

# DOHA ROUND BRIEFING SERIES

## Hong Kong Update

The International Centre for Trade and Sustainable Development (ICTSD) and the International Institute for Sustainable Development (IISD)

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WTO Members agreed in late November that their positions on key issues remained too far apart for the original goals of Hong Kong Ministerial Conference to be met. When this edition of the Doha Round Briefings went to press, attention was turning to ways to ensure that momentum would not be lost post-Hong Kong, and an 'ambitious' outcome could still be reached either by the end of 2006 or early in 2007.

Hopes were raised in mid-October, when key WTO Members and groupings tabled their first concrete offers on agriculture. Although their ambitions diverged quite widely, there seemed to be enough common ground for convergence to emerge eventually on the extent of domestic subsidy reductions and the phase-out of export support. Reflecting a long-standing stalemate in Geneva, however, the gap between Members' positions on market access showed no signs of narrowing. The European Union and the United States came in for stern criticism in this area, the former for its lack of ambition and the latter for proposing too steep cuts for all WTO Members.

The majority of WTO membership also rejected the EU's revised agriculture proposal three weeks later due to the considerable concessions it demanded from trading partners in exchange for slightly more generous tariff cuts. Developing countries in particular were incensed about the EU linking its offer to very significant reductions in their industrial tariffs, as well as mandatory market opening commitments in nearly a hundred services sectors. Many Members also objected to the large number of 'sensitive' agricultural products the EU proposed to carve out of full tariff cuts. If this is indeed the 'bottom line' European officials have insisted it is, the agriculture talks are likely to falter.

Such an outcome would inevitably mean a parallel lowering of ambition everywhere. Although the Chair of the non-agricultural market access (NAMA) group has repeatedly warned that time is running out on settling the numerous issues that must be clarified before final negotiating modalities can be agreed, several WTO Members remain unwilling to enter into real negotiations until the scope of the likely agriculture deal is much clearer. Given the number of unresolved issues, even an eleventh hour compromise on agriculture in Hong Kong would in all likelihood be too late for a deal to emerge in NAMA. The same holds for services and development issues, the other two central elements of the Doha Round's 'grand bargain'.

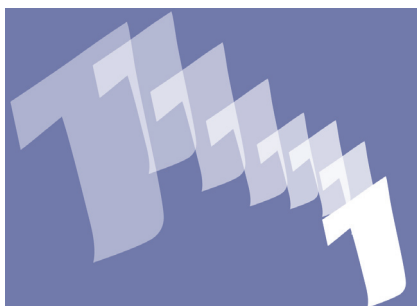
While much has been made of the development and poverty reduction dimension of these negotiations, a mediocre - or worse - outcome in agriculture would severely affect that potential. Should Hong Kong fail *altogether*, the possibility of advances in other areas could also be lost, including access to affordable medicines, less distorted trade in cotton, and strengthening anti-dumping disciplines. The Doha Round also represents an unprecedented opportunity to craft rules on fisheries subsidies and to clarify the relationship between WTO disciplines and those of multilateral environmental agreements.

The thirteen issue briefs collected in this volume provide a comprehensive review of the current state of play of negotiations and other discussions taking place under the Doha umbrella. It will be complemented by an overview of the latest developments in early December, as well as daily ICTSD reporting during the Hong Kong Ministerial Conference.



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## Doha Mandate:

*"We attach the utmost importance to the implementation-related issues and concerns raised by Members and are determined to find appropriate solutions to them. In this connection, and having regard to the General Council Decisions of 3 May and 15 December 2000, we further adopt the Decision on Implementation-Related Issues and Concerns in document WT/IN(01)/W/10 to address a number of implementation problems faced by Members. We agree that negotiations on outstanding implementation issues shall be an integral part of the Work Programme we are establishing, and that agreements reached at an early stage in these negotiations shall be treated in accordance with the provisions of paragraph 47 below. In this regard, we shall proceed as follows: (a) where we provide a specific negotiating mandate in this Declaration, the relevant implementation issues shall be addressed under that mandate; (b) the other outstanding implementation issues shall be addressed as a matter of priority by the relevant WTO bodies, which shall report to the Trade Negotiations Committee, established under paragraph 46 below, by the end of 2002 for appropriate action."*

(Paragraph 12 of the Doha Ministerial Declaration)

# Implementation-related Issues and Concerns

The ambiguity of paragraph 12 of the Doha Ministerial Declaration on implementation-related issues and concerns, in conjunction with the number of different bodies involved in their examination, have resulted in a piecemeal process that has resolved only a handful of concerns. Members' failure to address many of the implementation demands reflects the higher priority given to other negotiating areas in the run up to the Hong Kong Ministerial Conference in December 2005. Once a final package is in sight implementation-related issues and concerns should start moving up the WTO's agenda.

## Background

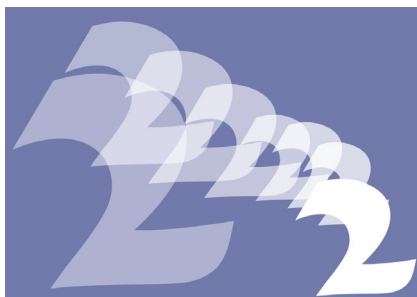
Prior to the 1999 Seattle Ministerial Conference, 'implementation' was broadly understood to mean compliance with WTO obligations. During pre-Seattle negotiations, however, developing countries broadened the concept to include the implementation of soft law provisions in their favour and addressing the imbalances in WTO agreements that prevent them from benefiting fully from the multilateral trading system. The 2001 Doha Ministerial Conference addressed implementation issues in the Ministerial Declaration itself, a separate Decision on Implementation-related Issues and Concerns (WT/MIN(01)/17) and a Compilation of Outstanding Implementation Issues Raised by Members (JOB(01)/152/Rev.1). In the 2004 'July Package', Members were urged to address outstanding implementation concerns. The General Council asked the WTO Director-General to continue consultations on paragraph 12b, highlighting the extension of the protection of geographical indications (GIs) provided under Article 23 of the TRIPS Agreement to products other than wines and spirits. Negotiations after July 2004 on paragraph 12b were conducted on a two-track basis. Under the first track, the then Director-General, Supachai Panitchpakdi, asked all Chairpersons of the relevant WTO bodies to act as his 'friends' by carrying out consultations on his behalf on the progress of implementation issues and concerns in their respective areas of negotiation. The second track directly addressed the GI extension issue. Some Members have expressed concern that the subsequent high profile discussions on GI extension have overshadowed other implementation-related issues.

## Current State of Play

The Director-General's mandate was renewed by the General Council in July 2005 and given to the new Director-General, Pascal Lamy. In his October 2005 statement to the Trade Negotiations Committee, Lamy indicated that the naming of Chairpersons as 'friends' would continue. He also nominated two of his Deputy Director-Generals to look at particular implementation issues. Valentine Rugwabiza [Rwanda] is responsible for issues concerning the Agreement on Trade-related Investment Measures (TRIMs) and Rufus Yerxa [US] is responsible for GIs in the Council on Trade-related Aspects of Intellectual Property Rights (TRIPS), as well as the relationship between the TRIPS Agreement and the Convention on Biological Diversity (CBD). The table opposite highlights some of the most important implementation concerns and the progress that has been made - or, more often, not made - to address them since the 2003 Cancun Ministerial Conference.

Implementation issues relating to negotiations on agriculture, services and intellectual property rights are addressed in Doha Briefings No. 2, 3 and 5 respectively.

Issue Area	Relevant WTO Agreement	Implementation concern addressed in	What the implementation-related text says	Status
Rules of Origin	Agreement on Rules of Origin	Doha Decision on Implementation-related Issues and Concerns (hereafter 'Decision') paragraph 9	Committee on Rules of Origin urged to complete the harmonisation work programme by end-2001.	No decision taken; intense negotiations continue. Deadline for 94 core policy issues moved to July 2006; technical work to be completed by end-2006.
Customs Valuation	GATT 1994, Art. VII	Decision paragraph 8.3	Committee on Customs Valuation to address the 'legitimate concerns' of customs authorities regarding the declared value of imports.	No decision taken.
Subsidies and Countervailing Measures	Agreement on Subsidies and Countervailing Measures (SCM)	Decision paragraph 10.3	Committee on Subsidies to continue its review of the Agreement's provisions on countervailing duty investigations.	No decision taken.
Subsidies and Countervailing Measures	SCM Agreement, Art. 27.4	Decision paragraph 10.6	Extension of transition periods for certain export subsidies granted by a slightly redefined category of developing countries.	On 27 October 2005, Members granted a one-year extension (to end-2006) to 19 developing countries, reflecting the new eligibility criteria.
Anti-dumping	Agreement on Anti-dumping, Art. 15	Decision paragraph 7.2	Members to clarify how developed countries must give 'special regard' to the situation of developing countries when considering anti-dumping measures.	No decision taken; discussions continue in the Negotiating Group on Rules.
Safeguards	Agreement on Safeguards, Art. 9.1	Tiret 84 of the Compilation	Consider changing <i>de minimis</i> levels so the safeguard measures are not applied to developing countries individually accounting for less than 7 percent of total imports and 15 percent collectively.	No decision taken; the Committee on Safeguards continues to negotiate, e.g. JOB9(04)158 from Malaysia and G/SG/M25 and 26.
Market Access	GATT 1994, Art. XIII, paragraph 2(d)	Decision paragraph 1.2	Members to define by end-2002 the meaning of the term 'substantial interest' in determining quota allocation.	No decision taken, discussions continue in the Committee on Market Access.
Trade-related Investment Measures	Agreement on Trade-related Investment Measures (TRIMs)	Tiret 40 of the Compilation	Provisions shall be included in the Agreement to provide developing countries the necessary flexibility to implement development policies.	No decision taken; negotiations continue.
Textiles and Clothing	Agreement on Anti-dumping	Decision paragraph 4.2	Members agree to exercise particular consideration before using anti-dumping remedies on developing countries.	Turkey has imposed seven anti-dumping duties on Chinese textiles; the US and EU have instead used safeguards.
Trade and Development	GATT 1994, Art. XVIII	Doha Declaration para 12(b); tiret 3 of the Compilation of Implementation Issues Raised by Members	Members are to ensure that GATT Article XVIII allows developing countries to implement economic development programmes designed to raise their general standard of living.	On 18 August 2003, Members agreed to instruct the Council for Trade in Goods to develop and adopt procedures for recourse to Article XVIII: C; in November 2002, Committee on Balance of Payments reported on draft language on section B; informal consultations continue.
Balance of Payments	GATT 1994, Art. XVIII, Section B	Doha Declaration para. 12(b); tiret 1 of the Compilation	Only the Committee on Balance of Payments shall have the authority to examine the justification of BoP measures.	No decision taken; consultations continue.
Sanitary and Phytosanitary Measures	Agreement on Sanitary and Phytosanitary Measures (SPS)	Decision Paragraph 3.3	Noting an earlier decision on equivalence of different food safety and animal and plant health measures, instructs expeditious implementation.	In March 2004, the SPS committee completed its workplan on equivalence by adopting three clarifications of its October 2001 Decision on Equivalence.
Sanitary and Phytosanitary Measures	Agreement on Sanitary and Phytosanitary Measures (SPS)	Paragraph 3 of the Compilation	When the introduction of an SPS measure may have a significant effect on trade in products of interest to developing countries, Members shall notify the WTO and the Member concerned.	On 27-28 October 2004, the SPS committee adopted a procedure for transparent notification of SPS measures and bilateral consulting if requested.



## Doha Mandate:

*"Building on the work carried out to date and without prejudging the outcome of the negotiations we commit ourselves to comprehensive negotiations aimed at: substantial improvements in market access; reductions of, with a view to phasing out, all forms of export subsidies; and substantial reductions in trade-distorting domestic support. We agree that special and differential treatment for developing countries shall be an integral part of all elements of the negotiations and shall be embodied in the Schedules of concessions and commitments and as appropriate in the rules and disciplines to be negotiated, so as to be operationally effective and to enable developing countries to effectively take account of their development needs, including food security and rural development. We take note of the non-trade concerns reflected in the negotiating proposals submitted by Members and confirm that non-trade concerns will be taken into account in the negotiations as provided for in the Agreement on Agriculture."*

(Paragraph 13 of the Doha Ministerial Declaration)

# Agriculture

The agriculture negotiations - key to the Doha Round as a whole - have, in the run up to the December 2005 WTO Hong Kong Ministerial Conference, been marked by an urgent need for leadership on the part of key players and the simultaneous necessity of an inclusive process that takes on board the concerns of all countries and operationalises the development dimension of the round.

Members had hoped to come up with a 'first approximation' of agriculture modalities by the end of July 2005, with the actual modalities - percentages of tariff and subsidy cuts, reduction formulae, criteria for domestic support, deadlines, or transition periods - to be completed at the ministerial. However, negotiations were severely delayed during the first five months of the year due to a technical hitch related to the process for converting 'specific' agricultural tariffs based on imported quantities into 'ad valorem' equivalents (AVEs), i.e., tariffs based on the price of the product. AVE conversion is a transparency exercise allowing Members' tariffs to be classified into different brackets slotted for different reduction requirements under the tiered formula for tariff cuts. Key Members finally agreed on the AVE conversion process in May at a 'mini-ministerial' on the sidelines of the OECD annual meeting in Paris, after which negotiations on the tariff reduction formula could begin in earnest. During a mini-ministerial in July in Dalian, China, the G-20 group of major developing countries (including Brazil and India) tabled a market access proposal that Members agreed to use as a basis for further negotiations.

However, the AVE hold-up together with continuing political differences and the lack of engagement of key parties contributed to the failure of delegates to forge agreement on 'first approximations' at the end of July despite intensive small group meetings among key countries and the last-minute presence of trade ministers in Geneva. Tim Groser, the former New Zealand ambassador who chaired the agriculture talks, instead delivered an assessment of the status of agriculture negotiations at the General Council. According to Mr Groser, the pre-Hong Kong negotiations would be firmly anchored in the Doha Declaration itself, as well as in the 2004 'July Package', given that no new text had been agreed. Market access negotiations continued to be the most challenging 'pillar' of the talks, with progress lagging behind that achieved with regard to domestic support and export competition.

When negotiations restarted after the WTO's August recess, Mr Groser was replaced by his compatriot Ambassador Crawford Falconer as chair of the agriculture talks. Ambassador Falconer set in motion a process focusing directly on negotiating modalities, based on a 'comprehensive' approach looking at trade-offs across the three agricultural pillars, as well as linkages to other negotiating areas. These Geneva-based negotiations, in which delegates were continuously on call between the official 'agriculture weeks', were flanked by ministerial-level meetings between key Members.

On 10 October, at a meeting between ministers from the Five Interested Parties (FIPs, which include Australia, Brazil, the EU, India and the US), the US tabled new proposals both on domestic support - for the first time showing a willingness to cut its own trade-distorting subsidies - and on market access. The EU and the G-20 made counterproposals on market access, with the G-20 calling for deeper



cuts than the EU, but remaining less ambitious than the US. The EU inched towards the US on domestic support, even though the US had proposed an approach under which the EU would make the greatest reductions - 70 percent cuts to trade-distorting subsidies. The US cut would be 60 percent. The effect of such cuts is difficult to estimate, however, given that countries already apply tariffs that are lower than their maximum allowed 'bound' tariffs.

A new set of ministerial-level talks in Geneva among the FIPs fell apart on 19 October because the EU was unable to table a revised market access offer due to internal tensions.

While the US, Australia and the G-20 were putting immense pressure on the EU to agree to deeper tariff cuts, the African, Caribbean and Pacific (ACP) group expressed grave concern that the emerging concept of a 'middle ground' was migrating towards the US and Cairns group positions, rather than taking G-10 (mainly developed country net food importers, such as Switzerland and Japan) and ACP positions into account. The group noted that a large number of developing countries - including its 79 WTO Members - favoured a more cautious approach to farm tariff reduction. The group also called for a more transparent and inclusive negotiating process.

Groups that had mobilised around specific issues also participated actively in the negotiations. The G-33 countries - an alliance in support of the designation of 'Special Products' (SPs) slated for lower tariff cuts in developing countries and a 'Special Safeguard Mechanism' (SSM) to protect these countries against import surges - made proposals both on SPs and the SSM. The G-11 group of Latin American countries that are seeking to secure the widest possible liberalisation of tropical products also made their views known in the negotiations, focusing in particular on market access in developed countries.

On 28 October, the EU tabled a 'new and improved' proposal, stressing that this was a final offer, contingent on movement on other issues such as: stronger disciplines on export competition tools other than direct export subsidies; tighter rules on partially decoupled Blue Box domestic support; geographical indications (a type of trademark to globally protect typically European products, such as Parma ham); as well as industrial market access and services. Developing countries rejected the level of concessions sought by the EU in the latter two areas as wholly disproportionate.

After another round of intense ministerial-level negotiations held in the second week of November failed to bridge differences, Members acknowledged that time had run out for agreement on full modalities for the agriculture negotiations in Hong Kong. Attention was shifting towards how the scaled-down expectations should be reflected in the draft ministerial declaration while ensuring that progress could be made in the months ahead. WTO Members stressed that they remained committed to an ambitious Doha Round outcome, but that more time was needed for convergence to emerge on agricultural market access, as well as the levels of ambition in the different negotiating areas, including in particular industrial tariff reductions and services.

Mr Falconer and Members agreed that he would draft a non-negotiated Chair's text by the third week of November, with Members having the opportunity to comment on it before it was submitted to the Trade Negotiations Committee (TNC), which oversees the Doha Round and is chaired by the WTO's Director-General. According to Mr Falconer, the text was not going to be of just 'historical interest', but should help focus ministers' work in Hong Kong. The TNC would decide how to fit the agriculture text in the draft ministerial declaration. Ministers of at least some key countries might still meet in Geneva in an effort to move the talks forward.

The negotiations took place against the backdrop of two major dispute settlement

cases successfully launched against US cotton and EU sugar subsidies. A long-standing dispute between the EU and Latin American banana producers has also come back to haunt the system. At the beginning of 2006, the EU has to replace its current import regime, which includes tariff rate quotas and preferences for ACP countries, with a tariff-only regime. The EU and the Latin Americans cannot agree on an appropriate tariff and the latter are threatening that an agreement has to be reached by Hong Kong in order for the ministerial to succeed. The countries behind the 'cotton initiative', on the other hand, see a deliverable in this area as the make-or-break issue at Hong Kong.

## Mandated deadlines

- Conclusion of negotiations as part of the 'single undertaking' agreed at the 2001 Doha Ministerial Conference.

## Background

Agriculture and services are the only areas where negotiations on further trade liberalisation were mandated in the WTO agreements themselves. Talks within those parameters started on schedule in 2000, but no noticeable progress was made until broader negotiations were launched in November 2001 at the Doha Ministerial Conference. At Doha, ministers struggled to find a compromise acceptable to all WTO Members, who were utterly divided over the general direction to be taken in the agricultural reform process. At the 2003 Cancun Ministerial Conference, negotiations failed in part due to the perception that key developed countries had wielded too strong an influence on the agriculture text under negotiation (see Doha Round Briefing Series Vol.2).

Following Cancun, it took ten months of fitful negotiations for the WTO General Council to muster consensus on the 2004 'July Package' (W/L/579) that finally allowed the process to move forward. Annex A of that document contains a 'frame-

work for establishing modalities in agriculture', which presents broad parameters for further negotiations, but is vague enough to have left all key battles to be worked out further down the road. After having agreed on the July Package, delegates completed a 'first reading' of the full text in March 2005, with more detailed discussions of certain elements taking place in small groups.

Cancun permanently changed the negotiating dynamics: gone are the days when the 'Quad' comprising the EU, the US, Canada and Japan called the shots. Instead, the 'new Quad' comprises Brazil, the EU, India and the US. Together with Australia, these countries make up the 'Five Interested Parties' and are now at the centre of decision-making. The G-20 group of developing countries - formed just before Cancun and comprising powerhouses such as Brazil, China, India and South Africa - has become a major player in the negotiations and has produced specific proposals seeking to stake out the 'middle ground.'

### Market Access

The market access pillars of the talks continue to be most challenging and overall negotiations were severely delayed during the first half of 2005 due to a technical hitch on AVEs.

#### AVE Conversion

In straightforward cases, Members base the AVE conversion on import volumes and notified import values submitted to the WTO Integrated Database (IDB). Complications arise, however, with some refined products such as sugar and cheese, or where preferences or tariff quotas are involved. In such cases, import prices often differ significantly from the world prices compiled in the UN commodity trade statistics (ComTrade) database. Cases for which the two data sets produce particularly divergent prices (and consequently, ad valorem rates) are 'filtered' out based on comparisons between the WTO and UN sets of

data and the AVE conversions are subsequently carried out based on both IDB and ComTrade data.

AVE conversion pitted the EU and G-10 countries against the US, the Cairns group and the G-20. The former groups make use of a large number of specific tariffs and wanted the conversion to be based on IDB data while the agricultural exporters wanted to see the conversion based more closely on the lower world prices, which would lead to higher AVEs and, eventually, steeper tariff cuts. Following tense negotiations at a mini-ministerial in May, participants agreed on specific figures for weighting averages of the IDB and ComTrade price estimates. The prices of basic products will be weighted further towards the lower ComTrade prices, while the prices of processed goods will be relatively closer to the higher IDB levels.

#### Tariff Reduction Formula

Following the compromise on AVE conversion, Members were finally able to produce AVEs for their various tariff lines and proceed to discussions on the tariff reduction formula. In initial discussions, Members remained in their old camps, with the US, Cairns group and G-20 preferring a formula with a strong harmonising effect - higher tariffs are cut proportionally more than lower ones - over the Uruguay Round formula, which gives Members more flexibility with regard to higher tariffs. The EU and G-10 countries prefer the latter. Some ideas for compromises were tabled, but the real step forward was provided when the G-20 tabled a proposal at the Dalian mini-ministerial in July, which thereafter served as the basis for negotiations.

Under the G-20 formula, developed and developing countries' tariff lines would be divided into different sets of tariff bands according to the level of duties currently levied, with each band subject to different percentage cuts. For developed countries, five different bands would be available with the first comprising tariffs of up to 20 percent and the fifth all tariffs over 80 percent. The tariffs within each band would be subject to linear cuts of progressively higher percentages for each band. Developing country tariffs, on the other hand, would fall into four different bands: zero to 30 percent, 30 to 80 percent, 80 to 130 percent, and over 130 percent.

In addition to the basic outline of the formula, the G-20 also suggested that individual tariffs be capped at 100 percent for developed countries and 150 percent for developing countries. This approach would address the issue of tariff peaks. The G-10 and ACP strongly opposed. The G-10 said high tariffs do not necessarily mean that market access is blocked and argued that the burden of market opening should not fall disproportionately on a small number of countries with high tariffs that actually import a significant portion of their food.

Following Dalian, the EU suggested an alternative approach based on three tariff bands for developing and developed countries alike, with developing countries making two-thirds the cut of developed countries for comparable tiers. As discussions moved into the next phase, the EU dropped this proposal and presented four different 'scenarios' for tariff reductions based on the G-20 proposal. Each scenario would divide countries' tariffs into four bands and allow developing countries to make cuts two-thirds the size of those made by developed countries. The four varied in ambition: the average reductions ranged from 24.5 to 36.4 percent, with tariffs in the highest bands to be cut most steeply. In addition, the EU proposed building flexibility directly into the formula in the form of 'pivots'. According to this approach, a 10 percent pivot in a band with a 50 percent reduction requirement would leave Members the option of cutting tariffs on some products by 40 percent, so long as other tariffs were cut more deeply to keep the average cut for the band at the target level. The EU said that building greater flexibility into the formula through the pivots would lower their need to resort to 'sensitive products', which fall outside the formula and are slated for milder tariff reduction. The US and Brazil expressed scepticism about the pivot concept.

On 10 October, the US tabled a formula that established four identical tiers for developing and developed countries comprising tariffs of below 20, 20-40, 40-60 and above 60 percent. It would have tariff cuts rise progressively through each tier, with developed countries making reductions of 55-65, 65-75, 75-85 and 85-90 percent respectively within the four tiers. The US did not specify the depth of tariff cuts it would seek from developing countries, but said they would only be slightly lower than those undertaken by developed countries. It also suggested capping developed country tariffs at 75 percent and developing country tariffs at 100 percent.

A G-10 proposal, also dated 10 October, outlined two options for market access and required countries to choose between a more flexible formula and designating more products as sensitive. The proposal did not put forward specific percentages for tariff cuts. Countries opting for the flexible formula would be allowed to make constrained deviations from the average cut for products within each tier, but would be allowed fewer sensitive products than countries that chose the less flexible formula. The group rejected the notion of tariff caps.

The G-20 made a revised market access proposal on 12 October, now inserting numbers for the tariffs cuts for the bands it had outlined in the paper at Dalian. The group called for an average minimum tariff reduction of 54 percent in developed countries and an average maximum tariff cut of 36 percent in developing countries. It would have developing countries make cuts of 25, 30, 35 and 40 percent in the respective bands of under 30 percent, 30-80 percent, 80-130 percent and over 130 percent. In their (revised) tiers of under 20 percent, 20-50 percent, 50-75 percent and over 75 percent, developed countries would be required to make higher cuts of 45, 55, 65 and 75 percent respectively.

The G-20 proposal said the different thresholds and tariff reductions were necessary to ensure that developing countries did not end up with a disproportionate burden of commitments. The group proposed capping developed country tariffs at 150 percent, while developing country tariffs would be capped at 100 percent.

The ACP countries made a market access proposal on 21 October that highlighted the vulnerability of many developing countries to the unrestrained opening of markets. Their formula would classify tariffs into four tiers for reduction: for developing countries, products with tariffs of 0-50, 50-100, 100-150 and over 150 percent; the corresponding tiers for developed countries would be 0-20, 20-50, 50-80 and over 80 percent. Developing countries would make tariff cuts ranging from 15 to 30 percent; those required of developed countries were not specified.

The ACP proposal also provided for special consideration for developing countries that bound their tariffs at a very high uniform rate during the Uruguay Round - otherwise, these countries' tariffs would fall into high tiers in all of the current market access proposals, where they would be slated for steep percentage reductions.

On the erosion of long-standing preferences - one of the key concerns of the ACP - the group promised to table a more detailed proposal. It already stated that developed countries should include preference-related products in their lists of sensitive products slated for lesser tariff reduction, as this would shield against preference erosion.

The EU tabled its 'new and improved' market access offer on 28 October. Under this approach, developed country tariffs would be divided into four tiers comprising tariffs of 0-30, 30-60, 60-90 and over 90 percent, slated for cuts of 35, 45, 50 and 60 percent respectively. For developing countries, the tiers would be for products with tariffs of 0-30, 30-80, 80-130 and over 130 percent and the related tariff cuts 25, 30, 35 and 40 percent. Although the EU had dropped the pivot concept, it suggested additional flexibility would be allowed for tariff cuts in the

lowest bands of both developed and developing countries. Eight percent of products could be designated as sensitive. The EU accepted the G-20 approach to tariff capping.

### **Special Products (SPs), the Special Safeguard Mechanism (SSM) and Sensitive Products**

The G-33 countries, the *demandeurs* of SPs and the SSM, highlighted their position at a ministerial meeting in June. They demand that countries have 'maximum flexibility' when designating SPs, given that a common set of indicators cannot reflect the widely varying circumstances across the developing world and even within developing countries. SPs should not be subject to tariff reduction and should qualify for the SSM. The SSM should be applicable to all agricultural products - rather than being tied to low tariff levels or steep tariff reduction commitments - and should be triggered both based on volume surges and price decreases. They said SPs and SSM must be settled by the Hong Kong Ministerial.

In discussions at the WTO, the possible effects of designating SPs on South-South trade stirred controversy. Some Latin American countries said export products should not be eligible as SPs as they do not meet the food security criteria and suggested that the indicators should ensure that SP recognition be limited to non-commercial products. The G-33, however, opposed such limitations, arguing that the criteria of food security, rural livelihood and development did not prevent these products from being commercial. Malaysia and Thailand said exporting to other developing countries was a very important instrument for achieving development goals and should not be unduly hindered. Peru said tropical products should not be designated as SPs; Chile pointed out that there are many forms of special and differential treatment to which countries have recourse in addition to SP exemptions, including the SSM. China, Nicaragua and Cuba said that SPs should be limited to a certain percentage of tariff lines.

On the SSM, the US said this mechanism would duplicate the SP designation, arguing that both instruments were used for the same purpose. The G-33 countered that the latter was a longer-term exemption, whereas the SSM was a short-term mechanism to help developing countries cope with fluctuations in the prices of products and resulting import surges.

Given that the three criteria for SPs are spelled out in the July Framework (food security, livelihood security and rural development), the G-33 came under pressure to produce indicators for operationalising the criteria. The group tabled a paper on 12 October on how SPs could be identified. Regarding food security, national level concerns included access to food across regions and in individual households, as well as the share of a product in average caloric intake. International concerns included countries' vulnerability to interruptions in supply. With regard to assessing the importance of products to livelihood security, the paper focused heavily on the role of small and resource-poor farmers in the production of particular crops that may be displaced by imports. It also said that the needs of special groups, such as tribal communities or women, or products from disadvantaged geographical regions could be taken into account. On rural development, the paper noted the need for options to improve the living conditions of rural populations, based both on existing products and the potential for value addition in rural areas. The G-33 noted that countries should have the flexibility to designate new SPs in place of existing ones as circumstances change. The G-33 paper also contended that products whose world market prices are distorted by rich country subsidies should be automatically eligible for SP status.

The G-33 also tabled a detailed proposal for how to operationalise the SSM. According to the paper, developing countries would be able to impose duties higher than the bound ceiling level on farm imports in the event that import volumes rose above their three-year average, or if

import prices fell below their average level for the three years preceding the year in which the duty was being imposed. These duties would last a maximum of 12 months. The G-33 outlined provisions for four tiers of increased import levels and maximum additional tariffs that could be levied. Their sizes would be negotiated. Safeguard measures imposed in response to a drop in the import price of a product would be levied in one of two ways: on a shipment-by-shipment basis; or on a percentage 'ad valorem' basis. For the sake of transparency, developing countries would have to notify the Committee of Agriculture of any measures taken under the SSM.

On sensitive products, which are available to all countries and set for lower tariff reduction, the US and G-20 proposed a limit of one percent of tariff lines. The EU favoured the right to designate up to eight percent of tariff lines as sensitive; the G-10 between ten and fifteen percent, depending on the tariff reduction formula a country chose. All parties provided different solutions to how to balance the flexibility to deviate from a standard tariff reduction with increased tariff rate quotas (TRQs). Australia proposed a simple approach, with flexibility for sensitive products built directly into the tiered market access formula. For each tier, a standard combination of a tariff reduction and TRQ expansion would apply; the higher the tier, the larger the combined tariff cut and TRQ expansion required for a sensitive product in the tier.

An ACP request that 'products relating to long-standing preferences shall be designated as sensitive products' - which would allow developed countries to mitigate the extent of preference erosion - was at odds with the G-20's suggestion that developed countries be prohibited from listing tropical products as sensitive. The newly-formed G-11 (Costa Rica, Ecuador and other Latin American exporters) that favours expanded market access for tropical products and alternatives to illicit crops had originally proposed this prohibition.

## Domestic Support

### Amber Box

In the area of domestic support, the main subsidisers have long disagreed on the structure of the tiered formula for making cuts to trade-distorting support (AMS - Aggregate Measure of Support; the level of the binding cap on aggregate trade-distorting domestic support). The EU supported a three-tier formula that would have it make the largest cuts percentage-wise, with the US and Japan falling into the second category. The US preferred a formula in which Japan would fall into a higher tier than the US.

In a proposal dated 10 October, the US expressed its willingness to reduce the bulk of its Amber Box by 60 percent over a five-year period, so long as the EU and Japan would reduce their Amber Box by 83 percent. In response, the EU offered to make cuts in its Amber Box support by 70 percent, up from an earlier offer of 65 percent, contingent on proportionate reductions by the US and Japan.

A G-20 proposal tabled on 12 October would classify ceilings for overall trade-distorting domestic support by developed countries into three bands of under US\$10 billion, US\$10-60 billion and over US\$60 billion, slating them for cuts of 70, 75 and 80 percent respectively. This would have the EU lower its ceiling for the sum of Amber Box, Blue Box and de minimis support by 80 percent, while the US would do so by 75 percent. It is not clear into which of the top two bands Japan would fall.

In addition, the G-20 proposal on market access suggested that developing countries should have recourse to remedial action (which could potentially take the shape of anti-dumping or countervailing measures) against subsidised imports from developed countries. It did not, however, provide specifics for how such a mechanism might work.



With regard to a timeframe, the G-20 suggested 'front-loading' the cuts, so as to achieve real reductions in subsidies, given that many countries have the right to provide higher subsidies than they actually do - their bound AMS levels are higher than their applied levels. The G-20 also stressed the need for accurate base levels and avoidance of 'box shifting', which entails making minor changes to trade-distorting subsidies in order to move them to the Blue Box or Green Box.

### Blue Box

The G-20 presented a proposal on the Blue Box (partially decoupled farm payments under production-limiting programmes), seeking to prevent 'box shifting'. The group said that any Amber Box commodity support had to be completely reformed before it could be moved to the Blue Box, as the Blue Box was created to help countries transition out of trade-distorting subsidies. In addition, the group called for checks on price-linked support if these were to be considered Blue Box support measures.

The US is planning to shelter its counter-cyclical payments - subsidies to farmers that increase with a fall in the value of season-average market prices for commodities - in the Blue Box and is linking tightening criteria to concessions by others in the market access pillar. The EU, in its proposal of 28 October, stressed the need for effective disciplines on the Blue Box.

### Green Box

While the EU and G-10 see the review of the Green Box (de-coupled, minimally distorting subsidies) as just a 'health check', others wish to ensure that the criteria for subsidies meet the objective of that Box. Canada suggested measures to simplify calculations of baselines and reference periods for payments, increase clarity and make sure that reference periods are representative, fixed and notified. With regard to structural adjustment payments for the retirement of producers and resources, Canada wanted to ensure that these were time-bound, rather than indefinitely ongoing. For environmental payments, Canada sought to ensure that these were independent of the volume of production and only related to the additional costs of compliance with government-imposed conditions.

The G-20 introduced a paper stressing the need to ensure that direct payments to producers are not linked to production levels. The paper also contained a number of amendments to provide special and differential treatment for developing countries, including: income support to low-income producers only; subsidies for land reform in developing countries; flexibility for developing countries in deciding what income insurance or support after natural disasters should be exempted; and exceptions for developing countries from stringent criteria for payments under regional assistance programmes.

Wrapping up at the end of July, Chair Groser noted that those countries making most use of the Green Box would need to seriously consider proposals by others on tightening the criteria. Meanwhile, some new provisions focusing on the needs of developing countries would need to be included. In their submissions in October, the US and EU confirmed the continued need for the Green Box.

## Export Competition

Under export competition, WTO Members largely agree on the changes needed to phase out regular export subsidies (although they have yet to set the final end date) and export credits. However, they must still agree on new disciplines on state trading enterprises and on food aid, which the EU - the largest user of direct export subsidies - insists must be reformed in parallel. The EU and other exporters of agricultural products argue that food aid should be largely restricted to cash grants, except during emergencies. They aim to halt what they see as US exports of surplus subsidised products in the guise of bilateral aid programmes.

The US denies these charges. The cash grant proposal is supported by some recipient countries such as Uganda, which have seen poor farmers displaced from local markets by subsidised agricultural surpluses that entered the country as food aid. Other recipients disagree and the head of the UN World Food Programme (WFP) has warned against limiting food aid to cash.

The G-20 called for an "immediate standstill commitment on all forms of export subsidies" and suggested that export subsidies should be eliminated within five years, with significant reductions to come sooner rather than later.

## Cotton

The sub-committee on cotton held its first meeting in February and has been meeting regularly since. Members agreed that the sub-committee's work should focus on assessing progress in the agriculture negotiations and providing regular updates on the cotton-related developmental implications. They could not agree on whether to also address 'other' subjects, as proposed by the US, including broader textile-related issues relevant to industrial market access and trade facilitation.

Early on in the process, the group of African WTO Members submitted a proposal calling for radical reforms in the trade of cotton and cotton by-products including textiles. However, others argued that any reforms should be addressed within the broader ongoing agriculture negotiations and not in the sub-committee. The US said reductions in specific areas of the overall talks, such as domestic support, would affect US cotton programmes. African countries expressed disappointment at the lack of written responses to their proposal. They warned that African cotton-producing countries would ensure that the issue does not get overlooked at the Hong Kong Ministerial Conference.

# Trade in Services

## Doha Mandate:

*"The negotiations on trade in services shall be conducted with a view to promoting the economic growth of all trading partners and the development of developing and least developed countries. We recognize the work already undertaken in the negotiations, initiated in January 2000 under Article XIX of the General Agreement on Trade in Services, and the large number of proposals submitted by Members on a wide range of sectors and several horizontal issues, as well as on movement of natural persons. We reaffirm the Guidelines and Procedures for the Negotiations adopted by the Council for Trade in Services on 28 March 2001 as the basis for continuing the negotiations, with a view to achieving the objectives of the General Agreement on Trade in Services, as stipulated in the Preamble, Article IV and Article XIX of that Agreement. Participants shall submit initial requests for specific commitments by 30 June 2002 and initial offers by 31 March 2003."*

(Paragraph 15 of the Doha Ministerial Declaration)

The most significant - and controversial - recent development in the Doha Round services negotiations has been the strong push by certain WTO Members to establish mandatory minimum market access commitments (benchmarks). These initiatives are premised on the view that both the initial and the revised commitments offered so far leave much to be desired, and that the existing bilateral 'request-and-offer' negotiating modality is not sufficient to achieve the depth and scope of liberalisation commitments desired by these Members.

The proponents of benchmarks suggest complementing the bilateral request-and-offer approach by multilateral and plurilateral modalities, which reflect the 'collective level of ambition' for the negotiations. The multilateral approach is intended to widen the scope of liberalisation commitments, and involves setting numerical targets for the services sectors and sub-sectors that Members must commit to liberalise, with the provision that the targets will be differentiated between developed, developing and least-developed countries. The plurilateral approach seeks to enhance the depth of commitments by proposing that countries that form the 'critical mass' of the market or total trade in a services sector or sub-sector abide by an 'ideal' or 'model' schedule of commitments developed for that sector or sub-sector.

The main proponents of the benchmark approach are keen to improve market access for their services supplied cross-border (Mode 1) and through commercial presence (Mode 3). On the other hand, a number of developing countries remain disappointed with the lack of relevant and commercially meaningful offers in services supplied through the temporary movement of natural persons (Mode 4). With the exception of India, they are generally opposed to the notion of benchmarks. These countries argue that mandatory market opening commitments go against the very nature of the General Agreement on Trade in Services (GATS), which explicitly recognises countries' right to liberalise in accordance with their individual development situation. Further, rather than being complementary, they see benchmarks as supplanting the request-and-offer approach as the primary method for negotiating concessions (see Background below).

Meanwhile, work related to rule-making shows uneven progress. Negotiations on a proposed emergency safeguard mechanism (ESM), which would provide domestic industries time to adjust to increased competition following services liberalisation, remain mired in questions on its desirability and technical feasibility. Discussions on possible disciplines on subsidies in services trade suffer from some Members' reluctance to fully engage in the exchange of information that is supposed to be foundation for the development of such disciplines. Talks on government procurement are blocked over disagreement on the scope of the negotiating mandate, i.e., whether negotiations are limited to establishing rules on transparency in government procurement or, as the EU insists, encompass market access as well. The sole area of rule-making that has made significant strides since the last ministerial conference has been the negotiations on disciplines on domestic regulation.

## Background

The General Agreement on Trade in Services provides a 'built-in agenda' requiring Members to enter into successive rounds of negotiations aimed at progressive liberalisation, the first of which was mandated to start in 2000. In March 2001, Members adopted the modalities for services trade negotiations, referred to as the 'Negotiating Guidelines and Procedures' ('Guidelines', S/L/93), which stipulate the request-and-offer approach as the main method of negotiating new 'specific commitments' on market access, national treatment and additional commitments. The Guidelines also mandate Members to continue negotiations on the 'outstanding issues', i.e. the establishment of an emergency safeguard mechanism (ESM) for services, possible disciplines on domestic regulation, and disciplines on government procurement and subsidies.

The Doha Ministerial Declaration subsequently referred to these Guidelines as "the basis for continuing the negotiations" with a view to achieving the objectives of the GATS. Among the relevant objectives for this mandate are the establishment of a framework of principles and rules for trade in services, the achievement of progres-

sively higher levels of liberalisation and the facilitation of increased developing country participation in trade in services and the expansion of their service exports. With regard to the latter objective, the GATS specifically provides that access in sectors and modes of supply of export interest to developing countries must be liberalised.

To pursue progressively higher levels of liberalisation of trade in services, negotiations shall be directed to the reduction or elimination of measures that impede effective market access (such as conditions for the establishment of commercial presence, restrictions on the entry of foreign workers) and discriminate against foreign service suppliers (such as prohibition against the ownership of land by foreigners) and thus generally make it more difficult for foreign services providers to do business.

The GATS recognises that the process of liberalisation must take place with due respect for national policy objectives and the level of development of individual Members, both overall and in individual sectors. Thus, it states that there shall be appropriate flexibility for individual developing country Members for opening fewer sectors, liberalising fewer types of transactions, progressively extending market access in line with their development situation and, when making access to their markets available to foreign service suppliers, attaching to such access conditions as will allow them to strengthen their domestic services capacity and its efficiency and competitiveness to withstand the consequences of entry of foreign service suppliers.

## Mandated Deadlines

### Market Access

- Negotiations on market access in services will conclude as part of the 'single undertaking' when the Doha Round does.
- The 'July Package' provided an indicative deadline of May 2005 for the submission of a new round of offers.

### Emergency Safeguard Mechanism

- Negotiations on the ESM should conclude by the time the market access negotiations do.

### Other Outstanding Issues

- Prior to the conclusion of the market access negotiations Members "*shall aim to conclude*" negotiations on GATS Articles VI:4 (domestic regulation), XIII (government procurement) and XV (subsidies).
- An evaluation "*shall be conducted*" of the implementation of GATS Article IV (on increasing developing countries' participation in the global services trade). No such evaluation has been undertaken so far.

## Current State of Play

### Market Access – Benchmarks

The strongest backers of the benchmark approach are Australia, the US and the EU. Indeed, the latter has linked its agricultural tariff reduction offer to the membership's acceptance of mandatory market opening commitments in services. In contrast, the overwhelming majority of developing countries remain fiercely opposed to any kind of benchmarks.

The 3 November 2005 draft Hong Kong ministerial text on services – proposed by the Chair of the Council for Trade in Services Special Session under his own responsibility (JOB (05)/262/Rev.1) – incorporates both multilateral and plurilateral approaches to enhance liberalisation. The multilateral approach focuses on two modalities: (i) through numerical targets and indicators, and (ii) through an exhortation for Members to bind their existing levels of liberalisation in Modes 1 and 2 and to increase the current level of allowable foreign equity participation, as well as permit greater flexibility in the types of legal entity allowed under Mode 3, and improve commitments on Mode 4, particularly in the categories of workers 'de-linked' from the establishment of commercial presence.

The text's suggested plurilateral approach also seeks to focus on two modalities: (i) a procedure on the submission by any Member or group of Members of requests or collective requests on other Members for purposes of entering into plurilateral negotiations, and (ii) sectoral and modal objectives as expressed by Members and summarised by the CTS-SS Chairman in an Annex to the text, which are intended to guide negotiations.

The latest version of the text does not provide details on what or how numerical targets or indicators would be used in the services negotiations, nor does it elaborate on how guidance will be provided by the sectoral and modal objectives contained in the Annex. These proposed provisions in the text remain extremely controversial. Argentina and Brazil are among the most vocal opponents to the inclusion of benchmarks in the draft ministerial text.

**Bilateral Market Access Negotiations:** Virtually all WTO Members have received initial requests from some 90 developed and developing countries. At least 69 WTO Members (counting the European Union members states as one) have submitted their initial offers. As negotiations move more deeply into the revised offer stage, at least another 40 revised offers (in addition to the 26 already submitted) will need to be prepared and presented by WTO Members. While some developing countries have delayed the submission of their initial and revised offers for tactical reasons, others genuinely do not have the necessary technical and institutional capacities to identify their offensive and defensive interests, or to analyse how trade liberalisation in certain sectors may hinder or facilitate the achievement of national sustainable development.

Members have generally indicated disappointment with the results thus far. In his report to the Trade Negotiations Committee in July 2005, the Chairman of the CTS-SS stated that "notwithstanding the fact that the number of offers has improved since my last report, it was widely acknowledged that the overall quality of initial and revised offers is unsatisfactory. Few, if any, new commercial opportunities would ensue for service suppliers. Most Members feel that the negotiations are not progressing as they should. It is clear that much more work will be necessary in order to bring the quality of the package to a level that would allow for a deal." This statement subsequently became the basis for the alternative approach of benchmarks previously discussed above.

### What Has Happened to Mode 4?:

For many developing countries, the 'movement of natural persons' (Mode 4) represents one of the few areas that offers concrete benefits from services liberalisation.

India has led a group of 18 developing countries – including Brazil, China and other Latin American and Asian WTO Members – in advocating modalities for reflecting improvements in commitments in Members' schedules. Despite such efforts, an April 2004 review of



the initial offers from trading partners led the group to state that there had not been "any real improvement" in developed countries' Mode 4 commitments. This group also pointed out that most of the new Mode 4 offers remained linked to commercial presence (Mode 3), providing only for movement of intra-corporate personnel and other highly-skilled workers. In this, as well as subsequent submissions, they called for 'de-linked' Mode 4 offers, accompanied by the elimination of pre-employment conditions, economic needs tests, quota restrictions on visas, discriminatory tax treatment and undue restrictions on the duration of stay for purposes of supplying a service, as well as the recognition of qualifications.

In February 2005, India led a group of developing countries<sup>1</sup> in proposing a common categorisation of Mode 4 service suppliers, based on how some Members had scheduled commitments during the Uruguay Round. This coincided with a similar submission by the EU, Bulgaria, Canada and Romania which used the same 'common categories'.

The categories are:

- contractual service suppliers;
- independent professionals;
- intra-corporate transferees;
- business visitors; and
- others.

While this common categorisation, together with improved transparency in relation to regulations affecting the entry and stay of Mode 4 service suppliers, are seen possible 'deliverables' for certain key host countries, the question remains whether these sufficiently address the kind of Mode 4 movement that many developing countries, and the least-developed in particular, engage in.

In June 2005, LDCs informally submitted a negotiating proposal on Mode 4, which identified specific categories of workers (in much more detail than the 'common categories' tabled by the EU- and India-led groups) for whom they wished to see improved market access. By all accounts, key trading partners' reactions in bilateral meetings were not encouraging. This has reinforced many LDCs' doubts as to whether they will reap any benefits at all from these multilateral negotiations.

The draft ministerial text of 3 November appears to direct Members to schedule Mode 4 commitments in line with the 'common categories'. Paragraph 4 of the text exhorts Members to "strive to ensure" new and improved offers of commitments on the categories of (i) contractual service suppliers and (ii) independent professionals, de-linked from commercial presence, and (iii) intra-corporate transferees and (iv) business visitors.

The text also calls for, on a best endeavour basis, the removal or substantial reduction of economic needs tests, and the indication of prescribed duration of stay and possibility of renewal, if any.

If these categories will indeed be the classification model used for scheduling commitments in Mode 4, some developing countries, especially LDCs, have said that the criteria used for determining 'contractual service suppliers' should be broadened to accommodate the kind of movement they are advocating, i.e., non-high skilled service suppliers.

### 'Horizontal' Issues

**Assessment of Trade in Services:** As a prerequisite to the negotiations, the GATS mandates that Members carry out an assessment of trade in services in overall terms and on a sectoral basis with reference to the agreement's objectives (see Background above). Cuba, Kenya, Nigeria, Pakistan, the Philippines, Senegal and Thailand called for the Council for Trade in Services (CTS) to conduct and conclude the multilateral assessment before the start of the market access negotiations, as required under the GATS, while the US, Canada, the EU, Switzerland and Japan, argued that it was up to each Member to conduct a national assessment which would in turn be the basis for the broader assessment exercise. They further maintained that the data on services trade at the international level was insufficient for the overall assessment envisioned. Although the multilateral assessment exercise was eventually commenced, developing countries agreed - as a political and practical concession - at the time the Guidelines were drafted in 2001 to carry out the assessment of trade in services on a continuing basis throughout the negotiations and that the "negotiations shall be adjusted in the light of the results of the assessment."

While Members have since focused on the conduct of national assessments of trade in services in order to prepare their requests and offers, even this exercise has been constrained by the lack of resources and technical capacity of developing countries. Some observers have pointed out the direct link between the lack of a multilateral assessment and the quality of offers, noting that without information on the possible impact of liberalisation commitments, many developing countries have opted for caution in their offers.

**Modalities for LDCs:** The GATS provides for special and differential treatment (SDT) for developing country Members, with particular priority given to least-developed countries (LDCs). Article XIX.3 specifically mandates the establishment of modalities for SDT for LDCs, and in September 2003, the Council for Trade and Services adopted such modalities. These have been looked at as a way to translate SDT into actual market access commitments, and are summarised as follows:

- Members shall take into account the difficulties of LDCs in undertaking specific commitments, and shall exercise restraint in seeking commitments from LDCs;
- Members shall help LDCs to increase their participation in services trade, in part by according them effective market access in sectors of interest, including categories of natural persons identified by LDCs in Mode 4 services requests;
- LDCs do not have to offer national treatment, may open fewer sectors, and are not expected to undertake additional commitments on regulatory issues which may go beyond their institutional, regulatory, and administrative capacities;

Many points made by Zambia on behalf of the LDC group (TN/S/W/13) were taken into account during the negotiation of these modalities. Nevertheless some observers fear that, like the modalities on autonomous liberalisation, the LDC modalities will not be adequately reflected in bilateral requests and offers.

### Subsidiary Bodies – Outstanding Rule-making Issues

**Emergency Safeguard Mechanism (ESM):** Various developing country Members led by the members of the Association of Southeast Asian Nations (ASEAN) have, since the conclusion of the Uruguay Round, advocated the establishment of an ESM for services trade. They argue that such a mechanism would provide symmetry with goods trade, where a safeguards clause exists. Moreover, it would provide Members the necessary safety net when undertaking new liberalisation commitments, and could thus give them an incentive to undertake new market access commitments.



In March 2004, ASEAN revised its EMS model<sup>2</sup> - largely based on the goods safeguards agreement, albeit adjusted to take into account the characteristics of services trade - to include, *inter alia*, prospective application to new commitments, protection of 'acquired rights', a shorter period for applying safeguards and a limited time frame within which a Member may use the mechanism, reckoned from the time its liberalisation commitments for the relevant sector comes into full force and effect.

Most developed countries and some Latin American developing countries remain rather sceptical, with the EU and the US questioning the mechanism's desirability and feasibility. ASEAN has noted that some countries might not agree to any final services offer/request outcome without an ESM negotiated beforehand. In any event, WTO Members agreed in early 2004 to extend the deadline (originally set for 1998!) for achieving results in this area by the conclusion of current market access negotiations.

Brazil has argued for linking the ESM to the 'necessity tests' in Members' commitment schedules. Such tests allow governments to keep a sector closed to liberalisation if they decide that it is adequately serviced by existing providers, and thus effectively amount to a safeguard mechanism for certain countries. In consequence, Brazil proposed two options: either create an ESM that everyone can use, or give up the use of necessity tests, as well as the ESM.

**Subsidies in Services:** According to the Guidelines, WTO Members shall "aim to complete" negotiations on the necessary multilateral disciplines for subsidies in services prior to the conclusion of the market access negotiations.

However, the discussions in the Working Party on GATS Rules (WPGR) remain tentative. Only a handful of Members have so far responded to the WPGR questionnaire about their domestic services support programmes. As a result, little debate has taken place on issues such as the definition of subsidies in the field of services, the role of subsidies in the pursuit of public policy objectives, the need for SDT for developing countries, or the appropriateness of a countervailing mechanism.

Taiwan recently presented a list of hypothetical cases of governmental subsidy programmes designed to serve as a basis for identifying some of the elements of a working definition of a services subsidy (JOB(04)78). Elements identified included the existence of a financial contribution, the benefit to the supplier of a service, the distortiveness of the programme, and the existence of a particular recipient ('specificity'). Most of these match the current definition of 'subsidies' in the Agreement on Subsidies and Countervailing Measures. Many believe that the absence of a specific definition of services subsidies should not preclude discussions toward the establishment of multilateral disciplines for them.

The lack of a multilateral definition of, and disciplines on, services subsidies has started to work against weaker partners in the request-offer process. Many developing countries find themselves at a clear disadvantage, unable to assess the competitiveness or market prospects of domestic providers vis-à-vis potentially subsidised foreign providers.

**Government Procurement:** The scope of the mandated negotiations remains the pre-eminent issue in these discussions. Most developing countries are of the view that GATS Article XIII.1 excludes government procurement of services from GATS disciplines on non-discrimination, national treatment and market access issues, and that only issues linked to transparency and due process should be addressed in the WPGR. Some developed countries, and the EU in particular, disagree, arguing that GATS Article XIII.2 provides for negotiations on government procurement in services, including market access and national treatment.

The 3 November draft ministerial text does not appear to provide sufficient guidance or impetus to concluding the rule-making aspect of negotiations as part of the single undertaking. For instance, the proposed directive for an ESM merely instructs Members to engage in more focused discussions on the technical and procedural questions relating to the operation and application of a possible ESM. Some observers have noted, however, that this is exactly what Members have been doing over the last five years.

The draft text's directive on subsidies mandates Members to intensify their efforts to expedite information exchange and engage in more focused discussions on proposals by Members, including the development of a possible working definition of subsidies. Again, apart from fulfilling the mandate on information exchange, the reference to focused discussions seems to echo what has been going on anyway in the Working Party on GATS Rules.

On the other hand, South Africa has criticised the draft text's mandate on government procurement for accommodating the proposal for specific market access commitments in government procurement, rather than recognising the continuing differences on the scope of the mandate contained in the GATS.

**Disciplines on Domestic Regulation:** The debate on disciplines on domestic regulation appears to have gained the most traction among the various rules issues, and many anticipate concrete results at the end of this services round of negotiations. Some suggest that the Hong Kong Ministerial outcome could be a list of elements as a basis for further work, or at the very least a specific directive from ministers to conclude an agreement on disciplines on domestic regulation by a date certain.

Nevertheless, a number of issues continue to pose significant challenges to the membership. Foremost of these is the continuing lack of sufficient understanding on the part of many Members of the various substantive technical issues and the potential repercussions of choosing any particular option.

The most fundamental - and politically contentious - issue is whether, and the extent to which, new disciplines on domestic regulation would qualify (some say impinge on) a Member's right to regulate. In the sense that the right to regulate is recognised in the GATS Preamble, and is generally regarded as a sovereign right, it is suggested by some that the right cannot be diluted by any new disciplines.

Nonetheless, many Members think that the trade-facilitating benefit of such disciplines would offset any possible impinging qualities. The obvious and undisputed benefits accrue to service suppliers who would be regulated on the basis of transparent and objective criteria, and have the assurance that these regulations are not more burdensome than necessary to assure the quality of a service. However, Members have obviously had to grapple with how these elements should be operationalised with greater specificity in legally binding form.

Moreover, there is a negotiating dynamic, where Members try to nudge the outcome in the direction of the sectors or modes of supply of interest to them. For instance, the EU has proposed disciplines on licensing procedures, which are widely seen as the type of regu-

lation that most impedes the supply of services through the establishment of commercial presence (Mode 3), the main mode through which the EU and other developed countries supply services to the world economy. India, Chile, Pakistan and Thailand on the other hand have only proposed disciplines on qualification requirements and procedures, which are regarded as the regulatory measures that most often hinder the ability to supply professional services, whether through the temporary movement of natural persons (Mode 4), or through cross-border trade (Mode 1).

Another overarching issue is whether the disciplines should apply horizontally, that is, across all services sectors, or on a sector-specific basis. All the proposals currently discussed at the Working Party on Domestic Regulation seek horizontal application. Some WTO Members, however, are bent on sector-specific disciplines. Australia, for instance, has recently tabled a proposal for disciplines on legal services. While this has the obvious advantage of having a specific correlation with the kinds of regulatory measures existing in the targeted sectors, for a great number of developing countries this raises concerns over the proliferation of specific disciplines.

Within the disciplines themselves, the substantive issue of greatest controversy is the notion of a 'necessity test', or more specifically, the extent to which any disciplines should require that regulatory measures not be more burdensome than necessary 'to ensure the quality of a service.' Some WTO Members question whether 'ensuring the quality of the service' is the limit within which the necessity of a regulatory measure could be justified. In this regard, a proposal made by Brazil, Colombia, the Philippines, et al. seeks to expand the necessity test as formulated in GATS Article VI by suggesting that domestic regulation should 'not be more burdensome

than necessary to pursue national policy objectives.' The disciplines proposed by this group would necessarily have to accord deference to a wider scope of regulatory measures, and as such respond to concerns expressed about a necessity test's potential impacts on the policy space needed by governments.

The key proponents of domestic regulatory disciplines in the WTO, including Hong Kong, Japan, Switzerland, India, Mexico, the EU, the Philippines, Colombia and Brazil, among others, have over the last few months began intensive negotiations to try and find the threads of convergence in the various proposals. At the time of writing, the WPDR was negotiating draft ministerial text relating to domestic regulation (left blank in the Chair's 3 November draft).

### Work Programme Post-Hong Kong

The 3 November draft ministerial text draws up the following timeline with a view to concluding the negotiations by the end of 2006:

Any outstanding initial offers shall be submitted as soon as possible.

Groups of Members presenting plurilateral requests to other Members should submit such requests by [February 2006] or as soon as possible thereafter.

Members shall notify the Special Session of the Council for Trade in Services by [date] of the sectors in which they intend to engage in plurilateral negotiations.

A second round of improved revised offers shall be submitted by [date].

Final draft schedules of commitments shall be submitted by [date].

The bracketed dates are expected to be filled in the revision to the draft text, or at the Hong Kong conference itself.

### The US-Antigua & Barbuda Gambling Case

In April 2005, the WTO Appellate Body issued its report on the 'gambling dispute' launched by Antigua and Barbuda - population 67,000 - against the United States. The dispute is significant as it provides an indication of how schedules of commitments will be interpreted in future disputes and the need for precision in inscribing commitments.

The Appellate Body found that the US had, by not explicitly excluding gambling from its commitments under the 'other recreational services' sector, assumed full market access and national treatment commitments on such activities

Perhaps more importantly, the Appellate Body ruled that the US prohibition on internet gambling, particularly as applied to foreign service suppliers, amounted to a 'zero quota' which fell within the scope of limitations on market access under GATS Art. XVI. Since the US is deemed to have undertaken full commitments on gambling services, it is not permitted to have a measure that amounts to, or has the effect of, applying a 'zero quota' on the foreign supply of this service.

Critics of the decision note that a legitimate, non-discriminatory regulatory measure, which in any way results in a limitation on the number of service suppliers that may supply a market, may henceforth be deemed as a market access limitation of the type listed under Art. XVI. These critics argue that the decision unduly expands the scope of Art. XVI-type measures and thereby narrows the scope for domestic regulation.

### Endnotes

- 1 Argentina, Bolivia, Brazil, Chile, Colombia, India, Mexico, Pakistan, Peru, the Philippines, Thailand and Uruguay.
- 2 Document not yet derestricted, downloadable at [http://www.ictsd.org/issarea/std/Resources/Docs/ASEAN\\_ESM.pdf](http://www.ictsd.org/issarea/std/Resources/Docs/ASEAN_ESM.pdf). The new proposal may be compared to the earlier ASEAN ESM proposal tabled in 2000 under the document number S/WPGR/W/30.



### Doha Mandate:

*"We agree to negotiations which shall aim, by modalities to be agreed, to reduce or as appropriate eliminate tariffs, including the reduction or elimination of tariff peaks, high tariffs, and tariff escalation, as well as nontariff barriers, in particular on products of export interest to developing countries. Product coverage shall be comprehensive and without a priori exclusions. The negotiations shall take fully into account the special needs and interests of developing and least developed country participants, including through less than full reciprocity in reduction commitments, in accordance with the relevant provisions of Article XXVIII bis of GATT 1994 and the provisions cited in paragraph 50 below [on special and differential treatment for developing and least-developed countries]. To this end, the modalities to be agreed will include appropriate studies and capacity-building measures to assist least-developed countries to participate effectively in the negotiations."*

(Paragraph 16 of the Doha Ministerial Declaration)

# Market Access for Non-Agricultural Products

Negotiations on non-agricultural market access (NAMA) are currently deadlocked, largely due to many Members' insistence on knowing the likely extent of agricultural trade reform before determining their level of ambition with regard to other key elements of the Doha Round. However, progress in this area - which some predict could become more challenging than that in agriculture - is crucial for the Hong Kong Ministerial to deliver a package acceptable to all Members in December 2005.

## Mandated Deadline

As part of the 'single undertaking', the NAMA negotiations will conclude when the Doha Round does.

## Background

The Negotiating Group on NAMA was established by the Trade Negotiations Committee on 1 February 2002.

Reducing tariffs and non-tariff barriers (NTBs) on industrial goods was the core of multilateral trade negotiations under the General Agreement on Tariffs and Trade (GATT), and remains central to the negotiations agreed in Doha under the WTO. Most countries support this mandate, although many developing countries and, in particular, small economies are concerned about loss of tariff revenues, the potential weakening of their competitiveness and the expected erosion of preferential access margins vis-à-vis other developing country competitors. In addition, they generally feel that reductions in tariff and non-tariff barriers will disproportionately benefit developed countries given the current organisation of production, supply and market chains in international trade.

## Current State of Play

Currently, the basis for NAMA negotiations is Annex B of the 2004 'July Package'. Although the annex helped re-start the stalled discussions, it was much less specific than the agriculture text, simply placing an additional paragraph outlining developing country concerns in front of the Cancun NAMA text. The new paragraph stipulated that "additional negotiations are required to reach agreement on the specifics of some (initial) elements". These initial elements refer to the tariff reduction formula, flexibilities for developing countries, the treatment of unbound tariff lines, participation in sectoral initiatives and preferences.

By late October 2005, Members remained unable to agree on any of these elements, prompting some commentators to suggest that the real NAMA negotiations had yet to get underway. Once they do, a major factor affecting countries' negotiating positions will be the extent to which they have been affected by the end-2004 expiry of trade quotas for textiles and clothing. The liberalisation of this sector threatens to divide developing countries along the lines of expected beneficiaries and losers (see section on 'Textile and Clothing').

The Chair of the Negotiating Group, Ambassador Stefan Johannesson of Iceland, has asked Members to focus on three key elements in the negotiations leading up to the Hong Kong Ministerial: the formula, the flexibilities and unbound tariffs.



## Tariff Reduction Formula

Members cannot reach agreement on the NAMA negotiation modalities without finding consensus on the formula they will use to cut tariffs after the conclusion of the Round.

The July Package stipulates that tariff reductions on industrial products should be based on a non-linear formula applied to bound tariffs on a line-by-line basis; and that the base for reducing unbound tariffs should be set at two times the applied "most-favoured nation" (MFN) tariff. It also specifies that all specific duties (based on import volumes, e.g., US\$10/tonne) be converted to 'ad valorem equivalents' (AVEs), i.e. tariffs expressed as a percentage of the good's value, before the formula is applied.

All of the proposals for the tariff reduction formula are based on a 'Swiss' formula approach, or variations thereof. This methodology cuts higher tariffs more steeply than lower ones, and 'harmonises' tariffs by bringing them closer to a level that corresponds to the coefficient associated with the formula.

A major obstacle in the talks has been whether developing countries should have trade flexibilities for a formula structure that would allow them to make relatively lower cuts than rich countries through the use of different coefficients. According to paragraph 4 of the NAMA mandate set out in Annex B of the 2004 July Package, the tariff reduction formula should account for the needs of developing and least-developed countries, "including through less than full reciprocity in reduction commitments." Paragraph 8 provides for additional flexibilities that would allow developing and least-developed countries to retain some unbound tariffs and make tariff cuts on some products that are smaller than those required by the formula.

Eight proposals for the tariff reduction formula are on the table:

- The EU has proposed a simple Swiss formula with one coefficient

that would vary for developing countries depending on their use of paragraph 8 flexibilities in its application. Members opting for greater use of flexibilities would have a lower coefficient, and consequently would be required to make steeper tariff cuts.

- Norway proposes two coefficients, one for developed countries and another for developing ones, in association with a 'credit' system that would reward developing countries for making less use of the flexibilities by raising the value of their coefficient, thus lowering their tariff cuts.
- The US also proposes two coefficients, but would have the higher coefficient for developing countries replace all other flexibilities.
- Chile, Colombia and Mexico have put forward a proposal that would establish a menu of flexibilities, each option linked to one of a limited number of coefficients. This would allow developing countries to choose a balance among binding their tariffs, the ability to exclude some products from the tariff reduction formula, the implementation period for tariff cuts and the depth of tariff reduction (TN/MA/W/50).
- Two sets of countries have put forward proposals that link Members' post-reduction tariff levels to their existing average tariff rates. Argentina, Brazil and India (TN/MA/W/54), in addition to the average tariff level, provide for Members' coefficients to include a common component(s) based on the level of ambition in other areas of the negotiations. Building on this idea, a proposal from a group of Caribbean countries adds a new element for assigning Members 'credit' based on a list of development-related considerations, including their dependence on revenue from tariffs, degree of openness to trade, and economic vulnerability.
- Pakistan's proposal uses a simple Swiss formula with a coefficient of 6 percent for developed countries and 30 percent for developing countries - corresponding to each group's average tariff level. Developed countries have stated that the gap between the two coefficients is too wide and must be reduced substantially.

In an attempt to advance the discussions and provide clearer guidelines for Hong Kong, Chair Johannesson has proposed that Members start putting numbers into the different formulae. However, several countries have been expressed their reluctance to do this until the final formula to be used is agreed. In contrast, the EU and the US have recently suggested that developed countries reduce their maximum industrial tariff to 10 percent, and developing countries to 15 percent. While these proposals have not been discussed in the NAMA negotiating group, many developing countries - including Brazil and India - have categorically rejected the 15 percent tariff cap for developing countries, arguing that it would place a wholly disproportionate burden on them.

Developing countries are anxious that steep tariff reductions would worsen their balance of trade, since the cuts in their generally higher rates would not be matched by those made by industrialised countries. Some governments are concerned about the effects of deep tariff cuts on total revenue - according to IMF figures, import duties represented 15 percent of government revenue in developing countries between 1999 and 2001; in African least-developed countries (LDCs) this share was 34 percent.

Developing countries have also advocated a stronger focus on reducing tariff peaks - exceptionally high tariffs on certain products, often of critical interest to them, as well as tariff escalation, i.e. higher tariffs on products of higher added value. In addition, those that benefit from preferential access to rich country markets fear that further tariff reductions would negatively impact on the value of their preferences.

## Sectoral Approach

The July Package stipulates that further work is needed on sectoral liberalisation, which aims at agreement on deep tariff cuts/elimination in certain sectors, including on products of particular export interest to developing countries.



After several months of disagreement over the nature and sequencing of the proposed sectoral tariff liberalisation, discussions have proceeded in an informal manner in parallel with negotiations on the formula, although some countries - such as Brazil and India - have been reluctant to participate in any form. There is still no agreement on whether the approach should be voluntary, mandatory or based on a 'critical mass' approach under which Members could agree to tariff cuts/elimination for a specific good triggered by the assent of a target percentage of countries trading in that product.

Liberalisation proposals have been tabled for sectors such as gems and jewellery, bicycles and other sporting goods, and some information technology products.

### AVE conversion

Members have broadly agreed to follow the model used in the agriculture talks for the conversion of specific tariffs into price-based *ad valorem* equivalents (AVEs) - a mathematical exercise necessary in order to apply the reduction formula to such tariffs. They are determining their tariffs in percentage terms on the basis of their import volumes and the notified values for these imports that they submit to the WTO Integrated Database (IDB). Most WTO Members have fairly few non-*ad valorem* tariff lines for industrial goods - fewer than 7 percent - and are in the process of making the calculations.

### Non-tariff Barriers

Discussions on non-tariff barriers (NTBs) have lagged behind those on the tariff reduction formula and have tended to follow two themes. The first theme relates to the compilation of NTB notifications and their examination; the second concerns possible ways of categorising NTBs.

### Environmental Goods

In March 2002, Members decided that negotiations on "reduction or, as appropriate, elimination of tariff and non-tariff barriers to environmental goods" (paragraph 31(iii) of the Doha Declaration) would take place in the NAMA Negotiating Group, to be monitored by the Committee on Trade and Environment (CTE). At this stage, the CTE is still in the process of establishing a definition of what would qualify as an environmental good. Once this work is concluded, the NAMA Negotiating Group will be in a better position to determine how to address the issue (see Doha Round Briefing No.8 on trade and environment).

## Textiles and Clothing

Nearly half a century of voluntary and formal trade quotas came to an end on 1 January 2005 when textiles and clothing were fully integrated into WTO disciplines on industrial goods, marking the expiry of the WTO's Agreement on Textiles and Clothing (ATC). The ATC was created in 1995 as a transitional mechanism to phase-out the system of quotas known as the Multifibre Arrangement (MFA), which allowed developed countries to impose quantitative restrictions on imports from individual developing countries. Despite the ATC's schedule for phasing-out of quotas, on 1 January 2005 trade restrictions remained on nearly half of the tariff lines that had been under quota in Canada, Norway, the US and the EU in 1990. Since the liberalisation of the sector, developed and developing countries alike have been trying to assess the new trading environment and ease the adjustment process.

Developing countries account for half of world textile exports and nearly three-quarters of world apparel exports. Liberalisation of the textiles and clothing sector was considered one of the key gains for developing countries from the Uruguay Round, framed during the negotiations as a concession from developed to developing countries in return for agreements on intellectual property rights and services. Indeed, the International Textile and Clothing Bureau went so far as to estimate that liberalised trade in textiles and clothing would ac-

count for as much as one-third of the benefits that developing countries would realise from the round (G/C/W/495).

It has become clear, however, that not all developing countries have benefited from liberalisation. The guaranteed market access provided by the quota system gave many small economies and LDCs a larger share in the international textile trade than they would have had under a freely competitive regime. In these countries, many jobs essential to poverty alleviation and women's empowerment relied on this access, and some have been hit hard by the absence of quotas. On the other hand, larger developing countries such as China and Pakistan, whose exports were constrained by import quotas, have profited from the expiry of the ATC. They have been reluctant to support the efforts of vulnerable countries such as Turkey and Uganda to create adjustment mechanisms to soften the blow of freer trade. The liberalisation of the sector thus threatens to divide developing countries along the lines of expected winners and losers.

### Adjustment Costs Discussed at WTO

In the lead-up to the liberalisation of the sector, countries that expected to be affected negatively by the phasing-out of quotas began raising the issue at the WTO. Members including Bangladesh, the Dominican Republic, Fiji, Jamaica, Madagascar, Mauritius, Mongolia, Nepal, Sri Lanka, Turkey and Uganda asked the WTO Secretariat to consider adjustment mechanisms to minimise the adverse impacts of the transition. Many countries maintain that the WTO should attempt to address the liberalisation-related problems faced by small developing countries, including lower world prices, fierce competition from China and India, and the risk of losing markets in the US and the EU. In 2005, the issue was discussed in the Council for Trade in Goods and the Subcommittee on Least-developed Countries (LDCs).

In October 2004, Bangladesh, Mauritius, the Dominican Republic, Fiji, Madagascar, Sri Lanka and Uganda (subsequently supported by Jamaica, Nepal and Mongolia) tabled a submission (G/C/W/496) to the Goods Council. They requested the WTO Secretariat to prepare a study on adjustment-related issues and costs arising from quota elimination, as well as the establishment of a WTO work programme to discuss possible solutions to the problems identified in the study. Turkey proposed a range of solutions to deal with adjustment problems, including monitoring and safeguard mechanisms (G/C/W/497).

These were followed by a May 2005 submission from Tunisia (JOB(05)/31) and a new Turkish paper in July (G/C/W/522) that asked WTO Members to examine ways to stabilise market prices for foods, textiles, and clothing and to work with international financial institutions in establishing a funding mechanism to help countries that had benefited under trade quotas adjust to the new reality. It too proposed that adjustment-related textiles issues should be placed as a permanent item on the Goods Council's agenda.

Throughout the debate, China and India continued to argue against the idea of continued work in the Goods Council on textiles, insisting that the full liberalisation of the textile and clothing trade was a major achievement of the WTO and in developing countries' interests. They contend that measures such as increased private investment, improved preferential rules of origin in major importing countries and enhanced technical assistance from the International Monetary Fund and World Bank could help ease the transition to free trade. Opponents of a work programme on textiles in the Goods Council would prefer the issue to be discussed in the LDC Sub-committee, while non-LDC developing coun-

tries such as Turkey and Sri Lanka counter that the adjustment concerns affect all developing countries.

The LDC Sub-committee received a report in July 2005 from the WTO Secretariat entitled "Options for Least-developed Countries (LDCs) to improve their competitiveness in the textiles and clothing business". The report suggested that LDC exports could be increased by reducing developing-country import tariffs on textile and clothing products, either through non-reciprocal preferences or through regional trade agreements. However, several developing countries expressed reservations about liberalising their textiles and clothing sectors. Members concluded that LDCs needed targeted supply-side technical assistance to boost their competitiveness.

### Adjustment efforts elsewhere

Countries have taken specific measures to protect domestic markets and industries from newly-liberalised imports, particularly from China. On 10 June 2005, the EU and China signed a bilateral agreement - subsequently adjusted to allow for higher than anticipated imports into the EU during summer 2005 - that limits Chinese exports to the EU in ten categories of textile and clothing to between 8 and 12.5 percent growth until the end of 2007. As of October 2005, the US had imposed import restrictions on nine types of Chinese textiles imports under the textile-specific safeguard provided for in paragraph 242 of China's WTO Accession Agreement, which allows Members to limit imports of Chinese textiles and clothing products to an increase of 7.5 percent above the preceding year's import levels if they are found to disrupt markets. Turkey has invoked the clause to impose safeguards on 42 products and has implemented anti-dumping measures against China for seven different categories. Brazil is reportedly seeking a bilateral deal with China to restrain Chinese exports of textiles and shoes, as well as considering use of the textile-specific safeguard clause.

### Effects begin to be felt

As statistics are collated for the first half of 2005, it is becoming clear that the effect of liberalisation may not have been entirely as predicted. Warnings of the collapse of the sector in Bangladesh, for example, have been proven mostly wrong: on the whole, the industry is consolidating its capacity and several factories and sectors are expanding. Exports to the US have increased and overall apparel exports from Bangladesh rose dramatically in February and March 2005 compared to the year before. Cambodia has maintained its share in the global textiles trade, as its reputation for decent working conditions has helped attract and retain investment. Pakistan has benefited from the elimination of quota restraints. Turkey is fairing slightly better than once feared, but Indian ready-made garment exports fell by 24 percent in the first three months of 2005, well below expectations. The main losers, however, are countries in Sub-Saharan Africa, which had previously gained in employment, growth and investment under trade quotas coupled with preferential access to the US market through the 2000 African Growth and Opportunity Act (AGOA). They are now suffering from factory closures and the resulting job losses. In Lesotho, one of the world's poorest countries, several factories have shut down or scaled-back operations in the sector that was the country's single largest employer and accounted for more than 90 percent of its exports. Kenya reported a 13 percent drop in textiles and clothing exports between January and March 2005 compared with 2004 figures for the same period. Similar experiences are being reported in Madagascar, Morocco, Nigeria, Swaziland and Tunisia. Mexico also appears to be struggling in the post-quota environment, while many Central American countries are hoping that the implementation of the CAFTA-DR agreement will enhance their access to the lucrative US market.



## Doha Mandates:

### Public Health

*"We recognize that WTO Members with insufficient or no manufacturing capacities in the pharmaceutical sector could face difficulties in making effective use of compulsory licensing under the TRIPs Agreement. We instruct the Council for TRIPs to find an expeditious solution to this problem and to report to the General Council before the end of 2002."*

(Paragraph 6 of the Doha Declaration on the TRIPs Agreement and Public Health)

### Geographical Indications

*"With a view to completing the work started in the Council for Trade-Related Aspects of Intellectual Property Rights on the implementation of Article 23.4, we agree to negotiate the establishment of a multilateral system of notification and registration of geographical indications for wines and spirits by the Fifth Session of the Ministerial Conference. We note that issues related to the extension of the protection of geographical indications provided for in Article 23 to products other than wines and spirits will be addressed in the Council for TRIPs pursuant to paragraph 12 of this Declaration."*

(Paragraph 18 of the Doha Ministerial Declaration)

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# Intellectual Property Rights

Negotiations on questions related to public health, geographical indications and biological diversity made little progress in the Council for Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPS) during the first ten months of 2005. Nonetheless, in an attempt to find a solution to the current impasse, discussions on these issues are continuing in the run up to December's WTO Ministerial Conference in Hong Kong.

The most important formal step forward in the TRIPS Council since the launch of the Doha Round was the adoption, on 30 August 2003, of a General Council Decision on the Implementation of Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health (WT/L/540). The Decision, commonly referred to as the 'waiver', spells out the conditions under which countries without sufficient pharmaceutical manufacturing capacity can use compulsory licenses to import generic versions of drugs still under patent protection. While a number of potential exporter countries have started adapting their domestic laws to reflect the Decision, the likely importing countries have yet to make use of the system. The African Group of WTO Members has submitted a proposal for a permanent amendment (IP/C/W/437) to the TRIPS Agreement (IP/C/W/437), but several (mostly developed) Members argue that it does not accurately reflect the 30 August waiver.

Negotiations are also stalled on the establishment of a multilateral system of notification and registration of geographical indications (GIs) for wines and spirits, as well as on extending the protection the TRIPS Agreement currently grants to wines and spirits to other, mostly agricultural, products. This bitterly divisive issue acquired a higher profile in late October 2005, when the EU linked its latest agricultural tariff cut offer to stronger TRIPS protection for all GIs. The EU also demanded that all GIs be covered by the future multilateral registration system - with legal effects for both participating and non-participating Members. In addition, the EU said it would seek the prohibition of current third party use of a 'limited number' of well-known European GIs (see also Doha Round Briefing Series No. 2 on agriculture).

Despite several new and more specific submissions, discussions on the relationship between the TRIPS Agreement, traditional knowledge and biodiversity-related issues have made no headway due to Members' divergent views on modalities to move the process forward. Contention has focused on the need for a disclosure of origin requirement, mechanisms for access and benefit-sharing, and prior informed consent. At ministerial-level meetings held in early November, India's Minister of Trade highlighted three TRIPS-related issues as "critical to an agreement in Hong Kong": paragraph 6 of the Doha Declaration on TRIPS and Health; the disclosure of origin of genetic resources; and the relationship between the Convention on Biological Diversity and the TRIPS Agreement.

## Mandated Deadlines

- **End March 2005:** Report to the General Council on a solution to compulsory licensing and lack of pharmaceutical manufacturing capacity; partly implemented on 30 August 2003. The deadline for the development of a permanent amendment to TRIPS was extended to 31 March 2005, but this date was missed. Discussions at the last scheduled TRIPS Council in October 2005 failed to reach

### Non-violation Complaints

*"The TRIPS Council is directed to continue its examination of the scope and modalities for complaints of the types provided for under subparagraphs 1(b) and 1(c) of Article XXIII of GATT 1994 and make recommendations to the Fifth Session of the Ministerial Conference. It is agreed that, in the meantime, members will not initiate such complaints under the TRIPS Agreement."*

(Paragraph 11.1 of the Decision on Implementation related Issues and Concerns)

### Other Out-standing Implementation Concerns

*"We instruct the Council for TRIPS, in pursuing its work programme including under the review of Article 27.3(b), the review of the implementation of the TRIPS Agreement under Article 71.1 and the work foreseen pursuant to paragraph 12 of this declaration, to examine, inter alia, the relationship between the TRIPS Agreement and the Convention on Biological Diversity, the protection of traditional knowledge and folklore, and other relevant new developments raised by members pursuant to Article 71.1. In undertaking this work, the TRIPS Council shall be guided by the objectives and principles set out in Articles 7 and 8 of the TRIPS Agreement and shall take fully into account the development dimension."*

(Paragraph 18 of the Doha Ministerial Declaration)

agreement. The TRIPS Council is now due to reconvene before Hong Kong in an attempt to develop a solution that could be put before the General Council. Separately, informal consultations between the African Group, the US and the EU continue under the Chair's guidance.

- **December 2005 (Sixth Ministerial Conference):** The Council's deadline for reporting to the Trade Negotiations Committee (TNC) on action on outstanding implementation issues under paragraph 12(b) of the Doha Declaration was extended until the Sixth Ministerial Conference in Hong Kong for all issues save the extension of GI protection to other products than wines and spirits. For the extension of GIs, the Chairman of the TNC meeting in September 2005 indicated that, at the insistence of several countries, the issue would be on the agenda for Hong Kong.
- **December 2005 (Sixth Ministerial Conference):** The conclusion of the negotiations on the multilateral system of notification/registration of geographical indications for wines and spirits has had its deadline de facto extended to the Sixth Ministerial Conference.

## TRIPS and Public Health

The relationship between WTO rules on patent rights and access to essential medicines was taken up at the TRIPS Council for the first time in June 2001 at the request of the African Group, supported by a number of developing countries. The subsequent protracted discussions culminated with the adoption of the Doha Declaration on the TRIPS Agreement and Public Health of 14 November 2001 (WT/MIN(01)/DEC/2), which stressed that the agreement did not and should not prevent Members from taking measures to protect public health.

One issue remained unresolved at Doha: how to address the problems that countries with insufficient or no pharmaceutical manufacturing capacity might face in making use of compulsory licensing (paragraph 6 of the Declaration on TRIPS and Public Health). Compulsory licensing refers to the practice by which a government authority permits a third party or a government agency to use an invention without the consent of the patent-holder, although the latter has the right to 'adequate remuneration' contingent upon the circumstances of the case. Many Members felt that TRIPS Article 31(f), which requires production under compulsory licensing to be primarily for the supply of the domestic market, could seriously limit access to affordable medicines for those developing and least-developed countries that are unable to produce generic copies of patented drugs themselves.

### The 30 August Decision and the Chair's Statement

A compromise was finally reached with the adoption of the 30 August 2003 Decision, which temporarily waived Members' obligations under Article 31(f) with regard to the export of pharmaceuticals produced under compulsory license. In theory, the waiver offers an interim solution to countries with no domestic capacity to produce generic copies of patented medicines, but many consider its provisions too cumbersome and politically charged to be of much use to the intended beneficiaries. A large number of its detailed notification and other obligations are aimed at ensuring that imported pharmaceuticals manufactured under compulsory license are not re-exported (for details, see Doha Round Briefing Series Vol. 3 No.5). The waiver remains in force until the TRIPS Agreement is permanently amended.

The Decision was accompanied by a statement (JOB (02)/217) from WTO General Council Chair Carlos Pérez del Castillo noting that the system established by the Decision would be used "in good faith to protect public health" and not as "an instrument to pursue industrial or commercial policy objectives." It detailed further measures aimed at curbing trade diversion, and listed a number of developed and advanced developing country Members who had either agreed not to use the



system as importers at all, or had undertaken to use it only in cases of national emergency or other circumstances of extreme urgency. Recent discussions on the waiver have mainly revolved around the statement's legal status and how it should be reflected in a permanent amendment to the TRIPS Agreement.

### Current State of Play

Discussions on the amendment remained desultory until December 2004, when the African Group proposed a text that built on the 30 August Decision, but did not provide details on the 'trade diversion' issues, with the exception of a paragraph on distinctive packaging. The African Group defended the proposal as an attempt to simplify the use of the mechanism with a view to making it more operational and user-friendly in response to numerous criticisms about the waiver's cumbersome provisions.

The US, the EU, Canada, Japan and Switzerland, among others, continue to insist that any amendment must be a simple 'technical translation' of the Decision. They objected to the African proposal, arguing that it had left out the waiver's sections on notification obligations - such as specifying in advance not only the name but the exact quantity of the drug that the Member sought to import under compulsory license. Many also criticised the proposal's lack of any mention of the Chair's statement. Nigeria and Kenya argued that all of the purported omissions were 'superfluous,' since they were already reflected elsewhere in the TRIPS Agreement.

Several developing countries, including Brazil and India, have welcomed the debate's shift from procedure to substance, and expressed support for the African view that a permanent amendment should be simpler than the waiver, which places considerable administrative burdens on developing country governments. Most recently, at the EU's initiative and under the guidance of the Chair, the African Group, the US and the EU have engaged in informal consultations on an EU proposal, which would keep the original waiver language intact, but omit any reference to the Chair's statement. Several Members - including Switzerland and Malaysia - have expressed support for the process and their willingness to participate. Brazil and India, however, have made strong calls to be included, arguing that consultations organised by the Chair should include all interested parties. As no agreement on the waiver was reached at the final 2005 session of TRIPS Council in October, the Council is to reconvene before Hong Kong in an attempt to develop a permanent or interim solution. No date had been set at the time of writing.

In practical terms, the waiver has already been translated into national legislation in Canada, India, Norway, Switzerland and the EU. Korea's changes to domestic IP law will take effect as of January 2006. Importing countries also need to adopt their legal frameworks to make use of the Decision, but none of them have yet done so; nor has a single eligible country notified the WTO of either its intention to use the system as an importer, or of a specific shortfall of a particular drug.

## Geographical Indications

Geographical indications (GIs), as defined in Article 22 of the TRIPS Agreement, are identifications of the national, local, or regional origin of a product for which "a given quality, reputation or other characteristic... is essentially attributable to its geographical origin." Discussions at the TRIPS Council are conducted along two inter-related tracks: (i) in formal negotiations on a register for GIs denoting wines and spirits; and (ii) implementation-related discussions concerning enhanced protection for GIs that identify other products.

### The Multilateral Register

Paragraph 18 the Doha Declaration requires WTO Members to "negotiate the establishment of a multilateral system of notification and registration of geographical indications for wines and spirits". No discernible progress has occurred in those negotiations due to a profound disagreement over two issues. The first of these

is 'legal effect', i.e. whether registered terms must be automatically protected or whether such protection is voluntary. The second concerns 'participation', i.e. whether the legal effect applies only to those who choose to participate in the system, or whether all WTO Members should be obliged to protect the registered GIs. In September 2005, the Chair of the multilateral register negotiations concluded that "differences appear[ed] to be as large as ever and [had] not narrowed since prior to Cancun."

Argentina, Australia, Canada, Chile, El Salvador, New Zealand and the US, supported by Ecuador, have argued for a GI register what would essentially function as a searchable database, which could be consulted by national intellectual property offices when making decisions on whether or not to grant protection to a given GI for wines and spirits. The register would be voluntary, i.e. Members would be free to choose whether or not to register their GIs. The enforcement of GI protection would remain grounded in national law.

In contrast, the EU and some other European countries would require registered terms to be protected in all WTO Member countries, including non-participating Members. The EU's latest agricultural tariff cut offer repeated this view, adding that the register should comprise all GIs (not only those for wines spirits) and have legal effects for both participating and non-participating Members not having lodged a reservation to the registration of a GI. The submission also suggested that that third party use of a 'limited number' of well-known European GIs should be prohibited.

Some have expressed cautious hope that the impasse over the register could be overcome in the wake of the 15 September 2005 bilateral agreement between the EU and the US to mutually recognise 'names of origin' and 'semi-generic' names for wines. However, French and Italian wine-makers continue to lobby for the rejection of the deal since it permits

certain US producers to continue using names such as Champagne. More importantly, the EU's linking of the register to enhanced protection for all GIs is likely to cause a hardening of the opposition.

For more details on GI extension, see the section on implementation below.

### Biodiversity, Traditional Knowledge and Folklore

Paragraph 19 of the Doha Declaration instructs the TRIPS Council - as part of its review of TRIPS Articles 27.3(b) and 71.1 - to consider the relationship between the TRIPS Agreement and the Convention on Biological Diversity (CBD), the protection of traditional knowledge (TK) and folklore. Article 27.3(b) states that WTO Members must provide patent protection over micro-organisms and microbiological processes (such as those used in biotechnology today), but allow countries to exclude plants and animals from their patent laws. Article 71.1 calls for a general review of the Agreement.

Discussions on these issues have largely focused on whether the TRIPS Agreement should be made to require applicants to disclose the country of origin and source of any genetic material/TK used either in the research and development process and/or directly in the invention they seek to patent. This could include providing evidence of (a) prior informed consent (PIC) of the country/community of origin, and (b) how they intend to share the benefits arising from the commercialisation of the invention with the country/community of origin. Developing countries pushing for such amendments include Brazil, Bolivia, Cuba, the Dominican Republic, Ecuador, India, Thailand, Peru and Venezuela, as well as the African Group. In addition to calling for disclosure of origin and evidence of PIC/benefit-sharing, African WTO Members have also proposed to revise TRIPS Article 27.3(b)

so as to prohibit the patenting of plants, animals and micro-organisms, as well as the classification of TK as a category of intellectual property rights.

While some developed countries, such as the EU, Norway and Switzerland, have shown a degree of willingness to address these issues either in the WTO or in the World Intellectual Property Organisation (Switzerland), others, including the US and Japan, remain firmly opposed. They do not see any conflict between the CBD and TRIPS, and argue that patent disclosure requirements would be ineffective with respect to PIC and access and benefit-sharing goals, as well as adding a burden to the patent system.

These fundamentally differing views have led to a long-standing stalemate at the TRIPS Council. In 2005, Brazil and India, along with several other developing countries, made a number of submissions regarding disclosure, PIC and benefit-sharing (IP/C/W/442, IP/C/W/438 and IP/C/W/429). Peru has also taken a strong stance in favour of disclosure requirements - including penalties for non-compliance - as part of the patent system under TRIPS or under WIPO-administered treaties (IP/C/W/441 and IP/C/W/447), citing numerous cases of erroneously granted patents on Peruvian genetic resources and traditional knowledge. In response, the US has argued (IP/C/W/449 and IP/C/W/434) that national laws outside the patent system are the most effective way to ensure prior informed consent and equitable benefit-sharing, which could be arranged through contracts between the provider and the user of the genetic material and/or knowledge. The US has indicated that the suggested additional requirements would be a burden on the patent system and would undermine technological development incentives. Where patents have been granted erroneously, the US has suggested that Members should focus on remedies, including the use of organised databases, information on patentability criteria and post-grant opposition or re-examination systems, as an alternative to litigation.

At the TRIPS Council meetings of 26 and 28 October 2005, Peru introduced a paper (IP/C/W/457) providing an analysis of the benefits that a disclosure requirement could have had in the 'biopiracy' case concerning the Camu Camu plant. India, Brazil, Bolivia, Cuba and Pakistan (IP/C/W/458) provided technical observations on the previous US submission (IP/C/W/449), arguing that a contract-based approach to access and benefit-sharing was insufficient. India and Brazil noted the new level of maturity in the discussions and emphasised that many delegations believed disclosure would be an efficient and workable solution to biopiracy, which could be complemented by the national contract-based approach proposed by the US. In addition, India and Brazil stressed that the TRIPS Council, in its work under paragraph 19 of the Doha Declaration, should be guided by the objectives set out in Articles 7 and 8 of the TRIPS Agreement, fully taking into account the development dimension. Although these meetings failed to yield consensus, many developing country delegations seem determined to move forward on biodiversity-related issues.

On 26 October, India proposed a paragraph for the Hong Kong Ministerial Declaration suggesting that "negotiations shall be undertaken on the relationship between the TRIPS Agreement and the CBD," which would cover *inter alia* "the details of the mandatory requirements on patent applicants to disclose," as well as PIC and benefit-sharing. The proposed paragraph received strong developing country support but raised objections from the US and Japan.

### Implementation Issues

*Non-violation complaints (paragraph 11.1 of the Doha Implementation Decision):* 'Non-violation' complaints are legal actions provided for in Articles XXIII (b) and (c) of GATT 1994 that allow Members to bring a dispute to the WTO based on the loss of an expected benefit caused by another Member's actions even if the actions do not violate WTO law. The purpose of allowing such complaints was to dissuade

countries from altering the negotiated 'balance of benefits' by instituting trade-restrictive but formally GATT-consistent measures. Critics argue that permitting litigation against measures that do not violate WTO rules undermines the predictability of the rules-based trading system. Article 64.3 of the TRIPS Agreement calls for the examination of the scope and modalities for such complaints in the TRIPS context.

The potential application of this type of legal action in the field of intellectual property rights is particularly controversial. The TRIPS Agreement was designed to establish standards for intellectual property protection rather than to protect market access, the main purpose behind GATT Articles XXIII (b) and (c). Moreover, some Members are concerned that countries might use it to bilaterally pressure weaker ones and as such have detrimental effects on issues of high socio-economic importance, such as health, technology transfer or nutrition.

Members agreed in Doha to not initiate non-violation complaints for two additional years (Article 64.2 of the TRIPS Agreement itself had established an initial non-application period of five years). The US is the principal advocate for allowing non-violation complaints in the TRIPS context, while many other countries have proposed removing the possibility of such complaints from the TRIPS Agreement. The 'July Package' explicitly extended the moratorium until the Sixth Ministerial Conference in December 2005. As no progress has been made on a more permanent solution, the moratorium is likely to be further extended in Hong Kong.

*Additional protection for geographical indications (tired 87 of the Compilation of Outstanding Implementation Issues; JOB(01)/152/Rev.1):* Paragraph 18 of the Doha Declaration provides for the TRIPS Council to address the controversial question of whether to extend to other products the protection of GIs afforded by Article 23 to wines and spirits. Bulgaria brought up the issue in the TRIPS Council in April 2003; it was also first to raise it in the context of the agriculture negotiations. Discussions on GI extension have effectively blocked progress on the other implementation issues, which came under the remit of Article 12(b) of the Doha Declaration, i.e. those for which the Doha Ministerial had not provided a specific negotiating mandate.

The EU and Switzerland are the main *demandeurs* for GI extension. They have been joined by a number of developing countries - including India, Kenya, Sri Lanka and Thailand - in calling for negotiations on this issue, although the latter group is not advocating the inclusion of GI extension within the agriculture negotiations. GI extension is strongly opposed by the US, Argentina, Australia and other 'New World' countries that are net exporters of agricultural products, as well as frequent users of 'Old World' GIs for their own food products, such as names of hams or cheeses. The EU's 28 October 2005 agricultural tariff offer formally linked GI protection (including extension) to the agriculture negotiations, thus marking the already divisive issue as a key priority and potential deal-maker or deal-breaker in Hong Kong.

## Parallel Developments

IPRs have been, and continue to be, among the most controversial chapters of bilateral and regional free trade agreements (FTAs), particularly between the US and developing countries. So far, the US has prevailed on its would-be FTA part-

ners to accept a number of 'TRIPS-plus' provisions, including enhanced protection for pharmaceutical test data, which is likely to delay the introduction of generic versions of medicines. Its FTAs also contain routine clauses offering stronger protection to trademarks than GIs, as well as enhanced protection for plant varieties. On the other hand, US has received its first TRIPS-plus requests from Thailand and the Andean Community, both of which have proposed that genetic resources/TK disclosure be made a part of patent filing criteria in their FTAs with the US. This reflects the growing determination of developing countries - despite considerable negotiating challenges - to push for a disclosure requirement at national, bilateral, regional and multilateral levels.

WIPO was recently invited to integrate a more development-friendly approach into its work on elaborating and implementing IP treaties. Based on an original proposition put forward by 14 developing countries, including Argentina and Brazil (WO/GA/31/12), the WIPO General Assembly has established a mechanism to consider the various aspects of the proposal. The Intergovernmental Committee on Intellectual Property, Genetic Resources, Traditional Knowledge and Folklore (IGC) has also contributed to the recognition of the importance of traditional knowledge, as well as providing a forum for discussion on some of the inherent limitations of the intellectual property system on this issue. Some substantive gains have also been made through the IGC. For example, an amendment was made to the Patent Co-operation Treaty in the minimum documentation list requiring patent offices to consider sources outside of scientific literature, including journals on traditional knowledge.

# Trade Facilitation

## Doha Mandate:

*Recognizing the case for further expediting the movement, release and clearance of goods, including goods in transit, and the need for enhanced technical assistance and capacity building in this area, we agree that negotiations will take place after the Fifth Session of the Ministerial Conference on the basis of a decision to be taken, by explicit consensus, at that Session on modalities of negotiations. In the period until the Fifth Session, the Council for Trade in Goods shall review and as appropriate, clarify and improve relevant aspects of Articles V, VIII and X of the GATT 1994 and identify the trade facilitation needs and priorities of Members, in particular developing and least-developed countries. We commit ourselves to ensuring adequate technical assistance and support for capacity building in this area."*

(Paragraph 27 of the Doha Ministerial Declaration)

*The Doha Ministerial Declaration also provided identical mandates for investment, competition policy, transparency in government procurement and trade facilitation.*

(Paragraphs 20, 23 and 26 of the Doha Ministerial Declaration)

The 2004 July Package represented the first concrete agreement on the status of the so-called Singapore issues in the Doha Round since talks broke down at the Cancun Ministerial in September 2003. WTO Members agreed on the basis of 'explicit consensus' in the General Council to formally launch negotiations on trade facilitation, while dropping the more contentious issues of investment, competition policy and transparency in government procurement from the Doha work programme.

Annex D of the July Package states that negotiations "shall aim to clarify and improve relevant aspects of Articles V, VIII and X of the GATT 1994 with a view to further expediting the movement, release and clearance of goods, including goods in transit." Article V deals with freedom of transit for goods from another Member, and states that all charges imposed on goods in transit must be 'reasonable'. Article VIII says that fees and formalities connected with importation and exportation must be about equal to the cost of the services rendered, so that they do not constitute a form of indirect protection, and calls for reducing the number and diversity of such fees. GATT Article X requires all trade regulations to be clearly published and fairly administered.

The modalities for the negotiations contain a series of unprecedented caveats for special and differential treatment (S&D) for developing and least-developed countries (LDCs), such as tying the extent of their obligations under the final agreement to their capacity to implement them. Technical assistance and capacity building provisions are also more binding than they are elsewhere: if developing and least-developed countries do not receive the additional support and assistance that they need to develop the infrastructure necessary to implement their commitments, they simply will not have to.

## Mandated Deadline

As the 2004 agreement to launch negotiations on trade facilitation makes the issue part of the Doha 'single undertaking', the negotiations will conclude when the Doha Round does.

## Background

The 1996 Singapore Ministerial Declaration established working groups to analyse issues related to investment, competition policy and transparency in government procurement. It also directed the Council for Trade in Goods to "undertake exploratory and analytical work [...] on the simplification of trade procedures in order to assess the scope for WTO rules in this area." (For an overview of the run-up to the WTO Cancun Ministerial, refer to the ICTSD-IISD Doha Round Briefing Series, Volume 2).

Paragraph 27 of the Doha Declaration provides the mandate for the Working Group on Trade Facilitation. (WGTF). The post-Doha WGTF work programme is organised around the following three 'core' agenda items: (i) GATT Articles V, VIII and X, each to be addressed in consecutive meetings; (ii) trade facilitation needs and priorities of Members, particularly developing and least-developed countries; and (iii) technical assistance and capacity-building.



At the Cancun Ministerial Conference, the EU showed eleventh-hour willingness to take investment and competition off the negotiating table, but the meeting ended abruptly before any decisions were taken. The fate of all four Singapore issues consequently remained unclear until informal consultations on the way forward started a year later.

A willingness to discuss trade facilitation emerged in December 2003. Bangladesh, on behalf of the LDC group, supported by 15 other developing countries including China and India, submitted a communication on the Singapore issues (WT/GC/W/522) requesting that investment, competition and transparency in government procurement be dropped. In April 2004, a 'core-group' of developing countries and LDCs said they were prepared to discuss trade facilitation, but only for the purpose of clarifying substantive modalities for negotiations. In addition to insisting that negotiations must be based on 'explicit consensus', they called for the remaining Singapore issues to be definitely removed from the WTO work programme, and expressed a desire to see prior movement in issues such as agriculture before starting discussions on trade facilitation.

Developing countries acceptance of negotiations under the July Package was largely due to what one delegate described as "development language unprecedented in WTO negotiating history", as well as a perception of progress on the critical issue of agriculture since Cancun. It also served to alleviate fears on the part of poorer countries with regard to the cost-burden associated with implementation.

## Current State of Play

In post-July negotiations, WTO Members have agreed to deal first with the clarification and improvement of the articles related to trade facilitation mentioned in the July Package. Some international organisations have already presented their work and findings on trade facilitation to Members, and they will be invited to attend future meetings on an ad hoc basis. The negotiating process has been described as 'flexible', 'evolutionary' and 'Member-driven'. Many Members believe that trade facilitation efforts will lead to improved transparency, certainty, legal security and efficiency in customs procedures. The benefits to small- and medium-size enterprises (SMEs) have been highlighted in many submissions. Landlocked developing countries in particular hope that the negotiations will address their concerns about border delays and higher transit costs for their goods. Difficulties have, however, arisen with regard to the timing and extent of commitments on technical and financial assistance to help developing/least-developed countries implement trade facilitation provisions.

Since February 2005, interactive discussions on the substantive issues under the negotiating mandate have been fuelled by the large number of submissions tabled, by both developed and developing countries, and assisted by the presence of technical experts and officials from capitals. An interesting feature of these negotiations has been the joint tabling of submissions by developed and developing countries and countries from different regional groupings, which on other issues in the Doha negotiations would often find themselves at the opposite ends of the table.

For instance, Paraguay, Rwanda and Switzerland have jointly proposed that Members examine ways to improve and clarify the provisions of GATT Article V on freedom of transit, with a view to finding solutions to the particular problems affecting land-locked developing countries (TN/TF/W/39). Ten percent - or about 350 million people - of the total developing country population live in such countries. As a percentage of exports, freight and insurance costs in the least-developed among them account for nearly 13 percent on average, rising to more than 50 percent for certain African countries (the averages are 8.1 percent in developing and 5.8 percent in developed countries). These costs have direct implications for the competitiveness of SMEs, and thence livelihoods in the poorest land-locked

countries. The submission noted that as existing international transit arrangements faced huge implementation problems, the establishment of WTO rules on transit would "provide land-locked countries with effective instruments [...] to make such agreements work." The proposal also noted that technical and financial assistance would be required in cases where the developing/least-developed country lacked adequate information technology, or a sufficiently developed banking system for customs to require shipments to be covered by bank guarantees.

This proposal responds, *inter alia*, to the trade facilitation priorities identified by the African Group, i.e. the reduction of transport and communication costs, enhancing the capacities of customs administrations, and the integration of African enterprises/economies into international payments and insurance systems (TN/TF/W/33).

India and the US have proposed the establishment of a multilateral mechanism to facilitate information exchange (TN/TF/W/57), and Pakistan and Switzerland have tabled a submission on a specific, transparent and predictable technical assistance and capacity-building mechanism (TN/TF/W/63). The use of international standards as the basis of documentation and data requirements was raised by New Zealand, Norway and Switzerland (TN/TF/W/36), as well as Bolivia, Mongolia and Paraguay (TN/TF/W/28). Submissions have also raised issues such as corruption, non-discrimination regarding modes and routes of transport, and security.

## Support and Assistance

The operationalisation of technical assistance, as well as capacity-building and special and differential (S&D) treatment, have been at the heart of many developing country submissions, including those by the African Group (TN/TF/W/56) and several Latin American countries (TN/TF/W/41). The African Group made strong statement in April regarding the high importance it attaches to

enhanced S&D, technical assistance, support for capacity-building and implementation assistance, adding that "the right to select policy options and exercise policy flexibility granted in favour of developing and least-developed countries must remain sacrosanct" (TN/TF/W/33). The EU has given examples of several trade facilitation initiatives underway, including a 60 million euro project to overhaul customs administration in Egypt (TN/TF/W/37), as well as the importance of trade facilitation-related technical assistance in the EU's free trade area negotiations with Mercosur and ACP countries. The EU has also said that it will increase direct aid to improve infrastructure in African countries.

Some tension is evident in this area, however. A number of WTO delegates have stressed the importance of allaying developing country fears that technical assistance will be 'one-off' and short-term rather than 'dynamic' and long-term. Others have raised the lack of clarity over sequencing, i.e. should needs assessment be tackled first, followed by technical assistance and then WTO commitments, or should WTO commitments be addressed before needs assessment, followed by technical assistance.

On 11 November, talks broke down over a draft report prepared by the Chair of the negotiations, Ambassador Muhamad Noor Yacob of Malaysia, who suggested that there was a need to "move into focused drafting mode early enough in 2006 so as to allow for a timely conclusion to text-based negotiations on all aspects of the mandate." African and least-developed countries had said earlier that they wanted more detailed commitments on technical and financial assistance, as well as capacity-building, before starting text-based negotiations on trade facilitation disciplines. Developed countries, on the other hand, argued that details on technical assistance/capacity-building could only be settled once the provisions themselves were clearer. On 11 November, the EU said it could not accept the latest changes proposed to the Chair's report. The US and Canada also suggested that the amendments would break the report's 'delicate balance'. The negotiating group was tentatively scheduled to meet on 18 November in hopes of securing a compromise.

Although Members have already discussed a Secretariat document (TN/TF/W43/Rev.2) that consolidates into a single text existing proposals on the broad mandate of the trade facilitation negotiations, it now looks unlikely that a single text laying out the basis for further substantive negotiations will emerge by the Hong Kong Ministerial. While this is a disappointment to some Members, others would be content with a ministerial stock-taking exercise.

### Other Singapore Issues

Paragraph 1(g) of the July Package states that the other Singapore issues (investment, transparency in government procurement and competition policy) "will not form part of the Work Programme set out in [the Doha] Declaration and therefore no work towards negotiations on any of these issues will take place within the WTO during the Doha Round." Indeed, all clarification work on Singapore issues other than trade facilitation has been suspended. In addition, the WTO's Technical Assistance Plan for 2005 states that the three remaining Singapore issues will not be covered in regional seminars, although assistance could be requested at the national level. They will also continue to feature in Geneva-based and Regional Trade Policy Courses (see Doha Round Briefing No.12).



## Doha Mandate:

*"In the light of experience and of the increasing application of these instruments by Members, we agree to negotiations aimed at clarifying and improving disciplines under the Agreements on Implementation of Article VI of the GATT 1994 [i.e. the Antidumping Agreement] and on Subsidies and Countervailing Measures, while preserving the basic concepts, principles and effectiveness of these Agreements and their instruments and objectives, and taking into account the needs of developing and least developed participants. In the initial phase of the negotiations, participants will indicate the provisions, including disciplines on trade distorting practices, that they seek to clarify and improve in the subsequent phase. In the context of these negotiations, participants shall also aim to clarify and improve WTO disciplines on fisheries subsidies, taking into account the importance of this sector to developing countries."*

(Paragraph 28 of the Doha Ministerial Declaration)

*"We also agree to negotiations aimed at clarifying and improving disciplines and procedures under the existing WTO provisions applying to regional trade agreements. The negotiations shall take into account the developmental aspects of regional trade agreements."*

(Paragraph 29 of the Doha Ministerial Declaration)

# Negotiations on WTO Rules

In 2005, the Negotiating Group on Rules - tasked with 'improving and clarifying' WTO provisions governing anti-dumping, subsidies and countervailing measures, as well as regional trade agreements - met mainly in informal sessions of a highly technical nature and entered into preliminary discussions on possible textual amendments to certain parts of the anti-dumping and subsidies agreements. Members' interests and positions remain highly divergent over a wide range of complex issues, and many expect the rules talks to wrap up only after the outcomes in other areas of the Doha Round negotiations are much clearer.

Members differed with regard to how they wanted the negotiations to progress. At the beginning of the year, the 'Friends of Anti-dumping Negotiations' (FAN) - a group comprising 14 developing and developed countries with a common interest in tightening rules governing anti-dumping investigations and measures - called for accelerated negotiations and the preparation of "a stepping-stone, that is, a textual basis [...] that can pave the way for the final stage of negotiations." The US, however, said it was not yet prepared to move to negotiations based on text, and India and Egypt emphasised the need for more attention to developing country issues such as special and differential treatment.

In his report to the Trade Negotiations Committee in July 2005, Chair Ambassador Guillermo Valles Galmes of Uruguay concluded that in order to complete negotiations on time, there must be text-based negotiations in 2006. His draft text for the Hong Kong ministerial declaration issued on 15 November would have ministers instruct the Chair to prepare consolidated texts of amendments to the anti-dumping and subsidies agreements that would form the basis for the final phase of the negotiations. In discussions following the circulation of the draft text, China, Brazil, Egypt, Switzerland and Venezuela said that setting deadlines would be premature at the current stage.

Within the rules negotiations, fisheries subsidies have been singled out as a specific subsidies category for further discussion. Since Cancun, substantial progress has been made in this area, and the discussion has moved from *whether* there should be specific disciplines on fisheries subsidies to the *nature* and *extent* of such disciplines. In 2005, Members have made a number of new submissions with a strong focus on the development dimension of the negotiations.

Members have also met regularly on regional trade agreements (RTAs), including in open-ended informal discussions on transparency and systemic issues.

## Mandated Deadlines

- 1 January 2005, conclusion of the negotiations as part of the single undertaking agreed in Doha. This deadline is now *de facto* extended until the Round concludes.

## Background

The inclusion of trade remedy and subsidy rules in the Doha Round was a victory for developing countries. As frequent targets of anti-dumping and countervailing investigations - and subsequent import duties - on industrial goods, they had pushed for tightening disciplines on the use of remedies since before the WTO's failed Seattle Ministerial Conference. To secure a negotiating mandate in Doha, the FAN had to overcome stiff resistance from the US, which has traditionally viewed trade remedies as an essential tool of its trade policy. While not a 'Friend', the EU conceded

that in order to achieve a negotiating mandate acceptable to all Members, concerns on trade remedy agreements would have to be addressed despite the issue's political sensitivity. This view finally prevailed in Doha, albeit with the potentially significant proviso that the negotiations must "preserve the basic concepts, principles and effectiveness of these Agreements." The explicit mention of fisheries subsidies in the Doha mandate for the rules negotiations was due to the concerted efforts of the 'Friends of Fish' (FoF) - a loosely defined group of countries that includes Australia, Argentina, Chile, Ecuador, New Zealand, the Philippines, Peru, Norway, Iceland and the US.

During the first phase of negotiations from Doha in 2001 to Cancun in 2003, Members made 141 submissions of a mostly general nature. At the first post-Cancun rules meeting in March 2004, Members decided to start a new informal process focusing on the technical details of the numerous proposals tabled. Entering into informal talks entailed moving on from the issue identification of the first phase of the work programme to negotiating over compromises. Members submitted 55 elaborated proposals (both formal and informal) during this second phase. All but ten of these relate to trade remedies, i.e. anti-dumping and - to a lesser extent - countervailing measures.

During the third phase, which started in spring 2005, the Chair supplemented this process with bilateral and plurilateral consultations to discuss submissions proposing specific changes to the anti-dumping agreement. The number and composition of Members consulted varied from issue to issue.

Regional trade agreements (RTAs) have been under scrutiny in the WTO since its creation, but Members have thus far failed to reach conclusions with regard to any particular agreement's WTO compatibility, or to arrive at a common understanding of key definitions. At Doha, Members acknowledged for the first time the need for coexistence between regionalism and multilateralism. The challenge of the Doha Round negotiations is to devise an approach that balances the proliferation of RTAs with efforts under the WTO.

## Anti-dumping, Subsidies and Countervailing Measures

More proposals and questions/comments have been tabled on anti-dumping than on any other issue under consideration in the Negotiating Group. In February 2005, the FAN put forward six negotiating objectives: mitigating the 'excessive effects' of antidumping measures; preventing such measures from becoming permanent; strengthening the due process and transparency of dumping proceedings; reducing the cost of antidumping cases (often prohibitive to small firms); ensuring a quick end to unjustifiable investigations; and improving and clarifying rules on what constitutes 'dumping' and 'injury.'

To that end, submissions by the FAN and other countries have tackled the question of how to improve the definitions of the technical terms in the anti-dumping agreement in a way that gives less opportunity for protection-seeking domestic industries and their governments to abuse the system. In this context, submissions have focused on more precise definitions for such terms as 'dumped imports', 'domestic industry'; the determination of 'normal value', 'constructed export price', 'like product', 'causation' and 'product under consideration'.

Other proposals address the procedures governing the initiation, conduct and completion of anti-dumping investigations. They seek to reduce the burden placed on exporters involved in such investigations (e.g. the obligation to provide financial data about 'affiliated parties') and to tighten the rules that give right to the initiation of an investigation in the first place, including a requirement that domestic industries that request the initiation of an investigation must represent a certain minimum share of total domestic production. 'Public interest' clauses aim to give exporters or other groups who may be affected by the anti-dumping measure opportunities to comment on the investigation application before procedures are started or when they are at an early stage. Submissions on 'facts available' seek to give exporters in an investigation greater flexibility to submit missing or supplementary information. Proposals also seek to improve rules on the level, scope and duration of measures, such as 'sunset clauses' that provide for the automatic termination of an anti-dumping measure five years after its imposition or the 'lesser duty rule' which stipulates that the amount of the duty collected may not exceed the dumping margin.

The US has focused in particular on introducing rules that would make it more difficult for exporters of dumped goods to circumvent anti-dumping duties or countervailing measures. Exporters have in the past tried to get around duties by modifying the product targeted by anti-dumping measures or by setting up assembly plants either in the country that imposed the duty or in third countries not affected by the measure. The US proposal on the prevention such practises met with strong resistance from the rest of the Membership and developing countries in particular. However, the US warned that it would block other initiatives in the rules negotiations should anti-circumvention be deleted from the Hong Kong ministerial declaration. At the time of writing, the draft text explicitly mentioned that rules regarding anti-circumvention proceedings ought to be clarified and improved.

Of the proposals/comments submitted on the subsidies and countervailing (SCM) agreement, about half focus on the agreement's trade remedy (i.e. countervailing) provisions, while the other half centre on subsidies, focusing on issues such as definition of subsidy, export and local content subsidies, export credits, remedies for prohibited subsidies, serious prejudice, non-actionable subsidies, subsidy notifications, special and differential treatment, natural resource and energy pricing, taxation, and the calculation of subsidy amount.

## Fisheries Subsidies

A number of Members have focused on the elimination of fisheries subsidies as possibly the greatest contribution the multilateral trading system could make to sustainable development. The FoF has pointed to the 'win-win-win' nature of such action: good for the environment, good for development and good for trade. The group argues that subsidies are at least partly responsible for the alarming deple-



tion of many fish stocks and have contributed to the distortion of international fish trade by lowering the cost and increasing the volume of production.

Others, notably Japan and Korea, initially opposed this position, arguing that the principal cause of stock depletion was inadequate management of fisheries resources rather than subsidies and that the trade-distorting effects of fisheries subsidies should be discussed as part of the broader subsidies negotiations. However, in a June 2004 break-through submission, Japan acknowledged the need for disciplines on fisheries subsidies, turning the debate from *whether* specific disciplines should be established to how they should be addressed. The Japanese proposal was supported by Korea and Taiwan.

The proposals on fisheries subsidies are based on a 'traffic light' approach that includes three categories: a 'green box' of non-actionable subsidies; a 'red box' of prohibited subsidies; and possibly an 'amber box' of subsidies subject to disciplines if specific 'adverse effects' can be demonstrated. However, two alternative frameworks compete in the negotiations. The FoF have proposed a 'top-down' (positive or comprehensive list) approach, which calls for a general prohibition of fisheries subsidies that benefit the fishing industry with specific exceptions (see e.g. TN/RL/W/3, TN/RL/W/58 and TN/RL/W/166). Such an approach is also thought to enhance transparency of fisheries subsidies by providing Members an incentive to notify the programmes that they wish to maintain.

Japan, Korea and Taiwan support a 'bottom-up' (negative list) approach, which would require Members to identify prohibited subsidies on a case-by-case basis (TN/RL/W/172). They have argued that a blanket ban of subsidies, by limiting flexibility in the use of policy tools and eliminating an 'effect test', would differentiate fisheries from other sectors that are disciplined based on their trade impacts. They have proposed that all subsidies deemed to directly cause serious harm to fisheries resources should be prohibited, including subsidies for capacity-enhancement of fishing vessels and subsidies relating to illegal, unreported and unregulated (IUU) fishing. 'Green box' subsidies should include those with positive effects on fish stock recovery, social security, welfare, and research and development.

## Special and Differential Treatment

Submissions by Brazil (TN/RL/W/174 and TN/RL/GEN/56) on the special concerns of developing countries included an elaborate list of special and differential treatment (SDT) provisions. Brazil called on developed countries to bear the brunt of the burden resulting from stricter fisheries subsidy disciplines, and to permit capacity-enhancing subsidies in developing countries under certain conditions. Its suggested 'green box' subsidies included: financial contributions to management services; support for adoption of environmentally-friendly fishing equipment and compliance with safety standards that do not have trade- or production-distorting effects; fees paid by other governments to access developing countries' Exclusive Economic Zones (EEZ); assistance to disadvantaged regions dependent on fisheries; and, under specific conditions, subsidies to small-scale fishing and capacity reduction. All subsidies not falling under the 'green box' would be considered 'red box' subsidies. In the case of least-developed countries (LDCs), these would be actionable for ten years, and challenged only if they were trade-distorting.

Furthermore, developing country members of regional fisheries management organisations (RFMOs) should be allowed to maintain certain capacity-enhancing subsidies within the limits of a "sustainable level of exploitation established under the RFMO." As a transparency-enhancing measure, Brazil suggested a notification requirement that would presume any subsidy not notified to be prohibited. Addressing Japan's concern about IUU fishing, Brazil proposed that all of a Member country's 'green box' subsidies should become challengeable under WTO rules if an RFMO found a single vessel registered in that country engaged in such activities. However, Japan contended that such an approach would adversely affect developing countries that have less capacity to enforce efficient management. Several developing country Members supported the strong S&D provisions proposed by Brazil, and Sri Lanka particularly appreciated the section on natural disasters that would allow financial support to fishermen struck by natural catas-

trophes. The EU, China and the FoF also welcomed the paper, while Japan, Korea and Taiwan criticised it.

Eight 'small vulnerable coastal states', including Antigua and Barbuda, Belize, Fiji, Guyana, the Maldives, Papua New Guinea, the Solomon Islands, and St Kitts and Nevis, had previously submitted a proposal that highlighted the relatively high dependence of their populations on fisheries, and called on Members to address the sustainable development concerns of small vulnerable coastal states, including the operationalisation of proposals on SDT for developing countries in this area (TN/RL/W/136). They would like to see the following to be excluded from the definition of a subsidy: access fees and development assistance; fiscal incentives to domestication and fisheries development; and assistance to artisanal fisheries.

In September 2005, the group - excluding Belize and the Maldives but joined by Barbados, the Dominican Republic, Grenada, Jamaica, St Lucia, and Trinidad and Tobago - reiterated this position (TN/RL/GEN/57). It also called into question both the appropriateness of the WTO as a forum for handling subsidies that are solely production-related and not trade-distorting, and the use of a 'traffic light' approach to addressing fish stock conservation issues. Reactions to the proposal were mixed. Brazil, Chile, China and Peru voiced concern about the proposal's implicit differentiation between small vulnerable coastal states and other developing countries.

## Specific Issues

Several submissions elaborated on specific subsidies categories. The US submitted further clarifications on subsidies for vessel decommissioning as a candidate for the 'green box' (TN/RL/GEN/41). Some Members noted that the usefulness of decommissioning schemes depended on the criteria and conditions attached. New Zealand suggested that fisheries subsidies to management services should be allowed under WTO rules, but acknowledged that an agreed definition of 'management services' would be neces-

sary (TN/RL/GEN/36). New Zealand also highlighted issues related to infrastructure subsidies, arguing that subsidies specific to fisheries infrastructure could have an effect on overfishing and overcapacity and should therefore be prohibited under new disciplines (TN/RL/GEN/70). Japan, Korea and Taiwan were reluctant to distinguish between fisheries and other infrastructure, which they said was impossible to do in practice. In another submission, Japan linked IUU fishing and subsidies, arguing that subsidies for overseas transfers of fishing vessels may lead to IUU fishing (TN/RL/GEN/47). FoF members took this as an argument in favour of tackling fisheries subsidies in general, rather than trying to identify those that might lead to IUU fishing on a case-by-case basis.

In a joint submission, Australia, Ecuador and New Zealand raised general questions about subsidies to aquaculture (TN/RL/GEN/54). However, the EU and India questioned whether these subsidies would fall within the fisheries subsidies mandate. China opposed applying any new rules to inland fisheries and aquaculture. Following a second brief discussion of the issue in September 2005, aquaculture was dropped from the agenda for the time being.

The EU introduced enforcement issues into the debate, proposing a dual notification system for fisheries subsidies (TN/RL/W/178 and TN/RL/GEN/39). Members could choose either domestic control systems, whereby they would endorse fisheries subsidies in national law after they have been granted, or a multilateral control system requiring notification to the WTO prior to the provision of fisheries subsidies. A de minimis rule would impose less stringent notification requirements on small subsidies. Information about subsidies should be made readily available to WTO Members via the Internet. Members were reluctant

to discuss enforcement of disciplines without knowing the outcome of the various categories and sceptical about the effectiveness of the national enforcement solution. Brazil found the proposal insufficient to address developing country needs despite the inclusion of longer phase-in periods and technical assistance.

## Regional Trade Agreements

In mid-November 2005, the Chair's draft text for the Hong Kong ministerial declaration proposed the following elements for an RTA 'transparency mechanism': early announcement, notification, consultative/review process, subsequent notification and reporting, dissemination of RTA information, technical support, transitional provisions, and appraisal of the implementation of the transparency mechanism. The text also had two transparency-related annexes, one on the 'submission of data by RTA parties' and another on 'outlines for the Secretariat's report'.

Several Members, including the US, Chile, Australia and the EU expressed support for the Chair's text, although the latter two would also like to see movement on 'systemic issues', i.e. the clarification and improvement of WTO rules on RTAs.

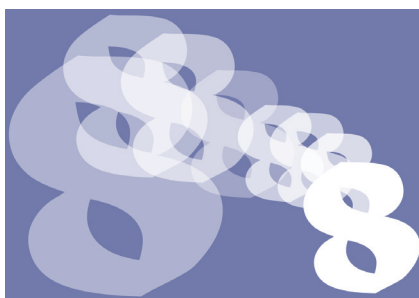
For instance, while GATT Article XXIV:8 (b) requires 'duties and other restrictive regulations of commerce' to be eliminated on 'substantially all the trade' between the parties to an RTA, WTO Members have so far been unable to agree on (i) what constitutes 'substantially all trade', and (ii) how to define the 'other restrictive regulations of commerce' that should be eliminated.

The EU and China have proposed limiting the discussions on 'substantially all trade' to a quantitative benchmark, which could be based on a percentage of tariff lines, the volume of trade in a given product, or a combination of the two. Japan has indicated a preference for a trade volume test, while Australia has proposed the elimination of all duties on a very high minimum of 95 percent of tariff lines at the six-digit level of the Harmonised System at the end of a transitional period. Australia has also proposed that at least 70 percent of 'highly traded' products should be liberalised when an RTA enters into force.

Members have tabled several proposals on the transition period for the full implementation RTAs (GATT Article XXIV:5 (c) requires this to happen 'within a reasonable period of time'). Convergence seems to be emerging on a 10-year period, but countries are flexible with longer timeframes, the EU in 'limited circumstances' and Japan for certain 'types of products'. The ACP group has proposed that liberalisation become operational only after the expiry of an 18-year transition period, and should be linked to countries' development and financial status.

No consensus has emerged on the inclusion and/or form of special and differential treatment (SDT) in RTAs, particularly those between developed and developing countries. In April 2004, African, Caribbean and Pacific (ACP) states submitted a proposal that called for SDT to be explicitly incorporated in any new WTO rules on regional trade agreements. China is the only other Member to have proposed that WTO rules on RTAs should explicitly allow SDT to be granted to developing countries.

The inclusion of the Enabling Clause as an issue for negotiations under the RTA transparency provisions has pitted developed against developing countries. ACP countries, Brazil, China, Egypt and India oppose it, while all developed countries - supported by a few developing countries such as Chile - favour its inclusion.



### Doha Mandate:

*"We attach the utmost importance to the implementation-related issues and concerns raised by Members and are determined to find appropriate solutions to them. In this connection, and having regard to the General Council Decisions of 3 May and 15 December 2000, we further adopt the Decision on Implementation- Related Issues and Concerns in document WT/IN(01)/W/10 to address a number of implementation problems faced by Members. We agree that negotiations on outstanding implementation issues shall be an integral part of the Work Programme we are establishing, and that agreements reached at an early stage in these negotiations shall be treated in accordance with the provisions of paragraph 47 below. In this regard, we shall proceed as follows: (a) where we provide a specific negotiating mandate in this Declaration, the relevant implementation issues shall be addressed under that mandate; (b) the other outstanding implementation issues shall be addressed as a matter of priority by the relevant WTO bodies, which shall report to the Trade Negotiations Committee, established under paragraph 46 below, by the end of 2002 for appropriate action."*

(Paragraph 12 of the Doha Ministerial Declaration)

# Review of the Dispute Settlement Understanding

Despite picking up intensity in 2005, the review of the WTO's Dispute Settlement Understanding (DSU) has continued to move slowly. This is largely because of Members' unwillingness to move forward in the absence of concrete advances in their key areas of interest in the Doha Round, notwithstanding the formal decoupling of the review from the negotiation's 'single undertaking'. In addition, while recognising that the DSU has much room for improvement, most Members consider it to operate well enough for the moment. Thus the clarification and/or amendment of dispute settlement rules is not the most pressing among current issues for most Members.

Many delegates have praised the quality of proposals tabled at the 2005 DSU negotiating sessions, as well as the informal meetings arranged by the Chair, Ambassador David Spencer of Australia. The discussions brought clarity to a number of issues, while allowing Members to voice their differences of opinion. Delegates have also emphasised how the 'bottom-up approach' - under which the review's scope is left at the discretion of individual Members - had facilitated issue-by-issue discussions on the submissions presented, particularly in light of the failure of past attempts to define the scope of the DSU review.

Early in 2005, Chair Spencer urged delegations to change gears and speed up the negotiations. To facilitate discussion and consensus-building, he initiated a series of informal meetings in which delegates could seek clarification on proposals. Although the Chair suggested potential issues for discussion before each meeting, delegates were free to raise their own issues of interest. At the end of the summer recess, he called for progress in moving beyond issues of clarification to the active consideration of legal texts in formal negotiating sessions.

While the DSU negotiations stepped up between February and October 2005, there is no sign of consensus. Many delegates believe it unlikely that any agreement or substantive text will be submitted to ministers in Hong Kong. The most likely outcome of the conference is a paragraph in the Ministerial Declaration, urging delegations to accelerate the negotiations without mention of specific DSU issues. Negotiators are therefore bracing themselves for increased DSU activity post-Hong Kong. While there seems to be enough will to reach an agreement, the task is made difficult by the political sensitivities around some issues.

With a good number of proposals now on the negotiating table, many delegations are aiming at a 'package' agreement since this would improve the chances of forming a consensus. They recognise, however, that such a package might not address the most politically sensitive issue in this area, namely the implementation of WTO rulings. Indeed, it is possible that an agreement on implementation in the DSU might be postponed to a future review, or dealt with under a separate negotiation.

## Mandated Deadlines

Under the Doha Mandate, Members were to negotiate improvements and clarifications of the DSU by end-May 2003. In July 2003, they adopted a new end-May 2004 deadline, which was also missed. The 2004 July Package simply endorsed the continuation of the DSU negotiations.

Even though the DSU review currently has no set deadline, some trade delegates see mid-2007 as a *de facto* limit for the review's completion. This is based on speculation that the Trade Promotion Authority - under which the US executive branch is authorised to negotiate trade agreements without Congressional participation - is unlikely to be renewed when it lapses in late June 2007, and that getting a DSU amendment package through US Congress after that date might prove difficult. Consequently, delegates are aiming to agree a deal by late 2006 or early 2007.

### Background

During the Uruguay Round, ministers adopted a decision to complete a full review of the DSU within four years of the establishment of the WTO, i.e. by 1 January 1999. When this deadline was missed, it was extended to July 1999. At the Doha Ministerial in 2001, it was agreed to "improve and clarify" the DSU agreement, which has been under negotiation in Special Sessions of the Dispute Settlement Body (DSB) since March 2002.

### Key Issues Raised in the Special Sessions

During the first nine months of 2005 Members' submissions covered a wide range of topics. Framed by the bottom-up approach, topics were raised in accordance with the interests of delegations and discussion took place on an issue-by-issue basis. Although no consensus was reached on any of the proposals submitted, delegates indicated that some of them could form the building blocks of a future agreement.

#### Third Party Rights

A Group of Seven (G-7) - Argentina, Brazil, Canada, India, Mexico, New Zealand and Norway - submission addressed the issue of balancing the enhancement of third-party rights at all levels of the dispute settlement process with the preservation of the interests of the main parties involved in a dispute (Job (05)/19).

The revised text contains four main elements. The first refers to the granting of the right to third parties to join consultations. Under DSU Article 4.11, Members have to prove a 'substantial trade interest' in a case, which gives the defending Member considerable latitude to reject third party requests. Disagreeing with long-standing GATT and WTO practice, the G-7 questioned the effective sense of the definition of 'substantial trade interest', and proposed that a defendant should only be able to reject a Member's request for third party rights if all other such requests were also declined. The second element is related to the right of third parties to attend panel hearings and receive documentation. The third element proposes that, under certain conditions, third party rights should be granted to Members at the appellate stage without requiring their participation at the panel stage. Lastly, to secure parties the right to attend all meetings, the G-7 put forward an amendment to Appendix 3 (Working Procedures) since its paragraph 7 refers only to 'parties' and not 'third parties'. This would oblige the panel to invite third parties to attend the second and any subsequent meeting(s) held in the proceedings before its interim report is issued to the main parties in the dispute. The proposal was well-received by the many delegates who consider third party rights to be a key issue.

Granting all Members a *de facto* right to be accepted as third parties in any dispute, including access to all meetings and submissions, would enable developing countries to participate in the WTO dispute settlement process in spite of a lack of legal and financial capacity to initiate cases or prepare documentation showing a 'substantial trade interest'. From a broader perspective, this would also provide an important opportunity to WTO Members that have not previously participated in dispute settlement proceedings to gain first-hand experience about the system without having to fulfil the ever more complex requirements demanded from a complaining or defending party. Such experience would build developing country capacity to defend their trade interest in future disputes, as well as the negotiations on the DSU.

#### Sequencing

The Group of Six (G-6) - Argentina, Brazil, Canada, India, New Zealand and Norway - has proposed a clarification of the so-called 'sequencing problem' between Article 21.5 on non-compliance and Article 22 on retaliation rules (Job(05)/52). The inconsistency between the timelines for the completion of a compliance ruling and the request for trade sanctions came to light during the long-running banana dispute. Since then the defending and complaining Members have frequently resorted to bilateral arrangements similar to the one proposed by the G-6.

The issue of sequencing has recently become more controversial, however, with a joint submission by the EU and Japan (Job(05)/47) outlining a procedure to be followed when a Member under trade sanctions notifies the WTO that it has brought the condemned measures into compliance with the dispute settlement ruling. The two proponents suggest that if the Member applying the sanctions does not request a compliance panel within 60 days of the notification, the DSB shall, upon request, withdraw the authorisation to retaliate.

The proposal reflects the beef hormones dispute, where the EU notified its compliance measures to the WTO in 2003, but the US and Canada maintain that the measures do not constitute compliance and therefore refuse to lift the trade sanctions they have applied since 1999. As the latter two have refused to request a panel to determine whether compliance has indeed been achieved, the EU has initiated a new case against what it regards as their 'unilateral determination of [the EU's] non-compliance'. The root cause for both sides' reluctance to request a panel on the substance of the EU measures appears to be that the party initiating compliance proceedings bears the burden of proving its case.

#### Remand

The G-6 has also proposed that the Appellate Body should be required to send an issue back to original panel for review if it is unable to make a ruling on the basis



of the panel's findings (Job(04)/52). The establishment of such a 'remand' procedure under the DSU would respond to many Members' wish to see the dispute settlement system rule on all issues raised in a complaint, including those that currently remain unaddressed on the grounds that the panel report lacked a sufficient factual basis for the Appellate Body to complete its analysis.

According to the proponents, in such cases the Appellate Body should offer a detailed description of the nature of the findings that would be required to complete the analysis. After the adoption of an Appellate Body report, the issues highlighted therein could, upon request, be brought before the original panel, which would make its findings in accordance with the guidelines provided by the Appellate Body. All issues brought before a WTO panel and the Appellate Body would thus be addressed, unless the principle of judicial economy was found to apply.

### Panel Composition

The EU reiterated its call for the establishment of a permanent roster of panel members and submitted a discussion paper to further the debate (Job (05)/48). A permanent roster, as well as saving time and resources on the cumbersome process of selecting panellists, would ensure that the panel is more experienced in fact-finding and adjudication. The latter consideration is particularly important as panels continue to face increasing factual and legal complexity in their proceedings. As in the past, delegates remain divided over the merits of a fixed roster of panellists, with those against expressing concern over how it would be structured and its potential to narrow participation. Some developing country delegates have pointed out that compared to issues such as third party rights, sequencing and transparency, the panel roster debate represents merely a fine-tuning of the DSU. They advocate finding a better balance between the two levels of discussion.

### Transparency

Discussion continued on increased transparency, an issue long-championed by the US. In a July 2005 submission (TN/DS/W/79), the US elaborated on two previous proposals (TN/DS/W/13 and TN/DS/W/46) on opening up panel and Appellate Body hearings, and providing timely access to submissions and final reports. Two months after its submission, representatives of all Member countries, as well as the general public, were allowed to attend a dispute settlement hearing for the first time in the WTO's 10-year history. The hearing dealt with the beef hormone case (see under 'sequencing' above), and the parties to the dispute - the EU, Canada and the US - agreed to open the proceedings to the public through a closed circuit television link. Reflecting continued dissension among Members regarding the appropriateness of making dispute settlement proceedings public, the session involving third party arguments was not broadcast. Nevertheless, a precedent has been set for cases where all parties agree to make hearings accessible to the public.

In contrast, status quo will probably prevail on the other major transparency issue raised in the DSU review, i.e. the treatment of unrequested 'amicus' briefs submitted by public interest and other organisations or individuals. This deeply divisive topic has not been addressed in recent DSU review sessions, and most delegates predict that panels and the Appellate Body are likely retain their current right to consider such submissions, or to reject them without explanation.

### Additional Guidelines to WTO Adjudicative Bodies

The US put forward a set of questions (TN/DS/W/74) on developing modalities for panels and the Appellate Body, based on its long-standing disagreement with some of the interpretive methods used. The paper focused on the function, scope and limitations of the decision-making process. It also touched on the understanding of 'judicial economy', the use of public international law in the WTO, and the interpretive scope of panels and the Appellate Body in particular.

Although parts of the paper were well received, US calls to provide additional guidance to adjudicative bodies on the interpretation of WTO agreements and public international law found little support. The proposal reflects the US view that undue 'judicial activism' exercised by panels and the Appellate Body has been responsible for a number of adverse rulings over the years, especially in anti-dumping cases. In its proposal, the US suggested that Members discuss, inter alia, "what significance should attach to the fact that some provisions of the covered agreements are imprecise and susceptible to more than one interpretation", as well as whether it is appropriate for a panel or the Appellate Body to "fill in the gap" in the agreement text if the latter is "silent on an issue."

### Acceleration of Timeframes in Dispute Settlement Procedures

Throughout the DSU review, several Members have called for a tightening of timeframes in the dispute settlement process. Australia's 2002 submission (TN/DS/W/8) proposed time-saving mechanisms in areas such as safeguard disputes, compensation arrangements and the rights of non-parties to a dispute, sequencing, and surveillance of retaliation. A 2005 revised text from Australia prompted re-discussion of these issues. Although time-saving procedures have much support among delegations in principle, the full text of the Australian proposal was not well received. In particular, the idea of a fast-track procedure for safeguard disputes did not sit well with many delegates, and some felt the issue more suited to discussion under the Negotiating Group on Rules. On the other hand, Australia's proposal to shorten the timeframe for the complainant's first written submission was widely supported. Currently, this timeframe is almost twice as long as that afforded to the defending party. The revised text proposed an amendment requiring the complainant's first written submission to be lodged at the time of the first panel request.



## Doha Mandate:

*"With a view to enhancing the mutual supportiveness of trade and environment, we agree to negotiations, without prejudging their outcome, on: (i) the relationship between existing WTO rules and specific trade obligations set out in multilateral environmental agreements (MEAs). The negotiations shall be limited in scope to the applicability of such existing WTO rules as among parties to the MEA in question. The negotiations shall not prejudice the WTO rights of any Member that is not a party to the MEA in question; (ii) procedures for regular information exchange between MEA Secretariats and the relevant WTO committees, and the criteria for the granting of observer status; (iii) the reduction or, as appropriate, elimination of tariff and non-tariff barriers to environmental goods and services."*

(Doha Ministerial Declaration para. 31)

Further instructions to the Committee on Trade and Environment are included in paragraphs 33 and 51; see section on non-negotiating Doha Mandates

# Trade and Environment

Negotiations on the relationship between WTO rules and multilateral environmental agreements (MEAs), under paragraph 31(i) of the Doha Declaration, have been largely bogged down with procedural issues. Discussions on environmental measures and market access, eco-labelling and paragraph 51 (on integrating sustainable development into the round as a whole) are also virtually at a standstill. Only the negotiations on environmental goods, under paragraph 31(iii), have seen some movement.

## Mandated Deadlines

No specific interim deadlines have been set for the negotiations. The 31 negotiations, encompassing the specific environmental mandate, will be concluded as part of the 'single undertaking' agreed in Doha.

## Background

As the principal *demandeur* for WTO negotiations on environmental issues, the EU, supported by Japan, Norway and Switzerland, pushed hard for their inclusion in the Doha Ministerial Declaration. The majority of other Members opposed such negotiations. Developing countries' objections were primarily due to their desire to keep the agenda focused on development priorities. They were also concerned that environmental negotiations might expand the potential for the use of environmental measures to restrict market access for their goods. The US and some members of the Cairns group of agricultural-exporting countries were chiefly concerned about the potential for the EU to use an environment mandate to slow down agricultural subsidy reform or to further restrict entry of agricultural goods - including genetically-modified organisms - via eco-labelling or by citing the need for precautionary measures.

## Current State of Play

### Paragraph 31(i): MEA-WTO Relationship

Discussions on the relationship between WTO rules and specific trade obligations (STOs) in MEAs continue to largely focus on procedural issues. One group, including the US, Canada, Australia, Argentina, India and Malaysia, would like to keep the mandate as narrow as possible, focusing on a limited number of MEAs and on the mandatory and explicit STOs that they contain. They also favour an experience-based, analytical approach, with discussions focusing on national experiences in negotiating and implementing MEAs.

The main *demandeurs* of the trade and environment negotiations would like a broader, conceptual approach which, in addition to discussing specific MEAs, would also address the basic principles underlying the MEA-WTO relationship. Rather than limiting the discussions to mandatory specific trade obligations under a given MEA, they have called for the inclusion of all measures necessary to achieve the treaty's overall objective.

In July 2005, the EU submitted a document (TN/TE/W/53) outlining its internal policy co-ordination, development and processes for dealing with the MEA-WTO relationship. Switzerland, in a bolder paper (TN/TE/W/58), suggested that it was

'useful and necessary' to consider three principles for this relationship, namely: 'no hierarchy' between the environmental and trade legal systems; 'mutual supportiveness' of the two regimes; and 'deference' to the framework that includes particular issues within its primary area of competence. Upon request for clarification from New Zealand and other Members, Switzerland submitted another paper that explained the meaning of these terms (TN/TE/W/58). Referring to general principles of international law, Switzerland argued that MEA and WTO provisions must be interpreted in ways that maintain compatibility with both sets of rules in order to ensure the integrity of each. No discussion took place on the submission.

The US and several developing countries indicated that they would rather focus on Members' national experiences than revisit the debate on principles. While they saw little contradiction between the two regimes, some developing countries pointed to a clear tension in certain fields, including that between the Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPS) and the provisions of the Convention on Biological Diversity (CBD).

### **Paragraph 31(ii): Information Exchange and Observer Status**

While no concrete decisions have been taken on information exchange between the WTO and MEA secretariats and criteria for observer status, a number of suggestions have been made. These include regularisation/institutionalisation of existing MEA information sessions focused on specific topics; undertaking joint WTO, United Nations Environment Programme (UNEP) and MEA technical assistance and capacity-building projects; organising parallel WTO events at MEA Conferences of the Parties more systematically; and enhanced national level co-operation between trade and environment officials, as well as better collaboration between MEA and WTO secretariats at the international level (TN/TE/7).

The lack of clear rules for MEA observers at the negotiating sessions on the environment (currently stalled at the level of the General Council) continues to dog the negotiations. A number of MEA secretariats, UNEP, the United Nations Conference on Trade and Development (UNCTAD) and the Organisation of Economic Co-operation and Development (OECD) have attended the past few sessions as ad hoc, informal guests.

### **Paragraph 31(iii): Environmental Goods & Services**

In early 2002, Members agreed to shift the paragraph 31(iii) mandate on liberalising environmental goods and services (EGS) to the Negotiating Group on Non-agricultural Market Access (NAMA) and to the Council for Trade in Services Special Sessions, respectively. However, since there is no clear definition for environmental goods, the Committee on Trade and Environment (CTE) has continued to examine the scope and definitional aspects of this mandate. Regarding environmental services, most of the negotiations are currently at a bilateral request-offer stage as part of the overall services negotiations.

#### **Goods**

Discussions on environmental goods have dominated the CTE agenda in 2005. Some Members, including Japan, Taiwan and the US, have proposed to use the OECD and Asia-Pacific Economic Co-operation (APEC) lists as starting points. These lists focus mainly on 'end-of-pipe' technologies used to address environmental problems. Some developing countries have expressed concern that the OECD and APEC lists constitute an emerging definition for the WTO negotiations that is too heavily focused on goods of interest to developed countries. Given that negotiations on this point fall under the market access mandate, they emphasise that discussions should focus on products of export interest to developing countries and take fully into account the special needs and interests of poorer countries, including less than full reciprocity in tariff reduction commitments.

Several Members, including the EU, Switzerland, Brazil, New Zealand and India, have raised the possibility of broadening the definition to include environmen-

tally preferable products (EPPs), i.e. goods with high environmental performance and/or low environmental impact. Such products could include organic agricultural products; sustainably-harvested timber or non-timber forest products; fish products from sustainably-managed fisheries; or products made from natural fibres such as jute and coir.

The EU, in its March 2005 submission (TN/TE/W/47), acknowledged that some of these products might need to be defined through standards requiring certification and proposed using schemes included in the existing international Global Eco-labelling Network. However, developing countries in particular have been cautious about including EPPs in a possible list due to concerns that such products might need to be distinguished based on the process and production methods (PPMs) used. They fear that PPM distinctions could be misused for 'green protectionism' and could open the door for other PPM-based criteria (such as labour standards) to be brought into the WTO. They are also against the use of eco-labelling schemes for distinguishing EPPs. In response to these concerns, the EU pointed out that not all EPPs would necessarily be distinguished on the basis of PPMs.

In June 2005, India proposed an alternative to list- or criteria-based approaches. It suggested that a potentially wide array of both goods and services could be temporarily liberalised for the duration of a project seeking to fulfil a specific environmental objective, approved by a 'designated national authority' (TN/TE/W/51, TN/TE/54 and TN/TE/60). According to India, this approach would address a number of problems attributed to the list approach, including the fact that many of the items likely to appear on such lists could have dual or multiple uses; the negative impacts of unrestricted concessional market access for environmental goods on indigenous innovation and the competitiveness of local industries; and the separation between environmental goods and environmental services (EGS). EGS

eligible for specific concessions for the duration of the environmental project could include, for instance, air pollution control, renewable energy facilities, or EPPs. The national authority would base its assessment on criteria to be developed by the CTE. In its second submission, India argued that operations through designated national authorities would provide countries with policy space, while the determination of criteria by the CTE would ensure transparency. Furthermore, the project approach would ensure that approved EGS were used only for environmental and not for other purposes.

Developed country Members questioned whether such an approach, applied on a case-by-case temporary basis, would have as widespread an effect as envisaged under the paragraph 31(iii) mandate on EGS. Some noted that the benefits might be limited to multinational corporations due to the necessary scale of environmental projects. Even after India's third submission on technical and implementation aspects of the approach, it was criticised for not being clear, viable or practical enough, as well as for failing to provide sufficient predictability and market access for exporters. Other concerns were related to the transfer of authority to the national level and the long time it would take for the CTE to develop criteria.

Many developing countries welcomed the new, alternative approach as a basis for further discussion. They feared that a list approach would not provide any benefits to them and therefore resisted attempts to push for a list to be finalised by the December 2005 WTO Ministerial Conference in Hong Kong. A submission by Brazil (TN/TE/W/59) articulated these concerns, pointing out that negotiations thus far had privileged a definition of environmental goods focused on high-technology products of little interest to developing countries. In addition to calling for improved market access for products with low environmental impacts and/or derived from or incorporating cleaner technologies,

Brazil proposed adopting UNCTAD's approach to EPPs as a basis for negotiations. Brazil insisted on the need to consider criteria for identifying environmental goods as a means of building confidence among developing countries to come forward with their lists. Cuba also presented a paper (TN/TE/W/55) that raised doubts about the benefits to developing countries from using the OECD and APEC lists. In addition to the concerns raised by India, it stressed the problem of non-tariff barriers such as certification and eco-labelling requirements.

Argentina made an attempt to bridge the gap between India's project approach and the list approach by incorporating the merits of both into what it called an 'integral approach' (TN/TE/W/62). Under the proposed 'integral approach' national authorities would decide on whether to temporarily eliminate tariffs for environmental products used in particular environmental projects. Members would multilaterally pre-identify categories of environmental projects and environmental goods that could be used in them. However, Members opposed to the project approach, in particular the US and Hong Kong, argued that the Argentine proposal was simply a variant of India's earlier submissions.

New Zealand has suggested employing certain 'reference points' - such as the OECD or APEC lists, or relevant bilateral or regional Free Trade Agreements (FTAs) - for the identification of possible environmental goods (TN/TE/W/47 and TN/TE/W/49). It also supported the US proposal to identify a 'core list' containing goods that everyone agreed on and a 'complementary list' of goods, which would be subject to different liberalisation commitments. These should be 'living lists' that could be updated at a later stage, responding to the dynamic nature of environmental goods. Several Members requested further clarification on how a living list would work. Others also remained sceptical regarding the use of FTAs for the establishment of lists. In its second submission, which was generally well received, New Zealand added EPPs, cleaner and more resource-efficient technologies and products, and waste and scrap utilisation as new categories.

New lists have also been proposed by Switzerland, the EU, the US, Canada and the Republic of Korea. Both the EU (TN/TE/W/57) and the Swiss (TN/TE/W/56) submissions include EPPs with 'high environmental performance and/or low environmental impact' in their lists, selected according to their end-use or disposal characteristics, as also supported in New Zealand's submission. Although the new US submission (TN/TE/W/52) does not explicitly recognise EPPs, it includes seven EPPs identified by UNCTAD in a list of 158 possible products. The Canadian list (TN/TE/W/50) contains environmental goods identified mainly on the basis of the OECD and APEC lists. Korea's submission (TN/TE/W/48) emphasises the need for 'practical and simple' criteria for the identification of environmental goods. It proposes drawing up a list based on criteria, which include ensuring that the end-use of the products is primarily for environmental purposes; that products are classifiable under the HS code; and that EPPs and goods defined according to their process and production methods are excluded 'for practical reasons'. The paper proposes a list of 89 products primarily related to pollution management. Korea's submission attracted significant support as a practical way forward.

The Swiss list was criticised by some delegates for containing few products of interest to developing countries and other products - such as bicycle and railroad parts - of dubious environmental value. The US and New Zealand responded to earlier criticisms that their lists only included products of export interests to developed countries by citing statistics showing that they imported significant percentages - 40 percent in the US case - of the listed products from developing countries.

In September 2005, the US convened a meeting where it provided case studies on the environmental and developmental benefits of proposed environmental goods. This exercise was perceived by many delegates as an opportunity to test the credibility of the lists, streamline them and analyse potential win-win-win scenarios for trade, environment and development. Canada proposed structuring



the discussions according to categories as a way to clean up existing lists and to support developing countries in the preparation of their own lists, naming sanitation, wastewater management and renewable energies as three possibilities. The proposal was generally welcomed.

## Services

Negotiations on environmental services continue without dramatic outcomes in terms of either scope or coverage. A number of Members have tabled offers in the area of environmental services as part of their overall services offers. These offers have been limited, however, particularly among developing countries, with commitments made in only few sub-sectors such as environmental consultancy. There have been no offers in relation to the more sensitive water sector.

Classification issues will have a major bearing on the type of environmental services that will be included in liberalisation commitments. A multilaterally accepted classification system can only be elaborated within the WTO Committee on Specific Commitments. Discussions in this forum, however, are currently at a standstill. In the meantime, Members are free to use their own classifications of environmental services. Another factor that could affect the quality of Members' market access commitments in services will be the completion of negotiations for disciplines on domestic regulations (Article VI:4), subsidies (Article XV) and government procurement (XVIII:2), (see Doha Briefing No. 3 on services).

## Non-negotiating Doha Mandates

### Paragraph 32

At the regular session of the CTE, the Chair proposed structuring the debate under paragraph 32(i) on environmental measures and market access in accordance with the four main issues raised by delegations during discussions: using a sectoral approach to consider the effect of environmental measures on market access by identifying sector-specific environmental requirements which impact export performance; 'process issues' in the areas of transparency, notification and consultation procedures when preparing environmental regulations; technical assistance to facilitate developing country compliance with new environmental requirements; and issues concerning the preparation of environmental measures. However, progress has yet to be made on how to structure talks on environmental measures and market access.

Discussions on the relationship between the TRIPS Agreement and the CBD under paragraph 32(ii) have taken place in the TRIPS Council (see Doha Briefing No. 5 on

intellectual property rights). Talks on labelling for environmental purposes under paragraph 32(iii) have not shown much movement.

### Paragraph 51 – Reflecting Sustainable Development in the Negotiations

Discussions have inched forward on the Doha Declaration's paragraph 51, which instructs the CTE and the Committee on Trade and Development (CTD) to "each act as a forum to identify and debate developmental and environmental aspects of the negotiations, in order to help achieve the objective of having sustainable development appropriately reflected." Virtually no progress has been made to put the mandate into action, and the CTE and CTD continue to struggle with determining their approach.

Members held a workshop on paragraph 51 on 10-11 October, which included sessions on: trade and development; agriculture; fisheries subsidies; environmental goods and services liberalisation; relevant aspects of intellectual property rights; and capacity-building for developing countries. In his opening speech, WTO General-Secretary Pascal Lamy called on Members to give meaning to paragraph 51, emphasising in particular the important role that 'accompanying policies' play in realising the social benefits of economic growth resulting from trade liberalisation.



### Doha Mandate:

*"We agree to an examination, in a Working Group under the auspices of the General Council, of the relationship between trade, debt and finance, and of any possible recommendations on steps that might be taken within the mandate and competence of the WTO to enhance the capacity of the multilateral trading system to contribute to a durable solution to the problem of external indebtedness of developing and least developed countries, and to strengthen the coherence of international trade and financial policies, with a view to safeguarding the multilateral trading system from the effects of financial and monetary instability. The General Council shall report to the Fifth Session of the Ministerial Conference on progress in the examination."*

(Doha Ministerial Declaration, para. 36)

## Trade, Debt and Finance

Several developing countries have highlighted the importance of examining the links among trade, debt and finance in an effort to find sustainable solutions to challenges arising from their interplay within the context of the multilateral trading system.

Although the issue has not been a particularly high priority for most Members over the past two years, recent disagreements over the future direction of work in the Working Group on Trade, Debt and Finance (WGTDF) have prevented Members from agreeing on "recommendations on steps that might be taken within the mandate and competence of the WTO," as required by the Doha Declaration. African, Caribbean, and Pacific (ACP) countries and Argentina called for the transformation of the working group into a permanent WTO committee with a specific mandate, a proposition that was opposed by developed countries, including the US. The latter position prevailed, and in October 2005 Members agreed to ask the Hong Kong Ministerial Conference to simply renew the Working Group's Doha Mandate.

The 'July Package' framework for the Doha Work Programme adopted by WTO members on 1 August 2004 did not contain specific directions on areas not involving specific negotiating mandates. For other issues, it merely stated that the "[General] Council emphasises its commitment to fulfil the mandates given by Ministers in all these areas," and, along with other relevant bodies, "shall report... to the Sixth Session of the Ministerial Conference," scheduled for 13-17 December 2005 in Hong Kong.

### Background

The Doha Declaration introduced a binding mandate for WTO Members to examine the relationship between trade, debt and finance and established the WGTDF as a permanent forum to address these issues. Trade ministers recognised that the "challenges Members face in a rapidly changing international environment cannot be addressed through measures taken in the trade field alone." They agreed, therefore, to "continue to work with the Bretton Woods institutions for greater coherence in global economic policy-making."

The *demandeurs* for this process are developing countries seeking ways to reduce their external debt burden in the context of the multilateral trading system, as well as countries that have experienced financial crises. Many developed countries consider the exercise of little or no use due to the limitations of the trading system in addressing international debt and finance problems. Some trade observers have suggested that the issue only surfaced on the agenda as a bargaining chip, in return for developing countries' assent to launching negotiations on trade and environment. The WGTDF first met in April 2002, and discussions have remained largely at the analytical and theoretical level.

The agenda of the WGTDF consists of three issue clusters: the relationship between trade and finance; the relationship between trade and debt; and greater policy coherence between relevant institutions.<sup>1</sup> Meetings held in December 2004, April 2005, and July 2005 were based mainly on background notes prepared by the WTO Secretariat, as well as the two documents from the ACP countries proposing potential recommendations to be submitted to the Ministerial Conference. The October 2005 meeting, as well as informal gatherings at the time, focused on producing an agreed report for the General Council. Members adopted this report (WT/WGTDF/4) on 10 October 2005.

### Mandated Deadlines

As mandated by the Doha Declaration, the General Council transmitted the working group's report on progress in the examination of the linkages between trade, debt

and finance (WT/WGTDF/2) to the Cancun Ministerial Conference held in September 2003. The second revision of the draft Cancun Ministerial Text (JOB(03)/150/Rev.2, which was never adopted) acknowledged this report and stipulated that the talks "shall continue on the basis of the mandate contained in paragraph 36 of the Doha Ministerial Declaration and the progress made in the Working Group to date". The July Package requires the General Council and other relevant bodies with 'non-negotiating' mandates to report to the Hong Kong Ministerial Conference.

## Current State of Play

Observer institutions such as the International Monetary Fund (IMF), the World Bank and the OECD have made several presentations at meetings of the WGTDF. The WTO Secretariat has weighed in with notes on trade liberalisation and its inter-linkages with domestic reform (WT/WGTDF/W/29), economic growth, external financing, commodity prices, and export diversification (WT/WGTDF/W/31).

The ACP countries (WT/WGTDF/W/30, W/32, and W/35), supported by Argentina (W/33) made submissions in 2005 asking the WGTDF to recommend that the Ministerial Conference create a permanent WTO Committee on Trade, Debt, and Finance. They emphasised the links between trade, debt and finance, and called for their correlation to be examined in greater depth. Furthermore, the ACP group's submissions on the matter set out a specific agenda for this committee that included reviewing WTO rules that might affect countries' debt and balance-of-payments positions; supporting economic diversification in commodity-dependent developing countries; promoting increased market access for developing and least-developed country (LDC) exports; urging rich countries to cancel bilateral debts, including those resulting from export credits; and changing the WTO's trade policy review to include an assessment of the effect of developed countries' development assistance, debt, and export credit policies on developing and least-developed countries.

The ACP Group and Argentina wanted the WGTDF to address these issues in its post-Hong Kong work even in the event that Members did not agree to establishing a permanent committee.

Several developed countries, including the US, opposed the ideas put forward by Argentina and the ACP countries. Taking the position that Members had not agreed on the ACP and Argentine proposals, they argued that the WGTDF's recommendations should simply refer to the Doha mandate on trade, debt, and finance outlined in Paragraph 36 of the Doha Declaration. One Member suggested that the ACP papers ignored the role of governments' macroeconomic and structural policies when pointing to the links between trade and debt. Other delegations called for the report to mention the 'Coherence Declaration,' a Uruguay Round document that suggests that "the WTO should... pursue and develop co-operation with the international organisations responsible for monetary and financial matters."

The US-backed position effectively won out. The WGTDF's report (WT/WGTDF/4) to the General Council repeats, word for word, the mandate given to the group when it was created in Doha: "the relationship between trade, debt and finance, and of any possible recommendations on steps that might be taken within the mandate and competence of the WTO to enhance the capacity of the multilateral trading system to contribute to a durable solution to the problem of external indebtedness of developing and least-developed countries, and to strengthen the coherence of international trade and financial policies, with a view to safeguarding the multilateral trading system from the effects of financial and monetary instability."

## Towards Greater Coherence

Coherence between financial reforms and the trading system featured prominently at the sessions in December 2004 and April and July 2005. Members seem to generally recognise that countries need to integrate trade issues into their poverty reduction and development strategies; that trade strategies must complement broader economic reforms to improve countries' regulatory environment, investment climate, transportation infrastructure and customs procedures.

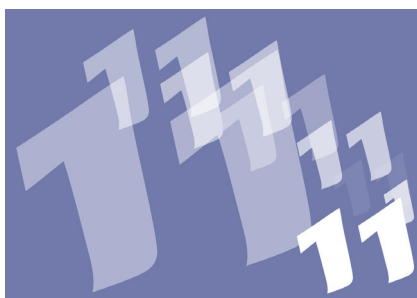
An UNCTAD paper entitled 'Economic Policy Challenges in an Open Economy: Coherence Between Trade and Finance' (WT/WGTDF/W/27) presented to the group notes that exchange rates play major role in determining the competitiveness of

a country's exports but are greatly influenced by financial flows - a major instance of incoherence between trade and finance. Indeed, the study argues that while there is an international trading system, there is no multilateral financial system. Furthermore, it contends that the level of exchange rates, rather than volatility, is the key determinant of trade flows. Noting that monetary unions have a positive effect on trade and that some developing countries are trying to pursue them the study concludes that trade liberalisation, domestic economic reform, and improved supply-side capacity are not enough: a country also needs the right exchange rate system.

## External Liberalisation, Internal Reforms and Economic Growth

The links between trade liberalisation, internal economic reforms, and economic growth were examined at the WGTDF's meetings in April and July 2005. The discussions involved many of the same issues that were touched upon in the debate on coherence. A background document prepared by the Secretariat' (WT/WGTDF/W/29) noted that external liberalisation can catalyse internal reform in a country, and that liberalisation stimulates growth if accompanied by policies that improve a country's investment climate. One delegation noted that supply-side constraints including structural adjustment and its effects needed to be tackled alongside liberalisation in order for developing countries to benefit from opening their markets. The World Bank's Doha Round Initiative and the IMF's Trade Integration Mechanism (TIM) were highlighted as important new mechanisms for providing temporary adjustment assistance.

Many Members observed that market access was a major part of making trade liberalisation and internal reforms contribute to growth: if markets abroad were closed then liberalising at home or ensuring infrastructure capabilities would not yield the benefits that they potentially could. They also noted that reducing tariff escalation - the practice of placing higher tariffs on higher value-added products - would help alleviate the chronic debt problems of countries heavily reliant on commodity exports.



## Doha Mandate:

*"We agree to an examination, in a Working Group under the auspices of the General Council, of the relationship between trade and transfer of technology, and of any possible recommendations on steps that might be taken within the mandate of the WTO to increase flows of technology to developing countries. The General Council shall report to the Fifth Session of the Ministerial Conference on progress in the examination."*

(Para. 37 of the Doha Ministerial Declaration)

*"Reaffirming that the provisions of Article 66.2 of the TRIPS Agreement are mandatory, it is agreed that the TRIPS Council shall put in place a mechanism for ensuring the monitoring and full implementation of the obligations in question. To this end, developed-country Members shall submit prior to the end of 2002 detailed reports on the functioning in practice of the incentives provided to their enterprises for the transfer of technology in pursuance of their commitments under Article 66.2. These submissions shall be subject to a review in the TRIPS Council and information shall be updated by Members annually."*

(Para. 11.2 of the Decision on Implementation-related Issues and Concerns)

# Trade and Transfer of Technology

In 2005, Members continued discussions on measures to promote the transfer of technology (ToT) in the Working Group on the Relationship between Trade and Transfer of Technology. Although no consensus has been reached on recommendations that could be put forward at the Hong Kong Ministerial Conference in December, three developing country proposals provide some potential for advancing discussions towards practical outcomes. Nevertheless, in Hong Kong ministers are unlikely to do more than extend the working group's mandate.

## Background

Paragraph 37 of the Doha Ministerial Declaration introduced, for the first time in the WTO, a mandate to examine the relationship between trade and the transfer of technology (ToT). A Working Group on the Relationship between Trade and the Transfer of Technology (WGTTT), open to all Members, was established to carry out the task.

The main *demandeurs* for WTO action on this issue are developing countries seeking the full implementation of existing ToT clauses in all WTO agreements and possibly the development of a new agreement to facilitate ToT. Some developed countries, however, seem to regard the WGTTT as an academic exercise and appear reluctant to move into discussions that might trigger substantive negotiations.

Reaching agreement on an agenda and the process to follow was thus not an easy task. Developing countries preferred to focus on provisions relating to ToT in the Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPS), the Agreement on Trade-related Investment Measures (TRIMS), the General Agreement on Trade in Services (GATS), Article 10.1 of the Agreement on Sanitary and Phytosanitary Measures (SPS) and Article 12.3 of the Agreement on Technical Barriers to Trade (TBT). On the other hand, the EU and other developed countries sought to clarify some definitional issues before engaging in substantive discussions.

To reconcile these differences, Members agreed to the following agenda:

- analysis of the relationship between trade and ToT;
- work by other intergovernmental organisations (IGOs) and academia;
- sharing of country experiences;
- identification of provisions related to ToT in WTO agreements; and
- any possible recommendations on steps that might be taken within the mandate of the WTO to increase flows of technology to developing countries, and the least-developed countries (LDCs) in particular.

## Mandated Deadlines

- The General Council was supposed to report to the 2003 Cancun Ministerial Conference "any possible recommendations on steps that might be taken within the mandate of the WTO to increase flows of technology to developing countries." As talks in Cancun collapsed without either a Ministerial Declaration or a specific decision on the matter, the WGTTT should present its recommendations to the Hong Kong Ministerial Conference in December 2005.



- Paragraph 11.2 of the Doha Decision on Implementation-related Issues and Concerns requested the TRIPS Council to put in place a mechanism to monitor developed country compliance with their ToT obligations to LDCs under Article 66.2 of the TRIPS Agreement. On 19 February 2003, the TRIPS Council took a Decision (IP/C/28), which required developed country Members to submit annual reports on actions taken or planned in pursuance of their commitments under Article 66.2. The TRIPS Council reviews the reports annually; see section on Implementation Issues below.

## Current State of Play

In 2005, Members continued their analysis of the relationship between trade and ToT, as well as discussed possible recommendations on steps that could increase flows of technology to developing countries. Cuba submitted a communication in June in an attempt to hasten discussions in the lead up to Hong Kong. It focused on the examination of different ToT provisions contained in the WTO agreements, with a view to making these operational and meaningful from the perspective of developing countries, and LDCs in particular. In October, a more comprehensive proposal on the same topic was put forward by India, Pakistan and the Philippines, co-sponsored by Brazil, Egypt, Barbados and Nigeria.

### Relationship between Trade and Technology Transfer

Members and observer organisations have identified a number of barriers to ToT, as well as strategies that could facilitate host and home country measures to overcome them. Home country measures could include policies that provide financing for ToT, incentives to stimulate foreign direct investment with a ToT component, incentives for small- and medium-size enterprises seeking partners in developing countries, simplification of rules of origin and the establishment of a database to ensure the flow of all relevant information on technology.

In this context, UNCTAD has introduced a number of documents to the working group. The first of these on *Transfer of Technology for Successful Integration into the Global Economy* (UNCTAD/ITE/IPC/2003/6) provides a general overview of the main findings and conclusions of successful cases of ToT and an analysis of those cases in light of multilateral rules in order to identify policies related to ToT and capacity-building. The second document, entitled *A Survey of Home Country Measures* (UNCTAD/ITE/IPC/2004/5) highlights measures such as incentives, the role of home country governments and the private sector, and other efforts that could be made to facilitate ToT. The *Case Study of the Electronics Industry in Thailand* (UNCTAD/ITE/IPC/2005/6, submitted in April 2005) focuses on the contribution of Thailand's manufacturing sector to the country's rapid economic growth in recent years, particularly the export growth in manufactured and electronic goods, and the role of foreign direct investment in the development of the electronics industry. It also emphasises the role of host country measures, discussing some of the pro-active policies pursued by the government of Thailand. Members welcomed all three documents and highlighted the importance of partnerships in ToT in order to make it a win-win situation for both home and host countries.

## Possible Recommendations

In 2003, Cuba, India, Indonesia, Jamaica, Kenya, Nigeria, Pakistan, Tanzania, Venezuela and Zimbabwe presented a proposal on Possible Recommendations on Steps that Might Be Taken within the Mandate of the WTO to Increase Flows of Technology to Developing Countries (WT/WGTTT/W/6 and add1). They suggested that the WGTTT examine, *inter alia*, restrictive practices adopted by multinational enterprises in the area of ToT and how to prevent such practices; the impact of tariff peaks and tariff escalation on ToT; developing countries' difficulties in meeting WTO standards when the relevant technologies are unavailable; the need for and desirability of internationally agreed disciplines on ToT with a view to

promoting development; and ways of helping developing countries to strengthen their technology base. In subsequent meetings Members agreed to undertake an examination of the provisions in WTO agreements that relate to ToT and to consider which provisions might have the effect of hindering ToT to developing countries.

On 23 June 2005, Cuba submitted a communication in June 2005 reiterating the urgent need for the WGTTT to agree on concrete recommendations for adoption at the Hong Kong Ministerial on the basis of those already proposed by various developing countries in the 2003 proposal. These recommendations would request ministers to instruct the WGTTT to:

- *carry out a detailed examination of the different provisions on technology transfer contained in the various WTO agreements, with a view to making these provisions operational and meaningful from the point of view of developing countries; and*
- *look at those provisions of various WTO agreements which may have an effect of hindering technology transfer to developing countries and come up with recommendations as to how to mitigate the negative effects of these provisions.*

At the working group's July 2005 session, several developing countries supported the Cuban submission. In contrast, many developed countries, including the US, argued that as the links between trade and ToT had yet to be adequately defined a push towards such recommendations might jeopardise the process of consensus-building.

In October 2005, Members considered a proposal tabled by India, Pakistan and the Philippines, co-sponsored by Brazil, Egypt, Barbados and Nigeria (WT/WGTTT/W/10). The submission made several possible recommendations to be taken up in discussions at the Hong Kong Ministerial, including:

- an expansion of technical assistance under TRIPS by linking Article 67 (on technical and financial co-operation) to patent applications and patent databases to facilitate use and exchange of technical information.
- the formal adoption of voluntary guidelines such as those of the OECD on technology transfer incentives for multinational firms;
- assistance for developing countries to implement or improve competition policies capable of monitoring and discouraging the use of restrictive business practices by technology owners;
- the establishment of mechanisms to help developing countries' standards-monitoring authorities acquire the necessary technology to improve health and environmental quality standards;
- encouraging mobility of technical experts through the General Agreement on Trade in Services;
- further information exchange on investment and technology related incentives provided to firms; and
- the encouragement of regulatory standards-sharing between patent offices, in terms of the operation of patent applications and patent databases to facilitate use and exchange of technical information.

The submission was well-received as useful and pragmatic, although there was some discussion about

whether the WGTTF was the appropriate forum in which to address competition policy. Most notably, Brazil maintained that the working group's mandate was broad enough to address such cross-cutting issues.

An UNCTAD study outlining potential tax measures aimed at facilitating technology transfer was also briefly discussed in October (*Taxation and Technology Transfer*, UNCTAD/ITE/IPC/2005/9). The report highlights the need for an incentives policy within the taxation framework that encourages foreign direct investment, such as the adoption of tax-sparing credits, the granting of a deemed credit in the amount of tax that would have been paid to the foreign country had it not provided a tax subsidy, or an exemption from tax for business income earned in developing countries - in particular sub-Saharan Africa. Among other possible measures is the extension of R&D incentives to include activities undertaken in non-home countries.

An additional informal session was scheduled for November 2005, with some brief discussions on ToT expected at the Hong Kong Ministerial itself.

### Implementation Issues

The TRIPS Council has been working on ToT in relation to Article 66.2 of the TRIPS Agreement, which commits developed countries to "provide incentives to enterprises and institutions in their territories for the purpose of promoting technology transfer" to least-developed country Members. The Doha Decision on Implementation-Related Issues and Concerns requested the Council to put in place a mechanism to monitor developed country compliance with their ToT obligations. On 19 February 2003, the Council adopted a Decision (IP/C/28), which requires developed country Members to submit annual reports on actions taken or planned in pursuance of their commitments under Article 66.2. The purpose of the reports is to provide an overview of the incentive regime put in place; the type of incentives offered to firms; the government agency or entity making them available; eligible enterprises and other institutions; and any information available on actual the functioning of the incentives. The TRIPS Council reviews these reports at its final meeting each year, where Members have an opportunity to ask questions and discuss the effectiveness of the incentives.

By the end of October 2005, Australia, Canada, Japan, New Zealand, Norway and Switzerland had provided updated information on their recent ToT incentives. The EU and certain of its member states, as well as the US, have also reported on their ToT-related activities in the past. Developing countries, including LDCs, continue to review these reports, but so far there has been little actual discussion at the TRIPS Council meetings.

Some commentators have argued that this provision is flawed because it commits developed *countries* to provide incentives rather than targeting the *firms* based within those countries to ensure the effective operation of ToT. To date, large firms in many developed countries have been reluctant to take up many of these incentives, fueling developing country - and particularly LDC - impatience with the process.



## Doha Mandates:

Paragraphs 38-41 of the Doha Ministerial Declaration deal exclusively with overall technical assistance and capacity-building. Paragraphs 42-43 focus more specifically on assistance to least developed countries.

*Para. 38 instructs the Secretariat "to support domestic efforts for mainstreaming trade into national plans for economic development and strategies for poverty reduction. The delivery of WTO technical assistance shall be designed to assist developing and least-developed countries and low-income countries in transition to adjust to WTO rules and disciplines, implement obligations and exercise the rights of membership, including drawing on the benefits of an open, rules-based multilateral trading system. Priority shall also be accorded to small, vulnerable, and transition economies, as well as to Members and Observers without representation in Geneva."*

*Para. 39 underscores the importance of co-ordinated delivery of technical assistance with relevant bilateral, regional and multilateral institutions and calls for consultations with relevant agencies, bilateral donors and beneficiaries to identify ways of enhancing and rationalising the Integrated Framework for Trade-related Technical Assistance to Least-developed Countries and the Joint Integrated Technical Assistance Programme (JITAP).*

Continued on p. 44

# Technical Assistance and Capacity-building

The WTO Committee on Trade and Development adopted the 2006 Technical Assistance and Training Plan without the usual delay caused by disagreements over its contents. Delegates spoke favourably about the plan's focus on the quality of technical assistance, as well as its emphasis on nationally-determined needs.

## Background

Several Members see the technical assistance and capacity-building (TACB) provided by the WTO Secretariat as an important component of the 'development' dimension of the Doha Round. The financial commitment, attention and effort put into TACB has increased significantly in recent years, largely in response to demands from developing country delegations for a more coherent and better co-ordinated programme that addresses their needs.

Earlier critiques of the TACB programme - that it focused more on quantity than quality, failed to provide long-term capacity-building, lacked national ownership and did not take into account the needs of beneficiary countries - have been recognised through the monitoring and evaluation process and efforts to address these issues have featured prominently in the WTO's Technical Assistance and Training Plans (TATPs) of recent years. These efforts are part of an ongoing process described as the "blueprint for the delivery of training and technical assistance," explicitly aimed at the long-term enhancement of institutional capacities in developing countries.

## Current State of Play

The 2006 Technical Assistance and Training Plan (WT/COMTD/W/142), adopted by the WTO Committee on Trade and Development in October 2005, focuses on the quality of particular TA 'products' - i.e. courses, partnerships, financial support and physical infrastructure - and the establishment of specific processes and programmes through which to channel their delivery. According to the plan, it is "expected to facilitate the development of a multi-year approach for the delivery of trade-related technical assistance (TRTA), thus leading to sustainable and cumulative capacity-building."

The courses, to be provided by the WTO Secretariat, will vary in length and degree of specialisation, ranging from one-week short courses covering basic information to more comprehensive 12-week programmes. In addition, there will be specialised courses on dispute settlement, sanitary and phytosanitary measures, and commercial negotiation.

Regional-level seminars are planned on virtually every issue area covered by the WTO agreements. The list of subjects for these seminars, however, may be modified depending on the outcome of the Hong Kong Ministerial Conference. Most of these courses are run by the WTO Institute for Training and Technical Co-operation (ITTC), often in co-operation with other international or regional organisations such as the UN Economic Commission for Africa, the Asian Development Bank and the Latin American Development Bank. In total, the WTO Secretariat has signed memoranda of understanding with some 20 international organisations to provide technical assistance to Members.

Provisions exist for some 250 'national activities' that are meant to be taken up by the Secretariat in response to requests from national governments for TA with respect to specific issues. The Secretariat will give priority to issues not covered in other courses, as well as to those that are important either for national policy-making or for the negotiations as a whole.

Some TA activities will specifically target Geneva-based work, such as topic-specific symposia to which both Geneva- and capital-based officials will be invited. Provisions have also been made for advisory assistance to Geneva-based missions, two 'Geneva Weeks' during which officials from non-resident Members will be invited to



*Para. 40 instructs the Committee on Budget, Finance and Administration to develop a plan for adoption by the General Council in December 2001 that will ensure long-term funding for WTO technical assistance.*

*Para. 41 instructs the Director-General to report to the fifth Session of the Ministerial Conference, with an interim report to the General Council in December 2002, on the implementation and adequacy of the technical assistance and capacity-building commitments identified in different paragraphs of the Declaration.*

*Para. 42 lists meaningful market access, support for the diversification of their production and export base, and trade-related technical assistance and capacitybuilding as essential for integrating least-developed countries (LDCs) into the multilateral trading system. Para. 42 also instructs the Sub-Committee for LDCs to design a work programme taking into account the trade-related elements of the Brussels Declaration and Programme of Action adopted at LDC-III.1*

*Para. 43 endorses the Integrated Framework for Trade-related Technical Assistance to Least-developed Countries (IF) as a viable model for LDCs' trade development. It also requests the Director-General to provide an interim report to the General Council in December 2002 and a full report to the fifth Session of the Ministerial Conference on all issues affecting LDCs.*

*The Declaration has specific technical assistance and capacity-building provisions for various negotiating mandates.*

*Yet more specific technical assistance provisions are to be found in the Decision on Implementation-related Issues and Concerns (WT/MIN (01)/W/10) also adopted in Doha.*

Geneva, and a variety of internship and trainee programmes. E-training exercises and other distance learning tools will also be used to help government officials and others access information from remote locations.

The 2006 TATP outlines the responsibilities incumbent on both the WTO Secretariat and beneficiary countries in relation to TA. Most significantly, the Secretariat must ensure that the objectives and outcomes of a particular activity, as well as the required qualifications of the participants, are made clear. For the beneficiary countries the onus is on verifying the appropriateness of candidates. The plan notes that TA-related 'demand' need not be linked with 'need,' emphasising the importance of canvassing Members' requirements. It also draws attention to the guidelines prepared by the Secretariat, designed to assist countries in conducting their needs assessments for TRTA (JOB(04)/113).

The ITTC will continue to promote partnerships between the WTO Secretariat and the trade policy-related academic community in developing countries, through institutional co-operation, workshops for university professors and financial support for doctoral students. The TATP also provides for some outreach activities with parliamentarians and civil society.

The two main programmes that bring the WTO together with donors and recipient countries to co-ordinate the funding and delivery of TRTA are the Joint Integrated Technical Assistance Programme (JITAP) and the Integrated Framework for TRTA to least-developed countries (LDCs). The 2006 TATP outlines the work planned under both programmes for the coming year. The results for TA activities in 2006 will be assessed by TA providers, participants and the WTO's Technical Co-operation Audit. The evaluation results for TA will eventually be used in the general work of the Secretariat.

The Doha Development Agenda Global Trust Fund (GTF) was created in 2001 to "provide a solid and stable financial basis for WTO TACB." The 2006 TATP has been referred to the WTO Committee on Budget, Finance and Administration, which will in turn recommend to the General Council a target amount that is equivalent to the cost of implementing the plan - approximately US\$18.7 million. The implementation of the desired range of TA activities from the start of 2006 would require US\$4.7 million by the end of 2005, and full funding for the entire year by end-June 2006. At press time, Members' pledges seemed on pace to meet these requirements.

## Aid for Trade

Although it has long been discussed in other fora, the issue of increasing 'aid-for-trade' - i.e. assistance aimed at enhancing developing countries' capacity to take advantage of the opportunities created by trade liberalisation - has emerged only recently as a subject of discussion at the WTO. In his introductory speeches as WTO Director-General in September, Pascal Lamy made a point of mentioning aid-for-trade as part of the development package of the Doha Round. The Group of Eight (G-8) industrialised nations also pledged to spend more on foreign aid related to trade during their July summit in Gleneagles, Scotland.

These exhortations took concrete shape in a September paper called 'Doha Development Round and Aid for Trade' from the World Bank and the International Monetary Federation (IMF). According to the paper, "increased international assistance is required to help countries to overcome supply-side constraints in order to take advantage of new trade opportunities from the Doha Round, or to address transitional adjustment costs from liberalisation. This 'aid for trade' is an essential element of a successful, pro-development Doha package." However, although the two institutions called for expanding the Integrated Framework for delivering trade-related assistance to least-developed countries by US\$200-400 million over the next five years, they suggested that creating a general multilateral fund to address adjustment concerns, as many developing countries had requested, would be an ineffective use of funds.

Zambia's Trade Minister Dipak Patel, who co-ordinates the work of LDCs at the WTO, called the proposed increase a "post-dated cheque with insufficient funds." He pointed out that spending US\$200-400 million in 40 countries over five years amounted to no more than US\$1-2 million per country per year, which he said could "hardly be called a significant enhancement." Nevertheless, the EU's conditional offer of deeper farm tariff cuts at the end of October called on developed country WTO Members to agree in Hong Kong to an aid-for-trade package "along the lines of" the World Bank/IMF proposal.





## Doha Madate:

*"We reaffirm that provisions for special and differential treatment are an integral part of the WTO Agreements. We note the concerns expressed regarding their operation in addressing specific constraints faced by developing countries, particularly least-developed countries. In that connection, we also note that some Members have proposed a Framework Agreement on Special and Differential Treatment (WT/GC/W/442). We therefore agree that all special and differential treatment provisions shall be reviewed with a view to strengthening them and making them more precise, effective and operational. In this connection, we endorse the work programme on special and differential treatment set out in the Decision on Implementation- Related Issues and Concerns."*

(Paragraph 44 of the Doha Ministerial Declaration)

# Special and Differential Treatment

Special and differential treatment (SDT) was once considered the developmental cornerstone of the Doha Round. It was hoped that the negotiations mandated under the Doha 'Development' Agenda would enable developing countries to gain more from WTO membership and better integrate WTO rules into domestic policy. To this end, SDT was to be made more "precise, effective and operational" through better implementation, technical assistance and capacity-building. Members also agreed to seek out new ideas on the unique challenges faced by least-developed countries (LDCs) and small economies.

In the wake of the 2003 Cancun Ministerial Conference, however, many of the so-called 'development issues' have been put on the back burner. Some delegates suggest that the lack of movement calls into question the spirit of the Doha negotiations as a 'development round'. Others argue that the negotiations on agriculture, non-agricultural market access (NAMA) and services have overtaken negotiations on SDT in the Committee on Trade and Development Special Session (CTD-SS). The challenge lies in ensuring that all parts of the Doha Round deliver benefits to developing countries - including the CTD-SS negotiations on SDT provisions, as well as market access outcomes in agriculture, NAMA and services - while strengthening rather than weakening the rules-based multilateral trading system.

## Special and Differential Treatment

Negotiations in the CTD-SS have in 2005 moved away from earlier debates on the relative priority to be given to agreement-specific proposals *vis-à-vis* cross-cutting issues. In the first few months of the year, Members struggled to define an approach that would enable both sets of issues to be addressed. Several Members, including a number of developed countries, said that cross-cutting issues had to be addressed as a priority. On the other hand, several other Members suggested that the lengthy discussions on the relative priority of agreement-specific versus cross-cutting issues - which ran from April 2004 until spring of 2005 - had distracted attention away from the review of SDT that was mandated in Doha and supported in the 'July Package' of 2004. The approach presented by CTD-SS Chair Faizel Ismail of South Africa in December 2004 attempted to address both sets of issues, but in May 2005 Members decided to focus for now on agreement-specific proposals in the hope of making concrete progress on the mandate given to the group in the run up to the Hong Kong Ministerial.

In particular, since May 2005 Members have been examining five agreement-specific proposals from least-developed countries (LDCs), as well as proposals from the African Group. Negotiations, however, have been difficult. In July and September 2005, Members were unable to agree on the LDC and African amendment proposals, with many calling for them to be reworded to better address the needs of their proponents. The stalemate on the proposed texts can be explained at least partially by the fact that many Members think the texts do not reflect or address the underlying needs of their proponents and run contrary to the non-discrimination pillars of a multilateral trading system. This has led some to conclude that achieving common approaches to cross-cutting issues will resolve the imperative of accommodating different levels of development and needs without compromising on the essentials of the system.

## Background

The relationship between international trade policy and rules and national development objectives and strategies is at the heart of the WTO negotiations on SDT. The concept of more favourable treatment for developing countries in the multilateral trading system stretches back to the earliest years of the General Agreement on Tariffs & Trade (GATT), but the form that such treatment has taken within trade rules has changed over time. The WTO agreements contain approximately 155 provisions on SDT, aimed at enabling participants in the WTO to avail themselves of the rights provided while observing their obligations. They stem from a negotiated acceptance of the need to include Members with diverse capabilities, and in particular those with disadvantages, as full participants in the multilateral trade system.

During the Uruguay Round, the concept of SDT changed from one of providing a range of flexibilities and 'spaces for development policy' based on economic criteria to one of time-limited derogations from the rules, with more favourable treatment regarding tariff and subsidy reduction commitments, and more generous thresholds in the application of market defence measures (i.e. countervailing and anti-dumping duties).

At the same time, the WTO Agreements cover a much wider variety of fields than did the GATT, many of which reach beyond borders to regulate fairly central aspects of state economic policy. The SDT provisions that were established to address the challenges that this change in scope posed to developing countries introduced another form of SDT, namely broad but largely unenforceable statements and ideas in favour of development.

As such, SDT can be said to have evolved from an instrument for making trade liberalisation supportive of development (in the GATT) to its current manifestation (in the WTO) as an instrument for helping

developing countries develop the legal and institutional capacity to undertake their trade liberalisation obligations.

This transformation in the nature of SDT reflects a change in the popular understanding of the trade-development relationship. According to the prevailing orthodoxy, increased trade liberalisation is seen as a necessary element of development policy. This school of thought argues that SDT is at best a way of slowly integrating developing countries into the WTO mainstream and at worst damaging.

Developing countries agreed to this change in the Uruguay Round - along with new commitments in intellectual property, services and investment-related measures - in the expectation of benefits from increased market access in agriculture, textiles and clothing, as well as meaningful development-sensitivity from the implementation of SDT provisions. Benefits have for the most part failed to materialise while the novel disciplines are perceived as straitjackets limiting the use of economic instruments for strategic advancement of regions and sectors, as well as the establishment or application of social and economic safety nets. Developing countries' frustration with aspirational statements in favour of development has led them to refocus on the Doha Declaration mandate to make the SDT provisions contained in specific WTO agreements more "precise, effective and operational."

Some developed countries, however, have raised concerns that the extent and effectiveness of SDT is limited because all 'developing' countries, besides LDCs, must be treated the same. This, they say, limits the extent of preferential treatment that can be directed to Members at assorted stages of integration into the global economy, featuring diverse capabilities, heterogeneous sectoral and sub-national conditions and highly dissimilar market sizes. They argue that the debate on cross-cutting issues, such as the principles and objectives of SDT, the issue of eligibility, benchmarking, the monitoring mechanism and enhanced differential treatment would enable Members to apply the special treatment accorded to developing countries in a different way.

## Mandated Deadlines

According to the original Doha mandate, the CTD was to report to the General Council "with clear recommendations for a decision" regarding the SDT mandate contained in Paragraph 44 by 31 July 2002. The deadline has been extended and missed three times: to December 2002, February 2003 and July 2005.

## Current State of Play

The Trade Negotiations Committee (TNC) originally assigned the mandate on SDT to the CTD-SS in 2001. In May 2003, the Chair of the General Council circulated a list categorising the 88 agreement-specific proposals put forward by developing countries. In Category I were 38 proposals on which agreement was seen to be possible before Cancun, owing either to existing support or their urgency. Category II comprised another 38 proposals that were sent to relevant WTO bodies in late May 2003. Category III included the 15 proposals on which delegates had the most difficulty in finding consensus. Twenty-eight agreement-specific recommendations were included in Annex C of the Cancun Draft Ministerial text. However, the failure of the Ministerial meant that the 28 recommendations were left un-adopted.

As a result of the post-Cancun focus on agriculture, non-agricultural market access, cotton and the Singapore issues in late 2003 and early 2004, discussions on SDT did not begin again until April 2004, when Members began a one-year attempt to clarify how to prioritise agreement-specific and cross-cutting issues. Chair Ismail asked Members what they wished to do with the proposals on which they have already agreed in principle; how the current discussions on SDT could be made more productive; and what suggestions they had on a way forward. Slow progress on how to proceed, as well as a challenge by Latin American and East Asian develop-

ing countries on language that they feared would create a de facto new category of developing countries and thus incorporate the controversial differentiation issue, resulted in the 2004 July Package simply instructing the CTD-SS to "expeditiously complete the review" by July 2005.

In its October 2004 meeting, the CTD-SS continued discussions on the process to be taken and the balance between agreement-specific and cross-cutting issues. Switzerland proposed a new clustering of proposals around specific underlying themes such as capacity constraints and technical assistance. In addition, the Chair agreed to push the other WTO bodies examining Category II proposals to report back to the CTD, and also spoke hopefully about taking up all 28 recommendations, along with the rest of the Category I proposals, by the end of 2005. At a meeting in December 2004, however, Chair Ismail put forward a new approach to negotiations in an attempt to overcome the disagreement on the relative importance of agreement-specific and cross-cutting issues. The Chair's 'situational flexibility' approach calls for negotiators to cluster agreement-specific SDT proposals on the basis of their motivations or underlying issues. A number of developing countries expressed concerns that the approach gave undue emphasis to cross-cutting or 'horizontal' issues and could introduce differential treatment among developing countries.

At a meeting in February 2005, Members decided to move forward with negotiations on agreement-specific proposals, while keeping the Chair's proposed approach as a reference point. Concerns over how to formalise this process came to the fore when the April meeting of the CTD-SS fell apart after Members were unable to agree to an agenda that allocated a full day of a two-day meeting to cross-cutting issues. The proposed agenda reportedly would have divided all the cross-cutting and agreement-specific proposals into two broad categories - 'flexibility' and 'capacity-building'. The entirety of the April meeting would have focused on the proposals in the flexibility category and examined agreement-specific proposals on the first day and cross-cutting on the second day, with a May meeting looking at capacity-building proposals. Several developing countries including India, Malaysia, Mexico, Colombia and Peru complained that they had not been adequately consulted about this classification. They expressed fears that structuring work along such lines would shift negotiations towards cross-cutting issues instead of ensuring that Members focus their attention on agreement-specific proposals, arguing the latter had a stronger mandate under the Doha Declaration to deliver concrete outcomes within the negotiating timeframe. As a result, they refused to accept the agenda and the meeting adjourned early.

Following extensive consultations, meetings in May 2005 moved ahead by looking at five agreement-specific proposals from LDCs with the understanding that Members could bring up cross-cutting issues as solutions to these proposals as appropriate. This was the first time that the agreement-specific proposals had been examined in earnest by the group in the two years since the Cancun Ministerial. Members suggested that these proposals needed to be redrafted in order to update them after the July Package and other developments. A number of developed countries also added that LDCs would have to make at least some commitments and could not expect to receive perpetual exemptions, since the objective of WTO Membership is to integrate countries, including LDCs, into the multilateral trading system. LDCs retorted that the intention of their proposals was to address the costs of implementation of WTO disciplines. The result was that LDCs were asked to redraft their submissions to better address their underlying needs. These new versions were presented in June 2005. Members criticised the new texts, arguing that the changes were largely cosmetic and the proposals would benefit from further redrafting to make them clearer and ensure they addressed the stated needs of the proponents. Members also raised concerns about the 'automaticity' of some of the exemptions in the proposals. Despite eleventh-hour marathon negotiations on the LDC proposals, Members were unable to deliver any texts for the July 31 2005 set deadline set a year earlier.

Since July 2005, LDCs have asked for some time to reconsider their proposals, meet bilaterally with countries that have expressed concerns and reword their proposals accordingly. Meanwhile, at informal consultations in September and in a formal meeting in October, Members looked at the African proposals but encountered many of the same difficulties in terms of clarifying the language and intent behind the submissions. Consequently, developing countries have been questioned on the objectives of the proposals and on whether they were prompted by particular challenges in implementing the WTO agreements they sought to amend. However, LDCs and African countries are struggling to convert their current texts, which some describe as vague, into proposals that deliver concrete changes to WTO agreements. As the Hong Kong Ministerial Conference draws closer, intensive meetings on crucial topics such as agriculture, NAMA and services have underlined their limited negotiating capacity. When deciding whether to struggle with clarifying the language of SDT proposals or to prioritise negotiating on higher-profile topics, many countries have expressed their preference to focus on more 'deal-breaking' negotiations in other bodies, many of which take up the issues raised in the SDT negotiations and have important developmental implications.

## Looking Forward.

It appears that for the time being the debate has cooled over whether cross-cutting issues, such as the principles and objectives of SDT, eligibility and differentiated treatment, are part of the Doha mandate. Much as the new focus on agreement-specific proposals is what developing countries had hoped for, actual examination of the text is revealing that the proposals address many cross-cutting problems. As such, it may be worth considering whether small textual changes in specific WTO Agreements can address the broader development needs that have motivated developing countries to bring forward new text. If the proposals are to make SDT more operational, they must address the



needs of developing countries in a targeted and enforceable way. This may imply narrowing their scope and level of ambition. However, it may also imply that systemic issues that cut across agreements pose problems for the effective treatment of developing countries in the WTO. In this case, such issues would need to be addressed hand-in-hand with specific textual changes.

Most of the 'easier' category I proposals have already been dealt with through inclusion in the 28 texts that were agreed pre-Cancun, while the 38 category II proposals remain with the respective negotiating bodies. As a result, most of the proposals being currently considered by CTD-SS belong to the 'difficult' category III proposals, and the political will to agree on the broad aspirations expressed in the LDC and African Group proposals remains lacking. However, the incentive to renegotiate and redraft the texts may emerge if successful outcomes can be achieved in agriculture, NAMA and services negotiations.

### LDCs and Small Economies

Although they receive less attention, the work programmes for LDCs and small vulnerable economies are also active areas of negotiation at the WTO. Key issues in the WTO Sub-committee on Least-developed Countries since the Cancun meeting have included technical assistance for acceding LDCs and supply-side

problems, market access issues (particularly in relation to Australia and Canada), Integrated Framework-related issues and, most recently, the phase-out of textiles and clothing quotas (see Doha Round Briefing Number 4).

In the Committee on Trade and Development Dedicated Session (CTD-DS), Members have been struggling to address the needs of small and vulnerable economies. The mandate in the Doha Declaration to "frame responses to the trade-related issues identified for the fuller integration of small vulnerable economies into the multilateral trading system" has proven difficult given the Declaration's order to "not create a sub-category of WTO Members". In February 2005, Members agreed to adopt a three-step strategy presented by Chair Ambassador Trevor Clarke of Barbados. The first step entails the consideration of characteristics to identify what can be accepted as 'small, vulnerable economies'. Step two, which was eventually combined with step one, involves the consideration of the trade-related problems that could reasonably be attributed to those characteristics, while step three would require framing responses to the problems identified. The proponents of the small economies work plan - including fourteen ACP countries - presented a paper (WT/COMTD/SE/W/12) in February 2005 that outlined some 17 characteristics and problems that, they suggested, would enable Members to understand the structural handicaps that prevent small economies from reaping the full benefit of the multilateral trading system. In May 2005, the proponents tabled another proposal (WT/COMTD/SE/W/13) to jump-start negotiations on solutions to problems.

In response to reactions to their May 2005 proposal, at a 17 October 2005 meeting the 21 proponents of the small and vulnerable economies work plan tabled a further proposal (WT/COMTD/SE/W/14). It outlines a two-track approach in which proponents would table submissions on how their particular problems could be addressed directly to the relevant WTO bodies, while the CTD-DS would continue to monitor the progress of these proposals. The proposal also cites submissions that have been made by its sponsor countries to the WTO negotiating groups on agriculture, non-agricultural market access (NAMA) and rules (TN/RL/GEN/57/Rev.2) since July 2005. Other Members have responded favourably to the two-track approach, which has been advocated by developed countries in the CTD-DS for several years. During informal negotiations aimed at drafting preliminary text for the Hong Kong Ministerial Conference, however, Members continue to grapple with how to put forward substantive content that would promote the interests of small and vulnerable economies without introducing differentiation among developing countries. It is the extent to which the CTD-DS is able to agree on the text, along with how the proponents' submissions are dealt with in the negotiating bodies, that will determine how much of this work will be integrated into the Ministerial outcome.

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