political economy of dispute settlement

In the international marketplace, Chinese renewable energy subsidies may be part of a larger dynamic competition for the aggressively supported market of the European Union. High European uptake creates an enormous market for renewable energy. Feed-in-tariffs, the most widely used European policy, have a secondary effect of favouring the least expensive technology, where China has developed an advantage, rather than favouring the most advanced technology. Rent seeking behavior among project developers is as pervasive for renewable energies as it is for any other technology.

Both China and the US appear to be subsidising renewable

energies to some degree in order to capture European uptake, which may itself be at the heart of American arguments condemning Chinese policy. The political context of the USW’s decision to file a complaint with the United States Trade Representative and the Obama Administration’s decision to formally investigate the petition is potentially telling. Economic growth and job creation were at the center of the rhetoric of both political parties in the 2010-midterm Congressional elections and growth of the renewable energy industry in the United States is an important imperative in this debate. The timing of the US Trade Representative’s announcement of its acceptance of the USW petition is also suspect, as it occurred on October 15, 2010, several weeks ahead of the November 2 elections. This could be interpreted as a message to show the Obama Administration’s commitment to job creation. More fundamentally, a WTO dispute could be part of a narrative of “being tough on China;” it is logical that a rapidly developing country would face opposition as it establishes itself as a formidable industrial power.

An additional consideration is the general state of renewable energy support policies in the US. Certain states, such as California, have put both demand-pull and technology-push policies in place, yet policy at the Federal level remains rather fragmented and uncertain; Chinese renewable energy policy is considerably more extensive and comprehensive at both the provincial and national levels. The USW may view a WTO dispute as a way of protecting the US’s competitive advantage in renewable energies in the absence of American policy comparable in depth and breadth to that of China. Several failed attempts to institute Federal climate and energy legislation reinforce this view.

What role for the DSB?

It is important that the WTO ensures a level playing field between countries and industries. The DSB will soon make a decision on the legality of the Chinese Special Fund for Wind Power Manufacturing, and determine whether or not it includes a prohibited subsidy. More generally, the same rules should apply to all countries supporting renewable energies.

However, the DSB is certainly not the appropriate forum to organise the necessary international cooperation on how to balance, both domestically and globally, pull and push policies. It needs to stick to its task, and settle disputes. The WTO might serve this purpose, but more realistically, this could be tackled by bilateral or regional trade agreements and by balancing climate and industrial objectives.

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US vs. China: Renewable energy competition hits the WTO

By Marie Wilke

While governments and trade experts continue to dispute whether current WTO law is sufficiently equipped to address government support of a “green economy,” a WTO panel might soon have to apply these very rules to determine the legality of Chinese subsidies to its wind power manufacturers.

In response to a monstrous 5,800 page submission by the United Steelworkers Union (USW) denouncing the alleged illegal support of China's green energy market, the US initiated dispute proceedings at the WTO in late 2010. For the moment, the case is limited to certain measures affecting wind power manufacturing. Should the parties fail to agree on a negotiated solution, the case is likely to be resolved under the WTO's subsidy accord: the Subsidies and Countervailing Measures (SCM) Agreement. The United States Trade Representative (USTR) continues to analyse the possibility for a similar claim regarding subsidies to China's solar panel industry.

In its formal request for consultations, which marks the beginning of proceedings at the WTO, the US claims that China's “special fund for wind power manufacturing” is illegal under WTO subsidy law as it favours domestic products and services. Beijing's funds are contingent on the use of domestic input which illegally discriminates against foreign products, the USTR and USW claim. Article 3 (b) of the SCM Agreement indeed prohibits such “local content” subsidies. “Import substitution subsidies are particularly harmful and inherently trade distorting, which is why they are expressly prohibited under WTO rules,” said US Trade Representative Ron Kirk in a recent statement.

Beijing instead insists its policies are within the bounds of WTO rules and, above all, green. “Every country in the world is seeking to develop renewable energy to cope with climate change,” reads a statement on the Commerce Ministry's website. “China's wind power measures are helping save energy and protect the environment.” This reference to environmental protection could become the centrepiece of the dispute. While the WTO's main agreement, the General Agreement on Tariffs and Trade (GATT), acknowledges a need for balancing free trade and environmental interest by stipulating “exemptions” to the GATT obligations (Article XX GATT), the SCM Agreement's counterpart (former Article 8 SCMA) expired in 1999. Could and should Article XX fill this ‘gap’?

Article XX: Beyond the borders of GATT?

If a panel were to find that China's measures indeed qualify as a prohibited subsidy, China might argue that Article XX GATT nonetheless justifies the programme as it is “necessary to protect human, animal or plant life or health” or “relates to the conservation of exhaustible natural resources” (paragraph (b) and (g) of Article XX GATT). This poses two critical questions: first, can the function of Article XX be extended to the SCM Agreement; and second, can a prohibited subsidy that is contingent on local content under any circumstances constitute such an “environmental measure” justified under Article XX GATT?

Much has been written, said and speculated on the applicability of GATT Article XX to agreements other than GATT. As a negotiated outcome, the WTO agreements are far from straightforward and they generally allow many different interpretations. In the absence of a clear ruling by either panels or the Appellate Body, various positions have thus been argued. Only some can be presented here. While some experts see the SCM Agreement as *lex specialis* to the GATT and thus assume that the general GATT provisions (including Article XX) remain applicable, others

have countered that Article XX GATT remains inapplicable unless otherwise stated¹.

The latter position is supported by the fact that agreements such as the WTO Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement) specifically define the applicability of Article XX. The SCM Agreement's silence could indicate that Article XX was not meant to be applicable. This is further supported by Article 3.1 of the SCM Agreement which states that certain subsidies are prohibited “except as provided in the Agreement on Agriculture.” The agreement makes no similar exclusion for Article XX exemptions.

Finally, one needs to take into account former Article 8 of the SCM Agreement that expired in 1999. This provision originally included a defined list of subsidies to be deemed “legal,” including certain subsidies for research and development and environmental protection. The existence of a provision similar to Article XX but designed exclusively for the SCM Agreement could indicate that parties acknowledged the inadequacy and eventually inapplicability of GATT Article XX.

Eventually, the question comes down to different interpretative approaches and varying policy preferences. Proponents of the applicability of Article XX GATT will easily find sufficient evidence to argue their case, as will the opponents. Now that the question has formally entered the halls of the WTO, it is left to the adjudicative bodies to pick their side.

Climate change and the Article XX exemptions

In this light, the second issue appears almost straightforward. Already in 1996, one year before the adoption of the Kyoto Protocol and many years before the climate change discussion fully entered the public stage, the Appellate Body found that clean air qualifies as an “exhaustible resource.” In 2008, the Appellate Body reconfirmed this view when it ruled in the *Brazil-Tyres* case, that even “measures adopted in order to attenuate global warming and climate change” could potentially fall within the realm of Article XX GATT.

However, one must distinguish between the general measure that might contribute to the fight against climate change, and parts of its design. Is it the subsidy or the local content requirement that contributes to the mitigation of climate change? The distinction is of critical importance in particular in the light of the Article XX “two-tier” test. It requires a country invoking this justification clause to first show that the measure falls within either of the alternatives (for instance public health or natural resources conservation) and second that it is not “applied in a manner that constitutes a means of arbitrary or unjustifiable discrimination [...] or a disguised restriction on international trade.” The latter requirement clearly raises the question whether a local content requirement could ever qualify as applied in a non-discriminatory manner.

¹ *Lex specialis* is a special law which prevails over general law when the language is more detailed.

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GATTzilla vs. Flippa revisited?

The tuna-dolphin dispute's second round

In a couple of months, a WTO panel will issue a ruling on the ongoing 'tuna dolphin' spat between the US and Mexico. The ruling could have important implications for the increasing number of disputes concerning technical and sanitary standards and labelling requirements.

On 24 October 2008, Mexico requested consultations with the US over its rules on 'dolphin-safe' labelling, which Mexico says unfairly discriminates against its tuna exports in the case known as *US-Tuna II*. US law dictates that the 'dolphin-safe' label cannot be used on tuna caught in encircling, or 'purse-seine' nets, which often trap dolphins along with the tuna. Mexico, using purse-seine nets, contends that its tuna should qualify for the 'dolphin-safe' label nonetheless, as its fishing practices are fully sustainable and comply with international guidelines.

International agreements and domestic opposition: A dispute with many parties

The current dispute extends back to the early 1980's when dolphin conservation first became an issue of public interest. In the 1990's Mexico challenged under the pre-WTO, GATT system a US import ban allegedly put into place to prevent dolphin by-catch in the tuna industry. In a ruling heavily criticised by environmentalist groups, Mexico won its case against the US import embargo, which was subsequently withdrawn. The panel, however, did not reject the additional US policy of using 'dolphin-safe' labelling, nor did it spell out labelling criteria for GATT compliance. The latter issue now finds itself back at the international trade court.

In the wake of *US-Tuna I*, Mexico, the US and others agreed in the 1995 Panama Declaration to formalise, enhance and make legally binding existing international dolphin conservation programmes (later culminating in the Agreement on the International Dolphin Conservation Program, AIDCP). The Declaration also called on the US to change its 'dolphin-safe' label from that of a *fishing method* to a *non-mortality or serious injury* standard. In addition, Mexico adjusted its fishing methods (though continuing to use purse seine nets) which puts it in compliance with various international agreements, and specifically the AIDCP administered by the Inter-American Tropical Tuna Commission (IATTC).

After its victory in *Tuna I* and complying with the standards set forth by the IATTC, Mexico was hopeful its products would reach the American markets without prejudice; it was mistaken.

For a while, it looked like the US would impose the labelling standard established by the AIDCP - *no dolphins killed or seriously injured*. In fact, the US Department of Commerce was ready to modify its labelling criteria accordingly until

national conservation groups launched a massive public relations campaign against the proposed new standard. The groups claimed that tuna fishing using the purse seine method, regardless of the modifications, continued to adversely affect dolphins in the eastern Pacific Ocean (ETP) and brought commerce to court over it. The lawsuit culminated in an April 2007 California appeals court ruling that agreed with the environmental groups. Moreover, due to the perceived threat to the integrity of the US government label, the largest tuna brands declared that they would not buy purse seine tuna products even if the government labelling requirements were changed to allow it. Eventually no changes were made and the US continues to exclude tuna fished with purse seine nets from its tuna safe label. There are also several dolphin-safe labels on the market, run by environmental groups and the private sector.

Tuna II: the Sequel

Frustrated with Washington's failure to comply with the bilaterally agreed tuna labelling standard and to what it saw as a 'de-facto' embargo on its tuna products, Mexico requested consultations with the US at the WTO in October 2008. Mexico argues that while it can 'legally' import its tuna products into the US, without the label it cannot, in reality, sell its products there. Mexico argues that this, in effect, amounts to a ban on its imports as Mexico overwhelmingly employs the prohibited method, which violates the non-discrimination principles (national treatment and most-favoured nation treatment) set forth in the WTO's General Agreement on Tariffs and Trade (GATT). In addition Mexico alleges that the US labelling measure contravenes the Agreement on Technical Barriers to Trade, a specialised WTO agreement.

In essence, Mexico is invoking the WTO Agreements in support of a successful multilateral environmental agreement, in particular of its sustainable fishing practices provisions. While Mexico has changed its fishing methods, now complying with this international agreement, its products have further suffered. Others, however, turn the argument on its head saying that Mexico did not go far enough with its reform and that its products only suffer as it refuses to abandon an internationally sanctioned fishing method.

The question for the panel regarding Mexico's GATT claims boils down to 'what constitutes discrimination'; specifically can a

Transparency and Public Opinion at the WTO

News coverage critically influences public opinion on what is right and what is wrong, especially in areas of political sensitivity. The massive publicity campaign launched by environmental groups and private sector actors in response to the first Tuna-Dolphin ruling evidences this. And it is fair to say that current news coverage again 'argues the US side', incompletely reporting on Mexico's concerns and allegations. By contrast, however, according to experts close to the case, some environmental groups have spoken in favour of Mexican fishing methods while rejecting methods used and promoted by the US, including fishing in association with floating objects.

Access to the parties' arguments is critical to inform the greater public. Yet this particular aspect of transparency (and many others), continues to be disputed among WTO members. While some countries such as the US nowadays post their submissions and other documents online, most developing countries continue to keep their arguments for themselves. Also, in the ongoing negotiations on reforming the WTO's procedural rules, many developing countries are against imposing higher standards on transparency. Mexico itself, for instance, cautions against compulsory transparency outlining that smaller countries might lack the necessary resources to address intensified questions from the media and handle greater public attention.

Upon the request by academics, and their own industry, the government of Mexico has now, for the first time ever, allowed access to party submissions in ongoing proceedings. It is this wealth of information that the present article is based on - and it will hopefully encourage other journalists, academics and lawyers to engage in further in-depth analysis to prevent a post Tuna Dolphin II.

The complex web of actors and agreements is not made any easier by the fact that both parties to the dispute are members of the North American Free Trade Agreement (NAFTA). NAFTA, established one year before the WTO, provides for its own dispute settlement mechanism (DSM) which gained notoriety during a series of disputes between the US and Mexico over soft drinks. The US contends that the Tuna-Dolphin argument must be resolved in such a NAFTA panel, rather than in Geneva.

As most FTAs, NAFTA provides for a choice-of-forum clause which clarifies the relationship between its own (DSM) and that of the WTO. It normally gives complainants the right to pick one of the two - once the choice has been made, the other forum can no longer be approached. However, if three conditions are met and the responding party so requests, the case must be resolved under NAFTA instead. These conditions are that: 1) the dispute concerns a standards-related measure, 2) the measure is adopted or maintained by a party to protect its human, animal or plant life or health or to protect its environment, and 3) the dispute raises factual issues concerning the environment, health, safety or conservation, including directly related scientific matters.

On that basis the US contends that Mexico's decision to pursue the case at the WTO violated the NAFTA choice of forum clause. In September 2010 Washington petitioned to establish a dispute settlement panel to examine Mexico's choice of forum. Since then parallel proceedings have been ongoing. However, while the WTO examines the dispute at hand, the NAFTA panel is only concerned with the procedural details. The US as the respondent, after all, could (would) hardly bring a case against itself.

But what has induced the US to take that step? What is the advantage of having the argument resolved 'back at home' rather than at the WTO? At this stage, only one thing seems certain: Mexico has good reasons to oppose this move as the 'soft drink' spat revealed procedural limitations of NAFTA's DSM.

Under a perfectly functioning NAFTA, a panel would be established automatically. If parties do not choose panellists within 15 days, then they are chosen 'by lot' from a country's roster of panellists to ensure automaticity nonetheless. However, these rosters need to be renewed by each country every three years. Thus, in effect, a country can block dispute resolution as happened in the soft-drink case series by not renewing the rosters. Currently there are no country rosters in place.

Even if a panel was to agree with the US and determine that the WTO was not the right place to resolve the case (i.e. it has no jurisdiction) it is questionable whether the WTO panel would (could) simply 'refer' the case to NAFTA (and this point was not raised by the US before the WTO Group of Experts). Unlike FTAs, the WTO has no choice-of-forum clause. At this stage, against the background of its own jurisprudence, it seems highly unlikely that a panel or the Appellate Body would ever deny their own jurisdiction, especially in ongoing cases.

voluntary label result in *de facto* discrimination (that is *in effect* opposed to a law explicitly banning imports of a certain origin)? While in *Tuna I*, the case concerned discrimination in the form of a ban, *Tuna II* concerns a labelling requirement that is a measure only applying once a product has been imported. It is now to the panel to determine what extent imports are being discriminated against vis-à-vis domestic products and vis-à-vis other imports and whether that suffices to amount to 'discrimination' within the meaning of GATT.

With respect to Mexico's national treatment discrimination claims, the US argues that almost all the imports must be negatively affected while the group of 'like' domestic products as a whole is benefitted. Since most imported tuna comes from countries that do not employ purse seine nets, it would be hard for Mexico to win on such an interpretation of the law. Mexico, on the other hand, argues that the imported products have to be treated less favourably than their domestic counterparts. That is, not all the imports have to be negatively affected but some, so long as more imports are harmed than domestic products. With respect to Mexico's most-favoured-nation discrimination claims, Mexico is arguing that all imports from certain countries receive the advantage that is not being accorded immediately and unconditionally to Mexican imports.

Technical regulations and standards amounting to a trade barrier

Mexico has also brought claims under the TBT Agreement, a specialised WTO agreement that further addresses non-tariff barriers to trade and promotes regulatory standardisation around international standards. The central question here is whether the measure at issue is *voluntary* or *mandatory*. One could legitimately ask how a label can be mandatory when it is not a precondition for importation. In this regard, the US argues that countries can choose whether or not they want the label to be affixed to their products which makes it voluntary. Mexico counters this with two arguments.

First, it puts forward that the measure is mandatory because it prohibits labels based on all other dolphin safe standards including the international AIDCP standard. A true voluntary standard would permit the use of a US dolphin safe label when the conditions of the US label are met and the use of the international AIDCP label when the conditions of that label are

met, Mexico argues. In this regard it also cites the Appellate Body ruling in *EC-Asbestos* which said a regulation is mandatory if the product must possess certain characteristics (positive form) or must not possess certain characteristics (negative form). Mexico argues that the dolphin-safe label is mandatory because it falls under the latter criteria (it cannot be caught using purse seine nets). Second, Mexico puts forward that in reality, producers have no choice. If they want to sell their tuna in the US market, it must have the 'dolphin-safe' seal of approval. In this sense, the measure is *de facto* mandatory.

If the measure is found to be voluntary, a different set of rules set out by the TBT could be applicable instead, namely the rules on standards which require harmonisation of rules when international standards exist. In this context, not surprisingly, the US argues that the AIDCP does not constitute an 'international standard', meaning the US label does not have to comply with that of the AIDCP. In addition, the US points to a provision in the TBT agreement that says countries do not have to follow the relevant international standard if it would frustrate the fulfilment of a legitimate objective(s); in this case what the US says are the legitimate objectives of preventing consumer deception and protecting the welfare of dolphins. Mexico counters both arguments on various accounts, among others by questioning the accuracy of the information portrayed by the label and the fact that the US does not allow for any other "dolphin safe" label in its territory (including the AIDCP label).

As the TBT and its rules on standards are largely unexplored areas of WTO law, the outcome of this 'interpretative' dispute remains unknown. A decision that spells out the criteria for how and when international standards trump domestic standards would send important signals to the many standards making bodies on international stage. Moreover, the case could tell us where the WTO is headed in terms of addressing 'standard' disputes - be it environmental, sanitary or technical - and could provide insight into how future panels will develop working solutions to these complex issues. Likewise, if the panel was to agree with the US' argument, WTO members could be encouraged to apply similar "single exclusive labels" to address otherwise prohibited process and production method distinctions.

The panel is expected to finalise its work this summer.

Private standards and WTO law

By Makane Moïse Mbengue

Proliferating private sector standards - with requirements that often go beyond or differ from those set by public bodies - are generating considerable interest and controversy among WTO members. Among questions being asked is whether private sector standards could be 'imported' within the WTO, or whether WTO rules should rather be 'exported,' bringing some order to the standard-setting universe. In this context, the international standard-setting organisations with an agreed mandate under the WTO are also seeking to ensure their continued dominance.

Private sector standards in the area of agricultural products/food for human consumption purport to achieve a variety of objectives, ranging from food safety to environmentally sustainable production. Such standards have been actively discussed at the WTO Committee on Sanitary and Phytosanitary Measures (SPS Committee) over the last few years. Critics stress that private voluntary standards may exclude small producers in developing countries from markets; strong opponents emphasise that such standards are much more rigid than public-sector standards, and without scientific justification. In other words, private standards may not be based on science or risk analysis, and their adoption is neither democratic nor transparent.

Private and commercial standards are proving to be sensitive at the World Trade Organization (WTO), as the organisation's membership is restricted to states and its agreements are binding on states only. This article aims at briefly depicting and describing the current challenges facing private standards within the WTO framework.

Importing private standards within the WTO?

There are many reasons behind the rise of private standards in the international trade arena. These include a lack of public confidence in regulatory agencies, the legal requirements on companies to demonstrate 'due diligence' in the prevention of food safety risks, a growing focus on 'corporate social responsibility' and the global expansion of food service companies. Examples of some of the more prominent private voluntary standards schemes in international trade include the 'Carrefour Filière Qualité' standard, the 'British Retail Consortium Global Standard - Food', the 'QS Qualität Sicherheit', the 'Label Rouge', the 'Global Food Safety Initiative', as well as the International Standards Organization (ISO) standards: 'ISO 22000: Food safety management systems' and 'ISO 22005: Traceability in the feed and food chain'.

One approach to private standards at the WTO would be to allow their 'import.' 'Importing' such standards would imply, *inter alia*, the possibility for WTO member states to develop national standards based on private standards or to permit imports certified to comply with a private standard that incorporates and exceeds the official requirements embodied in national standards and/or international standards¹. The debate on the 'importability' of private standards in the multilateral trading system arose in June 2005 when Saint Vincent and the Grenadines raised concerns at the SPS Committee about EUREPGAP certification for bananas.² Saint Vincent and the Grenadines opposed the importability of private standards, considering that those standards go well beyond international standards.

¹ In this article, 'International standards' refer to those standards elaborated by international standard-setting organisations of an inter-state character.

² EUREPGAP is a private sector body that set voluntary standards for the certification of agricultural products around the globe. The terms of reference defines the body as "The Global Partnership for Safe and Sustainable Agriculture"

Since then, there has been a growing perception that private standards need to be scrutinised through a multilateral approach and surveillance. This perception was confirmed at a first WTO Session of Information on private standards in October 2006, at which EUREPGAP (which became GLOBALGAP) and the United Nations Conference on Trade and Development (UNCTAD) participated. Another UNCTAD/WTO Joint Information Session was organised in June 2007, and private and commercial standards were included for the first time as a specific agenda item of the SPS Committee. A lively debate on private standards, including many Member contributions, took place between October 2007 and June 2008.

The multilateral trading system was conceived primarily to deal with 'public' standards, i.e. standards formulated by public regulatory agencies and/or elaborated by agreed international standardisation organisations like the *Codex Alimentarius*. Unless an evolutionary interpretation of some of the core WTO Agreements involved in private standards is fashioned, the import of private standards into the WTO may be limited by legal impediments. For the time being, discussions on a so-called 'integration' of private and commercial standards within the WTO framework remain slow and cautious, not to say controversial.

Exporting WTO law into the sphere of private standards?

During a meeting of the WTO *Informal Ad Hoc Group on Private Standards* in December 2008, the group of Latin American countries presented a statement raising a number of concerns about private standards. The group proposed that the SPS Committee should permanently monitor the development of private standards and identify whether the measures based on those standards "constitute restrictions to trade disguised as replies to the on-going economic crisis". This position emphasised the need to 'export' WTO law into the sphere of private standards when these standards are being used or authorised by WTO member states within their own jurisdiction. The issue of rationalising private and commercial standards through the lens of WTO law is another tricky element of the ongoing discussions. Some solutions are being suggested for the sake of conferring more legitimacy (legality?) to private standards.

For instance, with regard to the TBT Agreement, most WTO Members do not consider that the *TBT Code of Good Practice for the Preparation, Adoption and Application of Standards* (TBT Code of Good Practice)³ would be useful in this context, as it essentially applies to governmental or quasi-governmental standardisation bodies, not to private bodies. Some have emphasised, nevertheless, that it would be useful "if private standard-setting bodies adhered to the basic principles of the TBT Code of Good Practice, in particular with regard to transparency, participation of developing countries, impartiality and consensus, effectiveness and relevance, coherence, and the

³ *Code of Good Practice for the Preparation, Adoption and Application of Standards*, Annex III of the TBT Agreement.

development dimension.”⁴ Therefore, from the point of view of some WTO members, private standards may play a greater role in the multilateral trading system if they abide by well-embedded WTO law principles like the principle of transparency. It is true that the TBT Agreement opens the door for such compliance. If private standardisation bodies are to be given the status of ‘non-governmental bodies’, WTO members states seem definitely to be under an obligation to “take such reasonable measures as may be available to them to ensure that local government and non-governmental standardising bodies within their territories (...) accept and comply with this Code of Good Practice.”⁵

When it comes to the SPS Agreement, things are much more nebulous. It is highly uncertain whether private standards could qualify as SPS measures within the scope of the SPS Agreement. Article 1.1 of the SPS Agreement states that the agreement applies to “all sanitary and phytosanitary measures which may, directly or indirectly, affect international trade,” without explicitly limiting this application to SPS measures taken by governmental authorities. Along the same lines, the definition of an SPS measure in Annex A(1) and the accompanying indicative list of SPS measures do not explicitly limit these to governmental measures. A number of private standards would appear to address, in particular, the risks to human health identified in Annex A(1)(a). However, other provisions of the SPS Agreement, including the basic rights and obligations in Article 2, explicitly refer to the rights and obligations of “Members,” i.e. member states and not private bodies. Furthermore, doubts remain regarding how and to which extent private standardisation bodies can be subject to the fundamental requirement of the SPS Agreement to base SPS measures on scientific risk assessment.

The only obvious path for ‘exporting’ SPS rules in the context of private standards may be the one rooted in Article 13 of the SPS Agreement, which reads as follows: “Members are fully responsible under this Agreement for the observance of all obligations set forth herein (...) Members shall take such reasonable measures as may be available to them to ensure that non-governmental entities within their territories, as well as regional bodies in which relevant entities within their territories are members, comply with the relevant provisions of this Agreement.” Countries like Egypt, Argentina, and a number of other developing countries argue that the SPS Agreement makes governments in importing countries responsible for the standards set by their private sectors. For the time being, the only point on which WTO members have agreed not to disagree relates to the need to conduct a study of the relationship between the SPS Agreement and private standards.

The Empire Strikes Back... Linking private standards and international standards?

The formulation of standards, and in particular of food safety as well as health standards, has long fallen within the province of agreed international standard-setting organisations, also referred to as the “international standardisation community.” More specifically, under the SPS Agreement ‘three sister organisations’ are identified as being the ‘Hercules’ of standardisation in the context of food safety and health: the Codex Alimentarius, the International Plant Protection Convention (IPPC), and the World Organization for Animal Health (OIE). The standards formulated by these organisations now face competition from private standards. Without a doubt, there is an increasing fragmentation in the field of standardisation and

thus a potential risk of ‘standards shopping’ in international trade law.

Aware of these major developments, the International Committee of the OIE adopted a resolution in 2008, in which it recalled that the “World Trade Organization, under the Agreement on the Application of Sanitary and Phytosanitary Measures, formally recognises the OIE as the reference organisation responsible for establishing international standards relating to animal diseases, including zoonotic diseases.”⁶

The focus by the OIE on its mandate is not fortuitous. The rationale governing the resolution is to delineate clearly the sphere of influence of international standards *vis-à-vis* private standards. The position of the OIE is strong and does not leave any room for interpretation. Private standards must comply with international standards. They should neither exceed international standards nor conflict with international standards.

The WTO is thus confronted with a dilemma when it comes to standards. Should it adopt a ‘legalistic’ approach that would only take into account international standards? Or should it adopt a ‘pragmatic’ approach, which would entail the integrative recognition of private standards in the framework of the multilateral trading system? WTO Members have suggested various ways to promote coherence between private standards and international standards. These mainly involve information exchange and outreach between international organisations and private standardisation bodies to improve coherence in the standard-setting universe, inclusion of private standard-setting bodies as observers in the standard-setting procedures of the three sisters, and harmonisation of the standards of the three sister organisations with private standards, in particular with ISO standards.

Behind these suggestions lies a great concern by several WTO members, who wish to avoid being forced to make a Cornelian choice between private standards and international standards. The concern is all the more understandable when considering the constitutional mandates and competence of the relevant international standardisation organisations. Capitalising on their respective mandates, the ‘empire’ of international standard-setting organisations is watching and is determined to strike back if the development of private standards goes beyond any normative control. It suffices to have a careful look at the conclusions of the Codex Alimentarius Commission at its last session. The relevant passage reads as follows: “The Commission noted that the proliferation of private standards was of significant concern to many members as compliance with and certification to these standards was difficult, especially for developing countries. The Commission also noted that for food safety matters *there was no other international standard-setting organisation than Codex developing science-based standards in an open, democratic, inclusive and transparent forum*. The Commission acknowledged that private standards existed and there was a need to see how they related to Codex standards. The Commission was of the opinion that *Codex standards should be benchmarks for these private standards* and that international harmonisation of food safety provisions should be based on Codex standards” (emphasis added). It remains yet for the three public standard setting organisations to formulate a common position on private standards.

⁶ See, OIE, Resolution XXXII, *Implications of private standards in international trade of animals and animal products*, 76th General Session, 25-30 May 2008.

⁴ See, SPS Committee, *Private Standards - Identifying Practical Actions for the SPS Committee (Summary of Responses)*, Note by the Secretariat, doc. G/SPS/W/230, 25 September 2008, p. 6.

⁵ See, Article 4 of the TBT Agreement.

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Quota trimming: Chinese export restrictions and the WTO

By Bo Ye

In the wake of the global economic crisis, the Chinese government has taken several measures to restrict the export of raw materials. For example, China now levies export duties from 5-15 percent on 110 raw materials. While export restrictions on rare earth metals used in the manufacture of many electronic devices have received much media attention, export quotas are also applied to minerals including bauxite, fluoride, zinc, and silicon carbide. Beijing has also established a review mechanism to determine the lowest export price of such raw materials.

The United States and EU have cried foul on the measures, arguing that such restrictions will disrupt international markets and increase manufacturing costs in markets that are dependent upon the raw materials. In June and August of 2009, the US, EU, and Mexico filed complaints against China at WTO's dispute settlement body, arguing that China's export restrictions are a violation of WTO rules. The complaints allege that the quantity restrictions violate Article XI:1 of GATT, which regulates the issue of quantitative restrictions and commitments made in paragraphs 162 and 165 in the Report of the Working Party on the Accession of China. The countries also claim that China levies *ad hoc* export duties on many raw materials, even though these products are not included in Annex 6 of China's Accession Protocol, which exempts certain materials from an export duty prohibition. Because the duty rates in question are also in excess of what is mentioned in Annex 6, there is an alleged violation of both Article 11.3 of the Protocol and paragraph 342 of the Report.

The legality of the dispute hinges upon whether the export restriction measures fall under the regulatory scope of GATT and the Accession Protocol and whether China can justify such measures under Article XX of GATT, the agreement's general exceptions clause. Article XI of GATT, which regulates the issue of quantitative restrictions, allows for relatively broad interpretation. However, import/export restrictive measures such as duties, domestic taxes, or other charges are not within its scope. In fact, WTO agreements do not regulate export duties at all since the focus of GATT is on import restrictive measures, not export restrictive measures.

China, however, made special commitments on export duties when it acceded to the WTO. Article 11.3 of the Accession Protocol stipulates that China will eliminate all taxes or charges applied to exports unless specifically provided for in Annex 6. The annex illustrates 84 products that may have export duties levied, with the highest rates ranging from 20-40 percent. Accession Protocols are generally recognised as becoming part of a country's WTO obligations upon accession. As a result, Article 11 of the Protocol regulates the scope of products and export duty rates, while GATT itself remains silent on the issue. In essence, if a panel would find China's export restrictions to constitute a violation of WTO law, it would do so on the basis of the Accession Protocol.

Identifying the "source of law" is of critical importance for the potential justification under Article XX of GATT. Whether this specific provision is applicable to agreements other than GATT, including Accession Protocols have been one of the main controversies in WTO law. Thus far, there is no final judgment on this issue. Various arguments can be put forward. In 2009, the WTO's dispute settlement body issued a panel decision on the *China - Publications and Audiovisual Products* case referring to "China's right to regulate trade in a manner consistent with the WTO Agreement" recognised in Article 5.1 of the Accession Protocol. The Appellate Body ruled that on the basis of this wording, Article XX of GATT was applicable to Article 5.1 of the

Accession Protocol, as GATT is part of "the WTO Agreement". If one finds Article XX to be applicable to this particular case, China would need to show that the measures fall within the provision's scope. Raw materials such as bauxite and fluoride are exhaustible natural resources. In the 1996 *US-Gasoline* WTO case, the Appellate Body declared that measures taken only need to relate to the protection of natural resources. Following that argument, in the current case, levying export duties does, in fact, relate to the protection of exhaustible natural resources.

Beijing must also prove that in addition to levying taxes on raw materials, it has taken measures to restrict domestic production and consumption at the same time. This is one key point in the GATT Article XX test. Yet, the respective measures taken do not need to have an immediate effect on restricting domestic production and consumption. This takes account of the difficulty to establish a causal relationship between novel measures and changes in production and consumption over short time. In the rare earth example, as China is the main supplier in the international market, if China is able to prove that the measure is intended to protect environment, then the measure is justified under general exception provision.

In its so-called "chapeau," GATT Article XX also outlines further "general" requirements that need to be met regarding how a measure is applied. First, there can be no arbitrary discrimination between countries where the same conditions prevail; second, there can be no unjustifiable discrimination between countries where the same conditions prevail; and third, there can be no disguised restriction on international trade. The Appellate Body ruled that these three conditions are interrelated, and if a measure fails to satisfy even one of the conditions, it cannot be justified under GATT Article XX. In sum, while a measure may satisfy many conditions, it is considered a potential trade barrier if the application does not satisfy the chapeau requirement. In the past, many countries, including China, have failed to meet these "last" requirements. Also, in the current case, it could be difficult to show that the measure is not applied in a discriminatory way nor is it a disguised restriction on international trade.

The WTO is an international organisation intended to liberalise international trade, and Article XI of GATT is designed to meet this purpose. In order to maintain a balance between rights and obligations, under certain exceptional conditions, a WTO member may take provisional measures to restrict international trade. This is the legislative purpose of GATT Article XX. In the *China-Raw Material Exports* case, the panel may rule that China's measures violate several provisions of GATT from substantial or procedural perspectives, but may ultimately support China's sovereign rights to make better use of its natural resources, by justifying it on the basis of Article XX of GATT even if otherwise found in breach.

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Governance of international trade for the green economy

By Ricardo Meléndez-Ortiz

This essay on governance of international trade for the Green Economy is the first in a series of articles exploring trade-related issues in the lead-up to the Rio+20 conference in 2012. In this context, Ricardo Meléndez-Ortiz, Chief Executive of ICTSD, reflects on the means, as well as the limits, of the international trade system to provide solutions for sustainability.

On Economics and Sustainability

In its simplest formulation, the “green economy” refers to economics in the name of sustainability: a system of interactions among markets, environmental forces, and social policies that support human subsistence and freedoms over generations.

Sustainability broadens the study of economics, moving it beyond the assumption that utility sufficiently explains individual behavior and that certain “natural” laws govern market exchanges. It calls for a reformulation of economics in the direction proposed by Amartya Sen, bringing together modern economics and the foundations of the moral philosophy of welfarism, thus welding economics to the natural resource realities of today, to the rapidly integrating global market and the blinding pace of technological innovation supporting it.

If economics intends to “understand, explain, and predict human behavior” to inform “prognosis and policy” in the service of sustainability, tinkering with concepts of classical economic thought may not give us all the tools that we now need.¹ Sustainable development requires that economic actors be guided by an Aristotelian “god-like” aim, not by the “good of man.” In Adam Smith’s words, good citizens promote “welfare of the whole society.” Today, such aims refer as well to an inter-generational imperative.²

We need to ensure that institutional arrangements and “decisions should not impair the prospects for maintaining or improving future living standards.”³ Moreover, by capturing the negative externalities of our natural resource use “our economic systems [should] be managed so that we can live off the dividends.” We need to distinguish “between survivability, which requires welfare to be above a threshold in all periods, and sustainability which requires welfare to be non-decreasing in all time periods.”⁴ We need to provide incentives that protect rainforests rather than turn them into charcoal.

We are currently transitioning from a world of plenty into one in which the planet’s resources have been compromised in their ability to sustain our routines. We are also in a world of global economic and social multi-level governance. From the perspective of the trade system of today, how can we get to sustainability?

The governance web

Trade and sustainable development hinge on institutions. In the absence of a formal worldwide authority, governments need to ensure that domestic and international institutions interact constructively to pursue sustainable development goals and not work at cross-purposes. Several crucial sustainable development policies will have ramifications for commercial exchange. Shaping and managing this intersection is the governance challenge. While

national governments can establish sustainability directives for ministries, this is not an option available at the multilateral level. Global “governance,” rather than “government,” recognises a system that operates under formal and informal rules and practices arising from multiple sources, and that efforts are accountable to multiple stakeholders. Getting these rules to reinforce each other and work together coherently is critical. To do this, governments will need to work innovatively within and across institutions.

The challenges are manifold. Population growth is concentrated in the poorest countries, where meeting basic human development needs and aspirations entails increased resource use. Increasing wealth in the developing world - a good thing - involves changing diets and boosting demand for resource-intensive food, which puts more pressure on nature and energy systems. Climate change impacts are complicating the picture even more.

New policies governing investment, finance, energy, and knowledge are necessary to harness economic activity into modes of production that favour resource conservation. However, the current trading system - which encompasses the multilateral rules of the World Trade Organization (WTO) together with the growing landscape of bilateral and regional trade agreements - is not yet fully equipped to steer economic activity towards new pathways.

Let us have no illusions about the trading system’s capacity to play a driving role. Most of the decisions necessary to set the planet on a course to sustainability will not be made within the trading system. But virtually all such policy decisions - from the internalisation of environmental costs to policies that encourage innovation - will impinge on trade: what we produce, where we produce it, and how we exchange it. Some policy will overlap with issues now dealt with by international trade rules, such as intellectual property, standards, and protections for foreign investors. There are ample opportunities for policy-makers and influencers to ensure that trade-related policies do not detract from the pursuit of sustainable development.

At the same time, the trading system must remain true to its own principles and not allow environmental policy to become a pretext for governments to engage in discriminatory practices or pander to influential domestic economic actors. Trade and investment policies determine allocation and use of resources, from minerals and labour to knowledge and soil. Individual societies’ ability to govern domestic resources is affected by the international regulatory systems for trade and investment - systems that they in turn can influence.

The idea is simple enough, but governments have a record of taking with one hand what they have given with the other. By conflating development policy with development aid, they have too often ignored the developmental effects of their trade, investment, immigration, and environmental policies. The classic example is levying high tariffs on goods exported by aid recipients. A more complex narrative comes from the incoherence of governments’ pursuit of a fundamental global developmental goal: food security, which has been an international policy objective for decades. Yet, nearly one human in six still does not get enough food to lead a healthy and active life.

¹ Sen, A. 1987. *On Ethics and Economics*, Cambridge: Basil Blackwell.

² Reppeto, R. C. 1986. *World Enough and Time: Successful Strategies for Resource Management*. New Haven: Yale University Press.

³ See [Global Footprint Network](#)

⁴ Munasinghe, M. 1993. ‘Environmental Economics and Sustainable Development’. World Bank Environment Paper No.3. Washington, DC: The World Bank

One problem linked to trade governance is well-known: rich country farm subsidies and tariffs push down prices and weaken incentives for developing country governments, or the private sector, to invest in agricultural production and build roads and the other rural infrastructure necessary to support it. The Uruguay Round trade talks, which brought agricultural tariffs and subsidies into the scope of multilateral trade rules, failed to correct these practices. Decades of low productivity and low farm prices pushed many small farmers in developing countries to look for other sources of income. In the process, they became net buyers of food. When food prices rose in 2007-08, many developing country farmers got caught in the middle. Correcting these problems requires an evidence-based approach that allows countries to rise above commercial and mercantilist interests and conclude the WTO's Doha Round. Coherent, cooperative action on land-use across the governance board - whether on forests, water, biodiversity or climate - is another urgent need that must be addressed.

The multi-polar world

It is not possible to look at trade governance processes in isolation from broader governance challenges. Modern international institutions must operate in circumstances they have never had to confront before: an increasingly multi-polar world. No single actor can impose its will on others. Moreover, the worst financial and economic crisis in decades has devastated some of our core assumptions about the global economy. As a result, major powers now disagree on fundamental aspects of how economies should be organised. Concordant beliefs and expectations are necessary to motivate action and change in international regimes.

Even though "policy coherence" is a phrase used too much and followed too little, it is a concept to which we must return. Our collective failure to produce global public goods, such as updated multilateral trade rules that respond better to poor countries' needs or curb greenhouse gas emissions, has been due at least in part to an inadequacy of what has been called "cosmopolitics" - "global political action transcending a strict state-to-state, or multilateral, basis."⁵

Doing with what we have - incrementally

The rules and practices embodied in the multilateral trading system offer governments ample potential to take action on current and future challenges linked to sustainable development - it's just that they have not purposefully taken advantage of it yet. Making trade governance more supportive of sustainable development will require governments to change their behavior. Networks that bring together civil society, business, international organisations, and governments have done sterling work on several challenges, from public health to environmental protection and corruption. But trade institutions largely remain an enterprise between governments.

Moreover, the "legislative" or rule-making function of the WTO and other trade institutions is likely to remain limited to government participation only. Outside input into their 'ideational' function - identifying which issues to discuss, and potential solutions - is desirable, especially from non-traditional sources (i.e., those other than business). But here too, governments will play a central role. Even if a "trisectional network" analogous to the World Commission on Dams were created to bring governments, business, and civil society together to think through problems facing the trading system, any recommendations would have trouble being heard at the WTO unless the initiatives receive member governments' blessing.⁶

There is ample latitude in pre-existing arrangements to propel a

reform and bolster accountability to the public⁷. Dogged inclusion and mainstreaming of sustainability and coherence driven by a universal mandate and vision may do the trick.

To make sense of a chaotic and disorderly system, the hundreds of preferential trade arrangements of various types and coverage is a good place to start. The WTO has failed miserably to bring consistent rules here. A continuing black mark for the trading system is the vastly uneven capabilities among governments to assess their own needs and grasp the implications for global challenges of the complex web of arrangements. One proposal, a review by a new Global Task Force of Ministers, may help minimise inefficiencies and complexities inherent in the current system. This may lower the bar of meaningful participation from Olympian heights and make coherence more plausible.

On this same path, countries need to update trade rules that are not working for sustainable development. The *de facto* differentiation among developing countries that has emerged in the Doha Round negotiations could become a springboard for a bold experiment in giving nations more policy space to respond to risk, unsustainable situations, or vulnerabilities. Parties to bilateral trade agreements could alter investment provisions so that they are not used as a sword against legitimate health and environmental action. WTO members could act to anticipate potential challenges to trade governance that might arise from governments' pursuit of sustainable development, enabling a nimble response.

WTO members would do well to build on existing subsidy rules to identify and target government handouts that damage the environment. Also, government procurement rules and standards on process and production methods or measures addressing carbon content should be developed following non-discrimination principles, ensuring prevention of disguised protectionism.

In the past few years, countries have been able to provide expression in trade terms - through particular prescriptions for market access, for instance - to the intractable concepts of food security, sustainable livelihoods, and rural development. They have done it in the context of Doha's negotiations by recognising and classifying the particularities of specific products in terms of agro-ecological conditions, nutritional intake, employment relevance, and a long list of indicators that despite its hard reality would otherwise be unapparent to multilateral policymaking. While the possibilities are there, countries can only shift direction and rearrange objectives if driven by compelling vision and political leadership.

Broadening the system

Issue-specific cooperation outside trade-related institutions could amplify the contribution that trade governance could make to sustainable development. For instance, while continuing the slow process of reducing rich country farm subsidies inside the WTO, governments collaborating in the Organisation for Economic Co-Operation and Development (OECD) could agree to a 'tax' on farm subsidies, with the proceeds directed at funding agricultural research and development and extension services in developing countries.⁸

Having to pay extra for the privilege of subsidising would potentially make governments think twice about lavish farm programmes and their international consequences. Investing a share of subsidy money directly in boosting agricultural productivity in developing countries would amplify the effects of the WTO's subsidy reform process. A farm subsidy tax may be

5 Charnovitz, S. 2002. 'WTO Cosmopolitics', New York University Journal of International Law and Politics 34: 299-354.

6 Keohane, R. 2002. Power and Governance in a Partially Globalized World. London: Routledge.

7 Trade Governance and Sustainable Development, Meléndez-Ortiz R. and T. Biswas, in Deere Birkbeck, C. (ed) (forthcoming 2011), Making Global Trade Governance Work for Development: Perspectives and Priorities from Developing Countries, Cambridge: Cambridge University Press

8 Biswas, T. 2010. 'Let's counter the damage of subsidies', letter to the Financial Times, 8 September 2010.

wishful thinking. But a different trade issue with direct ramifications for food security - including agricultural export bans - will be impossible to address without serious complementary policies.

Sudden bans of farm exports are not good policy-making: not only do they “starve your neighbor,” as the then director of the International Food Policy Research Institute, Joachim von Braun, put it, they discourage investment to boost future production.⁹ But export bans do make a lot of sense to a government faced with rioters demanding cheaper food. Similarly, growing rice in solar-powered greenhouses, fed by groundwater and cooled with seawater, seems preposterous from both a cost standpoint and an environmental one. But Djibouti started doing it when it felt that it could no longer trust world markets for its food supply.¹⁰

Action outside the WTO could enhance the sustainable development impacts of the Doha talks to liberalise trade in environmental goods and services. Research in renewable energies suggests that tariffs are just one in many factors determining whether companies choose to invest in green technology.¹¹ Other policies, such as “feed-in tariffs” guaranteeing a price for renewable electricity, subsidies for components, and the use of renewable energy tax breaks, matter at least as much. If a group of governments got together and cooperated on these other factors - for instance, by harmonising standards or making them interoperable, and by establishing incentives for the sharing of trade secrets linked to green technology - it would substantially expand the market for environmental goods. Stand-alone initiatives, building on multilateral principles, may be the response in the medium range future to inertia in the WTO.

More immediately, consistency in financing responses becomes urgent as the international community comes to grips with the wants of developing economies in the face of emerging challenges. Importantly, an Aid-for-Trade (A4T) initiative has been established at the WTO, involving major international financial institutions. In 2006-2007 total new commitments from bilateral, multilateral donors and others had reached over \$50 billion.¹² At the same time, the Kyoto Protocol unleashed climate mitigation funding for developing countries. Commitments under the United Nations Framework Convention on Climate Change and the December 2009 Copenhagen Accord have lined up \$30 billion for immediate release in 2010-2012. This flow of funds is expected to ramp up to \$100 billion per year by 2020 to attend to the adaptation and mitigation requirements of developing countries.

Both A4T and climate financing may be addressing similar and synergetic objectives: from specific analytical and policy capabilities, to shifts in production, material needs, and challenges to competitiveness. Operational realities will dictate the obligation of addressing trade and climate financing in a coordinated manner. A sound understanding of needs, ways, and means to effect demonstrable change is still to be fully developed, as is an efficient and responsive governance scheme. Lessons learned in the financing of climate change accords, the elaboration of national adaptation plans of action as well as the World Bank's endeavour to draw poverty reduction strategy papers as basis for development financing, should inform the push for coherence. Existing mechanisms need to be tested as to whether they are equipped to undertake full carbon or biodiversity impact lifecycle analysis of assistance projects. Moreover, we need to ask what we can do about mainstreaming these imperatives and handling the ensuing costs. Devising an institutional apparatus that brings together donors with recipient countries around the goal of coherence and coordination is a primary task in the governance of trade for the green economy.

Final thoughts on trade and the green economy

Today's trade system may be incapable of steering the world into a “green economy.” It is, however, a wisely constructed governance device, with valuable principles for the management of interaction among members at different levels of development. Yet, it is a system informed by a theoretical perspective of economics and the *homo economicus*, which is questionable from a sustainability perspective. In the absence of a review to complement it, tinkering with what we have may move us closer to shifting pathways, but only if societal concerns are introduced in an operative manner and responsive adaptations to the system are added in strategic steps. A firm political will, articulated in the form of a compact for shared vision agreed at Rio +20, may trigger and make reform possible.

Establishing a governance system for trade that supports the green economy would take time - whether ruinously too long is in our leaders' hands. And time is the real test.

9 Reuters 2008. “‘Starve Your Neighbor’ Policy Roils Food Trade”, by Missy Ryan, 5 March 2008.

10 Martin, A. 2008. ‘Mideast Facing Choice Between Crops and Water’, New York Times, 21 July 2008.

11 Jha, V. 2009. ‘Trade Flows, Barriers and Market Drivers in Renewable Energy Supply Goods: The Need To Level The Playing Field’, Bridges Trade BioRes Review 3(3), December 2009. Geneva: International Centre for Trade and Sustainable Development. (<http://ictsd.org/i/news/bioresreview/64027/>)

12 OECD and WTO, 2009. Aid for Trade at a Glance 2009: Maintaining Momentum. Organization for Economic Cooperation and Development and World Trade Organization, Paris and Geneva.

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- 7 Geneva, Switzerland. POLICY DIALOGUE ON THE GREEN ECONOMY. Organised by the University of Geneva and UNEP.
- 11-12 Geneva, Switzerland. FIFTY-SECOND SESSION OF THE TRADE AND DEVELOPMENT BOARD. Organised by the United Nations Conference on Trade and Development.
- 11-12 Paris, France. BUSINESS AND INDUSTRY GLOBAL DIALOGUE: THE ROAD TO RIO+20.
- 25-29 Geneva, Switzerland. FIFTH MEETING OF THE CONFERENCE OF THE PARTIES TO THE STOCKHOLM CONVENTION.
- 26-27 Manila, Philippines. FOURTH MEETING OF THE ADVISORY GROUP ON CLIMATE CHANGE AND SUSTAINABLE DEVELOPMENT. Organised by the Asian Development Bank (ADB).
- 27-29 April, Rio de Janeiro, Brazil. WORLD ECONOMIC FORUM ON LATIN AMERICA 2011.

May 2011

- 2-13 New York, US. NINETEENTH SESSION OF THE UNITED NATIONS COMMISSION ON SUSTAINABLE DEVELOPMENT.
- 3-4 Geneva, Switzerland, WTO GENERAL COUNCIL.
- 4-6 Cape Town, South Africa. WORLD ECONOMIC FORUM ON AFRICA 2011.
- 9-13 Istanbul, Turkey. FOURTH UNITED NATIONS CONFERENCE ON LEAST DEVELOPED COUNTRIES (LDC-IV).
- 9-14 Rome, Italy. GENERAL FISHERIES COMMISSION FOR THE MEDITERRANEAN THIRTY FIFTH SESSION.
- 10 Manama, Bahrain. SIXTH SESSION OF THE REGIONAL COMMISSION FOR FISHERIES (RECOFI). Organised by the Food and Agriculture Organization of the United Nations.
- 16-18 Helsinki, Finland. THIRD MEETING OF THE SECRETARY GENERAL'S HIGH-LEVEL PANEL ON GLOBAL SUSTAINABILITY (GSP 3). Organised by the United Nations.

June 2011

- 20-24 Geneva, Switzerland. FIFTH MEETING OF THE PARTIES TO THE ROTTERDAM CONVENTION (PIC COP 5).
- 20-24 Vancouver/Whistler, Canada. INTERNATIONAL CONFERENCE ON ENVIRONMENTAL COMPLIANCE AND ENFORCEMENT.
- 22-24 Geneva, Switzerland. UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT (UNCTAD) PUBLIC SYMPOSIUM: MAKING TRADE AND FINANCE WORK FOR PEOPLE AND THE PLANET.

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