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United States / European Union: An agreement to wine about?

The United States and the European Union (EU) recently concluded an agreement ending long-running disputes involving the use of certain wine names and wine-making practices, which have curbed wine sales potentially worth hundreds of millions of dollars. While many in the wine business have welcomed the agreement, others say that it only masks broader legal conflicts between the two sides concerning the protection of intellectual property.

For decades, the United States and the EU have fought over the use of wine names that originated in Europe. Officials in the EU have challenged the use of terms such as Champagne, Chablis, and Sherry – which are specific regions of Europe that produce wines with those names – by American and other wine producers, arguing that wines not produced in those particular regions should be prohibited from using those labels. They say that it would confuse consumers who might believe that a bottle of Champagne or Chablis bottled in, say, California, was actually produced in the Champagne or Chablis region of France.

U.S. and industry officials counter that these labels – and many others – have become “semi-generic,” which is a legal term used to refer to names that have “little or no relation to their [original] namesakes,” and which are no longer fully protected by American intellectual property laws. Officials argue that the passage of time has consigned many of these terms into common usage. They point out, for instance, that the name Chablis “has been used on wine labels in the United States since the 1800s.” In the United States, 27 CFR §4.24 defines two types of “semi-generic” names for wines. The first type includes names that can legally refer to any grape wine. For example, under the regulation, Burgundy can refer to any generic red wine while Chablis can refer to any white wine. Under the second type of generic names, particular terms must be used with certain restrictions. For instance, a wine that uses the term “Champagne” must, in fact, be sparkling wine.

This particular dispute concerning the use of wine names has its roots in the extent to which the United States and the EU enforce an intellectual property right called a geographic indication (or GI), which is a name that identifies the geographical origins of a product and where the product’s unique quality and characteristics are directly linked to its place of creation. Examples of GIs include Idaho potatoes, Swiss chocolate, Florida orange juice, and Parma ham. Although the United States does not have a specific law regarding GIs, the United States Patent and Trademark Office provides a manufacturer with a “certificate of origin” to protect geographic product names. But it does not provide protection for semi-generic and generic names.

In contrast, the EU has a regulation that specifically protects GIs and prevents individual EU member states from using a geographical indication that does not accurately represent a product’s true place of origin. In addition, the EU – until recently – did not provide a foreign manufacturer with GI protection unless the applicant’s home country provided GI protections equivalent to those found in the EU. Furthermore, GI regulations in the EU do not consider terms such as Champagne as semi-generic, and, instead, offer these geographic designations full protection under the law. Consequently, these legal differences have prevented American wine producers from labeling and selling their products in Europe with names that are not considered semi-generic in the EU.

Trade analysts point out that the two sides have also argued over certain wine-making practices. In 1983, the EU implemented regulations which allow the production and sale

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of wines using only approved techniques such as ageing in oak barrels. EU officials argued that these rules would protect the integrity and quality of what it believes to be proper wine-making techniques. These EU regulations prohibited other methods – such as using oak chips to flavor wine or adding water to the fermentation process, both of which are done in the United States – unless a winery was given special permission called a “derogation.” The Office of the U.S. Trade Representative argued that “the temporary nature of these derogations created continuous uncertainty for U.S. wine exporters,” and has also limited sales of American wine in the EU.

In response to the EU’s strict policies, the United States, in 2004, imposed its own regulations – such as requiring wine importers to present a certificate stating that “the practices and procedures used to produce the wine constitute proper cellar treatment as defined in U.S. law” – on all imported natural wines. Analysts say that complying with these requirements would be costly to European wineries exporting their products to the United States. But the regulations allowed exemptions to those nations accepting U.S. wine-making practices.

In September 2005, the United States and the EU reached an agreement ending these disputes. Under the terms of the agreement, American producers will be able to continue selling – only within the U.S. market – their already-existing brands of wines using a list of 17 contested European names. But new brands of these products sold in either the American or EU market can no longer use any names on that list. In order to implement this particular provision of the agreement, Congress will first have to approve domestic legislation limiting the use of these 17 wine names, all of which are currently considered semi-

generic under American regulations. Once Congress makes these changes, the EU will then grant “full recognition to all U.S. wine-making practices” and will no longer require temporary derogations.

The EU will also provide legal protection for American wine labels such as Napa Valley – and the names of other “individual states, counties, and designated American viticultural areas” – sold in the EU. This protection will prevent, for instance, a winery in Italy from using these particular terms. In addition, because the EU will soon accept U.S. wine-making practices, the United States will exempt the EU from its 2004 wine regulations.

Opponents of the agreement – including many wineries in Europe – believe that the EU had offered too many concessions. Some demanded that American wine producers stop using the 17 contested names completely. Lawmakers in the European Parliament have also argued that trade rules under the World Trade Organization (WTO) would permit other countries with large wine industries to demand the same benefits offered under the wine agreement. The principle of most-favored-nation status in the WTO agreements, they argue, requires member nations to extend the same trade benefits to all other members. But in response to this particular criticism, an EU official simply responded that this “situation is completely different . . . in relation to procedures for recognizing wine-making practices.”

Despite these reservations, many analysts view the wine agreement as a “positive step forward in expanding the global wine market and meeting evolving consumer tastes and needs.” The agreement benefits the EU by increasing protection of European wine names. Analysts also point out that because the United States will become the world’s largest consumer of wine by the year 2008, the EU had a strong incentive to resolve the dispute. Business executives say that the agreement will benefit the United States by increasing American wine sales in Europe. Trade experts note that, in 2004, the United States sold \$487 million worth of wine to the EU (compared to the more than \$1 billion sold by Australia during the same year).

Despite the conclusion of this agreement, experts say that it won’t affect other current disputes between the United States and the EU concerning GIs. For example, the United States had alleged that the provisions of the EU regulations protecting GIs violated another principle of global trade rules. Specifically, American officials argued that the EU regulation’s reciprocity requirement – where the EU would provide GI protection within its jurisdiction only to other countries that provide comparable GI protection – violates the national treatment principle. This principle requires the EU to afford the same GI protection to non-EU states that it offers its own nationals – regardless of whether the non-EU nation has similar GI standards.

In 2005, a WTO dispute settlement panel ruled that the EU’s reciprocity requirement did, indeed, violate the principle of national treatment. The EU announced – in March 2006 – that it had deleted any references to reciprocity

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in its GI regulations. It also pointed out that these changes would not have any significant economic impact because, it claimed, no third country (such as the United States) had tried to register its own GI products (such as Idaho potatoes) in the EU. The United States said that it would review European regulations in the coming months to confirm that the EU had, indeed, complied with the WTO ruling. ■



WTO: First decision on “Frankenfood”

In a decision that could have wide implications across the world, a dispute settlement panel at the World Trade Organization (WTO) ruled that the European Union (EU) had maintained a “de facto” moratorium on the approval of products containing genetically modified organisms (or GMOs) for sale in the European market. That is to say, even though the EU had never officially acknowledged or even legally established an actual moratorium, the panel concluded that one still existed. More specifically, the panel said that this moratorium (covering the years 1999 to 2003) violated provisions in the WTO’s Agreement on Sanitary and Phytosanitary Measures (or the SPS Agreement). This was the first time that a WTO panel had ruled on the controversial subject of GMOs.

Scientists make GMOs (which can include seeds, animals, and microbes) by transferring desirable traits from one species into another species. For example, plants can be made to produce their own insecticide, withstand the effects of weed killers, and survive adverse conditions such as dry weather. Some say that the use of GMOs has led to larger crop yields and lower pesticide use. GMOs also represent an increasingly important source of trade for the United States, which is the largest grower and exporter of GMO crops. Analysts estimate that these exports are valued in the tens of billions of dollars.

On the other hand, trading partners such as the EU, Japan, and scores of other nations have viewed GMOs with distrust. They point out that no one has conducted long-term studies showing whether it is safe to grow and consume GMOs. Some have suggested that GMOs might combine with surrounding plants to create “super weeds” or insects resistant to pesticides. Others have derisively described genetically-modified products as “Frankenfood.” As the use of GMOs began to grow in the 1990s, many countries around the world implemented legislation to regulate the sale and distribution of those products within their own jurisdictions.

In the realm of international trade, the WTO allows its 149 member nations to adopt measures restricting trade in order to protect human, animal or plant life, or health. Countries may want to ban the import of, say, certain

agricultural products to curb the spread of disease or pests. Countries do so by passing their own domestic regulations and by setting their own health and safety standards. Some of these measures may include certain inspection procedures and labeling requirements for particular products.

While the WTO allows its member nations to implement different standards and procedures, the SPS Agreement sets out the “basic rules for food safety and animal and plant health standards.” (Legal experts say that these rules will help to prevent countries from using domestic health regulations as a disguise for protectionism.) For example, the SPS agreement says that health regulations and procedures must be based on objective scientific data and appropriate risk assessments. Annex C of the agreement also requires that WTO members “shall ensure, with respect to any procedure to check and ensure the fulfillment of sanitary or phytosanitary measures, that such procedures are undertaken and completed without undue delay . . .” (Some legal analysts say that such a requirement serves as a warning to countries to avoid using political considerations in carrying out health inspections.) Under WTO rules, a member nation may also challenge another member nation’s health regulations on the grounds that they are not backed by scientific evidence.

During the 1990s, the EU regulated GMOs using Directive EEC/90/220, which outlined the approval process for importing and selling those products in its market. In response to public outcry over the use of GMOs, the EU – in 1998 – said that it would suspend the approval of new GMOs until it reviewed its directive. The United States said that this suspension was actually a moratorium in disguise (to placate public concerns), and pointed out that the EU action “was never published as a formal EU decision.” The EU dismissed these claims, arguing that it was simply revising the directive. Since 1998, U.S. officials say that the moratorium has cost American farmers over \$300 million in agricultural sales in the EU. While the EU did pass a new directive in 2002 (EEC/2001/18) requiring a stricter approval process for GMO products, several EU countries delayed its implementation until May 2004 (six years after the EU had stopped the consideration of new GMO applications).

At the request of the United States, Canada, and Argentina (all of which have large GMO industries), the WTO established a dispute settlement panel in September 2003 to determine whether the EU had instituted a de facto moratorium when it refused to consider “applications for, or granting of, market authorization of biotech products under the EU approval system.” Such a moratorium, argued the complainants, violated provisions in the SPS Agreement. The complainants also challenged the legality of a ban instituted by six EU countries for GMO products that had already been approved by an EU scientific panel through established regulatory procedures.

In February 2006, the dispute settlement panel circulated a confidential interim report (or decision), which largely found in favor of the complainants in the dispute. (Legal

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experts say that the panel will formally release its report in mid-2006, and that, historically, these later reports have largely mirrored the interim reports.) In its report, the panel agreed that the EU had, indeed, maintained a general moratorium on the approval of new GMO products from 1999 to 2003, hence violating the SPS agreement, which requires approvals to be completed “without delay.” Political analysts note that the formal approval process for dozens of biotech products was delayed at several points over five years, and they suspect that the slow rate of approvals was based on political – and not scientific – considerations.

The panel also ruled that the import bans imposed by six EU states on already-approved GMOs had violated WTO rules. It concluded that “these bans were not based on scientific principles or maintained with sufficient scientific evidence” as required by the SPS Agreement. But the panel also dismissed several arguments made by the complainants. For example, it rejected claims that the EU’s approval process “was not based on appropriate risk assessments.”

Legal experts note that the panel had avoided answering (and was not required to answer) several contentious questions in the debate over GMOs, including whether the use and consumption of these products presented a long-term threat to human, plant, and animal life or health, and also whether an EU moratorium still exists.

To show that it did not maintain a moratorium, the EU stated that it had approved several GMO products since the initiation of the WTO dispute. But U.S. officials described them as a “few token approvals,” and argued that the EU still had a de facto ban in place. They noted that many current GMO applications have been waiting for approval since 1999. It said that such a delay could only be explained by an approval process based largely – in its opinion – on political and not scientific considerations.

Political analysts say that in light of the WTO decision, the EU would still be able to keep in place its current regulations approving new GMO products, and that the EU would likely appeal the panel’s ruling later in the year. But they also believe that the WTO decision will likely send a warning to other countries which may have used mostly political – over scientific – considerations in preventing the approval of GMO products. ■

nations unanimously agreed to “broad negotiating guidelines” in several contentious sectors of trade, which analysts say had previously slowed down the pace of these talks. But while WTO officials and several member nations have lauded these recent advances toward a final agreement, critics and other analysts say that the WTO had put off the most controversial areas of negotiations to a later date.

The latest round of global trade negotiations – called the Doha Round – began in November 2001 under the auspices of the WTO, and is the ninth round of talks held since 1945 to reduce barriers to trade. The last successful trade round – called the Uruguay Round – ended in 1994 and not only lowered tariffs in almost every area of trade in goods, but also created rules in new areas such as intellectual property and trade in services. This round also reformed the world trade system by creating the WTO, which is now the premier organization setting the rules for international trade and the settlement of trade disputes. The current round of talks – which were scheduled to end at the end of 2005 – had broken down at several points because WTO member nations (divided largely between rich and poor countries) weren’t able to reach a consensus in several areas of negotiations.

For example, officials say that agricultural trade is particularly sensitive in both developing and industrialized countries. Observers note that over 80 percent of WTO member nations are developing countries, and that many depend on their agricultural exports for economic growth. On the other hand, economists estimate that industrialized countries – mainly the United States, the European Union (EU), and Japan – provide over \$300 billion in subsidies to their politically-influential farmers every year. Developing countries complain that they cannot compete against such subsidies (which cover the difference between higher-priced agricultural goods produced in wealthier countries and lower world prices). Without such payments, agricultural exports from the industrialized world would not be competitive in world markets. Trade officials from developing countries have also complained that trade barriers and other regulations in the industrialized world unfairly keep out their competitively-priced agricultural products.

Analysts say that many developing countries had agreed to begin the Doha Round – which has also been dubbed the “development round” to bring attention to the difficulties of poorer WTO nations to fulfill their obligations under various WTO treaties – only after their wealthier counterparts had promised to make reductions in their agricultural subsidies during the course of negotiations. They say that because current negotiations had – up to now – yielded little progress toward this goal (especially on the part of the EU, say critics), many developing countries had little incentive to address other areas of interest to their richer counterparts such as reducing high tariffs on manufactured goods made in the latter countries.

Trade experts say that the talks inched forward during the WTO’s Hong Kong meeting only after the EU had yielded to strong political pressure and agreed to a statement



WTO Doha trade talks: Putting off hard decisions

In December 2005, the World Trade Organization (WTO) made some progress in its efforts to conclude the current round of global trade talks aimed at reducing barriers to trade. During a meeting in Hong Kong, its 149 member

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committing WTO members to reduce various agricultural subsidies around the world. Political analysts say that the WTO wanted to avoid a breakdown in the negotiations. More specifically, the WTO member nations agreed to the following points:

- WTO members will eliminate agricultural export subsidies (i.e. subsidies which help directly in the export of goods) before 2013 with “substantial” cuts coming sooner. One analyst said that while many countries had, in the past, declared that they would eliminate export subsidies, this was the first time that WTO members had announced a specific date. The EU grants its export subsidies in the form of direct cash payments (around \$3.5 billion a year). But others point out that the EU had agreed to this point by demanding that the WTO ensure that other forms of export support – such as export credits, credit guarantees, and insurance programs, many of which are used by countries such as the United States – were “self-financing, reflecting market consistency.”

- The United States and the EU also agreed to end their export subsidies for cotton sometime in 2006 to help African cotton farmers who, experts say, produce that commodity more efficiently than their American counterparts and who rely on that crop for their economic livelihood. But another critic pointed out that “the U.S. was already obligated to eliminate export subsidies for cotton” under a ruling issued by the WTO Appellate Body last year, which said that the amount of subsidies given to its cotton farmers exceeded limits set by the WTO.

- The wealthier WTO members agreed to end all quotas and tariffs on 97 percent of categories of goods from the world’s 50 poorest countries by 2008. While saying that this is an improvement over the 80 percent of goods that were already exempt, many critics argue that the remaining three percent “gives [for example] the U.S. tremendous flexibility to protect products of real interest to [developing countries] such as sugar and textiles,” which are more expensive than world market prices but enjoy strong political protection in the United States and other countries around the world. Others point out that some developing countries – which have long received special trading preferences from the United States and the EU – were unhappy with this particular arrangement because the poorest nations could one day become more competitive in world markets.

Experts point out that these pledges will not be implemented until every WTO member nation signs and ratifies a final Doha Round agreement, which has been rescheduled to conclude by the end of 2006. In the meantime, officials say that the WTO member nations must complete a blueprint for final talks – which will involve crafting not only the precise language for a final trade deal, but also “the formulas and figures for reducing tariffs” – by April 30, 2006 or sooner.

Despite these particular advances, trade experts note that the negotiations had put off the most contentious issues, which could again threaten talks if they are not resolved to the satisfaction of every WTO member nation. One analyst

said that “on the toughest issues, [the Hong Kong negotiations] just kicks the can down the road.” For example:

- Some point out that while the industrialized countries agreed to end agricultural export subsidies, the negotiations did not address whether they would lower their tariffs on agricultural products from developing countries, which, analysts say, have an advantage in producing those goods at a lower cost.

- The participants did not establish limits on domestic farm subsidies in wealthier WTO nations, which, experts say, developing countries will most likely demand before signing off on a final agreement. While the United States did agree to eliminate export subsidies, it did not make any specific commitments to cut, for instance, *domestic* cotton subsidies, which economists say also distort international trade by providing an unfair advantage to less competitive American cotton farmers in world markets. Experts believe that unless wealthier nations go beyond eliminating their agricultural export subsidies in future negotiations, developing countries may threaten to hold up the conclusion of the Doha Round.

- Commentators point out that developing countries have not promised to develop guidelines in lowering their tariffs on manufactured goods made in industrialized countries. Business executives say that rich countries dominate the trade in manufactured goods, which makes up close to 60 percent of global trade. But they point out that developing countries impose tariffs averaging 40 percent on the import of such manufactured goods from the industrialized world. (On the other hand, U.S. tariffs on such goods average around five percent.)

Officials say that because the United States is one of the most influential members of the WTO, its members must complete action for a final trade agreement by July, 1, 2007, which is the expiration date of the U.S. president’s trade promotion authority. This allows the president to submit trade agreements to Congress for an up-or-down vote. Without such authority in place, members of Congress could demand changes to a final (and delicately negotiated) Doha Round agreement, and doom any chances of passage. (Analysts note that the negotiations are being conducted as a “single undertaking,” meaning that all WTO member nations must agree on the results in order to conclude the round and implement its provisions.)

Economists say that a successful conclusion of a Doha round agreement could increase world gross income by almost \$3 trillion by the year 2015. ■

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United Nations: Defender of endangered cultures?

Does the world's wide array of cultures need protection from being overwhelmed by those found in more influential and economically-powerful countries? Delegates to the United Nations Education, Scientific, and Cultural Organization (or UNESCO) recently adopted a new international treaty to protect the world's "cultural diversity" from the effects of globalization. Supporters say that globalization has allowed a few countries to dominate almost entirely the trade in cultural goods – ranging from movies to music – to the exclusion of less influential countries. While many countries have applauded the passage of this treaty, critics say that the interpretation of its provisions is open to abuse and that its ratification could sow confusion in the administration of already-existing global treaties affecting a range of areas, including international trade.

UNESCO – which has been called the cultural wing of the United Nations – functions as a clearinghouse for sharing and distributing information and ideas among its member nations in order to promote international cooperation. One of its concerns is the protection of "cultural diversity," which, the agency says, is embodied in the distinct languages, values, beliefs, practices, and expressions of the thousands of communities existing in the world today.

In the face of globalization and the fast pace at which it allows people to transmit information all over the world, some have argued that the cultures of economically-powerful countries have overwhelmed local cultures, and could create new forms of inequality. For example, although there are over 6,000 languages spoken today, social scientists say that 96 percent of the world's population uses only four percent of these languages. Furthermore, they believe that over 50 percent of all languages could fall into disuse and become extinct in following generations. UNESCO officials also note that only five countries – a list which includes the United States – monopolize the world's cultural trade.

In October 2005, delegates from UNESCO member nations overwhelmingly passed a global treaty called the "Convention on the Protection and Promotion of the Diversity of Cultural Expressions" (or simply the Convention). One of the objectives of this treaty is to "protect and promote the diversity of cultural expressions," which it defines as expressions with a cultural content resulting from the creativity of individuals, groups, and societies. It also defines "cultural activities, goods, and services" as "those activities, goods, and services, which – at the time they are considered as a specific attribute, use, or

purpose – embody or convey cultural expressions, irrespective of the commercial value they may have." One official described the treaty's passage as the "first time that culture per se has been integrated into international law."

Another objective of the Convention is to "reaffirm the sovereign rights of States to maintain, adopt and implement policies and measures that they deem appropriate for the protection and promotion of the diversity of cultural expressions on their territory." Under the treaty, states may, for instance, provide public financial assistance to or create more opportunities for the dissemination and distribution of its domestic cultural activities, goods, and services. They may also support financially public institutions and artists. Legal commentators point out that the Convention does not limit UNESCO members to these specific measures, and that the treaty text seems to give its signatory nations broad leeway in determining what cultural items need protection.

UNESCO delegates approved the Convention by a vote of 148-2, with the United States and Israel opposed to its passage. Four countries abstained from voting on the text. The Convention will not come into force until it is ratified (i.e. approved by the domestic legislatures in individual UNESCO countries) in 30 out of 191 countries. Once it comes into force, the treaty will be legally binding only on those countries that ratified it.

Despite the treaty's wide passage, critics believe that several important terms in the treaty – such as "cultural expressions" and "cultural activities, goods and services" – remain vague, and, thus, could be open to misinterpretation and abuse. Some legal analysts say that countries may use these vague provisions as a cover for protectionism.

For example, they worry that a country may suddenly designate certain domestic goods as "cultural expressions" needing specific protection under the UNESCO treaty when, in fact, it simply wants to protect inefficient sectors of its economy from foreign competition. Some officials have pointed out that, under the UNESCO treaty, there neither exists an "official list" of those activities, goods, or services deemed as "cultural expressions" nor any criteria to identify and designate such items. They also question whether anyone can truly create objective criteria to distinguish between ordinary national products from so-called cultural products deserving of protection.

Business executives worry that – under what they believe to be the Convention's vague definitions – some goods and services that could receive protection from a government will include films, books, music, television programs, and agricultural products such as wine, foie gras, and rice. One commentator asked: "Can France now justify trade protection for . . . foie gras as against the United States? Can Canada now safely protect its magazine industry against the sweeping force of U.S. bestsellers such as *Sports Illustrated*?" An American official added: "The problem is that . . . others are expanding the lists of cultural objects and things to now include wine."

Civil libertarians fear the convention's vague language

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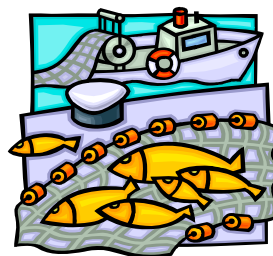
will tempt some authoritarian regimes to put further curbs on certain political rights such as freedom of speech and press in the name of “cultural security.” They note that countries such as China backed the treaty. Other critics have argued that, while, in theory, the convention will supposedly promote and protect cultural diversity by encouraging countries to establish incentives to stimulate “cultural expressions,” such measures could have the opposite effect by restricting cultural expressions (and the flow of information) from other nations.

One official described the approved treaty text as “deeply flawed and fundamentally incompatible with the UNESCO’s constitutional obligation to promote the free flow of ideas . . .” American officials believe that the convention was hastily drafted, but added that the United States “remains a vigorous proponent of cultural diversity,” and pointed out that its population is the most culturally-diverse in the world.

Legal analysts also worry about possible legal clashes between the Convention and other already-existing international treaties such as those administered by the World Trade Organization (WTO). The UNESCO treaty explicitly states that its provisions “shall not be interpreted as modifying rights and obligations of Parties under any other treaties to which they are parties.” Legal experts say that this particular provision allows UNESCO members to perform in good faith their obligations under other existing treaties to which they are parties. However, the Convention also requires that its parties not subordinate their obligations to other treaties, and that “when interpreting and applying . . . other treaties to which they are parties or when entering into other international obligations, Parties shall take into account the relevant provisions of this Convention.”

Legal experts say that the existence of these provisions could lead to a scenario where actions carried out by UNESCO member nations under the Convention could violate their obligations under other international treaties. For instance, a country may decide, under the UNESCO treaty, to restrict certain imports in order to protect “cultural diversity” within its own borders. However, those restrictions may violate fundamental international trading rules and principles under WTO treaties, which require member nations, for instance, to “accord treatment to imported products no less favorable than that accorded to *like* domestic products.” (In other words, once a certain foreign product enters a certain WTO member’s market, that member cannot favor a comparable, domestically-produced good by, for example, imposing disproportionate restrictions on the imported good.) These legal analysts point out that the WTO does not allow countries to create exceptions to its rules in the name of protecting “cultural diversity.”

Although many analysts have pointed to several possible conflicts that may arise from the implementation of the UNESCO treaty, they say that these problems have not yet manifested themselves. As of December 2005, Canada was the only country to ratify the Convention. ■



Delicate situation for caviar

In January 2006, over 160 nations agreed to suspend the international trade of sturgeon products such as caviar. While the measure has angered some in the fishing industry and consumers of such goods around the world, conservationists and government officials argue that the temporary ban would help to protect and conserve the sturgeon fish population in the long-term from further depletion.

International trade is popularly viewed as consisting of imports and exports of tangible and familiar goods such as cars, fabrics, and agricultural products, among others. But it also includes trade in wild animals and plants, which are used – for instance – for medicinal reasons or to satisfy a particular luxury market such as those for exotic fur pelts. One analyst estimated that the annual trade of wildlife was worth billions of dollars and included “hundreds of millions of plant and animal specimens.” But unregulated trade in this area has, in many cases, threatened existing wildlife populations or has even led to the extinction of many different species of wildlife.

In 1975, an international treaty called the Convention on International Trade in Endangered Species of Wild Fauna and Flora (or CITES) came into force to “ensure that international trade in wild animals and plants does not threaten their survival.” It does so by subjecting the trade of “selected species [threatened by over-exploitation] to certain controls,” and lists these species in different appendices “based on the degree of protection they need.” For example, Appendix I of the treaty lists those species threatened with extinction, and, accordingly, allows trade in these items only in exceptional circumstances. On the other hand, Appendix II contains a listing of species whose trade – while not necessarily threatened with extinction – must be controlled to avoid what the treaty calls “over-exploitation.” (One commentator described this particular appendix as a “watch list.”) There are currently 5,000 animal species and 28,000 species of plants listed in these appendices.

Under the provisions of the CITES treaty, each of its 169 state Parties (which include the United States) must adopt – through its own domestic legislation – a licensing system under the auspices of a designated regulatory agency to authorize the “import, export, re-export, and introduction from the sea of species” covered under the treaty. (One analyst noted that the provisions of the CITES treaty “does not take the place of national laws.”) In the United States, for example, the U.S. Fish and Wildlife Service is the primary government agency which administers that country’s obligations under the CITES treaty. An individual party that

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wants to import or export a particular specimen listed under the various appendices maintained by CITES can only do so “if the appropriate document has been obtained and presented for clearance at the port of entry or exit.”

Analysts have credited efforts undertaken under the CITES treaty in the successful preservation of various wildlife populations around the world. In recent decades, a ban on the trade in rhino horn has helped to increase the population of rhino in the wild. In 1989, the Parties to CITES agreed to ban trade in ivory, which, say conservationists, led to reduced poaching of elephants and has allowed some populations to recover. Other measures adopted by CITES has lead to better management and regulation of certain species of sharks, turtles, seahorses, and crocodiles.

Beginning in the 1990s, conservationists grew alarmed as populations of sturgeon – a fish whose meat and caviar (or unfertilized eggs) are prized around the world – began to decline quickly due to over-fishing and poaching. In 1998, the Parties to CITES agreed to list all species of sturgeon on Appendix II, meaning that the international trade of sturgeon and sturgeon products such as caviar – which industry analysts say is worth several hundred million dollars a year – would be placed under more strict regulation, including the greater use of permits and special labeling requirements to ensure, for instance, that sturgeon products came from legal sources. Furthermore, the Parties agreed to create annual export quotas of sturgeon products which would have to be approved by CITES after its administrators determined that trade under such quotas would not be “detrimental to the long-term survival of the [sturgeon] species.”

Despite these efforts, the secretariat of CITES – in 2001 and 2002 – ordered temporary bans on the trade in sturgeon products (the first lasting eight months and the second only three weeks). Under the bans, legal analysts note that sturgeon species were placed in Appendix I of the treaty, which prohibited all CITES Parties from engaging in the export and import of that species. Speaking of the ban, a scientist working at CITES said: “There are not enough [sturgeon] fish left.”

Conservationists say that because sturgeon populations still continued to fall despite these measures, the CITES secretariat announced – in January 2006 – that it would not approve this year’s export quotas on sturgeon products (which effectively shut down the global trade in that species) until the primary exporting countries – Azerbaijan, Bulgaria, China, Iran, Kazakhstan, Romania, Russia, Serbia, Montenegro, Turkmenistan, and Ukraine – provided more information showing, for instance, that their quotas would not harm the long-term sustainability of the sturgeon population and that the quotas would accurately reflect the amount of sturgeon caught illegally. Some analysts believe that “the illegal trade [of sturgeon] matches or exceeds the legal harvest.” As of February 2006, all species of sturgeon were still listed on Appendix I of the CITES treaty. While sturgeon-exporting nations are banned from shipping their products to other countries, commentators note that they may

still sell their products within their domestic markets.

Even so, a spokesman said that the “CITES Secretariat remains hopeful that the exporting countries will supply the missing data that may allow international trade [in sturgeon products] to resume.”

Legal analysts note that importing countries, too, must meet certain requirements under the CITES treaty. For example, under the recently-imposed ban, they are prohibited from importing sturgeon products that they have not already ordered in the months prior to the ban. Importing countries must also confirm that all imports of sturgeon are from legal sources, and must have in place registration systems for the domestic processing and repackaging of caviar, which can cost upwards of \$200 per ounce for certain species. Some believe that many importing countries have not yet implemented these measures. ■



Stopping child sex abuse via Foreign Commerce Clause

A recent decision by a United States court of appeals upheld the extraterritorial application of a domestic statute enacted to prevent the sexual abuse of children by American citizens and residents traveling to foreign venues. It also rejected claims that Congress did not have the authority to implement the statute under the Foreign Commerce Clause of the U.S. Constitution.

In its efforts to help curb sexual abuse of minors worldwide, the United States passed the Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003 (also known as the “PROTECT Act”). One particular provision of that act – 18 U.S.C. § 2423(c) – allows the United States to prosecute U.S. citizens who travel in foreign commerce and commit illicit sexual conduct in other countries. It states that “any United States citizen or alien admitted for permanent residence who travels in foreign commerce, and engages in any illicit sexual conduct with another person shall be fined under this title or imprisoned not more than 30 years, or both.”

The statute defines “illicit sexual conduct” in two ways. The first definition includes forms of sexual abuse that are non-commercial in character and committed against persons under the age of 18. The second definition covers “any commercial sex act . . . with a person under 18 years of age.”

In June 2003, an American citizen – Michael Lewis Clark – was arrested by Cambodian National Police in the city of Phnom Penh for engaging in sex acts with two young boys. He paid \$2 and \$5 to a 10-year old and 13-year old, respectively. Clark, a 71-year old U.S. citizen and veteran,

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was living primarily in Cambodia for five years on a business visa (which he renewed annually), but made occasional trips back to the United States. He maintained real estate, bank accounts, investment accounts, a driver's license, and a mailing address in that country. Prior to his arrest in Phnom Penh, Clark had returned from a trip to the United States using military aircraft.

The U.S. government received permission from the Cambodian government to take jurisdiction over the case. After an investigation, Clark was extradited to the United States and was later indicted for violating provisions of the PROTECT Act. Although he pled guilty, he reserved the right to appeal his pre-trial motion to dismiss based on jurisdictional, constitutional, and statutory grounds.

In seeking to dismiss the charges against him, Clark first argued that the "extraterritorial application of the PROTECT statute would violate principles of international law and would also be unreasonable." Clark argued that, under international law, the United States did not have jurisdiction (i.e. the legal authority to hear and decide a case) to prosecute him under the statute because he was residing outside of American borders. Legal experts and practitioners say that a country usually enforces its laws only within its own borders and cannot compel other sovereign countries to do so. But they also note that, under appropriate circumstances, a nation may engage in a practice called extraterritorial jurisdiction, which – as its name suggests – is the legal ability of a country to enforce its national laws outside of its formal boundaries.

In its decision, a U.S. district court decided that the statute did not violate international law because extraterritorial jurisdiction was properly exercised under both the nationality and the universality principles of international law. Under the nationality principle, jurisdiction is based on the "nationality or national character of the offender." The court said that Clark maintained his American citizenship and had strong and existing ties to the United States. The principle of universality provides for jurisdiction over "crimes so heinous as to be universally condemned." The court noted that prohibiting sex with minors was accepted in most countries around the world.

The court went further and stated that "even if certain principles justified the extraterritorial application of a country's laws," international law still required an element of reasonableness in its application. The court used several factors to determine whether the statute was applied reasonably. For instance, it said that it was unlikely that the PROTECT Act would conflict with regulations of other nations because many countries already had laws prohibiting sexual relations with children. Citing these factors and others, the court found that the extraterritorial application of the law was reasonable.

Clark also argued that the "extraterritorial application of the statute violated the Due Process Clause of the Fifth Amendment" of the U.S. Constitution. The district court dismissed this particular claim and found that the

extraterritorial application of the statute satisfied the Due Process requirement. In its ruling, the court said that the government had to show a "sufficient nexus" (or connection) between the defendant or the conduct condemned and the United States so that the extraterritorial application of the statute would not be viewed as arbitrary or fundamentally unfair. Legal experts say that a showing of a nexus helps to ensure that a court in the United States will only have jurisdiction over someone who should reasonably anticipate being brought to court to answer for his conduct.

The court ruled that the government's arguments established this connection. It noted that Clark was a United States citizen and that the eradication of trafficking in and exploitation of sex workers – especially minors – "is a foreign policy, law enforcement, and public health policy priority for the U.S. government." It ruled: "A crime against a foreign national alone does not create a sufficient nexus with the United States. However, when that crime is committed by an American citizen or resident alien, a sufficient nexus exists."

Clark finally argued that, under the Foreign Commerce Clause of the Constitution (U.S. Const. art I, § 8, cl. 3), Congress did not have the authority to regulate his charged activity. Legal scholars say that because commerce with foreign nations is primarily a national concern, Congress is the sole regulator of foreign commerce and also possesses broader power to regulate this activity than, say, interstate commerce, which primarily deals with commercial relations between the states.

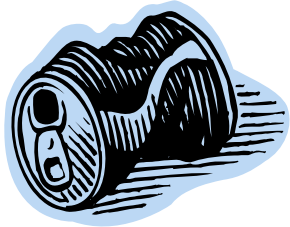
Legal analysts say that the Commerce Clause allows Congress to regulate various categories of commercial activities, including "the use of the channels of interstate or foreign commerce," and also instances of the misuse of those channels. In his defense, Clark argued that the statute only covered those actions that occurred during *actual* travel in the channels of foreign commerce. Because his actions were not committed while he was traveling in foreign commerce (e.g. on an airplane or a ship en route to his destination), Congress did not have the authority to regulate his charged actions. The district court rejected these claims and said that previous case law established that "the cessation of movement does not preclude Congress's reach if the person or goods traveled in the channels of foreign commerce."

The U.S. Court of Appeals in the Ninth Circuit largely affirmed the district court's decision. It reiterated that extraterritorial application of the statute based on defendant's status as a U.S. citizen was proper and complied with the nationality principle as well as established precedent. The court also found no instances of violations of due process because, it ruled, Clark's citizenship was sufficient to satisfy these concerns. The defendant, it noted, still had substantial connections in the United States, including investments, ongoing receipts for federal retirement benefits, and had used U.S. military flights to travel between the United States and Cambodia.

The appeals court also affirmed the use by Congress of

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its broad powers granted in the Foreign Commerce Clause. It noted that the U.S. Supreme Court has not yet struck down an act of Congress for exceeding its powers to regulate foreign commerce, and that it saw no compelling reason to do so in the particular case. It also described as “strained” Clark’s argument that the statute applied to actions that occurred during actual travels in foreign commerce: “From a practical perspective, it seems nonsensical for Congress to limit the scope of § 2423(c) to the unlikely scenario where the abuse occurs while the perpetrator is literally en route.” ■



WTO: Soda tax goes flat

The World Trade Organization (WTO) recently ruled that a tax imposed by Mexico on the sales of beverages not sweetened with cane sugar violated global trade rules, siding with the United States on this long-running dispute between the two trading partners.

In January 2002, Mexico had imposed a 20 percent sales tax and an additional 20 percent distribution tax on beverages not sweetened with cane sugar. On the other hand, beverages sweetened with cane sugar (which is produced in vast quantities in Mexico) were exempt from these taxes. In addition, Mexican regulations imposed extra bookkeeping and reporting requirements on beverage companies using sweeteners other than cane sugar.

Although Mexico’s tax was supposedly directed at all non-cane sugar sweeteners, analysts say that it was specifically meant to block U.S. imports of high fructose corn syrup (HFCS), a popular alternative sweetener which has increasingly replaced Mexican cane sugar. This was not Mexico’s first attempt at blocking imports of HFCS from the United States.

Since the 1990s, the United States and Mexico have disputed the amount of cane sugar that Mexico could export to the American market. Mexico claimed that – under the terms of the North American Free Trade Agreement (NAFTA) – the United States had to allow any production of Mexican sugar in excess of domestic consumption to enter the U.S. market duty-free. But the United States argued that both sides – in a side letter signed by top U.S. and Mexican trade officials in 1993 under the NAFTA agreement – agreed to a quota limiting Mexico’s duty-free sugar exports to the United States to 250,000 tons. Mexico has been trying since 1997 to convene a NAFTA dispute settlement panel to address this disagreement, but the United States has refused to go along in the creation of such a panel.

Industry analysts say that the beverage tax has caused significant loss to the U.S. economy. As one of the world’s largest soft drink markets, Mexico is also the United States’s

largest market for HFCS. According to the Corn Refiners Association, the tax effectively “shut down our top foreign market for HFCS sales overnight.” Prior to the imposition of the sweetener tax, U.S. exports of HFCS in 1997 reached 193,519 metric tons valued at \$63 million, while in 2003, exports only reached 4,111 tons valued at \$1.5 million.

In March 2004, the United States requested that the WTO determine the legality of the sweetener tax. American officials argued that Mexico’s tax was discriminatory and violated WTO trade laws. (The WTO is the premier international organization that regulates international trade through various treaties and provides a dispute settlement mechanism to resolve disputes.) More specifically, the United States argued that Mexico’s tax violated the principle of national treatment, which requires all WTO member nations “to accord treatment to imported products no less favorable than that accorded to *like* domestic products.” In other words, once a certain foreign product enters a certain WTO member’s market, that member cannot favor a comparable, domestically-produced good by, for example, imposing more regulatory oversight or higher taxes on that foreign product. Without the principle of national treatment, the goals of the WTO – such as reducing trade barriers – would be frustrated by domestic protectionist interests.

Article III of the WTO’s General Agreement on Tariffs and Trade (GATT) lays out the obligations of WTO member nations under the principle of national treatment. Specifically, Article III:2 states that imported products should not be subject to internal taxes in excess of those applied to like domestic products. Article III:4 requires WTO members to treat imported products no less favorably than similar domestic products. The United States said that Mexico’s sweetener tax violated these specific sections of Article III.

On the other hand, Mexico claimed that the tax was a necessary response to an alleged U.S. violation of the NAFTA agreement. It argued that its tax was allowed under Article XX(d) of the GATT, which grants exceptions to principles such as national treatment when it is “necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this [WTO] Agreement.” In Mexico’s view, the tax was necessary to secure U.S. compliance with its apparent obligations under NAFTA, which was to allow Mexico to export more cane sugar to the United States. It also argued that the WTO should not decide the case until a NAFTA dispute settlement panel first had a chance to consider the dispute.

In its October 2005 report, a WTO panel ruled that the imposition of sales and distribution taxes on beverages not sweetened with cane sugar violated WTO rules. The panel first determined that Mexican cane sugar and American HFCS were like-products directly competitive or substitutable with one another. It then ruled that the sweetener taxes imposed on HFCS (a foreign like-product to cane sugar) violated Article III:2 of the GATT agreement, which prohibits taxes on foreign products in excess of those

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applied to domestically-produced like products. The panel also decided that – by imposing extra bookkeeping and reporting requirements on those companies importing and using HFCS – the taxes also violated Article III:4 by giving less favorable treatment to imported HFCS over domestic cane sugar.

The WTO panel also rejected Mexico's Article XX(d) defense. The panel ruled that Article XX(d) only pertains to securing conformity of domestic regulations with WTO provisions and not with provisions of other international treaties such as NAFTA. Since Mexico had tried to use its taxes to secure U.S. compliance with provisions in NAFTA, Article XX(d) did not apply. It also ruled that the WTO did not have to decline jurisdiction over the dispute simply because another judicial body (i.e. a NAFTA dispute settlement panel) could first consider the dispute. The Mexican government later appealed the decision.

In March 2006, the WTO Appellate Body largely upheld the rulings of the WTO dispute settlement panel. Concerning the WTO's jurisdiction over the case, the Appellate Body added: "A decision by a panel to decline to exercise validly established jurisdiction would seem to 'diminish' the right of a complaining Member to seek the redress of a violation of obligations . . . We see no reason, therefore, to disagree with the Panel's statement that a WTO panel would seem . . . not to be in a position to choose freely whether or not to exercise its jurisdiction." ■



United States: Still master of the Internet domain?

Should any one country have a larger say than others in regulating the electronic network comprising the Internet? During a recent United Nations summit, delegates from around the world agreed to maintain the current arrangement whereby the United States plays a pivotal role in the technical governance of the Internet. But they also agreed to establish a new forum to discuss issues that are affected by the Internet and its growing use.

There is no one international organization or even a single treaty that regulates or addresses areas affected by the Internet. Instead, a broad spectrum of groups and organizations – such as government and regulatory agencies, international bodies, non-governmental organizations, industry groups, and members of civil society – are involved in different aspects of managing the Internet and the implications it may have for particular public policy areas such as international commerce, privacy rights, and certain political freedoms.

In an effort to coordinate global efforts concerning the

Internet, delegates from 175 countries gathered at the first "World Summit on the Information Society" in December 2003 – organized under the auspices of the United Nations – to begin the process of studying the effects of the Internet on various public policy areas. At the end of that summit, the delegates agreed to form a working group to present proposals in addressing specific Internet governance issues during the next summit meeting in Tunisia in November 2005.

One issue that has garnered the most attention is the control of a critical Internet resource called the "domain name system" (DNS), which allows users to communicate with each other through the Internet, and is overseen and maintained by the Internet Corporation for Assigned Names and Numbers (or ICANN) – a non-profit corporation based in California subject to oversight by the United States Department of Commerce.

When a user decides to establish, say, a homepage on the Internet, it must choose and pay for a domain name such as *www.nyls.edu*. ICANN is responsible for creating and assigning top-level domains, which are the generic suffixes that make up the last part of every domain name on the Internet (such as *.com*, *.edu*, and *.org*). It also creates and maintains top-level domain names to be used by a particular country. For example, an Internet address in Japan will end in the suffix *jp*, while an address in the United Kingdom will end in *uk*. Another important component of the domain name system is the "Internet Protocol" (or IP) number that is assigned to every computer that wants to communicate with other computers on the Internet.

To allow users to communicate with one another via the Internet, large computers known as root servers match the domain names with their corresponding IP numbers. Various organizations – such as NASA, the University of Maryland, the U.S. Army Research Lab, and ICANN – currently maintain these root servers. Ten of the 13 existing root servers in the world today operate in the United States, and analysts say that ICANN controls the master database containing all of the top-level domain names used by every root server.

Given the global reach and growing importance of the Internet in everyday life, many nations have argued that this electronic network should be administered under a multilateral treaty. The current arrangement is viewed in some countries as an instrument of American hegemony over cyberspace. Critics say that the United States should not, for example, be the sole country which regulates the vast majority of root servers (and, accordingly, the master root files of top-level domain names) because such an arrangement lacks legitimacy in the eyes of the world. Indeed, one analyst pointed out that the majority of Internet users reside outside of the United States.

Some critics believe that the operators of the root servers could – for political reasons – delete another country's top-level domain name, thus disabling people's ability to reach an Internet homepage in that particular country. "The reality

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is whoever controls the root servers has the final authority about what new top-level domains are added or deleted,” said one analyst.

Supporters of the current arrangement (such as Canada and Australia) point out that advisors representing a large segment of society – ranging from businesses, technical organizations, and civil society groups from around the world – provide guidance to ICANN and the Department of Commerce in the daily operations of the DNS. Furthermore, they point out that ICANN has never deleted another country’s top-level country-code domain. Still, opponents argue that ICANN ultimately reports to the Department of Commerce, and that the United States still has the potential to manage the Internet in ways which will benefit that country to the detriment of other nations.

These critics have offered proposals whereby a newly-established United Nations agency would take over the oversight functions that the Department of Commerce currently maintains in respect to ICANN. But some opponents of a UN-administered plan suspect that several countries simply want to restrict Internet users within their respective jurisdictions. They point out that many ardent supporters of reducing American influence over ICANN include despotic regimes such as those found in China, Cuba, and Zimbabwe, where civil liberties – such as freedom of speech and press – are often ignored, and where the Internet can allow access to alternative information sources that can sometimes evade official censorship. Furthermore, others worry that UN oversight of ICANN – which is a private sector entity – could stifle further innovation of the Internet because every UN member nation could conceivably have a say in ICANN’s management and operations, which is not the case right now. Political analysts point out that several UN agencies over the years have been accused of significant corruption and inefficiency.

In a compromise reached at the summit in November 2005, delegates agreed to maintain the current arrangement where the Department of Commerce maintains its oversight function of ICANN. In fact, in a declaration released at the summit, delegates announced that they “recognized that the existing arrangements for Internet governance [through ICANN] have worked effectively to make the Internet the highly robust, dynamic, and geographically diverse medium that it is today.” The declaration also states that governments should not get involved in “day-to-day technical and operational matters that do not impact on international public policy issues.” Some political analysts say they never doubted that the summit participants could have reduced American influence over the DNS for the simple reason that ICANN remains firmly in U.S. hands.

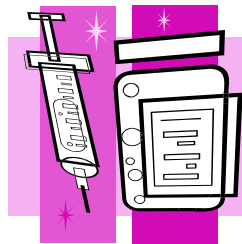
Delegates also agreed that ICANN’s technical ability to manage the day-to-day affairs of the DNS outstripped other forums addressing Internet governance, and that any abrupt changes to the current system could adversely affect the Internet and its billions of users, which include millions of companies around the world that have come to rely on this

vast electronic network for a growing share of their revenues.

In turn, American officials acknowledged in the official declaration that many countries had “sovereignty concerns” regarding control of their two-letter country domain name, and agreed that “countries should not be involved in decisions regarding another country’s country-code top-level domain.” But experts say that the United States did not promise any further action on this particular issue.

The United States also agreed to allow the formation of a new “Internet Governance Forum” to discuss issues affected by the Internet, which, analysts say, will include continuing debates as to whether the United States should maintain its role over the DNS. According to the final summit declaration, the new UN forum – which will convene its first session sometime in 2006 in Greece – will have “no oversight function and would not replace existing arrangements, mechanisms, institutions, or organizations.” But some diplomats argued that this new forum has set in motion a process for the “evolutionary movement” of Internet governance away from the United States. The UN will then convene another summit in the year 2010 to determine its role in Internet governance.

Despite what is perceived to be the favorable results of the summit for the United States, some analysts fear that unless that country gives more responsibility to other countries in managing the DNS, other nations may create a “parallel Internet” with its own DNS, though many technical experts say that such a move is unlikely because of its potential to disrupt international commerce. Despite these concerns, one participant summed up the summit as follows: “If a solution [to the problem concerning Internet governance] cannot be found in [Tunisia], there won’t be any impact on users, because the Internet will remain as it is now . . . and life will continue.” ■



Affordable medicines for poor nations?

Last year, the member nations of the World Trade Organization (WTO) reached a final agreement to make it easier for poor countries to import generic versions of patented (and more expensive) medicines to treat illnesses such as AIDS. Although that organization had reached a tentative agreement in 2003, it wasn’t until late last year that its members resolved some outstanding issues.

Critics around the world have criticized the WTO for worsening what they see as inequalities created by globalization. The WTO is the main international organization responsible for regulating global commerce and the settlement of trade disputes. It administers several

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treaties, one of which is the Agreement on Trade-Related Aspects of Intellectual Property Rights (popularly known by its acronym "TRIPS"). The TRIPS agreement is a comprehensive multilateral agreement on intellectual property rights, covering such areas as patents, copyrights, and trademarks, and is binding on the 149 member nations of the WTO.

The TRIPS agreement does not require all WTO members to have the same intellectual property laws. Instead, it sets out the minimum standards that each member nation must employ in its own legal system to protect and enforce intellectual property rights. In terms of, say, patents, the TRIPS agreement requires member nations to provide patent protection for any invention for at least 20 years from the filing date of the patent.

But patent protection is not absolute under the TRIPS agreement. Under that agreement, a WTO member government may issue "compulsory licenses" so that, for instance, domestic drug makers can manufacture generic (and cheaper) versions of patented products without authorization from the rights holder. But the TRIPS agreement also requires that the patent holder receive adequate compensation. Although the TRIPS agreement does not list the circumstances that justify giving out compulsory licenses, experts say that they may include public health emergencies. Many public health officials note that medicines used to treat illnesses such as AIDS are prohibitively expensive for people living in poor countries around the world, and that compulsory licenses will give these countries access to less expensive drugs.

But some critics have argued that a particular section of the TRIPS agreement has prevented poorer countries from issuing compulsory licenses in the manufacture of generic drugs. They say that Article 31(f) of the TRIPS agreement allows WTO member governments to issue compulsory licenses only when "any such use shall be authorized predominantly for the supply of the domestic market of the Member authorizing such use." That is to say, compulsory licenses may be given only to domestic drug manufacturers to supply their own domestic market with generic medicines. Critics note that because the overwhelming majority of the least-developed countries that are in most need of cheaper medicines do not have a domestic pharmaceutical industry to make generic version of expensive patented drugs, Article 31(f) has effectively blocked poorer countries from issuing compulsory licenses.

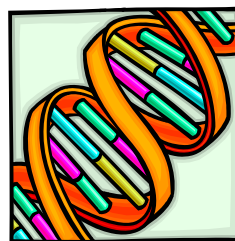
In response, WTO member nations reached a formal agreement in August 2003 whereby countries would be given a waiver from complying with Article 31(f). They agreed that this waiver would remain in place "pending incorporation of a permanent arrangement" into WTO rules. The agreement also states that only those countries classified as "least developed" by the United Nations and those that "do not have sufficient domestic manufacturing capacity" will be able to make advantage of the waiver. Furthermore, not only does the agreement require an importing country to issue a

compulsory license in order to import generic copies of patented drugs, it also requires that a government of an exporting country issue compulsory licenses to its generic drug manufacturers before they send their medicines to the poor country in need.

In addition to this agreement, the WTO also released a list of safeguards to prevent member nations from taking advantage of the new waivers. For example, it stated that its member nations must not use the waivers "to pursue industrial and commercial policy objectives," and that "governments should take all reasonable steps to prevent and discourage medicines produced under compulsory licenses from being diverted to rich country markets." The United States, for example, has long argued that the waivers should only help the poorest countries. Analysts note that some developing countries – such as Brazil and India – have thriving generic drug industries, and many drug industry officials worry that these nations may take advantage of the WTO waivers to establish a stronger foothold in the global drug market. Some also note that even people living in wealthier nations such as the United States have been buying generic versions of patented medicines manufactured abroad in order to save money. Countries that issue compulsory licenses must also notify the WTO of their intention to do so.

Despite this progress, WTO member nations failed to reach a consensus on how to incorporate the August 2003 agreement into the TRIPS agreement. More specifically, they debated the legal status of the list of safeguards. While countries such as the United States argued that the list of safeguards should be incorporated into an amended TRIPS agreement, other nations wanted to exclude that list completely.

In December 2005, the United States – under some international pressure – backed down from its demands to incorporate the safeguard provisions into the TRIPS agreement. The WTO will incorporate the text of the August 2003 agreement into the TRIPS agreement once two-thirds of its 149 member nations formally ratify these changes by December 1, 2007. ■



UN: Cloning around for a treaty

There has been a raging debate concerning the ethics of cloning and stem cell research ever since Scottish scientists successfully cloned a sheep in 1997. In numerous reports over the last decade, some scientists from around the world announced breakthroughs in their efforts to clone different forms of life (including human life). Though much of these results were later discredited or found inconclusive – a South Korean scientist was recently accused of fabricating his

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widely-publicized feat of cloning human embryos and, later, harvesting their stem cells – research in this area continues in the hope that medical treatments will be found for various ailments such as diabetes, spinal cord injuries, and Alzheimer’s disease.

While the subject of cloning has both fascinated and worried the public, governments around the world have passed – with wide popular support – various types of legislation to regulate strictly this kind of research. The provisions of these recently enacted national laws have varied along with their respective countries. But what is the current status of efforts to pass a global treaty regulating cloning and stem cell research?

The three types of technologies used for cloning are DNA cloning, reproductive cloning, and therapeutic cloning. DNA cloning involves the transfer of a DNA fragment – which contains specific traits – from one organism to a self-replicating foreign host cell. Scientists have used this particular method, for example, to make plants resistant to certain types of insects and diseases. The process of reproductive cloning is used to generate an animal that has the same DNA as another currently or previously existing animal. Therapeutic cloning involves the production of human embryos for the purpose of extracting their stem cells, which scientists say are cells “that can produce mature specialized body cells [that eventually grow into specific organs such as the liver],” and can be used to study human development and, perhaps, aid in the treatment of certain diseases. Scientists hope that, one day, this technology can be used to generate tissues and organs for transplants.

Reproductive and therapeutic cloning remain the most controversial areas in this growing area of research. The controversy surrounding reproductive cloning technology stems from the fact that “more than 90 percent of cloning attempts [on animals such as sheep] fail to produce viable offspring.” Scientists note that cloned animals have a “compromised immune function and higher rates infection, tumor growth, and other disorders,” and that many die soon after birth.

These complications have raised concerns about the ethics of creating cloned humans who will have a high probability of suffering during their lifetimes. Others point to negative connotations surrounding reproductive cloning. For instance, some ethicists argue that cloned people might be denied the “right to an open future” because they will always be compared to the genetic original or, “even worse, the parents might actually limit the child’s opportunities for growth and development.” Others oppose cloning due to religious beliefs. The destruction of embryos in stem cell research brings up the controversial issue of when life begins, and has attracted the hostility of, for example, anti-abortion groups.

At present, there are no federal laws regulating cloning research. While President Bill Clinton issued an executive order in 1997 prohibiting the use of federal funds for human cloning, it had no effect on privately-funded research. In

1998, a bill introduced in Congress – with strong backing from religious and anti-abortion groups – would have banned human reproductive cloning and the creation of cloned embryos. A competing bill – supported by the biomedical research community and the biotechnology industry, among other groups – would have banned only reproductive cloning. Neither bill passed in either chamber of Congress.

After two separate teams of scientists announced plans – in December of 2000 and January 2001 – to begin attempts to clone human beings, some members of Congress introduced legislation calling for a permanent ban on the creation of clonal embryos in order to produce human clones. Another bill called for a 10-year moratorium on producing cloned human beings. It also required that individuals inform the federal government if they planned to produce cloned human embryos for research purposes and to make a promise not to use these embryos to produce fully-formed human clones. Political analysts say that the hard stances taken by both anti-abortion groups and the biotech lobby concerning cloning research eventually frustrated attempts to draft a compromise bill.

On the other hand, individual states have been more successful in passing legislation banning human cloning. Some states – such as Arizona and Missouri – prohibit the use of public monies for reproductive or therapeutic cloning. The majority of states that have legislation regulating cloning research prohibit reproductive cloning, but are split on the issue of therapeutic cloning. So while Arkansas, Iowa, and Indiana prohibit both reproductive and therapeutic cloning, other states – such as California, Connecticut, and Massachusetts – prohibit only reproductive cloning, but allow therapeutic cloning.

At the international level, various countries have taken different approaches in regulating cloning research. Countries in South America have generally banned specific aspects of human cloning research. For example, Argentina enacted national legislation stating “experiments concerning cloning of human cells in order to generate human beings are hereby prohibited.” The criminal code in Colombia prohibits both “the fertilization of a human ovum with intent other than procreation” and “genetic manipulation for the purpose of the reproductive cloning of a human being,” though it allows “the fertilization of human ova for research and diagnostic purposes if they have a therapeutic goal.”

South Africa has legislation that prohibits reproductive cloning, but only limits therapeutic cloning. Israel has a five-year ban on human cloning. Australia prohibits human cloning and the creation of embryos for purposes other than pregnancy in a woman. Analysts say that most countries around the world have banned reproductive cloning for the purpose of creating a cloned human being, though some critics say that the language of the accompanying legislation can be vague. They also note that a majority of countries has passed legislation regarding research involving embryos and therapeutic cloning.

As publicity has grown over cloning, several countries –

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beginning in 2001 – have pushed for the creation of a global treaty that would try to set some minimum standards for regulating such research. In 2004, the United States urged the United Nations to support a resolution proposed by Costa Rica which would ban *all* human cloning, including that carried out in the name of medical research (such as therapeutic cloning). In his speech to that organization's General Assembly, President Bush said that "no human life should ever be produced or destroyed for the benefit of another."

Commentators note that while all 191 member nations generally agree that there should be a prohibition on human cloning for reproductive purposes, officials are divided over whether to broaden such a ban to cover stem cell research and therapeutic cloning, which – analysts point out – would go beyond laws enacted in individual states such as California, which allows such research. A compromise resolution submitted by Italy would have banned human cloning for reproductive purposes, but would have allowed countries to deal with therapeutic cloning through three options – "banning it, putting a moratorium on the practice, or regulating it through national legislation to prevent misuse."

Political analysts note that because the groups supporting each resolution could not agree to a further compromise, the General Assembly ultimately adopted a non-binding and vaguely-worded resolution in 2005 called the "Declaration on Human Cloning," which calls on member states to prohibit all forms of human cloning "inasmuch as they are incompatible with human dignity and the protection of human life." While 84 countries voted to approve the resolution (including the United States), 34 voted against it, and 37 countries abstained. Legal analysts say that because the declaration is non-binding, it will not affect nations that currently allow, for example, therapeutic cloning research. ■



Final exhale for global warming treaty?

What will happen to international plans to address global warming when the main treaty dealing with that issue expires in less than a decade? The Kyoto Protocol requires its State parties to begin talks on future efforts to reduce the emission of greenhouse gases – which many say contributes to global warming – once that agreement expires in 2012. But efforts to comply with current reduction targets have proven more difficult than anticipated. Furthermore, political analysts note that many influential countries in the current debate are either still opposed to the entire treaty or are refusing to carry out its key provisions.

Scientists say that emission of industrial gases and pollutants – such as carbon dioxide – trap heat in the atmosphere and cause temperatures to rise around the world in a so-called "greenhouse effect." They claim that without a sustained and coordinated international effort to reduce the emissions of these gases, temperatures could rise further in the next decade and lead to catastrophic natural disasters such as rising ocean levels and the expansion of deserts.

Efforts to control and even reverse the effects of global warming culminated in the Kyoto Protocol in 1997. State parties to this treaty are legally bound to reduce total emissions of industrial gases to five percent below 1990 levels through a combination of efforts such as burning less fossil fuel, using more fuel-efficient technologies, and promoting alternative energy sources. Experts note that these cuts in emissions – which must commence in the year 2008 – will apply only to the 38 industrialized nations that have ratified the protocol. Although the negotiation of the protocol ended in 1997, the treaty did not come into force until 2005. Scientists and other experts say that the almost eight years of delay in implementing the treaty will make it more difficult for its State parties to reach their targets in reducing greenhouse gas emissions.

In December 2005, signers of the Kyoto Protocol met in Montreal, Canada, during the United Nations Climate Change Conference and began talks for setting new targets and timetables in reducing emissions of greenhouse gases once the protocol expires in 2012. During the conference, the United States – which refused to ratify the protocol and contributes to 36 percent of the world's emissions (the largest in the world) – rejected efforts to set new targets for reducing emissions beyond 2012. American officials continued to argue that any legally-binding cuts would hurt its economy, and that the United States was undertaking its own efforts to reduce emissions through a variety of programs, which include investing in environmentally-friendly technologies and granting tax credits to businesses that voluntarily undertake efforts to reduce emissions from their factories and plants. Other countries such as Australia have also taken similar positions against the protocol.

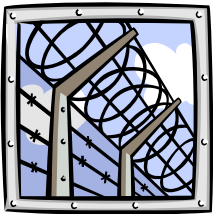
Developing countries such as China and India – which have no obligation to make specific cuts of emissions under the Kyoto Protocol – have also argued that they cannot cut their emissions without hurting their standards of living, and that, historically, their nations did not heavily contribute to the emission of greenhouse gases. But scientists say that China, for example, is the second largest polluter in the world (and will probably overtake the United States within 20 years), and that future efforts to reduce emissions will be much harder to achieve without significant cuts from the 119 developing countries that also ratified the treaty, but are not legally-bound to cut emissions.

Though a majority of countries say they aspire to set new targets, analysts point out that many industrialized nations have failed to meet their own cuts in emissions under the protocol. One expert noted that in 2003, "emissions were

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above the 1990 baseline by more than 10 percent in Italy and Japan, more than 20 percent in Ireland and Canada, and more than 40 percent in Spain.”

At the end of the conference, the parties to the protocol agreed to create a formal working group which will discuss what steps should be taken to reduce greenhouse emissions before the current protocol expires in 2012. One analyst said that the delegates “mainly agreed to start talking about what comes after [the protocol’s] terms expire in 2012,” and that the working group would not set specific targets in reducing emissions beyond those set in the current treaty. Political analysts note that because many signatories to the protocol were having difficulties in meeting their respective targets in reducing their emissions, delegates also agreed not to set a specific deadline for the working group to complete a report. Instead, they vowed that proposals would be announced “as soon as possible” so as to avoid any gaps that could occur in reducing emissions once the current treaty expires. ■



Limiting Guantanamo detainees' access to courts?

What is the legal status of suspected terrorists held in the American military base in Guantanamo Bay, Cuba? Although the U.S. Supreme Court ruled that American courts had jurisdiction (i.e. the legal authority) to consider habeas petitions filed by those detainees, civil libertarians worry that recent legislation passed by Congress has already chipped away at this important decision.

After the September 11, 2001, attacks on New York and the Pentagon by the terrorist group Al Qaeda, the United States invaded Afghanistan, which served as a base of operations for that group. In a ground campaign, American military forces captured hundreds of foreign fighters (whom they designated as “foreign combatants”) and sent them to the Guantanamo Bay naval base, which is a U.S. base located in Cuba. The U.S. military announced that – in accordance with international treaties governing the treatment of enemy combatants – the detainees would be held until the end of the hostilities and would be denied access to courts or counsel to challenge their detentions. If a detainee was accused of committing a war crime, he would be tried by a U.S. military tribunal.

Civil libertarians said that the detainees should be afforded the same constitutional rights as non-citizens who are within U.S. borders, including the ability to challenge their detention in a court by filing a petition for a writ of habeas corpus. (This is a judicial order to bring a prisoner before a court to determine the legality of that prisoner’s detention, and is considered to be one of the most important limits against arbitrary government detention.) The argument

was that because the detainees were being held by American authorities on a U.S. military base, American courts had jurisdiction to consider their habeas corpus petitions.

The government argued that while aliens certainly have certain rights under the U.S. Constitution, they must first have established some physical “presence” within sovereign U.S. territory. In its interpretation of a well-known Supreme Court case called *Eisentrager v. Johnson*, the government argued that that “the Court recognized that federal habeas statutes did not grant jurisdiction over a petition filed on behalf of aliens held abroad.” The government compared the Guantanamo Bay prisoners to those in the *Eisentrager* case, saying that the detainees were aliens with no connection to the United States.

In response, lawyers for the detainees said that the *Eisentrager* case did not automatically bar foreign nationals from seeking redress in the U.S. legal system, and that the court’s decision was not as absolute as characterized by the government. They argued that the *Eisentrager* decision only limited review of habeas petitions to “instances where a party has already been through a fair legal process.” The Guantanamo detainees, they noted, had not been through any legal process to evaluate the legality of their detention. Some claimed to have been captured accidentally by U.S. forces.

In an 8-1 decision issued in June 2004, *Rasul v. Bush*, the Supreme Court rejected the government’s interpretation of *Eisentrager* and ruled that federal courts did have jurisdiction to consider habeas petitions filed by relatives of foreign detainees held specifically in Guantanamo Bay. But legal experts noted that the decision did not address whether U.S. courts had jurisdiction to consider habeas petitions filed by foreign detainees held by American military authorities in other geographical locations (such as Afghanistan). After the decision, lawyers for the detainees filed hundreds of cases in federal courts challenging their detentions.

In 2005, Senator Lindsey Graham (R-South Carolina) proposed a bill to amend the federal habeas statute (28 U.S.C. § 2241) to limit court privileges exercised specifically by Guantanamo Bay detainees. In November 2005, after much debate and compromise, the Senate passed legislation (by a vote of 49-42) which stated: “No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien outside the United States . . . who is detained by the Department of Defense at Guantanamo Bay, Cuba.”

One legal analyst said that the legislation – if ultimately signed by the president after passing both houses of Congress – would effectively overturn the *Rasul* decision, and, in turn, “stem the flood of litigation” that resulted from that ruling. (The legislation would also apply retroactively, meaning that it could end the hundreds of existing habeas petitions now working their way through the American court system.) At the same time, the compromise legislation provides that if a military tribunal in Guantanamo Bay meted out a death sentence or a prison term of at least 10 years to a detainee, he would be granted an automatic appeal to the U.S. Court of

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Appeals for the D.C. Circuit. The House of Representative is considering a similar measure, and legislative analysts believe that it could come up for a vote some time this year.

Despite the compromise measure passed in the Senate, critics point out that the Executive branch will establish the rules governing any military trials in Guantanamo Bay, and they worry whether the process will be administered in a clear fashion. ■



UN: Old human rights group with new face?

On March 15, 2006, the United Nations General Assembly approved a resolution to replace its discredited Commission on Human Rights with a new Human Rights Council. The vote passed by an overwhelming majority, 170-4 with three abstentions. The United States – citing what it says were many shortcomings – voted against the creation of the Council in its present form. While supporters believe that the new Council will help to improve human rights around the world, others are already questioning its effectiveness.

The original Commission on Human Rights was entrusted with reviewing and investigating human rights practices and violations around the world. In recent decades, however, according to legal and political analysts, many nations have been seeking membership on the Commission not to strengthen human rights, but to deflect attention away from their own human rights abuses or simply to criticize others for political reasons. Analysts note that some of the worst offenders of human rights in the world – including the governments of Libya, Syria, and Sudan – had sat on the Commission, thus eroding its credibility and professionalism.

In the face of such developments, the UN Secretary General – Kofi Annan – proposed the creation of a new human rights body with higher standards for membership and accountability. Initial proposals included election to the Council by a two-thirds majority vote of the 191-member General Assembly, and prohibiting membership for countries under UN sanctions. Instead, UN member nations crafted several compromises. While appeasing some UN member states, these compromises dashed the visions of others for a better-working Council to protect human rights.

According to the text of the final resolution, the Council will have a membership of 47 members (as opposed to the 53 members in the original Commission). While the original Commission met for a single annual meeting lasting for six weeks, the Council would meet at least three times a year for a total of 10 weeks. The Council will also have a subsidiary body that would meet all year round. New procedures would also allow the Council to convene more quickly in order to address urgent human rights crises.

Rather than electing members to the Council through

regional groupings (which, critics say, had allowed countries with poor human rights records to gain membership in the original Commission), new procedures will require direct individual elections by a majority vote of the General Assembly (i.e. a minimum of 96 out of 191 votes) through secret ballot. UN member nations will also be able to remove a country from the Council for “gross and systematic violations” of human rights by a two-thirds vote in the General Assembly.

Critics, including the United States, pointed to what it believes are major shortcomings of the Council. For example, they cite the lack of more rigorous standards for membership. They point out that although a state’s human rights record is taken “into consideration,” membership to the Council is, nevertheless, still open to all UN member states. American officials argued that Council membership should be denied to any state facing UN sanctions and also those unwilling to accept human rights monitoring missions.

The United States also noted that the election of members to the Council by a simple majority was similar to the Commission’s election process. An official said that the initial proposal of requiring a two-thirds vote would have prevented regimes with questionable human rights records from standing for membership. The United States also argued that garnering a two-thirds vote to remove members was highly improbable. Officials noted that last year, only 40 percent of the UN member states was willing to condemn the African nation of Sudan for its highly-publicized violations of human rights.

Other critics believe that regional groups will continue to dominate the work of the Council and shift influence away from blocs of democratic countries. They say that a formula which will be used to distribute seats in the Council will guarantee 26 seats (an absolute majority on the Council) to countries from Africa, Asia, and the Middle East – areas of the world which many consider to be the least democratic. On the other hand, the UN will allocate only seven seats to the United States, Western Europe, and other democratic countries. Others note that because membership on the Council is limited to two consecutive three-year terms, countries such as the United States will not have continuous representation on the Council as it did on the Human Rights Commission (except for a brief period in 2001-2002).

Major human rights organizations and a number of U.S. allies argued that these terms marked an improvement over the original Commission and would keep major human rights abusers off the Council. Despite their opposition to the current form of the Council, U.S. officials assured the UN that they supported the Council’s overall mission and will not stand in the way of its funding. Elections for Council membership will take place on May 9, 2006, and its first meeting will convene on June 19, 2006. ■

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The World Trade Organization and Developing Countries: Cotton subsidies and the Brazil – United States dispute

By Robert W. Njoroge '06

PART I: INTRODUCTION

The formation of the World Trade Organization

In 1946, more than 50 countries participated in negotiations to form an International Trade Organization (ITO), which would have had the status of other well-known Bretton Woods institutions – such as the World Bank and the International Monetary Fund – but whose work would have focused on international trade. During these negotiations, 23 of the 50 countries decided to reduce and bind customs tariffs as a way of stimulating trade after the destruction of World War II. Forty-five thousand tariff concessions, affecting about one-fifth of the world's trade, were reached. The 23 nations also agreed to accept provisionally some of the ITO trade rules in order to protect the value of negotiated tariff concessions.¹ These trade rules and the tariff concessions were known as the General Agreement on Tariffs and Trade (GATT).

GATT was intended to be a provisional arrangement, pending the establishment of the ITO. But the United States and other countries declined to ratify the Havana Charter (which would have created the ITO), and what remained was the “framework” of GATT which now became the “constitution of world trade.”² GATT experienced a level of success. It led to liberalization in world trade, stimulating growth in trade that often out-paced production.³ By the 1970s and 1980s, however, economic recessions caused countries to implement protectionist policies and increase the use of subsidies, as countries faced high unemployment and foreign competition.

By the 1980s, GATT's effectiveness had declined. Several factors of the decline have been explained. Chief among these was the fact that world trade had changed since 1947. Factors known as “globalization” had arisen, and trade in services had expanded, although GATT did not have any rules on trade in services. In addition, countries were exploiting loopholes in GATT, thereby undermining the efforts to liberalize agricultural trade.⁴ The deficiencies of GATT convinced member countries to create the World Trade Organization (WTO) during the Uruguay Round of trade negotiations, which took place between 1986 and 1994. The WTO was created to administer agreements that, in addition to the GATT, deal with trade in services, inventions and intellectual property, investment, agriculture, dispute settlement, and other topics. Therefore, the WTO was an expansion of the GATT, which dealt mainly with trade in goods.⁵ Despite the creation of the WTO, the GATT agreement remained as the WTO's “umbrella treaty” for trade in goods, with updates from the Uruguay Round negotiations.⁶

The treaties administered by the WTO (including the GATT) operate on several fundamental principles. The first is the principle of “most-favored-nation status” (or MFN) whereby countries are prohibited from discriminating among their trading partners. Under the principle of national treatment, WTO members must treat foreign-produced goods and services in the same manner as local goods and services. National treatment only applies when a product or service has entered a country; therefore, imposing customs duties on imported goods does not violate this principle.⁷ Other WTO principles include: liberalizing trade through multilateral negotiations; predictability through binding agreements; promoting fair competition; and encouraging development and economic reform.⁸

The WTO is a rules-based system which includes almost sixty agreements that have been negotiated by member countries.⁹ WTO members cannot pick and choose the agreements to which they will abide. Instead, agreements are viewed as a “package deal” that overcomes divergent interests among negotiating countries.¹⁰ (Exceptions to the “package deal” are four “plurilateral agreements” which bind only the signatory members, and which relate to government procurement, civil aircraft, dairy goods, and bovine products. The agreements establishing the WTO expressly provide for such exceptions).¹¹

The WTO Agreement on Agriculture

The long-term objective of the WTO Agreement on Agriculture is to “establish a fair and market-oriented agricultural trading system . . . through negotiations of commitments on support and protection.” Members are committed to achieve specific binding commitments on market access, domestic support, and export competition, and to reach an agreement on sanitary and phytosanitary issues.

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Agricultural negotiations are designed to result in “substantial progressive reductions” in agricultural protections over an agreed period of time in order that distortions in world agricultural markets will be corrected and restricted. The special needs of developing countries are considered in the Agreement on Agriculture. The goal is to provide better opportunities and terms of access for the produce of developing nations.¹² Although the prior GATT agreement contained provisions for agriculture, it allowed countries to use non-tariff measures such as import quotas and export subsidies, which created a highly distorted agricultural market.¹³ The Agricultural Agreement, while not prohibiting all such measures on agriculture, is designed to avoid great distortions in trade. Additionally, developing countries and least-developed countries (LDCs) are given some flexibility.

Features of the Agreement on Agriculture: Market Access and Tariffication

The Uruguay Round initiated a process of tariffication. First, quotas and non-tariff measures on agriculture were replaced by tariffs which provide an equivalent level of protection. Second, a gradual reduction in these tariffs would be implemented.¹⁴ Article 4 of the Agreement on Agriculture prohibits members from maintaining, resorting to, or going back to any measures that have been converted into ordinary customs duties (with certain exceptions). These prohibited measures include quantitative discretionary import licensing and voluntary export restraints.¹⁵

The principle of special and differential treatment is contained in Article 15. Under this principle, developing countries are given 10 years (until 2005) to carry out their commitments, while LDCs are not required to make commitments. In addition, member governments are allowed to take emergency action (or measures) to avoid the consequences of rapid price decreases or rapid import increases in local markets. These measures must be implemented as specified. For example, they cannot be used in respect to imports that have tariff-quotas.¹⁶ Tariff-quotas ensure that quantities that were imported before the agreement took effect could continue to be imported, and that new quantities are charged duty rates.

Emergency measures are intended to be temporary. They are mainly authorized in four situations: to deal with a sudden influx of particular imports; to alleviate balance-of-payments disequilibrium; to prevent or relieve critical shortages of foodstuffs or important products of an exporting country; and for essential national security reasons. Emergency measures may take the form of discrimination, quantitative restrictions, and tariffs.¹⁷

Domestic Support Measures

Articles 6 and 7 of the Agreement on Agriculture deal with domestic support policies which have the potential of causing distortions on world markets. The agreement distinguishes between policies that directly stimulate production, and those that have no direct effect.¹⁸ Members have committed to decrease measures that directly affect production and trade.

“Green Box” Programs: No restrictions are placed on measures that have minimal impact on trade. These measures are referred to as “green box” measures. They include government services such as research, disease control, infrastructure, and food security. Direct payments to farmers that do not have an effect on production are also included in the “green box.” These include certain direct income support, assistance to restructure agriculture, and payments under environmental programs.¹⁹

“Blue Box” Programs: These are certain direct payments to farmers requiring them to limit production, as well as specified government assistance programs aimed at encouraging agricultural and rural development in developing countries. Additionally, some small scale support (in comparison to total value of products) is permitted.

“Amber Box” and the Aggregate Measure of Support (AMS): Measures that have a direct impact on production and trade are occasionally said to belong in the “amber box.” WTO members are committed to reducing these measures. During the Uruguay Round negotiations, members calculated how much “amber” support was provided for their agricultural sectors between 1986 and 1988, to obtain total Aggregate Measurements of Support (AMS). Developed countries agreed to reduce their AMS by 20 percent over six years, beginning in 1995. Developing countries agreed to make 13 percent cuts over 10 years. LDCs were not required to make any reductions.²⁰ Members were required to cap their total AMS and bind them as specified by each member’s “annual and final bound commitment levels.” Members have agreed that domestic support programs will not exceed these commitments.

Export Subsidies

WTO members are prohibited from providing export subsidies on agricultural programs, unless the subsidies are included in their lists of commitments. Even if a member is allowed to subsidize, the member is required to reduce both the amount of money that is spent on export subsidies and the quantities of exports that receive these subsidies. Using the average level of export subsidies used from 1986 to 1990, developed countries agreed to cut the value of their subsidies by 36 percent over six years (beginning in 1995). Developing countries also agreed to reduce their support by 24 percent over 10 years.

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Developed countries also agreed to reduce their total subsidized exports by 21 percent over six years while developing countries committed to a 14 percent cut over 10 years. LDCs were not required to make any reductions.

Recognizing that food importing countries and other LDCs depend on low-cost subsidized food from developed countries, a WTO ministerial decision has outlined measures for the provision of food aid and aid for agricultural development.²¹ In addition, Article 10 of the Agreement on Agriculture outlines the rules that member-donors of food aid are required to follow. Specifically, the members are to ensure that food aid is not tied to commercial exports of agricultural products to recipient countries. Donors must also comply with United Nations principles and adhere to the Food Aid Convention of 1986.²²

“Subsidies” and the Agreement on Subsidies and Countervailing Measures

During the Uruguay Round negotiations, provisions were added to GATT rules on subsidies and were set out in the Agreement on Subsidies and Countervailing Measures (SCM). The SCM Agreement also defined the term “subsidy” as a financial contribution which is made by a government or any public body within the territory of a member and confers a benefit.²³

All subsidies are not treated equally. The SCM Agreement distinguishes between subsidies which are “actionable” or “non-actionable” or “prohibited.” A prohibited or actionable subsidy has to be “specific.” Specificity relates to whether a subsidy is general or targeted to a specific industry.²⁴ Prohibited subsidies are generally contingent on export performance or conditioned on the use of domestic goods. Actionable subsidies are those that have an adverse trade effect on other WTO members. These effects include the decline of a domestic industry. Although actionable subsidies are not prohibited, they allow specific responses by an affected member. These responses may be in the form of countervailing duties. Non-actionable subsidies are not “specific” and are not regulated under the SCM Agreement. However, if such subsidies lead to serious adverse effects to the domestic industry of a WTO member, the affected member may have some remedies.²⁵

The Dispute Settlement Understanding (DSU)

The WTO states that its priority regarding disputes is to settle the disputes and not to pass judgment.²⁶ The Uruguay Round led to the creation of a structured dispute settlement process. A notable feature of this process is that a losing member country cannot block the adoption of a dispute ruling. Rulings are adopted unless a consensus of all members rejects the rulings. Interestingly, members are encouraged to resolve their own disputes. The DSU states that it is preferable for members to reach a mutually acceptable solution.²⁷ Therefore, dispute resolution is to begin with consultations between the members involved. If the members reach agreement, the dispute comes to an end.

Dispute Settlement

A dispute settlement proceeding commences when consultations fail to settle a claim by a WTO member that the trade policies of a fellow member are damaging its interests in violation of WTO agreements. A country can also raise the issue of a member’s failure to live up to its commitments. A difference or disagreement becomes a WTO dispute when the complaining member notifies the WTO Secretariat and invokes one of the WTO agreements. The Dispute Settlement Body (DSB), comprising all WTO members, establishes panels to handle disputes. The DSB monitors the implementation of rulings and also has the power to authorize retaliatory acts in the event of non-compliance.²⁸

The Appeal Process

The complainant’s or defendant’s appeal from a panel ruling must be based on points of law. Evidence or new issues may not be examined. Appeals are heard by a permanent seven-member Appellate Body. It may uphold, modify, or reverse the panel’s ruling. Normally, appeals do not take more than 60 to 90 days. Once a decision is reached, the DSB is required to accept or reject it within 30 days, but rejection is not a viable option because it requires unanimity. It is important to note that countries may settle disputes by themselves at any stage.

The Enforcement of Rulings

A losing party is required to implement the recommendations of the ruling. The party must inform the DSB of its intention to comply within 30 days of the final report’s adoption. Members are given a reasonable time period to implement policies that cannot be carried out immediately. If a party cannot comply within the set time, it must negotiate with the complaining party. Mutually acceptable compensation is determined at these negotiations. This may include tariff reductions.

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If compensation cannot be mutually agreed upon within 20 days, the complainant may ask the DSB for permission to impose limited trade sanctions against the defendant. Sanctions are normally implemented in the trade sector and under the WTO agreement that gave rise to the dispute. For serious circumstances or when practical reasons exist, sanctions may be enforced under a different agreement. The goal of sanctions is to avoid affecting other sectors while remaining effective. Overall, the dispute settlement process intends to avoid interpreting WTO rules in any way that would create new rules or add to existing rules.²⁹

PART II: COTTON SUBSIDIES DISPUTE

Cotton subsidies: Brazil's dispute with the United States

On September 27, 2002, Brazil sent a request for consultations to the United States and to the Chair of the DSB. The consultations were requested under the SCM Agreement, the Agreement on Agriculture, GATT, and the DSU.³⁰ Brazil sought consultations on what it deemed were prohibited and actionable subsidies that were provided to U.S. producers, users, and exporters of upland cotton.³¹ Upland cotton accounts for approximately 97 percent of U.S. cotton production. It does not include extra-long-staple (ELS) cotton used in high-cost fabrics.

Brazil also wanted to consult on U.S. legislation and regulations that were passed in favor of the U.S. cotton industry, including domestic support subsidies to the American upland-cotton industry from 1999 to 2002; export subsidies; and subsidies contingent upon the use of U.S. upland cotton. Brazil asserted that these measures violated WTO agreements because, in essence, the United States was using these measures to provide a higher level of support than limits set by the WTO. (Various WTO agreements had set limits on subsidies that were equal to those used in 1992.³²) Part IV of the Agreement on Agriculture states that members must adhere to their domestic support commitments. Therefore, the United States was bound not to exceed 1992 levels of support.

In addition, Brazil claimed that the U.S. measures were causing serious prejudice to Brazil's interests through price depressions in cotton markets, and through the impediment of Brazilian cotton exports and overproduction by the United States (which led to an increase in U.S. market share). For these reasons, Brazil claimed that the U.S. measures were in violation of the SCM Agreement, GATT, and the Agreement on Agriculture.

Initial Evidence provided by Brazil³³

Brazil included the following as some of its initial evidence regarding the nature of U.S. subsidies and their effects on Brazil's interests. Brazil obtained its information from, among others, the U.S. Department of Agriculture (USDA), the Congressional Budget Office, and the International Cotton Advisory Committee:

- U.S. producers of upland cotton received domestic support in excess of 100 percent of the U.S. crop value in 2001.
- U.S. domestic and export support subsidies to producers of upland cotton in 2001 exceeded \$4 billion. This was greater than the value of total U. S. production.
- U.S. government subsidies to cotton producers had increased significantly from 1992 levels.
- Total cost of production for U.S. cotton producers was well above the U.S. market price for upland cotton.
- In spite of declining cotton prices, U.S. production increased from 14 million tons in 1998 to a record 20.3 million tons in 2001, while prices fell from 1998 to 2001. Thus, U.S. production and exports increased while world prices decreased.
- Brazilian upland cotton is similar to U.S. upland cotton. Overproduction by the U.S. depressed the prices that Brazilian producers could obtain, both locally and internationally. Prices were also depressed in third-country markets. Brazil's production of upland cotton decreased from 939 metric tons to 718 metric tons, between years 2000 and 2001.
- Econometric studies by the International Cotton Advisory Committee, the World Bank, and the IMF demonstrate that the cited U.S. subsidies have price depressive effects on prices of upland cotton.
- Estimated losses to Brazil due to price depression were over \$600 million in 2001 alone. This included lost revenue, lost production, higher unemployment, and a loss in Brazil's balance of trade.

The Panel Hearing

The Dispute Settlement Body established a Panel on March 18, 2003. On September 8, 2004, the Panel released its report. The following were issues and findings. The Panel began by noting that upland cotton was covered by the Agreement on Agriculture. Next, the Panel considered the interests of LDCs in the proceedings.

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The DSU contains special considerations for the interests of LDCs. To this end, Chad and Benin presented joint written and oral presentations before the Panel, describing the condition of their cotton sectors. Benin's delegation included a researcher from the International Food Policy Research Institute. He presented his study on the effect of global cotton prices on Benin.³⁴

The U.S. Measures at Issue³⁵

A. Domestic Support Measures:

- (i) Marketing Loan Payments: These programs were continued under the Federal Agricultural Improvement and Reform Act of 1996 (FAIR Act of 1996), and the Farm Security and Rural Investment Act of 2002 (FSRI Act of 2002). The programs were intended to minimize loan defaults by providing interim financing to eligible producers. The loans enable producers to store their produce immediately after harvest, rather than selling it, because prices are lowest soon after harvest time. Under the FRSI Act of 2002, the loans are provided to producers for any upland cotton produced on a farm.
- (ii) User Marketing (step 2 payments): This program provides for issuance of marketing certificates or cash payments to eligible domestic users and exporters of eligible upland cotton, when certain market conditions exist.³⁶
- (iii) Production Flexibility Contract Payments: These payments were only made under the Fair Act of 1996. The last payments were made no later than September 30, 2002. The program provided payments that were based on historical acreage and yields. Its intent was to "support farming certainty and flexibility while ensuring compliance with farm conservation and wetland protection requirements."³⁷ These payments did not depend on the then-current price of cotton. The acreage-payment formula was not based on current planted acreage. It was based on acreage planting from 1993 to 1995.
- (iv) Market Loss Assistance Payments (MLA): These were ad hoc emergency and supplementary assistance provided to producers to make up for losses sustained due to low commodity prices.
- (v) Direct Payments: This program provides support to producers based on historical acreage. The payments are at fixed rates, and do not depend on current commodity prices.
- (vi) Counter-cyclical Payments: These payments depend on the current prices of commodities. They are provided whenever the effective price falls below the target price. This price is fixed by the FSRI Act at 72.4 cents per pound for upland cotton.
- (vii) Crop Insurance Payment: Upland cotton producers may also obtain these payments for losses due to natural causes and market fluctuations. The stated objective of the program is to promote national welfare by improving the economic stability of agriculture. Insurance is provided by the Federal Crop Insurance Corporation. The insurance program provides protection against losses from low crop yields and low revenue. Therefore, protection is provided for both low yields and low crop prices.
- (viii) Cottonseed Payments: These are ad hoc emergency and supplementary assistance to cotton gins and producers of cottonseed. The payments are made to offset low commodity prices.

B. U.S. Export Credit Guarantee Measures:

- (i) The USDA provides export credit guarantee programs through the Commodity Credit Corporation (CCC). The CCC operates three export credit programs whose objectives include the increasing of agricultural exports and competition against foreign agricultural exports. Through these three credit programs, the CCC guarantees the repayment of credit given to finance commercial export sales of agricultural commodities. This includes credit given by a U.S. exporter to a buyer in another country. The three programs are: General sales manager 102; General sales manager 103; and the Supplier Credit Guarantee Program.

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- (ii) In addition to the above-mentioned programs, Brazil also asked the panel to consider certain tax exclusions that were provided under the “FSC Repeal and Extraterritorial Income Exclusion Act of 2000” (ETI Act of 2000). Brazil asserted that the ETI Act of 2000 provided for the non-taxation of extraterritorial income that would otherwise be taxed. These tax exclusions benefited upland cotton producers thereby qualifying as “subsidies.”

The Panel’s Analysis

Article 13 of the Agreement on Agriculture

The dispute settlement panel began by assessing whether the Agreement on Agriculture was applicable to this dispute. The Panel noted that, while domestic support measures for agricultural products were dealt with in Article 13 of the Agreement, Article 13 is a temporary provision, applying only “during the implementation period.” This period is defined in Article 1 as nine years commencing in 1995.³⁸ Brazil’s request for consultations occurred on September 27, 2002. Therefore, this placed the dispute “within the implementation period,” and Article 13 was applicable.

Brazil argued that U.S. measures were not exempt under Article 13(b)(ii) of the Agreement on Agriculture. This provision exempts measures that conform to the Aggregate Measure of Support provisions (Article 6). Moreover, support cannot exceed the 1992 marketing year levels. The United States asserted that its measures were exempt under Article 13(b)(ii), but agreed that the market loan program payments, user marketing payments, crop insurance payments, and cotton-seed payments were non-“green box” payments. The countries disagreed on whether the production flexibility contract payments or the direct payments fully satisfied Article 13(a).

Under Article 13(b)(ii) of the Agreement on Agriculture, support measures are exempt if they, among other conditions, “do not grant support to a specific commodity in excess of that decided during the 1992 marketing year.” The Panel, upon weighing the evidence, concluded that U.S. domestic support measures exceeded the levels that were decided in 1992. Therefore, these domestic support measures were not exempt.³⁹ Moreover, the domestic support measures did not meet GATT 1994 or the SCM Agreement exemptions.

Export Subsidies

Brazil argued that the United States was in breach of its export-subsidy obligations under the Agreement on Agriculture and the SCM Agreement. The United States responded that, because its measures were not contingent on export performance, they were not export subsidies as defined by the Agreement on Agriculture. The United States also pointed that some measures were available both to exporters and domestic users. The Panel, finding that the cited U.S. measures were financial contributions which placed recipients in a better position than they would have been under market conditions, concluded that these measures were “subsidies” within the meaning of the SCM Agreement.⁴⁰

Role of Econometric Models and other Studies

The Panel also considered studies that were presented by Brazil. An economist retained by Brazil presented a study that showed that “but for” the U.S. subsidies, production of U.S. cotton from 1999 to 2002 would have been 28.7 percent lower than actual production. Moreover, U.S. exports would have declined by about 41.2 percent during the same year. The Panel considered U.S. arguments regarding the flaws of the study.

Ultimately, the Panel did not specifically rely on the study. Even so, the Panel noted that the econometric simulations were prepared by experts, and that the conclusions were consistent with the general proposition that subsidies have the potential to distort production and trade. Moreover, the elimination of subsidies would reduce “artificial” incentives for production.⁴¹ The Panel also considered studies that were performed by other organizations. In general, the Panel considered these studies to be relevant because they directly related to the principles behind the WTO Agreements. These principles included the regulation of market-distorting practices.

Next, the Panel considered arguments regarding the existence of a “world market” in cotton and whether a “world market price” for cotton existed. The Panel found that countries relied on the “A-Index,” which is a composite of cotton prices that is provided by Cotlook, a private U.K. organization.⁴² Most importantly, the USDA relied on the A-Index for deriving the “world price” for upland cotton. The Panel concluded that a world price and a world market existed.

Brazil argued that the U.S. subsidies had caused significant “price suppression” in the Brazilian, American, and world markets. The Panel noted that Part III of the SCM Agreement does not provide a definition of “price suppression,” as the term is used in Article 6.3(c) of the SCM Agreement. However, the Panel referred to the ordinary meaning of the words and to the general context of the SCM Agreement.

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Ultimately, the Panel concluded that “price suppression” refers to the situation where prices – in terms of money set for sale of upland cotton or the value or worth of upland cotton – are either prevented or inhibited from rising (i.e., they do not increase when they otherwise would have) or they do actually increase, but the increase is less than it otherwise would have been.

In considering whether price suppression had occurred due to U.S. subsidies, the Panel noted that several of the U.S. subsidies were directly linked to world prices for upland cotton (i.e. there was automatic compensation for low world prices. Therefore, U.S. producers had a “numbed response” to low market prices. The Panel found that U.S. subsidies functioned as deficiency payments which were laced with incentives. Moreover, the fact that these subsidies were price-contingency subsidies was strong evidence to support a finding that price suppression was occurring. The Panel concluded that price suppression had occurred within the meaning of the SCM Agreement. In examining the central link between U.S. subsidies and world markets, the Panel considered the following evidence:

- The U.S. share of world upland cotton production had increased to about 20 percent.
- From 1998 to 2001, the prices received by U.S. producers decreased by 34 percent.
- U.S. exports increased by 160 percent from 1998 to 2001.

The data revealed that although world prices were falling, U.S. production was increasing. The Panel found credible evidence that, without their subsidies, U.S. producers would not have been economically capable of remaining in cotton production. In addition, the subsidies allowed U.S. producers to sell upland cotton at lower prices than would have been necessary to cover their costs.⁴³

United States Arguments

The United States asserted that prices for cotton were historically low because of low demand and competition from synthetics. The Panel did not agree with this argument. There was no evidence that world cotton consumption was decreasing. Although the United States also argued that its production level was affected by technological advancement in U.S. production practices, the Panel concluded that it was reasonable to find that U.S. producers were motivated by subsidies.

The Panel’s Conclusions and Recommendations⁴⁴

Based in part on the preceding analysis, the Panel’s conclusions included the following:

- U.S. domestic support measures did not satisfy the requirements of the Agreement on Agriculture.
- U.S. export credit guarantees were inconsistent with the Agreement on Agriculture.
- The user marketing payments were inconsistent with U.S. obligations.
- Brazil’s interests were seriously prejudiced by significant price suppression.

The panel’s recommendations included the following:

- The United States should withdraw prohibited subsidies “without delay” (within six months of adoption of the panel’s report by the DSB).
- The United States should conform its measures to the Agreement on Agriculture.
- With the adoption of the report, the United States was obligated to take appropriate steps to remove the adverse effects or withdraw the subsidy.⁴⁵

The Panel’s report was presented on September 8, 2004.

The Cotton Sector in Central West Africa

As noted previously, several African countries were third parties to the proceeding initiated by Brazil’s complaint. Benin and Chad presented written and oral submissions to the panel. Studies were also presented by Oxfam International, and in the form of a World Bank policy research paper. The studies supported the arguments presented by Brazil, and the panel considered such studies to be relevant.

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In “*Impact of Global Cotton Markets on Rural Poverty in Benin*,” Nicholas Minot, a researcher from the International Food Policy Research Institute, examines the link between cotton prices and poverty in Benin. Mr. Minot was part of Benin’s delegation to the Brazil-U.S. dispute. Minot’s study points out that world cotton prices fell by 40 percent from January 2001 to May 2002 (from 64 cents per pound to 39 cents per pound). In the mid-1990’s, prices were over 80 cents per pound.⁴⁶ The downward spiral has been largely attributed to governmental support of cotton growers. In the United States, government measures ensured that farmers obtained at least 52 cents per pound. The United States was the largest provider of cotton subsidies, followed by China, and by the European Union, which provided support to small numbers of cotton growers in Spain and Greece. Other producers such as Brazil, Turkey, and Egypt provided subsidies but these were significantly less than U.S. measures.

Benin, a West African nation of about 6 million inhabitants (in 2002), has a per capita gross national product of US \$380, making it one of the low-income countries of the world. The agricultural sector accounts for 38 percent of the gross domestic product and employs about 56 percent of the economically active population.⁴⁷ Benin is the 12th largest exporter of cotton in the world. Minot’s study found that a strong link existed between cotton prices and rural welfare in Benin. Specifically, a 40 percent decline in farm prices of cotton resulted in a 7 percent short-term reduction in rural per capita income. In the long run, income declined by about 6 percent. Additionally, the 40 percent fall in price increased poverty by 8 percent in the short run, or by 334,000 people. Regarding the impact on the overall economy, the study estimates that a dollar of reduced spending by cotton growers leads to a contraction of 3.3 dollars in overall demand.⁴⁸ Overall, the study finds that the rural poor in Benin are affected by world prices in cotton. Therefore, policies that subsidize cotton production have an adverse effect on rural populations in Benin and elsewhere.

Minot’s study is supported by the World Bank’s research on the cotton sector in West and Central Africa. The World Bank notes that studies have shown that African countries are among the world’s lowest-cost producers of cotton.⁴⁹ Therefore, the countries are competitive in the world market. As a result, these countries can operate profitable cotton sectors if the international price exceeds 50 cents per pound. Few countries can produce cotton with profit at this price. To underscore this point, a removal of U.S. subsidies would cause an increase in international cotton prices. It has been estimated that revenues in the African countries (from cotton) would increase by about \$250 million. In addition, a removal of U.S. cotton subsidies would stimulate a reallocation of production to low-cost producers.

Ultimately, the removal of export subsidies would have a significant impact on poverty reduction in Africa. Due to the importance of cotton as an export commodity to many African countries, the long-term objective of reducing poverty is directly linked to the prosperity of the cotton sector. Therefore, the World Bank study calls for reform in the cotton sector with subsidy reduction being a key component of this reform.⁵⁰

These studies are also supported by research conducted by Oxfam International. Oxfam’s research was presented to the WTO dispute panel. Oxfam asserts that U.S. subsidies are destroying livelihoods in Africa and other developing countries. Using data from studies by the Food and Agricultural Organization and the International Cotton Advisory Committee, Oxfam paints a sobering picture. In the years 2001 to 2002,⁵¹ Burkina Faso lost 1 percent of GDP and 12 percent of export earnings. Mali lost 1.7 percent of GDP and 12 percent of export earnings. Benin lost 1.4 percent of GDP and 9 percent of export earnings.

These losses gain significance when they are viewed within the context of poor sub-Saharan countries. Mali received \$37 million in aid in 2001, but lost \$43 million due to lower export earnings. Benin, Burkina Faso, and Chad lost greater revenue in exports than they received in debt relief. Significantly, U.S. trade preferences under the African Growth and Opportunity Act are conditioned on the liberalization of African agricultural markets. This highlights the difficult position of these countries.

Oxfam also points out that the losses caused by U.S. subsidies are greater than assistance given by American aid programs. Furthermore, the African countries are being forced to spend scarce resources to prevent the collapse of their cotton sectors. In Benin and Mali, the governments spent \$20 million and \$13 million, respectively, to put a price floor under their cotton markets.

Such spending has worsened budget deficits and caused friction between national governments and the IMF. Oxfam reports that the IMF recently prohibited Benin from increasing cotton subsidies on the grounds that such increases would interfere with targets for reducing fiscal deficits in Benin.⁵² Oxfam notes that around 2 million households directly depend on cotton in Central and West Africa, compared to 25,000 in the United States. Interestingly, African farmers can produce cotton at lower costs because they have an advantage in small-holder production. International comparisons reject the notion that large-scale cotton production is inherently more efficient. West and Central African countries are among the world’s lowest-cost producers.

According to Oxfam's studies, most cotton sectors in this region can operate profitably at prices of 50 cents per pound, far below the level at which many competing exporters could compete in the absence of subsidies. Interestingly, the small holders produce high-quality cotton because the cotton is tended and picked by hand. In addition, Oxfam notes that the African farmers have developed systems of soil nutrient replenishment and pest control that are well-suited to local conditions. These techniques are also financially less costly than in capital-intensive farming.⁵³

From its study, Oxfam concludes that countries which heavily subsidize their cotton are causing direct adverse effects on poverty rates in cotton-growing regions of Africa. This conclusion is supported by the aforementioned studies by the World Bank and the International Food Policy Research Institute.

Conclusion

On March 3, 2005, the United States lost its appeal of the dispute panel's report when the WTO Appellate Body confirmed the ruling that U.S. measures violated WTO agreements. On March 21, 2005, the DSB adopted the Appellate Body report as well as the panel report as modified by the Appellate Body report. These reports have some far reaching implications.

The World Bank's analysis of the dispute touches on some of these implications. First, the dispute is important because it is the first case that has focused on agricultural subsidies within a North-South dimension. It is the first WTO ruling in which a developing country has challenged a farm-subsidy program in an industrialized country.⁵⁴ Therefore, the dispute may be a precedent in future North-South agricultural disputes. Interestingly, it is suggested that if more cases like these are filed, there may be a shift in the focus of WTO activities, from one of negotiations to litigation.⁵⁵

The cotton-subsidy dispute seems to support the views of critics (such as economist Joseph Stiglitz) who claim that Western countries have often pushed for trade liberalization in products that they export while continuing to protect their local sectors from developing countries that enjoy comparative advantage in respect to other products.⁵⁶ As noted by Stiglitz, inequities in international trade can lead to a loss of confidence in the international trading system.

It is reasonable to expect that the decision here will embolden developing nations who have long asserted that global trade terms are unfair. Therefore, disputes could extend to other products. Oxfam International points out that the U.S. measures on cotton are also relevant to similar measures involving other commodities such as soybeans, rice, oilseed, and grain.⁵⁷ In addition, it is likely that developing countries are going to form alliances to strengthen their position in trade negotiations and disputes. Many poor countries do not have the resources of a country such as Brazil. In the upland-cotton dispute, we saw the participation of Benin and Chad as third parties.

The cotton dispute also shows the enormous potential of the WTO. Here, we saw a dispute that was centered on the principles of the WTO. Ideally, these principles are aimed at the general good of member nations. Therefore, it is encouraging that a "powerful" nation may be compelled to adhere to the rules. As we have seen, the inhabitants of rural West Africa have much to gain by the elimination of U.S. subsidies.

It is fair to note that existing globalization problems may result in a call to action for those who see (or foresee) the virtues of an equitable international trading system. The world economies are becoming more integrated, so the arguments for a fairer trade system are quite strong. With increased integration, the problems of developing countries can no longer be ignored by other regions of the world. As a grave underscoring of this point, current events have shown us that some diseases cannot be stopped at international borders. Therefore, projects that are aimed at the "greater good" should not be discounted as being overly idealistic. With the loss of its WTO appeal in the cotton-subsidies case, the United States is required to negotiate compensation on an MFN basis until its local subsidies comply with WTO agreements. Brazil may be entitled to impose countervailing measures if an agreement cannot be reached. ■

NOTES

¹ World Trade Organization, *Understanding the WTO*, p. 15 www.wto.org. [hereinafter World Trade Organization, *Understanding the WTO*].

² Carl, Beverley M, *Trade and the Developing World in the 21st Century* p. 76 (Transnational Publishers, NY. 2001) [hereinafter Carl, *Trade and the Developing World*].

³ World Trade Organization, *Understanding the WTO*, 17.

⁴ *Ibid.*, 17.

⁵ *Ibid.*, 10.

⁶ *Ibid.*, 19.⁷ *Ibid.*, 10.

⁸ *Ibid.*, 11-13.

⁹ *Ibid.*, 23.

¹⁰ Carl, *Trade and the Developing World*, 90.

¹¹ *Ibid.*, 91.

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¹² For example, see WTO Agreement on Agriculture, Part IX, Article 15, *Special and Differential Treatment*.

¹³ World Trade Organization, *Understanding the WTO*, 26.

¹⁴ *Ibid.*, 26.

¹⁵ World Trade Organization, Agreement on Agriculture Article 4(2).

¹⁶ World Trade Organization, *Understanding the WTO*, 28.

¹⁷ Qureshi, Ashif. The World Trade Organization: Implementing International Trade Norms, 35 (Manchester University Press, 1996) [hereinafter Qureshi, The World Trade Organization].

¹⁸ World Trade Organization, *Understanding the WTO*, 28.

¹⁹ *Ibid.*, 29.

²⁰ *Ibid.*, 29.

²¹ *Ibid.*, 29.

²² World Trade Organization, Agreement on Agriculture, Article 10.4(a)–(c).

²³ Carl, Trade and the Developing World, 418.

²⁴ Qureshi, The World Trade Organization, 28.

²⁵ *Ibid.*, 29.

²⁶ World Trade Organization, *Understanding the WTO*, 55.

²⁷ Gallagher, Peter. Guide to Dispute Settlement, p. 6 (Kluwer Law International, The Hague, 2002). [hereinafter Gallagher, Guide to Dispute Settlement] *Peter Gallagher is a former trade negotiator and specialist in the Uruguay Round Agreements*.

²⁸ World Trade Organization, *Understanding the WTO*, 56-59.

²⁹ *Ibid.*, 23.

³⁰ World Trade Organization, *Request for Consultations by Brazil*, WT/DS267/1 October 3, 2002. www.wto.org [hereinafter *Request for Consultations by Brazil*].

³¹ Upland cotton is *planted and stub cotton that is produced from other than the pure strain varieties of the Barbados species, any hybrid thereof, or any variety of cotton in which one or more of these varieties predominate*. World Trade Organization, United States-Subsidies on upland cotton, Report of the Panel, p. 68. WT/DS267/R, www.wto.org.

³² *Request for Consultations by Brazil*, 3

³³ *Ibid.*, Annex.

³⁴ This research is noted later in this paper.

³⁵ World Trade Organization, United States-Subsidies on upland cotton, *Report of the Panel*, 69-82 [hereinafter *Report of the Panel*].

³⁶ The objective of step 2 payment is to bridge the gap between higher U.S. domestic prices and world prices so that U.S. exporters remain competitive. World Bank Trade Note, p. 2 (July 2002).

³⁷ *Report of the Panel*, 72.

³⁸ *Ibid.*, 101.

³⁹ *Ibid.*, 160.

⁴⁰ *Ibid.*, 264.

⁴¹ *Ibid.*, 285.

⁴² *Ibid.*, 297.

⁴³ *Ibid.*, 316.

⁴⁴ *Ibid.*, 349.

⁴⁵ *Ibid.*, 351.

⁴⁶ International Food Policy Research Institute, *Impact of Global Cotton Markets on Rural Poverty in Benin*, p. 1 (November 2002) www.ifpri.org.

⁴⁷ *Ibid.*, 1.

⁴⁸ *Ibid.*, 50.

⁴⁹ World Bank Policy Research Working Paper 2867, July 2002. *Cotton Sector Strategies in West and Central Africa*, p. 12.

⁵⁰ *Ibid.*, 21.

⁵¹ Oxfam International Briefing Paper, 2002, p. 3. *Cultivating Poverty: The Impact of US Cotton Subsidies on Africa*.

⁵² *Ibid.*, 19.

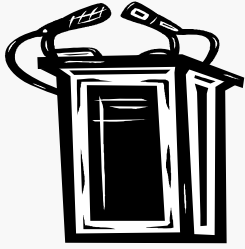
⁵³ *Ibid.*, 20.

⁵⁴ World Bank Trade Note, July 12, 2004, 2-3. *Brazil vs. US: Cotton Subsidies and the Implications of Development*.

⁵⁵ *Ibid.*, 3.

⁵⁶ Stiglitz, Joseph. Globalization and Its Discontents, 60-61. (New York, W.W. Norton & Co., 2003).

⁵⁷ Oxfam International Briefing Note, March 3, 2005, p. 4. *Who will be left to cheer the end of illegal US subsidies?*



Events in Spring 2006

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February 22, 2006: A Colloquy Commemorating the 25th Anniversary of the United States Court of International Trade, with THOMAS J. AQUILINO, JR. (Senior Judge, United States Court of International Trade); **ANDREAS F. LOWENFELD** (Herbert and Rose Rubin Professor of International Law, New York University School of Law); **AMELIA PORGES** (Counsel, Sidley Austin LLP); and **BARBARA S. WILLIAMS** (Attorney-in-Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, United States Department of Justice). Since the establishment of the United States Court of International Trade in 1980 to exercise jurisdiction over the administration and enforcement of American customs and trade laws, the world community has lowered tariffs and other barriers to trade largely through trade agreements, most notably the agreements administered by the World Trade Organization and other treaties such as the North American Free Trade Agreement. But as tariffs have declined, more and more countries – including the United States – have come to rely on, for example, antidumping and countervailing duties to protect their commercial interests and to remedy injuries from allegedly unfair foreign competition. As the Court of International Trade takes on – and the U.S. Court of Appeals for the Federal Circuit reviews – such cases, their decisions have global implications. As the Court of International Trade celebrates its 25th anniversary, it seems appropriate to examine current issues and trends in the administration and enforcement of national and global trade regulations. How will American antidumping and countervailing duty laws fare under greater international scrutiny? To what extent will the various governmental and judicial bodies involved with trade matters (both at home and abroad) coordinate their activities in the future?

March 22, 2006: Trade in Services in the Doha Round with CHRISTINE BLISS, Acting Assistant United States Trade Representative for Services and Investment, Office of the United States Trade Representative. In many industrialized countries, the “services” industries – including telecommunications, transportation, banking, insurance, engineering, architecture, education, accounting, and legal practice – account for the largest source of employment (80 percent of employment in the United States), and more than half of gross domestic product. The United States is currently running a trade surplus in the tens of billions of dollars in services, selling substantially more abroad than foreign suppliers of services are selling in the United States. As for developing countries, in many of them, services make up the fastest growing economic sectors. Current global trade negotiations – called the Doha Round – being held under the auspices of the World Trade Organization are seeking to reduce barriers to trade in the vast area of services. These talks have been viewed with both promise and concern. Officials say that opening various services markets could create new economic opportunities for many countries. But some domestic authorities are concerned that new international rules could supersede local laws and regulations. Christine Bliss will discuss the status of services in the Doha Round, the problems and controversies that have been encountered, and the feasibility of concluding the negotiations by the end of this year.

April 5, 2006: The 2006 Otto L. Walter Lecture: Civil Liberties in the Age of Terrorism with FLOYD ABRAMS, one of the nation’s best-known and well-regarded attorneys specializing in First Amendment rights. Since the September 11, 2001 attacks in the United States, Congress has passed laws granting the Executive broad powers to prevent and prosecute acts of terrorism. Several of these measures have raised concerns that freedom of speech, freedom of the press, and the right to due process are being eroded in the name of protecting national security. The USA PATRIOT Act, for example, expands the surveillance powers of various Federal agencies over terrorist suspects. The government has also made vigorous attempts to restrict the rights of suspected terrorists (including an American citizen) captured outside of U.S. borders. Officials recently acknowledged the existence of a secret (and now-suspended) program which allowed agents to eavesdrop on and intercept communications between American citizens and people in other countries without a court warrant. In another well-publicized case, a court recently jailed journalists who refused to comply with an order to reveal their confidential sources during a federal investigation. Some worry that this turn of events may intimidate reporters pursuing potentially controversial stories. Where do civil liberties stand in an age where terrorism is a real and constant threat? Does the protection of civil liberties hamper the war on terror? What needs to be done in the years ahead to maintain a balance between protecting national security and upholding civil liberties? Floyd Abrams will discuss these and other questions during the 2006 Otto L. Walter Lecture.