Bridges

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Facts and Figures

- Agricultural trade has continued to grow since the Uruguay Round Agreement, but more slowly than in earlier years, and more slowly than non-agricultural trade.
- Developed countries continue to dominate global agricultural trade, accounting for 71 percent of exports and 75 percent of imports between 2001-2004.
- Least-developed countries' agricultural exports grew from 0.4 percent of world trade in 1994 to 0.8 percent in 2004, but imports grew faster, from 0.4 percent to 1.1 percent.
- All other countries accounted for 28.1 percent (same as in 1990-1994) of world agricultural exports and 23.8 percent of global imports (up from 22.5 percent) between 2001 and 2004.

Source: *Tackling Trade in Agriculture*. OECD. November 2005

Can London Deliver What Hong Kong Couldn't?

The trade and agriculture ministers of Australia, Brazil, the EU, India, Japan and the US will meet in London on 10-11 March with the intention of making parallel moves in key negotiating areas so as to keep the Doha Round on the track agreed in Hong Kong.

Unable to break the deadlock on agriculture and non-agricultural market access (NAMA) in Hong Kong, ministers set 30 April 2006 as the new target date for agreement on the structure and percentages of tariff and subsidy cuts or, in WTO parlance, the 'modalities' for concluding Doha Round. The ministerial declaration instructed negotiators to "ensure that there is a comparably high level of ambition in market access for agriculture and NAMA. This ambition is to be achieved in a balanced and proportionate manner consistent with the principle of special and differential treatment."

Post-Hong Kong negotiations have so far shown little movement, although trade diplomats generally acknowledge that Members seem more willing to advance on substance instead of restating well known positions. However, a difference persists in the interpretation of the concept of 'comparably high level of ambition'. Brazil's and India's view is that industrial and agricultural tariff cuts must start from bound levels and be reduced by matching percentage points. In contrast, the EU argues that advanced developing countries should make steeper industrial tariff cuts because of the difference between their bound and applied duties, while the EU applies its considerably lower bound rates. EU Trade Commissioner Peter Mandelson has repeatedly said that the Doha Round cannot be concluded on the basis of "real cuts by Europe, paper cuts by others."

The EU has proposed 35-60 percent agricultural tariff cuts and a 100 percent maximum tariff for developed countries (25-40 percent cuts and 150 percent cap for developing countries). This proposal, however, is conditioned on advanced developing countries accepting a final maximum industrial tariff of 15 percent. For developed countries, the industrial tariff cap would be 10 percent. In addition, the EU originally required both developed and developing countries to undertake minimum market opening commitments in a large number of services sectors (the Hong Kong services text did not retain this approach, see page 12).

The low level of tariff cuts, as well as the conditionalities, were roundly criticised when the offer was tabled in October 2005, and the EU's refusal to revise it has frequently been blamed for the lack of agreement on modalities in Hong Kong. However, Commissioner Mandelson has staunchly maintained that "the blockage in the Round is not in Brussels, but in those countries failing to come forward with an offer on industrial tariffs and services that goes anywhere near responding to the seriousness of our offers in all sectors of the Round."

The US agricultural offer has also come under fire due to its timidity on domestic subsidy reductions, while the G-10 group of net food-importing countries has been criticised for seeking so much flexibility in tariff reductions and quota expansion for 'sensitive' products as to make market access gains meaningless. The countries most blamed for stalling in the negotiations on NAMA and services are India and Brazil, the two leaders of the G-20 developing country coalition focused on opening markets for agricultural products.

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

Regular ICTSD contributors include:
Heike Baumüller
Johanna von Braun
Dominic Furlong
Malena Sell
Mahesh Sugathan
David Vivas

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The public finger-pointing seems to have subsided of late. At press time, senior officials from the so-called Group of Six – the US, the EU, G-10 member Japan, Cairns group representative Australia, and G-20 co-leaders Brazil and India – were meeting in Paris to develop options for tariff and subsidy cut formulas for their ministers to consider at the 10-11 March meeting in London. Although the ministerial agenda also covers services, rules and development, agriculture and NAMA are expected to largely dominate the talks.

Cautious Optimism Prevails

Nobody believes that 'full modalities' can be agreed in April. However, a number of negotiators appear confident that enough progress can be made for a deal to emerge in June/July, although most concur that the level of ambition is likely to be low. One scenario often evoked is that Members could reach agreement on the *structure* of the modalities – such as the number of, and perhaps the thresholds for, tariff/subsidy cut categories – by the April deadline, while numbers for coefficients and reduction percentages would be decided by 31 July 2006, the date currently targeted for the submission of draft Schedules of commitments.

There are signs that the G-6 ministers are ready for at least some horse-trading. US Trade Representative Rob Portman and Commissioner Mandelson have highlighted their mutual determination to achieve parallel progress on all issues. Mr Mandelson told journalists on 22 February that he and Mr Portman had agreed that they needed "more serious offers from WTO Members on industrial goods and services […] if we can achieve this then perhaps both the EU and the US will be in a position to look again at their offers in agriculture in the context of a final deal." Prior to the Hong Kong Ministerial Conference, the EU insisted that its agriculture offer was final.

Brazil's WTO Ambassador Clodoaldo Hugeney, for his part, has signalled that his country could be willing to accept an industrial tariff reduction formula that would bite into its applied rates rather than just eliminate the 'water' between bound and applied rates. The US and the EU will also be looking for NAMA movement by India, as well as market opening in several services sectors, and financial services in particular, by Brazil, India and China.

Nevertheless, even if the G-6 does strike a deal – or even an outline of one – there is no guarantee that other WTO Members will accept it as the basis for further negotiations. There will be no one in London representing least-developed countries, small and vulnerable countries, or countries dependent on long-standing trade preferences. Neither will a single minister attend from the G-33 group, which focuses on advancing talks on 'special products' and the special safeguard mechanism Members have agreed to negotiate for the use of developing countries.

Simulation Results Could Be Helpful to G-6, Others

All WTO Members are likely to be in a better position to decide what market access formula would best serve their interests after the results of a simulation exercise have been circulated. The simulations – carried out by technical experts from Australia, Brazil, Canada, Egypt, the EU, India, Japan, Malaysia, Norway and the US – applied different reduction percentages or coefficients to the participating countries' industrial and agricultural tariffs in order to get a clearer picture of how various tariff lines would be impacted by specific tariff-cutting proposals. With regard to agriculture, tariffs were divided into four bands to which four different sets of percentage cuts were applied. For developed countries, these ranged from 25 to 60 percent in the lowest band to 40-85 percent in the highest. For developing countries, the simulation tested figures between 15 and 50 percent in the lowest tier, and between 30 and 75 percent in the highest tier. The NAMA simulation modelled the tariff-cutting effects of a simple Swiss formula with four coefficients for developed countries and six for developing countries, as well as the effects of using each Member's bound tariff average as a coefficient, as advocated by Argentina, Brazil and India. The simulations also factored in a number of other variants, such as different numbers for sensitive tariff lines and formulas for tariff rate quota expansion in agriculture; and different options for the treatment of unbound tariffs and flexibilities for developing countries in NAMA. The deadline for completing the simulations was 28 February and the results were to be circulated to all WTO Members.

WTO Services Negotiations & Development: A Post Hong Kong Review

Mina Mashayekhi and Elisabeth Tuerk

With the Hong Kong Ministerial Declaration setting out approaches and time-lines aimed at achieving ambitious market access commitments, there is a crucial need to ensure that Members' follow up work focuses on outcomes that most impact on development and poverty eradication.

Services play a fundamental role in building infrastructure and improving competitiveness. They also have important implications for poverty reduction, access to essential services (e.g. health, education or water), human development and gender equality.

The ultimate development impact of the Hong Kong services language will depend on the follow-up work Members will undertake in the months to come. In this work, the common baseline should be in terms of development-oriented criteria. Many are already enshrined in the two developmental pillars of the General Agreement on Trade in Services (GATS), namely Articles IV and XIX, which call for increasing participation of developing countries in world trade, including through liberalisation of market access and in sectors/modes of export interest to developing countries and through appropriate flexibility in terms of making market opening commitments. Development benchmarks can also be found in the Modalities for the Special Treatment of Least-developed Countries (LDCs), the inadequate implementation of which was highlighted at a recent Special Session (see page 12). In addition, paragraph 15 of the 2001 Negotiating Guidelines calls for an evaluation of the implementation of Article IV, to be followed by suggestions for additional means to achieve its goals. As such, preserving the right to regulate for the public interest (e.g. policy flexibility for development), meaningful commitments in sectors/modes of interest to developing least-developed counties and supply-side capacity-building are key development benchmarks.

The Hong Kong Ministerial Declaration recalls many of these criteria, clearly flagging development oriented objectives (e.g., the economic growth of all trading partners; the development of developing countries and LDCs; and due respect for the right to regulate). Amongst the key development achievements of the Hong Kong meeting is the clear acknowledgement that LDCs are not expected to enter into any commitments. However, favourable language on objectives and certain flexibilities does not in itself ensure pro-development outcomes.

After Hong Kong, it is important to not be caught in process-related issues, including those surrounding plurilateral approaches (see page 12). Rather, there is need to move forward in making commercially meaningful commitments which reflect the interests of developing countries. The need to ensure pro-development outcomes from the Hong Kong mandate also became clear at UNCTAD's February 2006 Trade Commission. While some lauded plurilateral approaches as a means of speeding up the negotiating process, others expressed caution as regards the ability of developing countries to successfully engage in such processes. Some countries called upon Members to avoid reproducing the outcome of post-Uruguay Round sectoral negotiations (which resulted in sectoral agreements on financial and telecom services, thereby accommodating the interests of developed country Members), while sectors (maritime transport) and modes (Mode 4) of interests to developing countries did not make progress. Concerns raised include that plurilateral initiatives may result in higher levels of commitments in selected sectors and lead to a possible formalisation of particular, sectoral negotiating initiatives. Delegations also put on record their understanding of the Hong Kong Declaration, namely that plurilateral negotiations would be undertaken on a voluntary basis; that they are to be of a complementary nature; that no country should be obliged to participate in negotiations on sectors on which they are not in a position to make specific commitments. This is important, as some 20 plurilateral requests are expected, covering sectors ranging from financial, telecom and energy to computer and environmental services, as well as modes, notably Mode 3. It should be noted in this context that the GATS has been hailed as a development-friendly agreement, mainly because it allows Members to choose which (sub)sectors to commit and which conditions/limitations to attach to such commitments.

At the February Services Cluster, WTO Members discussed how exactly to move forward on implementing plurilateral approaches. Members will need to address a series of issues, including the transparency of the requests and the format of the negotiations. Among open questions are whether the sectoral negotiating groups should be formalised, the extent to which the WTO Secretariat should be involved, and how to avoid overlaps while ensuring that there is sufficient time for scheduling plurilateral meetings. While many had expected plurilateral negotiations to help accelerate and focus the negotiations, the organisational and logistical challenges of that approach are becoming increasingly obvious; plurilateral negotiations may end up slowing down rather than accelerating the services trade negotiations. Leadership is now required from major trading partners, including in terms of making commercially meaningful commitments in sectors and modes of interest to developing countries.

Where Are the Gains?

Two areas have been identified as particularly important in terms of generating developmental benefits: Mode 4, the movement of natural persons, and Mode 1, the outsourcing of services. Both can help bridge skill shortages and take advantage of large pools of workers in developing countries, bringing benefits to both sending and receiving countries. Various studies converge in announcing global gains from liberalising Mode 4, stating that gains could range from US$150-200 billion; much of which would flow from liberalising lower-skilled movement; and that gains of freeing higher-skilled movement would amount to 3-11 percent of world GDP. In the Mode 1 context, global outsourcing expenditures are expected to grow to US$827 billion in 2008. This potential – and the repeated

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calls that GATS negotiations should benefit developing countries – strongly call for meaningful commitments in these two areas.

So far, however, Mode 4 progress has remained limited. In June 2005, developing countries submitted an analysis of offers that highlighted the lack of commercially meaningful liberalisation in this mode: while some WTO Members have partly expanded commitments in categories such as contractual services suppliers and independent professionals, they neither extend commitments to (sub)-sectors and categories of developing country interest, nor sufficiently deepen the sectoral scope. In addition, they often contain limitations that effectively reduce the commercial value of the commitments.

The Hong Kong Declaration contains several (explicit and implicit) references to Mode 4. For example, it states that particular attention will be given to sectors and modes of supply of export interest to developing countries, and most importantly, Annex C sets out modal objectives. However, a closer look reveals that Annex C provides for differentiated levels of ambition for each mode. Compared to Modes 1 and 2 (where Members aim at commitments at existing levels of market access) and for Mode 3 (where they aim at adopting specific types of commitments or eliminating specific, listed, limitations) the objectives for Mode 4 are of a somewhat lower level of ambition. In fact, Annex C merely calls for new or improved commitments on the categories of contractual services suppliers; independent professionals; 'others' de-linked from commercial presence; intra-corporate transferees and business visitors. For all of them, the suggestion is to remove or substantially reduce economic needs tests and to indicate the prescribed duration of stay and eventual possibilities of renewal. Thereby, Mode 4-related language stops short of setting out clear objectives for new and commercially meaningful commitments in less skilled categories – the area with most export opportunities for developing countries and LDCs.

There is therefore a need to flag approaches that could facilitate commercially meaningful Mode 4 commitments, including for skill levels of interest to LDCs. Options could comprise a framework of common categories (e.g. classification, definitions, terminologies) capable of capturing less-skilled movement that benefit LDCs; responding to the joint request on Mode 4 put forward by LDCs; strengthening transparency; avoiding criteria that exclude less-skilled suppliers; ensuring appropriate depth/breath of commitments both horizontally and sectorally; adopting clear disciplines on domestic regulation; addressing overly burdensome visa requirements/procedures; facilitating developing countries' participation in mutual recognition agreements (MRAs); or creating a special committee dedicated to Mode 4-related issues. In addition, sending countries could receive assistance for devising measures that facilitate commitments and export opportunities through national flanking policies, including for ensuring temporariness of stay, and to strengthen developing countries' domestic services supply capacities.

Domestic Regulation

Navigating between the need to preserve domestic policy-flexibility and achieving clear and specific disciplines to secure market access is the key challenge in the Working Party on Domestic Regulation (WPDR). While this challenge is particularly pronounced for developing countries (where regulatory frameworks are still at an emerging stage), it also exists in the developed world. The past months have seen a growing momentum in the WPDR with an increasing number of proposals/room-documents submitted. The WPDR has identified 'possible elements' for such disciplines, and the Hong Kong Ministerial Declaration calls upon Members to develop text for adoption and to do so before the end of the current round of negotiations.

For these future disciplines to achieve pro-development outcomes, as proposed by some developing countries, they need to: clearly state that they cover Mode 4 (and underpin any respective commitments); carefully respond to developing countries' needs in the design of the various elements; and have specific, precise and operational provisions for flexibility as well as provisions for special and differential treatment. These could include provisions that:

- clearly recognise developing countries' need to introduce new regulatory measures and preserve the right to regulate;
- ensure a development-focused interpretation;
- facilitate developing countries' export capacities (e.g. accounting of their special needs when devising domestic regulatory measures; providing technical assistance and capacity-building to enhance the quality of the service supplied);
- clearly recognise both the role that MRAs can play in facilitating developing countries' exports and the need to take concrete measures to facilitate their accession to MRAs;
- make examinations (for the verification of quality) available to all eligible applications, including foreign and foreign-qualified applications);
- provide for concessional licensing fees for developing countries;
- establish an appropriate set of disciplines for transparency, clearly excluding so-called *à priori* transparency obligations;
- facilitate developing countries' effective participation in international standard-setting; adequately limit the relevance of standards originating from organisations that do not operate on the 'one country one vote' principle; and establish a developmental review of services standards and requirements.

Emergency Safeguards

Development challenges also arise in GATS 'rules'. An Emergency Safeguard Mechanism (ESM) would allow adaptation to changing circumstances by addressing adjustment costs, bringing on board those who lose out from liberalisation and creating breathing space to build capacities. This is particularly important for developing countries in the context of services trade, where liberalisation is a novel phenomenon involving complex issues, which makes it difficult to foresee the economic, social and developmental results of changes.

Clear rules for the application of an ESM would help avoid abuse and provide clarity and predictability. Along these lines, any future mechanism would need to find the right balance between flexibility (e.g. allowing Members to define certain concepts at the national level) and rigidity (e.g. strict notification/transparency requirements and the concept of a 'limited window'). However, there is no consensus yet on the desirability and/or feasibility of such a

mechanism among WTO Members. Intermediary solutions have been floated, including, for example, specific procedures for expeditious processes when considering waivers, or guarantees for positive consideration of such requests. In principle, however, the option to resort to a waiver is already offered in Article IX of the WTO Agreement, and its usefulness for fulfilling ESM-type objectives remains questionable.

Appropriate flexibilities are even more important in the absence of a comprehensive services trade assessment that would bring clear guidance for Members regarding where and how to make commitments that truly create development gains. Absent an ESM, other options for Members are to not take any commitments, where full foresight is lacking or to resort to the Article XXI procedure for modifying commitments.

Appropriate Treatment for LDCs

Although their share of world trade in commercial services remains less than 0.5 percent, services are the fastest growing component of GDP in many LDCs. They also play a major role in the realisation of social and developmental objectives. Building on the Negotiating Guidelines and the LDC Modalities, the Hong Kong Ministerial Declaration puts particular emphasis on LDCs: first, it recognises the special difficulties LDCs face when making services commitments and contains the explicit acknowledgement that LDCs are not expected to undertake new commitments; second, it mandates Members to develop methods for the full and effective implementation of the LDC Modalities, and gives specific examples of how to do it.

This is, indeed, important, as the LDC Group had drawn attention to the inadequate implementation of the Modalities. Examples include that Members showed little restraint in seeking access to LDC markets, as well as Members' responses to the LDC Group's request on Mode 4. The methods suggested by the Hong Kong Declaration include: an appropriate mechanism for according special priority to (sectors and modes) of export interest to LDCs (e.g. a GSP type preferential mechanism on services could be envisaged); undertaking commitments in sectors and modes identified by LDCs; assisting LDCs to identify sectors/modes that represent development priorities; and developing a reporting mechanism to facilitate the review mandated in the LDC modalities.

The Need for a Proper Assessment of Services Trade

A thorough and comprehensive services trade assessment can offer valuable advice on how to ensure that current negotiations achieve pro development outcomes. At UNCTAD's February 2006 Trade Commission, experts and delegations carefully reviewed some of the preliminary findings, which UNCTAD's services trade assessment (based on a case study approach) has generated so far.

Delegates discussed different methodological approaches and the related challenges (e.g., the overall lack of data, as well as the limits to quantitative modelling, which is unlikely to be sufficiently accurate to be directly used in the negotiations). They reviewed general lessons learnt, including about differences between liberalisation and deregulation; the relationship between regulatory failures and market failures; the impact of market structures and the importance of backward and forward linkages. Policy-makers also discussed specific sectors, including telecommunication (where liberalisation has produced most beneficial results, but careful attention has to be given to competition-related challenges); financial services (an important infrastructural sector, where liberalisation has generated improvements, but with important weaknesses and challenges remaining, particularly as regards supervision and prudential regulation); tourism (a key sector with positive potential, including for small- and medium-sized enterprises, particularly when fostering linkages to other sectors and activities); or construction services (which can offer an important source of income to the poorer segments of the population and where liberalisation policies, particularly with regard to government procurement, require particular caution, including because of their impact on employment and domestic capacity-building).

Emphasis was also given to the need to address adjustment costs. Several aspects are key in that context, namely, to identify the origins of the adjustment needs; who is affected by the costs and how these effects play out. Similarly it is important to address who ultimately bears the costs, which can affect both the private and the public sector (costs of unemployment, lower wages, re-training or capital costs). The meeting also reviewed a number of policies to cope with adjustment (e.g., phased-in policy changes, paying compensation to potential losers, social policies and safety nets).

Participants concurred that for liberalisation to generate development gains, pre-conditions that must be in place include proper flanking policies, regulatory preparedness, the development of competition policies and laws, support for building domestic supply capacity and human capital, as well as policies to enhance the transfer of technology. However, there is no 'one size fits all' scheme of liberalisation and reform that guarantees success across a broad range of countries. In that context, much technical assistance is needed: first for building regulatory and supply capacity so as to ensure that services trade liberalisation will truly generate development benefits; and second, for compiling and analysing statistical data on trade in services, as well as identifying and assessing interests in and gains from services trade liberalisation. In addition, aid for trade can be useful for building services supply capacity and infrastructure, and should thus play an important role.

Attention was also given to the need to comply with the GATS Negotiating Guidelines, which – in paragraph 14 – mandate that the negotiations be adjusted in light of the results of an assessment. Similarly, the review of the services negotiations (paragraph 15)was deemed to be a crucial element for a successful outcome of the Doha Round.

With a deadline of 2006 looming for the Doha Round's completion, there is now an urgent need for follow-up work in Geneva and in capitals to ensure that, ultimately, services negotiations produce concrete pro-development outcomes.

Mina Mashayekhi, Head, Trade Negotiations and Commercial Diplomacy, Branch (TNCDB) of the UN Conference on Trade and Development and Elisabeth Tuerk, TNCDB. The views expressed here are the authors' and do not represent those of the UNCTAD Secretariat or its member states.

Did LDCs Get a Good Deal in Hong Kong?

While much has been made of the Hong Kong decision to grant duty- and quota-free access to developed country markets for products originating in least-developed countries, the exceptions in the text can seriously affect its impact.

Although most least-developed countries (LDCs) already enjoy preferential market access in many countries, some of their products still face restrictions in a number of developed countries. That was the key reason for their long-standing quest for a WTO commitment to full duty- and quota-free market access. Another was that, unlike individual countries' preferential trade schemes, access conditions bound at the WTO cannot be changed.

The Decision on Measures in Favour of Least-developed Countries in Annex F of the Hong Kong Declaration contains a brand-new developed country obligation to provide duty- and quota-free access for LDC exports as of 2008. There is, however, an important caveat with regard to product coverage: developed countries that face difficulties in providing full unrestricted access in 2008 will only be required to do so for 97 percent of tariff lines. This three percent reservation would account for some 330 tariff lines, according to Debapriya Bhattacharya, head of the Dhaka-based think tank, Centre for Policy Dialogue. "Given [LDCs'] undiversified export basket, three percent of tariff lines may essentially deprive them of market access for all of their products." He noted that 20-25 tariff lines at the six-digit HS level account for some two-thirds of Bangladesh's total exports. The ministerial declaration contains no guidelines for selecting the three percent of tariff lines that will not be given duty-and quota-free access.

There is no deadline for extending duty- and quota-free treatment to all products, although the text includes a 'best effort' provision to "take steps to progressively achieve" full product coverage "taking into account the impact on other developing countries at similar levels of development, and, as appropriate, by incrementally building on the initial list of covered products." While this last provision undoubtedly provides comfort for poorer developing countries likely to compete for the same export markets, it also carries the risk of permanently excluding the most competitive LDC export sectors. Some LDCs that benefit from preference schemes were actually supportive of the reservation, since it would reduce the chances that their exports would be displaced by competition from more efficient LDC producers.

Developing countries in a position to do so 'should' – rather than 'shall' – open their markets to LDC exports, but they "shall be permitted to phase in their commitments and shall enjoy appropriate flexibility in coverage."

Countries also have an obligation to ensure that preferential rules of origin for imports from LDCs are simple and transparent, and contribute to enhancing market access.

LDCs gained a potentially more significant development policy tool with the right to maintain for seven years existing measures prohibited by the Agreement on Trade-related Investment Measures (TRIMS). The measures must, however, be notified to the WTO Council for Trade in Goods, which may extend the transition period upon request. Importantly, LDCs may also introduce new TRIMS-incompatible measures for a period of five years, renewable by the Council, which must take into account "the individual financial, trade and development needs of the Member in question." Among the most frequently used measures that violate the TRIMS Agreement are local content requirements and export/import balancing provisions (see also page 13 for LDCs and services).

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Uneven Progress in Agriculture

Following consultations during the third week of February, the agriculture negotiations Chair Crawford Falconer said he would start producing 'reference papers' on a number of issues to facilitate ministerial decision-making in April.

According to the Hong Kong Ministerial Declaration, WTO Members must agree on full modalities for cutting export and domestic support, as well as tariffs, by 30 April 2006. Some issues were already decided in Hong Kong:

- It was agreed that all forms of export subsidies would be eliminated by 2013. In February 2006, convergence started to emerge on disciplines to ensure that food aid does not distort markets. Other export competition issues to be decided include disciplines for export credits and state trading enterprises, as well as the phase-out schedule.
- On domestic subsidies, ministers agreed in December that the EU, which has the highest level of permitted trade-distorting support, would make the highest cuts. The US and Japan are in a second tier for reducing subsidies, and all other Members fall into in the bottom band. Before 30 April, Members must decide the percentage of cuts in each tier. In addition, disciplines must be developed for the Blue Box to ensure that payments aimed at limiting production or cushioning market price fluctuations are less distorting than Amber Box support.In addition, the criteria for reduction-exempt Green Box payments must be re-viewed to ensure that such subsidies really are at the most minimally trade-distorting.
- In Hong Kong, ministers reached a 'working hypothesis' to structure their tariffs into four bands for reduction. However, Members' views on the other two elements of the tariff reduction formula – i.e. thresholds for the bands, as well as the level of cuts within each band – remain miles apart. In addition, the G-10 coalition of net food-importing countries continues to oppose any tariff caps, while other WTO Members have proposed a maximum tariff ranging from 75 to 100 percent, with some in favour of a 150 percent cap for developing countries. Another extremely difficult market access issue to be resolved involves the percentage and treatment of the 'sensitive' tariff lines that Members may exempt from full formula cuts. Two special and differential treatment measures must also be fleshed out as an 'integral part' of the modalities: the number/percentage and treatment of the 'special products' (SPs) that developing countries may self-designate on the grounds of their food security, livelihood security and rural development needs, and the triggers and other specifics of the Special Safeguard Mechanism (SSM) that will be negotiated to protect developing country farmers from import surges and price collapses.

Ahead of the February agriculture week, Chair Falconer had presented Members with a set of specific questions about each unresolved issue so as to help focus discussions on overcoming differences during the two months that remain before the 30 April deadline. The Chair's intention is to start drafting 'reference papers' that will outline the *structure* of the draft modalities, i.e. the general approach to be taken to specific issues, while leaving the numbers (percentages of cuts and sensitive/special tariff lines, thresholds for tariff reduction tiers, etc.) to political decision-makers. These issue-based reference papers will be designed to evolve into draft modalities, based on inputs from the negotiations.

The February consultations focused on food aid (export competition); Blue and Green Box disciplines and the base year for determining Amber Box reduction (domestic support); and the treatment of sensitive products, the SSM and *ad valorem* equivalents for specific duties (market access).

Food Aid Disciplines a Step Closer

Talks were most successful on preventing food aid from distorting export competition. There was considerable convergence that in-kind emergency aid solicited by intergovernmental organisations should qualify for the 'safe box' that ministers agreed in Hong Kong should be protected. WTO Members also recognised that at times donor governments might need to act before an emergency was declared by international organisations. Chair Falconer suggested that definitions for this situation would also be useful.

For non-emergency situations, Members continued to debate whether food aid should only be given cash form, whether it could be 'monetised' (sold to raise money) and whether it could be re-exported. While differences remain, Chair Falconer reported that he saw a 'shadowy outline' emerging thanks to Members' greater willingness to seek middle ground, for example through discussing disciplines for monetisation in response to concerns expressed about the potential of aid to replace commercial sales.

Domestic Support

Despite general goodwill, no convergence appeared on disciplines for the 'new' Blue Box, which is to cover price-related support such as the US counter-cyclical payments. Positions also remain essentially unchanged on the need for disciplines the 'old' Blue Box, which allows compensation for production-limiting measures. As before Hong Kong, some Members advocated capping Blue Box spending at a lower level than that currenly permitted, while others wanted more far-reaching disciplines.

Members of the Cairns Group, as well as the G-20 coalition of developing countries, are also seeking tighten existing rules for Green Box support, which will remain uncapped and exempt of reduction commitments. In addition, developing countries have proposed elaborating new criteria that would make it easier for them to support development objectives. These negotiations bore little fruit, as did those on the base year/period from which to cut product-specific 'aggregate measurement of support' (AMS, corresponding roughly to the Amber Box of most trade-distorting subsidies).

In the only new proposal on domestic support to have emerged since the Hong Kong Ministerial, the G-10 in late January called for capping product-specific AMS support at the average of actual spending levels notified for the product in question between 1995-2000, excluding the highest and lowest annual spending levels from the calcula-

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tion. Countries with very low or no product-specific support during this period would have limits fixed at a to-be-negotiated percentage of the value of production of each commodity.

The G-10 also proposed that the EU reduce its ceiling level for 'overall trade-distorting domestic support' (OTDS) by 75 percent and its total AMS by 70 percent. For Japan and the US, the OTDS cut should be 65 percent and the AMS cut 60 percent. Other WTO Members would reduce their overall support by 45 percent, and their AMS by 40 percent. However, G-10 members with relatively high levels of Amber Box support (namely Japan, Switzerland, Norway and Iceland) would be willing to make an unspecified 'additional effort' in AMS reductions. Developing countries should be allowed to make lower cuts (when applicable) to overall and Amber Box support, over longer periods of time. These figures are not significantly different from those proposed by the EU or the US.

The G-10 endorsed the principle that OTDS levels – consisting of the combined expenditure on the Amber and Blue Boxes, as well as *de minimis* support – by a greater percentage than the cuts foreseen for Amber Box support alone. This principle was introduced in paragraph 5 of the Hong Kong Declaration to prevent countries from engaging in 'box-shifting,' i.e. reclassifying subsidies in different boxes so as to avoid having to cut them. In contrast, the latest US and EU proposals on domestic support provide for OTDS to be cut by lower percentage amounts than AMS.

The G-10 found existing 'old' Blue Box criteria as spelled out in the July 2004 Framework adequate, but called for immediate technical work to develop appropriate disciplines for the additional 'new' Blue Box criteria. Finally, the G-10 ruled out any new disciplines that would cap Green Box support or change its character.

Sensitive Products, SSM

Market access remains the most difficult area of the agriculture negotiations. No common ground emerged on the treatment of sensitive products. According to the July 2004 Framework Agreement, WTO Members may designate a to-be-negotiated number of sensitive tariff lines – current proposals vary between one and fifteen percent of all tariff lines – that will not be subject to full formula cuts. Nevertheless, 'substantially' better market access must be provided through tariff quota expansion and tariff reductions. As the February meeting showed no change in Members' positions, Chair Falconer said he saw little point in trying to draft his own paper on this issue.

Earlier, Members had offered a fairly positive reception to the G-10's proposal on the methodology for calculating quota expansion and tariff reductions for sensitive products: TRQs for sensitive products equivalent to less than five percent of domestic consumption would be doubled, while those accounting for 5-10 percent or greater than 10 percent would be increased by progressively lower amounts. As for tariff reductions, Members would negotiate a percentage of the cut for other farm goods in the same tier of the overall tariff reduction formula. The G-10 also confirmed its position that Members should have the flexibility to provide market access for sensitive products through any combination of TRQ expansion and tariff cuts. Although the submission did not suggest a number or percentage for sensitive tariff lines, it did propose that Members be allowed to designate products not currently subject to TRQs as sensitive, provided that the less-than-formula tariff cut was implemented over a shorter period. Alternatively, they could choose to make newly-designated sensitive products subject to the full reduction formula, but spread implementation over a longer period.

The EU argued, however, that import volumes rather than domestic consumption should be used as the basis for determining TRQ expansion. Several other Members countered that this would not substantially improve market access for commodities in markets where their import levels are currently insignificant. In addition to the G-10, the G-20, the US and the Cairns Group of agricultural exporters support linking TRQ expansion to products' share in domestic consumption. The EU was reported to consult bilaterally with a variety of Members to discuss the designation and treatment of sensitive products.

February discussions on the Special Safeguard Mechanism were inconclusive. The Hong Kong Ministerial Declaration calls for Members to agree on 'precise arrangements' for the volume- and price triggers that would allow developing countries to limit imports. The volume trigger could be invoked after imports exceed a certain percentage of domestic consumption, and the more controversial price trigger – agreed in Hong Kong – would justify protective measures if the price of a product falls under a given level.

It was decided that the Secretariat would organise a meeting on outstanding issues regarding the conversion of volume-based specific duties to percentage-based ad valorem equivalents.

Preference Erosion Sparks Controversy

The July 2004 Framework Agreement stated that the issue of 'long-standing preferences' would be addressed in the negotiations. One of Mr Falconer's preliminary questions to Members was whether they could accept the 2003 Harbinson draft agricultural modalities as the basis for further discussion. Paragraph 16 of that text provided for a longer implementation period and delayed tariff phase-out for products that had benefited from long-standing trade preferences, so long as the product accounted for a certain percentage of the total exports of the beneficiary country (the text contained a bracketed suggestion of 20 percent). At the February 2006 meeting, Colombia, Costa Rica and Nicaragua argued that the paragraph could not serve as a basis for discussions, since the Harbinson text had been rejected at Cancun. However, preference beneficiaries Jamaica, Kenya and Mauritius countered that the July 2004 Framework, which was adopted by consensus, specified that sections of the Harbinson text, including paragraph 16, would 'be used as a reference' when addressing preference erosion.

On other issues, Ecuador said it would soon present a paper on tropical products cultivated to diversify production away from illicit narcotic crops, and the ' Cotton' Four introduced their new proposal on fast-tracking cotton subsidy elimination (see related article on page 11).

The next agriculture week is scheduled for 30-24 March 2006.

Industrial Tariff Talks Still Seeking Momentum

The negotiations on non-agricultural market access (NAMA) have been at a virtual standstill for months, and the Hong Kong Ministerial did little to break the deadlock.

The most significant Hong Kong contribution to the NAMA debate was paragraph 24 of the Ministerial Declaration, which instructs negotiators in Geneva to ensure that there is "a comparably high level of ambition in market access for agriculture and NAMA," adding that this ambition "is to be achieved in a balanced and proportionate manner consistent with the principle of special and differential treatment." This language responds to two key developing country concerns. The first is their view that the negotiations must narrow the current gap in market access for agricultural and industrial products and therefore a greater effort is required in reducing agricultural tariffs than those affecting industrial goods. In contrast, most industrialised countries, and the EU in particular, have repeatedly said that unless developing countries start moving on NAMA (and services), further progress will not be possible in agriculture.

The second major developing country concern has to do with the proportionality of the effort involved in cutting industrial tariffs, which tend to be far higher in developing countries. A number of them have argued that the tariff reduction formula should allow them to make smaller cuts than developed countries since Members agreed from the start that developing countries would have the right to 'less than full reciprocity in reduction commitments'.

The Hong Kong Declaration confirms that tariffs will be reduced according to a 'Swiss formula,' which cuts high tariffs more steeply than low ones. However, it leaves open the number of coefficients that would be used in order to reflect the 'less than full reciprocity' principle. The number of coefficients remains extremely divisive, with the US insisting that even a slightly higher coefficient for developing countries should result in a reduction of other flexibilities, while Argentina, Brazil and India argue for multiple coefficients tied to a country's existing average tariff, as well as full access to the additional 'special and differential treatment' flexibilities contained in paragraph 8 of the July 2004 Framework Agreement's NAMA annex. Several other Swiss formula-inspired proposals are also on the table.

The Ministerial Declaration reaffirms the importance of (i) special and differential treatment; (ii) less than full reciprocity, and; (iii) para. 8 of the NAMA Framework, but gives negotiators no other guidance than that these should be 'integral parts of the modalities' and that the details should be finalised 'as soon as possible'. The special and differential treatment flexibilities in para. 8 include the possibility for developing countries to exempt a small number of tariff lines from reductions, or to make less than formula cuts on a higher number of products.

Before the formula can be completed, Members must agree on how reduce import duties on tariff lines that have not been bound at the WTO. Other open questions to which ministers instructed negotiators to find solutions as soon as possible include the erosion of long-standing trade preferences, and flexibilities for small and vulnerable economies.

No Progress in February

Summing up his last session as Chair of the NAMA negotiations, Ambassador Stefan Johannesson of Iceland said the discussions had been more 'business-like' than in the past, but added that Members would need to be more willing to compromise in order to agree on how to address the effects of the erosion of trade preferences due to multilateral tariff liberalisation. He held very brief informal consultations with 20-odd delegations on issues including the tariff reduction formula, the nature and extent of the flexible treatment to be accorded to developing countries, unbound tariffs, small and vulnerable economies and preference erosion.

Some Members suggested that discussing the tariff-cutting effects that would result from specific values for formula coefficients and flexibilities would be useful. Several also said that developing a list of issues that need to be resolved – as is being done in the agriculture negotiations – might help push the talks forward. Some Members believe that negotiations on the treatment of small and vulnerable economies would require the elaboration of identification criteria based on indicators of the degree of vulnerability in addition to market size.

Old battlegrounds were revisited and positions restated yet again.

For example, Kenya and a group of countries that benefit from trade preference schemes reportedly clashed with Costa Rica and several (mostly Latin American) countries that do not. The latter insist that the effects of preference erosion should largely be dealt with bilaterally, i.e. preference-giving governments should find ways to compensate countries whose exports are affected by a general lowering of tariffs in importing countries. The Hong Kong Declaration "recognises challenges that may be faced by non-reciprocal preference beneficiary Members," and instructs countries "to intensify work on the assessment of the scope of the problem with a view to finding possible solutions."

A group of developing countries comprised of Argentina, Brazil, Egypt, India, Indonesia, Namibia, the Philippines, South Africa, Tunisia and Venezuela reiterated their position that the negotiations must respect development concerns, particularly with regard to the flexibilities for developing countries. On behalf of the so-called 'NAMA group,' India emphasised that the outcome of the negotiations must not be disproportionately onerous for developing countries. With regard to non-tariff barriers, Japan, a major importer of natural resources, said that it would table legal text on export restrictions in time to meet the 30 April deadline for agreement on full NAMA modalities.

The next NAMA negotiating session in the first week of March will be chaired by Ambassador Don Stephenson of Canada. The previous NAMA Chair, Iceland's Stefan Johannesson, has been appointed to represent his country in Brussels.

Consensus Elusive on Fisheries and Anti-dumping Rules

The pace of negotiations on changing the WTO's anti-dumping and subsidy rules makes it doubtful that Members will meet the July 2006 deadline for a consolidated legal draft.

In accordance to the timetable drawn at the Davos mini-ministerial, the Chair of the rules negotiations, Ambassador Guillermo Valles Galmés of Uruguay, has requested Members to put their amendment proposals into detailed legal text by the group's next meeting on 13-17 March. While Ambassador Valles Galmés intends to prepare a consolidated draft text by July 2006, convergence on any of the nearly 200 proposals on the table has proved elusive so far.

At its February session, the Negotiating Group on Rules continued to discuss new disciplines for fisheries subsidies, amendments to anti-dumping rules, and voluntary price undertakings by exporters.

Fisheries Roadmap Discussed

A joint submission on fisheries subsidies by Brazil, Chile, Colombia, Ecuador, Iceland, New Zealand, Pakistan, Peru and the US summarised progress to date in the negotiations and outlined a series of steps that the sponsors deemed necessary to fulfil the Doha fisheries mandate (TN/RL/W/196).

According to the paper, the main issue to be resolved before text-based negotiations can begin is whether to take a top-down or a bottom-up approach to the new disciplines. The former, favoured by the paper's sponsors, would prohibit fisheries subsidies apart from certain exceptions, while the bottom-up approach, advocated by heavy subsidisers Japan, Korea and Taiwan, would identify specific subsidies for prohibition. In addition, the sponsors said that Members would need to agree on how to handle fisheries subsidies-related programmes not yet addressed in the negotiations, such as those for conservation, regional development, social insurance and research. The submission also called on any new disciplines to be 'simple and enforceable', more transparent than existing rules and flexible enough to respond to the 'dynamic nature' of the industry. The new rules should also take into account the fishery sector's importance to developing countries through appropriate special and differential treatment.

Differing with the nine-country position, Barbados noted that small and vulnerable coastal states (SVCSs), as well as the African, Caribbean and Pacific (ACP) Group of States, preferred a bottom-up approach, since they believed that it would allow them greater flexibility in pursuing policies to fully utilise the resources in their waters.

Instead of the reduction of over-capacity and over-fishing, the SVCS and ACP groups see the primary goal of the talks as ensuring that "developing countries and specifically least-developed countries are able to enhance their level of development and increase their integration in the multilateral trading system." In this vein, while expressing full support of the proposal's indicative list of issues that still require analysis, they added access fees, development assistance and assistance to artisanal and small-scale fisheries, management services, infrastructural development and port facility enhancement as issues of paramount importance to their fishing sectors.

'Public Interest' in Anti-dumping

Canada proposed to modify the Anti-dumping Agreement (ADA) to require Members to establish national-level mechanisms for to ensure that the imposition of an anti-dumping duty is not contrary to the 'public interest' (TN/RL/GEN/85). In other words, governments should take into consideration the views of consumers and/or industrial users of an allegedly dumped import product when deciding whether to impose an anti-dumping duty. The proposal also put forward text for a possible annex to the ADA outlining factors that the concerned authorities should consider when making their decision, including the likely effect of imposing an anti-dumping duty on consumers as well as domestic producers or services providers that use the targeted product. Canada explicitly specified that any new public interest provisions "must not try to prescribe what is or is not in the importing Member's economic interest," and that a country's eventual public interest decisions, as the sovereign prerogative of each Member, would fall beyond the reach of WTO dispute settlement proceedings.

Price Undertakings vs Anti-dumping Duties

Members generally welcomed draft legal text from Mexico amending ADA Article 8 on 'price undertakings', i.e. exporters' offers to raise the export price of their product in order to avoid the imposition of an anti-dumping duty (TN/RL/GEN/76).

The proposed amendments provide for the suspension or termination of anti-dumping proceedings "upon receipt of satisfactory voluntary undertakings from any exporter to revise its prices… so that the [investigating] authorities are satisfied that the injurious effect of the dumping is eliminated." They also specify that exporters would be notified of their right to offer price undertakings, but would not be asked to make any unless the concerned authorities in the importing country had already made a preliminary determination of the existence and extent of dumping.

Several Members voiced concerns that the proposal sought to oblige investigating authorities to accept price undertakings, and that it drew a link to the so-called 'lesser duty' rule which would require anti-dumping duties to never exceed the dumping margin. The proposal specifies that price increases offered through such undertakings "shall not be higher than necessary to eliminate the margin of dumping determined for the said exporter," and that the increases "shall be less than the margin of dumping if such increases would be adequate to remove the injury." New Zealand asked why such a link was being established, considering that no consensus on the lesser duty rule had been reached, let alone on how to incorporate it into price undertakings. The US and Hong Kong raised similar questions. China, the EU and Thailand also pointed out that Mexico's proposal to grant exporters the right to address "minor errors and omissions" in information failed to explain such errors and omissions would be defined.

US Calls for More Prohibited Subsides

In January, the US circulated a proposal calling for the expansion of subsidies categories prohibited by the Agreement on Subsidies and Countervailing Measures (SCM). These should include those mentioned in the now-lapsed SCM Article 6.1, i.e. subsidies to cover operating losses sustained by an industry or an enterprise, and forgiveness of government-owned debt. In addition the US suggested the prohibition of government equity investments in, or lending to, companies with poor financial prospects unable to attract commercial financing, and other government funding of companies or projects that would not otherwise receive conventional commercial financing. However, 'special consideration' could be given for government aid for small business, government financing of public utilities, and passive investments not driven by government industrial development policies, the US paper said. The next rules week is scheduled for 13-17 March.

Cotton Four Seek Post-Hong Kong Action on Subsidies

Benin, Burkina Faso, Chad and Mali have proposed that domestic support for cotton be phased out in one third of the implementation period agreed for other agricultural goods.

Seeking to remedy the difficulties they faced in exporting cotton at a profit, the Cotton Four, as the four least-developed African countries have been dubbed, launched the Cotton Initiative in May 2003. The root cause of their problem, the initiative's sponsors said, was that the world price for cotton had declined dramatically as the result of developed countries' generous subsidies. They thus sought the rapid elimination of all cotton subsidies and compensation for export losses during the phase-out period.

The principal target of the initiative was the US, the world's number one cotton exporter and the only developed country to subsidise such exports. The US also has a vast domestic support regime, which helps farmers sell their cotton in foreign markets below the real cost of production.

The Cotton Initiative aroused much sympathy but little action until the July 2004 Framework Agreement mandated WTO Members to address cotton "ambitiously, expeditiously and specifically, within the agriculture negotiations." It created a special sub-committee to discuss "all trade-distorting policies affecting the sector in all three pillars of market access, domestic support and export competition." The sub-committee, however, made no significant progress, and cotton became one of the key issues of the Hong Kong Ministerial Conference.

Cotton in Hong Kong

Marathon negotiations between the US and the Cotton Four produced a disappointing result. True, 'developed countries' – in practice the US – agreed to eliminate all forms of export subsidies for cotton in 2006, but this was slated to happen anyway following Brazil's successful WTO challenge of US support to cotton. To implement that ruling, the US will terminate its Step 2 programme next August (see page 15). The 'subsidy element' of US export credit guarantees is yet to be addressed.

African cotton-producing countries were particularly disillusioned at the Hong Kong outcome on domestic subsidies. Ministers agreed to "the objective that […] trade-distorting domestic subsidies for cotton production be reduced more ambitiously than under whatever general formula is agreed and that it should be implemented over a shorter period of time than generally applicable." First, elimination is not the goal here and, second, the decision on the depth and speed of domestic cotton subsidy cuts is delayed until the general domestic support reductions in agriculture and their implementation schedules are agreed.

With regard to the market access pillar, developed countries agreed to give duty- and quota-free market access to least-developed countries' cotton exports as of the conclusion of the Doha Round negotiations. However, African countries are unlikely to benefit from this since they do not export cotton to the US and in other markets, particularly in Asia, they will still compete against subsidised US exports.

Although the Ministerial Declaration did not establish a compensation or emergency fund to assist affected cotton farmers, it urged the WTO Director-General to explore – together with bilateral donors, and regional and multilateral institutions – the possibility of establishing a "mechanism to deal with income declines in the cotton sector until the end of subsidies. According to the WTO Secretariat, consultations have already been initiated concerning the 'development aspects' of the cotton issue.

New C-4 Submission

A 16 February 2006 submission from Benin, Burkina Faso, Chad and Mali calls for the implementation period for reducing domestic support for cotton to be one third of that decided for other agricultural products (TN/AG/GEN/12 . The new proposal is less clear on the reduction formula, as it suggests that the cut should be three times higher for cotton than that agreed for domestic support in general. Considering the level of general support cuts proposed in the negotiations so far, a three-fold increase could produce a 150 or even a 210 percent reduction in cotton subsidies. The formula will no doubt become clearer once the Cotton Four define the coefficient 'c' they propose to include in the general domestic support reduction formula when calculating cuts to cotton subsidies.

The proposal was introduced at the February negotiating session on agriculture, but neither the US nor other major cotton subsidisers commented on it. The submission is also on the agenda of the cotton sub-committee meeting of 2 March 2006.

Services Negotiations Focus on Collective Requests

Post-Hong Kong activity on services has largely revolved around the elaboration of plurilateral requests for market access in a number of services sectors and modes of supply.

Frustrated by the lack of meaningful new market opportunities in the offers tabled so far, developed countries, and the EU in particular, sought prior to Hong Kong to establish mandatory minimum market access commitments, or benchmarks, in services for all Members. They had to bow to fierce opposition from developing countries, however, and the notion of benchmarks was abandoned before the Ministerial Conference started (Bridges Year 9 No.10, page 12).

In the Hong Kong Declaration, ministers affirmed their determination to intensify the services negotiations "with a view to expanding the sectoral and modal coverage of commitments and improving their quality." Instead of benchmarks, they agreed to supplement the bilateral request-offer negotiating method with a 'plurilateral' approach under which groups of countries may make joint market access requests in specific sectors. Any concessions made in response to such requests will be extended to all WTO Members.

The services draft sent to Hong Kong would have made it mandatory for *demandees* to enter into negotiations on the plurilateral requests. That language was weakened, however, to only require recipients to 'consider' such requests "in accordance with paragraphs 2 and 4 of Article XIX the General Agreement on Trade in Services (GATS) and paragraph 11 of the Guidelines and Procedures for the Negotiations on Trade in Services."

GATS Article XIX.2 specifies that the "process of liberalisation shall take place with due respect for national policy objectives and the level of development of individual Members, both overall and in individual sectors." The Guidelines adopted by WTO Members in 2001 state that liberalisation "shall be advanced through bilateral, plurilateral or multilateral negotiations." Although it is not quite clear what will constitute the 'consideration' that the *demandees* are required to give the plurilateral requests, most experts appear to believe that the references to GATS principles will give countries sufficient formal grounds to reject any requests they believe contrary to their level of development or national interest.

The services annex of the Hong Kong Declaration also set new deadlines for the negotiations:

- outstanding initial offers – originally due in March 2003 – to be submitted as soon as possible (only 70 out of the WTO's 150 Members, counting the EU as one, have tabled initial offers to date);
- plurilateral requests to be submitted to Members by 28 February 2006 or "as soon as possible thereafter";
- second round of revised offers to be submitted by 31 July 2006;
- final draft schedules of commitments to be submitted by 31 October 2006; and
- Members shall 'strive' to develop mechanisms for according 'special priority' to sectors and modes of supply of interest to least-developed countries before 31 July 2006.

In January 2006, sectoral interest groups started to emerge, with Canada co-ordinating financial services, Singapore leading on telecommunications and Chile on computer services. Other sectors where plurilateral requests are under elaboration include audiovisual, energy, legal, construction and maritime services, as well as logistics, express delivery, education and environmental services. In addition, Switzerland has focused on reducing restrictions to the commercial presence of foreign companies, while India has co-ordinated a plurilateral request on the movement of professional service providers. The latter is the only request driven overwhelmingly by developing countries.

In late February sources close to the negotiations predicted that collective requests would be made in practically all services sectors, with Brazil, China, Indonesia, Malaysia and Thailand being the most frequent targets. One trade diplomat suggested that plurilateral negotiations might be more conducive to producing new liberalisation commitments than the standard bilateral process, since the plurilateral requests are expected to be more specific, for example with regard to identifying the particular market access restrictions that the *demandeurs* want removed.

Some plurilateral requests are likely to take the form of model commitment schedules, with *demandees* asked to comply as closely as possible, although Members, and developing countries in particular, would at least in principle be able to refuse due to the flexibilities in the General Agreement on Trade in Services (GATS). Other plurilateral requests may ask countries to remove a list of reservations, such as restrictions on foreign services providers, or to sign on to a 'reference paper,' such as the one on telecommunications, which would entail adhering to a series of regulatory disciplines.

Negotiations Between Groups Likely

While WTO Members have not yet agreed on how to structure the plurilateral market access negotiations that will follow the presentation of the requests, some trade observers suggest that the talks are likely to take place between the group of *demandeurs* and the group of *demandees,* rather than the *demandeurs* putting pressure on individual Members as some civil society groups and developing countries had feared.

Several countries want the next services 'cluster,' currently slated to start at the end of March, to allocate more time for meetings between the two groups. Concerned that capacity constraints could impair their ability to participate in these negotiations, some developing country delegations have asked for meetings not to be scheduled concurrently. The Hong Kong Declaration's specifically emphasised that developing country capacity constraints should be accounted for in the plurilateral negotiation process.

LDCs Worry

With negotiating energy so strongly focused on the plurilateral requests, least-developed countries (LDCs) are concerned that Members are neglecting the implementation of the modalities for special treatment of LDCs adopted by WTO Members in 2003. Paragraph 9 of the Hong Kong Declaration's services annex calls on Members to "develop methods for the full and effective implementation of the LDC modalities" – preferably before July 2006 – through such actions as according 'special priority' to sectors and modes of supply of particular interest to LDCs (see timeline bullets on page 12); assisting LDCs in identifying sectors and modes that represent development priorities, and; providing targeted technical assistance and capacity-building. The EU, Canada and Australia have committed to submitting written documents about steps they are taking to implement the LDC mandate.

Rules Negotiations

Members have discussed how to structure informal talks on emergency safeguard measures, and asked the Chair of the Working Party on Domestic Regulation to schedule a calendar of meetings through July. They have also requested him to prepare a document outlining areas of convergence and disagreement in the talks, and to identify target dates for intermediate stages in the negotiations, such as the development of a consolidated draft text.

Trade Facilitation Continues to Draw Interest

Demonstrating their growing sense of ownership of the Doha Round negotiations on trade facilitation, developing countries presented eight new proposals at the mid-February meeting dedicated to developing new disciplines in this area.

The negotiations aim to clarify three articles of the General Agreement on Tariffs and Trade (GATT): freedom of transit for goods (Article V), trade-related fees and formalities (Article VIII), and transparency in the administration of trade regulations (Article X). Developing countries long objected to WTO negotiations on trade facilitation, which was originally part of the Singapore issues package along with investment, transparency in government procurement and competition policy. The latter three issues were eventually dropped from the Doha work programme, but trade facilitation was included in the negotiating agenda in the July 2004 Framework Agreement, which explicitly stated that developing countries need not implement the new disciplines if they continued to lack capacity or had not received enough technical/financial assistance, including for infrastructure, to enable them to take on the new commitments.

At the February 2006 meeting a number of proposals raised concerns about technical assistance, capacity-building and the cost of implementing future rules. For instance, the African, Caribbean and Pacific (ACP) Group of States called for the establishment of an inter-agency co-ordinating mechanism for the provision of trade facilitation-related technical assistance and capacity-building involving international, regional and sub-regional organisations such as the UN Conference on Trade and Development (UNCTAD), the UN Economic Commission for Africa, the WTO, the World Customs Organisation or the World Bank (TN/TF/W/73). Moldova and the Kyrgyz Republic requested special flexibilities for small low-income transition economies (TN/TF/W/74), and together with Armenia, Canada, the EU, Mongolia, New Zealand and Paraguay put forth concrete suggestions for special and differential treatment (S&D), including longer implementation periods for resource-intensive commitments and even specific exemptions until capacity existed for least-developed and other countries in need, notably small low-income transition economies (TN/TF/W/79). This proposal also noted the importance of S&D with regard to land-locked countries' implementation of disciplines on the transit of goods.

Freedom of Transit

Chile's submission (TN/TF/W/70), which dealt with all three articles, called on Members to establish "precise routes and periods of transit between an entry and an exit point," to levy no fees that are not strictly related to transport costs, and to make all transport-related charges public. Similar issues were raised in a joint eight-country paper from Armenia, Canada, the EU, the Kyrgyz Republic, Mongolia, New Zealand, Paraguay and Moldova (TN/TF/W/79), which said that transit-related charges should be transparent, roughly equivalent to the cost of the service rendered, and subject to periodic review. Transit routes were the subject of many interventions at the meeting. Most countries felt that the choice of transit route should be based on commercial considerations, and be left to the operator. Pakistan, however, deemed this approach 'risky'; Argentina mentioned the need for balancing commercial interests with national ones. The EU reportedly supported allowing traders to choose the route, with governments retaining the right to apply restrictions if needed. One developing country delegate noted that intensive use of a specific route could lead to congestion particularly when road quality and infrastructure were poor. It would thus be was necessary to improve a number of alternative routes between the entry and exit points and until then the government should be able to regulate traffic using a particular route.

Fees and Formalities

Chile's proposed the creation of a 'single-window' for export/import clearance, as well as a register of all services connected with export and import operations in order to increase transparency and predictability (TN/TF/W/70). Some Members considered the proposal for a 'register' too costly .

India stressed the importance of uniform border clearance procedures for agricultural and food products among parties to a customs union, including specifications, definitions, inspection, sampling and test methods (TN/TF/W/ 77). In a complementary proposal, India argued that customs unions should only be allowed to use 'rapid-alert' systems to monitor and ensure the quality of imported food if they applied uniform standards across all of their constituent states (TN/TF/W/78). Under such systems, as soon as imports that are contaminated or that fail to meet the required standards are detected, every member of the customs union is notified, as is the exporting country, after which consignments from the exporter are subject to 100 percent inspection at points of entry, thus delaying clearance.

Latin Americans Seek Changes to EU Banana Tariff

Despite ongoing consultations outside the WTO, a number of Latin American countries have asked the Dispute Settlement Body to keep the EU's new banana import regime under close surveillance.

Under the new regime, which entered into force on 1 January 2006, all most-favoured nation (MFN) suppliers, which in practice consist of South and Central American countries, may sell unrestricted amounts of bananas to the European market at a tariff of EUR176 per tonne. Countries belonging to the African, Caribbean and Pacific (ACP) Group of States, however, have been granted a 775,000 tonne duty-free quota, traditionally shared between African producers, such as Cameroon and Côte d'Ivoire, and Caribbean island states.

At the DSB's January session, Honduras argued that the EUR176/tonne tariff discriminated against non-ACP exporters, reminding WTO Members that its US$704 per capita GDP was lower than that of 32 ACP countries. Nicaragua charged that the new tariff had been designed to protect the preferential margin of subsidised European producers in the Canary Islands and the French overseas territories of Guadaloupe and Martinique. Panama and the US questioned whether the new regime would maintain pre-2006 market access for MFN suppliers, and expressed concern about the maintenance of the duty-free ACP quota.

Background

At the end of a drawn-out WTO battle, which saw its banana import system based on quotas and a complex system of licences repeatedly condemned, the EU committed in 2001 to establishing a 'tariff-only' regime by 1 January 2006. Until then, nine Latin American countries shared a 2,653,000 tonne quota with a EUR75 per tonne import tariff, while ACP countries had a 750,000 duty-free quota.

According to a 'waiver' adopted at the 2001 Doha Ministerial Conference, the EU was allowed to continue granting ACP bananas duty-free access until 2007 on condition that it would negotiate a new MFN tariff, to enter into force on 1 January 2006, that would at least result in maintaining the existing total market access of MFN suppliers. The new MFN rate was to be set in consultation with Latin American exporters while taking into account "all EU WTO market-access commitments relating to bananas". If the consultations yielded no 'mutually satisfactory solution', the WTO was to arbitrate whether a tariff unilaterally proposed by the EU would result in maintaining MFN suppliers' existing market access. If the arbitrator decided that this would not be the case, and the EU failed to 'rectify the matter' after a second negative arbitration, the waiver would cease to apply to ACP bananas at the entry into force of the tariff-only regime.

The present status of the waiver is somewhat unclear, since the EU did – to an extent – 'rectify the matter' by lowering its proposed tariff from EUR230/tonne to EUR187/tonne after the first arbitration before adopting the even lower EUR176/tonne tariff following the second arbitration. However, Latin American banana producers immediately condemned that tariff as still too high to ensure at least the maintenance of their existing market access. In addition, they are concerned that, contrary to the initial understanding that the new regime would be quota-free, the EU reinstated a 775,000 tonne duty-free quota for ACP suppliers.

While the EU has stressed that it will monitor import volumes and lower the tariff in case MFN bananas show a marked decrease, some Latin American producer countries worry that the EUR176/tonne tariff could be adjusted upwards, as well as downwards, should imports from Latin America show a significant increase.

In Hong Kong, the two sides agreed to continue consultations under the 'good offices' of Norway's Foreign Minister Jonas Gahr Store, who served as facilitator of the conflict during the Ministerial Conference. A statement read out by Mr Store at the closing plenary session specified that the interests ACP countries would be taken into account in the consultations. The duration of the consultative process was not specified. Ecuador, Honduras, Nicaragua and Panama have warned that they may launch dispute settlement proceedings against the EU if the consultations do not result in a change of the current regime.

Brazil Faces Tyre Ban Challenge

A panel was established on 20 January to consider an EU complaint against Brazil's import import ban on retreaded tyres, as well as the US$181 fine Brazil imposes on the marketing, transportation, storage or warehousing of each imported retreaded tyre.

The EU argues that the import ban is inconsistent with GATT Article XI:1, which prohibits the use of quantitative restrictions. It also maintains that the fine, which only applies to imports, discriminates between Brazilian and non-Brazilian producers, thus running counter to the 'national treatment' principle of the GATT. In addition, the EU claims that Brazil violates the most-favoured nation (MFN) principle because it does apply the same restrictions to imports from Mercosur countries as to those from other WTO Members.

Health and Environment Impacts Evoked

Brazil's defense is based on the public health and environmental problems associated with the disposal of tyres. It argues that retreaded (i.e. once used and then resurfaced) tyres have a shorter life-span and as such are likely to become waste more quickly than do new tyres. However, there are those who consider that, instead of being 'almost waste', high-quality retreaded tyres are competitive with low-quality new tyres in some markets.

Brazil has said that it intends to prove that its provisions can be justified under GATT Article XX(b) as "necessary to protect human, animal or plant life or health", and do not constitute

arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade. Brazil points to the adverse effects of waste tyres, including their slow decomposition rates; fire risks; contribution to the spread of viral diseases – for instance, stored waste tyres provide ideal breeding grounds for mosquitoes that cause malaria and dengue fever; contamination of air, water and soil when burnt; high waste processing costs and hazardous pollutant content. According to Brazil, very few retreaded tyres are either produced or sold domestically, and imports from Mercosur countries are also insignificant. However, imports from other trading partners, such as the EU, would involve larger quantities likely to have adverse environmental and health impacts.

At the Dispute Settlement Body's 20 January session, Brazil alleged that the EU – which has extensive regulations of its own on tyre disposal – seemed to "count on Brazil to help it get rid of large volumes of unwelcome rubber wastes in a cheap and efficient manner", an allegation vigorously rejected by the EU.

Different Rules for RTA Partners?

The other issue at question is the fact that Mercosur countries are exempt from the import restrictions applicable to all other WTO Members including the EU. Although GATT Article XXIV allows states to confer preferential tariff treatment to parties to recognised regional trade agreements (RTAs), jurisprudence has yet to conclusively clarify whether different quantitative or environmental measures may be applied between them and other WTO Members.

Brazil does not subject Argentina, Paraguay and Uruguay to the tyre import measures as a result of a January 2002 decision by a Mercosur arbitration panel hearing a Uruguayan complaint about the import ban, which then concerned all countries. In that dispute, Brazil did not use environmental or health reasons to defend its measures despite the fact that the 1980 Montevideo Treaty contains health and safety exceptions similar to those in GATT Article XX. The arbitrators did not raise the issue either, and Brazil amended its domestic laws in 2002 and 2003 to exempt Mercosur from the import measures.

Last October, another Mercosur panel upheld Argentina's defense of retreaded tyre trade restrictions on health and environmental grounds under the Montevideo Treaty, but an appeals tribunal reversed this decision in December 2005.

Argentina, Australia, South Korea, Japan and the US have reserved their third-party rights in the WTO case. The panel proceedings are expected to begin in early March 2006.

At Long Last, US Repeals Step 2, Byrd Amendment

On 1 February 2006, the US Congress approved legislation repealing the Byrd Amendment, condemned by the WTO three years ago, as well as the Step 2 subsidy programme for cotton, which should have been eliminated by 1 July 2005. While welcome, both legislative initiatives perpetrate a pattern of late, protracted and partial US implementation of dispute settlement findings.

Following the adverse landmark ruling on its cotton subsidies last April, the US took a numbers of measures in late June 2005 to make some of its condemned export credit programmes compatible with WTO rules. It also sent to Congress a proposal to repeal Step 2, a well-endowed programme that compensates cotton mills for using more expensive US cotton, and pays cotton exporters the difference between US and world prices. At the announcement of the Step 2 repeal proposal, Brazil agreed to suspend the WTO proceedings it had initiated with a view to imposing trade sanctions worth US$3 billion.

At the Hong Kong Ministerial Conference, the US agreed – after marathon negotiations with African cotton producers – that all developed countries would eliminate export subsidies for cotton by 2006 (see page 11). The Step 2 repeal will fulfil that commitment, although it is slated to take place on 1 August 2006, more than a year after the deadline set by the WTO.

In addition, Brazil has a bone of contention with regard to continuing US marketing assistance loans, as well as counter-cyclical payments that shield US cotton exporters from fluctuations in world prices. These payments were ruled to cause serious injury to Brazil's cotton trade, and the US was invited to withdraw them by 21 September 2005. So far, however, no action has been taken, and it is more than likely that none will occur before the present Farm Bill expires in 2007. On 6 October 2005, Brazil filed a second request to impose countermeasures, this time in the amount of US$1 billion, in retaliation for US failing to respect the 21 September deadline. The proceedings were later suspended, but Brazilian authorities have raised the possibility of reviving the second request although no official announcement had been made when this issue went to press.

In both of its retaliation proceedings, Brazil sought the right to suspend concessions in a number of areas beyond agricultural goods, such as intellectual property rights (*inter alia*, the protection of patents, undisclosed information, copyrights and industrial designs) and such services sectors as business, communications and financial services.

Byrd Amendment Benefits Could Run for Years to Come

Under the Byrd Amendment, formally known as the Continued Dumping and Subsidy Offset Act, anti-dumping and countervailing duties collected by US customs are distributed to the industries that petitioned for them in the first place. The Appellate Body ruled against the practice in January 2003, arguing that it afforded double protection for the affected industries, first in the form of the higher tariff and then in the form of payments that fur-

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ther contributed to the enhancement of their competitiveness. According to the US Government Accountability Office, two-thirds of the US$1.26 billion in Byrd Amendment disbursements between 2001 and September 2005 went to just three industrial sectors: ball bearings, steel and candles. The WTO gave the US until 27 December 2003 to repeal the amendment.

The Byrd Amendment will not be struck from the books until 1 October 2007, however, and companies will be able to collect anti-dumping payments based on petitions approved up to that date. Some of these could be disbursed as late as 2009. Among major potential beneficiaries are the US lumber industry, which stands to collect in the ongoing trade dispute with Canada, as well as Micron Technologies, which successfully petitioned for countervailing duties to be placed on semiconductors manufactured by South Korea's Hynix.

The WTO authorised eight co-complainants in the case to retaliate against US exports in November 2004, and at least the EU, Canada, Japan and Mexico are currently imposing punitive tariffs worth US$114 million in all. An EU official said on 3 February that the Union's trade sanctions would not be lifted until 2009, as they were "tied directly to the duties disbursed" by the US. At press time it was not yet clear when the other countries currently applying sanctions might terminate them.

US Tax Breaks for Corporations Condemned Again

In a case along similar lines, the Appellate Body confirmed on 13 February that the transitional arrangements and 'grand-fathering' provisions of US legislation repealing tax breaks for exporting companies did not comply with earlier WTO rulings. The AB found that the 2004 US Jobs Act continued to offer exporting companies WTO-illegal tax advantages until 2006, as well as completely exempted, or 'grand-fathered', export support included in contracts concluded prior to September 2003. The EU said it would re-impose trade sanctions against imports from the US unless the latter removed the condemned measures within 60 days of the AB report's adoption. The US warned that such a move would be counterproductive.

Panel Critical of EU GMO Restrictions

After numerous delays, the dispute settlement panel adjudicating the joint US/Argentina/Australia complaint against the EU's 'moratorium' on approvals for genetically modified food products and seeds issued its preliminary ruling to the parties in the dispute on 7 February 2007.

The more than 1000-page confidential ruling appears to have found against the EU's approval processes for GMO products, although according to some sources the panel only considered the period between the start of the alleged moratorium in 1998 and 2004, when strict EU-wide traceability and labelling regulations for GMOs entered into force and approvals slowly resumed. While the US has made it clear that it considers the stringency of those regulations unwarranted by science, more trade-restrictive than necessary and even unworkable, the case before the panel did not concern the EU's regulatory framework for GMOs.

Instead, the three complainants had argued that the EU established a 'moratorium' on processing approvals for new biotech food products or crops in 1998 through not granting marketing permissions despite its own scientific experts repeatedly finding products submitted to their evaluation safe. The complainants also charged that six EU member states, namely Austria, France, Germany, Greece, Italy and Luxemburg, continued to refuse market approval even to products cleared by the EU. According to the complainants, these practices – rather than the regulatory regime as such – caused 'undue delays' in the approval of imports and, in violation of the WTO Agreement on Sanitary and Phytosanitary Measures, were not justified by any risk assessments.

The EU on the other hand maintained that no 'moratorium' was ever declared, and that approvals had resumed after the entry into force of its new labelling and traceability regulations. While it is indeed true that the European Commission has granted market approval to a handful of genetically modified food/feed varieties since then, the six EU member states mentioned above have refused to follow suit on the grounds of precaution. These national bans on new approvals were condemned by the panel, sources familiar with the report said.

Due to the report's still confidential status, official comments have been cautious. Referring to continued strong resistance to GMO foods and crops in Europe, US Trade Representative Robert Portman said: "Public opinion isn't the standard. The standard is a rules-based system in the WTO. That's why we're in the WTO, and as the world's largest trading partner I'm sure [the EU] would act responsibly." A fact sheet posted on the USTR website after the interim ruling was issued, noted that "recent EU approvals of a few biotech products […] do not mean that the EU has lifted the moratorium." It alleged that many "safe, proven biotech products" remained stalled in the EU's complex approval procedures, while those that had been approved had to go through an "extraordinary process" involving needless delays, and approval by the EU Commission over the objections of many EU member states. The USTR concluded that the EU would not have lifted the moratorium "until decisions are based on scientific principles and evidence – not politics – and until each biotech product application is processed without undue delay." The European Commission countered by posting a memo of its own, claiming that the EU approval process "may appear to be lengthy for some countries which adopt a more lenient approach towards food and environmental safety issues. The longer times to assess the safety of GMOs in the EU are due to the complexity of the science involved as well as to delays incurred by biotech companies to provide suitable data demonstrating the safety of the products."

Bridges will publish an in-depth analysis of the ruling once the report becomes publicly available.

IP Standards in the US–Peru FTA: Health and Environment

Peru signed a bilateral free trade agreement with the US on 7 December 2005. The fact that it acquiesced to some controversial US demands on intellectual property has provoked criticism within and outside the region.

The US-Peru FTA is the first agreement reached in the context of the US-Andean Free Trade Area (AFTA) that is also to include Colombia, Ecuador and, probably at a later stage, Bolivia. Negotiations began in May 2004 after Washington announced that it would not renew the Andean Trade Preferences and Drug Eradication Act scheduled to expire in December 2006. For all the Andean parties, US intellectual property protection demands have been a major factor holding back the conclusion of the talks.

An Unhealthy Outcome? CAFTA-plus IP Provisions

At the outset of the negotiations, Colombia, Ecuador and Peru had pushed for the inclusion of some form of public health safeguards in the actual text of the agreement, such as a direct reference to the flexibilities that exist under the WTO's Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPS). Instead of such a reference, Peru signed a separate Understanding Regarding Certain Health Measures with the US. While this understanding does emphasise that the obligations set out in the FTA's IP chapter "do not affect a Party's ability to take necessary measures to protect public health," the legal value of such side letters as opposed to their integration in the actual text of an agreement, remains uncertain.

A greater source of concern, however, is new language included in the chapter's provisions on 'data exclusivity', i.e. the period that clinical test data must be protected for brandname pharmaceuticals. Manufacturers of generics often use data submitted by brandname drug companies seeking marketing approval for a new medicine to prove the safety and efficacy of their generic copies. If the test data, which is expensive and time-consuming to produce, is kept confidential for lengthy periods, the introduction of generics is likely to be delayed.

All recent US trade agreements include data protection periods, in spite of consistent criticism by many health groups. However, while past FTAs, such as the Central American Free Trade Agreement (CAFTA), have required the protection of 'undisclosed' information, the US-Peru FTA covers all safety and efficacy information submitted by firms. This is significant as this language could potentially include information on clinical trials that has already been made public, either by the government or through scientific publications, and could also set a precedent for future US FTAs. The FTA does include a separate letter specifically clarifying that the 'understanding' on public health measures applies to the provisions on data protection, something that has not appeared in previous FTAs. While Peru views this as a considerable negotiating success, it does not provide any further indication about the legal value of such side letters and understandings.

However, the US did not get its way with regard to 'second-use patents'. Peru appears to have successfully argued that protection for new uses of existing inventions could lead to an effective extension of the term of protection, which could further delay the entry of generic competition in the market. Furthermore, the Peruvian negotiators avoided the incorporation of a US proposal to allow the patentability of therapeutical methods, such as particular medical procedures.

Nevertheless, civil society organisations, academics and government officials have criticised the IP provisions in the US-Peru FTA for going beyond WTO requirements. An economic assessment by the Peruvian Office on Intellectual Property and Competition has also predicted that the protection of test data could significantly raise the price of medicines in Peru.

Controversy over Biodiversity and Traditional Knowledge

The US-Peru FTA may also prove to have considerable implications for national biodiversity and conservation policies. Links between trade and biodiversity can be found in the IP chapter, the environment chapter and a separate 'understanding' outside the agreement's text (see related article on page 18).

In the IP chapter, three new obligations will affect policies aimed at the sustainable use of biodiversity. The first is the obligation to ratify UPOV 1991, a treaty that requires the protection of new plant varieties through patent or breeders' rights as opposed to other possible options. The second obligation relates to 'best efforts' to make patent protection available for plants, potentially paving the way for the patentability of biotechnological inventions that have not fulfilled the access and benefit-sharing criteria set out in the Convention on Biological Diversity (CBD). The third obligation is an expansion of the scope of what is patentable in Peru today to include methods, as opposed to inventions alone.

During the negotiations, Peru took a very active stand on trade and biodiversity matters in other fora, namely the WTO, the World Intellectual Property Organisation and the CBD. This raised the conservation community's hopes that biodiversity concerns would be part of the Andean FTA.

Article 18.8 of the environment chapter emphasises the parties' commitment to the conservation and sustainable use of biodiversity and preservation of traditional knowledge (TK). The US-Peru FTA also includes for the first time an additional understanding on biodiversity and traditional knowledge (see box on page19). The fact that the text specifically mentions contracts as a way to address access to, and benefit-sharing from, genetic resources and traditional knowledge corresponds to the US negotiating position at the World Intellectual Property Organisation and the WTO.

Neither the environment chapter nor the related 'understanding' contain mandatory obligations, but only a set of best-endeavour clauses encouraging information shar-

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ing on biodiversity co-operation programmes and for the purpose of evaluating the existence of 'prior art' in inventions related to TK. Thus, critics argue that the biodiversity provisions in the FTA do not improve the status quo to effectively tackle concerns over misappropriation of biodiversity and TK. Others counter that the very fact that the US has agreed to the inclusion in an FTA of a series of concepts regarding biodiversity and traditional knowledge is already an achievement, particularly given that the US has never ratified the CBD.

Colombia Finalises Deal

The US and Colombia announced the conclusion of a comprehensive bilateral free trade agreement on 27 February. The accord covers goods and services, intellectual property rights, investment, government procurement, and environmental and labour protection.

The negotiations had stalled late last year amid strong opposition from Colombian farmers, who feared that cheap US imports would displace their products in the domestic market and drive more farmers to cultivating illegal drugs. The primary obstacle in the last round of talks was Colombia's desire to retain a measure of permanent protection for corn, rice and poultry farmers. In the end, however, Bogota agreed to phase out all tariffs on US farm exports over the next 15 to 19 years, with the longest transition time accorded to rice, its most sensitive product. The US will continue to restrict sugar imports from Colombia, but will phase out all other tariffs. To minimise other market access barrier, Colombia tried to ensure that its agricultural goods would not be subject to unreasonable sanitary and phyto-sanitary (SPS) standards. According to the USTR, there is a 'consultative mechanism' that Colombia can use to help its producers move through the maze of US SPS regulations.

Like their counterparts in other Andean countries, Colombian opponents to the FTA continue to denounce the agreement's intellectual property provisions. In December 2004, an advisor to the Colombian IP negotiating team resigned citing fears that his government would bow to US pressure, with highly negative consequences on public health. Like Peru, Colombia ended by accepting the five-year clinical test data protection period, as well as other standard US patent protection requirements in FTAs. In addition, Colombia agreed to establish a system to prevent the marketing of pharmaceutical products that infringe patents in force. Nevertheless, it was expressly spelled out that Colombia would retain the right to "take necessary measures to protect public health by promoting access to medicines for all, particularly in circumstances or extreme urgency or national emergency."

The Not-So-Bad US–Peru Side Letter on Biodiversity

Manuel Ruiz

The biodiversity 'side letter' of the recently concluded US – Peru Free Trade Agreement is an important milestone in addressing concerns related to genetic resources and traditional knowledge in the context of international trade.

In the Understanding Regarding Biodiversity and Traditional Knowledge, to give the side letter its official title, Peru and the US agreed to a common interpretation of a series of concepts related to biodiversity and traditional knowledge. While the text contains no obligations *per se*, its contents reflect the importance and relevance that both governments accord to these issues.

What Does the Side Letter Mean for Peru?

The side letter represents the very first time that the US has accepted to include in a bilateral trade instrument – if not in the actual text, still as an integral part of the overall agreement – explicit reference to biodiversity and traditional knowledge in more than general terms. As these concepts have been historically problematic for US foreign policy, their inclusion, consideration and acceptance during negotiations of the free trade agreement (FTA) were a positive development for Peru. Furthermore, Chapter 18 (on the environment) incorporates a series of provisions regarding biodiversity and traditional knowledge. This is an important achievement in itself.

Politically, the side letter means that Peru acted consistently with its original commitment to ensure that biodiversity and traditional knowledge were fully recognised and explicitly mentioned in the FTA. And, as part of treaty's co-operation obligations, possibilities to consolidate these commitments grow considerably.

The Side Letter in Detail

In more specific terms, the side letter places biodiversity and traditional knowledge as key components of potential social, economic, cultural development. It also recognises the importance of:

- prior informed consent as the mechanism under which genetic resources should be accessed;
- equitable sharing of benefits derived from access to traditional knowledge and genetic resources; and, most relevantly;
- quality patent examinations to ensure that patents granted to inventions involving biodiversity or traditional knowledge are legally valid.

Although the word 'recognise' raises legitimate questions as to its precise legal status, read as a whole the text of the side letter will serve to inform future national measures, policies and, hopefully, laws that elaborate and build upon the basic principles agreed upon.

Paragraph three of the side letter seems to have generated most of the negative reactions from a number of sources, some of whom have voiced concerns about Peru's proposals and its overall negotiating position regarding disclosure of origin and legal provenance requirements during

negotiations at the WTO's Hong Kong Ministerial Conference. In particular, some observers expressed surprise at the "low level of ambition" of Peru's proposal on disclosure, speculating that this could be related to the side letter's reference to contracts as one way to govern access to genetic resources or traditional knowledge.

Peru's Position on Disclosure

As an initial comment, it should be noted that disclosure of origin-related ideas were actually conceived in and proposed by Peru during the process of negotiation of the Andean regime on access to genetic resources as early as 1994. Furthermore, the first piece of legislation which actually incorporates the disclosure of origin concept is Peru's regulation on plant breeders rights (May 1996). Since then, Peru has remained consistent and committed in its drive to further consolidate this idea.

What does paragraph three – which refers to contracts – of the side letter actually say? It states that the US and Peru "recognise that access to genetic resources or traditional knowledge, as well as the equitable sharing of benefits that may result from use of those resources or that knowledge, can be adequately addressed through contracts that reflect mutually agreed terms between users and providers."

For some, the reference to *contracts* seems most troubling and disturbing. However, this should not raise too many eyebrows, if we simply revisit the Convention on Biological Diversity (CBD), which has, based on sovereign rights of states, taken a bilateral contractual approach to the governance of, and access to, genetic resources (from national legislation to the Bonn Guidelines and the FAO International Treaty on Plant Genetic Resources for Food and Agriculture – although in this latter case contracts are used as part of a multilateral system for benefit-sharing). Whether contracts are a positive or negative approach is a totally different story. The fact is thart contracts derive naturally from the CBD and are nothing unusual in this context.

The Text of the Side Letter

Understanding Regarding Biodiversity and Traditional Knowledge

The governments of Peru and the United States have reached the following understandings concerning biodiversity and traditional knowledge in connection with the United States of America – Peru Trade Promotion Agreement signed this day:

1. The Parties recognise the importance of traditional knowledge and biodiversity, as well as the potential contribution of traditional knowledge and biodiversity to cultural, economic, and social development.

2. The Parties recognise the importance of the following: (1) obtaining informed consent from the appropriate authority prior to accessing genetic resources under the control of such authority; (2) equitably sharing the benefits arising from the use of traditional knowledge and genetic resources; and (3) promoting quality patent examination to ensure the conditions of patentability are satisfied.

3. The Parties recognise that access to genetic resources or traditional knowledge, as well as the equitable sharing of benefits that may result from use of those resources or that knowledge, can be adequately addressed through contracts that reflect mutually agreed terms between users and providers.

4. Each Party shall endeavour to seek ways to share information that may have a bearing on the patentability of inventions based on traditional knowledge or genetic resources by providing:
   a) publicly accessible databases that contain relevant information; and
   b) an opportunity to cite, in writing, to the appropriate examining authority prior art that may have a bearing on patentability.

Second, contracts are *already* recognised in regional Andean legislation as one way in which genetic resources (Decision 391) and traditional knowledge (Law 27811 on the protection of traditional knowledge) may be accessed and utilised. Again, there is really nothing new here.

Third, a direct reading of the side letter shows that there is nothing to indicate that contracts are the *only* mechanism that can be used. It simply states that contracts *can* be used without precluding other eventual options or approaches.

Finally, there is no direct relation between contracts and the issue of disclosure of origin and legal provenance. Contracts regulate (or may regulate) access conditions to genetic resources and traditional knowledge, while disclosure obligations *may* be included in contracts, but are (or should be) most importantly part of intellectual property legislation under which geographical and legal origin of resources and knowledge should be demanded as a condition for patentability, for processing applications, or whatever decision-makers decide.

In this regard, linking the FTA side letter to the Peruvian position on disclosure during Hong Kong seems a little extreme. In any case, Peru´s position in Hong Kong (see point 7 of document WT/MIN(05)/17 presented in Hong Kong by Bolivia, Colombia, Ecuador and Peru) is very consistent with its previous positions in other fora: disclosure of origin and legal provenance provisions should be developed and agreed upon to establish positive synergies between the TRIPS Agreement and the CBD.

Indeed, it could be pointed out that no reference has been made to disclosure in the FTA. Absolutely true. However, existing Andean legislation (Decision 391 and Decision 486) incorporates disclosure requirements explicitly (using *the* most explicit language anywhere in the world) and this legislation has a higher standing than the FTA, which must be approved by national lawmakers). The Andean Tribunal has expressly stated that Andean decisions (sub-regional norms) supersede national legislation – including in this case a Congressional law ratifying the FTA and incorporating it into the national legal system.

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Finally, paragraph four of the side letter offers the possibility of providing national IP authorities with enough information to enable them to better process applications. Publicly accessible databases and relevant prior art information are recognised as options to ensure that biodiversity- and traditional knowledge-related inventions are subject to a more rigorous examination procedure. This specific provision of the side letter actually targets a very important aspect: seeking mechanisms to prevent the misappropriation of genetic resources and traditional knowledge by making intellectual property examinations more rigorous and promoting a much more proactive attitude by national intellectual property (or genetic resources) authorities in terms of providing patent examiners with relevant information.

Final Comments

There are numerous grounds for attacking the US – Peru FTA. From arguing that the multilateral system is being eroded and affected by these bilateral agreements in general to highlighting the 'special' legal status of the side letter, arguments abound. However, some people in Peru think that ideas can be pursued at different levels, and the FTA is just one of many efforts that will have to be undertaken. The FTA, and the side letter in particular, *are* an important advance in the search of mechanisms to ensure that the biodiversity and traditional knowledge interests of Peru are taken into account and adequately protected. In practice, it is also Peru's responsibility to ensure that these common understandings translate into concrete, practical, beneficial and supportive actions.

In short, we prefer to see the side letter in a rather more positive light, under which specific cooperation (as provided by the FTA text) may serve to implement its underlying intention, as well as explicit wording and provisions; where public domain traditional knowledge databases may serve a defensive purpose against misappropriation; where disclosure requirements in force in Peru and the Andean region are effectively implemented; where contracts play (hopefully) a regulatory role enabling countries to share benefits; and where quality patent examinations are supported.

Manuel Ruiz is Director of the International Affairs and Biodiversity Programme at the Sociedad Peruana de Derecho Ambiental.

ENDNOTE

[1] "We consider that it is of the outmost importance to discuss in detail the relationship between the TRIPS Agreement and the Convention on Biological Diversity, as a key element of the development package. In that sense, the discussion must cover the requirements on patent applicants of disclosing, as a condition for granting the patent, the source and country of origin of the biological/genetic material and associated traditional knowledge used in their invention, as well as evidence of prior informed consent and benefit sharing requirements." WT/MIN(05)/17

Free Trade Agreements and Dispute Resolution: The Danger for Developing Countries

Peter Drahos

Free trade agreements continue to proliferate. A recent WTO discussion paper estimates that there will be almost 300 FTAs in existence by 2008, but much more significantly points out that an increasing percentage of the world's trade will be covered by these agreements.[1] One aspect of FTAs that has not received much consideration to date is dispute resolution.

FTAs and Choice of Forum

FTAs are comprehensive agreements covering many of the same areas that are already the subject of obligations under WTO agreements. The areas of overlap include investment, intellectual property, services, government procurement and technical barriers to trade. One feature of the FTAs that the US has signed is that the dispute settlement chapter contains a choice-of-forum provision, which allows the complaining state to choose where to file its complaint in cases where the state complained against has breached an obligation under more than one trade agreement and both states are parties to the relevant trade agreements.[2] In the words of the US-Australia FTA, "the complaining party may select the forum in which to settle the dispute" and "the forum selected shall be used to the exclusion of others".

If the US and EU become, as seems likely, the major hubs for a bilateral network of trade rules then both will have increased their options for managing their trade disputes. Generally, an FTA between a large developed country and a smaller developing country favours the former. For example, US FTAs typically contain intellectual property standards that match or exceed those to be found in the WTO's Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).[3] If the US does nothing to enforce these higher standards then the potential economic rents that it has secured through their negotiation will be lost. It follows that intellectual property lobby groups in the US have a strong incentive to promote the use, or the threat of use, of FTA dispute resolution mechanisms.

These choice-of-forum provisions may give rise to some complex litigation scenarios in the future because in cases of double breach, third states that are WTO Members but not party to the FTA could only proceed in the WTO, while the complaining party under the FTA would have a choice. There may also be cases where a party under a FTA introduces a measure that is seen by a third party as being inconsistent with its WTO obligations. The third party may

then seek a review of that measure from the WTO. Finally, a complaining party may find a way to proceed in both fora. The same set of facts may see a complaining party characterise a dispute as giving rise to separate legal matters allowing it to open up two fronts of litigation. For example, in the US-Australia FTA the provisions that relate to the Pharmaceutical Benefits Scheme (a scheme that impacts on the price of patented medicines) and the provisions on intellectual property might give rise to this kind of possibility. The Softwood Lumber litigation between the US and Canada, which over the years has involved both NAFTA and WTO panels, is an example of how parallel fora can be used to prolong and re-contest decisions that one party does not like.

Consequences

One obvious consequence of dispute settlement under FTAs is that it will create more opportunities for states to develop choice-of-forum strategies. There is evidence that the Parties to NAFTA think carefully about choice of forum.[4] However, for developing countries the crucial question is whether choice-of-forum provisions will bring more costs than benefits. Developing countries seem to be doing better in WTO dispute resolution than their track record under the GATT regime might have suggested.[5] One important advantage of the Dispute Settlement Understanding (DSU) is that it allows for significant third party participation in a dispute between two WTO Members. This participation can take place as early as the consultation stage, albeit in limited fashion.[6]

The DSU also has procedures that facilitate complaining states each bringing an action in relation to the same matter.[7] In short, the procedural rules of the DSU offer weaker states some scope for co-operation and collective action when it comes to defending or bringing trade actions. The same is not true of procedures that govern dispute resolution under an FTA. These procedures are only available to the parties to the agreement. One would predict, for example, that any trade litigation that dealt with the public health aspects of intellectual property would attract lots of coalitional activity by developing countries. Under the rules of the DSU those coalitions could formally participate in that litigation.

Of course, a developing country in the WTO still faces a complex contest of trade litigation in which it has disadvantages of resources and expertise.[8] But in an isolated FTA engagement the weaker actor will continue to face all the difficulties of litigation in the WTO, but without the prospect of third party assistance in the formal dispute resolution process. It is the possibility of coalitions that makes dispute resolution in the WTO a more fluid and dynamic process than is possible in the static context of an FTA.

Conclusion

Countries are signing FTAs for a combination of short term-political and economic gains. In doing so they are creating a system of many possible trade courts. It is the influential domestic trade lobby groups of the US and EU that are perhaps best positioned to take advantage of a trade dispute resolution regime that offers widespread choice of forum. In the case of intellectual property rights there is a real danger that FTA dispute mechanisms will be used to enforce bargains that would have been unobtainable under conditions of the more equal bargaining that prevails in the WTO.

If it is the case that "no group has a greater interest [in the success of the WTO] than the weak and the poor"[9] and that it is the DSU that offers the best chance of the equitable protection of those interests, it follows that developing countries should be thinking carefully about the choice-of-forum issue. At the very least they should support the approach to be found in Article 189.4.(c) of the EU-Chile FTA. Under this Article where a party seeks redress for breach of an obligation that is also a breach of a WTO obligation, that party "shall have recourse" to the WTO (unless both parties otherwise agree).

Under Article 23.1 of the DSU, WTO Members are meant to have recourse to the DSU when they decide to pursue a remedy for a breach of a WTO agreement. Article 23 provides a basis upon which to argue that the WTO's multilateral system has primacy over competing systems of dispute resolution.[10] Ensuring that that primacy is not undermined by FTA dispute resolution should be a long term objective for weaker players in the trade regime.

Peter Drahos is Professor of Law and Director of the Centre for the Governance of Knowledge and Development, Australian National University.

ENDNOTES

[1] See, Jo-Ann Crawford and Roberto V. Fiorentino, The Changing Landscape of Regional Trade Agreements, Discussion Paper No. 8, World Trade Organization, 2005.

[2] See Article 22.3 of the US-Chile FTA, Article 20.4.3 of the US-Singapore FTA, Article 21.4 of the US-Australia FTA, Article 19.4 of the US-Bahrain FTA, Article 20.3 of the US-CAFTA-Dominican Republic FTA and Article 20.4 of the US-Morocco FTA.

[3] See John R. Thomas, Intellectual Property and the Free Trade Agreements: Innovation Policy Issues, Congressional Research Service Report for Congress, December 21, 2005.

[4] See David A. Gantz, 'Dispute Settlement Under the NAFTA and the WTO: Choice of Forum Opportunities and Risks for the NAFTA Parties', 14 (1999) Am. U. Int'L L. Rev., 1025.

[5] Chad P. Bown, 'Developing Countries as Plaintiffs and Defendants in GATT/WTO Trade Disputes', 27 (2004) World Economy, 59.

[6] See Article 4.11 of the DSU.

[7] See Article 9.

[8] See Gregory Shaffer, 'How to Make the WTO Dispute Settlement Work for Developing Countries: Some Proactive Developing Country Strategies' in Towards A Development-Supportive Dispute Settlement System in the WTO, ICTSD Resource Paper No. 5, Geneva, 2003.

[9] See The Future of the WTO, Report by the Consultative Board to the Director-General Supachai Panitchpakdi, WTO, 2004, para 53.

[10] Ernst-Ulrich Petersmann, The GATT/WTO Dispute Settlement System: International Law, International Organizations and Dispute Settlement, Kluwer Law International, London, The Hague, Boston, 1997, 179.

Will the TRIPS Amendment on Compulsory Licensing Work?

Cecilia Oh

Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health recognised that developing countries without manufacturing capacity would face difficulties in making effective use of compulsory licensing, but it remains to be tested whether the recent amendment to the TRIPS Agreement will provide an adequate solution to the problem.

The Paragraph 6 problem has been defined thus: since Article 31(f) of TRIPS restricts exports of products manufactured under compulsory license[1], countries without manufacturing capacity dependent on foreign generic producers would have a problem sourcing adequate supplies of generic medicines produced under compulsory license. WTO Members were asked to find an 'expeditious' solution to the problem, but negotiations for the solution could hardly be described as expeditious. On 30 August 2003, WTO Members adopted an interim decision, which waived the restriction under Article 31(f) to permit the production and unrestricted export of generic medicines under compulsory license. It was another two years before the permanent 'solution' could be agreed upon.

While developing countries proposed to correct the flaws they saw in the temporary solution, industrialised countries focused the debate on the legal status of the Statementr read out by the General Council Chairman when the 30 August Decision was adopted. The Statement, supposedly reflecting 'key shared understandings' of Members regarding the solution is a restrictive reading of the solution, which many fear would further hamper its workability. Its doubtful legal status prompted some industrialised countries to try and elevate it by incorporating the Staement into the text of the amendment itself. Developing countries opposed the Chairman's Statement, just as they had done when they negotiated the interim solution. But, the heady mix of political pressure and the fear of a worse deal led to the Chairman's Statement being read out by as the decision to permanently amend the TRIPS Agreement was adopted, just as it had been when the interim solution adopted two years earlier.

It took four years for WTO Members to agree to this permanent solution. In fact, the agreement was simply to convert the temporary solution into a permanent one. Since the text of the amendment does not include the Chairman's Statement, its doubtful status is also preserved.

Will It Work?

According to WTO Director-General, Pascal Lamy, the agreement to amend the TRIPS Agreement "confirms once again that members are determined to ensure the WTO's trading system contributes to humanitarian and development goals as they prepare for the Hong Kong Ministerial Conference". But such pronouncements may be premature when the workability of the solution is still unproven. No use has been made of the 30 August Decision. Since the amendment will incorporate essentially the same system of permitting production and export under compulsory license, it must be asked if the system works.

The system permits countries wishing to import generic medicines, to do so from a foreign producer. Whilst least-developed countries are automatically eligible, developing countries have to establish that either they have no manufacturing capacity or the current capacity is insufficient to meet their needs. Countries make this determination themselves; and the WHO guide on implementing the August 30 Decision observes that this is a matter of self-assessment that is not challengeable by other Members.[2] The system requires the importing country to notify the TRIPS Council. Where the needed medicine is patent-protected in the importing country, the government will have to grant a compulsory license for the import of the generic version of the medicine. Where no patent is in force, the importing country has to provide notification of its intention to use the system.

Whilst much has been made about the amendment allowing poor countries to import generic medicines, the most significant aspect of the system is the ability of generic-producing countries to export generic medicines without the quantitative restrictions. But will generic manufacturers be willing and able to produce and export the needed medicines under the system? The generic manufacturer has to obtain a compulsory license to produce and export, which will only permit the production and export of the quantity required by the importing country. The compulsory license will also require the manufacturer to make the products clearly identifiable through labelling or marking, and notify TRIPS Council of the quantities supplied to the importing countries and the distinguishing features of product.

How to Make It Work?

The workability of the system will depend, in large part, on how the demand-and-supply chain can be linked up. On the demand side, importing countries must be able to indicate their needs. Procurement agencies in these countries must be able to forecast and quantify needed medicines, so that this information can be notified to the TRIPS Council. This notification will be the trigger for necessary measures to be taken on the supply side. Without this indication of demand, it is difficult to see how generic manufacturers will be moved to offer their products for export. In Canada, India and China – where national legislations have been amended to permit the production and export of generic medicines under compulsory license – the law generally requires some indication from the importing country of its intention to permit the import of products manufactured under compulsory license before such a license may be granted.

Generic manufacturers will have to respond by making the necessary applications for compulsory licenses. They will have to be convinced of the economic feasibility of applying for a compulsory license under the circumstances. It has been said that the system is a 'drug-by-

drug, country-by-country, case-by-case system', so that manufacturers will be forced to produce limited quantities under each compulsory license. However, it should be possible for a number of the purchasing countries to co-ordinate their orders, in order that the manufacturers may use a single compulsory license to enable the production and export to more than one country. This method of pooled procurement should be explored, in this context, in order to take advantage of the significant cost and other efficiency savings that can accrue. But it requires a degree of co-operation between participants and shared purchasing needs.

Exporting country governments will have to respond by enabling the grant of compulsory licenses for production and export by their generic manufacturers. This may involve amendments to patent legislation. The initiative taken by Canada, India and, most recently, by China to provide for the grant of compulsory licensing under the system is welcome; given that the concentration of generic manufacturers is in these countries. Governments should demonstrate their good faith by enacting simple and speedy procedures for the grant of compulsory licenses, without unnecessary requirements that may delay the grant of the licenses, or restrictions on the types of pharmaceutical products or diseases.

Importing country governments may have to take the necessary first step by notifying their intention to use the system. Where the product is patent-protected in the importing country, a compulsory license or government use authorisation will be required. Where no patent exists, or where a least-developed country has opted not to grant or enforce pharmaceutical patents until 2016[3], a notification to TRIPS Council of intention to use the system would be sufficient.

What may also be needed is an 'honest broker' (for want of a better word) to link up the various actors in the demand and supply chain. Obvious choices in this regard include UN agencies such as the WHO, UNAIDS and UNICEF, and the Global Fund for the Fight Against AIDS, TB and Malaria. These agencies are well-placed to assist countries in forecasting demand for medicines, identifying potential suppliers of quality assured medicines and have, as their part of their mandate, the achievement of the public health objective – access to medicines.

Put It to Test

It is time for governments and the international organisations to assume the responsibilities, and to make a concerted effort to make the system work. There are now several good reasons to put the system to the test. One reason for not using the August 30 Decision was that developing countries apparently lacked sufficient assurance regarding the 'permanence' of the interim waiver system. Governments were reluctant to revise national legislation due to concern that the final 'solution' might require yet more changes. With an amendment that is substantially the same as the 30 August Decision, there should no longer be concerns on this account.

Second, the post-2005 environment should provide another impetus for countries to test the system. As all new medicines come under the requirement for the 20-year patent protection in all but the least-developed countries, generic suppliers, including those in India, will not be able to reproduce patented medicines without compulsory licensing. This is already the case of medicines such as the second-line HIV treatments. Global efforts, such as the WHO's 3x5 campaign may have helped to put more people on treatment, but it has also increased the need – as resistance inevitably develops – for a switch to second-line or third-line treatments. The generic competition that resulted in the price plunge for first-line ARVs, does not yet exist for the second-line medicines. Current prices of the typical second-line treatments can be 6 to 12 times higher than those of the older first-line medicines.[4] Governments and international organisations will have to develop alternative strategies to ensure the future sustainability of ARV treatment, particularly in low-income countries. Compulsory licensing to permit imports (and local production) of generic second-line ARVs is an obvious option to introduce market competition and reduce prices.

Third, the seemingly imminent avian flu pandemic demonstrates that it is neither easy nor possible to predict future need for medicines, or the quantities in which they may be required. In case of another public health emergency, or pandemic, countries will want to ensure their ability to obtain the necessary treatments in sufficient quantities, at affordable prices. The global debate about access to Tamiflu and the ability of countries to fill national stockpiles have raised questions about the need to ensure multiple suppliers to guarantee availability and affordability.

Change the Rules?

The amendment is expected to come into force in 1 December 2007, WTO Members having set themselves this deadline to have the amendment ratified by the required two-thirds of the membership. This "solution" is here to stay, unless there is a change of heart for the majority of the Members. This seems unlikely, unless there is evidence to demonstrate the workability or otherwise of the system. WTO Members had been congratulated for their unprecedented decision to amend the TRIPS Agreement, which demonstrated their willingness and flexibility to take concrete steps to improve intellectual property rules to ensure the primacy of health. If it is shown that the system does not work, WTO Members may perhaps demonstrate similar willingness to change the rules once again, in the interest of public health.

Cecilia Oh is a technical officer with the World Health Organization. Any views expressed in this article are personal and may not be attributed to the WHO.

ENDNOTES

[1] Article 31(f) restricts exports by providing that compulsory licenses shall be used "predominantly for the supply of the domestic market of the Member authorising such use."

[2] *Implementation of the WTO General Council Decision on Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health* (2004), Health Economics and Drugs EDM Series No. 16, WHO Geneva

[3] Para. 7 of the Doha Declaration on the TRIPS Agreement and Public Health exempts LDCs from the obligation to protect pharmaceutical patents or undisclosed information until 1 January 2016.

[4] See for example; Médecins Sans Frontières (2005) *Untangling the web of price reductions: A pricing guide for the purchase of ARVs for developing countries*, in UNICEF-UNAIDS-WHO-MSF (2005) *Sources and prices of selected medicines and diagnostics for people living with HIV/AIDS.*

What Next for the Development Agenda at WIPO? Priorities for 2006

Carolyn Deere

In February 2006, WIPO's Provisional Committee on Proposals Related to a WIPO Development Agenda meets for the first time. In launching the Development Agenda discussions in 2004, WIPO's members recognised that intellectual property policies and laws raise a complex set of development considerations and that efforts should be made to ensure WIPO's work properly addressed this challenge.

In the first year's discussion, however, little substantive progress was made. Often submerged in procedural debate, many members became frustrated and the space for dialogue diminished. Betraying the importance of the issues at stake, detractors pushed the idea that the Agenda was a purely political exercise driven by a select group of countries. This year, the Development Agenda must be accorded the respect and serious engagement that the issues it raises deserve.

Charged with presenting concrete decisions for consideration at the 2006 General Assemblies, the Provisional Committee has just three meetings and less than eight months to fulfill its mandate. With the question of *how* and *where* to proceed with discussion of the Development Agenda resolved, what are the core priorities for getting the Committee's discussion off on the right track?

Substantive Discussion of Development Agenda Proposals

Attention this year must focus on substantive debate on existing and new proposals. Concrete decisions should be made on those proposals that already attract broad-ranging interest or support, such as proposals for mechanisms to ensure more demand-driven and effective technical assistance, stronger evaluation of WIPO programmes and activities, improved internal management and oversight, and a code of ethics for staff and providers of WIPO's technical assistance. Equally, there must be serious engagement with the more contentious proposals; this in turn will demand a far more sophisticated dialogue on the relationship between IP and development than has occurred thus far.

In the 2005 discussions of the Development Agenda, a good deal of time was spent dispelling misunderstandings and building mutual understanding on some of the basics (for instance, none dispute that IP *can* be a tool for development; none deny that WIPO has devoted considerable resources to the administration and implementation of IP policies and that many developing country member states have been grateful for the assistance). This year, all actors need to resist the temptation to spend any more time either on political posturing on these matters or on over-simplifications that erode the quality of discussion (i.e., IP is always good for development; IP is always bad for developing countries; IP technical assistance is always good for development; or, more IP protection is always better).

We know that development is a multi-faceted concept that comprises multiple public policy objectives. In 2006, the starting point for discussion must be the acknowledgement that an IP policy that is good for one aspect of development may compromise the achievement of another, and an IP policy that works at one stage of development may at another point constitute a constraint. Only with this nuanced approach will there be scope for intelligent consideration of the most forward-looking proposals on the table, including calls for development impact assessments of proposed new international norms, and new strategies for promoting access to knowledge and protecting information in the public domain.

In 2006, WIPO member states will also need to engage substantively with proposals for institutional mechanisms that ensure development retains the organisational priority it deserves on a systematic, long-term basis. Here, lessons – good and bad – from the experience of other international organisations in 'mainstreaming' cross-cutting objectives into their work may be instructive – whether development in the WTO context, gender at the World Bank, or poverty alleviation at the IMF.

Build Cross-regional Coalitions and Alliances at the Multilateral Level

Advancing the WIPO Development Agenda will demand greater effort among all stakeholders to understand different perspectives, solve problems and build consensus where possible. In 2006, the supporters of the Development Agenda – among them both developing and some developed countres – must devote more energy to bolstering and expanding their coalitions and looking for alliances among industry, civil society and countries that share particular interests.

With billions of dollars on the table, the determination of the most powerful states to defend and advance their share of the global knowledge economy for commercial interest groups will continue to translate into intense pressures on developing countries to defect from coalitions and/or adopt positions preferred by key developed countries and industries – ranging from promises of more aid, letters to presidents, and efforts to sideline Geneva diplomats in favour of less politically-aware officials in capitals. These forces are most difficult to resist for those countries most dependent on WIPO and others for development financing. In this context, it is imperative that the more active and better-equipped developing countries and development advocates devote greater attention throughout the year to talking with, listening to and exchanging views with a broad range of members – from the poorest to the richest.

Monitor and Transform Procedural Matters at WIPO

Procedural challenges at WIPO can be expected to continue over the coming year. Reflecting on the 2005 WIPO Assemblies, one delegate likened WIPO to a DisneyWorld – a virtual

reality in which things are never quite as they seem. Although the Secretariat keeps assuring countries that WIPO is indeed the member-driven organisation they expect, even the most sanguine observers concur that the WIPO Secretariat has a distinctive organisational culture. In the past year, closer scrutiny of WIPO's activities by members and external observers has brought to the public's attention a pattern of exceptional and sometimes undue influence on the intergovernmental processes which are supposed to govern its workplan and norm-setting activities (evidence of a series of financial and management irregularities has also emerged).

Fairer, more transparent processes will require action from members and also from the Secretariat. The accountability of WIPO and its member-driven character relies on the commitment of member states to attentive, constructive and probing engagement in its work. Geneva-based negotiators need to keep their capital-based colleagues within and beyond the IP office better-informed of the range of issues and processes in play – and to stand their ground on matters of process. Where resources are limited, developing countries will need to share and delegate responsibility for following the technical but politically significant aspects of WIPO's work (including the organisation's programme and budget process and its new audit procedures).

To guard against pressures from commercial interests and powerful members that might prejudice the Secretariat's neutrality, the membership needs to consider institutional reforms that promote greater transparency and clarify procedures. It also needs to devise mechanisms to ensure the Secretariat consults with a broader range of external stakeholders than its traditional constituency of IP holders. To this end, the Committee could call for an exploration of the best practices of other UN agencies for soliciting external input and increasing the quality of its engagement with the full range of stakeholders – including improved communications, more opportunities for dialogue, greater opportunities to make materials available to WIPO member states and greater use of expertise from a diverse range of perspectives.

Harness Public Interest and Expertise in Multilateral and National Policy-making Processes

Finally, the Development Agenda discussion will benefit from intensified efforts to harness public interest, expertise and support both at WIPO and at the national level. Across the international system, consultation with key stakeholders is now considered a basic requisite for evidence-based, fair and predictable international processes. In 2006, the three-day informal open forum on all issues related to the proposed Substantive Patent Law Treaty provides an opportunity to test one of the recommendations of the elaborated Development Agenda proposal: public consultation on WIPO's norm-setting activities. To achieve success, the forum will have to enable member states to properly weigh the merits and pitfalls of proposed norms, consider different options and hear from the diversity of perspectives necessary to devising a balanced approach. Non-governmental observers, for their part, should take up the opportunity to provide substantive inputs, and to elaborate and evaluate the various proposals.

The quality of discussions in WIPO will also depend on the commitment of member states to consultative national level policy-making processes that engage the full range of relevant domestic ministries and key non-government stakeholders from industry, civil society and academia. More effective and better-informed domestic processes will help all countries develop more coherent domestic IP policy strategies, ensure that international positions reflect the broad range of national interests and maintain consistent international strategies. More systematic interaction and linkages between analysts in the fields of IP, investment, innovation, development, and science and technology is one necessary step. In developed countries, industry, academics and civil society groups need to continue to push for both domestic IP policies and international IP agendas that reflect and balance the diversity of industry interests, public concerns and international responsibilities.

A More Enabling Disposition from the WIPO Secretariat

It is no secret that the launch of the Development Agenda was not welcomed by all within the WIPO Secretariat. Many felt the call for the Development Agenda reflected a misunderstanding or lack of appreciation for the organisation's work. Within the Secretariat, the more forward-looking staff believe that the organisation ought to be less defensive and instead embrace the Development Agenda as an opportunity to bolster WIPO's long-term relevance and credibility. They understand that increased engagement by developing country member states must be welcomed as crucial to the organisation's vitality and viability. In the coming year, the success of the Development Agenda will rely on those with such a vision to take greater leadership.

WIPO's greatest challenges emerge not, as staff at the Secretariat often appear to fear, because it is failing to generate higher IP standards quickly enough, but because it is yet to respond to the changing needs of many of its members, the growing public interest in its work, and the fact that its activities have a far more critical influence on the direction and outcomes of global economic activity and social welfare than ever before.

As the knowledge-economy expands, a growing number of government agencies, scientists, public-interest groups and industries – from both developed and developing countries – share common priorities and concerns with respect to IP policy that defy a North-South divide. The convergence of interests and potential coalitions vary from issue to issue, but it is clear that as new technologies and business models alter economic dynamics, the pressure to properly explore the range of possible options for promoting innovation, creativity and economic dynamism are here to stay – whether through altering the approach to IP policies, using such policies more creatively, or looking beyond them.

To be sure, many countries still need basic assistance, education and training on the implementation of international IP obligations, the options before them, and the costs and benefits of different approaches in light of their development goals. But they need advice that provides them access to the best available thinking. A sustainable long-term vision for WIPO thus must be one that focuses on broadening the Secretariat's expertise, taking up the most cutting-edge con-

Continued on page 26

ceptual issues, acknowledging that there are no simple answers, reflecting on changing business realities, and engaging with innovative new ideas. This approach would open up the scope for WIPO to raise its international profile as a thoughtful player in global policy debates.

In moving toward this broader vision, the WIPO Secretariat will find that it attracts more enthusiasm and a broader constituency for its work. The recent admission of a range of NGOs as WIPO observers provides the Secretariat and membership with a new set of allies for more creative, forward-thinking work. A broad array of industries – both IP holders and not – are showing a growing interest in WIPO's work and looking to it for an expanded vision. Many member states and stakeholders are signaling to the Secretariat that it can rely on their support were it to respond more positively to calls for more thinking on new international guidelines or norms on the public domain, on access to knowledge, and for new approaches to stimulating and rewarding medical R&D.

Taking seriously its mandate as a UN specialised agency, WIPO would also find allies in other international and regional organisations if it devoted more energy to collaborating with their efforts related to the future of innovation, creativity, technological development and access to technologies and information.

Carolyn Deere is a Research Associate at the Global Economic Governance Programme at the University of Oxford where she leads it project on development and the global trading system.

Biological Resources Access Treaty a Step Closer

A possible framework is starting to emerge for accessing genetic resources and sharing the benefits arising from their use under the Convention on Biological Diversity (CBD).

After a tough meeting in early February 2006, the Ad Hoc Working Group on Access and Benefit-sharing agreed to send draft recommendations on an international regime on these controversial issues for the consideration of the parties to the CBD, which are to meet in Curitiba, Brazil on 20-31 March 2006.

The nature, sufficiency and methodology of certificates of origin, source or legal provenance, and whether such certificates should be linked to a mandatory disclosure requirement in patent applications, were at the centre of the working group's deliberations. Lack of agreement on whether the new regime should be legally binding led to the bracketing of substantial parts of the draft legal text. The term 'legally binding' was dropped from the title of the draft text sent to Curitiba.

The African Group, the Group of Like-minded Mega-diverse Countries and Latin American countries supported a Chair's text – which included language on objectives, scope, ownership, accessing genetic resources, accessing traditional knowledge, benefit-sharing, certificates of origin and other measures – as a good basis for negotiations on an international regime. Australia, New Zealand, Korea and the EU, however, said the text moved too fast in the direction of a legally-binding instrument. Together with Switzerland, Canada, the US and Japan, they suggested that more research and studies were necessary, for example analysing gaps in the international governance of access and benefit-sharing and exploring what certificates of origin, source or legal provenance could entail. They stressed that while the Chair's draft could be used for discussion on an international regime, it should not be forwarded on to the CBD Conference of the Parties (COP) as a proposed protocol.

Difficult negotiations followed, during which Australia, the EU and Canada objected to a revised draft on the grounds that it still did not reflect the views they had expressed verbally and submitted in writing. In the end, delegates proceeded to bracket large parts of the text to signal lack of agreement on a number of key provisions. For example, the title of the section reading 'access to genetic resources' was placed within square brackets owing to developing country concerns that a section should not be committed to providing such access; rather, they suggested that references to access be embedded in measures to govern and regulate the means by which admission to use genetic resources is granted. Several developed countries, however, stressed that the regime was as much about ensuring access to biological resources as benefits.

Certificates Subject of Focused Talks

Many delegates suggested that the international regime could potentially add value by creating a system for internationally standardised certificates of origin and/or legality. A number of developing countries rich in genetic resources acknowledged that certificates of provenance could be useful, but argued that they would not make a real difference unless national intellectual property rights legislations were mandated to require such certificates as a means to disclose the origin of the resource, the existence of prior informed consent to access and benefit-sharing arrangements as prerequisites for the granting of patents.

The developed country group resisted demands to include a provision on disclosure requirements in patent applications in the text, defending its position on similar grounds it used at the WTO Hong Kong Ministerial Conference in December 2005 and at meetings at the Council for Trade-related Aspects of Intellectual Property Rights (TRIPS) on the TRIPS-CBD relationship. Some suggested that an amendment to WIPO's Patent Co-operation Treaty could allow for a requirement on disclosure of source in national legislation. Others, including the US – which is not party to the CBD – argued that intellectual property rights regulations should not be reformed at the international level. Developing countries' oft-stated conviction

that disclosure of origin requirements in patent rules could ensure compliance with prior informed consent and mutually agreed terms goals, and their interest in incorporating some element of this debate into the text sent to the Curitiba meeting, led to lengthy discussions on whether the CBD was the appropriate forum to address this issue.

Nonetheless, delegates eventually agreed that a CBD instrument that includes internationally-approved certificates of origin could help achieve the mandate given to the working group. After consideration of the possibility of a web-based certification system that would facilitate permits on an individual basis (some raised concerns about Internet access and administrative costs), delegates agreed to recommend that CBD parties establish an ad hoc technical group, consisting of government-nominated experts, to consider possible options on the form and content of an international certificate of origin/source/legal provenance. The text sent to the COP includes a section on certificates, but all references to their coverage or the issuing authority remain bracketed.

Fate of Derivatives Still Unclear

Working group members were also split on whether derivatives of biological resources should be covered by the text. Developing countries argued that since derivatives of genetic resources were more often commercialised that the resources as such – mostly without benefits flowing back to the communities that provided them – derivatives must be part of any agreement that aims to ensure fair and equitable sharing of the benefits arising out of the utilisation of genetic resources, as required by the objectives of the CBD. Developing countries were split on whether benefit-sharing conditions should be determined nationally, or described in detail in the agreement.

Indigenous, Industry Groups Interested

Indigenous participants underlined the need for prior informed consent and mutually agreed terms in setting up specific access and benefit-sharing deals on knowledge originating from indigenous or traditional communities. Although the negotiations take place between governments, indigenous representatives said they were a key group of constituents and their views should be heard and taken into account.

The EU brought a last-minute proposal to the table calling on the working group to continue to support the participation of mandated indigenous and local community representatives, by incorporating them as participants in informal groups and debates during the negotiations on the international ABS regime. However, owing to the last-minute nature of the proposal and resistance from Argentina, Mexico and others, it was not included in the official recommendations, but will instead by included in the meeting report so that it can be discussed at the COP. Similarly, Canada asked at the last minute to submit its own, slightly toned down version of the EU statement and the Chair agreed to add it to the report.

Discussions on the international certificate of origin, source, or legal provenance, as well as compliance with prior informed consent and mutually agreed terms were closely followed by industry representatives, who are largely opposed to disclosure requirements in patent applications. These observers included the International Chamber of Commerce, the American BioIndustry Alliance (ABIA), the Biotechnology Industry Organisation, the Pharmaceutical Research and Manufacturers of America (PhRMA), as well as individual companies involved in biotech research and production.

Adoption in 2008?

Referring to the recommendation to set up the ad hoc technical expert group, several developing countries expressed frustration at the calls for yet more analysis and the bracketing of key parts of the draft text. However, Desh Deepak Verma of the Indian Ministry of Environment and Forests said developing countries were pleased that the process had not been derailed. He doubted that a decision could be reached in Brazil but said all the elements were now ready for discussion and, hopefully, the adoption of an international access and benefit-sharing regime at the CBD's next Conference of the Parties in 2008.

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

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WTO Meetings

Mar. 10	Council for Trade in Goods
Mar. 13-17	Rules Week*
Mar. 14-17	Council for TRIPS – Regular session followed by Special Session*
Mar. 15-17	Committee on Technical Barriers to Trade
Mar. 16	Sub-committee on Least-developed Countries
Mar. 17	Dispute Settlement Body
Mar. 20-24	NAMA Week*
Mar. 20-24	Agriculture Week*
Mar. 21-22	Dispute Settlement Body – Special Session*
Mar. 27	Services Week (continues to 7 April)
Mar. 27	Sub-Committee on Cotton
Mar. 28 to Apr. 4	Committee on Regional Trade Agreements
Apr. 5-7	Negotiating Group on Trade Facilitation
Apr. 18-21	Agriculture Week*
Apr. 19-21	NAMA Week*
Apr. 24	Negotiating Group on Rules (cont. to 5 May)
Apr. 24-25	Dispute Settlement Body – Special Session*
Apr. 24	Sub-committee on Cotton

** Negotiating session under the Doha Round*

Other Meetings

Mar. 10-11 London	G-6 Ministerial Meeting on Doha Round Modalities
Mar. 20-21 Geneva	FAO/UNCTAD Workshop on the WTO and Fisheries http://www.fao.org
Mar. 20-31 Curitiba	Eighth Meeting of the Conference of the Parties to the Convention on Biological Diversity http://www.biodiv.org/
May 1-2 New York	Fourteenth Session of the UN Commission on Sustainable Development

Selected Documents Circulated at the WTO

Dispute Settlement. 23 February 2006. India – Anti-dumping Measures on Batteries from Bangladesh. Notification of a Mutually Satisfactory Solution (WT/DS/306/3)

Dispute Settlement. 13 February 2006. United States – Tax Treatment for Foreign Sales Corporations. Report of the Appellate Body. Second compliance review (WT/DS109/AB/RW2)

Dispute Settlement. 17 January 2006. United States – Laws, Regulations and Methodology for Calculating Dumping Margins ('Zeroing'). Notification of an appeal by the European Communities (WT/DS294/12)

Dispute Settlement. 9 January 2006. Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products. Request for a compliance review by Argentina (WT/DS207/18)

Low, Patrick; Piermartini, Roberta and Richtering, Jurgen. October 2005. Multilateral Solutions to the Erosion of Non-reciprocal Preferences in NAMA. WTO Working Paper

Other Selected Resources

Adelphi Research et al. October 2005. Is the WTO the Only Way? Safeguarding multilateral environmental agreements from international trade rules and settling trade and environment disputes outside the WTO. AR, FoE and Greeenpeace. Brussels

Djankov, Simeon; Freund, Caroline and Pham, Cong. January 2006. Trading on Time: Reforms in Developing Countries That Can boost Exports. World Bank. Washington D.C.

Hertel, Thomas and Winters, Alan. January 2006. Poverty and the WTO: Impacts of the Doha Development Agenda. Palgrave UK

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Roffe, Pedro; Tansey, Geoff and Vivas-Eugui, David (eds). January 2006. Negotiating Health. Earthscan. London

South Centre. February 2006. South Centre Analysis of the Hong Kong Ministerial Declaration. South Centre. Geneva

Walls, Matthew and Vis-Dunbar, Damon. November 2005. The Standstill in Subsidies – Update. International Institute for Sustainable Development. Winnipeg