



Trade Negotiations Insights

A joint ECDPM-ICTSD-ODI quarterly publication on the major issues faced by African and ACP countries in their international trade negotiations at the WTO and with the EU in the context of the Cotonou Agreement

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Editor's Note

Over the coming years, all African and ACP countries (Africa, Caribbean, Pacific) will face trade negotiations on several fronts simultaneously, including: (i) on implementation of WTO commitments and participation in the new Round; (ii) on common or group negotiations with the EU on new (reciprocal) trade agreements under the Cotonou Agreement; and (iii) on trade commitments within economic groupings in their own regions. The major challenge for these countries consists therefore in taking advantage of the opportunities while avoiding potential drawbacks associated with these closely interlinked negotiations, to advance their sustainable development objectives in the context of international trade negotiations.

As a contribution to this process, the International Centre for Trade and Sustainable Development – ICTSD, the European Centre for Development Policy Management – ECDPM, and the Overseas Development Institute – ODI are proud to present a new quarterly publication: *The Trade Negotiations Insight*. The objective of this publication is to build bridges between these different levels of negotiations by providing trade policy makers and influencers with contextual analysis and putting relevant developments into a broader perspective, with the ultimate goal of making greater sense of the multiple choices in trade negotiations. The opinions expressed in signed contributions are the author's and do not necessarily reflect the view of ICTSD, ODI or ECDPM.

The Doha Declaration on TRIPs and Public Health: Does it change anything?

Graham Dutfield - ICTSD

Ministers attending the Doha Ministerial Conference last November agreed on the text of a declaration on trade-related aspects of intellectual property rights (TRIPs) and public health¹. The declaration has generally been perceived as a victory for Africa. But is such an assessment valid? It is very well known that many African countries have a public health emergency on their hands whose scale is without precedent and that will get a lot worse before it gets better. While HIV/AIDS has justifiably attracted the most attention, tuberculosis, malaria and several other infectious diseases also affect millions of Africans. Governments and development NGOs have identified TRIPs as one of several factors affecting access to treatments

for these terrible diseases, especially HIV/AIDS. They argue that since patents prevent generic competition, the multinational drug companies are free to charge as much as they like. In doing so, they price their treatments well beyond the reach of most Africans.

It is true that TRIPs provides safeguards such as compulsory licensing and parallel importation. In fact, prior negotiation with patent holders to copy drugs is not necessary in the case of a national emergency, other circumstances of extreme urgency, or for public non-commercial use. Nonetheless, African governments are being actively discouraged from using these lawful measures by pharmaceutical industry associations and by several developed country governments, including some whose national laws, ironically, contain similar safeguards.

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Patents and access to essential medicines – the debate

Defenders of the position that patents do not hinder access to essential medicines in Africa have been pointing to a recently-published study by Amir Attaran of Harvard University and Lee Gillespie-White of the International Intellectual Property Institute². The

paper claims that few of the fifteen anti-AIDS drugs included in the study are patented widely in Africa. To the authors, this finding suggests that “patents and patent law are not a major barrier to treatment access in and of themselves”.

But others have convincingly countered that while the study's data are probably accurate as far they go, the study does not make a convincing case that patents do not obstruct treatment access in Africa. Critics of the study have pointed out that anti-retroviral (ARV) drug patent coverage tends to be quite comprehensive in countries that have high populations and/or relatively high incomes, and large numbers of HIV/AIDS sufferers. These include South Africa, Kenya and Zimbabwe. According to a response to the study by a group of NGOs: “the 23 countries in Sub-Saharan Africa that have 4 or more ARV products on patent have 53 percent of the HIV+ patients and 68 percent of the region GDP. The 20 Sub-Saharan countries that have patents on 6 or more ARV products have 46 percent of the patients and 56 percent of the region's GDP”³. Second, effective treatment is based on the use of combinations of drugs. If only one ingredient in the “cocktail” is protected and sold at a monopoly price, the whole regime will be too expensive for most patients. Third, generic producers need to make profits like any other business. If they cannot sell in the major national markets or are only allowed to make one or two components of a combination therapy regime, they cannot easily achieve the economies of scale to make a profit.

So it seems more than likely that while the effects of patents will vary throughout the continent, patents *do* constitute a factor affecting access

to medicines in Africa. In the light of this conclusion, how does the Doha health declaration respond to the worsening public health crisis afflicting so much of Africa?

Compulsory licensing and exhaustion regimes

The declaration is a short one, consisting of only seven paragraphs. The most important one is probably the fifth, which clarifies the freedoms all WTO Members have with respect to compulsory licensing, their determination of what constitutes a national emergency or other circumstances of extreme urgency, and exhaustion of rights. Thus, the declaration reaffirms the right to use to the full the provisions in TRIPS allowing each member "to grant compulsory licenses and the freedom to determine the grounds upon which such licenses are granted". The declaration explicitly mentions that public health crises "relating to HIV/AIDS, tuberculosis, malaria and other epidemics, can represent a national emergency or other circumstances of extreme urgency". Moreover, WTO members are free to establish their own regime for exhaustion of intellectual property rights. This is important because it means that if national laws indicate that patent rights over drugs are exhausted by their first legitimate sale, countries can then import drugs legally purchased in countries where they are sold at a lower price.

One matter the declaration left unresolved is whether governments can only grant a compulsory license to a domestic manufacturer. Since TRIPS stipulates that unauthorised use of a patent shall be "predominantly for the supply of the domestic market" it can be argued that awarding a license to a foreign manufacturer would be illegal. This is an important issue because few African countries have the capacity to manufacture the HIV/AIDS treatments and would therefore need to import them from countries like India, an important supplier of cheap generic drugs. To make the situation even more difficult, India is required by the terms of TRIPS to introduce product patents on drugs from 2005. Normally patents prevent not just the unauthorised sale of protected products but also their manufacture. Therefore, even if an African country granted a compulsory license to an Indian generic firm, if the drug were protected by a patent, the licensee would presumably need permission from the domestic patent owner to make the drug. However, paragraph six acknowledges that countries lacking the capacity to produce drugs will find it difficult to make effective use of compulsory licensing. In response, the declaration instructs the TRIPS Council "to find an expeditious solution to this problem and to report to the General Council before the end of 2002". It is important to clarify, though, that compulsory licensing is not necessarily a panacea. In cases where prior authorisation from the patent owner is required, negotiations can be complicated and take a long time to conclude. Second, the patent specification may not provide sufficient information to copy the drug. In fact, with some drugs the most efficient manufacturing process is protected by a separate patent, which may even be owned by a different company. Third, many countries may lack chemists who can do the copying, and licensees may not necessarily be able to profitably sell the drug at a much lower price than that of the patent-holding firm. Such difficulties may be part of the reason why African countries have little if any experience in the use of compulsory licensing. Nonetheless, the very possibility of compulsory licensing tends to strengthen the bargaining position of governments even if it is rarely used.

The Declaration and Africa

So does the declaration actually say anything new? And will it make a difference? First, it is important to bear in mind that the declaration neither adds to nor subtracts from the obligations and freedoms of WTO members. In short, it is essentially an interpretative statement that makes very clear that members can respond as they see fit to public health crises, and that the TRIPS rules provide a lot of leeway for developing countries in terms of how far they can go.

On the negative side, the declaration is not legally binding. It is no more than a statement of intent among the WTO member states to adhere to an agreed interpretation of the TRIPS safeguards concerning public health. If any member decides to ignore the declaration, there is nothing legally that any other WTO member can do. On the positive side, it provides a green light for African countries to respond flexibly to their public health needs including by limiting patent rights. And it gives them more confidence that in doing so they are less likely to be bullied or otherwise pressured into accepting the far more restrictive interpretations of TRIPS that some developed country members prefer. Most likely, a dispute settlement panel would have to take the declaration into consideration if called upon to determine the TRIPS-compatibility of a measure adopted to address a public health crisis. Besides, developed country members would look hypocritical if they took a hard line that contradicted the language they have just agreed to accept in the declaration. Of course, it remains to be seen whether looking hypocritical would necessarily have an inhibiting effect!

In addition, the process of developing and negotiating the declaration has been a valuable experience for developing countries in Africa and elsewhere. The process was a unique collaborative effort involving trade negotiators, NGOs working in the areas of health and development, and academics that reflects an enhanced capacity to negotiate on important but technically complex issues in a united, effective and informed manner. The determination of the developing countries to have a meaningful declaration was such that last-minute attempts to dilute the text were headed off, and ensured that the outcome was a balanced document that was nonetheless fully compliant with TRIPS. The declaration may not satisfy those who would prefer to revise TRIPS or even to take it out of the WTO. But in a world of rampant bilateralism and asymmetric bargaining positions, there is little doubt that African countries have a little more room for manoeuvre with such a declaration than without one.

ENDNOTES

¹ http://www.wto.org/english/thewto_e/minist_e/min01_e/min01_e.htm

² A. Attaran and L. Gillespie-White (2001) 'Do patents for antiretroviral drugs constrain access to AIDS treatment in Africa?'

Journal of the American Medical Association vol. 286, No. 15, pp. 1886-1892.

³ Consumer Project on Technology, Essential Action, Oxfam, Treatment Access Campaign and Health Gap (2001) 'Comment on the Attaran/Gillespie-White and PhRMA surveys of patents on Antiretroviral drugs in Africa' - <http://www.cptech.org/ip/health/africa/dopatentsmatterinafrica.html>.

WTO Negotiations on Implementation Issues: How, Where & When?

Although the Ministerial Declaration and the Decision on Implementation adopted in Doha clearly fall short of the aspirations of many developing country Members, they do offer some potential avenues for addressing outstanding issues and perceived imbalances in the multilateral trading system. However, the ambiguity of the Ministerial texts makes it difficult to gauge their potential impacts for African and other developing countries. Three months since the adoption of the Ministerial Declaration, partial consensus is only starting to form on which issues are mandated for negotiations, where such negotiations might happen, and on what timeline. Many African delegates are undecided as to whether the Decision, and the various other Doha texts dealing with implementation concerns, in fact hold tangible benefits for their countries and their region.

Implementation issues have been prevalent in ongoing discussions at the WTO virtually since the coming into force of the Uruguay Round

Agreements. Through most of the fifty years of GATT/WTO history, implementation has essentially referred to compliance with negotiated obligations. The Seattle preparatory process, however, saw developing countries focus on implementation in terms of addressing the “implementation of existing agreements” in order to redress perceived imbalances in those Agreements, as well as their implementation. This concern stems from the perception that the Uruguay Round agreements have failed to generate anticipated benefits - partly because of incomplete implementation of commitments by developed countries and unsatisfactory “operationalisation” of special and differential treatment provisions. Another element here is the request by many countries for new flexibilities to allow for the use of currently prohibited policy instruments for development. The most contentious issues have been, and continue to be: market access for agricultural and textile goods, exemptions from subsidy prohibitions/reduction commitments, application of trade remedy measures, and technical requirements/impediments.

While many developing country Members had hoped to redress a greater number of concerns, the Decision itself only touches on approximately 40 out of the nearly 100 items identified by developing countries in the run up to Seattle. In line with the 3 May 2000 Decision on Implementation-Related Issues – which sought to address all implementation-related issues prior to the Fourth Ministerial Conference – developing country Members in Doha were pushing for a separate and expedited track for their concerns. From the perspective of African Members, and developing countries on the whole, more explicit implementation provisions in the Doha documents were viewed as a necessary precondition to moving ahead with new negotiations. Therefore, the shift from the stronger resolutions proposed to what are now “best endeavor” clauses has been disappointing in spite of having moved these issues more fully into the negotiation. Finally, it is important to recall that this shift in language in the Doha texts does not preclude the emergence of stronger language in any final agreements.

The Texts

In addition to the broader Ministerial Declaration [WT/MIN(01)/DEC/1], two documents deal with implementation exclusively: the Decision on Implementation-related Issues and Concerns [WT/MIN(01)/W/10], and the Compilation of Outstanding Implementation Issues Raised by Members [JOB(01)/152/Rev.1] (respectively referred to hereafter as Declaration, Decision, and Compilation).¹

The Ministerial Declaration – paragraph 12

The Declaration deals with implementation issues in a number of areas. This occurs most importantly in paragraph 12, entitled “Implementation-Related Issues and Concerns”. This paragraph outlines the details of the negotiating mandate; where items are to be dealt with; and under which timeline. The paragraph states:

[...] we further adopt the Decision on Implementation-Related Issues and Concerns in document WT/MIN(01)/W/10 to address a number of implementation problems faced by Members. We agree that negotiations on outstanding implementation issues shall be an integral part of the Work Programme we are establishing, and that agreements reached at an early stage in these negotiations shall be treated in accordance with the provisions of paragraph 47 below. In this regard, we shall proceed as follows: (a) where we provide a specific negotiating mandate in this Declaration, the relevant implementation issues shall be addressed under that mandate; (b) the other outstanding implementation issues shall be addressed as a matter of priority by the relevant WTO bodies, which shall report to the Trade Negotiations Committee, established under paragraph 46 below, by the end of 2002 for appropriate action.

In other words, negotiations on outstanding implementation issues will be an integral part of the Work Programme and any early agreements

reached in these negotiations shall constitute part of the single undertaking and hence, in the words of para. 47 of the Ministerial Declaration, “*may be implemented on a provisional or a definitive basis... [and] shall be taken into account in assessing the overall balance of the negotiations.*”

The paragraph makes, however, a distinction between three categories of implementation issues:

- Concerns dealt with in the Decision on Implementation. The Decision requires Members to take immediate measures with respect to some specific concerns in the following fields: sanitary and phytosanitary measures, technical barriers to trade, textiles, subsidies, anti-dumping, agriculture, TRIPs and special and differential treatment.
- Issues with a specific negotiating mandate in the Ministerial Declaration (paragraph 12(a)), i.e. agriculture, subsidies and anti-dumping. These are the only paragraphs (out of the total of eleven) that correspond to specific tirets of outstanding implementation issues raised by developing countries in the Compilation text.
- Other outstanding issues listed in the Compilation text, which are addressed neither in the Decision nor elsewhere in the Declaration (paragraph 12(b)). These have to be “addressed” by relevant WTO bodies “as a matter of priority”, and these bodies must report to the Trade Negotiations Committee (TNC) by end of 2002 “for appropriate action”. These issues include, *inter alia*, trade-related investment measures, safeguards, and some TRIPs provisions.

How, when and where?

Paragraph 12(b) contains an ambiguity as to how negotiations on the third group of issues are to be conducted (see also box p. 4). Two interpretations appear to make the soundest case.²

A first – and more restrictive – interpretation, essentially defended by developed countries, considers that under para. 12(b), outstanding issues shall be addressed through discussion – and not negotiations – by relevant bodies and that any future negotiations on the issues discussed will have to be decided by the TNC when the relevant bodies report to it at the end of 2002. The second interpretation, which reflects more the concerns of many developing countries, argues that the mandate for negotiations is given by the previous sentence “we agree that negotiations on outstanding implementation issues shall be an integral part of the Work Programme...” and that para. 12(b) only specifies the process under which the negotiations are to take place. Under this interpretation, para. 12(b) establishes an end-2002 deadline for the negotiation of outstanding implementation issues that do not fall within any specific mandated negotiating area. Hence, any early agreements reached in existing WTO bodies on these issues, and reported to the TNC by end of 2002, will be part of the “early harvests” and could be implemented on a provisional or definitive basis.

In order to carry out the post-Doha negotiations, on the first of February, WTO members agreed on a structure³ under which two new groups will be created, one on rules (i.e. anti-dumping, subsidies and regional trade agreements) and the other on non-agricultural (industrial) tariffs. All other issue areas for which a specific mandate exists in the Declaration will be negotiated in special sessions of the relevant WTO bodies (for instance, special and differential treatment will be addressed in the Committee on Trade and Development, which will also elaborate the WTO’s technical assistance work programme). With regard to the key implementation-related concerns, Members have agreed that “negotiations on outstanding implementation issues will take place in the relevant bodies in accordance with the provisions of paragraph 12 of the Doha Ministerial Declaration and of the Decision on Implementation-Related Issues and Concerns of 14 November 2001”⁴.

Table 1 (p.8) provides a summarised glimpse into whether a negotiating mandate is provided, on what timeline and in which body. Normal text

refers to implementation issues addressed in the Decision, text in bold refers to implementation issues with a specific negotiating mandate in the Declaration and text in italic refers to other outstanding issues.

Making a plan for moving ahead

Do these texts truly hold benefits for African Members? With African Members being as diverse as they are numerous, a simple answer here will not suffice. Perhaps the most significant gain is political. While the Doha Declaration delivers few tangible benefits, the inclusion and focus on implementation and, more broadly, development concerns marks the Declaration and related documents as different from any that have come before it. In this respect it may well indicate a shift in the political dynamics needed to carry multilateral trade negotiations forward. For example, prior to Doha, the US systematically refused to enter into any renegotiation or re-interpretation of the Agreement on Anti-dumping or that on Subsidies. Although the Declaration's negotiating mandate in these areas (in para. 28) is weakened by heavily qualified and guided language, it nonetheless constitutes a first step that for many years seemed impossible.

Another historically relative gain is that "development" has moved from an objective by reference to a negotiating concern that Members will have to face. In the pre-Doha process, many developing country delegates requested a specific "road map and timeline" on how these items would be addressed. While much ambiguity remains around their redressal, somewhere in the Doha texts the map and timelines have been drawn. As noted, the basis is there for an interpretation that favours African Members' needs, though the challenge remains as to how to fulfill these objectives.

With respect to the longer timeframes for dealing with many of the implementation-issues, one African delegate made the interesting point that such timeframes may in fact work in their favour. With so many new items coming onto the table after Doha, many resource-strapped African delegations will need the longer timeframes to enable themselves to cover this wide range of new topics, while not losing sight of the implementation ones.

More specifically, the Doha texts provide the basis for more operational and enforceable provisions on special and differential treatment (S&D), which could possibly culminate with the creation of a Framework Agreement on Special and Differential Treatment as proposed by the "Like-Minded Group" (WT/GC/W/442).

The texts also include requests to exercise restraint before challenging developing countries "green-box" agricultural notifications (Decision – 2.1), or exercising consideration before initiating anti-dumping investigations on textiles (4.2) or repeat investigations on any products (7.1). The paragraphs on sanitary measures and technical barriers add a specific timeframe to the existing "best endeavour" clauses and explicitly provide six months to comply with changes in standards that previously had unspecified time allowances.

Another *potential* absolute gain for developing countries is a provision that states that should their GNP per capita be lower than US\$1000, they may subsidise their industrial production and exports under Article 27.2 of the Agreement on Subsidies and Countervailing Measures. Paragraph 10.1 of the Decision stipulates that GNP must remain over \$US1000 in 1990 dollars for *three consecutive years* before revoking this exemption. However, by giving Members up to 2003 to determine methodologies to calculate the 1990 dollars, the Decision places these benefits at some point into the future. It also remains unclear whether African countries will be able to effectively use this flexibility and subsidise their industrial production.

Despite all these caveats and ambiguities, the fact is that the Doha texts have been adopted. While the case for an expedited path for

implementation issues can still be made, a number of African delegates recognise that they are likely to have to concede trade-offs if they want to see real progress on implementation issues. As negotiations advance on these issues, taking advantage of the opportunities and avoiding potential drawbacks associated with the post Doha context will require a strong understanding of the issues at hand as well as clear strategies supported by concrete proposals.

ENDNOTES

¹ http://www.wto.org/english/thewto_e/minist_e/min01_e/in01_e.htm

² For further details on the two interpretations, see "Looking at the ambiguities in the Doha Ministerial Declaration on implementation and the Singapore issues", Legal Memorandum prepared by Vicente Paolo B. Yu III, Friends of the Earth International (FOEI), 2001, Geneva, Switzerland.

³ See [JOB 708/Rev.1], Statement by the General Council Chairman, 1.2.2002.

⁴ According to trade officials, this statement strengthens the presumption that all developing countries' implementation demands, both those that fall under the explicit negotiating mandates under para 12 and those that do not, will be part of the agenda.

Geographical Indications

Post Doha talks on the extension of geographical indication (GI) protection for products other than wines or spirits illustrate perfectly the controversy around para. 12 and the wide disagreement among members as to whether negotiations have or have not effectively been launched or under which body or timeline they are to be conducted. The WTO TRIPs Agreement defines geographical indications as "indications, which identify a good as originating in the territory of a Member [...] where a given quality, reputation or other characteristics of the good is essentially attributable to its geographical origin." Special protection is currently granted to wines and spirits (e.g. "Champagne") under TRIPs. In the ongoing debate on implementation issues, some developing countries have called for an extension of GIs to cover other products including those where they have a comparative advantage (e.g. "Darjeeling tea" or "Basmati rice"). However, GI extension, while part of the outstanding implementation-related concerns, is not a North-South dispute. Rather, it pits countries that want to use GIs to promote exports and prevent misappropriation (mainly in Europe, Asia & Africa) against the main agriculture exporting countries that do not want their products to be prevented from using these names. For several developing countries, including in Africa, GI extension might also lead to new obligations while the benefits are more likely to go to developed countries that are better prepared to take advantage of it. After Doha, some Members have argued that GI extension should be addressed under para. 12(a), while others see it as an issue for discussion under 12(b). Also, among those supporting the latter interpretation, some assert that "appropriate action" could, but does not necessarily imply negotiations, whereas others say that it can only be regarded in the context of negotiations. The US, Argentina and other Cairns Group countries, for example, argue that no mandate exists. Whereas Switzerland, in a communication submitted on behalf of the EU and 13 other countries states that the Ministerial Declaration provides "a clear mandate to launch negotiations" on GI extensions. This conclusion is also supported by India, which in a joint submission with Bulgaria, Kenya and Sri Lanka (WT/MIN(01)/W/9) asserts that negotiations have been launched on GI extension "as part of the negotiations on outstanding implementation issues" and "that no additional consensus is required for the launching of these negotiations". Regardless of which interpretation one ascribes to, this debate might set a precedent for the treatment of other outstanding implementation concerns within the new WTO Work Programme.

Who will negotiate with the EU? In search of an ACP-EU negotiating framework

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In September 2002, the European Union (EU) and the African, Caribbean and Pacific (ACP) countries are due to start negotiating new trading arrangements. With only a few months left, policy makers on both sides have a lot of preparation to do if they want to keep the schedule from slipping away. Negotiation mandates are not yet ready and the ACP and the EU have to agree on the broad format of the negotiations, based on the provisions of the Cotonou Agreement. It is not even clear yet who will negotiate with the EU.

The Cotonou Agreement: Just a framework

The Cotonou Agreement, signed by all – but not yet ratified by most – 77 ACP countries and the 15 EU member states, foresees the negotiation of new WTO-compatible trading arrangements between the EU and the ACP. Such agreements would build on regional integration processes in the ACP. The precise configuration of ACP countries which will enter agreements with the EU is not yet defined. The choice rests with the ACP countries. Obviously, this will be a political decision, but such a decision should be based on economic analysis and be taken according to clear criteria. In view of the significant delays encountered by ACP countries in conducting regional studies and in the mobilisation of political forces, they were either not in a position, or not willing, to commit to a definite ACP configuration for the negotiations by their self-determined deadline of last December 2001. The decision has now officially been postponed to the next ACP Council of Ministers meeting on 25-27 June 2002.

The Commission seeks regional partnerships

The European Commission, in a recent document entitled “Orientations on the Qualification of ACP Regions for the Negotiation of Economic Partnership Agreements”, has clearly set out its preferences in terms of geographical configuration principles for the ACP countries¹. Following the principles contained in the Cotonou Agreement, the Commission envisages negotiations with the main ACP regional groupings. This conception was presented in the Commission’s 1996 Green Paper in which the notion of Regional Economic Partnership Agreements (REPA)s was introduced². The Commission’s approach is based on the perception that regional integration is a stepping stone toward further trade liberalisation and thus integration into the world economy. By removing barriers to trade among a group of countries, a larger integrated market is created. The Commission argues that this will allow for economies of scale in production, increases in efficiency, unrestricted access for more consumers to a larger bundle of products, stimulation of investment flows, and increased levels of competitiveness in the domestic economies. It believes that larger trade flows among regional partners and with the rest of the world should ultimately lead to a better and smoother integration of the ACP Groupings into the world economy.

The EU, being a major trading partner of the ACP countries, wants to play a positive role in the development and fostering of regional integration processes for the ACP by entering into economic partnership agreements (EPAs) with those ACP Groupings that constitute *effective* regional trading arrangements. The EU is willing to provide direct support to these regional processes. According to the Commission, the establishment of EPAs with the relevant ACP Groupings could also help to “lock-in” their regional integration processes and to enhance the credibility of their regional initiatives.

Based on these premises, the Commission is seeking free trade agreements, or economic partnership agreements, with the ACP

regional groupings. These EPAs should aim at “fostering the smooth and gradual integration of the ACP states into the world economy [...], thereby promoting their sustainable development and contributing to poverty eradication in the ACP countries” (Article 34.1 of the Cotonou Agreement).

The envisaged EPAs will cover not only reciprocal market access issues (in goods and services), but also technical barriers to trade and some trade-related issues (such as investment, competition, standards and certifications, environmental and labour concerns). The intention is to have EPAs between the ACP and the EU in place by 2008, as envisaged by the Cotonou Agreement. A transition period, possibly as long as 12 years, would be granted to ACP countries to adjust to this new environment.

Which countries and which regions?

One of the problems, particularly in Africa, is that many countries belong to more than one ACP regional grouping. To address the issue of overlapping membership, the Commission requires, in principle, that countries belonging to more than one ACP regional grouping commit to one grouping to form an economic partnership agreement with the EU³. Exceptions could be made provided that the regions concerned adopt closely harmonised positions and that the negotiations are conducted under one setting, leading to a single EPA.

Hence, the Commission would agree to negotiate a single EPA encompassing SADC and COMESA for instance, provided the two regions can adopt a common position on EPA. With respect to sub-regional groupings within a broader ACP region, such as SACU within SADC, and UEMOA within ECOWAS, the Commission proposes either to negotiate only with the deeper integration grouping, leaving out the wider region, or to negotiate with the wider region, in which case the sub-region will only be considered as a member of the wider grouping. Again, the objective of the Commission is to avoid overlapping EPAs.

In the second case, the Commission could negotiate a multi-speed agreement, where an “accelerated approach towards the more integrated sub-region may be considered”. This could be the situation for UEMOA for instance, which has already taken the formal decision to negotiate an EPA with the EU. The position of the Commission is that bilateral agreements with the EU should be *a priori* avoided. The ACP Group has yet to determine its own position as to which criteria for negotiations are important to ACP countries.

WTO-compatibility or the need for reciprocity

The Cotonou Agreement marks a turning point in the EU-ACP trade relations. Preferential treatment was the key principle behind the EU policy under the successive Lomé Conventions. As a consequence, a special waiver from WTO commitments has always been required. With the Cotonou Agreement, the EU seeks to conclude trade agreements that will be WTO-compatible and will not require a waiver. In this context, reciprocity has become a corner stone to the approach of the Commission to the negotiations of EPAs.

This raises questions about the consistency of EPAs with the implications of the “Everything but Arms” (EBA) initiative, where the EU grants non-reciprocal market access to all least-developed countries (LDCs). At issue is whether ACP-LDCs could retain, or even extend, their non-reciprocal trade preferences with the EU under an EPA. If not, the question is whether least-developed ACP members (40 out of the 77 ACP countries) have any serious incentive to join an EPA. The Commission claims that EPAs will encompass much more than standard market access measures, and will include trade-related measures as well. Yet, the superiority of an EPA over EBA, in terms of benefits for ACP countries, has to be demonstrated. Of particular

relevance to LDCs will be the future preferential market access for products currently covered by the commodity protocols.

In a recent speech, Mr Poul Nielson, European Commissioner for Development and Humanitarian Aid, proposed to “broaden the scope of the [EBA] initiative and gradually eliminate all tariffs and quotas for all developing countries”⁴. This offers the perspective of unrestricted access to the EU market for *all* ACP countries, on a non-reciprocal basis. The implications of such a proposal for the negotiations of ACP-EU agreements should be thoroughly examined.

Under the current conditions, one may wonder whether the Commission would be ready to adopt a flexible approach, allowing least-developed countries which would join an EPA to keep their preferential access to the EU without having to provide reciprocity. This process could be facilitated if access to EU markets under an EPA were similar to the conditions under the EBA, an outcome envisaged by the Commission.

The problem is that non-reciprocal free trade areas are unlikely to be WTO-compatible under current rules (GATT Art. XXIV). However, the forthcoming WTO negotiations on regional integration agreements could open the door for a differential treatment within such agreements. ACP countries will have an important role in WTO negotiations, which could be crucial for the format and content of EPAs to be negotiated with the EU.

In search of an ACP perspective

The Commission’s approach to EPAs has triggered various reactions among ACP countries. UEMOA and more recently ECOWAS and CEMAC have openly embraced the EPA proposal. The Caribbean has still to determine its position. It seems however to be inclined to keep negotiating within an overall ACP framework. COMESA and SADC could negotiate, either together or separately, trade agreements with the EU. The diversity of these groupings (in terms of levels of development and membership to sub-regional and overlapping regional grouping), could also make them more sensitive to keep a coherent overall ACP approach. For the Pacific ACP countries, the benefits of a free trade agreement with the EU appear doubtful, and alternative trading arrangements may be sought.

The issue for the ACP countries, and to some extent the EU, is the possible disintegration of the ACP as a group. The Everything but Arms initiative has already divided the ACP Group into two distinct categories, least-developed countries (LDCs, covered by the EBA) and non-LDCs. The negotiation of separate economic partnership agreements with each regional grouping could further divide the ACP.

To prevent such an outcome, Mauritius has advocated an all-ACP approach. The proposal consists of undertaking a common negotiation between all non-LDC ACP members and the European Union, while allowing ACP least-developed countries to join the EPA negotiations should they wish to do so. It is worth noting that such all-embracing negotiations would also strengthen the position of smaller ACP economies, making them better able to defend their trade interests (such as sugar and textiles in Mauritius for instance). More importantly, joint negotiations would benefit cross-regional ACP interests.

The Commission argues that such an approach would tend to exclude ACP LDCs from EPAs, would divide regional groupings and would ignore the regional differences which could not be accounted for in a single “one-size-fits-all” EPA. Moreover, it may not be WTO-compatible.

A common approach to the ACP-EU negotiations has been suggested informally by other ACP actors. One proposal is to separate the negotiations into three phases. In the first stage, ACP countries would identify and agree on certain issues of substantive concern common to all ACP countries. They would also establish procedures to be

followed for the conduct of the negotiations, so as to preserve the rights and core interests of all ACP countries. In the second phase, negotiations on regionally specific EPAs could be undertaken with the ACP sets of countries that wish to do so, on the basis of principles and approaches commonly agreed upon at the ACP Group level. In the third phase, the ACP and the EU will come back together to finalise the different agreements within a common all-ACP framework.

A common framework could also be envisaged to cover issues such as consultation and dispute settlement procedures, common provisions on rules of origin, custom procedures and cooperation, pre-shipment inspections, etc.

Issues which depend on negotiations within the WTO could also be left to a later stage, after the conclusion of the Doha Round, possibly in 2005. These could include agricultural trade liberalisation (and the implication of an WTO agreement on the CAP), anti-dumping and anti-subsidy measures, the potential for special and differential treatment, in particular within regional agreements (with the possible revision of Art. XXIV), as well as the trade related issues.

This proposal, or variants of it, would have the advantage of remaining flexible, accommodating regional differences and allowing for WTO-compatibility while fostering a coherent ACP framework. It also provides avenues for maximising the bargaining power of the ACP Group, providing that sufficient internal cohesion can be maintained among the ACP countries during the negotiations. This approach might also be acceptable for the EU.

Time is running out: the forthcoming agenda

In order to better assess the implications of ACP configurations for the EPA negotiations, it is necessary to conduct studies on the scope and possible content of new trading arrangements between the EU and the ACP. All regional groupings should now be in the process of conducting overview studies to identify the potential costs and benefits of entering into EPAs on a regional basis. These long-overdue studies, whose conduct has been delayed because the appropriate EU funding

Other Options

Other proposals for the configuration of EPAs include:

- *negotiations on a bilateral basis between the EU and individual ACP countries*: this option, so far ruled out by the Commission except in exceptional circumstances, would lead to a multitude of different EPAs;
- *negotiations of EPAs by the EU with groups of ACP countries based on their level of development*: while this option, implicitly proposed in the Green Paper, would be consistent with the principle of differentiation enshrined in the Cotonou Agreement, it would not ‘build on regional integration initiatives of the ACP States’, but on the contrary could lead to friction within regional groups;
- *negotiation of EPAs at the regional level with differentiated treatment of ACP countries in function of their level of development and specificity*: this approach resembles the EPA scheme proposed by the Commission, but allows for greater flexibility in terms of country specific transition measures and specific provisions. Apart from their level of development, countries specificities, such as small islands, land-locked countries, dependence on specific exports, etc., and could be accounted for under a reformed Article XXIV;
- *EPAs which are flexible in terms of regional coverage and content*: with this option, wider regional configurations could be envisaged, such as a common Western and Central Africa EPA, or an all-Africa EPA; it could also, like the option above, fully implement the principle of differentiation. Different configurations for different parts of the negotiations could also be envisaged.

was not released in time and for other technical reasons, should be concluded by March 2002.

Decisions on the ACP mandate and configuration could be made at the ACP Council of Ministers in July 2002. Around the same time, the EU member states should agree on a negotiation mandate. The timetable of the preparatory phase of ACP-EU negotiations has already had to be adjusted several times. Should either the ACP or the EU fail to meet this schedule, two options seem likely.

First, a cautious "wait-and-see" approach would consist of postponing the opening of the negotiations by at least another six months. While this option would provide more time to decide on the right course for conducting the negotiations, it would fail to stress the urgency of the process. For this reason, the EU and several ACP countries appear to be willing to stick to the September 2002 deadline, if only to keep the political momentum.

The second option then consists in formally opening negotiations as scheduled, but the first few months would be dedicated to determining the appropriate agenda and format for the negotiations. This could be done at an all-ACP level.

In any case, the discussion on the technical aspects of the negotiation process should not detract policy makers in both the ACP and the EU from the main task at hand: to design new trade agreements which should foster the development of ACP countries, their integration into the world economy and the alleviation of poverty. To this end, concrete actions to enhance the capacity of ACP countries to manage their future are urgently needed.

ENDNOTES

¹ <http://europa.eu.int/comm/trade/pdf/acp2.pdf>

² http://europa.eu.int/comm/development/publicat/l-vert/lv_en.htm

³ The main ACP regional groupings in Africa are CEMAC (Communauté Economique et Monétaire de l'Afrique Centrale), COMESA (Common Market for Eastern and Southern Africa), EAC (East African Cooperation), ECOWAS (Economic Community of West African States), ECCAS (Economic Community of Central African States), IOC (Indian Ocean Commission), SACU (Southern African Customs Union), SADC (Southern African Development Community) and UEMOA (Union Economique et Monétaire Ouest Africaine).

⁴ Poul Nielson, 'EU development policy and today's global challenges', Speech/02/30, New Delhi, 28th January 2002.

Resources

Dutfield, Graham. 2001. Intellectual Property Rights and Development. Comments are sought on this draft Policy Discussion Paper prepared by Graham Dutfield for the joint ICTSD/UNCTAD capacity building project on TRIPs and Development Capacity Building. Available at: <http://www.ictsd.org/unctad-ictsd/>

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All WTO phone and fax numbers start with (41-22) 739. Only extensions are provided in this list. Please contact the Secretariat for confirmation of dates. Also Available at <http://www.ictsd.org/cal/>. For further information on ACP events, contact ACP Secretariat, tel: (32 2) 743 06 00, fax: 735 55 73, e-mail: info@acpsec.org, Internet: <http://www.acpsec.org/>

- March 5-7: Geneva** WTO Council for Trade-related Aspects of Intellectual Property Rights, Contact: Peter Ungphakorn, tel: 5412, fax: 5458
- March 8: Geneva** WTO Dispute Settlement Body, Contact: Nuch Nazeer, tel: 5393 fax: 5458
- March 11-22: Geneva** WTO Council for Trade in Services, Contact: Nuch Nazeer, tel: 5393 fax: 5458
- March 14-15: Geneva** WTO Working Group on the Interaction between Trade and Competition Policy, Contact: H-P. Werner, tel: 5286, fax: 5458
- March 14-15: Geneva** WTO Committee on Technical Barriers to Trade, Contact: Luis Ople, tel: 5374, fax: 5458
- March 18-21: Cape Town** ACP-EU Joint Parliamentary Assembly
- March 18: Geneva** WTO Council for Trade in Services, Contact: Nuch Nazeer, tel: 5393, fax: 5458
- March 18-22: Monterrey** UN International Conference on Financing for Development, Contact: FfD Secretariat, tel: (1-212) 963-2587, e-mail: ffd@un.org
- March 21-22: Geneva** WTO Committee on Trade and Environment, Contact: H-P Werner, tel: 5286, fax: 5458
- April 9-12: Brussels** (to be confirmed): ACP-EU Private Sector Meeting
- April 23-24: Apia, Samoa** (to be confirmed): 5th Meeting of ACP Ministerial Trade Committee
- April 29-30: Washington** 14th Annual Bank Conference on Development Economics, Contact: B. Pleskovic, fax: 1-202 5220 304
- May 28: Brussels** 5th ACP Trade Ministers Meeting
- May 29 (am): Brussels** 2nd ACP Meeting of the Ministers of Finance
- May 29 (pm): Brussels:** Joint Session of the ACP Ministers of Trade and Finance
- May 30 (am): Brussels** 6th Meeting of ACP Ministerial Trade Committee
- May 30 (pm): Brussels** 3rd Meeting of the Joint Ministerial Trade Committee

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Table 1: Summary of the Negotiating Mandates

Topics	Relevant Paragraphs in the Decision Declaration or Compilation	When	Where
Agriculture	2.1 (DI) Restraints on challenging measures notified under 'Green Box' for DCs 2.2 – 2.4 (DI) (G/AG/11) Net Food-Importing Developing Countries 13 –14 (MD). + 2 (C). Negotiations on Market Access, Domestic Support, Export Subsidies, S&D	Immediate Immediate Jan 2005	Special Sessions of the Committee on Agriculture
Subsidies	10.1 (DI) Exclusion from Annex VII (b) 10.2 (DI) Non-actionable subsidy for DCs – development space 10.3 (DI) Review on countervailing duty investigations 10.4 (DI) Re-inclusion to Annex VII (b) 10.5 (DI) Re-affirmation of Art. 3.1(a) exemption for LDCs 10.6 (DI) Transition period extension 28 (MD). + 8 (C). Negotiations on Disciplines	01.01.2003 at the latest Restraint: Immediate Proposal: Jan 2005 31 July 2002 Immediate Immediate Immediate Jan 2005	SCM Committee Negotiating Group on Rules
Anti-dumping	7.1 (DI) Repeated Investigations 7.2 –7.4 (DI) Reviews on Art. 15, 5.8, 18.6 28 (MD) + 6 (C) Negotiations on Disciplines	Immediate 13 November 2002 Jan 2005	Committee on ADP for 7.4, & Implementation WG (7.2–3) Negotiating Group on Rules
Textiles & Clothing	4.1-4.3 (DI) Early integration, consideration of Anti-Dumping measures, Rules of Origin 4.4-4.5 (DI) Textile quota calculation methodology	Immediate Recommendations to General Council by 31 July 2002	 Council for Trade in Goods
TRIPS	11.1 (DI) Non-violation complaints 11.2 (DI) Reports on incentives for Technology Transfer 18 (MD) Negotiations on Notification and Registration of Geographical indications (GI) for Wine & Spirits <i>10 (C) + 12 (b) (MD): GI coverage extension. Negotiations or "Discussion" depending on interpretation of 12 (b)</i> <i>10 (C) + 12 (b) (MD): Transition period extension, operationalisation of Article 7&8, review of Article 27.3"(b). Negotiations or "Discussion" depending on interpretation of 12 (b)</i>	No complaints: immediate Recommendations: 5 th Min. Conf Before end of 2002 Fifth Ministerial Conf. <i>End 2002</i> <i>End 2002</i>	TRIPS Council TRIPS Council Special Sessions of the TRIPS Council <i>TRIPS Council</i> <i>TRIPS Council</i>
TRIMS	<i>5 (C) + 12(b) (MD) Deadline for phasing out domestic content requirements and flexibility to implement development policies. Negotiations or "Discussion" depending on interpretation of 12 (b)</i>	<i>End 2002</i>	<i>TRIMS</i>
Safeguards	<i>9 (C) + 12(b) (MD): Import level from DCs for application of Safeguards. Negotiations or "Discussion" depending on interpretation of 12 (b)</i>	<i>End 2002</i>	<i>SG Committee</i>
S&D	12 (DI) Effectiveness of S&D provisions	Recommendations to General Council by July 2002	Special Sessions of the CTD
SPS and TBT	3.1 – 3.2 + 5.1 (DI) Definition of "Longer time-frame" and "reasonable intervals"	Immediate	

Notes: Normal text refers to implementation issues addressed in the Decision, text in **bold** refers to implementation issues with a specific negotiating mandate in the Declaration and text in *italic* refers to other outstanding issues listed in the Compilation document.

When: timeline for completion of mandate; **Where:** WTO body/committee where negotiations shall/may occur

Abbreviations: (DI) = Decision on Implementation; (MD) = Ministerial Declaration; (C) = Compilation Text; ADP = Anti-dumping; DC = Developing country; LDC = Least-developed country; SCM = Subsidies and Countervailing Measures; SG = Safeguards; TNC = Trade Negotiations Committee; CTD = Comm. on Trade and Development