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COMMUNICATION BY THE EUROPEAN COMMUNITIES AND THEIR MEMBER STATES TO THE TRIPS COUNCIL ON THE REVIEW OF ARTICLE 27.3(B) OF THE TRIPS AGREEMENT, AND THE RELATIONSHIP BETWEEN THE TRIPS AGREEMENT AND THE CONVENTION ON BIOLOGICAL DIVERSITY (CBD) AND THE PROTECTION OF TRADITIONAL KNOWLEDGE AND FOLKLORE

"A CONCEPT PAPER"

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EXECUTIVE SUMMARY

This text addresses the issues dealt with under Paragraph 19 of the Doha Declaration, which instructs the TRIPs Council to continue the review of Article 27.3(b) TRIPs, and to examine the relationship between TRIPs and CBD and the protection of Traditional Knowledge (TK) and folklore, and other relevant new developments. It reflects the EC's stated willingness to commit to this process in a spirit of openness, with the aim of finding ways of interpreting and implementing the TRIPs Agreement in a way to support the objectives of the CBD.

The review of Article 27.3(b)

This review deals, *stricto sensu*, with the patentability of biotechnological inventions and the protection of plant varieties. This subject has an important link with development issues in agriculture, so the development dimension must be fully taken into account.

The European Communities and their Member States (hereinafter "the EC") see no reason to amend Article 27.3(b) as it now stands. The TRIPs Agreement allows members sufficient flexibility to modulate patent protection as a function of their needs, interests or ethical standards. In this connection Article 27.3(b) - in conjunction with Article 27.2 (exclusion from patentability of inventions the commercial exploitation of which is necessary to protect ordre public or morality) and Article 27.1 (patentability criteria) - provides considerable leeway.

The EC have already indicated that they are prepared to discuss certain technical issues related to Article 27.3(b). However, in the EC's view, trying to clarify the definitions of technical terms such as "micro-organism" in the TRIPs Council may not be the best way forward. Firstly, because it would be extremely difficult to agree on precise definitions in that context, and, secondly, because it is questionable whether more precise definitions are really necessary, given that they would reduce the flexibility of WTO Members.

The relationship between the TRIPs Agreement and the CBD

From a legal perspective there is no conflict between the CBD and the TRIPs Agreement. However, it would be wrong to put on end to all discussion by saying that, in the absence of legal incompatibility, there cannot be a problem with the implementation of both Agreements. There is considerable *interaction* between both agreements, so TRIPs and CBD can and should be implemented in a mutually supportive way. The TRIPs Council should focus on ways and means of doing this.

At national level, sound regulation (through legislation or administrative or policy measures) on access and benefit-sharing (ABFS) under the CBD is essential to guarantee legal security for all parties involved and to protect the rights of providers of genetic resources. Further details can be settled through contractual arrangements. Legislation/policy measures and contracts are complementary instruments for ensuring fair implementation of the CBD.

Further synergies between the implementation of these agreements can be worked out at international level by ensuring policy coherence in all forums which deal with issues relevant to the interplay between TRIPs, the CBD and the FAO International Treaty on Plant Genetic Resources for Food and Agriculture. In this respect the Bonn Guidelines on Access to Genetic Resources and Benefit-sharing adopted at the 6th Conference of the Parties in The Hague on 19 April 2002 are an important evolution.

Disclosure of origin

The EC agree to examine and discuss the possible introduction of a system, such as for instance a self-standing disclosure requirement, that would allow Members to keep track, at global level, of all patent applications with regard to genetic resources for which they have granted access. The EC see merit in a system that would ensure transparency and would allow the authorities of countries granting access to their resources to keep track of patent applications linked to the use of these resources.

Under such a system, the information to be provided by patent applicants should be limited to information on the geographic origin of genetic resources or TK used in the invention, while such a disclosure requirement should not act, de facto or de jure, as an additional formal or substantial patentability criterion. Legal consequences to the non-respect of the requirement should lie outside the ambit of patent law.

Protection of TK

Preventive approaches to avoid misappropriation of traditional knowledge and to stimulate the sharing of benefits could be dealt with by the TRIPs Council. We need to explore methods of documenting and sharing information on TK, such as databases and registers, in order to allow patent examiners to take them into account in prior art searches. When TK is used as a basis for further innovations, disclosure of the original TK from which inventions are derived would be an important way of ensuring that holders of traditional knowledge share in the benefits.

The EC support further work towards the development of an international *sui generis* model for legal protection of TK in WIPO. At this stage, the TRIPs Council is not the right place to negotiate a protection regime for a complex new subject matter like TK or folklore. This is an issue where the WTO should ideally be able to build on the work done by the WIPO Intergovernmental Committee on Intellectual Property, Genetic Resources, Traditional Knowledge and Folklore. Depending on the outcome of the WIPO process, the TRIPs Council will have to determine whether this result warrants further work in the WTO.

Effective sui generis protection of plant variety rights

The absence of a definition of this concept means that Members have a considerable degree of flexibility in determining how their legislation meets the standard of effectiveness, thus allowing them to design a protection regime that is appropriate to their specific national situation. Although the UPOV Convention meets the standard of effectiveness in Article 27.3(b), other protection models may be equally effective.

This paper explores the criteria that any regime establishing rights over plant varieties must fulfil (for example, a clear definition of the protectable subject matter and the conditions for granting protection, the availability of enforcement procedures, etc.).

Farmers' rights and farmers' exemptions

Farmers' exemptions (*i.e.* exceptions to plant variety rights or patents allowing farmers to save, use, exchange or sell seeds of protected varieties or seeds) can, under certain circumstances, be justified under Article 27.3(b) of the TRIPs Agreement, or under Article 30 of the TRIPs Agreement. The special situation of least developed or developing countries could be addressed by specific exceptions allowing subsistence farmers or small farmers to save, replant, exchange, share and resell seed, provided they do not use the commercial denomination of the variety. Farmers with significant commercial interests should remain subject to more stringent rules.

1. Introduction

1. Paragraph 19 of the Doha Declaration instructs the TRIPs Council to continue the review of Article 27.3(b) of the TRIPs Agreement, and to examine the relationship between the TRIPs Agreement and the Convention on Biological Diversity (hereinafter called CBD) and the protection of Traditional Knowledge (hereinafter called TK) and folklore (as well as other relevant new developments), both in the context of this review and as part of the work arising from paragraph 12 of the Doha Ministerial Declaration (outstanding implementation points) and the review provided for by Article 71.1 of TRIPs. The recent adoption of the FAO International Treaty on Plant genetic Resources for Food and Agriculture and of the Bonn Guidelines on Access to Genetic Resources and Benefit-sharing are important relevant new developments which are also dealt with in this document.

2. In the WTO, the relationship between the TRIPs Agreement and the CBD and the protection of traditional knowledge have so far been dealt with exclusively under the review of Article 27.3(b) of the TRIPs Agreement.

3. The Doha Declaration further specifies that, in undertaking this work, the TRIPs Council is to be guided by the objectives and principles set out in Articles 7 and 8 of the TRIPs Agreement and should take full account of the development dimension.

4. The European Communities and their Member States (hereinafter "the EC") welcome this broad mandate, because the EC have always been of the opinion that review of 27.3(b) was too narrow a basis for dealing with the wide array of complex issues raised by this review. Also, the EC hold the view that both processes, i.e. the review of 27.3(b) and the examination of the relationship between the TRIPs

Agreement and the CBD are, by virtue of their numerous interconnections, inextricably linked. This new mandate arising from the Doha Development Agenda (hereinafter "the DDA") means we can now give this debate more attention.

5. The EC have already expressed a first series of views on the relationship between intellectual property, on the one hand, and biodiversity and TK, on the other, in the communication of 3 April 2001. In this document the EC concluded that the search for solutions to the developing countries' concerns, expressed within the context of the review of Article 27.3(b) of TRIPs, does not necessarily lie within the scope of that Article itself, but may rather be found :

- in developing appropriate instruments to achieve the objectives of the CBD (in particular in particular access to genetic resources benefit-sharing and protection of traditional knowledge) and those objectives of the TRIPs Agreement which, in the view of the developing countries, have not been sufficiently promoted by the developed countries (i.e. the protection of TK, or transfer of technology and know-how);

- in providing technical assistance to developing countries to implement the CBD through sound an effective legislative, administrative and policy measures; and

- through the possible negotiation of measures within the IPR system (in particular in the context of WIPO and the TRIPs Agreement) aimed at facilitating benefit sharing and protecting sovereign access rights (e.g. to insert a provision on the disclosure of origin or to develop protection of traditional knowledge.

6. It was therefore concluded that these issues would be better dealt with within the framework of the new round of trade negotiations as part of a comprehensive package. The DDA now provides for this framework.

7. The EC want to engage in this process in the same spirit of openness so as to find ways of interpreting and implementing the TRIPs Agreement so as to support the objectives of the CBD, like for example the fair and equitable sharing of the benefits arising from the use of genetic resources.

8. To achieve this, the EC believe it might be useful for those countries which have a particular interest in these issues and have specific demands to submit a comprehensive presentation of these demands as a basis for structured and fruitful discussion. The EC are looking forward to receiving concrete proposals from Members who have raised specific concerns in the TRIPs Council.

9. The EC are willing to consider proposals which genuinely reflect the concerns of developing countries, provided these do not affect the substance as well as the balance of rights and obligations laid down in the TRIPs Agreement, and maintain the rights of Members to create a favourable intellectual property environment for research in the area of biotechnology.

10. The EC takes this opportunity to draw the Membership's attention to the fact that specific attention is given to the issues under discussion here in their Action Plan on Life Science and Biotechnology. In particular, Action n° 26 of the Plan foresees that "The Commission and the Member States will support the conservation and sustainable use of genetic resources in developing countries and their equitable sharing of benefits arising from their use, inter alia by supporting the development and enforcement of effective measures to conserve, to use sustainably and to provide access to genetic resources and traditional knowledge, as well as to share equitably the benefit arising from them, including income generated by intellectual property protection"[1].

2. The review of Article 27.3(b)

11. This review process, which started in 1999, deals *stricto sensu* with the patentability of inventions, including biological material (biotechnological inventions), the protection of plant varieties and possible exclusions to patentability.

12. At the TRIPs Council meeting on 21 March 2000, the Chairman concluded that the Council should proceed in a more orderly, systematic and productive manner by focusing on :

- the link between Article 27.3(b) and development
- technical issues relating to patent protection under Article 27.3(b)
- technical issues relating to sui generis protection of plant varieties
- ethical issues relating to the patentability of life forms
- the relationship with the conservation and sustainable use of genetic material
- the relationship with the concepts of TK and farmer's rights.

These issues call for certain comments.

Link between Article 27.3(b) and development

13. Now that we are in the context of the DDA, the link between Article 27.3(b) and development should be the central theme of our debate. This is emphasised by paragraph 19 of the Doha Ministerial Declaration, which instructs the TRIPs Council to be guided by Articles 7 and 8 TRIPs and to take the development dimension fully into account.

14. The subject matter of Article 27.3(b) - biotechnological inventions and plant varieties - has an important link with development issues in the agricultural sector. Biotechnology offers enormous potential and can play a role in improving the agricultural output, health and the environment of the developing world. It is a sector where intellectual property protection plays an important role because it often requires a considerable amount of high-risk investment.

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[1] Also, the European Commission financed or co-financed several seminars and workshops on related issues such as :
- The Role of Intellectual Property Protection in the Field of Biodiversity and Traditional Knowledge (Brazil, 2001, co-organised with the Brazilian Institute of Intellectual Property)
- Developing Global Bioresources (London 2002)
- Microbial Biodiversity and Biotechnological Opportunities in the Humid Tropics (Venezuela, 2002)

When determining how to implement Article 27.3(b), it is crucial to assess its impact on the possible development of biotech research.

15. At the same time, it is true that access by the developing world to these important technologies, as well as their capacity to deal with the potential risks associated with these technologies, remains limited. Agricultural technologies, and biotechnology in particular, are therefore an important issue to be tackled in the context of transfer of technology and capacity-building.

Technical issues relating to patent protection under Article 27.3(b)

16. The EC have already indicated that they are prepared to discuss certain technical issues related to Article 27.3(b) (such as for example domestic implementation of Article 27.3(b), issues related to the patentability of inventions including biological material and the protection of plant varieties, possible exclusions to patentability, etc.).

17. Some WTO Members have requested that the TRIPs Council examine and clarify the definition of certain terms used in Article 27.3(b), e.g. "microbiological processes", "essentially biological processes" or "micro-organisms", in order to make it clearer what can and what cannot be excluded from patentability under Article 27.3(b).

18. In this regard, the EC takes the view that those Members advocating more precise *definitions* of the technical terms used in Article 27.3(b) should be aware of the difficulties of getting all WTO Members to agree on definitions. It is indeed questionable whether the TRIPs Agreement could or should go into this amount of detail.

19. And it will not be easy to get the TRIPs Council to agree on clarification of these terms, because decisions are made by consensus and the issues are complex. The EC are therefore of the opinion that the TRIPs Council is not the right forum to agree on *definitions* of technical terms. This could rather be examined in the context of WIPO, which has more expertise on these specific technical issues.

20. Another argument against clarification in the context of the TRIPs Agreement is that the absence of definitions of certain terms gives an element of flexibility, leaving Members some freedom to interpret terms broadly or strictly within reasonable limits.

21. An example of a term that is not defined in TRIPs is the term "micro-organisms". There is also no commonly accepted definition of "micro-organism" in science, international conventions or patent office practices. Nevertheless, the definition of its scope at domestic level is important, as micro-organisms are widely used in the pharmaceutical, chemical or biotech industries and they are the only form of living organism for which WTO Members are obliged to provide patent protection. However, the patentability of micro-organisms depends on whether or not the patentability criteria are met, thus rendering the definition issue less important. As stated, other international conventions fail to provide a definition, e.g. the 1977

Budapest Treaty on the International Recognition of the Deposit of Micro-organisms for the Purposes of Patent Procedure.

22. Also there are divergent views among scientists as to what the term "micro-organism" encompasses. But there is some agreement as to its core meaning: "micro-organism" is generally understood to refer to living beings other than plants and animals, i.e. bacteria, fungi, viruses, etc. The *Concise Oxford Dictionary of Current English* (which has been used by WTO panels for interpretation purposes) defines "micro-organism" as an organism not visible to the naked eye, e.g. bacterium or virus. Taking into account the rules of Treaty interpretation, as set out in the Vienna Convention of the Law of the Treaties, and although this is no more than a first step in this process, this definition of the Oxford Dictionary can be considered as providing a standard of reasonableness within which Members can modulate the definition. In this way, WTO Members can determine the scope of what is patentable and what is not.

23. Moreover, microbiology is a fast-moving science, which has led classifications such as "micro-organism" to evolve rapidly. This also raises the question as to whether a more precise definition is really necessary, since it would reduce the flexibility of WTO Members while introducing new uncertainties, given the rapid evolution of knowledge, technologies and applications in the field of microbiology

24. Finally, the task of "review" does not mean that WTO Members are under a duty to agree on an exhaustive definition of each and every term. But rather to see how different Members do for themselves define and apply these terms.

Technical issues relating to sui generis protection of plant varieties

25. The effective protection of plants is an important issue and will be dealt with in Section 5.

26. The review of Article 27.3(b) could be used to clarify the potential benefits and limitations of different national and international schemes for the protection of plant varieties.

Ethical issues relating to the patentability of life-forms

27. The EC acknowledge that issues relating to the patentability of life forms need to be addressed carefully. Different societal values come into play. In fact the TRIPs Agreement does allow Members to take these considerations into account. Article 27.3(b), in conjunction with Article 27.2 (exclusion from patentability of inventions the commercial exploitation of which is necessary to protect ordre public or morality) and Article 27.1 (patentability criteria), already allow Members considerable freedom to modulate the patentability of biotechnological inventions. For instance, the interpretation of the patentability criteria under Article 27.1 may slightly differ from Member to Member, which may lead to certain nuances in approach when distinguishing between an invention and a discovery. This is evidenced by disparities in the legislation and practices of developed countries. It is up to each country to strike the right balance, taking into account economic, ethical and other concerns,

without losing sight of the fact that granting intellectual property rights to biotech inventions is one of the key factors for developing domestic skills in this sector.

28. It should be remembered that Article 27.3(b) is the result of a carefully negotiated balance: calls to reopen 27.3(b) in order to change that balance may give rise to counterclaims by other Members to make it compulsory to patent broader categories of biotech inventions, including plants and animals. The EC are in favour of maintaining the current balance of the TRIPs Agreement, which gives WTO Members a large degree of flexibility with regard to patentability of biotech inventions, and therefore see no reason to amend Article 27.3(b) as it now stands.

29. The EC established the scope for the legal protection of biotechnological inventions in Europe in Directive 98/44 of the European Parliament and of the Council on the legal protection of biotechnological inventions. It authorises EC Member States to exclude biotech inventions from patentability where their commercial exploitation conflicts with "ordre public" and morality, and includes an illustrative list of inventions excluded from patentability, such as interventions in the human germline, cloning of human beings and the processes referred to or the use of human embryos for industrial or commercial purposes. The EC invites other Members to adopt a similar approach. The EC would welcome further information about the experience of other Members in patenting biotech inventions and dealing with the related ethical aspects.

The relationship with the conservation and sustainable use of genetic material

30. This issue refers to the broad relationship between the TRIPs Agreement and the CBD. Strictly, this issue does not fall within the direct scope of Article 27.3(b), but appropriate solutions will be discussed in the section on TRIPs and CBD below.

The relationship with the concepts of traditional knowledge (TK) and farmers' rights

31. TK is in the EC's view an issue that, strictly speaking, does not fall exclusively within the scope of Article 27.3(b). As a matter of fact, protection of TK is relevant to several other Articles of the TRIPs Agreement which deal with patents, e.g. Articles 27.1 and 29. It is more appropriate therefore to deal with it under a separate heading (Section 4).

32. The issues of **farmers' rights** and farmers' exemptions are directly linked with the intellectual property protection of plants and plant varieties, and will be dealt with in Section 6 of this communication.

3. The relationship between the TRIPs Agreement and the CBD

Interface between two mutually supportive instruments

33. In its Articles 16.2 and 16.5 the CBD acknowledges the need to act in consistency with the adequate and effective protection of intellectual property rights and urges Members to ensure that intellectual property rights are supportive to the CBD. The CBD language relating to intellectual property strikes a fine balance

between the need to implement intellectual property protection and the need to ensure that intellectual property rights facilitate conservation and sustainable use of biodiversity and the ABSF principles. It is a fact that the TRIPs Agreement, in its turn, does *not* refer to the principles of the CBD as regards access to genetic resources and the sharing of the benefits arising from their use. This does not mean, however, that the TRIPs Agreement runs counter to the CBD! There is nothing in the TRIPs Agreement that would prevent the sharing of the benefits arising from intellectual property protection over inventions incorporating genetic resources or the protection of traditional knowledge. At the same time, it is true that the TRIPs Agreement does not provide for direct tools to establish a link between intellectual property protection and compliance with the principles of the CBD.

34. As regards the relationship between the TRIPs Agreement and the CBD, the EC's April 2001 Communication was based upon two basic premises.

35. First, the CBD and the TRIPs Agreement do not conflict with each other from a legal perspective. They have different objectives and do not deal with the same subject matter. There is nothing in the provisions of either Agreement that would prevent a country from fulfilling its obligations under both. The CBD, for example, does not prohibit patents on inventions using genetic material. TRIPs does not prevent signatories to the CBD from exercising their right to regulate access to their genetic resources, to require prior informed consent or to share in the benefits arising from their use.

36. Second, closing the door to any debate on the grounds that, in the absence of legal incompatibility between the two Agreements, there cannot be a problem with the implementation of both Agreements would not be the right attitude. Despite their difference in coverage, there is indeed considerable *interaction* between the rights referred to in the TRIPs Agreement and the subject matter of the CBD. There are a range of issues for which both Agreements do have implications such as biotechnology, plant varieties, environmental technology relating to conservation and sustainable use, information relating to conservation and sustainable use, traditional knowledge and benefit-sharing.

37. This leads the EC to the view that, with regard to their implementation, the TRIPs Agreement and the CBD should not undermine each other's objectives. They should, accordingly, be implemented in a mutually supportive way.

38. In its implementation, the TRIPs Agreement can in fact be used to support the objectives of the CBD, such as the fair and equitable sharing of the benefits arising from the use of genetic resources. Intellectual property can be a suitable instrument for implementing the CBD. Intellectual property rights can encourage the use of genetic resources by promoting biotechnological innovation. Intellectual property rights generate financial benefits further to commercial exploitation. So, provided that international law (and in particular the CBD), national legislation and contractual arrangements on access and benefit-sharing are fully respected, there is scope for congruence of interests between providers and users, through the use of intellectual property rights, given that the latter contribute to creating benefits stemming from the use of genetic resources in the form of financial returns or access to the relevant technology.

39. Any examination of the link between the CBD and the TRIPs Agreement should, therefore, focus on ways and means of implementing both instruments in a mutually supportive way and on how to create an interface between the two Agreements.

Ways and means of ensuring mutually supportive implementation of both Agreements

40. The first way is at **national level**. It is the duty of the WTO Members and the CBD signatories to honour their commitments under both Agreements at national level. Both Agreements allow for a significant degree of flexibility with regard to their implementation at national level, thus leaving scope for a balance in the way they are applied. These national implementation measures are the primary instruments for ensuring mutually supportive implementation.

41. The CBD must be implemented at national level by establishing the core conditions for access to national genetic resources and determining minimum conditions for benefit-sharing. This implementation may be by legislative, policy and/or administrative measures. Sound regulation is essential to guarantee legal certainty for all parties involved and to protect the rights of providers of genetic resources. The details of each deal can be set out in the contractual arrangements (material transfer agreements) according to "mutually agreed terms".

42. It is important in this context that those Members, which are the most advanced in domestic policy-making with regard to access and benefit-sharing share their experience with other Members of the TRIPs Council.

43. Further synergies between the implementation of both Agreements can also be created at **international level**. First of all, it is important for governments to ensure policy coherence in all forums dealing with issues relevant to the interplay between TRIPs and CBD in order to ensure an integrated approach across institutions (CBD, WTO, WIPO, FAO ...). In this context, the granting of observer status to the CBD in the TRIPs Council would play a positive role in creating a clearer appreciation of the links between TRIPs and CBD. The direct relationship of the work of the CBD and that of the TRIPs Council, as expressed in Paragraph 19 of the Doha Ministerial Declaration, makes this observership indispensable.

44. It is also important to underline that legislative, administrative and policy approaches on the one hand and contractual approaches on the other hand should not be set against one another. Multilateral rules, national regulatory or policy measures and contractual arrangements are complementary instruments in securing the principles of the CBD. In this regard, the EC welcome the Bonn Guidelines on Access to Genetic Resources and Benefit-sharing adopted at the 6th Conference of the Parties in The Hague on 19 April 2002 which sets out practical ways and means of implementing the principles of prior informed consent and mutually agreed terms enshrined in Article 15 of the CBD at national level. The Bonn guidelines provide useful elements for Material Transfer Agreements and examples of monetary and non-monetary benefits which could be shared. They are accompanied by a set of recommendations on the role of intellectual property rights in the implementation of

access and benefit-sharing arrangements. Their implementation will help to achieve the objectives of access and benefit-sharing and ensure mutually supportive interplay between these principles and intellectual property protection. All stakeholders, governments, scientific and research institutes, companies and indigenous and local communities are invited to implement them.

Disclosure requirements

TRIPs and disclosure of origin

45. A number of Members have expressed the view that the TRIPs Agreement should be amended in order to reconcile or harmonise the Agreement with the CBD (most recently in IP/C/W/356 of 24 June 2002). These proposals are designed to create a direct interface between the Agreements in the TRIPs Agreement itself by incorporating a requirement into the TRIPs Agreement that patent applicants should disclose the geographical source and origin of the genetic material and the related traditional knowledge used, and produce an official certificate or evidence that domestic laws on access and benefit-sharing of the source country have been respected (evidence of prior informed consent and of fair and equitable benefit-sharing).

46. The TRIPs Agreement does not specifically deal with the disclosure of genetic resources used in an invention. However, Article 29 of the TRIPs Agreement requires that the disclosure of an invention must be in a manner sufficiently clear and complete for the invention to be carried out by a person skilled in the art. This means that, where inventions related to genetic resources are concerned, relevant information must be provided as regards the genetic resource concerned. In certain cases, the geographical origin may be one of the relevant elements of information to be provided to allow "a person skilled in the art" to put the invention into practice, in which case patent applicants are obliged to provide this information. Where the disclosure of that information is not essential to put the invention into practice, there is no such obligation.

47. However, the objective of Article 29.1 (*i.e.* disclosure in order to allow reproduction of the invention) is different from the disclosure requirement for genetic resources as proposed by certain WTO Members in the context of the discussion on the relationship between the TRIPs Agreement and the CBD (*i.e.* to facilitate the enforcement of access and benefit sharing requirements) . In most cases, Article 29.1 will *not* require patent applicants to disclose the geographical origin because other elements of information, and/or the deposit of the biological material concerned (as regulated under the Budapest Treaty) would be sufficient to meet the requirements of Article 29.1.

48. In any event, the TRIPs Agreement does not prevent Members from requiring the disclosure of origin in cases where this information is not essential in the meaning of Article 29 TRIPs, or the production of evidence of respect of access and benefit-sharing rules to patent applicants, as long as this requirement does not constitute a patentability criterion and has no bearing on the patentability of the invention or the validity of the patent. Substantive patentability criteria are set out in Article 27.1 of the TRIPs Agreement, while Article 29 lays down obligations that can or must be

imposed on the patent-holder in order to check whether the patentability criteria are met. Compatibility with TRIPs depends on the consequences arising from non-compliance. Thus, the concept of making the patentability of an invention subject to the respect of a requirement to disclose the geographical origin of genetic resources used in the invention (in cases where this information is not required under Article 29.1 TRIPs) or of a requirement to provide evidence of the access and benefit sharing rules constitutes a clear step beyond the current provisions of the TRIPs Agreement.

Self-standing disclosure requirements

49. The EC explicitly recognise disclosure of origin of as a principle in the preamble to Directive 98/44 of the European Parliament and of the Council on the Legal Protection of Biotechnological Inventions, although without making it a binding requirement[2].

50. Of course, no WTO Member is obliged under TRIPs to require or encourage patent applicants to disclose the origin of genetic resources or related traditional knowledge used in an invention where this is not required under Article 29, *i.e.* a "self-standing requirement" to disclose the geographical origin of genetic resources for *all* inventions incorporating or based upon such resources. However, because benefits arising from the use of genetic resources are perceived to be generated mainly through the commercial exploitation of inventions derived from biotechnology on the markets of industrialised countries, the interests of those advocating any such requirement are that it should be applied on a world-wide basis. Therefore, the EC acknowledge that it would be more significant if a self-standing requirement were to apply globally rather than only in developing countries.

51. The EC, therefore, agree to examine the possible introduction a system, such as for instance a self-standing disclosure requirement, that would allow Members to keep track, at global level, of all patent applications with regard to genetic resources for which they have granted access.

52. However, the question is how to calibrate such a self-standing disclosure system, especially as regards 1) **the type of information to be submitted by the applicants** and as regards 2) **the legal consequence of failure to disclose**.

53. The EC sees merits in a system that would ensure transparency and would allow the authorities of countries granting access to their resources to keep track of patent applications linked to the use of these resources.

54. Therefore, it is the EC's view that the **information to be provided** by patent applicants should be limited to information on the **geographic origin** of genetic resources or TK used in the invention which they know, or have reason to know. It may indeed happen that a patent applicant is not aware of the country of origin of a genetic resource because it has transited through other countries, research centres, botanical gardens or other ex situ collections. So, when the country of origin is not

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[2] Paragraph 27 of the preamble, stipulates that "*patent applications should, where appropriate, include information on the geographical origin of biological material of plant or animal origin, if known ... this is without prejudice to the processing of patent applications or the validity of rights arising from granted patents*".

known, the patent applicant's obligation would be to indicate the research centre, gene bank or entity from which they acquired the resource, it being understood that the disclosure requirement should not act retro-actively. Practical problems that may arise in this respect should not be overlooked, but duly anticipated and taken into account. Moreover, one should not require further evidence with regard to compliance with access and benefit sharing regulations, especially where many countries in the world do not yet dispose of legislation on access to genetic resources and are not in a position to deliver certificates of evidence[3]. Also, one must take into account that requiring patent offices to check compliance with ABFS requirements may well be a very complicated system to manage.

55. Moreover, the EC hold the opinion that such **a disclosure requirement should not act, de facto or de jure, as an additional formal or substantial patentability criterion**[4]. Failure to disclose, or the submission of false information should not stand in the way of the grant of the patent and should have no effect on the validity of the patent, once it is granted. Legal consequences to the non-respect of the requirement should lie outside the ambit of patent law, such as for example in civil law (claim for compensation) or in administrative law (fee for refusal to submit information to the authorities or for submitting wrong information). Patent law should not be used to sanction non-respect of domestic access and benefit-sharing requirements through the rejection of the patent application or the invalidation of the patent.

56. Thus, the EC are prepared to enter within the TRIPs Council, into discussions on the introduction of a multilateral system for disclosing and sharing information about the geographical origin of biological material used in all patent applications. However, such a system should have no bearing on the patentability of the inventions concerned or on the validity of these patents, and should not place an unreasonable burden upon patent offices and patent applicants. Requirements of patent applicants would involve the indication of the geographical origin of genetic resources, which they know, or have reason to know, or, when the country of origin is not known, the research centre, gene bank or entity from which they acquired the resource.

57. Such a system would meet the concerns expressed by a number of WTO Members because :

(1) It would help to prevent misappropriation of genetic resources and related traditional knowledge, *i.e.* by allowing patent offices to establish novelty more accurately by making more focused searches;

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[3] In this context, the Cancun Declaration, adopted on 18.02.2002, in view of the 6th session of the Conference of the Parties to the CBD, by the Like-Minded Megadiverse Countries (Brazil, China, Colombia, Costa Rica, Ecuador, India, Indonesia, Kenya, Mexico, Peru, South Africa and Venezuela) declared that they would seek the creation of an international regime which should contemplate in particular "certification of legal provenance of the biological material, prior informed consent and mutually agreed terms for the transfer of genetic material, as requirements to the application and granting of patents, strictly in accordance with the conditions of access agreed by the countries of origin."

[4] Except in those cases where the disclosure of the geographical origin of the genetic resource is already required under Article 29 TRIPs

(2) It would help countries providing access to genetic resources to monitor and keep track of compliance with access and benefit-sharing rules as well as with the contractual arrangements between providers and users of genetic resources. It would allow source countries to be informed, through foreign patent offices, of patent applications incorporating genetic resources or traditional knowledge to which those countries, or their local communities, have granted access. This would enable them to check whether patent applicants have respected national rules on access and benefit-sharing and to detect any commercial benefits from the use of genetic resources, thus making sure that source countries get their share of the benefits, by enforcement if necessary.

58. The EC take the view that problems relating to the fact that genetic material originates from more than one country should be resolved through arrangements among the source countries concerned and/or in the context of the CBD.

The FAO International Treaty on Plant Genetic Resources for Food and Agriculture (IT)

59. The relationship between the TRIPs Agreement and the IT has not yet been discussed in detail, due to its recent adoption. The adoption of the IT is an important relevant new development regarding issues related to the patentability of living material. It raises several issues that run in parallel to those raised under TRIPs/CBD.

60. Its provisions regarding IPRs on plant genetic resources covered by a multilateral system call for mutually supportive interpretation of the IT with the TRIPs Agreement and the CBD. As the objectives of the IT will be attained through its close links with the CBD, the conditions for the relationship between the TRIPs Agreement and the IT are similar to the one between the TRIPs Agreement and the CBD. In its Articles 12.3(f) and 13.2.b(iii) the IT acknowledges that access to genetic resources shall be consistent with the adequate and effective protection of intellectual property rights and relevant international agreements. Comparable ways and means to ensure a mutually supportive implementation, as outlined under point 3, will be sought for the IT in its relation to the TRIPs Agreement and the CBD. Currently, a dialogue on the conditions for ABFS is taking place in the context of the IT with an aim to agree on a standard Material Transfer Agreement.

4. <u>Protection of traditional knowledge (TK) and Folklore</u>

61. As regards the protection of TK and folklore, the EC are actively and constructively participating in the various forums where this issue is being discussed, and in particular the CBD, WIPO and the FAO (IT). The present Communication focuses primarily on traditional knowledge. In this respect, the EC refer to the document entitled "Traditional Knowledge and Intellectual Property Rights" submitted by the EC to the WIPO Intergovernmental Committee on Intellectual Property, Genetic Resources, Traditional Knowledge and Folklore on 14 June 2002 (WIPO/GRTKF/IC/3/16).

62. There exist three complementary intellectual property approaches to TK:

1. Protection of TK through existing intellectual property rights;
2. Instruments to prevent inappropriate patenting or other types of misappropriation of traditional knowledge and to ensure that benefits stemming from inventions based on TK are properly shared with the providers of that knowledge; and
3. The development of *sui generis* protection.

Protection of TK through existing intellectual property rights

63. Even if it appears difficult to protect all types of TK under existing IP regimes, it may be possible, to a certain extent, to protect certain types of TK or, at least, the way in which it is presented, or products incorporating TK, through existing IP regimes. A number of existing IP standards may potentially be used to this end. This use can take various forms. For more details, see pages 2-3 of WIPO/GRTKF/IC/3/16.

Approaches to prevent inappropriate patenting of TK and to facilitate benefit sharing

64. In many cases, TK is not eligible for patent protection, because it does not, respond to the substantive patentability criteria enshrined in Article 27.1 of the TRIPs Agreement. Some cases have been reported of parties obtaining patent protection merely for copying TK. This amounts to misappropriation of TK and the patent can be challenged for not meeting the patentability criteria. However, it is always preferable to deal with problems before they arise. Also, it must be taken into account that most TK holders do not have the means to engage in litigation that may be costly and time-consuming. Therefore, preventive approaches need to be devised.

65. An effective way of avoiding such practices would be to make sure that TK would always be duly recognised as prior art. Therefore, methods of documenting and sharing information on TK, such as databases and registers, in order to allow patent examiners to take them into account in prior art searches need to be explored. Such databases and registers should be developed with the full participation of the TK holders.

66. The situation is different when TK is used as a basis for further innovations. In many cases, TK serves as a basis or an element in further research and development for use in broader applications. In such cases these innovations are patentable, provided they meet the substantive patentability criteria. But the possibility of obtaining a patent does not override existing legal or contractual requirements to reward TK holders for the use of their knowledge or share the benefits of its use. In this instance, disclosure of origin of TK from which inventions are derived would be an issue. What has been said in this communication as regards disclosure requirements of genetic material also applies, *mutatis mutandis*, to traditional knowledge.

Sui generis protection of TK

67. In their Communication to the TRIPs Council of April 2001 on the relationship between the TRIPs Agreement and the CBD,[5] the EC expressed support for the development of an international model for the legal protection of TK. In this context, the EU also confirmed that it remained open to developing countries' requests to include TK on the agenda of a new round, as the EU had already committed itself to at the Seattle Ministerial in December 1999. This is why the EC welcome the reference to TK in paragraph 19 of the Doha Ministerial Declaration.

68. Certain WTO Members have suggested in the past that they would like to see provisions on TK protection included in the TRIPs Agreement.

69. However, the EC are of the opinion that, at this stage, the TRIPs Council is not the right place to negotiate a protection regime for a complex new subject matter like TK or folklore. This is an issue where the WTO should ideally be able to build on the work undertaken by the World Intellectual Property Organisation (WIPO), where traditional knowledge is now being extensively discussed in the Intergovernmental Committee on Intellectual Property, Genetic Resources, Traditional Knowledge and Folklore.

70. At this stage it is difficult to anticipate the result of the work of the WIPO Intergovernmental Committee. Nevertheless, it is clear from the EU's perspective that WIPO, as the specialised UN agency responsible for the promotion of IP world-wide, is, from a technical viewpoint, the most suitable forum for tackling the issue of legal protection of TK. There are many complex conceptual and operational problems involved in recognising (collective) rights over TK, and there could well be considerable hurdles to overcome when establishing stringent criteria such as the definition of TK as protectable subject matter, the determination of ownership, the modalities of ownership and the scope of rights related to TK. Folklore is being examined independently from TK in the framework of the WIPO Intergovernmental Committee. Attempts to protect expressions of folklore via intellectual property face similar, if not greater, challenges.

71. Therefore, it seems best to wait for the results of the WIPO Intergovernmental Committee and only then decide whether this warrants further work in the WTO. Depending on the outcome of the WIPO process, it could then be assessed whether the issue need to be taken up by the TRIPs Council. For example, it can be considered how and whether a protection regime for TK could ultimately be made enforceable, for instance through inclusion in the TRIPs Agreement. A separate assessment on the possibility of protecting expressions of folklore could only be made in the light of the outcome of the intergovernmental Committee.

[5] IP/C/W/254 (13 June 2001).

5. Sui generis protection of plant variety rights

72. The penultimate sentence of Article 27.3(b) TRIPs states that: "*Members shall provide for the protection of plant varieties either by patents or by an effective* sui generis *system or by any combination thereof*". The Agreement gives no further guidance of what is to be understood by "*an effective sui generis system*" and there is no agreed interpretation of this term among WTO Members.

73. The absence of a definition means that Members have a considerable degree of flexibility to determine how their legislation should meet the standard of effectiveness, which allows them to design a protection regime that is appropriate to their specific national situation. Account can be taken, for instance, of the overall agricultural development policy objectives of Members or the need to protect certain rights of small farmers or subsistence farmers (see Section 6).

74. Many countries have enacted specific laws granting exclusive rights to breeders of new varieties of plants so that they can receive a reasonable return on past investments. These rights also provide an incentive for continued or increased investment in the future, and confirm the moral right of the innovator to be recognised as such and his economic right to be remunerated for his effort.

75. A growing number of WTO Members have signed the UPOV Convention of 1978 or of 1991. The Convention requires its signatories to provide protection for new varieties of plants and contains explicit and detailed rules on the conditions and arrangements for granting protection. A plant variety is protected if it is distinct, stable, sufficiently uniform and novel. The Convention also contains rules on the scope of protection, possible restrictions and exceptions, and how protection may be forfeited. The UPOV Convention is an effective, flexible and widely recognised protection model for plant varieties, subscribed by 50 states all over the world. It offers many advantages for its signatories. For instance, it establishes, subject to certain limitations, the principle of national treatment for plant-breeders from other Member States and introduces a right of priority.

76. However, while UPOV 1978 and UPOV 1991 should be considered as meeting the standard of effectiveness under Article 27.3(b) of the TRIPs Agreement, they are not necessarily the only valid "effective sui generis systems" for plant variety protection. Other models may exist. Several countries have adopted or are preparing to adopt plant variety protection systems which differ to a lesser or a greater extent from UPOV.

77. In this context, the EC believe that in order to be effective any regime establishing intellectual property rights over a certain subject matter, be it inventions or plant varieties, must fulfil a certain number of criteria. The main criteria are the following :

- the protectable subject matter (i.e. plant variety) must be clearly defined;
- the conditions for granting protection must be clearly defined. In the context of plant varieties, novelty is an essential condition for protection;
- the rights with respect to the protected subject matter need to be clearly spelled out; the right-holder should at least be able to prevent third parties

from carrying out certain acts in relation to the protected subject matter over a certain period of time;

- the law must provide for national treatment and most favoured nation treatment; it is logical that Articles 3 and 4 of the TRIPs Agreement apply to plant variety protection as well;
- the procedure to be followed by the breeder to obtain these rights should be spelled out in a detailed and transparent way;
- the necessary administrative organisation needs to be set up to ensure that these rights can be effectively obtained within a reasonable time frame;
- limitations and exceptions to the rights of the right-holder need to be clearly defined; typical examples of such exceptions are experimental use, the right to use a protected variety for further breeding, compulsory licences (in which case Article 31 TRIPs provides a useful yardstick) and certain exceptions to the benefit of farmers (see Section 6 of this paper on farmers' rights and farmers exemptions);
- the period of application of the rights must be determined, but should be sufficient to allow breeders to recover costs and invest in new research;
- the law must provide for legal and institutional implementation procedures to allow the right-holder to enforce his rights and to create an effective deterrent to infringement; the legal actions spelled out in the TRIPs Agreement should be available to the right-holder for this purpose.

6. Farmers' rights and farmers' exemptions

78. The term "farmers' rights" is used to refer to very different concepts. For the sake of clarity it is essential to differentiate between basically two different (though closely interrelated) concepts:

a. "farmers' rights" as a set of measures in recognition of the ancestral role of farmers in developing foodcrop varieties and preserving biodiversity;
b. farmers' rights as an exception to plant breeders' rights or patents, which, in order to avoid confusion with the former concept, we will further refer to as "farmers' exemptions".

Farmers' rights

79. In its broad sense, the term "farmers' rights" refers to a set of measures in recognition of the ancestral role of farmers in developing foodcrop varieties and preserving biodiversity. These might for instance consist of measures to help support farmers in their conservation and development of agricultural biodiversity and plant genetic resources.

80. The term farmers' right has a specific legal meaning under the FAO IT (see its Article 9). Here, farmers' rights are intended to encourage contracting parties to take specific measures to assist farmers in their role as guardians of biodiversity and to ensure that they share in the benefits of further improvements of plant genetic resources (*i.e.* giving priority to a funding strategy to the implementation of agreed plans and programmes for farmers in developing countries protection of agriculture-related traditional knowledge etc.). This provision recognises the importance of farmers' rights, but it is left up to the contracting parties to take measures under their

national law. Farmers' rights to save, use, exchange and sell farm-saved seed/propagating material (paragraph 3) are not limited by the Article but are subject to the contracting parties' national laws.

81. In their broad meaning, farmers' rights do not directly interfere with the subject of intellectual property rights, the main aim of which is to encourage innovation. Farmers' rights on the other hand are more a matter of retrospective reward to farming communities for their ancestral role in fostering agricultural biodiversity, which is too broad an aspect to be dealt with by the TRIPs Council. It should rather be dealt with by other organisations, particularly the FAO, although some aspects may be considered in the context of traditional knowledge.

82. In this context, it is important to point out that nothing in the TRIPs Agreement prevents Members from taking measures to encourage, support and reward farmers for their role in the conservation and development of agricultural biodiversity and plant genetic resources.

Farmers' exemptions

83. In a more narrow sense, the term "farmers' rights" is also used to refer to exemptions to plant variety right protection or patents on plants or other genetic material allowing farmers to save, exchange or sell seeds of protected varieties or plants, or use them for further multiplication. Farmers' exemptions are thus a derogation - designed to help the farmer - from the scope of protection conferred by a plant variety certificate or a patent.

84. UPOV 91 provides for a right to restrict breeder's rights. The so-called "farmers' privilege" is a form of farmers' exemption, with a clearly circumscribed scope. It allows (but does not oblige) signatories to grant farmers the right to use, for propagating purposes, on their own holdings, the product of the harvest which they have obtained by planting the protected variety on their own holdings.

85. EC Regulation No. 2100/94 on community plant variety rights and EC Regulation No. 98/44 on the legal protection of biotechnological inventions both contain a farmers' privilege clause which applies to the main foodcrops (fodder plants, cereals, potatoes, oil and fibre plants), whereby small farmers do not have to pay any remuneration to the right-holders while other farmers are required to pay an "equitable" remuneration, which must be appreciably lower than the amount charged to licensed farmers. The EC consider that these exceptions are justified under UPOV 91 as well as under Article 30 of the TRIPs Agreement.

86. The EC believe that farmers' exemptions can be justified under Article 27.3(b) of the TRIPs Agreement (as an exception to *plant variety right protection*) or under Article 30 of the TRIPs Agreement (as an exception to *patent protection* on genetic resources for food and agriculture), depending on the scope of the exception.

87. The farmers' privilege under the UPOV Convention (which gives a farmer the right to freely propagate or multiply protected varieties *on his own farm*) is designed for economies where farming has become a commercial and quasi-industrial activity

performed by a small minority of the population and where plant breeding has become an industrial plant breeder's activity.

88. This could be different for the least developed or developing countries, where all or part of the farming activity is performed on very small farms at subsistence level or where commercial activities of farmers are of limited geographical scope. In these situations, a Member may well create, in its national law, a broader farmers' exemption for the benefit of subsistence farmers, or of small farmers who customarily reuse seed because they lack access to or financial resources for new seed every growing season. This allows them to save, replant, exchange, share and resell seed (to other small farmers), provided they do not use the denomination of the variety or the related trade mark. In any event, the breeder must remain the only one entitled to derive commercial benefit from the new variety. Another option could be to exempt exchanges of seed that take place within the same community or with neighbours, and between farming communities. However, farmers with significant commercial interests should be subject to more stringent rules.

The EC would be happy to discuss these issues further.

EUROPEAN COMMISSION
Directorate-General for Trade

Brussels, 19 November 2002
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[Public]

EC submission in DDA negotiations: Agreement on Subsidies and Countervailing Measures

WTO NEGOTIATIONS CONCERNING THE WTO AGREEMENT ON SUBSIDIES AND COUNTERVAILING MEASURES

PROPOSAL BY THE EUROPEAN COMMUNITIES

I. INTRODUCTION

1. Innovations introduced by the Uruguay Round

The Agreement on Subsidies and Countervailing Measures (ASCM) was one of the major achievements of the Uruguay Round. A definition of a subsidy, and the circumstances in which it would be actionable, were outlined for the first time. A "traffic light" classification of subsidies was also introduced.

A subsidy was essentially defined as a financial contribution from a government which confers a benefit. A subsidy was subject to disciplines only if specific, the specificity aspect referring to the fact that it was targeted at certain beneficiaries. The "traffic light" concept was based on the premise that some subsidies were trade distorting *per se* while others were benign or even noble, and ranged through several colours from prohibited red at one end of the spectrum (e.g. export subsidies) to non-actionable green at the other (e.g. subsidies for environment).

Finally, Members agreed on new rules for CVD investigations (increased initiation standards, sunset provisions, etc.) and the concept of special and differential (S&D) treatment for developing countries and economies in transition to a market economy.

2. The ASCM in practice

The creation of the "traffic light" system has focussed actions overwhelmingly on the "red" or prohibited category (i.e. export and "local content" subsidies), with most WTO dispute settlement under the ASCM being opened to combat such subsidies.[1] Not surprisingly, this concentration on disciplining prohibited subsidies means that less attention was given to less detectable types of "actionable" subsidy.

The main reason for the concentration on the "red" category is that the rules for certain types of actionable subsidies (particularly those not granted directly to a certain product) are much less explicit and therefore less operational and effective than those for direct export subsidies. Similarly, the non-actionable or "green" subsidy category (R&D, environment and regional aid) has proven to be ineffective and, because of its negligible

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[1] Indeed, all but one of the eight dispute settlement cases brought since 1995 against subsidy practices involved exclusively export subsidies.

impact on the actual application of subsidy disciplines, its expiry in 1999 has gone almost unnoticed.[2]

As for the main CVD innovations introduced by the Uruguay Round, experience since 1995 has shown that, despite increased initiation standards, cases can still be opened without the necessary justification and though the "sunset" provisions have led to slightly fewer measures, the overwhelming tendency is still to maintain measures.

II. DOHA DEVELOPMENT AGENDA AND MULTILATERAL SUBSIDIES DISCIPLINES

The Uruguay Round introduced disciplines to deal with most types of subsidies but it is clear that only some of these rules can already be considered operational. Indeed, the "traffic-light" approach has proven to be in need of streamlining through establishing clear and uniform rules for all specific subsidies. Therefore, the main objective in this new Doha Development Agenda ("DDA") should be focused on the essential disciplines set out in the current Agreement and make them workable and effective. This objective closely follows the Doha mandate.[3] The following improvements would go some way towards meeting these objectives. Nothing in this proposal prejudges, however, in any way, the specific rules on agricultural subsidies, existing or to be established following the DDA negotiations on agriculture.

1. Definition - More operational rules for "disguised" subsidies

The definition of a subsidy established in Article 1 is, in general, satisfactory. However, clarification is required in two areas.

Significant amounts of financial support are increasingly granted by governments for ostensibly general activities which in fact directly benefit the production of certain products. These "disguised" subsidies can have equally severe trade-distorting effects and they are potentially much more harmful than more direct subsidies since they confer benefits in a largely non-transparent manner. The same applies to similar financial support granted through certain government-controlled entities.

In view of this, the EC propose to clarify the definition of a "subsidy" in Article 1 ASCM as follows:

a) "Disguised" subsidies

Although the existing rules already apply to specific **"disguised" subsidies,** e.g. apparently general support - financial contribution by a government - which in fact confers benefits only to the commercial activities of the recipients, this is not always

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[2] Pursuant to Article 31 ASCM, Article 6.1 ASCM (subsidies presumed to cause serious prejudice) and Articles 8 and 9 (non-actionable subsidies for R&D, environment and regional aid) expired on 1 January 2000. The "green list" under Article 8 of the Agreement proved to be of very limited use since the definitions and procedures were so complicated that no Member could make serious use of it. "Dark amber" subsidies carrying the presumption of serious prejudice under Article 6.1 ASCM (e.g. subsidies above 5% ad valorem) have only been invoked once in dispute settlement.

[3] "In the initial phase of the negotiations, participants will indicate the provisions, including disciplines on trade distorting practices, that they seek to clarify and improve in the subsequent phase." (emphasis added).

spelt out in enough detail for effective implementation. The link between the subsidy and the recipient or product is often concealed and therefore much more difficult to establish than in cases where the funding is more up front. In other words, this support benefits all of the commercial activities of the recipient rather than being in line with its stated "general" purpose. To the extent that this kind of funding in an industrial sector is significant and leads to effective circumvention of the subsidy disciplines, it is a problem that needs to be tackled. Therefore, the subsidy rules for industrial products should be made more operational in order to bring these subsidies more clearly within the disciplines of the ASCM.

b) State-controlled entities

Furthermore, the terms of the current Agreement also make it extremely difficult to act against **entities which may be providing the "subsidy" under the covert direction of governments** (e.g. the granting of loans and other financial support through financial institutions which are acting on non-commercial terms). Current rules could be construed to only cover such actions if there is a clear and unambiguous showing of "direction" by the government. Such a link is often very difficult to prove. To cover this "grey zone" in subsidy disciplines, consideration could be given to clarifying Article 1 ASCM, so that entities which are effectively controlled by the state and acting on non-commercial terms are covered by this provision.

An alternative would be to clarify the rules so as to cover situations where the public direction is less apparent but nevertheless led to non-commercial behaviour in terms of the financial operation in question. Article 1.1. ASCM does not *per se* apply to public enterprises acting under commercial terms in the market.

While it is obviously not the case that all state-owned entities or enterprises should be considered part of the government, there is a need to develop workable rules in order to prevent the circumvention of subsidy disciplines, taking into account the WTO jurisprudence.

2. Clearer rules for "local content" subsidies

Though the rules on prohibited export subsidies (Article 3.1(a) ASCM) are reasonably effective, as demonstrated by the number of cases initiated for this category, there are improvements that can be made, in particular for the rules on "local content" subsidies (Article 3.1(b) ASCM), which are difficult to use effectively with regard to the industrial sector. Currently, these rules do not provide appropriate disciplines (especially as regards "value-added requirements"), given that it is necessary not only to show that an import substitution programme exists, but also to explicitly demonstrate that, in order to obtain the subsidy, the actual use of domestic over imported goods is **required** on a case by case basis (which is a higher standard than required for an Article III:4 GATT 1994 violation).[4]

This very high threshold of proof makes it very difficult to counteract subsidies linked to value added conditions under the ASCM prohibited subsidy disciplines, especially where a local content requirement is only one of several alternative conditions for obtaining the

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[4] See *Canada - Certain measures affecting the Automotive Industry* - complaint by the EC and Japan , Report by the Appellate Body(DS139/142).

subsidy. Moreover, the widespread lack of transparency, in particular with respect to *de facto* local content subsidies, calls for improved rules in this area. Rules should be clarified and made operational so that any subsidy linked to the use or purchase of domestic industrial products, and thus in breach of Article III:4 of GATT 1994, is covered by the prohibition. Of course, the fact that subsidies are available only to domestic producers would not, by itself, put them in the prohibited category (Article III:8 b of GATT 1994).

3. Clarification on export financing

The ASCM does, in fact, contain rules which address export financing but again these are, on their own, not set out in sufficient detail to be operational. Therefore, the ASCM also refers to rules on official support for export credits, which are currently elaborated in detail in the OECD Arrangement. This effectively provides a "safe harbour" for this type of export financing, i.e. that the export credit support can in no case be considered a prohibited export subsidy in the meaning of Article 3.1(a) ASCM as long as the OECD interest rate provisions on export credits are complied with. But this "safe harbour" does not apply for all types of official support for export credits covered by OECD rules.[5]

There is therefore a need to establish clear and consistent rules for all types of export financing. However, this will not prejudice in any way the specific rules on export financing existing or to be established under the Agreement on Agriculture.

In this regard, the EC consider the OECD regime on official support for export credits to be a tested and workable set of rules. Some Members have already indicated that WTO rules should set out clearly the rules applicable to this area. The EC take note of the concerns of developing countries who have argued that the fact that they are not members of the OECD puts them at a disadvantage. The EC are prepared to address the legitimate concerns of developing countries in this regard.

4. More effective notification rules

The notification process for specific subsidies has completely broken down. Only a few WTO Members regularly notify subsidies even though there is an absolute obligation to do so under Article 25 ACSM. This lack of transparency needs to be urgently addressed since without notifications it is difficult for the rules of the ASCM to be fully operational and effective. This failure is particularly damaging as regards "less visible" subsidies, whatever their form. A workable and effective notification system would be hugely beneficial for enabling these subsidies to be identified.

In view of this, we propose to explore the possibility of **penalising partial or non-notifications.** A mechanism would have to be devised through which the quality and scope of notifications could be scrutinised and if failings were found or suspected a review procedure could be generated through an expedited WTO dispute settlement procedure similar to the one envisaged for spurious initiations or by referring the matter to an empowered Permanent Group of Experts.

5. Subsidies and the environment

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[5] The safe harbour of item k of Annex I ASCM applies only to interest rate provisions of export credits but does not apply to export guarantees, risk premia and "matching".

The DDA has reaffirmed the commitment to the general objective of sustainable development and to the necessary mutual supportiveness between trade and environment. Certain subsidies may have a negative impact on the environment, but others can have a positive effect, by for instance encouraging reductions in pollution or furthering research into cleaner environment. In view of this it may be necessary to address the environmental dimension of subsidies and, in particular, to consider further how to approach subsidies aimed at the protection of the environment, following the expiry of the "green box".

III. DDA AND COUNTERVAILING DISCIPLINES

Under this heading, we propose changes along the lines included in the negotiating proposal for the Anti-Dumping Agreement:

- **Strengthen rules**
- **Increase effectiveness**
- **Reduce the cost of CVD investigations**

The EC also propose to focus on solving some of the problems shown up by the application of the innovations of the Uruguay Round, in particular, with regard to **initiation standards** where e.g. successive cases are opened in respect of subsidies which have been found to have already expired or no longer used.

Moreover, the application of the **sunset provisions** also gives cause for concern. The presumption in current rules towards expiry after 5 years is being circumvented with unsubstantiated reviews being initiated thus prolonging life of measures. Hence, there is a need to spell out more clearly the requirements for extending the life of a measure for a further 5 years.

IV. DDA AND DEVELOPING COUNTRIES

As a general principle, we propose to maintain the line that rules on multilateral subsidy disciplines should apply without exception. In our view, tight disciplines on trade distorting subsidies are in fact in the interests of all participants in the world trading system, including developing countries.

Nevertheless, the Communities recognise that certain types of subsidies can contribute to development, and would be willing to give positive consideration to a package of S&D treatment provisions for developing countries on the understanding that this would be for a strictly temporary period and would be drawn up only following an agreement on rules for non-exempted countries. S&D treatment (based on the existing Article 27 ASCM) could be considered in clearly defined circumstances, for **remedies, including countervailing duties, against certain prohibited and actionable subsidies given by developing countries.** The Communities will also review the existing Article 27 provisions in the light of any changes in the ASCM, to make sure that effective remedies remain against injurious subsidies.

For least developed country members (and perhaps other low income and small economies), we could envisage to relieve them of their notification obligation for specific subsidies under Article 25 ASCM. Instead, the review of this aspect of their trade policy could be conducted in the context of the Trade Policy Review Mechanism, which already

now partly covers the subject of subsidies. In this process, the relevant parts of the review could be conducted in the Committee on Subsidies and Countervailing Measures.

WORLD TRADE ORGANIZATION

TN/CTD/W/13
1 August 2002

(02-4259)

Committee on Trade and Development
Special Session

Original: English

SUBMISSION FOR THE COMMITTEE ON TRADE AND DEVELOPMENT - SPECIAL SESSION ON SPECIAL AND DIFFERENTIAL TREATMENT

Communication from the European Communities

The following communication, dated 26 July 2002, has been received from the European Communities

I. THE DOHA MANDATE

1. The EC welcomes the review of WTO special and differential (S&D) treatment as mandated by paragraph 44[1] of the Doha Ministerial Declaration and paragraph 12[2] of the Decision on Implementation-Related Issues and Concerns.

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

[2] Cross-cutting Issues:

12.1 The Committee on Trade and Development (CTD) is instructed:

i) to identify those special and differential treatment provisions that are already mandatory in nature and those that are non-binding in character, to consider the legal and practical implications for developed and developing Members of converting special and differential treatment measures into mandatory provisions, to identify those that Members consider should be made mandatory, and to report to the General Council with clear recommendations for a decision by July 2002;

(ii) to examine additional ways in which special and differential treatment provisions can be made more effective, to consider ways, including improved information flows, in which developing countries, in particular the least-developed countries, may be assisted to make best use of special and differential treatment provisions, and to report to the General Council with clear recommendations for a decision by July 2002; and

(iii) to consider, in the context of the Work Programme adopted at the Fourth Session of the Ministerial Conference, special and differential treatment may be incorporated into the architecture of WTO rules.

The work of the Committee on Trade and Development in this regard shall take fully into consideration previous work undertaken as noted in WT/COMTD/W/77/Rev.1. It will also be without prejudice to work in respect of implementation of WTO Agreements in the General Council and in other Councils and Committees.

12.2 Reaffirms that preferences granted to developing countries pursuant to the Decision of the Contracting Parties of 28 November 1979 ("Enabling Clause") should be generalised, non-reciprocal and non-discriminatory.

2. The Doha Decision on Implementation-Related Issues and Concerns outlines three pillars of work towards the objective of strengthening S&D treatment provisions and making them more precise, effective and operational: (i) identify those S&D treatment provisions that are already mandatory in nature and those that are non-binding in character and identify those provisions that Members consider should be made mandatory"; (ii) consider ways in which S&D treatment provisions can be made more effective, including especially ways in which developing countries, in particular the least-developed countries, may be assisted to make use of S&D treatment provisions; (iii) consider how S&D treatment may be incorporated into the architecture of WTO rules.

II. THE THREE PILLARS OF THE WORK PROGRAMME

A. MANDATORY/NON-MANDATORY S&D TREATMENT

3. The identification of provisions that Members consider should be made mandatory must be seen against the objective of strengthening S&D treatment provisions and making them more precise, effective and operational; as such it is a means to reach this objective and not an end in itself. In some cases, making provisions mandatory will not be instrumental in meeting the overall objective. Similarly, the EC wishes to recall that there are other ways to reach that same objective and suggests that Members broaden their attention to include the instruments that prove most appropriate in relation to the overall objective. This is not meant to exclude the option of making any given S&D treatment provisions mandatory, as mandated by paragraph 44 of the Doha Ministerial Declaration and paragraph 12 of the Doha Ministerial Decision on Implementation-Related Issues and Concerns, but to avoid confusing the means with the end.

B. ASSISTING DEVELOPING COUNTRIES IN MAKING BEST USE OF S&D TREATMENT PROVISIONS AND S&D TREATMENT IN THE ARCHITECTURE OF WTO RULES

4. The EC recalls the mandate to look at all ways to assist developing countries in making best use of S&D treatment provisions, including by information flows and technical assistance. The inter-relation between different S&D treatment instruments and provisions is relevant to this. In particular, making better use of S&D treatment requires better synergy and co-ordination between different S&D treatment instruments, e.g. how to make better use of transition periods to prepare implementation by providing targeted technical assistance and capacity building to countries that need such assistance. Transition periods may in this situation be seen as a function of the rules in question, the level of development of the implementing country and the capacity building efforts made and provided.

5. The EC therefore suggests that, in pursuing its work on cross-cutting issues, the CTD Special Session address as a priority the issue of how to ensure synergy and co-ordination of S&D treatment provisions as a central instrument in making S&D treatment provisions more effective and in assisting developing countries in making use of S&D treatment provisions. This should look at both existing and new S&D treatment provisions, and could touch upon the S&D treatment instruments, their structures and administration, as well as the possibility for a more differentiated application of S&D treatment to take account of the different constraints that countries at different levels of development face in relation to the implementation and use of specific WTO rules, and in light of the overall development objectives of the Doha Work Programme.

6. Moreover, the inter-relation between different S&D treatment provisions and instruments is linked to the issue of the incorporation of S&D treatment in the overall WTO architecture, i.e. their place and function in WTO Agreements, current or future, and should therefore be considered together with these other questions. Accordingly, the first element of the work programme on S&D treatment, relating to mandatory/non-mandatory nature of provisions, only makes sense if seen as part of a comprehensive agenda to achieve effectiveness of S&D treatment provisions, as underlined by the Least-Developed Countries in their communication (TN/CTD/W/4).

III. THE RELATION BETWEEN THE S&D TREATMENT WORK PROGRAMME AND OTHER ELEMENTS OF THE DOHA DEVELOPMENT AGENDA WORK PROGRAMME

7. The EC recalls the link between the work programme on S&D treatment and the overall WTO Doha Work Programme, as stated in paragraph 50 of the Doha Ministerial Declaration. In particular, the EC notes that the work of the CTD in Special Session will be without prejudice to work in respect of implementation of WTO Agreements in the General Council and in other Councils and Committees. Similarly, the EC notes that questions that have been dealt with in substance by the Decision on Implementation-Related Issues and Concerns, would not merit reopening by the CTD Special Session. S&D questions now being addressed in the negotiations (e.g. on Rules) also would not need to be separately addressed in the CTD although the CTD should be aware of those discussions so that coherence of approach can be maintained in accordance with paragraph 51 of the Doha Ministerial Declaration.

8. As regards market access, the EC recalls that the negotiation mandates under the Doha Ministerial Declaration fully integrate the need for S&D treatment, thus reflecting the principles of Part IV of GATT 1994. It should not therefore be necessary within the present S&D treatment exercise to address the substance of those market access negotiations, but rather to use it to ensure that the S&D treatment aims set out in the different market access mandates are pursued in the manner intended.

IV. MEMBERS' SUGGESTIONS ON SPECIFIC PROVISIONS

9. The EC welcomes the submission of specific recommendations by Members (TN/CTD/W/1 to 4) and the recommendation to continue the analysis and examination of these proposals in the Special Session of the CTD. The EC will consider each specific suggestion and provision with an open spirit, on its merits, and in line with the mandate for this exercise. The EC will address those specific suggestions separately in the pursuit of the work of the Special Session. The EC suggests that the primary aim of the Special Session in doing so must be to ascertain whether the proposal, if implemented, will aid the integration of developing countries into the multilateral trading system. At the same time, account must be taken of the feasibility of each proposal in legal and practical terms, of which Members or categories of Members should benefit from any strengthened provision, and of whether or not within the Doha Development Agenda Work Programme the issue is already being addressed.

V. ISSUES FOR FURTHER CONSIDERATION BY THE CTD SPECIAL SESSION

A. ANALYSIS OF THE OVERALL OBJECTIVES OF S&D TREATMENT IN WTO RULES

10. As a first step, the EC suggests that the CTD analyse the overall objectives of S&D treatment. Such analysis should build on the useful work carried out by the WTO Secretariat in WT/COMTD/W/77/Rev.1 and include both immediate and longer-term perspectives of S&D treatment provisions in existing and future agreements. Work should also consider the expectations of developing countries with respect to S&D treatment supporting their integration into the multilateral trading system: how can S&D treatment lead to integration and not exclusion? In this context, the EC recalls the principle of common but differentiated responsibility, and the need for all Members to participate in and contribute to the multilateral trading system, whether it be by demonstrating political will in the assumption of commitments, by providing and implementing technical assistance, or further market opening, or by carrying out appropriate domestic policies, in order to maximise the benefits for all Members.

11. A clearer definition and understanding of the overall objectives of S&D treatment can help assess the effectiveness of alternative S&D treatment measures and identify the most effective instruments to meet those objectives, and focus attention on areas and countries, where these instruments are most

needed. In this context, attention should be given to the current utilisation by developing countries. This broader analysis of S&D treatment objectives can help point to means of fundamentally improving the present approach, as indicated by the African Group in their submission. The exercise would also be useful in identifying cases where provisions have been implemented, but where the expectations in terms of result have not been met because of other circumstances. In particular, and as the African Group points out in their communication, the development needs of developing and least-developed countries require special domestic policies, measures and laws as well as assistance. The EC believes that recommendations flowing from this broader exercise should go beyond the "provision by provision" approach, which has been pursued so far, thus addressing the broader concept, objective and mechanism of S&D treatment in WTO agreements.

B. INTERACTION OF S&D TREATMENT INSTRUMENTS AND THEIR INTEGRATION IN WTO AGREEMENTS

12. A second element, which is relevant both for the ability of developing countries to benefit from S&D treatment and for incorporating S&D treatment in the WTO architecture, is the question of how different SDT instruments interact and how they are integrated into specific agreements. To take an important practical example: technical assistance is a central S&D treatment instrument, because it is one of the means to assist countries to meet commitments (as well as to benefit from opportunities offered in other markets). Technical assistance should, however, be designed and implemented in conjunction with decisions on the application of transition periods for the assumption of commitments, which in turn depends on the type of commitment in question and the objective situation and needs of the country in question.

13. WTO Members are committed to improving the quantity, quality and co-ordination of trade-related technical assistance and capacity building. The EC suggests that these efforts be seen as an integral part of the review of S&D treatment in the WTO.

C. TAKING ACCOUNT OF THE NEEDS, INTERESTS AND SPECIFIC CIRCUMSTANCES OF COUNTRIES

14. It has often been stressed that S&D treatment should not rely on arbitrary or blanket provisions, but be designed to reflect the needs of countries at different levels of development. We agree. The exercise should therefore consider how best to take account of such differentiated needs of developing countries in relation to both market access and WTO rule making. Understanding the needs and interests of countries in view of their specific circumstances will allow the trading system to better address those needs in relation to specific agreements. In particular, the needs, interests and specific circumstances of least-developed countries tend to be very different from those of most other developing countries. The EC therefore has doubts about the approach taken in some of the submissions made on SDT which present proposals across the board – for example sweeping and potentially permanent exemptions for all developing countries - without taking account of the objectively different needs of countries at different developmental levels.

D. TAKING ACCOUNT OF THE DIFFERENT NATURE OF WTO COMMITMENTS

15. The various WTO agreements, existing and future, are different in nature and imply different levels of capacity to implement. Whereas certain commitments may imply significant resources and infrastructure, others may be implemented and applied with relative ease. Such differences should be taken in account when determining appropriate S&D treatment instruments for countries whose capacities differ.

E. RELATION BETWEEN WTO S&D TREATMENT AND OTHER SUPPORT MEASURES

16. A fifth and final element for consideration could be the relation between WTO S&D treatment provisions and measures that are taken by other organisations or donors to support the development of

developing countries – notably those measures that assist their integration in the multilateral trading system and the global economy. In particular, the role of trade-related assistance and capacity building and the complementarity of WTO efforts and those by other donors need to be addressed in order to maximise efficiencies of scale, and strengthen complementarity.

WORLD TRADE ORGANIZATION

G/C/W/422
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Council for Trade in Goods

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WTO TRADE FACILITATION - STRENGTHENING WTO RULES ON GATT ARTICLE V ON FREEDOM OF TRANSIT

Communication from the European Communities

The following communication, dated 30 September 2002, has been received from the Permanent Mission of the European Communities.

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1. Introduction

1. The WTO's work on Trade Facilitation in the last three years has established an important body of evidence on the benefits of simplifying import and export procedures and on ensuring transparency for trade regulations.

2. In the framework of the DDA work on Trade facilitation, the EC have already submitted papers on Article VIII and Article X of GATT. In this paper the EC address the third leg of the Doha mandate on trade facilitation: GATT Article V on Freedom of Transit. It should be noted that, while it is possible to consider Articles V, VIII and X independently, they are in fact closely interlinked. Several of the measures proposed by the EC and other delegations to strengthen Article VIII and Article X could also be extended to transit operations (since transit involves a specific form of customs treatment). For example, proposals made in the context of GATT Article VIII to use international standards, to simplify or minimise trade documentation, or to clarify the scope and incidence of permissible fees and charges[1], are also relevant to transit operations and procedures.

3. Other proposals made already in the context of the discussions on GATT Articles VIII and X are also likely to have a "knock on effect" that could improve conditions for transit. This would be the case, for example, of proposals to improve transparency of customs regulations, to provide for regular consultation with interested parties on customs operations[2], to use information technology as far as possible in the application of customs procedures, or to introduce systems of risk assessment in order to improve controls over consignments passing international

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[1] As proposed in the EC's submission on GATT Article VIII, ref: G/C/W/394 of12 July 2002.
[2] As proposed in the EC's submission on GATT Article X ref: G/C/W/363 of 12 April 2002.

frontiers. Proposals to improve the quality and quantity of trade related technical assistance are also obviously relevant to transit, in cases where Members lack adequate domestic infrastructure.

4. Coherence with the provisions of GATT Articles VIII and X, and the various proposals already made to clarify or improve them, should therefore be kept in mind when addressing Article V.

2. The importance of transit as an element in trade facilitation

5. Discussions held in the WTO Trade Facilitation Symposium in 1998, at other international events such as the recent UN-ECE conference, and in the CTG itself, have seen support from a large number of governments and business sectors to address transit in the WTO. Traders seek, as a matter of priority, simple, transparent international transit regimes, that correspond to the just-in-time business methods and integrated multi-country supply chains increasingly applied throughout the world. As international trade increases, the volume of transit operations does likewise, making it all the more essential to review or improve transit and to ensure coherence and co-ordination between the actions taken in the various international fora dealing with transit related matters.

6. At the same time, Members must ensure that any measures taken to simplify transit operations, or indeed any other customs procedures, maintain the level of, or indeed improve necessary control functions. It would not be acceptable if important public policy goals related for example to health, safety, the environment, prevention of fraud, or national security, were in any way compromised by transit facilitation. Instead, a virtuous relationship between greater facilitation, greater compliance by traders, and improved controls, should be sought. In pursuing the discussions on Article V and any possible future improvements to it, full weight should therefore be given to the need to ensure these objectives are met and that in this respect the exceptions provided for in GATT Articles XX and XXI are fully applicable and relevant and should therefore be kept in view.

7. Ease of transit is, for obvious reasons, of high interest to landlocked WTO Members, many of whom are developing countries. They are by definition more dependent on transit to access markets. They generally have to rely on the possibilities for transiting through neighbouring countries, either by road, rail or by ship. A number of such Members have on various occasions underlined the fact that the expense of or inadequate possibilities for transit constitutes an important impediment to the development of their trading (both import and export) potential. A recent World Bank study[3] has highlighted – and quantified - the way in which the transport and transit costs faced by landlocked countries, irrespective of the physical distance their exports have to

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3 Limão N. & Venables A. (2000), "Infrastructure, Geographical Disadvantage, Transport Costs and Trade", mimeo, World Bank.

travel, can significantly impede their trade performance and overall economic growth. Transit is therefore a key issue for such Members.

8. The discussions held so far have also shown however that facilitation of transit is of interest not only to landlocked WTO Members. Traders in all WTO members, for whom the most cost-effective way of exporting goods to their final destination will be to cross the territory of another WTO Member, have an obvious interest in securing the freedom of transit.

9. The facilitation of transit is also of interest to countries of transit themselves, in the broader context of ensuring harmonious relations with their neighbouring countries (e.g. in their capacity of point of entry for landlocked countries), as well as being a key element in regional level economic integration and trade expansion. In the absence of an agreed transit regime, such integration, and the increase of trade that flows from it, is less likely to be achieved. Several studies, by the World Bank, the UN and others, have pointed to the beneficial effects on the economy of transiting countries of facilitating transit. Transit operations across a Member's territory can also contribute to economic activity and to the maintenance of well-functioning and up-to-date infrastructure networks.

10. The usefulness of establishing good conditions for transit is documented by the various agreements on transit which have been concluded on a regional or bilateral basis, e.g. the TIR convention under the auspices of the UN/ECE, the Common Transit Convention between the EU, the EEA and the Visegrad countries or the ASEAN Framework Agreement on the facilitation of goods in transit. The World Bank study cited earlier quantifies the trade and economic advantages enjoyed by countries operating effective transit regimes between them.

3. Key elements of GATT Article V

In addition to the basic obligations of non-discrimination, Article V contains a number of important elements aiming at ensuring, consistent with other public policy goals, the smooth flow of trade across borders for the purpose of transit. Notably:

- It provides a broad definition of "Traffic in transit" by making it encompass not only the goods transported, but also the vessels or other means of transport. This potentially is a far reaching provision in terms of the commitment it establishes for WTO-members to ensure that other WTO members are given satisfactory conditions of transit through their territory. (Article V, paragraph 1).

- It provides a general obligation for WTO members to facilitate transit rather than just to tolerate transit by obliging members to provide freedom of transit through their territories, via the routes most convenient for international transit, for traffic in transit to or from the territory of other contracting parties (Article V, paragraph 2).

- It emphasises the principle of non-discrimination in the transit context by prescribing that, for traffic in transit, there should be no discrimination based on the origin of the transit or on the mode of transit (Article V, paragraph 2).

- It specifies the obligation of parties to ensure that transit is not subject to any unnecessary delays or restrictions and restricts the charges that can be imposed in respect of transit (Article V, paragraph 3).

- It underlines that charges should be commensurate to services rendered stressing that any charges and regulations related to the transit shall be reasonable, having regard to the conditions of transit traffic (Article V, paragraphs 3 and 4).

- It underscores the importance of WTO members granting MFN treatment in respect to all charges, regulations and formalities in connection with transit (Article V, paragraph 5).

- It underlines the importance of respecting principle of non-discrimination between goods that have gone through transit and those which have been imported directly (Article V, paragraph 6).

4. Current problems in relation to transit

While the basic obligations in Article V aim at ensuring optimal conditions for transit, there are indications that, on the ground, real freedom of transit is often absent or compromised. The conditions of international trade and the requirements for transit have changed since Article V was originally formulated in the late 1940s, and comments from business, international organisations and WTO-members, in particular developing ones, have suggested a number of obstacles and shortcomings in relation to transit[4]. The EC's own consultations with both European and non-European business groups, have also highlighted several areas where, in their view, transit operations could be improved, potentially through further clarifying or strengthening the provisions of GATT Article V.

Without prejudice to whether the WTO in general, or Article V in particular represents in all cases the appropriate forum in which to find solutions, among the problems identified are:

(a) Non-standardised documentation requirements, excessive documentation and physical checks on transiting goods, vehicles and vessels, notwithstanding the provision in GATT Article V to avoid this.

(b) Non-application of international, regional or bilateral instruments for transit such as the TIR system.

(c) More (too) onerous customs requirements for transiting cargoes than for final destination imports.

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[4] WTO TRADE FACILITATION SYMPOSIUM 9-10 March 1998, Report by the WTO Secretariat G/C/W/115 and the International Forum on Trade Facilitation: 29 - 30 May 2002: For more information see http://www.unece.org/trade/forums/forum02/index.htm

(d) Unjustifiable restrictions on transiting vessels, vehicles or their drivers, and unwarranted restrictions on the entry of non-national transport operators.

(e) Unjustifiable restrictions on the nature of goods that are allowed to transit.

(f) Measures equivalent to restrictions on transit, in the sense that aspects of the transit regime are applied in such a way as to restrict the access of non-domestic operators to transit schemes. Examples include:, difficulty with the return, at the point of exit, of cash guarantees posted at the point of entry; imposition of disproportionate guarantees imposed in respect of the financial stakes represented by the consignment; the impossibility for operators to start a transit operation without being resident in the country transited, unwarranted requirements for consignments to be transported under escort.

(g) Lack of willingness or refusal on the part of transiting countries to co-operate with exporting or importing countries, e.g. in establishing regional transit corridors supported by regional transit authorities.

(h) Inadequate infrastructure which inhibits the inability of some Members – especially landlocked developing country Members – to participate effectively in international trade, and a concomitant need for technical assistance and investment to build up domestic infrastructure. It is worth noting that the WSSD in Johannesburg also underlined the importance of supporting the development of transport infrastructures, Implementation of this commitment will be an important measure to improve transit arrangements for land locked Members and others.

Without prejudice to the precise legal scope of GATT Article V, the EC's preliminary conclusion is that there may indeed be scope for clarifying and strengthening the provisions of GATT Article V to better facilitate international trade and that the Doha mandate offers an important opportunity to do this. Again, it must be stressed that in pursuing this work, the right of WTO members to continue to pursue legitimate public policy objectives, (including those specified in GATT Articles XX and XXI), must in no way be compromised.

5. Proposals to clarify and improve GATT Article V

In light of the above, the EC invites WTO members to consider the following issues that would be relevant in any possible clarification or improvement of the provisions of Article V.

A. <u>Ensuring Non Discrimination between modes of transport in relation to transit procedures</u>

GATT Article V specifies that there should be no discrimination in treatment of traffic in transit via whatever mode (road, rail, inland waterway, air etc). It is natural however that in most countries it will be easier to transport goods via particular transport modes, as a consequence of normal commercial behaviour and the legitimate transport policy choices of individual countries (e.g. environment, health and safety). We therefore believe it is worth discussing further how, in practice, the requirement for non-discrimination between different transit modes is applied, in transit procedures, documentary and data requirements in view of Members' need for flexibility in terms of transport and other policy choices. In addition to "classic" modes of transit such as air, road, rail or boat, it should be noted that the carriage e.g. of oil and gas and other products via pipelines or other means may also fall within the scope of transit. WTO Members may wish to evaluate whether freedom of transit for such goods is effective and whether there is any need or scope for reassessing GATT Article V to take account of the special nature of this form of transit.

B. Ensuring Non Discrimination between Individual Carriers in relation to transit procedures

As noted above, specific problems have been cited by WTO members regarding refusal to allow transit of non-national transport operators. Examples include: refusal by border authorities of licences and certificates relating to the vehicle used to transport the goods by one country's truck companies seeking to transit the territory of another country to get to the coastal port; refusal of entry to drivers from one country carrying out a transit operation; refusal to allow transit by operators not established in the country where the transit it taking place. If not stemming from the afore mentioned exceptions permitted by the GATT, such restrictions may be in conflict with GATT V, paragraph 2, in which case it may be necessary to examine ways in which full and faithful implementation of the provision can be ensured. Perhaps it would be possible to draw up some illustrative guidance as to measures that would or would not be considered consistent with GATT V, paragraph 2. However, to the extent that any such measure operates as an unwarranted restriction on the services provided (in a broader sense than transit alone) through cross-border supply or through commercial presence of foreign operators, this would be an issue more appropriately raised in the context of the GATS. The EC simply wants to note at this point the need to better clarify the interface between the freedom of transit for third country vehicles and vessels guaranteed by GATT Article V and the fact that, under the GATS, the right to provide a transport service in or across the territory of a third country depends on specific commitments having been made by that third country. It would be useful if Members were to consider this inter-relationship further to ensure, at a minimum, consistency between work being done in the GATS (including scheduling of commitments in the transport sector) and that in the CTG as regards Article V. This issue could usefully be drawn to the attention of the Council on Trade in Services.

C. Ensuring Non-discrimination between types of consignment

Some WTO members have complained that freedom of transit is denied for carriage of certain (usually controlled) goods, with local carriers being given the sole right to transport them across the transiting territory, notwithstanding security/safety guarantees being given by the exporting/importing Member. It is important to distinguish whether, in such cases, these measures are being applied for legitimate public protection reasons of the kind referred to earlier, or simply to favour domestic operators. It should be recognised that certain types of goods will always be subject to special provisions or may even be excluded from transit altogether. The solution is therefore not to accord *carte blanche* freedom of transit to all consignments: this will not be possible or even desirable. WTO members could however consider the need for countries individually to publish a list of such "sensitive" goods and strengthening the obligation of WTO members to ensure consistency of treatment for such goods and for operators so that when goods are allowed to transit only subject to exceptional guarantee requirements, those requirements are proportionate and applied uniformly.

D. Facilitation of transit by simplification of documentary and data requirements, and procedures applied for transit purposes

In its separate submission to the WTO[5] on GATT Article VIII, the EC has made proposals in respect of general simplification of import and export documentation and modernisation of customs procedures. Other WTO Members have made similar proposals. Some of these proposals may automatically apply to transit, although those tied to import and export by definition would not. It would therefore be necessary to determine only which additional requirements specific to transit should apply. As a general aim, however, Members could consider provisions to limit to the minimum and harmonise to the best possible degree the extent and nature of the documents and data to be presented purely in respect of transiting goods. It would seem appropriate that any specific rules in this context should begin with specifying that the requirements and procedures applied to traffic in transit should be significantly less onerous than that for imported or, as the case may be, exported goods.

The EC considers it unlikely that a common set of transit data could be agreed upon for all WTO members given the significant number of transit agreements that have their own data requirements. The most operational way to proceed will be to introduce a rule that stipulates that the data required for transit and any other procedures applied must be:

a) Based on international standards where they exist (comparable to the proposals in the EU paper on Article VIII).
b) The minimum needed and for a legitimate purpose.
c) Based on the presumption that they be less comprehensive and onerous than those for importation.

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5 See supra footnote 1.

As regards unnecessary procedures, paragraph 4 above noted a number of examples cited by Members of the WTO or other interested parties on certain seemingly excessive procedures and requirements. In addition to these examples there may also be requirements and procedures relating to excessively cumbersome or inefficient consignment reporting or forms of unjustified customs intervention. It would be useful to hear the views of other Members on problems encountered which could be resolved through a tightening up of the commitments in GATT Article V. In identifying such "problems" experienced by operators, it will of course be necessary to distinguish between procedures that are necessary to carry out a legitimate control objective, and those which are unwarranted.

E. Fees, Charges and Securities relating to transit

GATT Article V, paragraph 4 states that all fees and charges shall be "reasonable". It would be useful to provide a clearer definition of this and that fees should only be charged in respect of the provision of legitimate services necessary to ensure the effective transit of the goods. WTO members could consider establishing an indicative list of such legitimate services. The further work on this should take into account the fact that charges or fees could be justified not only by direct and specific services connected with the movement of goods but also fees caused by services of more general benefit to transporters, e.g. derived from the use of harbour waters and infrastructure maintenance for which public authorities are responsible. Excessive fees charged for overflying WTO Members' airspace would also appear to be covered by such a provision, to the extent such operations fall within the scope of Article V paragraph 7.

As regards securities, in view of the problems identified in part 4 h) above, it would be useful to introduce disciplines on the level, nature and management of securities or deposits demanded from transit operators, to ensure that such requirements do not have a chilling effect on trade.

The EC submission on GATT Article VIII concerning and fees and charges connected with importation and exportation, made a number of proposals to clarify such fees, and these proposals may constitute a good basis for elaborating parallel provisions on fees and charges in connection with transit.

F. Regional transit instruments or arrangements

In many cases solutions to transit problems can only be found through regional co-operation, since it is at the regional level that a large part of the problems related to unnecessary hindrances to transit are experienced.

Even though current Article V only requires WTO members to operate national transit schemes and does not prescribe or encourage the formation of larger transit areas between countries, some WTO members have responded to the need for facilitating transit by entering into international or regional transit agreements. As a result

a number of international and regional transit instruments exist, (including the TIR Convention, the European Convention on common transit; the ASEAN Framework agreement on the facilitation of goods in Transit and existing UN instruments relevant to transit).

Given the existing lack of recognition in relation to transit at a regional level, it should be considered what further action should be taken in the framework of GATT Article V. Members could consider whether it would be useful, in the framework of GATT Article V, to promote the establishment of regional transit regimes and provide guidance on their main elements. WTO members could also envisage provisions encouraging accession to international instruments relating to customs transit, or to take account of the standards in such instruments when drawing up bilateral or regional instruments. The EC would be ready to discuss this issue further at a later stage, if it finds favour among WTO members.

6. Special and differential treatment

The biggest beneficiaries of improved conditions for transit will be those who today suffer most from the absence of adequate conditions, i.e. those countries which suffer from infrastructure problems or are not part of well-functioning regional transit arrangements, as well a significant number of developing and least developed countries and in particular landlocked ones. Small and medium sized enterprises in developing countries are also likely to stand to gain from strengthened transit provisions. SMEs often do not have the same resources and economies of scale necessary to take advantage of alternative transport options that bigger firms might be able to.

Within its own development aid programmes the EC has attached priority to improving conditions of transit, often as part of broader efforts to increase regional trading capacities. A good example of this is the EC's work with the ACP countries in the framework of the Cotonou Agreement. Here, the EU is encouraging the establishment of more integrated regional economies (with whom the EC will then negotiate region-to-region free trade agreements), and a key element of this – particularly in Africa – is the establishment of fully functioning transit regimes and corridors within the different regional groupings. The EC will be ready to share the details of this work with other WTO Members and intergovernmental bodies in order to improve co-ordination and coherence of efforts.

As far as the WTO work is concerned, the EC in its recent submission on GATT Article VIII[6] has suggested a number of ways in which the principle of Special And Differential Treatment could be integrated, and made operational, within any future WTO commitments on trade facilitation. In that earlier paper the EC suggested that special and differential treatment in trade facilitation could encompass:

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[6] *See* supra footnote 1.

- possible differentiation in commitments, particularly for least developed countries, but also possibly for other developing country Members with specific needs or facing specific difficulties in implementing commitments which may carry appreciable resource implications.
- the use of transitional periods to enable progressive implementation of the results, at a pace and in a manner suited to the needs of developing country Members.
- and action to improve the quality, quantity and co-ordination of technical assistance, aimed at improving the conditions of transit for developing countries, including through more systematic co-operation between donor bodies and recipient Members, while involving as appropriate the private sector.

The aim of the above would, again, be to encourage the progressive implementation of all commitments in a manner best suited to the capacity, level of development and trade needs of each individual Member, to ensure that technical assistance flows effectively to those Members most in need, and more generally to ensure a coherent relationship between future WTO rules, and the tailoring of assistance to aid in their implementation.

The EC would welcome further discussion on how the WTO's future work on trade facilitation and transit could best respond to the needs and interest of developing country Members, several of whom have attached great importance to this aspect of the Doha work programme on trade facilitation.

7. Conclusions

The above represents some initial ideas on how GATT Article V could be clarified, which the EU looks forward to discuss with other WTO members.

WORLD TRADE ORGANIZATION

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Negotiating Group on Market Access

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MARKET ACCESS FOR NON-AGRICULTURAL PRODUCTS

Communication from the European Communities

The following communication, dated 31 October 2002, has been received from the European Communities.

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1. In this second submission to the negotiating group, the European Communities wishes to set out further ideas on the approach to achieve the ambitious objectives established in the mandate agreed at Doha under the relevant sections of non-agricultural market access.

2. Previous rounds of negotiations have substantially reduced market access obstacles. They have, however, resulted in very heterogeneous and uneven tariff structures between individual WTO Members, which differ considerably with regard to tariff peaks, high tariffs, tariff escalation, percentage of bindings, spread between bound and applied rates, and number of headings and sub-headings. In other words, the high protection in particular of labour-intensive manufacturing sectors does not contribute to the promotion of economic development and the alleviation of poverty. The DDA negotiations must tackle these sectors, which are of particular interest to many WTO Members, if the objectives of a development round and mutually beneficial reductions are to be achieved.

3. Economic efficiency is enhanced by the reduction of widely different and dispersed tariff structures. Tariff structures with a lower level of dispersion ensure a better allocation of resources amongst producers, are more transparent, easier to administer and less likely to shelter domestic protectionist interests. Indeed, some countries in their most recent reform programmes have substantially streamlined their tariffs into three or four categories of tariff rates.

4. Now it is time for a bold initiative that advances meaningful liberalisation across all non-agricultural products, which represent over 70% of developing country exports, and puts particular emphasis on those sectors where high tariff and non-tariff barriers have been encountered, including in markets of particular interest to developing countries. The necessary costs of this initiative – political and in terms of economic adjustment – should be borne by partners in accordance with their capacity: by developed countries in the first place, together with meaningful contributions by the more advanced

developing countries, as well as by others in keeping with their developmental problems and perspectives, since access to other developing countries' markets is increasingly important for developing country exporters.

Compression Mechanism

5. Specifically, the European Communities proposes that WTO Members agree to reduce all tariff duties considerably by compressing them into a flatter range, within which tariff peaks and high tariffs are eliminated. The application of such a compression mechanism must result in considerably reduced tariff rates with limited dispersion, thus streamlining tariffs. The negotiations should achieve the objective of significantly reducing tariff escalation on products of particular interest to developing countries by reducing the level of relevant *ad-valorem* and specific tariff protection. To this end, the mechanism shall – if necessary – be complemented by additional steps aimed at compressing disparities between tariff headings corresponding to products at different stages of production (i.e. raw materials - semi-processed - finished).

6. As noted above, the mechanism must fully include labour-intensive manufactures and must eliminate peaks and high tariffs that might impede developing and least developed countries from reaping the benefits of liberalisation. Exceptions and further sheltering of sectors can only result in distortions whose costs developing – and *a fortiori* least developed – countries can ill afford. Therefore the mechanism shall apply without sheltering any sector.

7. The mechanism we are proposing is intended to achieve a situation in which, as a result of negotiations, all Members benefit from tariff cuts across non-agricultural products. Insofar as other WTO Members were to indicate that it fails to fulfil our ambitious mandate, we are fully open to improve it.

8. A large part of the increased participation of developing countries in world trade is accounted for by the increase in trade between them. The compression mechanism we propose must integrate developing and least developed countries as full and self-interested participants, if we do not want new distortions to set in. In a situation where protection in some developing countries is significantly higher than in other developing or developed countries at a comparable level of development and competitiveness, those countries need to justify the maintenance of such excessive barriers to the detriment of the more vulnerable developing and least developed countries whose exports and imports are in the main sheltered from liberalisation altogether. Tariff compression will, therefore, address the very different levels of current tariffs.

Products of interest to developing countries

9. Ministers at Doha have placed development at the heart of the negotiations. This emphasis was long overdue and requires even bolder approaches that target

products of interest to developing and least developed countries with reductions well above the ones that could be obtained through the compression mechanism.

10. In this respect, the European Communities proposes that all Members agree to deeper cuts for textiles, clothing, and footwear, with a view to bringing these tariffs within a narrow common range as close to zero as possible. This would also require that non-tariff barriers are substantially reduced and all export restrictions on raw materials are removed.

Unilateral or asymmetric elements

11. This single, common tier of basic commitments will in itself respond to many of the development objectives of the Doha Mandate. As part of a global package, the European Communities, in order to take further into account in an appropriately focussed manner the interests, needs and different levels of development of developing and least developed countries, is ready to consider adding the following non-reciprocal or asymmetric elements:

Unilateral tariff elimination for all products from least developed countries

In conformity with the objectives agreed at the Third United Nations Conference on Least Developed Countries held last year in Brussels, all developed countries should now implement tariff and quota-free access for all products from least developed countries. This should be done no later than the date we have agreed for the establishment of the modalities for non-agricultural market access, i.e. May 2003. We would also invite the most developed of our developing partners to join this initiative.

Lowest duties

We also propose that all duties beneath a specific floor – to be negotiated – be eliminated by all WTO Members. This would benefit developing and least developed countries comparably more, since tariffs at such a low level are generally applied by developed countries.

Gradual phasing in of commitments

Where appropriate and depending on the results of the negotiations, members may not necessarily be expected to implement tariff reductions according to the same timetable. Developed, developing and least developed countries might follow different timetables for the implementation of their tariff commitments.

12. Finally, we reiterate our desire to negotiate cuts that are deeper than average for those goods that will be identified by the negotiating group as environmental goods, and whose liberalisation will help to develop a mutually supportive relationship between

economic growth and environmental protection, by improving eco-efficiency. In all aspects of these negotiations, and in accordance with the Doha Ministerial mandate, due account should be taken of the objective of sustainable development and of reducing resource depletion and pollution. In a similar spirit, we should not lose sight of the part of the Doha mandate concerning access to medicines.

13. A bold initiative on tariffs will only maximise market openness if non-tariffs barriers are tackled up-front through approaches that allow also for discussion of specific non-tariff measures on a case-by-case basis and – as necessary – of horizontal rules minimising their negative effects and fostering transparency, as we shall indicate in our forthcoming submission on this particular issue. A level playing field does, furthermore, require the removal of export restrictions, and in particular export duties, which are the flip-side to tariff escalation.

14. The European Communities proposes also a substantial increase in the scope of bindings, i.e. the number of headings bound, to foster greater security and predictability in international trade. Our objective should be to bring about a situation where all WTO Members other than the least developed countries have as close to 100 per cent bindings as possible. In previous rounds, traditional approaches to assessing the value of specific tariff bindings were supplemented by practical guidelines. While tariff bindings at free would still be assessed in accordance with Article XXVIII bis, we are open to discussion on the minimum level of credit which should be given practical effect in the negotiations to assess tariff bindings and reductions, including what constitutes a meaningful rate of bindings. The European Communities is, furthermore, ready to discuss guidelines concerning the assessment of the credit arising from initiatives of autonomous liberalisation undertaken by Members since the end of the Uruguay Round or to be undertaken during the course of the DDA negotiations, provided final rates are bound.

15. The approach hereby proposed by the European Communities covers all products, with the exception of those listed in Annex 1 of the Agreement on Agriculture. It applies to the final bound Uruguay Round rates and other bound rates as per Members' Schedules, or in the case of unbound duties, on a level related to the applied duties as at 14 November 2001.